



Legislative Bulletin.....November 3, 2005

Contents:

H.R. 4128 — Private Property Rights Protection Act of 2005

Summary of the Bills Under Consideration Today:

Total Number of New Government Programs: 0

Total Cost of Discretionary Authorizations: 0

Effect on Revenue: \$0

Total Change in Mandatory Spending: \$0

Total New State & Local Government Mandates: 0

Total New Private Sector Mandates: See below

Number of Bills Without Committee Reports: 0

Number of Reported Bills that Don't Cite Specific Clauses of Constitutional Authority: 0

**H.R. 4128 — Private Property Rights Protection Act of 2005 — *as reported*
(Sensenbrenner)**

Order of Business: The bill is scheduled for consideration on Thursday, November 3, subject to a structured rule, making in order only those amendments printed in the Rules Committee report accompanying the resolution.

Earlier this year, the House passed H.Res. 340 by a vote of 365 - 33, 18 Present ([Roll no. 361](#)), “expressing the grave disapproval of the House of Representatives regarding the majority opinion of the Supreme Court in the case of *Kelo et al. v. City of New London et al.* that nullifies the protections afforded private property owners in the Takings Clause of the Fifth Amendment.”

Summary: H.R. 4128 denies federal economic development assistance to any state or local entity that uses the power of eminent domain for economic development, and prohibits federal agencies from engaging in this practice. Below are the major provisions of the bill:

- Prohibits states and political subdivisions from using the power of eminent domain over property to be used for “economic development or over property that is subsequently used for economic development,” if the state receives federal economic development funds during the same fiscal year;
- Defines the term “economic development” to mean “taking private property, without the consent of the owner, and conveying or leasing such property from one private person or entity to another private person or entity for commercial enterprise carried on for profit, or to increase tax revenue, tax base, employment, or general economic health.” Also states that the term does not include:
 - A) conveying private property to public ownership, “such as for a road, hospital, or military base, or to an entity, such as a common carrier, that makes the property available for use by the general public as of right, such as a railroad, or other public facility, or for use as a right of way, aqueduct, pipeline, or similar use;”
 - B) removing harmful uses of land provided it constitutes an “immediate threat to public health and safety;”
 - C) leasing property to a private person or entity that occupies an “incidental part of public property or a public facility, such as a retail establishment on the ground floor of a public building;”
 - D) acquiring abandoned property;
 - E) clearing “defective chains of title;” and
 - F) taking private property for use by a public utility.
- Stipulates that states or entities in violation of the above provision would be ineligible for federal economic development assistance funds for two fiscal years following a final judgment by a court on the merits of a case; directs federal agencies to withhold funds for that two-year period, and requires the pertinent state to return or reimburse federal funds that may have already been distributed within the fiscal year that the violation occurred;
- Allows a state to cure the violation, and become eligible for federal funds again, by returning all real property included in the taking, replacing any other property destroyed and repair any property damaged as a result of the violation;
- Prohibits the federal government “or any authority of the federal government” from exercising its power of eminent domain for economic development;
- Allows private property owners to bring legal actions to enforce the provisions of this Act in the appropriate federal or state court, and waives the states’ constitutional immunity to such suits (pertaining to the Eleventh Amendment, which provides that states may only be sued in state courts);
- Provides that legal action may be brought if the property is used for economic development “following the conclusion of any condemnation proceedings condemning the private property” of the property owner, but bars legal action later than seven years after the conclusion of the condemnation proceedings;
- In proceedings under this Act, directs the court to allow the plaintiff a “reasonable attorneys’ fee” as part of the costs, and allows the inclusion of expert fees as part of the attorneys’ fee;

- Directs the U.S. Attorney General to provide to the governors of each state, the text and a description of the rights of private property owners under this Act, and also requires this information to be published on the Department of Justice website and in the Federal Register;
- Requires the Attorney General to compile a report to the House and Senate Judiciary Committees within one year of enactment that identifies states that have used eminent domain in violation of this Act;
- Provides that the provisions of this Act are severable: “If any provision of this Act... is found unconstitutional, that finding shall not affect any provision or application of the Act no so adjudicated.” Thus, even if certain provisions of the Act are later found to be unconstitutional through court challenges, the remaining provisions still stand as law;
- Includes the following Sense of Congress: *“It is the sense of Congress that the use of eminent domain for the purpose of economic development is a threat to agricultural and other property in rural America and that the Congress should protect the property rights of Americans, including those who reside in rural areas. Property rights are central to liberty in this country and to our economy. The use of eminent domain to take farmland and other rural property for economic development threatens liberty, rural economies, and the economy of the United States. Americans should not have to fear the government’s taking their homes, farms, or businesses to give to other persons. Governments should not abuse the power of eminent domain to force rural property owners from their land in order to develop rural land into industrial and commercial property. Congress has a duty to protect the property rights of rural Americans in the face of eminent domain abuse;”* and
- Provides that this Act shall take effect on the first day of the first fiscal year that begins after enactment. Thus, if the bill passes the House and Senate and is signed by the President prior to October 1, 2006 (the first day of the fiscal year), then it will take effect on that day.

Additional Information: This legislation was largely prompted as a result of the Supreme Court’s 5-4 decision in *Kelo v. City of New London*, as the bill text and committee report both referenced. On June 23 of this year, the Supreme Court held that “economic development” may be deemed a “public use” under the Fifth Amendment’s Takings Clause. Specifically, the Supreme Court allowed a local government to take private property from several homeowners and transfer it to a corporation to build a private research facility.

This ruling was seen by conservatives, and many others across the country, as a significant departure of past Supreme Court and lower court precedents regarding private property rights and the appropriate use of eminent domain by the government. The Fifth Amendment states “No person shall... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.” The committee report states that “the sanctity and centrality of private property rights are thus ingrained in our constitutional design” and extensively quotes the dissenting opinion in *Kelo* as the proper view of the Takings Clause, including the following statement from Justice O’Connor’s dissent regarding the majority’s decision:

“The specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory... Today nearly all real property is susceptible to condemnation on the Court’s theory.”

Administration Policy: A Statement of Administration Policy (SAP) was not available at press time.

Amendments: Amendments will be provided in a separate document.

Committee Action: H.R. 4128 was introduced on October 25, 2005, and referred to the Committee on the Judiciary. The bill was considered and a mark-up session was held on October 27, 2005, and it was reported to the House by a vote of 27-3 (H. Rept. [109-262](#)).

Cost to Taxpayers: CBO estimates that “implementing the bill would have no significant impact on the federal budget because most jurisdictions would not risk the economic development assistance they receive from the federal government by using eminent domain as described in the bill. Because the bill would deny certain economic assistance for up to two years to localities using eminent domain in a way proscribed in the bill, the pace of spending for some discretionary grant programs could be marginally reduced. Enacting the bill would not affect direct spending or revenues.”

Does the Bill Expand the Size and Scope of the Federal Government?: No.

Does the Bill Contain Any New State-Government, Local-Government, or Private-Sector Mandates?: No. However, CBO states that the bill “would impose significant new conditions on the receipt of federal economic development assistance by state and local governments. Because these conditions would apply to a large pool of funds, the bill would effectively restrict the use of eminent domain, and would have a significant impact on local governments' powers to manage land use in their jurisdictions. Further, state and local governments could incur significant additional legal expense to respond to private legal actions authorized by the bill, ” in instances where the state had used eminent domain to seize private property for economic development purposes.

Constitutional Authority: The Committee Report, H. Rept. [109-262](#), cites constitutional authority for this legislation in Article 1, Section 8, and Clause 1 (the power to raise revenue), Clause 3 (regulate commerce), and Clause 5 of Fourteenth Amendment (citizenship) of the Constitution.

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