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Condemnation of Private Property for Economic Development: Legal Comments on the House-Passed Bill (H.R. 4128) and Bond Amendment

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Condemnation of Private Property for Economic Development: The House-Passed Bill (H.R. 4128) and Bond Amendment

Summary

On June 23, 2005, the Supreme Court handed down *Kelo v. City of New London*, holding that under the Fifth Amendment Takings Clause, the sovereign power of eminent domain ("condemnation") can be used to transfer private property to new private owners for the purpose of economic development. *Kelo* sparked a public outcry and a flurry of legislative proposals in Congress and the states to restrict the use of eminent domain.

The principal *Kelo* bill in Congress is H.R. 4128, the "Sensenbrenner bill," which passed the House on November 3, 2005. Its key provision prohibits states and their political subdivisions (hereinafter "states") from using eminent domain to transfer private property to other private parties for economic development — or allowing their delegatees to do so. The prohibition applies to any fiscal year after the bill's enactment in which the state received federal economic development funds. A state that violates the prohibition is ineligible to receive federal economic development funds for two fiscal years following a judicial determination of violation — a penalty enforceable by private right of action.

H.R. 4128 raises several legal issues. The prohibition on economic development condemnations extends not only to land taken for the explicit purpose of economic development but also to land subsequently so used. The latter coverage raises the possibility that although a parcel was initially condemned for a non-prohibited purpose, its use years later for a prohibited one would trigger the two-year cut-off of federal funds. Nor does there seem to be any proportionality requirement between the prohibited condemnations and the length and scope of the federal funds suspension. *If* Congress's Spending Power includes a proportionality requirement for conditions on federal funds, as the Court suggests, the absence of proportionality in some of the bill's applications may raise a constitutional issue.

Persons forced to move by a prohibited condemnation may run into a standing problem should they attempt to use the bill's right of action to impose a funds suspension. Standing requires that the remedy sought in an Article III court will redress the complained-of injury. A suspension of federal funding to the offending jurisdiction does not redress the fact that the person was made to move, unless it can be argued that the funding cut-off makes it more likely that the jurisdiction will elect to return the wrongfully condemned property.

The Bond Amendment, inserted into an FY2006 appropriations bill by Senator Bond, is now enacted law. Like H.R. 4128, it attaches a condemnation-restricting condition to federal funds, though limited to funds appropriated under the statute. The Amendment's list of acceptable and unacceptable condemnation purposes largely echoes existing case law construing the "public use" prerequisite for condemnation in the Constitution.

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Introduction

On June 23, 2005, the Supreme Court handed down *Kelo v. City of New London*,[1] addressing whether, under the Fifth Amendment Takings Clause, the sovereign power of eminent domain ("condemnation") can be used to transfer private property to new private owners for the purpose of economic development.[2] The Court held 5-4 that the City of New London's use of private-to-private condemnations to further its economic revitalization project satisfied the Takings Clause's demand that eminent domain be employed for a "public use,"[3] despite the private nature of the transferees. The City's good-faith purpose, said the majority, was to carry out a carefully considered areawide redevelopment plan believed by the city (and state) to be needed to reverse decades of economic decline. On these facts, the majority deemed the public use requirement satisfied, especially given the strong deference owed by courts to legislative determinations of local needs.

Many observers argue that *Kelo* does not depart from established eminent domain law — that its view of public use as covering New London's revitalization plan is indistinguishable from prior Court precedent sustaining eminent domain for mixed private and public gain. Contrariwise, a vocal minority (starting with the four dissenters) argues that the decision represents a major expansion of public use, while still others counter that it actually narrows public use. For present purposes, this debate is unimportant. What matters here is that *Kelo* cast a bright spotlight on a controversial and increasingly frequent practice: the use of private-to-private condemnation by state and local governments solely to increase tax base or tax revenues, and create jobs. The new attention given by *Kelo* to the possibility that people's homes can be taken involuntarily for such purposes (upon payment of compensation) provoked a popular outcry and media coverage such as few recent Supreme Court decisions have generated. Following *Kelo*, the majority of state legislatures saw the introduction of, or talk of the introduction of, bills limiting the

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[1] 125 S. Ct. 2655 (2005).

[2] See generally CRS Report RS22189, *Condemnation of Private Property for Economic Development:* Kelo v. City of New London, by (name redacted).

[3] The Takings Clause of the Fifth Amendment states: "[N]or shall private property be taken for public use, without just compensation."

use of eminent domain.[4] Congress entered the fray through the introduction of roughly a dozen bills, most of them seeking to discourage state and local use of eminent domain for economic development through the device of attaching restrictive conditions on federal grant money.[5] The use of funding conditions, rather than a direct federal command that localities not condemn for economic development, presumably reflects the constitutional federalism concerns raised by the latter approach under the Commerce Clause, Fourteenth Amendment (Section 5), and Tenth Amendment.[6]

The main topic of this report is the principal "*Kelo* bill" in Congress at this time, H.R. 4128, the Private Property Protection Act of 2005. H.R. 4128 hews to the prevalent congressional approach to *Kelo*: imposing a condemnation-restricting condition on the grant of federal money. It was originally introduced as H.R. 3135 by Representative Sensenbrenner, chairman of the House Committee on the Judiciary, one week after the *Kelo* decision. It was reported in greatly expanded form as H.R. 4128 and passed the House 376-38 on November 3, 2005.

This report also examines a bill amendment introduced by Senator Bond, like H.R. 4128 a federal-money-restricting provision. The Bond Amendment was added on the Senate floor to H.R. 3058, the Transportation, Treasury, Housing and Urban Development, the Judiciary, the District of Columbia, and Independent Agencies Appropriations Act for FY2006. H.R. 3058 was enacted November 30, 2005, as P.L. 109-115, with the Bond Amendment as Section 726.

Other bills and resolutions responding to the *Kelo* decision are not treated here, either because they have been eclipsed by H.R. 4128, have seen little activity, or are nonbinding resolutions. These include S. 1313 (restricting federal funds), S. 1704 (restricting federal funds), S. 1883 (creating an Office of Property Rights Ombudsperson), S. 1895 (restricting federal funds and eliminating tax benefits for private parties acquiring property), H.J.Res. 60 (amending the Constitution), H.Res.

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[4] *Kelo* made clear that it was construing only the U.S. Constitution. So, it said, state courts remain free to interpret the public use clauses in state constitutions more restrictively, and state and local legislatures are at liberty to impose limits on the use of eminent domain. 125 S. Ct. at 2668.

Accepting the Court's invitation, four states so far have enacted *Kelo*-related laws. Alabama (SB 68, 2005 Special Session) and Texas (SB 7, 2005 Second Special Session) bar the use of eminent domain for specified purposes. Delaware (SB 217, 2005 Session) merely declares that eminent domain can be exercised only for a "recognized public use." Ohio (SB 167, 2005 Session) imposes a moratorium on eminent domain for certain economic development purposes until December 31, 2006, and creates a task force to study eminent domain issues. For a summary of the post-*Kelo* state legislation, see National Conference of State Legislatures memorandum to State Legislators Interested in Eminent Domain Issues, Nov. 30, 2005, at [http://www.ncsl.org/programs/natres/emindomain.htm]. In addition, three states enacted *Kelo*-related laws *in advance of* the Supreme Court's decision: Nevada, Utah, and Colorado. More state enactments are expected in 2006

[5] Reportedly, the City of New London's revitalization project at issue in *Kelo* was itself supported by various federal grants and direct appropriations. See S. 1895 § 2(17).

[6] See CRS Report RS22189, *Condemnation of Private Property for Economic Development:* Kelo v. City of New London, by (name redacted).

340 (expressing disagreement with the majority opinion in *Kelo*; passed House on June 30, 2005 by 365-33), H.R. 3083 and 3087 (each identical to S. 1313), H.R. 3315 (restricting federal funds), H.R. 3631 (restricting federal assistance), H.R. 3405 (restricting federal funds), and H.R. 4088 (restricting federal funds).

H.R. 4128

What the Bill Says

Section 2: The Heart of the Bill. The key provisions in H.R. 4128 are Sections 2(a) and 2(b). Section 2(a) sets out the state and local activities that the bill prohibits —

> No State or political subdivision of a State shall exercise its power of eminent domain, or allow the exercise of such power by any person or entity to which such power has been delegated, over property to be used for economic development or over property that is subsequently used for economic development, if that State received Federal economic development funds during any fiscal year in which it does so.

Section 2(b) states a consequence under the bill when a state or local government violates Section 2(a) —

> A violation of subsection (a) by a State or political subdivision shall render such State or political subdivision ineligible for any Federal economic development funds for a period of 2 fiscal years following a final judgment on the merits by a court of competent jurisdiction that such subsection has been violated ....

Under Section 2(c), the Section 2(b) ineligibility period is terminated if the offending state or locality elects to return all real property the taking of which was judicially determined to offend Section 2(a).[7]

Section 3 of the bill is the federal-condemnation counterpart to Section 2, barring federal agencies from using eminent domain for economic development. Section 3, however, is much less important than Section 2; at least as defined in the bill, federal condemnation for economic development is rare.

Section 8: Definitions. Section 8 determines which government condemnations are prohibited by Sections 2(a) and 3 above through its definition of "economic development." Given the huge variety of purposes for which eminent domain is used around the country, crafting such a definition is a difficult task, attempted by many of the *Kelo* bills in Congress. In Section 8's version, economic development means "taking private property, without the consent of the owner, and conveying or leasing such property from one private person or entity to another

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[7] Section 2(c)'s use of the qualifier "real" in "real property" is not picked up in other provisions of the bill, which refer only to "property" or "private property." Nonetheless, the context of the bill, local economic development projects, would appear to implicate primarily, if not exclusively, real property.

private person or entity for commercial enterprise carried on for profit, or to increase tax revenue, tax base, employment, or general economic health." Seven exemption categories are stated. The first allows the conveyance of private property to public ownership or an entity that makes the property available to the general public as of right (e.g., common carriers), or for use as a road or other right of way open to the public. Other categorical exemptions include removing harmful uses of land that constitute an immediate threat to public health or safety, acquiring abandoned property, clearing defective chains of title, use by a public utility, and redeveloping brownfields.

The bill uses the words "economic development" in a second context in addition to Section 2(a). The phrase "Federal economic development funds" in Section 2(b) defines which federal monies are to be suspended should a court find that prohibited condemnations have occurred. Notwithstanding the word overlap, the bill defines the Section 2(b) phrase in completely different language than it uses for the Section 2(a) phrase. "Federal economic development funds," according to Section 8(2), are those federal monies distributed to or through states or their political subdivisions "under Federal laws designed to improve or increase the size of [their] economies ...." The Attorney General is charged under Section 5(a)(2) with compiling a list of such federal laws, to delineate the particular federal funds that must be suspended in the event of Section 2(a) transgressions.[8]

Section 4: Private Right of Action. Section 4 gives the bill an enforcement mechanism in the form of a private right to sue. A property owner "who suffers injury as a result of a violation of any provision of this Act may bring an action to enforce any provision of this act in the appropriate Federal or State court ...." Unlike the typical suit, where the plaintiff has the burden of showing the elements of the cause of action, H.R. 4128 shifts the burden of proof to the defendant government "to show by clear and convincing evidence that the taking is not for economic development." Any such suit must be brought within a prescribed time window — namely, *after* the condemnation and the property's subsequent use for economic development, but *before* seven years following such economic-development use. (But see "Legal Comments on Section 4," infra, on the possibility that Section 4 also allows suits before and during an improper condemnation as well.)

Prevailing plaintiffs are to be awarded attorneys' fees; no comparable provision is included for prevailing government defendants.

Other Bill Provisions. Other bill provisions are as follows. Section 13 is a counterpart to Section 2(a) and 2(b) for the specific case where property of religious and nonprofit organizations is condemned. In the case of Section 13, condemnation triggers a funds cut-off if the condemnation occurs "by reason of the non-profit or tax-exempt status of such organization." This may be a rough analog to the prohibited "economic development" purpose in Section 2. House Judiciary Committee proceedings make clear that the inclusion of Section 13 was motivated

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[8] H.R. 4128 does not actually say that is the purpose of the mandated Attorney General list, but it would seem the most plausible reading of the bill, and the House committee report construes it so. H.Rept. 109-262 at 12 (2005).

by a belief on the part of committee Members that because religious and nonprofit organizations pay no or fewer taxes, they are tempting condemnation targets for municipal officials looking to increase tax revenue.[9]

Section 11 commands that the bill "be construed in favor of a broad protection of private property rights ...." In the same spirit but less substantively, Section 10 declares that "[i]t is the policy of the United States to encourage ... the private ownership of property ...," and Section 7 expresses the sense of Congress that the use of eminent domain for economic development is a threat to agricultural and other property in rural America.

Finally, Section 9(b) instructs that the bill, if enacted, applies prospectively only: it takes effect in the fiscal year that begins after the date of enactment, and does not apply to projects for which condemnation has been initiated before enactment.

Legal Comments on Section 2

Delegatees. Section 2(a)'s prohibition on condemnations for, or followed by, economic development explicitly reaches not only condemnations by states or their political subdivisions, but also those by entities to which eminent domain power has been delegated by states and political subdivisions. The inclusion of delegatees, public or private, presumably reflects the fact that economic-development condemnations are often carried out not by the state or local government itself, but by government-created non-profit entities created to implement the project (as in the *Kelo* case).

Absence of Time Limit. The Section-2(a) phrase "subsequently used for economic development" appears to have no outer time limit. This omission raises the possibility that while a parcel was initially condemned in good faith for a non-economic-development purpose (as defined in the bill), its use many years or even decades later for economic development due to unforeseen change in the law, policy priorities, or funding availability would trigger loss of federal funds per Section 2(b).[10] Bear in mind here, as elsewhere in the bill, the broad-construction mandate of Section 11 favoring private property rights. To avoid a funds cut-off, the condemnor government would have to return the property, a problematic option after the condemnee has moved — see discussion of Section 2(c) below.

Absence of Nexus and Proportionality Requirements. The plain meaning of Section 2(b) is that the suspended federal economic development funds need not be connected in any way to the economic development project at which the offending condemnation took place. Indeed, the project need not be slated to receive federal economic development funds at all. Nor would it appear to matter how many or how significant the offending condemnations: the condemnation and economic development of a single, small tract of land triggers the two-year funds cut-off every

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[9] See, e.g., H.Rept. 109-262 at 8 (2005).

[10] Whether the possibility of a future federal funds cut-off would have present consequences for a municipality's creditworthiness or bond rating is beyond the scope of this report. See H.Rept. 109-262 at 26-27 (dissenting views of Reps. Nadler and Scott).

bit as effectively as a jurisdiction-wide pattern of using condemnation for economic development.

Spending Power and Necessary and Proper Clause. At first blush, H.R. 4128 appears to be an exercise of Congress's Spending Power,[11] under which it is well-established that Congress may attach conditions to the grant of federal money so as to induce the recipients to cooperate voluntarily with federal policy.[12] And doubtless, many of the *Kelo* bills in Congress are straightforward exercises of this power — federal money available to the state or locality is made subject to some condition that there be no condemnation for economic development. If such condemnation is planned or actually occurs, the *same* money cannot be transferred.

H.R. 4128 takes a fundamentally different tack. The funds granted during the year in which the offending condemnations take place are not themselves at risk. Rather, the funds come with a condition that if a violative condemnation occurs during the same fiscal year as the money is received, *other* federal monies are blocked — namely, economic development funds for the two fiscal years after a court discerns the prohibited condemnation. This shift from loss of the conditioned money to loss of separate funds means that the constitutional basis of H.R. 4128 arguably is not the Spending Clause alone, but rather the Spending Clause together with Congress's authority under the Necessary and Proper Clause.[13] That Clause has been construed to empower Congress "to see to it that taxpayer dollars appropriated under [the Spending Power] are in fact spent for the general welfare ...."[14]

As either an exercise of the Spending Power alone or the Spending Power and Necessary and Proper Clause in combination, a discussion of the constitutional limits on Congress's use of funding conditions is relevant. One such limit is that the condition must be related to the federal interest for which the funds are expended.[15] This prerequisite has been little explicated by the Court and a spending condition has yet to be found deficient because of it. Because H.R. 4128 punishes condemnation for economic development by cutting off only funds promoting economic development, it would seem to pass this amorphous test.[16]

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[11] U.S. Const. art. I, sec. 8, cl. 1: "The Congress shall have Power ... to pay the Debts and provide for the ... general Welfare ...."

[12] South Dakota v. Dole, 483 U.S. 203, 206 (1987).

[13] U.S. Const. art. I, sec. 8, cl. 18: "The Congress shall have Power ... To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers .... The "foregoing Powers" include the Spending Power.

[14] Sabri v. United States, 541 U.S. 600, 605 (2004). *Sabri* explicitly holds that the federally undesired conduct targeted by Spending Power conditions need not always occur through use of the conditioned federal money, as is the case with the condition imposed by H.R. 4128 Section 2(a).

[15] *South Dakota*, 483 U.S. at 207-208, 208 n.3.

[16] Rep. Sensenbrenner, chairman of the House Committee on the Judiciary and chief sponsor of H.R. 4128, emphasized the "clear connection between the Federal funds that would be denied and the abuse Congress is intending to prevent. The policy is that States or localities

(continued...)

Whether a second (possible) constraint on Spending Power conditions is satisfied by H.R. 4128 is a closer question. The Supreme Court has suggested that in some circumstances the financial inducement created by Congress might be so coercive as to pass the point at which "pressure turns into compulsion"[17] — though once again the Court has never found a congressional condition to violate this criterion. It is conceivable that the threat of a two-year cut-off of millions of dollars under many federal programs, triggered by condemnation of a single, small property later used for economic development, could be viewed as such unacceptable compulsion.[18] Certainly H.R. 4128 presents a sharp contrast to some of the other *Kelo* bills in Congress, which terminate only those funds destined for the particular project at which the offending condemnation took place. The bill contrasts sharply as well with the facts in the leading Supreme Court decision on Spending Power conditions, upholding Congress's creation of "relatively mild encouragement" to the States — loss of a"relatively small percentage of certain federal highway funds" — to enact a higher minimum drinking age.[19] Again, however, any such compulsion test is only *suggested* in the Court's decisions, and is of poorly understood content.

Returning the Condemned Property. Section 2(c), allowing the offending condemnor to return the property and thereby end the funds cut-off, does not explicitly state that the condemnee has to return the money received for the property. Such a reimbursement requirement is arguably implied, however, possibly including interest, since the bill otherwise would allow unjust enrichment of the condemnee at the government's expense.

Assuming a reimbursement requirement, another issue arises: some condemnees might not want their property back, having long since moved somewhere else, spent the compensation on a new home, and settled in. Under a literal reading of Section 2(c), which requires that the state or political subdivision "return[] all real property" to restore federal funding, such a refusal by the condemnee forecloses the condemnor's use of Section 2(c). Query whether a court would read "returns all real property" more liberally to include bona fide return offers by the condemnor government that are rejected by the former property owner.

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[16] (...continued)
that abuse their eminent domain power by using economic development as the rationale for the takings should not be trusted with Federal economic development funds that could contribute to similarly abusive land grabs." H.Rept. 109-262, Part 2 at 32 (2005).

[17] *South Dakota*, 483 U.S. at 211, quoting Steward Machine Co. v. Davis, 301 U.S. 548, 590 (1937).

[18] If found to offend the Spending Clause in certain applications by reason of a "compulsion" standard, the two-year funds cut-off would still be available in others. Section 9(a) contains a severability clause: "[i]f any provision of this Act, or any application thereof, is found unconstitutional, that finding shall not affect any provision or application of the Act not so adjudicated."

[19] *South Dakota*, 483 U.S. at 211.

Legal Comments on Section 8

Entities Open to the Public "As of Right." Section 8(1) defines "economic development," the prohibited condemnation purpose under the bill, but exempts "an entity, such as a common carrier, that makes the property available to the general public as of right, such as a railroad or public facility." In committee markup, the question whether this exemption includes sports stadiums and shopping centers was debated at length.[20] Representative Nadler argued that it does. In response, Representative Goodlatte contended that shopping centers and private stadiums are not within the exemption because they are not open to the public "as of right," but that public stadiums might very well be.

"Removing Harmful Uses." Section 8(1) offers another exemption from "economic development" for "removing harmful uses of land provided such uses constitute an immediate threat to public health and safety." The "immediate threat" qualifier is of interest, because as the following paragraph argues, it seems to extend H.R. 4128 well beyond the sort of economic development project involved in *Kelo*.

One of the leading Supreme Court precedents leading up to *Kelo* is *Berman v. Parker*,[21] holding that private-to-private condemnation for blight-removal redevelopment is a public use. Another leading *Kelo* precedent is *Hawaii v. Midkiff*,[22] where the Court found a public use in a Hawaii statute allowing private-to-private condemnation to alleviate the economic harms of highly concentrated land ownership. In *Kelo*, Justice O'Connor's four-justice dissent explicitly left these precedents intact. While private-to-private condemnation for economic development as in *Kelo* was constitutionally objectionable, she wrote, the elimination of property uses that "inflict[] affirmative harm on society," as the urban blight in *Berman* and concentrated land ownership in *Hawaii*, was a legitimate public use. As noted above, however, Section 8(1)(B) does not exempt use of condemnation to remove *any* harmful property use, but only those involving an immediate threat. Thus, it seems H.R. 4128 would punish certain private-to-private condemnations that Justice O'Connor and her fellow dissenters would find unobjectionable.

The "immediate threat" qualifier may serve to discourage the use of eminent domain for redevelopment in cases of marginal, even moderate, blight. Accusations in the literature are common that the term "blight" is construed overly expansively by localities to further economic development, and is often applied to neighborhoods not exhibiting the classic blight-related ills of dilapidated structures, crime, drugs, etc.[23] In these milder instances of blight, an "immediate threat" may not be judicially

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[20] H.Rept. 109-262 Part 2 at 43-49 (2005).

[21] 348 U.S. 26 (1954).

[22] 467 U.S. 229 (1984).

[23] In the words of one commentator: "the courts have granted local interests almost carte blanche in their creative search for "blighted" areas eligible for federal funds or local tax breaks." Colin Gordon, *Blighting the Way: Urban Renewal, Economic Development, and the Elusive Definition of Blight*, 31 Fordham Urban L. J. 303, 305-306 (2004). In the words (continued...)

deemed present, with the result that a condemnation might trigger suspension of federal funds under the bill. And, the interpretational latitude in a vague term such as immediate threat, combined with the serious funding consequence if a jurisdiction guesses wrong, likely would deter condemnations in a wide grey area of moderate blight as well.

Condemnations and Projects with Multiple Objectives. It often happens that a condemnation, or the project it serves, aims at more than one goal — e.g., both increasing tax revenue and removing a harmful use of property. Query whether a mixed-purpose condemnation constitutes "economic development" for purposes of the bill if some of its purposes fall within the bill's definition of economic development and others do not.

Legal Comments on Section 4

Owners Only. Section 4, creating a private right of action to enforce the bill, applies by its terms only to owners of property, not lessees (renters). But displaced lessees could still, like displaced owners, receive compensation under the Takings Clause of the Constitution, plus moving expenses and replacement housing costs under the Uniform Relocation Act[24] or its state-enacted counterparts.

Third Parties. Section 4 makes its right of action available to "[a]ny owner of private property who suffers injury as a result of a violation of any provision of this Act ...." This language might lead one to think that the right of action can be asserted not only by the condemnee, but by third parties, such as a property-owner neighbor whose property value tumbles ("suffers injury") when the prohibited condemnation for economic development results in a big-box retailer next door. Coverage of third parties is undercut, however, by subsequent language in Section 4 stating that such actions are to "follow[] the conclusion of any condemnation proceedings condemning the private property *of such owner*."[25]

Remedies Available. Does Section 4 allow a court to enjoin an improper condemnation before or during the condemnation proceeding, in addition to suspending federal funds afterwards? The sounder argument, based on it seems, is that it does not. Section 4(b), which forecloses suits until "the property is used for

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[23] (...continued)
of another: "[A]s communities continue to use the elimination of 'blight' as an economic development tool, properties that would otherwise be considered desirable have become threatened." Christopher S. Brown, *Blinded by the Blight: A Search for a Workable Definition of "Blight" in Ohio*, 73 U. Cin. L. Rev. 207, 208 (2004). For an objective review of the elements commonly found in definitions of blight, see Hudson Hayes Luce, *The Meaning of Blight: A Survey of Statutory and Case Law*, 35 Real Prop. Probate & Trust J.389 (2000).

[24] More formally, the Uniform Relocation and Real Property Acquisition Policy Act, 42 U.S.C. §§ 4601-4655. The act compensates "displaced persons" at both federal projects and those undertaken by non-federal entities with federal financial assistance. See definition of "displaced person" at Section 101(6)(A) of the act, 42 U.S.C. § 4601(6)(A).

[25] Emphasis added.

economic development following the conclusion of any condemnation proceedings," is best read as applying to *all* actions under Section 4.[26] If the action cannot be filed until the conclusion of the condemnation proceeding and subsequent economic use, plainly it cannot be used to prevent the condemnation from happening — nor, as a practical matter, to undo it after the fact.

The dual-remedy reading cannot be completely discounted, however. Section 4(b) says that an action "may be brought" if the property is used for economic development after the condemnation, not that such action "may *only* be brought" at that time. Arguably, this suggests that Section 4(b) speaks to a different type of private right of action than Section 4(a) — one following the condemnation, seeking a funds cut-off — leaving 4(a) as the authority for injunctive actions before, during, or soon after the condemnation, aimed at thwarting or undoing it. And again, Section 11 calls for the bill to be construed in favor of broad property rights protection.

There appears to be no authorization in the bill for a damages (money paid to the plaintiff) remedy. Further, it might be contended that Section 2(c)'s "opportunity" for states and localities to cure the violation by returning the real property[27] is only that, a choice to be made by the state or locality in its sole discretion. That is, return of the real property (assuming the displaced property owner wishes to buy it back) probably cannot be compelled by a court.

If the foregoing arguments are correct, then the only remedy available in a Section 4 action (for non-federal condemnations) is for the court to order the two-year cut-off, and return of any federal funds mistakenly granted during this period.

Standing to Sue. As to the remedy of blocking federal funds to the offending jurisdiction and mandating reimbursement of improperly disbursed funds, Section 4 raises a constitutional question. Does the plaintiff seeking such remedy satisfy the standing to sue requirements derived from Article III of the Constitution? As the Supreme Court explains, the Article III "case" or "controversy" prerequisite for invoking the federal judicial power means that to establish standing, a plaintiff must show

> (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent ... ; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.[28]

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[26] Section 4(b) is titled "Limitation on Bringing Action," not "Limitation on Bringing *Certain* Actions." In addition, Section 6 requires the Attorney General to make annual reports to Congress identifying states and political subdivisions that have lost federal economic development funds for violating the bill, but makes no mention of *condemnations terminated* pursuant to the bill.

[27] The word "opportunity" is used in the title of Section 2(c) — "Opportunity to Cure Violation" — not in its text.

[28] Friends of the Earth v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167, 180 (2000), quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561 (1992).

Section 4 plaintiffs seeking funds termination plainly meet the "injury in fact" requirement (they have been forced to move, and possibly have uncompensated costs) and traceability requirement (being forced to move was caused by the challenged condemnation by the defendant). But whether redressability is satisfied is more doubtful. Obviously a funds cut-off does not of itself redress the injury that the plaintiff has suffered. But query whether redressability would be satisfied if the funds cut-off greatly increases the likelihood that the condemnor government will elect to return the property, pursuant to Section 2(c).

Eleventh Amendment/State Sovereign Immunity. The Eleventh Amendment[29] bars private actions against unconsenting states in either federal or state court, with exceptions for congressional abrogation under the Fourteenth Amendment Section 5 and prospective injunctions against state officials.[30] The issue is whether the Amendment is an impediment to suits against states under Section 4.

As a threshold matter, the Eleventh Amendment does not apply to political subdivisions of states.[31] Thus the Amendment is not implicated in most economic-development condemnations, done as they are by political subdivisions or their delegatees. In this connection, we read bill Section 2(a) to mean that when a political subdivision or its delegatee violates Section 2(a), the ineligibility for federal funds imposed by Section 2(b) is visited exclusively upon the political subdivision, not the state.

As for suits against states, Section 4 pronounces that "a state shall not be immune under the eleventh amendment ... from any [action under Section 4] in a Federal or State court of competent jurisdiction." The question is whether this language is adequate to effect a state waiver of Eleventh Amendment immunity by virtue of the state's acceptance of federal economic development funds following the bill's enactment. The answer appears to be yes: the Supreme Court in dicta, and a majority of the federal circuits in holdings, have interpreted nearly identical language in another federal statute to be sufficient to waive state sovereign immunity upon state acceptance of federal funds.[32]

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[29] U.S. Const. amend. XI: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State ...."

[30] The description of the Eleventh Amendment's coverage in the footnoted sentence is plainly quite different from the text of the Amendment itself (previous footnote). The discrepancy comes about through numerous Supreme Court decisions interpreting the Amendment and associated principles of state sovereign immunity. See generally CRS Report RL30315, *Federalism, State Sovereignty, and the Constitution: Basis and Limits of Congressional Power*, by Ken Thomas.

[31] Mt. Healthy School Dist. v. Doyle, 429 U.S. 274, 280 (1977).

[32] In Lane v. Pena, 518 U.S. 187 (1996), the Court addressed the Rehabilitation Act of 1973, which bans discrimination solely on the basis of disability in any federally funded program or activity. 29 U.S.C. § 794(a). The question before the Court was whether the act waived the *federal government's* sovereign immunity from suit. In answering no, the Court noted language amending the act stating that "A State shall not be immune under the Eleventh

(continued...)

Legal Comments on Section 3

The Section 3 prohibition on federal condemnations for economic development raises issues distinct from those in the state/political subdivision sections of the bill. For one thing, the Section 3 prohibition arguably covers only condemnations with the direct purpose of economic development. Recall that Section 2's prohibition on states and political subdivisions applies not only to the use of eminent domain "over property to be used for economic development," but also "over property *subsequently* used for economic development."[33] Given that Section 3, a provision of the same bill, omits the latter phrase, the presumption arises that Congress had a narrower vision for Section 3. If so, this relieves the United States of concern that should it in the future use eminent domain to assemble tracts of land for a federal facility (such as a military base), the property upon termination of federal use may be conveyed to private owners without running afoul of the bill.[34]

A second issue is what remedies are available when a federal agency violates Section 3. The funds cut-off in Section 2 applies only to states and political subdivisions. If one takes the view (see "Legal comments on Section 4" section) that a Section 4 claim can only be brought after the condemnation has occurred, an injunction against the improper federal condemnation is ruled out. Perhaps the lack of an explicit remedy in the bill for federal violations would be judicially viewed as giving courts leeway to fashion equitable remedies against the offending federal condemnor.

The Bond Amendment

The Bond Amendment to the Transportation, Treasury, Housing and Urban Development, the Judiciary, the District of Columbia, and Independent Agencies Appropriations Act for FY2006 is now enacted law: P.L. 109-115, Section 726. Its full text states —

> No funds in this Act may be used to support any federal, state, or local projects that seek to use the power of eminent domain, unless eminent domain is employed only for a public use:

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[32] (...continued)
Amendment ... from suit in Federal court for a violation of Section 504 of the Rehabilitation Act of 1973 ..." — words similar to those used in H.R. 4128 Section 4. Though this H.R. 4128-like language did not aid the private claimant's suit against the United States, said *Lane*, it was an "unambiguous waiver" of the *states'* Eleventh Amendment immunity. Since the dicta in *Lane*, at least eight federal circuits have held that the Rehabilitation Act amendment's phrase waives the sovereign immunity of states electing to participate in federally funded programs. See Koslow v. Pennsylvania Dep't of Corrections, 302 F.3d 161 (3d Cir. 2002) (collecting cases).

[33] Emphasis added.

[34] Federal facilities sitting on acreage condemned prior to H.R. 4128's taking effect are unaffected by the bill. Thus military bases now being conveyed into private hands per the Defense Base Closure and Realignment Act of 1990 are not covered.

> Provided, That for purposes of this section, public use shall not be construed to include economic development that primarily benefits private entities:
>
> Provided further, That any use of funds for mass transit, railroad, airport, seaport, or highway projects as well as utility projects which benefit or serve the general public (including energy-related, communication-related, water-related and wastewater-related infrastructure), other structures designated for use by the general public or which have other common-carrier or public-utility functions that serve the general public and are subject to regulation and oversight by the government, and projects for the removal of an immediate threat to public health and safety or brownsfield[35] as defined in the Small Business Liability Relief and Brownsfield[36] Revitalization Act (Public Law 107-118) shall be considered a public use for purposes of eminent domain:
>
> Provided further, That the Government Accountability Office ... shall conduct a study to be submitted to the Congress within 12 months of the enactment of this Act on the nationwide use of eminent domain, including the procedures used and the results accomplished on a state-by-state basis as well as the impact on individual property owners and on the affected communities.

By its reference to "funds in this Act," the Bond Amendment limits itself to federal monies used or disbursed by the agencies receiving appropriations under the statute, and applies only to FY2006 funds.

The second paragraph of the Amendment, excluding from public use instances of economic development that "primarily" benefits private entities, is a rough paraphrase of the often-stated rule that condemnations producing private benefits constitute a "public use" only if the private benefit is merely incidental or secondary to a primary public purpose.[37] Some condemnation decisions, however, declare or suggest a broader view of public use — namely, that even projects *primarily* benefitting private entities can be deemed for a public use, as long as there is *some* public benefit.[38] Supreme Court decisions, too, suggest such a broad view of public use — stating that condemnation not be *solely* for a private use and be "rationally related to a *conceivable* public purpose."[39] Within the ambit of the Amendment, the

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[35] Probably should be "brownfields."

[36] Probably should be "Brownfields."

[37] See, e.g., Swan Lake Hunting Club v. United States, 381 F.2d 238 (5th Cir. 1967) (condemnation of land for migratory bird refuge is for public use where private benefit to hunters is "incidental" to primary conservation purpose); Bailey v. Myers, 76 P.3d 898, 904 (Ariz. App. 2003) (condemnation of automotive repair facility for relocation of hardware store yielded insufficient public benefit; state constitution requires that anticipated public benefits must "substantially outweigh" private nature of the end use); Waldo's, Inc. v. Village of Johnson City, 543 N.E.2d 74 (N.Y. 1989) (condemnation of land to enlarge intersection is for public use of relieving traffic congestion; incidental private benefit to adjacent private property does not invalidate dominant public purpose).

[38] See, e.g., Town of Corte Madera v. Yasin, 2002 WL 1723997, *5 n.5 (Cal. App. 2002) (unpublished) ("mere [public] benefit is enough").

[39] See, e.g., Nat'l R.R. Passenger Corp. v. Boston and Maine Corp., 503 U.S. 407, 422 (continued...)

second paragraph makes clear that the former and narrower of these public use standards applies.

The third paragraph of the Amendment, declaring various projects to be public uses under the Amendment, conforms closely to existing Takings Clause jurisprudence as to what constitutes a public use. Particularly is this so because the paragraph uses the descriptors "benefit or serve the general public," "designated for use by the general public," and "serve the general public" — echoing the Supreme Court's modern reading of constitutional public use as meaning "for a public purpose."[40] Many of the listed items are facilities to which the public has physical access, satisfying even the narrow, nineteenth century sense of public use under which condemnation into private ownership required that the public still have physical access to the property. Two other items listed in the third paragraph, removal of immediate threats to public health and safety and removal of brownfields, plainly would constitute a public use.

The phrase "immediate threat to public health and safety" in the third paragraph replaced "blight (including areas identified by units of local government for recovery from natural disasters)" in the introduced version of the Amendment. Very likely, the switch was made to align the Bond Amendment with the same "immediate threat to public health and safety" phrase in H.R. 4128's list of exceptions from its definition of "economic development." It may also, as in H.R. 4128, reflect congressional concerns as to overuse of blight-removal justifications for local redevelopment involving condemnations.[41]

The list of non-public uses in the second paragraph, and public uses in the third, would each appear to be nonexhaustive. So what criterion as to public-use status applies to non-listed condemnation purposes? One candidate is that in Takings Clause case law. Applying this criterion, however, the switch from "blight" to "immediate threat to public health and safety" may have achieved little as to blight, since blight removal has been broadly endorsed as a constitutional public use by the Supreme Court, apparently irrespective of whether it constitutes an immediate threat to public health and safety.[42] On the other hand, the criterion for non-listed condemnation purposes might be statutory. Under this criterion, the fact of the

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[39] (...continued)
(1992) (emphasis added). See also *Kelo*, 125 S. Ct. at 2663, 2666 (stating that the case "turns on ... whether the City's development plan serves a 'public purpose,'" while acknowledging that "the government's pursuit of a public purpose will often benefit individual private parties"). Senator Bond, too, appeared in his statement accompanying introduction of his amendment to read *Kelo* as supporting the any-public-benefit-is-enough view. 151 Cong. Rec. S11513 (daily ed.) (*Kelo* "would essentially allow the use of eminent domain in virtually any circumstance where the locality believes some benefit could be derived.").

[40] *Kelo*, 125 S. Ct. at 2662. *Kelo* explains that the Supreme Court's embrace of this "public purpose" standard originated over a century earlier. See Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 161-162 (1896).

[41] See note 23 supra and accompanying text.

[42] Berman v. Parker, 348 U.S. 26, 32-33 (1954).

language change from "blight" to "immediate threat ..." could ground an argument that removal of lesser degrees of blight are not public uses pursuant to the Amendment.

Whatever the parallels between the Amendment's itemized public uses and non-public use and those of Takings Clause case law, the Amendment clearly works a change in the law by adding the funding prohibition. Under pre-existing law, the judicial invalidation of a state or local condemnation as not for a public use did not require a cut-off of federal funding for the associated project. This change effected by the Bond Amendment is enhanced in importance if the first paragraph is construed broadly to trigger a funds cut-off when eminent domain is used for other than a public use *anywhere* in the jurisdiction, rather than solely as part of the project in question.

The final paragraph of the Bond Amendment calls for a GAO study "on the nationwide use of eminent domain ...." By its literal terms, this mandate is of expansive scope: it includes federal, state, and local condemnations, and is not limited to, or even specially focused on, the *Kelo* issue of condemnation for economic development. Senator Bond's statement on introducing the Amendment, however, does suggest such a constrained focus for the report, dwelling as it does exclusively on *Kelo* and similar circumstances.[43] Similarly, the Senator's statement implies that report coverage of *inverse* condemnation, literally included in the term "eminent domain," was not intended.[44]

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[43] 151 Cong. Rec. S11515 (Oct. 19, 2005) (daily ed.).

[44] "Inverse condemnation" is the name given to the procedural reverse of a traditional condemnation action: the property owner sues the government, rather than the other way around. The property owner argues that a de facto exercise of eminent domain has "taken" his or her property, as through severe regulation, even if no formal condemnation action has been filed by the government. Because inverse condemnation is at bottom an unacknowledged exercise of eminent domain, the possibility arises that the Amendment's mandate for a study on eminent domain includes inverse condemnation.