

The Honorable Members of the United States Senate and House of Representatives:

The ability to own and control your private property is a cornerstone of our free society. The U.S. Constitution protects these rights. However, these basic rights are now on the verge of being violated by the forced sale provision of the Senate-approved “21st Century ROAD to Housing Act.” Now is the time to stop this assault on the Constitution.

Please see the attached white paper ([also here](#)) authored by [Paul Clement](#) of Clement & Murphy. The paper concludes that the provision in the Senate-approved “21st Century ROAD to Housing Act” that would force “large institutional investors” in the build-to-rent (BTR) industry to sell homes they have constructed – to another private party within seven years - is unconstitutional under the Fifth Amendment’s Takings Clause.

This “forced sale” provision regarding BTR housing should be dropped from the legislation.

Mr. Clement has argued more cases to the Supreme Court of the United States than any other attorney. He served as Solicitor General under President George W. Bush. He has an impeccable legal reputation.

His white paper finds that the “forced sale” provision is a “triple threat” to the U.S. Constitution. In summary:

- The Takings Clause permits the government to take private property only for “public use” – and only with the payment of “just compensation” by the government.
- The BTR “forced sale” provision meets neither condition required by the Fifth Amendment.
- The U.S. Constitution does not allow the government to take property from one private party simply to transfer it to another private party.
- Moreover, the bill provides no mechanism for the government to pay “just compensation” to investors whose homes would be taken.

It is also important to note that this conclusion is driven by the legislation’s proposed forced sale concept itself – not by the 7-year “hold” period.

A longer time period would not alter the paper’s conclusion that a forced sale, as envisioned by this provision, of property from one private owner to another is unconstitutional.

Much of the debate surrounding this provision has concerned the chilling investment impact it is already having and on the forecasted dramatic negative impact on overall housing supply. The [National Association of Home Builders](#) estimates that it could prevent the construction of 40,000 homes per year, while the [Urban Institute](#) suggests that it would decrease new construction by as much as 72,000 homes.

But the constitutional constraints identified by Mr. Clement are quite serious. If enacted one should expect years of litigation that could further diminish housing availability, slow the economy, and erode private property rights protected by the Constitution.

Of course this is not to deny the urgency of the housing crisis or the need for creative solutions. And the overall balance of the Senate and House bills are positive steps toward housing solutions.

However, Congress should avoid passing legislation raising Takings Clause problems through the forced sales of private property from one private party to another.

Thank you and please let me know if I can provide additional information.

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