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Community Rights Report

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OUTRAGE OF THE MONTH

Public Parks Not a Public Use?
More Shameless Exploitation of *Kelo*

Just when you think the property rights movement can't get any more extreme and radical, it manages to outdo itself.

On December 13, Senators Larry Craig (ID), Wayne Allard (CO), and Sam Brownback (KS) pushed for an amendment to the farm bill that prohibits any federal, state, or local government from using eminent domain to acquire farmland or grazing land for a public park, open space, or conservation purposes. The penalty for violating the ban is the loss of all federal funding and financial assistance for five years, including terrorism funding, natural disaster assistance, and other vital financial aid.

Craig tried to justify the amendment by exploiting public concern over *Kelo*, stating on the Senate floor, "If the city wants to create a park, go find a willing seller and a willing buyer. That is the way it has been done historically--not to use the power of eminent domain given them, if you will, by the *Kelo* decision." As virtually everyone except Senator Craig realizes, *Kelo* has nothing to do with condemnations for parkland. Public parks are traditional public uses that have supported the use of eminent domain for centuries. Even Justice Clarence Thomas's impassioned dissent in *Kelo* acknowledges that at the time of the nation's Founding, "States employed the eminent domain power to provide quintessentially public goods, such as public roads, toll roads, ferries, canals, railroads, and public parks." (emphasis added).

As should be obvious, condemnation sometimes is necessary to preserve parkland. In a unanimous 1896 ruling upholding the use of eminent domain to establish Gettysburg National Military Park -- *United States v. Gettysburg Electric Ry*., 160 U.S. 668 (1896) -- the Supreme Court concluded, " Such a use seems necessarily not only a public use, but one so closely connected with the welfare of the republic itself as to be within the powers granted congress by the constitution for the purpose of protecting and preserving the whole country."

The penalties for violating the ban are disproportionate to the point of lunacy. It is absurd beyond words, and very likely unconstitutional, for the U.S. Congress to seek to impose its will over local land use policy by threatening to cut off all financial assistance for five years, including programs that have nothing to do with land use or parkland acquisition. Funding could be restored only if the land is returned to the original owner "in the same condition," but if the owner died or if the condition of the land changed in the meantime, the state or locality would be out of luck.

Given the amendment's broad wording, even an inadvertent taking through inverse condemnation could trigger the funding loss. If, for example, a court ruled that state or local wetland protections worked a taking of one acre of farmland, that could constitute an exercise of eminent domain for conservation purposes that would trigger loss of all federal funding, even though the state or locality never intended to take the property.

Although Craig stated the amendment would stem the loss of farmland, it would have the opposite effect by precluding the condemnation of conservation easements designed to preserve farmland.

The proposal was supported by Charles Cushman, president of American Land Rights Network. Cushman launched a national boycott of the Minneapolis airport after Craig's arrest there in a sex sting, claiming that Craig was an innocent victim of profiling. Cushman told reporters he didn't ask Craig for anything in return for his support during this difficult time, but he enthusiastically endorsed the amendment. According to Cushman, his central role in both the Craig scandal and farm bill amendment is just a coincidence.

Thankfully, the Senate voted the amendment down, 37Y-58N. The National Conference of State Legislatures, Council of State Governments, National League of Cities, and U.S. Conference of Mayors signed a letter strongly opposing the measure, as did Community Rights Counsel, Earthjustice, American Planning Association, and a dozen other environmental groups. We'll keep you informed if similar measures resurface down the road.

EYE ON WASHINGTON

Another *Williamson County* Cert. Petition

Pacific Legal Foundation has filed yet another petition for certiorari asking the U.S. Supreme Court to overrule *Williamson County v. Hamilton Bank* (U.S. 1985) insofar as it holds that no claim against a state or locality arises under the federal Takings Clause until the claimant first seeks and is denied compensation in state court under state law. The latest petition was filed Nov. 13 in *Peters v. Village of Clifton*, No. 07-635, out of the Seventh Circuit. Peters alleges that the village worked a physical taking by placing drainage tile on his farm without any offer of compensation.

It comes as no surprise that the petition relies on the concurring opinion in *San Remo Hotel v. San Francisco* (U.S. 2005), which questions the *Williamson County* ruling. It is surprising, however, that the petition goes out of its way to note that the court already has denied review on this issue five times since *San Remo*. It seems like a strange strategy to remind the court that it is uninterested in the issue. PLF asserts that the *San Remo* concurrence "will continue to generate requests for action," and so it seems certain PLF will keep at it, even if the court denies review in *Peters*.

We hope the court continues to recognize, as it did in *Williamson County* itself, that the state court compensation requirement flows directly from the text and structure of the Fifth Amendment itself.

ON THE HORIZON

New Life for Proposed Ban on Judicial Junkets

Community Rights Counsel has long supported restrictions on the travel gifts offered to federal judges and their spouses by private, agenda-driven groups such as the Foundation for Research on Economics and the Environment (FREE), a libertarian outfit in Bozeman, Montana. FREE's vacation/seminars are expressly designed to encourage judges, among other things, to strike down our nation's environmental laws and other community protections. FREE and similar groups accept funding from large corporations that are litigants in cases pending before these judges, and from private foundations that also fund litigation campaigns based on the same theories espoused at the seminars. Legal ethics experts across the country have denounced these junkets for years.

CRC has prepared several reports demonstrating how these seminars create an appearance of impropriety and undermine the administration of justice. The federal attorneys who appear before these judges are not permitted to accept such travel gifts, typically worth thousands of dollars, and there is no good reason for the judges to do so either.

So we were pleased to learn that the U.S. Senate is considering a ban on these junkets as part of the bill that would raise federal judicial salaries. Sen. Jon Kyl has joined with longstanding junket opponents Patrick Leahy and Russ Feingold to support an amendment to the bill banning inappropriate junkets and eliminating the worst abuses associated with these trips.

The junket ban's inherent soundness is reflected by the silliness of the arguments made against it. In a Dec. 17 op-ed in the Wall Street Journal, John Fund denounces the proposed ban as a "dumbing down of the judiciary." Poppycock. Judges would still be able to accept lodging, food, and travel expense reimbursement for a vast array of continuing education programs, including all those offered by any bar association, a judicial association, the National Judicial College, the Federal Judicial Center, a subject-matter bar association, or ABA's Judicial Division.

Fund also contends any proposal "to insulate federal judges from intellectual influences is foolish." But the judges still will be able to read and listen to any scholar or other "influence" of their choosing, including every person who lectures at these junkets. They just won't be able to accept the accompanying vacation at Hilton Head, Amelia Island, Bozeman, and other resorts, paid for by private interests with litigation agendas. And the gift ban applies across the ideological spectrum to all private interests, whether progressive, libertarian, or middle of the road. That's a step in the right direction.

We hope the Senate and the House move forward with the junkets ban in coming weeks so we can put an end to this ethical stain for good.