TEXAS PUBLIC POLICY FOUNDATION
Testimony

July 23, 2012
Armstrong Center for Energy & the Environment

Invited Testimony before the House Committee on Land and Resource Management

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Good morning, my name is Josiah Neeley. I am an attorney and policy analyst with the Armstrong Center for Energy and the Environment with the Texas Public Policy Foundation. Thank you for inviting me to speak here today.

Eminent domain is a constitutional issue, and as with any constitutional issue it is always a good idea to begin with the text. Article I, Section 17 of the Texas Constitution provides that "No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person." This provision follows the Fifth Amendment, which reads in relevant part: "nor shall private property be taken for public use, without just compensation."

The words are familiar; so familiar that we often pass over them without noticing something curious about them.

The Founding Fathers surely believed that property rights were crucial to the development of our country. As Thomas Jefferson stated, "the true foundation of republican government is the equal right of every citizen in his person and property and in their management."[1] John Adams agreed, stating that: "the moment the idea is admitted into society, that property is not as sacred as the laws of God, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence."[2] I could multiply examples endlessly, but I trust this is not necessary.

Yet, the very men who believed so strongly in the sanctity of private property explicitly authorized the power of eminent domain in their constitutions.

They did this not because they didn't really care about property rights (they did), and not because they didn't recognize the need to limit government power (they surely did). Rather, I would submit that the Founders supported eminent domain because they recognized it was necessary to the maintenance and growth of a prosperous society.

For a society to be dynamic and prosperous, you need to have mobility. You need roads, railways, transmission lines, and pipelines that can quickly transport people and products from one area to another. Without this, property becomes isolated, and unproductive.

This is particularly true when it comes to energy. Texas has a robust economy. In 2011, Texas' gross domestic product grew by 2.4 percent, much faster than the national economy, which grew by just 1.6 percent. We are adding jobs at a faster rate than the rest of the nation. From March 2011 to March 2012, Texas nonfarm employment increased by 2.3 percent, whereas between April 2011 and April 2012, U.S. total nonfarm employment increased 1.4 percent. And our unemployment rate has been at or below the national average for 66 consecutive months.

Energy is a key component to Texas' economic success. Texas has a high level of energy use due largely to our thriving manufacturing sector. Our affordable and diversified energy has attracted to Texas a concentration of energy intensive industries. The recent rapid upsurge in oil and gas production due to hydraulic fracturing has only intensified the need for pipelines to transport energy to where it may be used most productively.[3] If Texas is to continue to prosper, we cannot be putting up roadblocks to energy production and transportation.

Without some sort of eminent domain authority, it would be impossible to build long-distance infrastructure like roads or pipelines that by necessity involve easements across many different parcels of land. All it would take is a few holdouts among the many landowners who are willing to sell to doom a project altogether.

Texas has also decided that the ability to use eminent domain should be extended to private companies building pipelines when they qualify as a "common-carrier." Since pipelines are necessary, the alternative to common-carrier status would be to leave the building of pipelines up to the state itself. For good reasons, Texas has decided not to go this route, and so extends eminent domain authority to common-carriers.

Of course, as with any government power, eminent domain is capable of being abused. One thinks here of *Kelo v. City of New London*, wherein a local government condemned a woman's property so that it could be given to a private developer.[4] The power of eminent domain must therefore be carefully circum-

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scribed and include adequate safeguards to protect the interests of all landowners.

Trying to minimize the potential for abuse without undercutting the whole rationale for eminent domain is a difficult task that courts and legislatures have been struggling with for decades. The Texas Supreme Court's recent decision in *Texas Rice Land Partners v. Denbury Green Pipeline-Texas* is the latest attempt to strike the proper balance between these competing interests.[5] The decision held that to qualify for common-carrier status, "a reasonable probability must exist that the pipeline will at some point after construction serve the public by transporting gas for one or more customers who will either retain ownership of their gas or sell it to parties other than the carrier."[6] Just as important, the Court held that while "a permit granting common-carrier status is prima facie valid," if a landowner challenges the pipeline company's exercise of eminent domain, it is the company that bears the burden of proof in establishing its common-carrier status.[7]

On its face the *Denbury* decision is a reasonable approach to these issues. It is not yet clear, though, how exactly the decision will work in practice. The major unknown concerns how difficult it will actually prove for pipeline companies to meet their burden of proof in establishing common-carrier status. Specifically, how much evidence and of what type, will be necessary for a pipeline company to show that it qualifies as a common-carrier under Texas law? Presumably a mere declaration by the company itself that they are open to transporting gas from other companies is not sufficient. If it were, *Denbury* would have come out the other way. On the other hand, the way the court's test is worded indicates that a pipeline company need not already have customers under contract before they can qualify as a common-carrier. If this were necessary, then there would be no point in the court's qualifications "reasonable probability" and "at some point after construction."

There are some cases that seem fairly clear. The proposed Keystone Pipeline, for example, would bring oil and gas from Cushing, Oklahoma to refineries along the Gulf Coast. There is an urgent need for such a pipeline. The current backlog of oil stuck in Oklahoma is affecting oil prices and, by extension, is raising the price we all pay at the pump. If the pipeline is built, there will be many companies vying to send their oil and gas through it to Texas. If the Keystone Pipeline does not qualify as a common-carrier, then it is hard to see what pipeline could qualify.

Other cases will be more challenging. While there is reason to be optimistic, only time will tell whether the *Denbury* standard will in practice prove to be adequately protective of private property rights or will prove unbearably burdensome to pipeline development.

Landowners and pipeline companies need clear rules to remove any uncertainty about which pipelines qualify as a common-carrier. Landowners need to have a mechanism whereby they can seek redress when their rights are being violated. But this process needs to be as simple and streamlined as possible to prevent valuable pipeline projects from getting stuck in legal limbo. And it should be made clear, either through legislation or agency regulation, exactly what sorts of evidence are sufficient to prove common-carrier status.

It is worth noting that nothing in the *Denbury* decision precludes this process from occurring largely within the Railroad Commission, whether via an administrative hearing or by another mechanism.[8] While the Supreme Court found that the existing Commission practice was not adequate to conclusively prove common-carrier status, it does not conclude that no Commission action could be adequate for this purpose.[9] A more rigorous process where the Commission could conduct an actual investigation or examination of the available evidence, did not treat the pipeline company's declaration that they would act as a common-carrier as dispositive, and that provided the affected landowners with notice and an opportunity to contest the application, could meet the constitutional strictures required by *Denbury* while imposing the least possible burden on builders.

This is a vexing issue. Like many, the Texas Public Policy Foundation continually struggles with the contending values that it involves. Property rights cannot be sacrificed for mere convenience. However, we need to balance the property rights of all Texans with the economic well-being of Texas, which includes those landowners and entrepreneurs who want to benefit from new pipeline construction.

I would be happy to take any questions. ✯

[1] Letter from Thomas Jefferson to Samuel Kercheval (June 12, 1816), http://www.famguardian.org/Subjects/Politics/ThomasJefferson/jeff6.htmhttp://www.famguardian.org/Subjects/Politics/ThomasJefferson/jeff6.htm.
[2] John Adams, *A Defense of the American Constitutions* (1787), http://press-pubs.uchicago.edu/founders/documents/v1ch16s15.html.
[3] Steven Hayward and Kenneth P. Greene, *Texas Energy and the Energy of Texas*, Texas Public Policy Foundation (Jan. 2011), http://www.texaspolicy.com/center/economic-freedom/reports/texas-energy-and-energy-texas.
[4] 545 U.S. 469 (2005).
[5] 393 S.W.3d 192 (Tex. 2012).
[6] Ibid. at 202.
[7] Ibid.
[8] *See* Denbury, 363 S.W.3d at 204.
[9] *See* ibid. at 202.

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