Testimony of John D. Echeverria
Professor, Vermont Law School
South Royalton, Vermont

Hearing on H.R. 1443, The Private Property Rights Protection Act of 2011

before the
Subcommittee on the Constitution
Committee on the Judiciary
U.S. House of Representatives

April 12, 2011

My name is John D. Echeverria. I am a Professor at Vermont Law School where I teach property law, including the law of eminent domain, and frequently write on the topic of takings and property rights. I have represented state and local governments and public interest organizations in judicial proceedings around the country in cases arising under both the federal and state takings clauses. I had the privilege of filing a brief in the U.S. Supreme Court on behalf of the American Planning Association and other organizations in the case of Kelo v. City of New London. Finally, I have followed federal and state legislative debates about potential responses to the Kelo decision over the nearly six years since the decision was issued. I appreciate the opportunity to appear before the Subcommittee this afternoon to express my strong personal opposition to the Private Property Rights Protection Act of 2011.

In my view, reasonable minds can differ about the public value of relying on the eminent domain power to promote economic development and whether state and local officials utilize this tool in a fair and effective fashion. I was the co-author of a report published in 2006, which sought to analyze objectively the arguments for the use of eminent domain for economic development as well as the objections to the use of this power. See Kelo's Unanswered Questions: the Policy Debate Over the Use of Eminent Domain for Economic Development (*available* at http://forms.vermontlaw.edu/gelpi/current_research/documents/GELPI Report_Kelo.pdf). One conclusion of that report is that eminent domain is, in many instances, an important tool to accomplish redevelopment objectives in the face of highly fragmented land ownership patterns and recurring holdout problems. Another finding is that the use of eminent domain, though rarely completely free from controversy, often enjoys deep and widespread

community support, including in several illustrative cases we discovered within a few miles of the U.S. Capitol.

But the issue before the Committee is not whether the use of eminent domain for economic development is a good or a bad idea. Instead, the issue is whether the U.S. Congress, at this moment in time, should consider *national* legislation limiting the use of eminent domain for economic development that would be binding on every State and local jurisdiction in the country. I submit that that such legislation is unnecessary, unwise as a matter of policy, and would be highly destructive of the recent efforts by the States to address this specific issue.

The basis for these conclusions is that, in the six years since the Kelo decision was handed down, every or virtually every state legislature in the country has studied proposed reforms on this subject, held hearings on the use of eminent domain, and in many cases enacted new legislation limiting the use of eminent domain. In addition, in several States ballot measures addressing eminent domain reform have been submitted to the voters. All told, approximately 40 States, four-fifths of all the States in the nation,[1] have now adopted some kind of post-Kelo reform measure. Some applaud the reform steps adopted, while others believe that some of these steps have been misconceived. Some believe certain state legislatures have gone too far in curtailing the power of eminent domain, while others believe some States have not gone far enough or have abdicated their responsibility by not imposing any new constraints on this governmental power. The bottom line, however, is that the state legislatures, as well as the voters themselves in some States, have fully engaged on this issue.

[1] Those who closely track state legislative activity in response to Kelo report slightly divergent figures. The National Conference of State Legislatures reports that 39 States enacted legislation or passed ballot measures during 2005 - 2007 in response to the Kelo decision. (See http://www.ncsl.org/ default.aspx?tabid=13252). Professor Ilya Somin reports that 43 States have enacted post-Kelo reform legislation. See *The Limits of Backlash: Assessing the Political Response to* Kelo, 93 Minn. L. Rev. 2100, 2101 (2009).

Furthermore, in several States the state courts have placed new restrictions on the use of eminent domain for economic development. As I explained in the brief I filed in the Supreme Court in the Kelo case, there has been a long history of state courts imposing additional limitations on the eminent domain power beyond those mandated by the federal constitution; thus, the recent state court cases imposing new post-Kelo limitations are consistent with the historic pattern in this area of law.

Significantly, the States have adopted very different positions on how far they wish to go in curtailing use of the eminent domain power and what kinds of procedural and/or substantive limitations they wish to impose. The National Conference of State Legislatures explains that recently enacted state laws and ballot measures fall into different categories:

> Restricting the use of eminent domain for economic development, enhancing tax revenue or transferring private property to another private entity (or primarily for those purposes).
>
> Defining what constitutes public use.
>
> Establishing additional criteria for designating blighted areas subject to eminent domain.
>
> Strengthening public notice, public hearing and landowner negotiation criteria, and requiring local government approval before condemning property.
>
> Placing a moratorium on the use of eminent domain for a specified time period and establishing a task force to study the issue and report findings to the legislature.

Http://www.ncsl.org/IssuesResearch/EnvironmentandNaturalResources/EminentDomainmainpage/tabid/13252/Default.aspx

Looking at the different state responses to Kelo in more detail, the state measures can be divided into three categories made up of roughly equal numbers of States: those that have essentially abolished the use of eminent domain for economic development or at least placed very strong limitations on its use; those that have enacted significant reforms while still allowing

for the continuing use of eminent domain in some circumstances; and those that have adopted no new legislation or adopted only minor changes. I will offer a few examples of each type of reform to illustrate the range of state responses to the Kelo issue.

Strong Limitations: In Florida, legislation enacted in 2006 generally prohibits the taking of land through eminent domain for transfer to private parties except in the case of common carriers, utilities, infrastructure provision, or leases of otherwise public space. See Fla. Stat. Ann §73.013(1) (a – e) (West 2010). The legislation eliminates government's power to take property to remove blight; instead it requires the government to determine that an individual property poses a danger to public health or safety before exercising eminent domain. See Fla. Stat. Ann §73.014. (West 2010). The Florida reform effort, which is widely viewed as one of the most restrictive in the country, is duplicated in several provisions of H.R. 1443.

South Dakota adopted reform legislation that prohibits the use of eminent domain to "take" property "for transfer to any private person, nongovernmental entity or other public – private business entity," see S.D. Codified Laws § 11-7-22 (2010), and specifically outlaws condemnations "primarily for enhancement of tax revenues." See S.D. Codified Laws § 11-7-22.1 (2010). Furthermore, in Benson v. State, 710 N.W. 2d 131, 146 (S.D. 2006), the Supreme Court of South Dakota affirmed that the state constitution provides landowners greater protection against eminent domain than the federal constitution; specifically, the Court said that the state constitution "requires that there be a use or right of use on the part of the public or some limited portion of it."

Moderate Limitations. Minnesota has adopted legislation that restricts municipalities from using eminent domain to transfer property from one owner to another for private commercial development, specifying that "[t]he public benefits of economic development,

including an increase in tax base, tax revenues, employment, or general economic health, do not by themselves constitute a public use or public purpose." See Minn. Stat. Ann. § 117.025(11). The effect of this restriction is moderated by inclusion of the phrase "by themselves," which presumably indicates that a locality can take a property to further economic development if it also has other valid reasons for doing so. Moreover, the statute authorizes the taking of non-"blighted" properties if they are in an area where a majority of properties are blighted, and no feasible alternative solution exists to remediate the blighted properties." See Minn. Stat. Ann. § 117.027.

Utah adopted several post-Kelo measures that are essentially procedural in nature. For example, a 2007 measure requires approval of a proposed condemnation by two-thirds of the condemning agency's board, and imposes new, more elaborate public notice requirements on condemning authorities. See Utah Code Ann. § 17C-2-601 (West 2010). In 2008, the Utah legislature adopted a bill which provides a right to repurchase if the condemning authority sells the condemned property and creates a cause of action whereby condemnees can "set aside condemnation for failure to commence or complete construction within a reasonable time." See Utah Code Ann. § 78B-6-521. Yet another piece of legislation adopted in 2008 prescribes detailed pre-condemnation notice requirements. See H.B. 78, 2008 Leg. Reg. Sess. (Utah 2008).

Modest or No Limitations. In Connecticut, the site of the Kelo case, the State has adopted some relatively limited constraints on the use of eminent domain for economic development. The Connecticut law bars condemnation of private property "for the primary purpose of increasing local tax revenue," and requires a supermajority vote in municipalities planning to condemn private property. See Conn. Gen. Stat. §§ 8-193(b)(1), 8-127(b)(6)(D) (West 2010). *Id.* § 8-127(b)(6)(D). This obviously allows eminent domain to proceed so long as

enhanced tax revenues is only a secondary purpose of the project, and the super-majority requirement should not be an obstacle to a project that enjoys widespread public support.

Finally, in Texas, although the legislature and the voters have expended a good deal of energy addressing the eminent domain issue, the new laws include so many limitations and qualifications that the net effect is not likely to be a substantial constraint on eminent domain. The Texas legislature enacted a law that prohibits condemnation if the taking "confers a private benefit on a particular private party through the use of the property; is for a public use that is merely a pretext to confer a private benefit on a particular private party; or is for economic development purposes, unless the economic development is a secondary purpose resulting from municipal community development or municipal urban renewal activities to eliminate an existing affirmative harm on society from slum or blighted areas…" Tex. Gov't Code Ann. § 2206.001 (b) (Vernon 2008).. The third criterion's explicit exceptions for municipal community development and for urban renewal in the face of blight indicate that this measure does not, as the first criterion might suggest, ban use of eminent domain to promote private economic development. Subsequently, Texas voters adopted a constitutional amendment which, among other things, altered the definition of "public use," mandating that condemnations only proceed for "ownership, use and enjoyment of the property" by the public. H.R.J. Res. 14 81st Leg. Reg.Sess (Tex. 2009). However, the amendment allows condemnations with incidental private use, prohibiting only the taking of private land for the *primary* purpose of economic development or an increase in tax revenue, which seems to implicitly allow the continued use of eminent domain so long as these are not the primary purposes. Finally, and most recently, the Governor of Texas vetoed legislation that would have eliminated the so-called blight exception.

These examples obviously provide only a sampling of how different States across the country have approached the use of eminent domain for economic development. But these examples should be sufficient to illustrate the widely differing perspectives on eminent domain that exist across the country and the divergent ways that States that have opted for reform have pursued this agenda.

In light of the extensive policy debates and legislative activity at the state level, it is unnecessary for Congress to enact legislation addressing the use of eminent domain for economic development. The States have responded forcefully (if not in uniform fashion) to public concerns about the potential for abuse of the eminent domain power. Many of these state measures have clearly accomplished dramatic change. The social and economic consequences of some measures, as well as their effects on individual landowners, remain to be determined based on experience. Given this flood of activity at the state level on the eminent domain issue, now is not the time for Congress to intervene.

Moreover, in light of the diversity of attitudes and strategies on eminent domain in the different States, it would be unwise for Congress to attempt to enact national legislation on this issue. Thoughtful policy-making on the eminent domain issue calls for balancing the value and importance of the eminent domain tool in pursuing vitally important economic development with land owners' understandable desires to use and dispose of their property with as little government interference as possible. Given the wide differences between the States – in terms of population density, the age of communities and building stocks, and redevelopment objectives, among other things – it stands to reason that different States will and should approach the eminent domain issue differently. When it comes to eminent domain, New York is not like

South Dakota, and Ohio is not like Montana. National legislation on this subject would be unwise because it would disregard and override the differences within our federal system.

Finally, it would be an extreme intrusion on the States for Congress to legislate at this time on the subject of the use of eminent domain for economic development by States and localities. Over the last half dozen years every or virtually every state legislature has either adopted post-Kelo reform measures or made the affirmative decision not to do so. One-size-fits-all national legislation would, in most cases, contradict and preempt these recently concluded state deliberations, substituting Congress's view on how eminent domain should be pursued for the highly varied and carefully considered views of the States. Only the most compelling national interest could justify such a massive, untimely intrusion into state policy-making, and the case for such an intrusion cannot be made here.

One additional note. It is hardly an accident that the States have taken the lead in determining what reforms are needed to the eminent domain process. The Supreme Court in Kelo rejected the argument that the use of eminent domain to promote economic development violates the federal Constitution. But, at the same time, the Court explicitly invited the States to decide whether they wished to provide protections for property owners against eminent domain that went beyond the federal Constitution:

> We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose "public use" requirements that are stricter than the federal baseline. Some of these requirements have been established as a matter of state constitutional law, while others are expressed in state eminent domain statutes that carefully limit the ground upon which takings may be exercised.

545 U.S. at 489. In the wake of the decision, state legislators and policy advocates obviously took up the Supreme Court's invitation. In particular, the Institute for Justice, following Kelo,

launched what it describes on its website (see http://www.castlecoalition.org/ about) as "an aggressive initiative to effect significant and substantial reforms of state and local eminent domain laws." In light of the enormous attention state legislators have given this issue over the last half-dozen years, and the Institute for Justice's not inconsiderable success in achieving its policy objectives at the state level, one wonders what the Institute's rationale is for now supporting action at the national level. Is it that not every State has gone as far as the Institute thinks they should, and therefore Congress needs to step in with national legislation that would preempt the recent State efforts and trump the policy judgments so recently made at the state level? Apparently so. The better conclusions to draw from the recent spate of state policy–making on eminent domain are that the States have already responsibly addressed the eminent domain issue, they have done so in a way that achieves a different balance in each State, time will tell how some of these reforms will work out, and Congress should not seek to intervene in this issue now.

Given my position that Congress should refrain from attempting to craft national legislation that would attempt to impose a one-size-fits-all solution on the States and localities, I have little to offer in the way of detailed commentary on the language of the bill itself. I will observe, however, that the restrictions on eminent domain in the bill are relatively radical, going far beyond the steps most States have adopted, perhaps most closely rivaling the restrictions adopted in Florida. Thus, it is clear that the interference with state policy judgments if this bill were adopted would be extensive. Another noteworthy feature of the bill is that it would not directly restrict the States and localities from exercising the eminent domain power, but instead would subject them to the punitive *post hoc* penalty of losing two years of federal economic development funding if it turns out they have run afoul of the bill's general and sometimes

vague prohibitions. This indirect approach is arguably mandated by the limited constitutional power of the federal government to instruct the States and theirs subdivisions on how to conduct their business. But it certainly produces an awkward piece of proposed legislation that could have disastrous fiscal consequences for State and localities, most of which are now facing financial challenges that rival if they do not surpass those facing the national government. The bill provides that a State or locality could "cure" a violation after the fact, but it is unclear how effective that cure could be if the development has already gone forward and/or if the condemnee has reinvested the compensation proceeds in another property. Ultimately, the effect of the bill, given the difficulty of predicting the outcome of litigation, and the severity of the potential penalties, might be to simply freeze a great deal of proposed redevelopment activity across the country, imposing yet another burden on States and localities and creating an additional drag on our struggling economy.

Thank you for the opportunity to present this testimony. I will be pleased to respond to any questions that members of the Committee may have.