System Check: Balancing Texas’s Need for Natural Resources Exploration with Texas Landowner Rights in Light of Texas Rice Land Partners v. Denbury Green Pipeline-Texas

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INTRODUCTION

Oil and gas exploration in Texas is extremely important to the state’s citizens, legislators, and the Texas economy. It is so important that the Texas Legislature authorized the Railroad Commission of Texas to grant common carrier status to pipeline companies that seek to use eminent domain to appropriate private land.1 Eminent domain refers to the power possessed by the state over all property within the state, specifically its power to appropriate property for a public use.2 In order for a private entity to exercise this power, the Railroad Commission must designate the private entity as a common carrier.3 One clear benefit of this power is increased oil and gas production in Texas, which is good for the Texas economy.4 While this is an ideal situation for oil and gas companies and Texas politicians, not everyone in Texas is pleased with the manner in which the system works.

Landowners in Texas are fighting an uphill battle against pipeline companies they believe are abusing eminent domain, while also fighting against the Texas Legislature, which seems intent on allowing eminent domain to be used in a manner inconsistent with Texas constitutional requirements. The Texas Constitution provides that “[n]o person’s property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made.”5 In order for a taking to be constitutionally valid, the taking must be for public use,6 thus, as a corollary, no person’s property...
may be taken for private use.\textsuperscript{7} Yet, this is precisely what landowners in Texas claim is happening to them regularly.\textsuperscript{8} While recent jurisprudence has sought to rectify this problem, the Texas Supreme Court’s efforts fail to prevent abuse of the eminent domain power granted to common carriers.\textsuperscript{9}

Further, deterrence through legislative action appears unlikely. After considering all options, criminal sanctions remain the most effective means of curbing pipeline companies’ participation in eminent domain abuse.\textsuperscript{10} The problem, however, is that the current state of the law leaves the possibility of criminal sanctions shrouded in doubt. Fear of criminal prosecution is necessary to deter companies that may consider engaging in eminent domain abuse. To effect change and prevent further abuse, the entire system for becoming a common carrier must be overhauled, especially after the Texas Supreme Court’s decision in \textit{Texas Rice Land Partners v. Denbury Green Pipeline-Texas}.\textsuperscript{11}

Part I of this Comment will discuss the relevant background of the public use doctrine as it relates to eminent domain, as well as the history of the oil and gas industry and eminent domain in Texas. Part II of this Comment will provide a brief overview of recent jurisprudence in Texas that addresses the issue of eminent domain abuse. While recent decisions have provided landowners with hope, these decisions also present several obstacles to combating eminent domain abuse via criminal sanctions. Part III of this Comment will discuss the context in which criminal liability is possible for those who abuse the power of eminent domain and what is required for prosecution. Of particular importance in this discussion is the \textit{Texas Rice Land Partners} decision and the problems it poses to criminal liability and deterrence.\textsuperscript{12} Finally, Part IV will present a solution to problems addressed throughout this Comment and will weigh the pros and cons of both legislative and systemic changes—changes that together may make criminal liability not only a theoretical possibility but rather an effective, practical tool for combating

\textsuperscript{7} See id.

\textsuperscript{8} See Amanda Buffington Niles, Comment, \textit{Eminent Domain and Pipelines in Texas: It’s as Easy as 1, 2, 3—Common Carriers, Gas Utilities, and Gas Corporations}, 16 Tex. Wesleyan L. Rev. 271, 271 (2010) (addressing the frequency of landowners’ interaction with pipeline companies in context of eminent domain abuse).

\textsuperscript{9} See infra Part II (discussing Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC, 363 S.W.3d 192 (Tex. 2012), \textit{reh’g denied}, 381 S.W.3d 465 (Tex. 2012)).


\textsuperscript{11} \textit{Texas Rice Land Partners}, 363 S.W.3d 192.

\textsuperscript{12} See generally id.
eminent domain abuse to preserve the balance between natural resources exploration and private landowner rights.

I. BACKGROUND

A. History and Scope of the Public Use Doctrine

Throughout the history of the United States, state governments, along with a limited number of private entities, have exercised the power of eminent domain in order to take land for public use.\(^{13}\) What constitutes public use has long been the subject of debate.\(^{14}\) The dispute over this seemingly self-evident standard has led to decades of jurisprudence attempting to spell out precisely the meaning of “public use”.\(^{15}\) Generally, there are two widely accepted standards for interpreting the public use requirement: the “use by the public” test and the “public benefit” test.\(^{16}\) The use by the public test reflects a narrow interpretation of the public use requirement and holds that public use means any legitimate public purpose or public advantage.\(^{17}\) Examples of use under the public standard may include public ownership or public access.\(^{18}\) The second and broader standard, the public benefit test, includes use for the purposes of eliminating blight, redistributing concentrated land, and promoting economic development.\(^{19}\)

Although the public benefit standard is considered by many to be the more appropriate standard for evaluating what constitutes public use, the federal government has declined to declare a general

\(^{13}\) See, e.g., TEX. CONST. art. I, § 17.

\(^{14}\) Compare Calder v. Bull, 3 U.S. 386, 388 (1798) ("[For example, A] law that takes property from A. and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with SUCH powers . . . ."), with Beekman v. Saratoga & Schenectady R.R. Co., 3 Paige Ch. 45, 73 (N.Y. Ch. 1831) ("[I]f the public interest can be in any way promoted by the taking of private property, it must rest in the wisdom of the legislature . . . .").


\(^{16}\) 2A-7 NICHOLS ON EMINENT DOMAIN § 7.02[2]-[3] (Julius L. Sackman ed., 3d ed. 2003) (noting two definitions of “public use”—a “broad” and a “narrow” definition—“each of which has its ardent supporters among legal scholars and courts”); Interpretations of the public use requirement are not limited to these two viewpoints.

\(^{17}\) Id.

\(^{18}\) Id.

\(^{19}\) Id.
public use standard. One reason for refusing to declare a general standard is that the meaning of “public use” might vary considerably from region to region; thus, it is more appropriate that the meaning “public use” be left for the states to define. Beginning in the twentieth century, however, there has been a push for the broader view. An illustration of how the public use doctrine has been interpreted provides a better understanding of the difficulty surrounding application of the doctrine.

1. Expanding the Public Use Doctrine

Both state and federal courts have implemented a series of varying interpretations, which have in turn favored both broad and narrow public use definitions; for many years, this failure to settle on a definition complicated the public use doctrine. In Poletown Neighborhood Council v. City of Detroit, the City of Detroit used its power of eminent domain to condemn an entire neighborhood for the construction of a new General Motors manufacturing plant. The affected homeowners argued that the takings were unconstitutional because the direct and primary beneficiary of the taking was General Motors; thus, the taking would have been for an impermissible private use. The Michigan Supreme Court, however, upheld the condemnations by concluding that “public use”

20. See United States v. Certain Lands in Louisville, 78 F.2d 684, 686–87 (6th Cir. 1935), cert. granted, 296 U.S. 567 (1935), cert. dismissed, 297 U.S. 726 (1936) (“[T]he term ‘public use,’ . . . is not susceptible of precise definition under the Supreme Court decisions.”); State ex rel. Tomasic v. Unified Gov’t of Wyandotte Cnty./Kansas City, Kan., 962 P.2d 543, 553 (Kan. 1998) (“There is no precise definition of what constitutes a valid public use . . . .”); Smith v. Cameron, 210 P. 716, 720 (Or. 1922) (“[I]t is difficult, and probably impossible, to frame such a definition of the term ‘public use’ . . . .”); Miller v. City of Tacoma, 378 P.2d 464, 470 (Wash. 1963) (“[T]he words ‘public use’ are neither abstractly nor historically capable of complete definition.”).

21. See Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 244 (1984) (stating that “legislatures are better able to assess what public purposes should be advanced by an exercise of the taking power.”).

22. See infra Part I.A.1. (discussing the expansion of the “public use” doctrine).


24. 2A-7 NICHOLS ON EMINENT DOMAIN § 7.06[7][c][iv] (Julius L. Sackman ed., 3d ed. 2003) (tabulating that “over 465 acres, 3,500 people, and 1,176 buildings, including 144 businesses, 3 schools, 16 churches, and 1 cemetery, were taken by the City of Detroit for a cost exceeding $200 million in order to provide land for a new General Motors facility.”).

and “public purpose” could be used interchangeably.\textsuperscript{26} The Michigan Supreme Court concluded that, “even though a private party will also, ultimately, receive a benefit,” a municipality’s use of eminent domain to alleviate unemployment and revitalize the local economy constitutes two “essential public purposes.”\textsuperscript{27}

The \textit{Poletown} decision resulted in many states interpreting their constitutions in a similar manner.\textsuperscript{28} States that chose to equate public use with public purpose created a situation in which almost any reasonable justification could be made for taking private property.\textsuperscript{29} Even if a use was inherently private and a private party received the primary benefit, the taking could be justified.\textsuperscript{30}

Recognizing that the state of the public use doctrine left private landowners without a reliable standard, the Michigan Supreme Court in \textit{County of Wayne v. Hathcock} unanimously overruled its prior decision in \textit{Poletown}, holding that promoting economic development does not constitute a legitimate public use under the Michigan constitution.\textsuperscript{31} The decision in \textit{County of Wayne} indicated a move towards a more restrictive interpretation of the public use doctrine. However, the move toward a narrow public use definition would not last long because the United States Supreme Court’s ruling in \textit{Kelo v. City of New London, Connecticut} was soon to change how the public use doctrine would be applied for years to come.\textsuperscript{32}

\textsuperscript{26} See \textit{id.} at 457 (“We are persuaded the terms have been used interchangeably in Michigan statutes and decisions in an effort to describe the protean concept of public benefit. The term ‘public use’ has not received a narrow or inelastic definition by this Court in prior cases.”).

\textsuperscript{27} \textit{id.} at 459.

\textsuperscript{28} See, e.g., \textit{City of Jamestown v. Levers Supermarkets, Inc.}, 552 N.W.2d 365, 369, 372–74 (N.D. 1996) (relying on \textit{Poletown} to conclude that “the stimulation of commercial growth and removal of economic stagnation . . . are objectives satisfying the public use and purpose requirement of N.D. Const. Art. I, § 16”). See also \textit{City of Duluth v. State}, 390 N.W.2d 757, 763 (Minn. 1986) (citing \textit{Poletown} and concluding that “revitalization of deteriorating urban areas and the alleviation of unemployment are certainly public goals”).

\textsuperscript{29} See Duncan Kennedy, \textit{The Stages of the Decline of the Public/Private Distinction}, 130 U. PA. L. REV. 1349, 1354 (1982) (“The arguments deployed [in \textit{Poletown}] in support of the publicness of this venture could be deployed in support of virtually \textit{any} venture one can imagine.”).

\textsuperscript{30} See \textit{Cnty. of Wayne v. Hathcock}, 684 N.W.2d 765, 769–70, 786 (Mich. 2004) (stating that \textit{Poletown’s} “economic benefit” rationale would “validate \textit{practically any} exercise of the power of eminent domain on behalf of a private entity” because “[e]very business, every productive unit in society does . . . contribute in some way to the commonwealth”).

\textsuperscript{31} \textit{id.} at 788.

In *Kelo*, the United States Supreme Court again expanded the public use definition, holding that promoting economic development does constitute a legitimate public use under the federal constitution. In that case, New London granted the power of eminent domain to a private economic development corporation charged with revitalizing the downtown and waterfront areas of the city. The development corporation decided to remove existing homes and small businesses and replace them with privately-owned office buildings and a riverfront hotel, all of which would complement a new Pfizer global research facility. However, nine property owners refused to sell, and the development corporation resorted to the use of eminent domain to take title to the land. City authorities argued that the condemnations were justified because the city had experienced significant economic decline and was designated a “distressed municipality” in 1990.

In the Court’s 5-to-4 decision, Justice Kennedy concurred with the explanation that, even though he agreed with the majority in the outcome, his opinion was that the majority did not “foreclose the possibility that a more stringent standard of review . . . might be appropriate” for private transfers with a higher “risk of undetected impermissible favoritism of private parties.” In two dissenting opinions, Justice O’Connor and Justice Thomas argued that, under the majority’s interpretation of the Public Use Clause, almost any private property was now vulnerable to the government’s use of eminent domain for a more productive private use. Justice Thomas


34. See *Kelo*, 545 U.S. at 470.
35. Id. at 474–75.
36. Id. at 474.
37. See id. at 475.
38. See id. at 473.
39. Id. at 493 (Kennedy, J., concurring).
40. See *Kelo*, 545 U.S. at 494 (O’Connor, J., dissenting) (“Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded—i.e., given to an owner who will use it in a way that the legislature deems more beneficial to the public—in the process.”); id. at 506 (Thomas, J., dissenting) (“If such ‘economic development’ takings are for a ‘public use,’ any taking is, and the Court has erased the Public Use Clause from our Constitution . . . .”).
further argued that the majority decision was not well-grounded in precedent. While the majority defended its holding by asserting that, under its interpretation, the Public Use Clause retained meaning, the Court failed to provide any clear standard for defining public use or distinguishing between public and private uses.

2. The Response to *Kelo v. City of New London, Connecticut*

The Court’s ruling in *Kelo* is widely believed to have opened the door for the use of eminent domain for private purposes. Landowners were unnerved by the decision, and several states took legislative action in an effort to strengthen landowner rights. One state was Texas. Although Texas acted swiftly in an attempt to curtail eminent domain abuse following the holding in *Kelo*, the resulting legislation was nevertheless incomplete.

Texas’s new laws included restrictions that prohibited a government or private entity from taking property if the taking did any of the following: (1) conferred a private benefit, (2) was pretextual, or (3) was for economic development. The legislation made the exercise of eminent domain permissible for economic development, but only if the exercise was secondary to the main objective of eliminating blight. The legislation was expected to

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41. See id. at 515 (Thomas, J., dissenting) (arguing that the majority’s application of *Berman* and *Midkiff* is “further proof that the ‘public purpose’ standard is not susceptible of principled application”).
42. See id. at 486–87 (noting that “transferring citizen A’s property to citizen B for the sole reason that citizen B will put the property to a more productive use and thus pay more taxes ... would certainly raise a suspicion that a private purpose was afoot”).
43. Id. at 487 (arguing that “the hypothetical cases posited by petitioners can be confronted if and when they arise” and “do not warrant the crafting of an artificial restriction on the concept of public use”); see also id. at n.19 (noting that “[a] parade of horribles is especially unpersuasive in this context, since the Takings Clause largely ‘operates as a conditional limitation, permitting the government to do what it wants so long as it pays the charge’”) (quoting East. Enters. v. Apfel, 524 U.S. 498, 545 (1998) (Kennedy, J., concurring in judgment and dissenting in part)).
44. See generally Kennedy, supra note 29.
46. See id.
47. See id.
48. Id.
49. See id.
prevent eminent domain abuse in Texas, but the results have been somewhat dissatisfying.\(^\text{50}\)

The new legislation also included exceptions to the prohibitions so that they do not apply to utilities, port authorities, or other specific agencies and projects.\(^\text{51}\) One such exception included the new Dallas Cowboys stadium.\(^\text{52}\) In 2007, the Texas Legislature passed a bill which would have specified that condemnation only qualifies as public use when it “allows the state, a political subdivision of the state, or the general public of the state to possess, occupy, and enjoy the property.”\(^\text{53}\) The bill would have provided even greater protection against common eminent domain abuse tactics; however, Governor Rick Perry vetoed the bill.\(^\text{54}\)

**B. Eminent Domain in Texas: A Brief Overview**

Our brief history of eminent domain legislation in Texas begins with a statute enacted during the 1895 regular session.\(^\text{55}\) Landowners first challenged the law as unconstitutional in a suit against an irrigation company that acquired a right of way over the owners’ land for an irrigation canal.\(^\text{56}\) The statute provided in part:

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\text{[Al]l corporations and associations formed for the purpose of irrigation, mining, milling, the construction of waterworks for cities and towns, and stockraising as provided in this chapter, shall have right of way over public lands, and that such corporation or association of persons, as well as cities and towns, may obtain the right of way over private property and water belonging to riparian owners by condemnation as provided in the case of railroads.}\(^\text{57}\)
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Since the plaintiffs believed the irrigation company was not seeking to take the land for a public purpose, the plaintiffs argued that the statute was unconstitutional.\(^\text{58}\) The plaintiffs also argued that the law authorized the creation of “purely private corporations” for the operation of wholly private businesses and did not secure any

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50. See id.
51. *Coalition Report, supra* note 45.
52. *Id.*
54. *Id.*
such use to the public.\textsuperscript{59} Siding with the irrigation company, the Texas Supreme Court reasoned that the corporation was transferring water to the public and that “the courts cannot inquire into the wisdom or expediency of the regulations adopted by the legislature for the protection of the public.”\textsuperscript{60} This tradition of categorizing projects that promote private enterprise as public use continues in Texas and plays a major role in the discussion of common carrier status and landowner rights.

1. Texas Law Today

Legislative bodies may delegate the power to determine whether a certain entity will be able to exercise eminent domain or whether that entity is one to which the power of eminent domain may be granted.\textsuperscript{61} In Texas, corporations or companies deemed to be common carriers may exercise the power of eminent domain. The authority to grant such a power has been given to the Texas Railroad Commission (TRC).\textsuperscript{62} Throughout the years, critics have disparaged the decisions made by the TRC regarding the designation of companies as common carriers.\textsuperscript{63}

There are three primary designations that a corporation may seek in order to obtain the right to exercise eminent domain.\textsuperscript{64} The first of these designations is common carrier status. The Texas Natural Resources Code provides, among others, the following possibilities for the common carrier designation: (1) owning, operating, or managing a pipeline for the transportation of crude petroleum to or for the public for hire, or engaging in the business of transporting crude petroleum by pipeline; or (2) owning, operating, or managing

\textsuperscript{59}. \textit{Id.}

\textsuperscript{60}. \textit{Id.} at 14–15.

\textsuperscript{61}. \textit{See, e.g.,} TEX. GOV’T. CODE ANN. § 2206.001 (West 2008 & Supp. 2013).

\textsuperscript{62}. \textit{See} TEX. NAT. RES. CODE ANN. § 111.019(b) (West 2011).


\textsuperscript{64}. \textit{Id.} at 280.
pipelines for the transportation of carbon dioxide or hydrogen in any form.\textsuperscript{65} Texas courts have attempted to arrive at more precise definitions than the Natural Resources Code offers but have come up short in fashioning a standard that clearly determines common carrier status.\textsuperscript{66}

When a corporation or private entity seeks a designation as a common carrier, it must fill out a T-4 application and file the application with the TRC.\textsuperscript{67} The T-4 application consists of various questions that seek to determine whether a company will, in fact, be operating as a common carrier.\textsuperscript{68} When a corporation files with the TRC, it asserts that the information provided on the form is correct to the best of its knowledge.\textsuperscript{69} For many years, Texas courts did not make the determination of whether a company was a common carrier.\textsuperscript{70} By filing with the TRC, a pipeline company was able to bypass the courthouse’s determination\textsuperscript{71} because a TRC application constituted an acceptance that the company would be governed by the TRC’s provisions.\textsuperscript{72} Courts simply performed a cursory check to establish that it was actually designated as a common carrier once the pipeline company filled out the appropriate paperwork.\textsuperscript{73}

Essentially, the process developed as follows: (1) a company would fill out the T-4 application; (2) the TRC would approve the application as long as the company agreed to be bound by the TRC’s provisions; (3) the company would receive common carrier designation; and (4) the court would simply make sure that the company was actually approved by the TRC.\textsuperscript{74} Determining whether the pipeline company was truly a common carrier as required by the public use clause of the appropriate provision of the Natural Resources Code can be a complex task.\textsuperscript{65, 66, 67, 68, 69, 70, 71, 72, 73, 74}

\footnotesize{\begin{itemize}
\item \textsuperscript{65} TEX. NAT. RES. CODE ANN. § 111.002 (West 2011).
\item \textsuperscript{66} See Niles, supra note 8, at 281.
\item \textsuperscript{68} See Niles, supra note 8, at 282–83.
\item \textsuperscript{69} See TEX. NAT. RES. CODE ANN. § 91.143 (West 2011) (listing penalties for providing fraudulent information during application process).
\item \textsuperscript{70} Niles, supra note 8, at 282. At the time the Niles article was written, Texas Rice Land Partners v. Denbury Green Pipeline-Texas had not yet been decided. As will be discussed later, Texas Rice Land Partners altered the review process.
\item \textsuperscript{71} See id. at 282.
\item \textsuperscript{72} See TEX. NAT. RES. CODE ANN. § 111.131 (West 2011).
\item \textsuperscript{73} Niles, supra note 8, at 283.
\item \textsuperscript{74} See supra Part I.B. (providing extensive discussion of the history of the procedure for obtaining common carrier designation).
\end{itemize}}
Resources Code was apparently beyond the scope of the courts’ duties.\textsuperscript{75}

Once a pipeline company subjected itself to the TRC as a common carrier, the pipeline company received, in effect, the “unreviewable authority to condemn land.”\textsuperscript{76} In addition, the qualifications for designation as a common carrier have, arguably, been set extremely low by the TRC,\textsuperscript{77} and courts have generally given extreme deference to the TRC’s designation of a company as a common carrier.

\section*{C. Free Reign: Lack of Accountability for Eminent Domain Abuse}

With the right to eminent domain being fairly easy to obtain in Texas, such that landowners’ property could be taken based on the presumed integrity of pipeline companies, one might ask why more has not been done to curb eminent domain abuse. The answer may lie in the significant impact that not allowing these companies to exercise eminent domain would have on the Texas economy. It is important to review the history of the oil and gas industry in Texas in order to illustrate this point properly.

\textbf{1. The Oil and Gas Industry in Texas and Political Influence}

During the oil boom in the early 1900s, the need to transport the products of oil wells increased dramatically in Texas.\textsuperscript{79} As a result, the legislature declared pipeline companies to be common carriers and then granted these companies the right of eminent domain.\textsuperscript{80} Throughout the years that followed, Texas passed legislation furthering the development of the state’s natural resources at the expense of landowners, including granting private companies the right of eminent domain for activities such as irrigation, mining, and

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\item \textsuperscript{75} See Borden v. Trespalacios Rice & Irrigation Co., 86 S.W. 11, 14 (Tex. 1905), \textit{aff’d}, 204 U.S. 667 (1907).
\item \textsuperscript{76} Niles, \textit{supra} note 8, at 284 (discussing results of prior jurisprudence interpreting courts’ ability to review common carrier decision of TRC).
\item \textsuperscript{77} As discussed throughout this Comment, the current process by which the TRC grants common carrier status has recently been cast into doubt by landowners and scholars alike, with emphasis being placed on both the ease of qualification and the lack of review by any judicial authority.
\item \textsuperscript{78} See TEX. NAT. RES. CODE § 111.020(d) (West 2011) (noting that the mere acceptance of the TRC’s common carrier provisions can provide a company with common carrier status).
\item \textsuperscript{79} Niles, \textit{supra} note 8, at 277.
\item \textsuperscript{80} Humble Pipe Line Co. v. State, 2 S.W.2d 1018, 1019 (Tex. Civ. App. 1928).
\end{itemize}
stock raising. The oil and gas industry was added to the list of beneficiaries of eminent domain powers when pipeline companies were granted this power by the legislature.

The Texas Supreme Court has historically sided with the oil and gas companies, adopting an admittedly broad view of what constitutes public use. In Coastal States Gas Producing Co. v. Pate, the Texas Supreme Court stated that the test for determining public use is to determine whether there “results to the public some definite right or use in the business or undertaking to which the property is devoted.” Furthering this pro-oil approach to the doctrine, courts have also declared that “[i]t is immaterial if the use is limited to the citizens of a local neighborhood, or that the number of citizens likely to avail themselves of it is inconsiderable, so long as it is open to all who choose to avail themselves of it.” A use will not be deprived of its public character simply because it is advantageous to a particular group or individual.

Texas courts have also made it clear that the legislature’s declaration (that a use is public) “is binding on the court unless it is manifestly wrong or unreasonable, or the purpose for which the declaration is enacted is ‘clearly and probably private,’” Further, the right to eminent domain grows out of necessity. While this statement likely has merit, there is little question that the legislature’s discretion in choosing to which entities to grant eminent domain power, coupled with the court’s liberal definition of public use, has made landowners the losing party in many battles against private entities over the use of eminent domain.

81. Niles, supra note 8, at 278.
82. Id.
83. See, e.g., Coastal States Gas Producing Co. v. Pate, 309 S.W.2d 828, at 832–33 (Tex. 1958) (affirming trial court judgment in favor of Coastal States Gas Producing Co., which ruled that Coastal States Gas had the right to condemn land for the purpose of drilling a directional well). See also id. at 833 (stating “[the Texas Supreme Court] has adopted a rather liberal view as to what is or is not a public use”).
84. Id. at 833.
86. Id.
87. Id.
89. Niles, supra note 8, at 279.
2. Landowners Are At a Significant Disadvantage

While political power and judicial interpretations of public use may have contributed to Texas landowners’ plight, other factors also affect their ability to fight back against private entities that they believe are abusing the power of eminent domain. These factors include legal and financial constraints, as well as the lack of mobilization among affected landowners. Some believe that the use of eminent domain should be discouraged due to the increase of inordinate private influence and corruption within the eminent domain process. Add political alignment with private entities and it becomes very clear why landowners are discouraged from challenging these companies.

Private parties that would directly benefit from takings have a strong incentive to influence the eminent domain process for their own private advantage, often resulting in “socially undesirable transfers.” In a taking for private benefit, “the single beneficiary . . . has a powerful incentive to capture a concentrated benefit.” On the other hand, a taking for general public benefit usually involves multiple beneficiaries. Takings primarily for the general public also help to ensure the absence of inordinate influence during the takings process. As a result, the potential for corruption is higher in a taking for a private party than in a taking for the government or public.

Private parties are able to use excessive influence to single-handedly benefit from a taking, so many landowners will be affected by the taking; yet, the effects experienced by each individual landowner as a result of the taking may be minor. As a result, the incentive to oppose the taking may be relatively weak. Projects that involve multiple owners (as most projects do) also create a coordination problem. Private parties are capable of using eminent

90. See Kelly, supra note 23, at 34.
91. See id. at 23.
92. Id.
93. Id.
94. Id.
95. See Jonathan R. Macey, Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model, 86 COLUM. L. REV. 223, 229 (1986) (“Pre-existing coalitions and groups of allied individuals will be more effective than dispersed individuals in obtaining transfers of wealth from society as a whole to themselves.”).
96. Kelly, supra note 23, at 35.
97. Id.
98. See id. at 23–24.
domain to exploit these bargaining problems among the dispersed owners.99

Owners are also at a significant disadvantage when it comes to challenging eminent domain abuse due to relatively ineffective political checks against the subversive use of eminent domain. As previously discussed, there are many reasons why political influence will side with private entities.100 First, the period of time that elapses between the time of the condemnation and the time at which the consequences of the condemnation become known results in the diminishment of political accountability.101 This is because the members of the legislature, who were instrumental in the condemnation proceedings, may not be the same members present in the legislature at the time the consequences of the condemnations become known. Also, private parties that exercise eminent domain are typically heavily involved in legislative proceedings and, therefore, regularly have the opportunity to influence legislation.102 One benefit of being regularly involved in the legislative process is the enjoyment of a substantial advantage in the political process.103 Because of this advantage, the political process will usually be unable to compensate for the inordinate influence private parties exert in seeking the condemnation authority for their own advantage.104

II. A GOOD FAITH EFFORT: TEXAS RICE LAND PARTNERS, LTD. V. DENBURY GREEN-TEXAS, LLC

The issue in Texas Rice Land Partners, Ltd. v. Denbury Green-Texas began when Denbury Green applied to the Texas Railroad

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99. Id. at 35–37.
100. See supra Part I.C.1. (discussing oil and gas significance to the Texas economy as reason for political alliance with oil and gas companies).
101. Id.
102. See Kelly, supra note 23, at 36; see also Donald J. Kochan, “Public Use” and the Independent Judiciary: Condemnation in an Interest-Group Perspective, 3 TEX. REV. L. & POL. 49, 82 (1998) (“[T]he special interest is likely to have more political influence, because unlike the landowner, the interest group is probably a repeat player in the political process and thereby able to offer more to legislators.”).
103. See Kochan, supra note 102, at 81–83 (discussing interest-group theory of legislation and the role of repeat players in the political process).
104. See James Geoffrey Durham, Efficient Just Compensation as a Limit on Eminent Domain, 69 Minn. L. Rev. 1277, 1309 n.187 (1985) (noting the “inefficient takings that result from the weakness of the political check on the use of eminent domain: the corruption, unfairness, or mistakes of elected officials and the electorate’s failure to effectively or fairly review the actions of its representatives”).
Commission for a permit to operate a carbon dioxide pipeline that would carry carbon dioxide from a field in Mississippi to various oil fields in Brazoria and Galveston County. When Denbury Green filled out the T-4 application, it noted that it would operate as a “common carrier” rather than as a “private line.” The company indicated that it would transport carbon dioxide owned by others and that this carbon dioxide would be transported for a fee. The company also sent a letter to the TRC stating that it would accept the provisions of Chapter 111 of the Natural Resources Code, which defines the requirements for achieving common carrier status and also imposes requirements on the operations of a common carrier pipeline. The TRC issued a permit for the transportation of carbon dioxide through a common carrier pipeline eight days later. The common carrier status conferred the power of eminent domain upon Denbury.

Texas Rice Land Partners, Ltd. owned the property where Denbury intended to place its pipeline, and when Denbury attempted to survey the land for the purpose of either purchasing or condemning a portion of the surface estate for pipeline right-of-way purposes, Texas Rice denied entry. Denbury sought an injunction to prevent Texas Rice’s interference. The trial court found Denbury was a common carrier, and therefore, it had the power of eminent domain.

The court of appeals affirmed the district court’s ruling, holding the following: (1) the determination of whether a pipeline company is a common carrier is a question of law; and (2) substantial

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106. See supra Part I.B.1. (discussing T-4 application).
108. Id. at 196.
109. Id.; see also TEX. NAT. RES. CODE ANN. §§ 111.002(6), 111.011–111.025 (West 2011); TEX. NAT. RES. CODE § 111.020(d) (West 2011) (stating that acceptance of the provision of the Natural Resources Code is a requirement for gaining common carrier status).
110. Texas Rice Land Partners, 363 S.W.3d at 196.
111. See TEX. NAT. RES. CODE ANN. § 111.019(a).
112. Texas Rice Land Partners, 363 S.W.3d at 196.
113. See id.
114. See TEX. NAT. RES. CODE ANN. § 111.019(a); Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC, 296 S.W.3d 878 (Texas Ct. App. 2009) (stating that “[t]he trial court found that Denbury Green proved as a matter of law that Denbury Green ‘is a common carrier’”), rev’d, 383 S.W.3d 192 (Tex. 2012).
115. Texas Rice Land Partners, 296 S.W.3d at 879 (citing Vardeman v. Mustang Pipeline Co., 51 S.W.3d 308, 312 (Tex. Ct. App. 2001)).
deference is to be given to TRC decisions in areas of its expertise.116 In his dissent, Justice Gaultney rejected the notion that checking the boxes and filling out the T-4 form was sufficient for designation as a common carrier.117 He reasoned that the record supported a finding that the pipeline would be used by Denbury solely to transport its own carbon dioxide.118 As a result of this evidence, there were unresolved factual questions about whether the common carrier decision was consistent with the constitutional requirement that prohibits the taking of private property for private, not public, use.119

The Texas Supreme Court agreed with Justice Gaultney. In the court’s revised opinion, the court stated the Natural Resources Code requires “so-called ‘common carrier’ pipeline companies to transport carbon dioxide ‘to or for the public for hire.’”120 Holding that “[u]ndecorated assertions of public use are constitutionally insufficient,” the court overruled the court of appeals and found that (1) a pipeline owner does not obtain the right to condemn private property by merely checking the correct boxes on the T-4 application filed with the TRC; and (2) a landowner can challenge in court whether the proposed pipeline is truly public.121

The court decided that the T-4 permit alone was not enough to designate Denbury as a common carrier; therefore, Denbury did not have the power of eminent domain.122 Since the mere declaration of a company as a common carrier was held to be insufficient, the court articulated a standard for determining whether a company qualified as a common carrier.123 The court declared that the "pipeline must serve the public; it cannot be built only for the builder’s exclusive use."124 Rejecting Denbury’s claim, the court held that merely making the pipeline available for public use was insufficient to confer common carrier status.125

Two reasons were offered for the rejection of Denbury’s claim. First, the court stated that Denbury’s claim was inconsistent with the wording of Section 111.002(6) of the Natural Resources Code; in

116. See id.
117. See id. at 881–83 (Gaultney, J., dissenting).
118. Id. at 881–82.
119. See id. at 883 (citing Maher v. Lasater, 354 S.W.2d 923, 924–25 (Tex. 1962)); see also TEX. CONST. art. I, § 17(a).
121. Texas Rice Land Partners, 363 S.W.3d at 195.
122. Id. at 198.
123. See id. at 200.
124. Id.
125. Id. at 201 (reversing appeals’ court judgment holding that making pipeline available for public use is sufficient to confer common carrier status).
addition, Denbury’s proposed reading would confer common carrier status and eminent domain power even when the pipeline will never serve the public by transporting carbon dioxide “to or for the public for hire.” 126 Second, under Denbury Green’s proposed reading of the statute, a company could acquire property through the use of eminent domain even when the company knows that no party other than itself will ever desire to use the pipeline. 127 Ultimately, the court found that, in order for a company to qualify as a common carrier, 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.” 128 The evidence presented by Denbury was deemed to be insufficient to establish a reasonable probability that such transportation would ever occur. 129

A. The Texas Rice Land Partners Decision: A Closer Look

The Texas Rice Land Partners decision expressly overruled a longstanding tradition in Texas that granted great deference to the decisions of the Texas Legislature and the TRC. 130 In doing so, Texas landowners were granted a new power: the power to challenge the decisions of the TRC. 131 Even with the ability to challenge TRC common carrier determinations, for reasons previously discussed, landowners are still unlikely to challenge the TRC’s rulings. 132 However, even if landowners were to overcome the barriers that currently limit their ability to challenge a company’s common carrier status, the Texas Rice Land Partners decision presents several new obstacles.

1. The Difficulties Presented by the Texas Rice Land Partners Decision

One of the primary reasons the Texas Rice Land Partners court was able to make its factual determination regarding Denbury’s common carrier status—that Denbury Green’s pipeline would in fact operate as a private pipeline, only carrying Denbury Green’s carbon dioxide—was that Denbury operated a website which

126. Id.
128. Id.
129. Id. at 203.
130. See id. at 198–99; see also supra Part I.B.1.
132. See supra Part I.C.2. (discussing various factors that affect landowners’ challenges).
provided evidence contrary to that provided on its T-4 application.\textsuperscript{133} Several portions of the company’s website indicated that it would be exclusively for private use.\textsuperscript{134} One statement on the website read:

\begin{quote}
We see these sources as a possible expansion of our natural Jackson Dome source, . . . and we believe that our potential ability to tie these sources together with pipelines will give us a significant advantage over our competitors, in our geographic area, in acquiring additional oil fields and these future potential man-made sources of CO2.\textsuperscript{135}
\end{quote}

While the court used this statement (and similar statements) as evidence that Denbury intended to operate a private pipeline, it is unlikely that this evidence will exist in many future cases.\textsuperscript{136} Pipeline companies that apply for common carrier status after the Denbury decision are likely to avoid the use of such incriminating statements on websites, or anywhere else.\textsuperscript{137} Without such statements to use as evidence, it will be difficult to prove that a company never intends to operate as a public pipeline.\textsuperscript{138} This will, undoubtedly, make landowners’ task even more difficult should they choose to challenge a TRC decision.

Another problem with the Texas Rice Land Partners decision is the inherent difficulty in disproving that there is a “reasonable probability . . . that the pipeline will at some point after construction serve the public.”\textsuperscript{139} As previously mentioned, it would be difficult for landowners to prove that the company intends to operate the pipeline privately in the absence of a company expressly stating so on its website or another public forum. If a company does not provide such information, proving its intent becomes a more difficult task. Not only is reasonable certainty a rather unclear standard, but the court in Texas Rice Land Partners also failed to set forth a requirement that pipeline companies must present certain

\begin{footnotes}
\item[133.] Texas Rice Land Partners, 363 S.W.3d at 203.
\item[134.] Id.
\item[135.] Id.
\item[136.] Since the court in Texas Rice Land Partners made it apparent that such statements will be used as proof of intent to operate as a private pipeline, it is unlikely that any company applying for common carrier status will deliberately place such statements on its website since proof of intent to operate as a private pipeline will work to defeat an application for common carrier status.
\item[138.] See id.
\item[139.] Texas Rice Land Partners, 363 S.W.3d at 202.
\end{footnotes}
evidence clearly indicating the company’s intent to operate its pipeline “to or for the public for hire.”

III. THE CHALLENGE WITH DETERRING EMINENT DOMAIN ABUSE IN THE PIPELINE ARENA

Texas landowners and activists have alleged eminent domain abuse in the pipeline industry for quite some time. After much public outcry, the *Texas Rice Land Partners* decision’s standard for challenging a company’s common carrier status has opened the door for discussion of criminal liability. If a pipeline company falsifies documents during the application process, it is a felony offense. However, a reading of criminal statutes providing for liability for fraud in conjunction with the *Texas Rice Land Partners* standard demonstrates that holding pipeline companies criminally liable for fraud is more difficult than ordinarily believed.

In Texas, when a court is faced with the issue of how to construe a statute, the court looks first to its literal text. When examining the literal text, courts will “read words and phrases in context and construe them according to the rules of grammar and usage.” If the statutory language is ambiguous, or leads to absurd results that the Texas Legislature could not have possibly intended, then courts may look outside the wording of the statute to ascertain the legislative intent.

The Texas Penal Code defines various acts that constitute fraud, one of which is the act of securing the execution of a document by deception. The statute begins by stating, “A person commits an offense if, with intent to defraud or harm any person, he, by deception . . . causes another to sign or execute any document affecting property or service or the pecuniary interest of any person.” The degree of punishment for the offense is proportionate to the value of the affected property, service, or

140. *See id.*
142. *Id.*
144. *Id.* (internal quotation marks omitted) (citing Lopez v. State, 253 S.W.3d 680, 685 (Tex. Crim. App. 2008)).
145. *Id.* (citing Boykin v. State, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991)).
147. *Id.* at § 32.46(a)(1).
pecuniary interest. That is, the punishment imposed will increase as the value of the affected property, service, or pecuniary interest increases.

For the purpose of prosecuting criminal offenses under Section 32.46 of the Texas Penal Code (Securing Execution of a Document by Deception), deception is defined as follows:

(A) [C]reating or confirming by words or conduct a false impression of law or fact that is likely to affect the judgment of another in the transaction . . . (B) failing to correct a false impression of law or fact that is likely to affect the judgment of another in the transaction, that the actor previously created or confirmed by words or conduct, and that the actor does not now believe to be true; (C) preventing another from acquiring information likely to affect his judgment in the transaction; (D) selling or otherwise transferring or encumbering property without disclosing a lien, security interest, adverse claim, or other legal impediment to the enjoyment of property, whether the lien, security interest, claim, or impediment is or is not valid, or is or is not a matter of official record; or (E) promising performance that is likely to affect the judgment of another in the transaction and that the actor does not intend to perform or knows will not be performed, expect that failure to perform the promise in issue without other evidence of intent or knowledge is not sufficient proof that the actor did not intend to perform or knew the promise would not be performed.

Given the above definition, an element of fraud that might be at issue in eminent domain abuse is deception.

While the Texas Rice Land Partners decision was rendered with the best intentions, the ruling may cause significant problems when it comes to combating eminent domain abuse in a manner that might result in effective deterrence. The Texas Rice Land Partners decision itself was backlash against pipeline companies who abuse eminent domain; however, pipeline companies will not be deterred if landowners fail to challenge the TRC. Without a challenge, no evidence of wrongdoing can be revealed. One potential avenue for challenging these companies is liability for fraud during the common carrier application process. However, further scrutiny of

148. See id. at § 32.46(b).
149. See id.
151. See Charles Richards, TransCanada wins OK to proceed with pipeline through Lamar County, ePARIS EXTRA! (Aug. 23, 2012), http://www.eparisextra
the Texas Rice Land Partners decision within the context of evaluating the crime of securing a document through deception will reveal this task is not as simple as practitioners and activists might imagine.

A. Analyzing a Case of Fraud In Light of Denbury

For the offense of securing execution of a document through deception, the act must be perpetrated with specific intent to defraud or harm any person and must cause another to sign or execute any document.152 The reasonable probability standard set forth by the court in Denbury makes a determination of common carrier status extremely challenging.153 The uncertainty the case presents becomes quite apparent, especially considering the possibility of fraud during the T-4 application.

In other words, for there to be a basis for deception, there must first be a clear rule that articulates the proper manner in which one must evaluate the information sworn as correct on an application.154 For example, in Forkert v. Texas, the defendant applied for Medicaid and food stamps.155 Her applications were approved, and she received $6,450 in benefits.156 The maximum amount of household resources an applicant may have in order to qualify for Medicaid and food stamps is $2,000.157 After an applicant submits their paperwork, a Texas Department of Human Services (DHS) caseworker conducts a follow-up interview so that the information

152. Id.
153. See supra Part II.B.1. (discussing difficulties which are likely to arise from the decision).
154. In other words, the application needs to require specific information that provides the reviewer of the application a basis from which the accuracy of the information provided may be determined. See, e.g., Forkert v. State, No. 08-05-00224-CR, 2007 WL 2682972 (Tex. Ct. App. Sept. 13, 2007) (holding that defendant was guilty of crime of securing execution of a document through deception because she intentionally stated that she had $0 in household resources on application for food stamps where qualification for assistance required that she not have more than $2000 in resources and defendant had resources greater than this amount).
156. Id.
157. See id.
provided on the application can be verified. The caseworker then submits the applicant's information for processing.

After review, it was determined that Mrs. Forkert failed to disclose the existence of two accounts to DHS during the application stage, one of which had a balance of approximately $58,000. However, on the defendant's original application, she claimed that, between those who live with her, she had $0 in cash. While the defendant did not have direct access to the accounts, her husband, who lived at the same residence, did, and the household benefited from the account. The court found that there was sufficient evidence to convict Mrs. Forkert of securing the execution of a document by deception because DHS relied on deceptive information to determine that she qualified for benefits, and she intentionally provided that false information.

There is a notable difference between the situation illustrated above and a situation in which a pipeline company could be prosecuted for fraud. In a situation where one fraudulently applies for Medicaid, there are two primary parties involved. Person A (applicant) lies and causes person B (state government) to execute a document, which harms person B’s pecuniary interest. During the T-4 application process, however, it would be Person A (pipeline company) that provides deceptive information, causing person B (TRC) to execute the T-4 application conferring common carrier status. However, there is a third person involved in this situation; it is person C (the landowner) whose pecuniary interest would be affected.

Nevertheless, the statute states that the deception must be perpetrated with specific intent to defraud or harm any person and must cause another to sign or execute any document. Based on a plain reading of the statute, as required by Texas methods of statutory interpretation, prosecution of the pipeline corporation would still be possible despite the fact that there is an intermediary between the deceptive applicant and the person whose pecuniary interest is affected.

158. Id.
159. Id.
160. Id.
162. See id.
163. See id. at *6.
164. Recall that affecting the pecuniary interest of a person or entity is an essential element of securing a document by deception. See supra Part III (discussing the elements of fraud).
While criminal liability is desirable in light of other failed methods of deterrence, it is likely unattainable with the current state of determining common carrier status set forth in Texas Rice Land Partners. If a pipeline company filled out a T-4 application, and it was later shown that the company intentionally provided deceptive information on the application, there would probably be a basis for prosecution. However, the problem rests on the company’s intent. The deception would be based on a finding that the company checked the common carrier box when, in fact, the company knew it was not a common carrier. In order to prove that the company knew it was not a common carrier, the government must demonstrate that the company knew that it would be operating the pipeline privately. Several problems arise in carrying this burden of proof.

The Texas Rice Land Partners decision seems to be out of touch with the historical definition of public use in Texas. The court in Texas Rice Land Partners makes clear that reasonable certainty of public use “at some point after construction” is required. However, further into the opinion, the court declined to find that the pipeline would be made available to the public “at some point after construction” when Denbury presented evidence that there was a “possibility” that it would be “transporting other people’s CO2 in the future.” The court stated that this evidence was insufficient to prove a reasonable certainty because the person who presented the testimony failed to “identify any possible customers and was unaware of any other entity unaffiliated with Denbury Green that owned CO2 near the pipeline route in Louisiana and Mississippi.”

The court’s use of the language, “at some point,” seems to indicate that it is willing to allow pipeline companies to satisfy the bar for common carrier status even if the other users are not identified at the time of application. However, the court’s reasoning abandons this position; namely, the court’s reasoning requires that there be definitive evidence presented at the time of a common carrier status challenge regarding those companies (or consumers) that will use the pipeline in the future.

166. See supra Part I.C.2. (discussing other ineffective methods of deterrence).
167. See TEX. PENAL CODE ANN. § 32.46.
169. Id. at 203 (internal quotation marks omitted).
170. Id.
171. See id. at 202.
172. By refusing to accept evidence presented by Denbury Green of the possibility that the pipeline would transport “other people’s CO2 in the future” as
The court in *Texas Rice Land Partners* fails to recognize that there are several reasons why a company may initially seek to construct a pipeline, yet fail to identify outside users or consumers at the time immediately prior to construction, or those who would use the pipeline for hire thereby establishing its public use status. In its decision, the court seems to ignore a fairly obvious fact regarding the timing of a landowner’s potential challenge: the challenge occurs very early in the pipeline project process—before the route is finalized and often before commercial agreements with customers and/or shippers are consummated.\(^{173}\) This is the stage where challenges to the power of eminent domain are most frequently asserted.\(^{174}\)

Landowners generally would like to prevent construction of a pipeline prior to its commencement, rather than after condemnation proceedings have already started. Therefore, the challenge is likely to occur shortly after common carrier status is conferred but before the pipeline company has identified actual consumers or before it has any tangible agreements for “public use for hire.” This makes it extremely unlikely that a pipeline owner will be able to identify other possible consumers with actual and definitive evidence, as the court in *Texas Rice Land Partners* requires. An advocate for landowners may initially believe this to be beneficial for the landowners. While this may be true for a single landowner in an isolated situation, such a result is not good for the overall objective of deterring widespread eminent domain abuse because an underdeveloped standard allows pipeline companies wiggle room in the event they are stretching the truth on a T-4 application.

There will likely be much disagreement over the application of *Texas Rice Land Partners* as time progresses.\(^{175}\) The *Texas Rice Land Partners* court stated that the decision was limited to the issue presented, only as it pertained to carbon dioxide pipelines, and that it was making no ruling on the interpretation of the remaining sections

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174. *Id.* (assuming that a landowner actually asserts a challenge).

175. *Id.* (discussing the likelihood that interpretations of *Texas Rice Land Partners* decision will vary).
of the Natural Resources Code dealing with common carrier status. The result will undoubtedly be an inconsistent application of the common carrier status standard set forth by the Texas Rice Land Partners court. If courts are inconsistent in determining what qualifies as reasonable certainty, how can pipeline companies truly be found to be guilty of fraudulent conduct through deception?

In a situation where one applies for Medicaid, there is a clear rule articulated: an applicant can have no more than $2,000 in resources per household. The same cannot be said regarding common carrier status because the Court in Texas Rice Land Partners failed to state what evidence would satisfy the burden of proving that a company is a common carrier. If the court did this there would be a clear rule, and any pipeline company that filled out a T-4 application stating it was a common carrier, knowing it did not meet the requirements for common carrier status laid out by the court—perhaps hoping that no landowner would challenge its common carrier status and thereby avoiding the production of evidence proving it was in fact a common carrier—would be subject to criminal prosecution.

An example of the conflicting interpretation issue can be seen in a recent decision issued by a Lamar County judge regarding the Keystone pipeline. The judge in that case declined to apply Texas Rice Land Partners although the landowner challenging eminent domain strongly argued that the case applied. While a pipeline that has national implications is significantly different from one that may have only local implications, the point remains that the possibility for inconsistent application of Texas Rice Land Partners’ reasonable certainty standard presents a significant hurdle for what may be one of the only remaining methods of deterring pipeline companies in Texas from engaging in eminent domain abuse. The Texas Rice Land Partners decision, while well intended, may actually limit one of the few methods available to combat eminent domain abuse: criminal liability for fraud.

IV. A POSSIBLE SOLUTION

While deception is the key to guilt for the crime of fraud, the Texas Rice Land Partners’ decision and its reasonable certainty
standard makes such a finding extremely difficult and only further complicates the matter of eminent domain abuse. Since the Texas Rice Land Partners decision was limited to carbon dioxide pipelines, criminal liability in situations in which eminent domain abuse is most likely to occur is probably not possible. Eminent domain abuse will generally occur when pipelines with a greater economic benefit are to be constructed. These pipelines include those such as crude oil and natural gas.  

Although there is support from the Texas Rice Land Partners decision expressing that its ruling should not be applied beyond the scope of carbon dioxide pipelines, there is sufficient reason to support application of the standard to other types of pipelines. In fact, litigants in Texas have begun to present arguments that the standard should be applied broadly. Applying the standard broadly ensures that, when a bright line rule for what is sufficient to establish oneself as a common carrier is articulated, the possibility of fraud will extend to all pipelines, especially those which have the greatest incentive to abuse the power of eminent domain. The problem is actually articulating a rule.

Once a rule is established, the application process needs to be revisited. The power to determine common carrier status cannot be left in the hands of the TRC. While landowners currently have the power to challenge common carrier status, they are still unlikely to do so with much frequency. Consequently, evidence that would uncover fraudulent behavior is unlikely to come to light with enough frequency to effectuate deterrence, even if a few landowners do challenge a company’s status. The incentive to game the system will still be great for most pipeline companies because the likelihood of detection will remain relatively low. Hence, even with a rule laying out precisely what will suffice to establish oneself as a common carrier, the process of review will need to be revamped.

180. See The World’s 25 Biggest Oil Companies, FORBES, www.forbes.com/pictures/me45g1fe/not-just-the-usual-suspects-2/ [http://perma.cc/957B-KHJ4] (archived Feb. 25, 2014) (featuring mostly crude oil and natural gas companies. It is reasonable to infer that many of the most profitable pipelines are those that are constructed for the purpose of exploring for crude oil or natural gas.).

181. In fact, the court expressly states so in the decision.

182. See Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC, 381 S.W.3d 465, 467 (Tex. 2012) (on motion for rel’t). See also supra Part I.C.1. (discussing the history of oil and gas in Texas, the importance of oil and gas to the Texas economy, and the political support behind oil and gas exploration in Texas). See also Elbein, supra note 178.

183. See supra Part I.C.2. (discussing reasons why landowners are seldom likely to challenge common carrier status).
Requiring a pipeline company seeking common carrier status to apply before the court is a much more effective standard. The process of filling out the application with the TRC may remain, but courts should be granted power beyond a mere cursory check, even if a landowner does not challenge the common carrier status. In fact, these checks should be random. However, requiring courts to simply check whether or not a pipeline company has agreed to be governed by the TRC is merely a perpetuation of the problem. The incentive for those in political power to protect pipeline companies known not to be common carriers is far too great. The system in place is designed to protect pipeline companies that are not actually common carriers and therefore should not have the power of eminent domain. Those in power are likely well aware of the low percentage of landowners who will actually challenge a pipeline company’s status. The situation is being taken advantage of for the sake of economic gain and it should be allowed no longer.

If the legislature grants courts the power to go beyond a mere cursory check and require a substantive evaluation of a company’s compliance with public use requirements by determining what evidence will support a finding that a company is a common carrier, pipeline companies will no longer be able to manipulate the system. This will almost immediately deter fraudulent behavior. The legislature may, however, refuse to grant courts this power at the beginning of the common carrier process. But once a rule for determining common carrier status has been developed, eminent domain abuse can still be curbed.

**CONCLUSION**

Eminent domain abuse, as it relates to pipeline companies and the TRC, is a serious problem in Texas. The political influence of oil and gas companies has resulted in legislation that is meant to give pipeline companies every advantage possible during the common carrier application process. Couple this with the strong incentive to defraud landowners, and what remains is a system that allows pipeline companies to manipulate the system for private gain. While the *Texas Rice Land Partners* decision made an attempt to help landowners, it may have resulted in more harm than good by making one of the few remaining methods of deterring eminent domain abuse (criminal liability) difficult to achieve. Legislative protections are desirable, but the potential for political influence

185. This is assuming the numbers of T-4 applications filed each year are so numerous that requiring review of each individual application would place too great of a burden on the Texas courts.
from the oil and gas companies makes it unlikely that any legislative changes to deter pipeline companies from engaging in fraudulent practices will be implemented.

Sending a strong message to pipeline companies that fraudulent practices will result in criminal liability is the best way to deter these companies from engaging in fraudulent practices. In order for this to happen, however, significant changes need to be made in the review process regarding the determination of which companies are, and which companies are not, common carriers. The power of eminent domain is absolutely necessary to the continuing growth of the Texas economy; however, when the scales are unjustly tipped in the favor of pipeline companies, the line between public use and private gain become blurred.

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