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THE KELO DECISION: INVESTIGATING TAKINGS OF HOMES AND OTHER PRIVATE PROPERTY

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CONTENTS

STATEMENTS OF COMMITTEE MEMBERS

WITNESSES

QUESTIONS AND ANSWERS

SUBMISSIONS FOR THE RECORD

THE KELO DECISION: INVESTIGATING TAKINGS OF HOMES AND OTHER PRIVATE PROPERTY

TUESDAY, SEPTEMBER 20, 2005

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Arlen Specter, Chairman of the Committee, presiding.

Present: Senators Specter, Hatch, Kyl, Sessions, Cornyn, Brownback and Leahy.

OPENING STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Chairman SPECTER. Good morning, ladies and gentlemen. The Senate Judiciary Committee will now proceed with a hearing on the issue of the right to take private property under what is called the doctrine of eminent domain for public use.

Our hearing is prompted by the recent decision just a few months ago, in June, by the Supreme Court of the United States in a case captioned *Kelo* v. *City of New London*, where private property was taken for the use of a private company, Pfizer.

Coincidentally, I have just come from the Judicial Conference across the street in the Supreme Court. Senator Leahy is still there and will be joining us shortly. The Conference is customarily presided over by the Chief Justice, but with the death of Chief Justice Rehnquist, the next senior Justice, Justice Stevens, was presiding, and he was talking about the *Kelo* case because it has produced a great deal of criticism.

In a humorous way, he referred to an op ed questionnaire for the confirmation hearing of Judge Roberts, and one of the questions was suggested to be, do you think it appropriate to take Justice Souter's house in the New Hampshire woods for public use and then call it Camp Liberty?

The writer of the question thought that Justice Souter was the writer of the opinion and Justice Stevens wanted to point out that it was he who was the writer of the opinion and he would prefer that before his opinions were criticized that people would read them. I told him I thought that was a fair comment when my turn came to speak, but it opened up the door for me to comment about opinions of the Supreme Court that I had read and that I disagreed with, not saying that that applies necessarily to the *Kelo* decision,

but this is a matter which requires Congressional analysis and we are going to proceed with this hearing.

The Fifth Amendment—and it is picked up by the Due Process Clause of the 14th Amendment—prohibits the government from taking private property unless it does so for a public use and with just compensation. There have been a number of exceptions on public use where the government transfers private property to public ownership for highways, parks, military bases, or, second, when the government would take private property for common carriers to make property available to the general public—railroads or a public utility company—or a third situation to eliminate a blight injurious to public health, safety, morals or welfare.

But the *Kelo* case goes a significant step further and takes it for economic development, where there are jobs, increased taxes and other revenues. The issue which the Congress has authority to act on—this is not a constitutional issue where the Supreme Court is the last word—is to determine as a matter of public policy whether this is a wise, appropriate taking of private property.

I have spoken a little longer today. I am up to the 3-minute mark and I have conducted this filibuster to give an opportunity to my distinguished Ranking Member to arrive so that he would be right in sequence with his opening statement.

Senator Leahy.

STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Senator LEAHY. Well, thank you, Mr. Chairman. I understand you did mention your colloquy with Justice Stevens this morning on the same subject, which I found fascinating, and I could see a number of the judges sitting around the table sort of making notes like I have got to go back and re-read that case.

Chairman SPECTER. Senator Leahy, I forgot to mention one thing. I told Justice Stevens that we were having this *Kelo* hearing and if he had some spare time later this morning to come on over; we would be glad to hear from him. He didn't think that was very funny, but all the other judges laughed.

[Laughter.]

Senator LEAHY. But I am willing to make an easy bet that none of them will show up.

Vermont was actually the first State in the Union to include a takings clause in its constitution. So we in Vermont stand second to none in our respect for private property rights. The language of our Vermont Constitution and our U.S. Constitution makes clear that there are times when private property can appropriately be used for public purposes, so long as the taking is for a truly public use and the owners get just compensation.

Now, the most difficult question is what constraints and procedures you have. But even when the justification is widely understood—a needed highway, for example—it does not alleviate the pain felt by property owners who are in the path of that highway, and you multiply that pain over and over again when families are displaced from their homes.

I think of my own home which has been in my family for over 50 years, actually before my wife and I met. There would be no

compensation that could possibly—we turn down offers every year to buy the place. We just wouldn't do it. It is our home.

Ms. Kelo, I am probably one of millions of Americans who were distressed when we learned your story. We are concerned about what happened to you. I want to work with others in this Committee to fashion some solution, some better, fairer and more sensible ways for local governments to use and not misuse the significant powers they have over property owners.

It has been said that tough cases make bad laws. It can also be said that bad law can lead to bad remedies, and so we are going to have to figure out the best way to do this. I have heard about legislative proposals to address this decision which could potentially benefit land speculators who want to make a quick buck or major corporations who want to gain more power to seize more property to install pipelines or create utility rights-of-way, or even privately owned, for-profit facilities such as sports stadiums. I will work with Senator Cornyn—I am delighted, John, to see you here—with respect to his bill and that of other members of the Committee.

We have to understand that the distress a family suffers from having their home condemned can be just as painful, whether it is taken to build a road or to build a school. The Federal Relocation Act which applies to Federal use of eminent powers contains some useful ideas that can improve fairness.

I have one final point. When Congress exercises its power to impose new conditions on local and State governments in areas that local and State governments have traditionally handles, then we should move cautiously so we don't have unintended consequences. I know that many, many States are already acting to impose additional restrictions and establish new procedures governing the use of eminent domain. We should act carefully, with an awareness of the remedies the States are also considering.

So I thank the distinguished Senator from Texas for being here, and I hope that Professor Merrill of Columbia University, Mayor Perez of Hartford, Connecticut, and Professor Eagle from George Mason will help the Committee in figuring out where to go. It is going to be a difficult area.

With that, I will hush up and listen to them, Mr. Chairman. I will follow your example.

[The prepared statement of Senator Leahy appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Senator Leahy.

Our first witness is our distinguished colleague, Senator John Cornyn. He was a Texas State court judge, later a Supreme Court Justice of the State of Pennsylvania, and elected to—

Senator LEAHY. Texas.

Chairman SPECTER. Texas.

I almost demoted you, John.

He was elected to the U.S. Senate in 2002 and has been a very active, contributing member to this Committee.

Welcome, Senator Cornyn. Thank you for introducing legislation on this subject and we are looking forward to your testimony.

STATEMENT OF HON. JOHN CORNYN, A U.S. SENATOR FROM THE STATE OF TEXAS

Senator CORNYN. Thank you, Mr. Chairman, and ranking member, Senator Leahy. I want to congratulate you and thank you for holding this hearing today about the right of every American to be protected against government seizure of their homes and their businesses and their property.

As we know, this week is Constitution Week, a week that is dedicated to celebrating the great principles of our Nation's founding document. Without question, private property rights rank among these important rights contemplated and outlined by our Founding Fathers. Thomas Jefferson wrote, "The protection of such rights is the first principle of association, the guarantee of everyone to a free exercise of his industry and the fruits acquired by it."

Accordingly, these rights were enshrined in the Fifth Amendment, as the Chairman has already noted. Yet, as the Chairman observed, the United States Supreme Court has weighed into this issue in a way that perhaps no one had really contemplated before, effectively, in my opinion, reading the public use requirement out of the Constitution.

Justice O'Connor, in a dissent, warned, "The specter of condemnation hangs over all property. Nothing is to prevent the state from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory." She further warned that under the Supreme Court's decision in *Kelo*, any property may now be taken for the benefit of another private party, and the fallout from this decision will not be random.

Indeed, this is an issue that has brought together people across the ideological spectrum without regard to party affiliation. I am proud that Senator Bill Nelson and I have sponsored some legislation which we filed the week after this decision came down, and I look forward to working with you, Mr. Chairman, and all of our colleagues on the Committee to refine that legislation in a way that meets the goals that I know we all share. I couldn't agree more with Senator Leahy that we do need to be deliberate about it and careful in crafting the appropriate remedy.

To just show the range of individuals and groups with concerns, an amicus brief filed by the National Association for the Advancement of Colored People and AARP, among other organizations, noted, "Absent a true public use requirement, the Takings Clause will be employed more frequently. The takings that result will disproportionately affect and harm the economically disadvantaged, and in particular racial and ethnic minorities and the elderly."

Suffice it to say *Kelo* was a disappointment to an awful lot of people. I actually in my office have gotten more telephone calls concerned about this decision than the decision on the Ten Commandments and other cases that perhaps you might think would provoke more controversy.

But, I think the sense is that private property rights under the rule of law is something that is always protected, and particularly against the awesome power of the government, except under the most exacting of requirements, and it has sent a shock wave in many ways throughout America and caused people to question whether they are actually secure in those rights or not.

The Institute for Justice has documented more than 10,000 properties either seized or threatened with condemnation for private development in the 5-year period between 1998 and 2002. This is one reason, among others, that I filed Senate bill 1313, entitled the Protection of Homes, Small Businesses and Private Property Act of 2005. As I noted, Senator Bill Nelson, of Florida, is the principal cosponsor, but I am happy to report today that a total of 28 of our colleagues have joined me as cosponsors of this important legislation.

This bill is intended to be specific and to deal with the Federal power of eminent domain which, of course, doesn't cover the whole spectrum, because State constitutions obviously cover that at the State level. But it is designed to be complementary of the power of the States to deal with this on a State-by-State basis and to deal primarily with Federal issues.

It also would deal with the exercise of eminent domain power by State and local governments using Federal funds. So, it would extend not only to the Fifth Amendment authority of the Federal Government to exercise eminent domain, but also reach the use of Federal funds in State and local government hands.

In conclusion, Mr. Chairman, the protection of homes, small businesses and other private property rights against government seizure and other unreasonable government interference is a fundamental principle and core commitment of our Nation's Founders. In the aftermath of *Kelo*, we must all take necessary action to restore and strengthen the protections of the Fifth Amendment. I would ask my colleagues to give me their consideration of the legislation that we have filed, and pledge to work together with you, Mr. Chairman, and the ranking member, Senator Leahy, and all our colleagues to try to achieve a legislative product which accomplishes the result that I know we would all like to reach.

Let me just ask, if I may, in closing, Mr. Chairman—I have a copy of the testimony of Dana Berliner, Senior Attorney for the Institute for Justice. They were unable to be here today, but I would ask that his testimony be made part of the record by unanimous consent.

Chairman SPECTER. Without objection, the testimony will be made a part of the record.

Senator CORNYN. Thank you very much.

[The prepard statement of Senator Cornyn appears as a submission for the record.]

Chairman SPECTER. Well, thank you very, Senator Cornyn. I am going to reserve my questions for you until we have our markup. That is when we all sit down and talk about the bill. I personally and the Committee generally appreciates your leadership putting in a bill so promptly after the decision came down, and 28 cosponsors is a hallmark of a lot of support.

Senator Leahy.

Senator LEAHY. Well, I am going to do the same. Of course, like all of us, I will be having chats with Senator Cornyn privately on this, but the markup will be the place we will talk about it. I also commend him for bringing us a vehicle so we can begin that discussion.

Chairman SPECTER. Thank you very much, Senator Cornyn.

We now call our witnesses today: Ms. Suzette Kelo, Pastor Fred Jenkins, Mayor Eddie Perez, Mr. Hilary Shelton, Professor Thomas Merrill and Professor Steven Eagle. Our lead witness is the lead plaintiff in this case.

Ms. Kelo, you are now an objective, impartial known noun. This case will be referred to as "Kelo" and they will always be talking about you.

She is a lifelong resident of southeastern Connecticut, the mother of five grown sons. She bought her Victorian home on E Street in Fort Trumbull in July 1997, and from her dining room on a clear day they can see Otok Point at the top of Long Island. She has been activist to save the Fort Trumbull neighborhood since the day before Thanksgiving in 2000, when a notice was posted on her door by the New London Development Corporation that she and her family would have to leave their home in a few months. Despite her loss before the Supreme Court, she continues to inspire and advocate for a return to sensible eminent domain policy.

Thank you for what you are doing, Ms. Kelo, and we look forward to your testimony.

STATEMENT OF SUSETTE KELO, NEW LONDON, CONNECTICUT

Ms. KELO. I want to thank Chairman Specter and the rest of the Senate Judiciary Committee for the opportunity to testify about legislation to cutoff funding to governments that abuse eminent domain law.

My name is Susette Kelo and I live in New London, Connecticut. I am the Kelo in *Kelo* v. *City of New London*, the now infamous U.S. Supreme Court case in which the Court ruled that private property, including my home, could be taken by another private party who promises to create more jobs and taxes with the land.

I sincerely hope that Congress will do what judges and local legislators so far have refused to do for me and for thousands of people like me across the Nation—protect our homes under a plain reading of the United States Constitution. Federal lawmakers should pass legislation that will withhold Federal development funding for cities that abuse eminent domain for private development, such as the one that could take my home which received $2 million in Federal funds. What we have now at the local, State and Federal level amounts to government by the highest bidder. That has got to stop.

I would like to tell you a little more of my story so you can hopefully see why the law needs to be changed. In 1997, I searched all over for a home and finally found this perfect little Victorian cottage with beautiful views of the water. I was working then as a paramedic and was overjoyed that I was able to find a beautiful little place I could afford on my salary. I spent very spare moment fixing it up and creating the kind of home I had always dreamed of, and I painted it salmon pink because that was my favorite color.

In 1998, a real estate agent came by and made me an offer on the house on behalf of an unnamed buyer. I explained to her that I was not interested in selling, but she said that my home would be taken by eminent domain if I refused to sell. She told me stories of her relatives who had lost their homes to eminent domain. Her advice: give up; the government always wins.

So why did the city and the New London Development Corporation want to kick us out? To make way for the luxury hotel, upscale condos and other private development that could bring in more taxes to the city and possibly create more jobs. The poor and middle class had to make way for the rich and politically connected. As quickly as the NLDC acquired homes in my neighborhood, they came in and demolished them, with no regard for the remaining residents who lived there, most of whom were elderly.

In late 1999 after graduating from nursing school, I became a registered nurse and began working at Backus Hospital in southeastern Connecticut. Early in 2000, the public hearings were eventually held and the Fort Trumbull plan was finalized. Our home was not part of that plan, and by that time I had met a man who shared my dreams and the two of us spent our spare time and money fixing up our home. We got a couple of dogs. We planted some flowers. I braided rugs. We found a lot of antiques that were just perfect for our home. Tim, who was a stone mason, did all kinds of stone work around the house. When I first bought it, it had been run down. Today, it is a beautiful home.

On the day before Thanksgiving, in 2000, a sheriff taped a letter to my door stating that my home had been condemned by the City of New London and the NLDC. We did not have a very pleasant holiday, and each Thanksgiving since has been bittersweet.

Happy that we are still in our homes, but afraid we could be thrown out any day, the following month the Institute for Justice agreed to represent us. Without them, none of us would be here today. None of us could have afforded the tremendous legal costs that would have been incurred over the years.

A year later, in 2001, we went to trial in New London, and after hearing ten different reasons for why our homes had been seized, from so-called park support, to roads, to museums, to warehousing, the judge decided no one could give him a straight answer and he overturned the demolition sentences on our homes.

One night in late October of 2002, I was working in the hospital in the emergency room when a trauma code had been called and a man who had been in a car accident was wheeled to the trauma room. To my horror, after several minutes of working alongside Dr. Wasalik and the nurses, I realized it was my partner, Tim. For 2 weeks, he lay in a coma and we did not know if he would live or die. Finally, he pulled through, and although permanently disabled, it was a miracle he was finally able to walk out alive 2 months later.

While he was still hospitalized, the Connecticut Supreme Court heard our case, and a while later after Tim well enough, we made it official by getting married. We still had no idea if we would keep our home, as the Connecticut court would take 15 months to reach a decision. When they ruled against us by a four-to-three decision, we were stunned. Our lives were on hold for another year as we waited for the U.S. Supreme Court to hear our case. We had high hopes that the Supreme Court would protect our homes, but by one vote they let all Americans down.

My neighborhood was not blighted; it was a nice neighborhood where people were close. Even though many of our homes had been destroyed, the people remaining are still good neighbors and good

friends, and we don't want to leave. None of us asked for this. We simply were living our lives, working and taking care of our families and paying our taxes.

The city may have narrowly won the battle on eminent domain, but the war remains in Fort Trumbull and across the Nation. What is happening to me should not happen to anyone. Congress and State legislatures need to send a message to local government that this kind of abuse of power will not be funded or tolerated. Special interests who benefit from this use of government power are working to convince the public and legislatures that there isn't a problem, but I am living proof that there is a problem.

This battle against eminent domain abuse may have started as a way for me to save my little pink cottage, but has rightfully grown into something much larger—the fight to restore the American dream and the sacredness and security of each one of our homes.

Thank you very much.

[The prepared statement of Ms. Kelo appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Ms. Kelo.

Our next witness is Pastor Fred Jenkins, of St. Luke's Pentecostal Church in North Hempstead, New York. He founded his church in 1979 and has been in the ministry for 26 years. For years, the congregation leased basement space and saved money so that it could buy a church, and in 1997 they bought a piece of property that included a partially constructed church.

Before they could build, the North Hempstead Community Development Agency condemned the property for private retail development.

Pastor Jenkins, I can understand your unhappiness about that and we are interested in what you have to say about public condemnation.

STATEMENT OF FRED JENKINS, PASTOR, ST. LUKE'S PENTECOSTAL CHURCH, NORTH HEMPSTEAD, NEW YORK

Rev. JENKINS. Thank you, Chairman Specter and the rest of the Senate Judiciary Committee, for the opportunity to testify about legislation to stop Federal funding to local governments.

My name is Fred Jenkins and I am the pastor of St. Luke's Pentecostal Church in North Hempstead, New York. After years of meeting in a rented basement and saving up money, we were able to find a permanent home for St. Luke's, but it was taken from us by the North Hempstead Community Development Agency, which uses funding from HUD for private retail development. Six years later, the place which we bought was still empty.

I founded St. Luke's in 1979, and over the years our congregation grew to over 100 parishioners. St. Luke's has rented in the Prospect Avenue neighborhood of North Hempstead. In the early 1980s, we began raising and saving money to purchase a permanent home for our church. For years, members sacrificed and contributed money and time to our building fund. We are certainly not a wealthy church, but everyone pitched in.

We looked hard for a perfect place for our church and we found that home in 1994. Nothing else fit St. Luke's needs like this build-

ing. The size would fit the 100-plus members and the price was manageable. It was where most of the parishioners live and in the area where we help people. My congregation has always been very active in our community. We pay for members' funerals, help the homeless, assist parishioners with drug and alcohol abuse, and provide rent money and heating oil to needy families.

We purchased the land at 822 Prospect Avenue and the almost-completed church building in December 1997. The congregation was so excited to finally have a permanent home. We were eager to start building. People went down to the site and began cleaning up. We spent a considerable amount of money preparing to complete the building.

We had completed everything required by the building department and submitted our application for a new building permit after we bought the property. We also took out a mortgage for over $207,000. We still make mortgage payments, but we don't have the building. For a year-and-a-half, we applied for permits. Meanwhile, not one person from the town told us our property was going to be condemned.

In November 1999, we received a letter from the NHCDA offering to buy our property for $80,000. This was $50,000 less than what we had paid for the property, and far less than the mortgage. This was the first time we heard that the town had a plan to take our property. That March, the town officially seized our new home. We had no idea that our new building had been slated for development. In 1994, nobody bothered to tell us this. While the Commissioner of the Department of Building told us how excited he was over our redevelopment of this property, he not once mentioned that the town planned to seize it.

St. Luke's has always taken care of the community, and in return we were kicked off our property and it was taken for retail development. It is now being used to store building material for the construction going on across the street. We are back in the basement we rented for years, we are at square one. But while the congregation is broken-hearted and is still paying the mortgage on the property that was seized from us, we have yet to receive compensation.

Chairman SPECTER. Pastor Jenkins, how many more pages do you have on your statement?

Rev. JENKINS. Just a little.

Chairman SPECTER. OK.

Rev. JENKINS. This country is full of people like my parishioners who work hard and save up to buy something to call home. I ask you to please stop funding local governments like North Hempstead that use Federal dollars to take away homes, businesses and churches for private gain.

I thank you for the opportunity of appearing before this Committee.

[The prepared statement of Rev. Jenkins appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Pastor Jenkins.

Our next witness is the Mayor of Hartford, Connecticut, Mayor Eddie Perez, elected in 2001. His election followed years of service to his community, including development of a revitalization plan as

president and executive director of the Southside Institutions Neighborhood Alliance. He was the administrator of Trinity College, from which he holds a degree in economics. He appears here today as the representative of the National League of Cities.

Thank you for joining us today, Mayor Perez, and the floor is yours.

STATEMENT OF HON. EDDIE A. PEREZ, MAYOR, HARTFORD, CONNECTICUT, ON BEHALF OF THE NATIONAL LEAGUE OF CITIES

Mayor PEREZ. Thank you, Mr. Chairman. Mr. Chairman, I request insertion of my written statement and attachments into the record of today's hearing.

Chairman SPECTER. Without objection, your full statement will be made a part of the record.

Mayor PEREZ. Good morning, Mr. Chairman and members of the Committee. I am Mayor Eddie A. Perez, of Hartford, Connecticut's capital city. I am testifying this morning on behalf of the National League of Cities.

The anxiety some people have with eminent domain is real. The history of how government has used eminent domain is mixed, but most of it is good. You have heard from some people who oppose it, but now let me speak for those people, and most importantly those communities, that but for the use of eminent domain would have few reasons to dream of a better future.

Since the Court issued the decision last June in *Kelo* v. *City of New London*, the frenzied rhetoric and misinformation about the use of eminent domain for economic development purposes has been overwhelming and, most importantly, disappointing. Once you get past the hype, two important points stand out.

First, eminent domain is a powerful economic development tool that helps cities create jobs, grow businesses, and most importantly strengthen neighborhoods. No locally elected official I know would use eminent domain to undermine the integrity or confidence in home ownership in his or her community. For urban America, and communities of color in particular, home ownership is the ticket to the American dream.

Second, if Congress were to pass legislation to hamstring State and local governments from using eminent domain in some of our poorest communities, I believe that we would have fewer people becoming homeowners, which means fewer participants in the administration's concept of an ownership society.

The *Kelo* decision does not expand the use or power of eminent domain by States or municipalities, nor did the Court's decision overturn existing restrictions imposed at State and local levels. The *Kelo* decision affirmed that eminent domain, a power derived from State law, is best governed by the States and their local political subdivisions. The *Kelo* Court affirmed federalism and the Tenth Amendment.

Since the opinion's release, State after State, including my home State of Connecticut, have taken the Court at its word. Many State legislatures have begun or will begin during the upcoming legislative session to examine their laws governing the use of eminent domain through proposed bills and study commissions.

Regardless of the individual State outcomes, the Court correctly concluded that eminent domain is not a one-size-fits-all power, and that States are better suited than Congress to govern its use. Post-*Kelo*, the use of eminent domain will receive increased scrutiny. Cities which generally use eminent domain as a last resort because of its significant cost in financial, political and human terms, are under an ever-increasing spotlight when it comes to the use of eminent domain.

However, the availability of eminent domain to the city of Hartford has facilitated economic development and growth in our community. Projects such as Adriaen's Landing, a $500 million mixed-used development, including a convention center, hotel, condominiums and retail, and the Learning Corridor, a $120 million, 16-acre complex of a K–12 magnet school development developed by a nonprofit developer in one of Hartford's poorest neighborhoods, would not have been possible without the city having the eminent domain power as a development tool.

The *Kelo* decision highlights the natural tensions public officials confront daily between individual rights and community needs. One of the most important responsibilities of any local city government is to provide for economic and cultural growth of that community.

Let me close by saying that municipal officials like me know from experience what the Supreme Court has affirmed, that economic development is a public use. Without the ability to exercise eminent domain judiciously, cities, in particular, would miss significant opportunities to create jobs, grow their economies and increase the quality of life for all its residents.

Urban development projects that have used eminent domain, ranging from Texas Rangers Stadium, to Lincoln Theater, to the Baltimore Inner Harbor, have all provided real public benefits to their communities. Without eminent domain, New Orleans and Louisiana will not be able to redevelop the devastated areas caused by Katrina.

The National League of Cities urges a careful examination of the underlying premise of the anti-*Kelo* bills pending before Congress. The National League of Cities also urges Congress generally, and the Senate in particular during its coming consideration of the Transportation, Treasury and HUD appropriations bill for fiscal year 2006 not to use the appropriations process to legislate eminent domain.

The *Kelo* decision has justifiably stirred some debate, but it has—

Chairman SPECTER. Mayor Perez, how many more pages do you have of your statement?

Mayor PEREZ. Three sentences.

Chairman SPECTER. Go ahead.

Mayor PEREZ. The *Kelo* decision has justifiably stirred some debate, but it has done nothing more than affirmed the status quo. I urge Congress to avoid taking any hasty action that would undermine the ability of State and local governments to thoroughly review this issue and create local solutions. The best solutions to what works at the local level come from conversations and compromise at town halls and in neighborhood living rooms. Let com-

munities develop their own vision of what they need and let them keep the tools that they need to get there.

Thank you, Mr. Chairman.

[The prepared statement of Mayor Perez appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Mayor Perez.

Our next witness is the Director of the NAACP's Washington Bureau, Mr. Hilary Shelton. Prior to taking this position, he has had a very distinguished career with the NAACP, worked with the United Negro College Fund, and before that the United Methodist Church on Capitol Hill. Mr. Shelton holds degrees in political science, communications and legal studies from Howard, the University of Missouri, in St. Louis, and Northeastern University in Boston.

Thank you very much for joining us today, Mr. Shelton, and thank you very much for lending us a very distinguished lawyer, Hannibal Kamerer, who is on our staff and doing very good work.

STATEMENT OF HILARY O. SHELTON, DIRECTOR, WASHINGTON BUREAU, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, WASHINGTON, D.C.

Mr. SHELTON. Thank you, Chairman Specter. It is an honor to be before this Committee. I want to thank Ranking Member Leahy and the members of the panel for inviting me here to talk about property rights in a post-*Kelo* world.

I should mention I am Hilary Shelton, Director of the NAACP's Washington Bureau, the government affairs office of the Nation's oldest and largest grass-roots-based civil rights organization.

Given our Nation's very sorry history of racism, bigotry and a basic disregard on the part of too many elected and appointed officials to the concerns and rights of racial and ethnic minority Americans, it should come as no surprise that the NAACP was deeply disappointed with the *Kelo* decision. Racial and ethnic minorities are not just affected more often by the exercise of eminent domain power, but we are almost always affected differently and more profoundly.

The expansion of eminent domain to allow government or its designees to take property simply by asserting that it can put the property to a higher use will systematically sanction transfers from those with less resources to those with more.

The history of eminent domain is rife with abuses specifically targeting racial and ethnic minority and poor neighborhoods. Indeed, the displacement of African-Americans and urban renewal projects are so intertwined that urban renewal was often referred to as black removal. The vast disparities of African-Americans or other racial and ethnic minorities that have been removed from their homes due to eminent domain actions are well documented. For your information, I have included examples of these documented disparities in my written testimony.

The motives behind the disparities are varied. Many studies contend that the goal of many of these displacements is to segregate and maintain the isolation of the poor, minority and otherwise outcast populations. Furthermore, condemnation in low-income or predominately minority neighborhoods is often easier to accomplish

because these groups are less likely or are often unable to contest the actions either politically or in our Nation's courts.

Last, municipalities often look for areas with low property values when deciding where to pursue redevelopment projects because it costs the condemning authorities less, and thus the State or local government gains more financially when they replace areas of low property value with those with higher property values.

Thus, even if you dismiss all other motivations allowing municipalities to pursue eminent domain for private development, as was upheld in the U.S. Supreme Court in *Kelo*, it will clearly have a disparate impact on African-Americans and other racial and ethnic minorities in our country.

Not only are African-Americans and other racial and ethnic minorities more likely to be subjected to eminent domain, but the negative impact of these takings on these men, women and families is much greater.

First, the term "just compensation" when used in eminent domain cases is almost always a misnomer. The fact that a particular property is identified and designated for economic development also certainly means that the market is currently undervaluing that property or that the property has some trapped value that the market is not yet recognizing.

Moreover, when an area is taken for economic development, low-income families are driven out of their communities and find that they cannot afford to live in the revitalized neighborhoods. The remaining affordable housing in the areas are almost certainly to become less so. In fact, one study from the mid-1980s showed that 86 percent of those relocated by an exercise of eminent domain power were paying more rent at their new residence, with the median rent almost doubling.

Furthermore, to the extent that such exercise of the takings power is more likely to occur in areas with significant racial and ethnic minority populations, and even assuming a proper motive on the part of government, the effect will likely be to upset organized minority communities.

This dispersion both eliminates established community support mechanisms and has a deleterious effect on those groups' ability to exercise what little political power they may have established. The incentive to invest in one's community financially and otherwise directly correlates with the confidence in one's ability to realize the fruit of such efforts.

By broadening the permissible uses of eminent domain in a way that is not limited by specific criteria, many minority neighborhoods will be at increased risk of having property taken, and there will be even less incentive to engage in community-building and improvement.

In conclusion, allow me to reiterate that by allowing pure economic development motives to constitute public use of eminent domain purposes, State and local governments will now infringe on the property rights of those with less economic and political power with more regularity. As I have testified today, these groups—low-income Americans and a disparate number of African-Americans and other racial and ethnic minority Americans—are the least able to bear the burden.

I want to thank you again, Chairman Specter, Ranking Member Leahy and members of the Committee, for allowing me to testify before you today about the NAACP's position on eminent domain and the post-*Kelo*, prepared statement landscape. The NAACP stands ready to work with the Congress and State and local municipalities to develop legislation to end eminent domain abuse while focusing on real community development concerns like building safe, clean and affordable housing in established communities with good schools, an effective health care system, small business development and a significant, available living-wage job pool.

I thank you very much for the opportunity.

[The prepared statement of Mr. Shelton appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Mr. Shelton.

Our next witness is Professor Thomas Merrill, who is the Beekman Professor of Law at Columbia Law School. He has written extensively on the Fifth Amendment Takings Clause on eminent domain. He has a distinguished record, having been of counsel at the Chicago law firm of Sidley Austin. A graduate of the University of Chicago Law School, he served as law clerk to Judge David Bazelon of the District of Columbia Court of Appeals, and clerked for Justice Harry Blackmun on the Supreme Court; also, Deputy Solicitor General from 1987 to 1990.

Thank you for joining us, Professor Merrill, and the floor is yours.

STATEMENT OF THOMAS W. MERRILL, CHARLES KELLER BEEKMAN PROFESSOR OF LAW, COLUMBIA UNIVERSITY SCHOOL OF LAW, NEW YORK, NEW YORK

Mr. MERRILL. Well, thank you, Mr. Chairman, for inviting me, and I thank the members of the Committee for their attention. As you pointed out, I have been studying issues involving eminent domain for a number of years. I should also indicate that I filed an amicus curiae brief in the *Kelo* case on behalf of the American Planning Association and the Congress of Economic Development.

Given my involvement with this legal issue, I did not find the *Kelo* decision especially remarkable. What I did find remarkable, indeed quite stunning, was the overwhelming reaction to the decision on the part of the American public. I certainly don't have to tell the Senators what the American public thinks of the characterization of the *Kelo* decision that has been disseminated since it was decided.

This has really sobered me quite a bit. I have given a great deal of thought to what it is about the decision that has caused this reaction, what many of us academics might have been missing in the eminent domain picture that caused us perhaps to overlook it. There are many explanations, but I think the nub of the problem is that the American people believe that property rights are invested with significant moral significance. It is not just a measure of value; it is something that people think has an important moral and constitutional dimension.

They are sophisticated about this. They do not think it is an absolute moral right. They recognize that in certain circumstances, for example, in response to a national disaster like the Katrina

hurricane, they may have to compromise their rights. They may be forced to evacuate their homes, and in certain circumstances their property may have to be taken through eminent domain for some public project.

But I think the overwhelming reaction has been that the justification for taking people's property, in which they have important autonomy interests and important aspects of their personal identity invested, has to be some higher justification than simply providing a higher valued use to some other owner or generating more tax revenues for the city. I think the perception which is nearly universal is that those sorts of justifications are not adequate to substantiate the exercise of eminent domain.

Now, I don't think that the *Kelo* majority intended to endorse the proposition that anybody's property can be taken merely on the grounds that someone else is going to put it to a higher use or that it will generate more tax revenue. I think the point of the *Kelo* decision is that the interests in protecting property that all Americans, I think, recognize are better served through some institutional mechanism other than judicial review by the Federal courts. It is better protected through political processes at the Federal and State level or by the State judiciary.

I think the fact that we are sitting here today having these hearings is testimony to the wisdom of the Supreme Court majority's assessment that, in fact, the political process is appropriate to protect people's property from eminent domain, because the people have spoken and I think the political process is responding.

So the significant question is really how to respond, and I think very briefly there are three strategies for reform of eminent domain. One is the prohibitory strategy, which would simply be to take up the cause of public use review that the Federal courts have indicated they do not intend to exercise with great strenuousness and to try to get courts to implement limitations on the power of eminent domain through some type of prohibition, such as the prohibition on the use of eminent domain for economic development.

Another strategy would be to try to improve the processes by which local communities decide whether to use the power of eminent domain, to make them more open, more inclusive, and to require that communities respond more completely to people's objections to having their property taken by eminent domain.

A third would be to improve the compensation that is awarded. I think some of the other witnesses have alluded to the fact that the compensation that the courts have required is inadequate; it is not full compensation. I think legislative bodies are well positioned to provide more complete type of compensation.

I think the prohibitory strategy is the logically tempting one. You read the decision, you disagree with the decision, you think it should be changed. We should actually have courts impose limits on eminent domain rather than having them decline to do so. But I think it is a temptation that should be resisted.

First of all—and I don't have time to get into this—the history of eminent domain does not give one great confidence that the judiciary is capable of identifying the line that should be drawn between the permissible and impermissible exercises of eminent domain. The judiciary struggled with this issue for 200 years and es-

sentially gave up because they could not discern the line. Now, maybe the legislature can help them out with more precise lines, but some of the legislation that has been introduced so far does not suggest to me that that is going to be forthcoming.

I also think there are concerns about federalism here. I think Congress is better suited to impose limits than the Supreme Court, but property rights have different circumstances around the country. I think this is an area where State variation and experimentation ought to be allowed to flourish. I think we need to remember the lessons of federalism and not impose a one-size-fits-all limitation on the exercise of eminent domain.

A third thing that people should be worried about is that if local governments really want to do something to rearrange property rights, there is a good chance that they are going to find some way to do it. And if they can't use eminent domain to do it, they will be tempted to use other powers like the zoning power or the power of taxation in order to achieve their objective.

From a property rights owner's position, it seems to me that eminent domain, if you look at the various powers of government, is in a way the most attractive way in which to have your property rearranged because you get just compensation if your property is taken through eminent domain. You don't get just compensation if it is taken through zoning or through the power of taxation. So we need to worry about displacing the energies of local government away from eminent domain to other types of regulation that actually might be more harmful to property owners.

Let me just mention quickly a couple of practical problems with the prohibitory strategy.

Chairman SPECTER. Professor Merrill, at this point could you summarize the balance of your statement?

Mr. MERRILL. I will summarize very briefly. I think there are some practical problems with trying to legislate prohibitions. I think the procedural reforms and the just compensation reforms are more auspicious. I think they are well-suited to the legislature's capabilities, and I would urge the Congress to consider intervening in those areas rather than imposing limits on the use of the eminent domain power by local governments.

Thank you.

[The prepared statement of Mr. Merrill appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Professor Merrill.

Our final witness is Professor Steven Eagle, who is the author of the treatise on regulatory takings. He is Professor of Law at George Mason University Law School. He is Vice Chair of the Land Use and Environmental Group of the Section of Real Property, Probate and Trust Law of the American Bar Association, and a graduate of the Yale Law School.

Which year, Professor Eagle? Which year did you graduate from the Yale Law School?

Mr. EAGLE. 1970, sir.

Chairman SPECTER. OK, you are one of the new guys.

[Laughter.]

Chairman SPECTER. We will start the clock at your full 5 minutes, Professor Eagle.

STATEMENT OF STEVEN J. EAGLE, PROFESSOR OF LAW, GEORGE MASON UNIVERSITY SCHOOL OF LAW, ARLINGTON, VIRGINIA

Mr. EAGLE. Thank you, Mr. Chairman and distinguished members of the Committee. I think that Professor Merrill, my distinguished colleague, is absolutely correct when he says that the American people think that property rights are invested with moral significance. That has been so since the founding. That is why we have the Public Use Clause in the Constitution to begin with.

The rule of law is inconsistent with the notion that everyone's property is up for grabs. That is why Justice O'Connor's statement which is now so famous about the Motel 6 being replaced with the Ritz Carlton struck such a resonant chord in the American people and why Senator Cornyn quoted it in his testimony earlier today.

Justice Stevens' majority opinion and Justice Kennedy's concurrence place substantial faith in the ability of courts to devise tests to detect condemnation abuse and to exercise vigilance. In fact, however, the Supreme Court's Williamson County test put an almost insurmountable barrier for regulatory takings issues to be heard in the Supreme Court. And even apart from that, lower Federal courts have been notoriously unreceptive to property rights litigation, which involves the application of vague tests to heavily fact-bound problems.

Making things worse, the Stevens opinion assumes that condemnation for economic development is a fairly pristine enterprise where expert staff utilize professional judgment to discern the need for redevelopment. Plans subsequently are formulated with input from all segments of the community, and only then are private redevelopers and corporations engaged.

This description seems somewhat naive. In most communities, political, commercial and financial elites are personally well-acquainted and connected through a multitude of social, civic and professional relationships. One hand washes the other. This does not necessarily imply corruption or overt favoritism. Nevertheless, in the nature of things the well-connected have a decided advantage. For these groups, the raw material for both civic and personal gain is often the property of the less well-off and less well-connected. Mr. Shelton a few minutes ago spoke eloquently to that situation.

Also, the Stevens and Kennedy opinions place emphasis on courts' ability to look at pretextual condemnation, or those of primary benefit to corporations. But here I think Justice O'Connor had it absolutely right when she said that the trouble with such redevelopment condemnations is that, by definition, benefits are merged and mutually reinforcing. Any boon for Pfizer or the plan's developer is difficult to disaggregate from the promised public benefits—gains in taxes and jobs.

The fact is, Mr. Chairman, that the quest for the smoking gun, the explicit quid pro quo between condemnor and subsequent private owner, not only is elusive, it is irrelevant. Cities like New London and States like Connecticut primarily care about their reputations as redevelopment partners. If major companies like Pfizer are pleased at the way things work out, the localities will be better redevelopment partners in the future and more avidly sought by

companies. Likewise, if the corporations are displeased, future relocations become more difficult. An explicit quid pro quo isn't needed.

The question cities ask is not who got the primary benefit, but whether we got a decent deal, corporations ask whether we got a decent deal, and the only people who do not get a decent deal are the condemnees left to suffer the costs because, as we know, just compensation is not full compensation.

It is not even clear, Mr. Chairman, that condemnation ultimately benefits the community because, after all, companies relocate from hometowns that themselves might have been distressed. Also, of course, many of these subsidies given to companies only compensate for the fact that naturally speaking it would have been better for them to locate elsewhere.

I think that a meaningful bill passed by Congress would have to first limit condemnation to traditional public uses and, second, I suggest should be accompanied by a grant of standing to landowners facing condemnations of their homes or businesses. I am not advocating standing to attack entire programs, but rather standing to contest the taking of one's own property.

Condemnation for economic redevelopment empowers every municipal recruiter for relocating businesses, every corporate CFO and every real estate developer with the ability to seek out private lands that could be profitably reconverted. It is not too much to ask that Congress empower landowners to seek to vindicate their rights in the courts as well. I think, Mr. Chairman, only if there is meaningful participation by individuals will a bill really have a meaningful effect in reducing condemnations that harm the public.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Eagle appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Professor Eagle.

We will now proceeding to questioning by Senators, five minutes under our rule.

Mayor Perez, what do you think about Mr. Shelton's statement that urban renewal is really black removal?

Mayor PEREZ. Mr. Chairman, we know that urban renewal in the 1960s and 1970s had the effects that were testified to.

Chairman SPECTER. Do you agree with what Mr. Shelton says that urban renewal—

Mayor PEREZ. I think my experience—

Chairman SPECTER. Wait a minute—is really black removal?

Mayor PEREZ. My experience in the city of Hartford is that when we have used eminent domain, we have used it for economic purposes in the central business district and in adjoining neighborhoods, and we haven't had wholesale displacement.

In the case that I worked on, the Learning Corridor, where we acquired 36 different properties, 17 of those properties were owned or occupied properties; the others had commercial and rental tenants.

Chairman SPECTER. Are you saying that your experience has been that the taking has not disproportionately affected African-Americans?

Mayor PEREZ. Not in Hartford in the recent past. In the 1960s when we had urban renewal that was federally driven, I think that was an impact, yes.

Chairman SPECTER. Mr. Shelton, if you are right about it, is there an answer by having better compensation so that when the people removed from the neighborhood want to come back to their neighborhood, they are able to be able to afford it and that the prices are not twice as much, and if so, they have the financial means to return to their old neighborhood?

Mr. SHELTON. I think that is a very helpful component, just compensation; that is, compensation that very well meets the demands of the market, but also planning, a program in which you have very active involvement from the same people that are going to be either temporarily or permanently moved into other communities so that they can begin to reassess issues and concerns.

Mr. Chairman, one of the issues is when you talk about the communities that are oftentimes affected, they are poor communities. They are poor communities where individuals and families learn to really depend on each other, and once you disband and disperse them, they have to set up whole new support networks, things that we have a tendency to take for granted, things like temporary babysitting, things like helping each other with keeping up their property.

Chairman SPECTER. Can adequate compensation pick up those facets?

Mr. SHELTON. It would begin the process.

Chairman SPECTER. Professor Eagle, when you talk about standing of the people who are displaced, is that really practical? It is very expensive, even if you have standing to go to court, to hire Professor Merrill to defend you, or other lawyers—a very expensive proposition.

Does standing really solve the problem or begin to solve the problem?

Mr. EAGLE. I don't think, Senator, that it solves the problem, but I emphasize that the localities involved and States involved and the Federal Government don't simply have the resources to devote to solving the problem. And even though it may be difficult for individuals to attempt to do so themselves, that at least gives people who are very concerned a meaningful opportunity to do so.

And I might observe from the very presence of Ms. Kelo here and her case before the Supreme Court that public interest organizations such as the Institute for Justice certainly are available to help in such cases and I think that will have a great impact.

Chairman SPECTER. Ms. Kelo, do you have a personal identity with your property; that is to say, will money compensate for the taking, as you see it, having been so close to it for so long?

Ms. KELO. There are things that you can't—

Chairman SPECTER. Is money enough to take your property, Ms. Kelo?

Ms. KELO. No. There are some things that you just can't put a price on, sir.

Chairman SPECTER. Pastor Jenkins, is money sufficient to take your church?

Rev. JENKINS. Well, our property was not for sale and money cannot really pay back what we lost.

Chairman SPECTER. Professor Merrill, is there any issue at all about our authority to legislate in this field? This is not a matter decided on constitutional grounds where the Court is the ultimate authority and we are precluded from coming in on public policy. Do we have the authority?

It is pretty hard to find Congressional authority generally here from what we have seen in the Roberts hearings, but do we have the authority to legislate in this field and establish the public policy?

Mr. MERRILL. Yes, I think you do have the authority in a couple of fashions. One would be, as Senator Cornyn's bill suggests, to use the spending power and to condition the receipt of funds by State and local governments for economic redevelopment purposes on compliance with certain guidelines that the Congress would set down. That is one source of authority.

I think if the Congress simply wanted to overturn the *Kelo* decision using Section 5 of the 14th Amendment, that probably would be unconstitutional under the *Boerne* v. *Flores* line of decisions. However, I think that if the Congress wanted to legislate on the compensation that is required to qualify as just compensation under the Eminent Domain Clause or Takings Clause of the Constitution, it might very well have that authority under Section 5 of the 14th Amendment.

Chairman SPECTER. My red light went on during the middle of your answer, Professor Merrill, so I am out of time. I yield now to Senator Hatch.

Senator HATCH. Well, first of all, Mr. Chairman, I am grateful that you have held this hearing on these very important issues, and I have really been interested in everybody's point of view here. I have to say that I am very concerned about the *Kelo* decision because I don't think it totally involves justice.

Professor Merrill, let me just begin with you. I found your testimony, both written and oral, to be very interesting and very thoughtful. Unfortunately, I found it somewhat disturbing as well. My first question concerns a statement in your written testimony to the effect that the Supreme Court in *Kelo*, quote, "intimates that the Court in the future may impose a higher standard of review in public use cases that has prevailed before," end quote.

Now, you base this assertion on Justice Kennedy's concurring opinion, but unless I missed something, not one Justice joined in that concurrence. I found Justice Kennedy's position encouraging in light of the majority opinion, but I do not believe it, standing alone, suggests that the Court may impose a higher standard of review in the future.

Would you care to elaborate on this point for the Committee?

Mr. MERRILL. Yes, I would be glad to, Senator. If you read the Supreme Court's decisions on public use before *Kelo*—and it is not just *Berman* v. *Parker* and *Hawaii Housing Authority* v. *Midkiff*, but other cases as well—you will see that the Court had applied the rational basis standard of review for public use determinations, asking whether there was a conceivable public purpose furthered by the taking.

One thing I found significant about *Kelo* is that if you read the majority opinion carefully, there is not one reference to rational basis review. Justice Stevens did not rely on rational basis review in upholding the taking in that case, and I think the reason for that is that he needed to write an opinion that would be joined by Justice Kennedy and Justice Kennedy in his concurrence specifically indicated that he would like to leave open the possibility of a higher standard of review that would be applied in a taking and re-transfer that was designed solely to enhance the value or the tax assessed value of a particular parcel of property. So I think the Court was clearly leaving open the possibility of a heightened standard of review.

The other thing that is significant about *Kelo* is that there are express references not just in the Kennedy concurrence, but also in Justice Stevens' opinion, to what Professor Eagle has alluded to as pretext review; that the courts, including Federal courts, could review records in condemnation cases in order to try to ascertain whether or not the invocation of a public purpose or public use was merely a pretext for favoring a particular transferee or favored private developer. They didn't direct lower courts to do that, but they certainly left open the possibility that that might be required in a future case.

So if you look at the development in the case law, there are at least strong intimations of a higher standard of review in *Kelo* than there were in the prior decisions.

Senator HATCH. Well, thank you. I am going to file a bill by the end of this week that does not speak directly to the *Kelo* economic decision, but what it would do is it would—I call it the Empower Act, which creates a Federal ombudsman to help property owners in eminent domain cases, give them advice, a number they can call, a person who really will help them to understand what the ramifications are. It is based on Utah's own legislative enactment out there and it has worked really well in Utah.

Mr. MERRILL. Yes. I have met your ombudsman, a very impressive fellow.

Senator HATCH. Yes, he is, and I have been pretty impressed with what they have been able to do. This, of course, is short of trying to outlaw economic development concerns, which nobody on this panel, I think, has argued for at this point, but some have thought might be the answer to these problems.

Mr. MERRILL. Could I just interject here? I think this is very much related to the standing point that Senator Specter and Professor Eagle were discussing. It is very important for the Congress to understand the way in which most property owners are able to obtain a lawyer in an eminent domain case. They hire someone on a contingent fee arrangement, and so it is critical for people to get legal representation that there be some money on the table out of which the contingency fee lawyer can be compensated.

If you just legislate a prohibitory strategy and you don't do anything else, then unless the Institute for Justice is willing to come along and represent every person in the United States that objects to a taking of their property free of charge, these people are going to have great difficulty finding a lawyer to represent them because

success in that case would mean no money on the table for the lawyer to be paid.

So I think that is a piece of ultra-realist reality on the ground that the Congress has to keep in mind, and I think something like the ombudsman solution or some other creative solutions that would provide effective representation for these people is the way to be thinking about this problem rather than just simply adopting a prohibition without any mechanism whereby individual property owners can invoke that.

Senator HATCH. Mr. Chairman, I would ask you and Professor Eagle—both of you are very intelligent in this area—to give us some assistance, help us to know how we might be able to resolve these problems in a better way, because I can see this economic assistance ban that could be a very, very harmful thing to inner cities. Yet, I have great concerns about what Mr. Shelton has said, and Ms. Kelo and Pastor Jenkins. These are real concerns of real people in usually the inner cities.

Mr. EAGLE. Well, Senator, of course, from a policy perspective, Justice Stevens gave a speech at the Clark County, Nevada, Bar Association recently where he said that he thought himself as a policy matter that it was far better to let the market work on economic development than to let a government do it.

Now, certainly, Congress can have no qualms about letting the States do what they wish, of course, and cities do what they wish. But it seems to me that for Congress to be funding both sides of the bidding wars for economic relocation may not be something that this Committee would find desirable.

I, too, know the Utah ombudsman and I am very impressed with his work. But it occurs to me, Senator, that for a person like that to be able to give meaningful advice to a particular potential condemnee would mean the ombudsman or somebody else is going to have to really go into the facts of the situation very closely because these are very fact-bound determinations.

So, ultimately, the amount of professional time involved in helping someone really is the equivalent of the professional time that a lawyer would have to devote, and this might even be the equivalent of some kind of legal aid mechanism here. But, surely, as long as groups like the Institute for Justice are at work there, that at least would tell localities that if they do interfere with individual rights, there is at least the potential that the individuals will have the wherewithal to protect themselves in court.

Senator HATCH. Thank you, Mr. Chairman.

Chairman SPECTER. Thank you.

Mayor PEREZ. Senator, if I could just add to that from the municipal perspective?

Chairman SPECTER. Mayor Perez.

Mayor PEREZ. It is important to understand that most municipal redevelopment plans, including plans to deal with blight, economic development and even public facilities like schools, police stations and things of that sort are successful because there is a lot of discussion at the local level before we get to court, and most of the cases do not go to court.

In the cases when you go to court, ombudsmen and other vehicles are probably great vehicles to continue that discussion. But the eco-

nomic development discussions usually have ample discussion in public hearings, how the plans come up, and there is local attention paid to that. my experience has been that if the local jurisdiction spends the right time in planning, as has been discussed, and includes all of the stakeholders in that planning, most of those issues are dealt with. There are going to be cases where people do not want to sell their house and they are going to have to be justly compensated.

Chairman SPECTER. Thank you, Mayor Perez.

We will go back to the early bird rule now.

Senator Cornyn.

Senator CORNYN. Thank you, Mr. Chairman. Again, I want to express my gratitude to you for convening this hearing. I think we have seen that this is not a simple, straightforward issue and it is going to take all of our best work and thought to try to develop some legislation.

The legislation that I have filed, along with Senator Nelson, which now has 28 bipartisan cosponsors, was intended to be narrow, recognizing that the States have an important role to play when it comes to what local governments can do within their State under their State constitutions. Indeed, we have limited it, as has already been noted, to use of the Federal eminent domain power directly and following Federal funds where they might be used rather than trying to, in my view, overreach beyond where it would be wise to do so. But, I have certainly benefited from the testimony we have heard today about some of the nuance and work that we need to do to refine it further.

Mayor Perez, I know that this is a concern of the cities and I understand your good-faith testimony about your concerns. But, certainly, you can understand how property owners like Ms. *Kelo* feel and their concerns that perhaps Mr. Shelton and others have expressed about those that don't feel like they have much political influence particularly at the local level when, let's say, a big developer comes in and is very active politically, let's say, in city council and mayoral elections. Then Pastor Jenkins' parishioners feel like it is not a fair fight.

Could you say anything that would sort of help address those concerns?

Mayor PEREZ. Senator, I have made a life of empowering people and I have spent a lot of time with individuals like Ms. Kelo and the good minister next to me and Mr. Shelton making sure that people's rights are protected, that they feel a part of this great system that we call America.

It is true that people who are in marginal circumstances, whether it is the neighborhood where they live—it is important that those people are helped and assisted. But I can tell that if done correctly with a lot of forethought and local input, eminent domain works. It works because it requires the public officials to take it seriously from day one.

If they think they are going to use eminent domain, they are going to do everything in their power not to have to use it. I have been in cases, whether it is building a major hotel and convention center or building a school. It is very hard to convince a lady who rehabbed her Victorian house brick by brick, wall by wall, to sell

her house to a non-profit development corporation that I ran at the time and ask her to do it for the public good. I guess I was lucky because that person happened to be a librarian and her co-owner was a math teacher in the same city that we were working on.

Down the street, there was a young man who had inherited his house from his father, and when I went to ask him about including his house in the project, he emphatically said no. He was the good kid on the block that got beat up by the gang members and he was not going to leave that neighborhood just because we wanted to build a school.

Senator CORNYN. Mayor, I appreciate your sensitivity to these issues and how you personally have worked with landowners in your capacity as mayor. Of course, there are a lot other people other than Mayor Eddie Perez who are going to be engaged in making these decisions all across the country and we have to make sure that there are some reasonable limits to that awesome power that government has to take private property.

Let me just ask in the short time remaining, I believe it was you—and correct me if I am wrong—someone here, and I believe it was you, encouraged us not to attach to an appropriations bill any legislation that had to do with this issue. But I would ask you, in light of what has happened in the Gulf region and the massive rebuilding effort that is going to have to take place as a result of Katrina, it would seem to me to be an appropriate place for Congress to say where Federal funds can and cannot be used when it comes to the reconstruction of that great city, New Orleans, and other property located throughout the Gulf region.

Do you disagree with that?

Mayor PEREZ. I don't disagree, but limiting economic development power for those communities is going to make it harder for them to put their plans together because that is going to slow down until you create a new system that is able to facilitate new legislation that you may put in. It is going to take time for local officials to figure out how to clean titles and where to put the levees and things that may be in a home's way.

Chairman SPECTER. Thank you very much, Senator Cornyn.

We are about to start a vote, so let us turn promptly to Senator Brownback.

Senator BROWNBACK. Thanks, Mr. Chairman, and thanks for holding the hearing. I will just be brief so my other colleagues can make a statement and ask some questions. Thank you for holding the hearing.

I want to go to Professor Merrill's point that he made. Just in commenting on it, you said you were stunned by the public reaction to *Kelo*. Certainly, I received a lot of comments on *Kelo*. I think all of my colleagues received a lot of comments.

When I was examining that thought and that set of comments, it really went at the very core of having the private property system that we have in the United States where people own private property and they look at this as my piece of the rock, my place. And it may not be much to you, but to me it is an awful lot.

I used to do a lot of legal work for farmers and one of the things that they would always look at would be this eminent domain issue because somebody would come across their property with a big

power line or somebody would take it for a lake or something else. They would say, you know, look, I realize it is only worth this much as a farm, but this is part of who I am and now you are taking it from me and you are saying you are giving me just compensation. One, I don't think you are giving me enough for it and, number two, it is not for sale, I don't want to sell it.

It seems like in the *Kelo* case you really struck at the people's core inside of them, saying your property is not sacred, it is not protected under the Constitution; that there are broader categories than what was previously thought under which people could take it. I think it really got to a lot of people and that is why you are seeing these responses by Congress.

I will just conclude, Mr. Chairman, by saying I do hope we can move a bill on through to reestablish and re-instill with the American public the belief that their property does belong to them and there is some notion of this is part of who I am and some sacredness to it, as well.

When we had Judge Roberts here and I was questioning him about this issue, he was saying, look, the legislature can act now; we didn't block them from acting; they can act. So I think it is going to be in our court really to try to tighten this down and to put some of that thought that this property—there is some sacredness to that. It doesn't matter whether you are rich or poor or where you are. It belongs to you.

Thank you very much.

Chairman SPECTER. Thank you very much, Senator Brownback.

Senator Sessions, we are about 3 minutes into the vote, so I think we will have time for two more questioners.

Senator SESSIONS. Thank you, Mr. Chairman.

Mr. Eagle, my first concern about this is a concern, I think, of most people who have complained to me that believe that the Court was not faithful to the Constitution—something we talked a lot about in the Roberts hearings. It seems to me that the words "public use"—that you could only take the property for a public use, which would indicate that the city or the county or some public entity or some substantially controlled private entity would be the ones to receive the benefit from it to a public purpose, because in a series of opinions culminating in *Kelo* they reached the decision that almost seemed to say for any public purpose.

To me, the Constitution gives that final bedrock protection. The city, let's be frank, has a conflict of interest. The city is going to get a lot more property tax, and the county and the State will if you have got an expensive home or an expensive development there than a middle-class home.

So I think, Mr. Merrill, we can't just rely on the political process. Sometimes, those good mayors out there who are determined to move their cities forward become less concerned about a person's constitutional right to their property and more concerned about making the city a better place to live, in their idea of what is best.

Professor Eagle, am I correct that this is troubling primarily because of an erosion of the classical understanding of what the Constitution has meant?

Mr. EAGLE. I entirely agree, Senator. My written testimony goes into this, and I think the problem is that there were cases involv-

ing blight and involving the need for land reform to get away from remnants of feudalism where the Supreme Court used very broad language and very grandiose statements in explaining what in those cases were much narrower holdings. And Justice O'Connor certainly goes into that point and now, of course, takes back what she called her own errant language in the Midkiff case, where she did precisely that.

Senator SESSIONS. Well, I think Professor Van Alstein at Duke said if we love this Constitution and if we really respect it, we will enforce it just like it is written even if we don't agree with parts of it, even if we would like to have it say you can take people's property and kick them out of their homes to develop a shopping center.

Having represented property owners in condemnation lawsuits, I would say it is very difficult and expensive for the property owner, Mayor Perez, to defend the taking. He can usually get a lawyer that will defend on the value on the theory that, well, I will have a contingent fee and whatever you get above the State's or the city's offer for the property—if you are offered $100,000 and I get $130,000, I get $10,000, maybe, a third of that increase.

So the property owner can maybe get a lawyer like that, but to do into a long-term, in-the-trenches battle with the city to contest the taking may cost $50,000 or $100,000 right out of their pocket, and most people don't have it. So I think that constitutional protection is important.

Mr. Chairman, the Mayor may have a brief response. I wanted to finish early and we have got a minute left.

Mayor PEREZ. Senator, I think that is one of the reasons why a lot of this has to be settled at the State and local level, because those are the kinds of discussions that are going on in State houses and city halls at this time.

Chairman SPECTER. Thank you very much, Senator Sessions.

Senator Kyl.

Senator KYL. Thank you, Mr. Chairman. I appreciate this hearing. I really appreciate the testimony of all of you, and I am going to make more of a statement here than a question because of the lack of time.

It seems to me that the nub of the issue if the Court's confusion historically of public use with public benefit. The Constitution says public use, not public benefit.

And, Mr. Shelton, you are right on target, in my view, when you say the expansion of eminent domain to allow the government or its designee to take property simply by asserting that it can put the property to a higher use will systematically sanction transfers from those with less resources to those with more. I mean, just one follows after the other. That is exactly what we are trying to prevent here.

To the suggestion that somehow we can reform processes, the less fortunate are always going to have less of a voice at city hall than the powerful interests, and that is just a fact of life. So I don't think that resolves the problem.

Professor Merrill, I really appreciate the spirit with which you approached your testimony. I am going to be a little more hard on you than I mean to be here because I really do appreciate that, but

your suggestion here is pretty much the same as the majority on the Court. The States can always do this. "Nothing in our opinion precludes any State from placing further restrictions on the power." And you say it is better under our Federalist system to let the States reform it.

Justice O'Connor had, I think, the definitive answer to that in her dissent. She said, "States play many important functions in our system of dual sovereignty, but compensating for our refusal"—meaning the Court's refusal—"to enforce properly the Federal Constitution, and a provision meant to curtail State action no less, is not among them."

In other words, what she is saying is it is the Supreme Court's duty to enforce constitutional rights. We shouldn't be passing the buck off to State legislatures to do whatever they may think is right. I think she is right. By the way, at a book-signing in Phoenix over the weekend, talking to some school kids she called the Court decision really scary, and then she said "whew" after that. I think she was right. The Constitution is for everyone. It is for poor people, it is for rich people, and it cannot be left up, it seems to me, to the Court to simply say, well, we will let legislatures deal with it because we don't want to do that.

To the notion that—and this is where, Mr. Merrill, I want to be a little hard on you. You said, you know, if it isn't resolved by condemnation, cities will use their zoning power or their taxation power to accomplish the same thing. You are right. I have seen them try to do it. It is wrong. And when you say at least you get paid in condemnation, I mean my response is, well, it is like the old thing, well, other than that, Mrs. Lincoln, how did you like the play? It is not exactly a good result. It is still taken from you, but you might get paid, not full value, but at least a just compensation. So that doesn't seem to me to be the answer.

And then to your final—and I realize this was a constructive suggestion that compensation reforms and better process might be a preferable answer. I respectfully disagree. I don't see how you can constitutionally reform—I mean, we can't change the Constitution. It says "just compensation." That means what it means and we can't say just compensation plus 10 percent. So I don't see how we get to it that way.

And with regard to the processes, you heard Mr. Perez talk about all of the processes the city goes through for its development plans and all the rest of it. The poor folks whose land is going to be taken are not the ones that have a big voice in that. I don't see how you are ever going to resolve it that way.

So I come back to the conclusion that private property is a bedrock of who we are. It is part of our freedom in this country, and these rights should be just as important to us as any other rights. It ought not to be a rational basis test. It ought to be a tougher test and there ought to be ways to redress the grievance. We can't just establish a new right. There has to be a remedy as well, and I am going to work very, very hard to see that we do that.

Again, I appreciate your constructive comments. Professor Eagle, I would have loved to have heard more from you. And Mr. Shelton and Mr. Perez, I understand your point of view. I disagree with you. I missed your testimony, Ms. Kelo, but I heard yours, Pastor

Jenkins, and I just think this is a case where Congress—sure, it is up to the States to do what they can and they are acting here, but I think Congress has a responsibility and we can fashion some remedies here that will do some good. Maybe the most important thing is to send a message to the Supreme Court that it has got an obligation to uphold and defend the Constitution and not duck this important issue.

Enough for my speechifying. If any of you would like to respond to the last 25 seconds, you are welcome to do so.

Mr. MERRILL. Could I just say—

Chairman SPECTER. Professor Merrill.

Senator KYL. Since I picked on Professor Merrill, please go ahead.

Chairman SPECTER. This has to be brief because we are on our way to vote.

Mr. MERRILL. First of all, I don't think anyone is suggesting that there should not be an important judicial role in keeping eminent domain within its confines, but it doesn't necessarily have to be a role in deciding what is and is not a public use. I think the courts have flunked the test of whether or not they can do that properly.

Courts should also enforce the statutory requirements that have to be satisfied to use eminent domain and they have to enforce the compensation requirements. If they perform those roles, I think they will empower the little people and the property owners. Because of the way they are represented through contingent fee lawyers and because of the way the process works, I think that will empower property owners much more than creating some abstract right limiting the power of eminent domain which will exist on paper, but will never be enforced in reality. That is my basic point.

Chairman SPECTER. Thank you very much, Professor Merrill.

As you can see, this has caused quite a lively discussion among members; a better attended hearing than many, except that none of you is up for Supreme Court Justice.

Ms. Kelo and Pastor Jenkins, I am sorry we are going to have to move ahead because we have got to vote and we don't want to miss that. Thank you for coming in and providing the testimony as to what it means to real people who are being affected by it, and, Mayor Perez, giving us a little different perspective as to where we are, and, Mr. Shelton, with the maxim of the day, urban renewal means black removal. And thank you, Professor Merrill and Professor Eagle, for the erudition on the technicalities of the law.

That concludes our hearing.

[Whereupon, at 11:35 a.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

"The *Kelo* Decision: Investigating takings of Homes and Other Private Property"
U.S. Senate Judiciary Committee Hearing – September 20, 2005

Written question from Senator John Cornyn:

Do you think cities or other political subdivisions should be allowed to exercise eminent domain simply because the project would bring taxes and jobs? Please define with specificity what limits, if any, should exist with respect to the use of economic development, increase of the tax base, or similar motive as a rational for eminent domain.

Response by Professor Steven J. Eagle, Professor of Law, George Mason University:

I am pleased to have the opportunity to respond to Senator Cornyn's question and to expand upon my written and oral testimony on this important issue.

I believe that the Public Use Clause of the Fifth Amendment is an independent source of protection for the liberty and property of citizens of the United States and that the Public Use Clause was included in the Bill of Rights for that purpose. The Clause also applies to actions of state and local governments by dint of the Fourteenth Amendment to the U.S. Constitution, which was deemed to incorporate the Fifth Amendment Takings Clause in *Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226 (1897). The interpretation of the Public Use Clause holding that it is synonymous with, or subsumed within, "public purpose" or the "general welfare" has the effect of vitiating public use as an important Constitutional safeguard. Yet that interpretation was accepted by a narrow majority of the Supreme Court in *Kelo v. City of New London*, 125 S.Ct. 2655 (2005).

A hallmark of the rule of law is that citizens have the right to settled expectations regarding their property. The importance of an individual's home or business to that person includes, but is not limited to, its value as an economic asset. The home is a center of family life, a repository of individual memories, and an extension of the owner's personality. Ownership of one's home, and also ownership of one's business, gives a sense of independence that permits and encourages participation in civic and political life as a full member of the community, and not as a supplicant dependent upon government largess.

Astute and well-connected developers, investment bankers, lawyers, and other professionals are well positioned to spot arbitrage opportunities in real estate markets. They can make substantial profits by finding homes and businesses that, when condemned by government and combined with other parcels, have considerably higher market values. The processes by which they work with local government officials are by no means transparent, and the "comprehensive" planning and due process hearings that Justice Stevens envisions will protect against condemnation for private benefit might well be just a veneer in many cases. Justice O'Connor, perhaps because of her extensive experience as a legislator before becoming a judge, understood that businesspeople and government officials benefit from condemnation for retransfer for economic development. The losers are the small businesspeople and homeowners whose personal, subjective, value in their property is destroyed and who receive inadequate compensation for their out-of-pocket losses.

Unlike condemnation for traditional purposes such as schools or highways, which are built on a larger scale or which provide little scope for manipulation, condemnation for redevelopment is a device custom-tailored for astute speculation. The result is that everyone's property is always, and involuntarily, "in play." Having one's home and business treated as an asset subject to speculation for the benefit of others is the antithesis of living under the rule of law.

While condemnation for retransfer for economic development harms individual liberty, it does not necessarily benefit the economy. It is true that parcels of land may provide additional employment opportunities and generate additional tax revenues after they have been redeveloped. But that does not necessarily mean that such redevelopment is a benefit for the community or the Nation.

Judges and economists do not have to ascertain the justice of free market transactions. That justice is implicit in the fact that each of the parties to a private real estate transaction considers himself or herself better off. All parties benefit from consensual transactions, and the regional and national economies gain correspondingly. There is no such guarantee of benefit where sales are forced by government against the will of the sellers.

Government might obtain a parcel using eminent domain, paying a modest sum as just compensation. The parcel might be worth somewhat more after being combined with other lands. However, those facts provide no guarantee that the parcel did not have *even more* value to the original owner. While owners typically are described as greedy holdouts, their unwillingness to sell often is based on their special attachment to the land resulting from sentimental reasons or the economic value derived from good will or customization of the land or building to suit their particular business needs.

Aside from the issue of uncompensated losses to condemnees of homes and businesses, the economic advantages of condemnation for redevelopment are significantly overstated. Even where jobs and increased tax revenues result from condemnation followed by redevelopment, there is no guarantee that those jobs and taxes represent net additions to the economy.

When localities subsidize the assembly of large parcels by using eminent domain, and also provide taxpayer-provided infrastructure improvements as additional incentives, they often are successful in luring businesses to relocate from elsewhere. However, those lures might do little more than offset the disadvantages of doing business in that community, as compared with the communities in which those businesses currently are located. Cities and states often dangle incentives to attract businesses from other jurisdictions. Frequently, however, this is a zero-sum game, with benefits to one jurisdiction being offset by losses of jobs and tax revenues in the other. The use of federal funds in this process would mean that Congress is complicit in subsidizing the takings of homes and businesses to induce business relocations that themselves are economically inefficient. Condemnees and federal taxpayers lose, and those who distribute and facilitate the flow of largess win.

In *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004), the Supreme Court of Michigan repudiated its infamous *Poletown* doctrine and limited condemnation for retransfer to private interests to three distinct situations. The first, "public necessity of the extreme sort," refers to projects such as highways and pipelines that require dozens or hundreds of miles of contiguous rights-of-way and are otherwise at the mercy of holdouts. The second, situations where "the private entity remains accountable to the public in

its use of that property," refers to continual and effective monitoring to ensure that specific public goals are accomplished. Finally, "condemned land may be transferred to a private entity when the selection of the land to be condemned is itself based on public concern." which refers to the elimination of blight. *Id.* at 781-783.

There is no assurance that the restrictions imposed in *Hathcock* will not be abused. Undoubtedly, legislatures and courts will have to develop measures to prevent condemnation for retransfer from being misused. But the *Hathcock* limitations are a salutary beginning.

In my testimony before the Judiciary Committee, I noted two ways in which the Congress could police abuse in the use of federal funds for state or local projects involving eminent domain. The first involves explicit statutory language not only proscribing the use of federal monies for "economic development," but also affirmatively indicating permissible uses of the funds. As an illustration, the alleviation of "blight" is an acceptable public use justifying condemnation under both *Kelo* and *Hathcock*. However, "blight" is a term often abused.

A good recent example is *Concerned Citizens of Princeton, Inc. v. Mayor and Council of Borough of Princeton*, 851 A.2d 685 (N.J. Super. Ct. App. Div. 2004). There, a group of citizens in an affluent community challenged the application of a "blighted area" designation to a municipal parking lot, thus permitting borough authorities to condemn and redevelop it. The court upheld the condemnation, noting that state law permits condemnation for *any* reason contained in a long enumeration that includes items such as "obsolescence," "faulty arrangement or design," "deleterious land use or obsolete layout," and "a growing lack . . . of proper utilization of areas caused by the condition of the title, diverse ownership of the real property therein or other conditions, resulting in a stagnant or not fully productive condition of land potentially useful and valuable for contributing to and serving the public health, safety and welfare."

The New Jersey statute in question also includes, as blighting conditions, "the generality of buildings are substandard, unsafe, unsanitary, dilapidated, or obsolescent, or possess any of such characteristics, or are so lacking in light, air, or space, as to be conducive to unwholesome living or working conditions." This is much closer to the mark,

but still permits the condemnation of perfectly sound groups of buildings so long as they are in the general vicinity of genuinely blighted structures and are categorized as within the blighted area.

For this reason, a limitation on the use of federal funds for projects involving eminent domain that are to be justified by "blight" removal must confine "blight" to its narrow sense of physically unsafe conditions.

Another device for ensuring that homes and small businesses are not taken in disregard of any restrictions on the use of federal funds that Congress wishes to impose is to accord standing to aggrieved property owners. Landowners facing ongoing or imminent state or local condemnation actions employing federal funds would be able to challenge those actions in federal court. As a practical matter, federal agencies providing funds to states and localities generally would place a low priority on monitoring the use of federal funds for condemnations not conforming to restrictions on the use of eminent domain. This is especially true where the funds are used in a manner that advances the specific substantive concerns of the federal agency. Without a specific grant of standing, it would take years of litigation to establish whether, under general principles of law, landowners have standing or not.

If I might summarize my response, the use of eminent domain for the condemnation of homes or business for redevelopment purposes reduces the liberty of condemnees and imposes financial hardship upon them. It would entail substantial expenditures by interests jockeying for favorable treatment and by other localities and business competitors acting in self-defense. It is by no means clear that a net increase in jobs, tax revenues, and the public's welfare would result. Hence federal funds should not be employed for economic redevelopment.

I appreciate the opportunity to express these views.

Steven J. Eagle
Professor of Law
George Mason University
Arlington, Virginia

Kelo Post-Hearing Questions to Mayor Eddie Perez, Hartford, Connecticut
Senator John Cornyn

1. *In your work as Mayor or in other capacities, have you ever been involved with a taking of private property that was not abandoned, hindered with title problems, dilapidated or otherwise problematic and then transferred that property ultimately to a private party?*

Prior to becoming Mayor, as president of the non-profit Southside Institutions Neighborhood Alliance (SINA) I managed the construction of a $120 million complex of magnet schools that served as the focal point for a $250 million neighborhood redevelopment effort in one of Hartford's poorest neighborhoods. In order to construct the sixteen-acre school campus, I began eminent domain proceedings, with permission of the Hartford city council, against three homeowners, whose homes where in the planned area of development. I was able to settle with the homeowners and transfer the property to SINA to construct the campus. Due to the financing structure of the development project, the transfer of the property to the private non-profit was necessary to guarantee the development of the campus.

Additionally, as part of the development of a new retail complex, hotel and convention center in the heart of downtown Hartford, the Capitol City Economic Development Authority used eminent domain to take property that was serving as a parking lot for Connecticut Natural Gas Company. This property is part of a plan of development that contemplates transferring the property to a private developer by CCEDA.

2. *You stated in your testimony that "the Kelo decision does not expand the powers of eminent domain by states or municipalities." Yet, numerous examples of action by cities across America seem to indicate otherwise. In Oakland, California, for example, one week after the Supreme Court's ruling in Kelo, Oakland city officials used eminent domain to evict a resident from the downtown tire shop his family had owned since 1949. He and his neighbors had refused to sell their property to make way for a new housing development. In Arnold, MO, the St. Louis Post-Dispatch reports, Arnold Mayor Mark Powell "applauded the decision." The city wants to raze 30 homes and 15 small businesses to make way for a Lowe's Home Improvement store and a strip mall. Powell said that for "cash-strapped" cities like Arnold, enticing commercial development is just as important as other public improvements. Can you comment, specifically, how your testimony that Kelo is having no effect on the law comports with these and countless other examples?*

I testified that the *Kelo* decision did not expand the power of state and local governments, not that the decision had no effect on the law. The *Kelo* decision is affecting state legislatures and the laws that govern eminent domain across the country, but not for the reason implied by this question because the decision affirmed the constitutional status quo. Eminent domain is a state-derived power and its post-*Kelo* use would not change unless legislatures decide to amend state statutes. Approximately 30 states are already reviewing or planning to review their eminent domain laws during upcoming legislative sessions, with the majority focused on just compensation and comprehensive planning process modifications. Since June 2005, Alabama, Texas, and Delaware enacted laws that tighten the application of eminent domain power in each state.

The *Kelo* Court affirmed the principle of federalism and did not preclude "any state from placing further restrictions on its exercise of the Takings power." The Court declared that this power is one best left to the states and their political subdivisions. The *Kelo* decision confirmed that eminent domain is not a one-size-fits-all power.

As mayor of Hartford, Connecticut, I cannot comment with any authority about the application of state-derived eminent domain laws by my colleagues in California and Missouri. There is usually another side to each reported story, especially with regard to this issue, and I would encourage you not to infer misconduct in the exercise of eminent domain power without verifiable evidence.

Examples abound from across the country about the positive use of eminent domain, and let me highlight two of them:

- **Hazelwood, Missouri**. Eminent domain is helping this metropolitan community of approximately 26,000 within the St. Louis region redevelop a 220-acre area adjacent to Lambert International Airport into the Hazelwood Commerce Center. The city's use of eminent domain to clear titles on abandoned properties and remove blighted conditions on land that contained an illegal dump, which the owners did not want to sell for fear of incurring liability costs, is helping accomplish what private market forces could not do. Six property owners chose not sell as part of the U.S. Federal Aviation Administration's airport noise abatement buy-out program in the early 1980s. The City used eminent domain to purchase those properties, paying fair market value calculated through an independent third-party review. According to Mayor T.R. Carr, "this project is necessary for removing the most blighted area in our community." "It would not be possible to convert this land into a productive job-creating business park without our ability to use Missouri's fair eminent domain process."[1]

- **Riverside, California**. Originally built in the 1950s and 1960s, an aging housing development located in the City's University neighborhood was one of the most challenged, multi-family housing complexes, rife with crime, health and safety violations. The City exercised eminent domain to restore the neighborhood. The City purchased 32 units through voluntary sale, but the remaining units required condemnation proceedings. All property owners, including those who had long neglected the properties, received just compensation – some at nearly twice the appraised value of the properties purchased through private sales. Today, according to the California Redevelopment Association, this vibrant area includes a renovated 64-unit rental complex for low and moderate-income families, constructed in phases to ease disruption for residents, and operated by a private non-profit corporation.

[1] Letter from Mayor Carr to Sen. Christopher "Kit" Bond (R-MO), October 12, 2005.

SUBMISSIONS FOR THE RECORD

Testimony of Dana Berliner
Senior Attorney, Institute for Justice
United States Senate Committee on the Judiciary
September 20, 2005

Thank you for the opportunity to submit testimony regarding eminent domain abuse, an issue that's finally getting significant national attention as a result of the U.S. Supreme Court's dreadful decision in *Kelo v. City of New London*. This committee is to be commended for responding to the American people by examining this misuse of government power.

My name is Dana Berliner, and I am a senior attorney at the Institute for Justice, a nonprofit public interest law firm in Washington D.C. that represents people whose rights are being violated by government. One of the main areas in which we litigate is property rights, particularly in cases where homes or small businesses are taken by government through the power of eminent domain and transferred to another private party. I have represented property owners across the country fighting eminent domain for private use, and I am one of the lawyers at the Institute who represents the homeowners in the *Kelo v. City of New London* case, in which the U.S. Supreme Court decided that eminent domain could be used to transfer property to a private developer simply to generate higher taxes, as long as the project is pursuant to a plan. I also authored a report about the use of eminent domain for private development throughout the United States (available at www.castlecoalition.org/report).

In *Kelo*, a narrow majority of the Court decided that, under the U.S. Constitution, property could indeed be taken for another use that would potentially generate more taxes and more jobs, as long as the project was pursuant to a development plan. The *Kelo* case was the final signal that, according to the Court, the U.S. Constitution simply provides no protection for the private property rights of Americans. Indeed, the Court ruled that it's okay to use the power of eminent domain when there's the mere *possibility* that something else could make more money than the homes or small businesses that currently occupy the land. It's no wonder, then, that the decision caused Justice O'Connor to remark in her dissent: "The specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping center, or any farm with a factory."

Because of this threat, there has been a considerable public outcry against this closely divided decision. Overwhelming majorities in every major poll taken after the *Kelo* decision have condemned the result. Several bills have been introduced in both the House and Senate to combat the abuse of eminent domain, with significant bipartisan support.

The use of eminent domain for private development has become a nationwide problem, and the Court's decision is already encouraging further abuse

Eminent domain, called the "despotic power" in the early days of this country, is the power to force citizens from their homes and small businesses. Because the Founders were conscious of the possibility of abuse, the Fifth Amendment provides a very simple restriction: "[N]or shall private property be taken for public use without just compensation."

Historically, with very few limited exceptions, the power of eminent domain was used for things the public actually owned and used—schools, courthouses, post offices and the like. Over the past 50 years, however, the meaning of public use has expanded to include ordinary private uses like condominiums and big-box stores. The expansion of the public use doctrine began with the urban renewal movement of the 1950s. In order to remove so-called "slum" neighborhoods, cities were authorized to use the power of eminent domain. This "solution," which critics and proponents alike consider a dismal failure, was given ultimate approval by the Supreme Court in *Berman v. Parker*. The Court ruled that the removal of blight was a public "purpose," despite the fact that the word "purpose" appears nowhere in the text of the Constitution and government already possessed the power to remove blighted properties through public nuisance law. By effectively changing the wording of the Fifth Amendment, the Court opened a Pandora's box, and now properties are routinely taken pursuant to redevelopment statutes when there's absolutely nothing wrong with them, except that some well-heeled developer covets them and the government hopes to increase its tax revenue.

The use of eminent domain for private development is widespread. We documented more than 10,000 properties either seized or threatened with condemnation for private development in the five-year period between 1998 and 2002. Because this number was reached by counting properties listed in news articles and cases, it grossly underestimates the number of condemnations and threatened condemnations. Indeed, in Connecticut, the only state that actually keeps separate track of redevelopment condemnations, we found 31, while the true number of condemnations was 543. Now that the Supreme Court has actually sanctioned this abuse in *Kelo*, the floodgates to further abuse have been thrown open. Home and business owners have every reason to be very, very worried.

Despite the fact that so many abuses were already occurring, since the *Kelo* decision, local governments have become further emboldened to take property for private development. For example:

- Freeport, Texas Hours after the *Kelo* decision, officials in Freeport began legal filings to seize some waterfront businesses (two seafood companies) to make way for others (an $8 million private boat marina).

- Sunset Hills, Mo. On July 12, less than three weeks after the *Kelo* ruling, Sunset Hills officials voted to allow the condemnation of 85 homes and small businesses for a shopping center and office complex.

- Oakland, Calif. A week after the Supreme Court's ruling, Oakland city officials used eminent domain to evict John Revelli from the downtown tire shop his family has owned since 1949. Revelli and a neighboring business owner had refused to sell their property to make way for a new housing development. Said Revelli of his fight with the City, "We thought we'd win, but the Supreme Court took away my last chance."

- Ridgefield, Conn. The city of Ridgefield is proceeding with a plan to take 154 acres of vacant land through eminent domain. The property owner plans to build apartments on the land, but the city has decided it prefers corporate office space. The case is currently before a federal court, where the property owner has asked for an injunction to halt the eminent domain proceedings. Ridgefield officials directly cite the *Kelo* decision in support of their actions.

- Hollywood, Fla. For the second time in a month, Hollywood officials have used eminent domain to take private property and give it to a developer for private gain. Empowered by the *Kelo* ruling, City commissioners took a bank parking lot to make way for an exclusive condo tower. When asked what the public purpose of the taking was, City Attorney Dan Abbott didn't hesitate before answering, "Economic development, which is a legitimate public purpose according to the United States Supreme Court."

- Arnold, Mo. The St. Louis Post-Dispatch reported that Arnold Mayor Mark Powell "applauded the decision." The City of Arnold wants to raze 30 homes and 15 small businesses, including the Arnold VFW, for a Lowe's Home Improvement store and a strip mall—a $55 million project for which developer THF Realty will receive $21 million in tax-increment financing. Powell said that for "cash-strapped" cities like Arnold, enticing commercial development is just as important as other public improvements.

Courts are already using the decision to reject challenges by owners to the taking of their property for other private parties. On July 26, 2005, a court in Missouri relied on *Kelo* in reluctantly upholding the taking of a home for a shopping mall. As the judge commented, "The United States Supreme Court has denied the Alamo reinforcements. Perhaps the people will clip the wings of eminent domain in Missouri, but today in Missouri it soars and devours." On August 19, 2005, a court in Florida, without similar reluctance, relied on *Kelo* in upholding the condemnation of several boardwalk businesses for a newer, more expensive boardwalk development.

Federal funds currently support eminent domain for private use

Of course, federal agencies take property for public uses, like military installations, federal parks, and federal buildings, which is legitimate under the requirements of the Fifth Amendment. While these agencies themselves generally do not take property and transfer it to private parties, in the states many projects using eminent domain for economic development receive some federal funding. Thus, federal money does

currently support the use of eminent domain for private commercial development. A few recent examples include:

- New London, Conn. This was the case that was the subject of the Supreme Court's *Kelo* decision. Fifteen homes are being taken for a private development project that is planned to include a hotel, upscale condominiums, and office space. The project received $2 million in funds from the federal Economic Development Authority.

- St. Louis, Mo. In 2003 and 2004, the Garden District Commission and the McRee Town Redevelopment Corp. demolished six square blocks of buildings, including approximately 200 units of housing, some run by local non-profits. The older housing will be replaced by luxury housing. The project received at least $3 million in Housing and Urban Development (HUD) funds, and may have received another $3 million in block grant funds as well.

- New Cassel, New York St. Luke's Pentecostal Church had been saving for more than a decade to purchase property and move out of the rented basement where it held services. It bought a piece of property to build a permanent home for the congregation. The property was condemned by the North Hempstead Community Development Agency, which administers funding from HUD, for the purpose of private retail development. As of 2005, nothing has been built on the property, and St. Luke's is still operating out of a rented basement.

- Toledo, Ohio In 1999, Toledo condemned 83 homes and 16 businesses to make room for expansion of a DaimlerChrysler Jeep manufacturing plant. Even though the homes were well maintained, Toledo declared the area to be "blighted." A $28.8 million loan from HUD was secured to pay for some parts of the project. The plant ultimately employed far fewer people than the number Toledo expected.

- Ardmore, Pa. The Ardmore Transit Center Project has some actual transportation purposes. However, Lower Merion Township officials are also planning to remove several historic local businesses, many with apartments on the upper floors, so that it can be replaced with mall stores and upscale apartments. The project receives $6 million in federal funding, which went to the Southeastern Pennsylvania Transit Authority. This is an ongoing project in 2005.

Congress can and should take steps to ensure that federal funds do not support the abuse of eminent domain

The *Kelo* decision cries out for Congressional action. Even Justice Stevens, the author of the opinion, stated in a recent speech that he believes eminent domain for economic development is bad policy and hopes that the country will find a political solution. Congress and this committee are all to be commended for their efforts to provide protections that the Court itself has denied.

Congress has the power to deny federal funding to projects that use eminent domain for private commercial development and to deny federal economic development funding to government entities that abuse eminent domain in this way. Clearly, Congress may restrict federal funding under the Spending Clause. The Supreme Court has laid out the test for any conditions that Congress places on the receipt of federal money in *South Dakota v. Dole*. The most important requirements are that there be a relationship between the federal interest and the funded program and that Congress be clear about the conditions under which federal funds will be restricted. The purpose of the federal funds is to aid states and cities in various development projects. If Congress chooses to only fund projects or agencies that conduct development without using eminent domain to transfer property to private developers, it may certainly do so.

Currently, federal money is being used in projects that take property from one person and give it to another. Or it is being used in a way that gives a locality more money to spend on projects that take people's homes and businesses for economic development. If Congress wishes to ensure that federal money will not support the misuse of eminent domain, terminating economic development funds is necessary.

And the best approach is to terminate *all* economic development funding—not just those funds related to a specific project—if a state or local government takes someone's home or business for private commercial development. Since appropriate definitions are so essential when drafting any eminent domain reform, especially to make sure that any restriction does not run afoul of the requirements of *South Dakota v. Dole*, specificity and clarity are the most important requirements of any law that potentially restricts federal funding. In order to be as unambiguous as possible, any bill must preclude funding where eminent domain is used to facilitate private use or ownership of new commercial development. States and local governments must know precisely what they can and cannot do, as well as what they stand to lose, so a bill's restrictions must be spelled out explicitly.

Funding restrictions will only be effective if there exists a procedure for enforcement, so any reform must also include a mechanism by which the economic development funding for the state or local government can be stopped. Part of this procedure should be a private method of enforcement, whether through an agency or court, so that the home and small business owners that are affected by the abuse of eminent domain or any other interested party like local taxpayers can alert the proper entity and funding can be cut off as appropriate. The diligence of ordinary citizens in the communities where governments are using eminent domain for private commercial development, together with the potential sanction of lost federal funding, will most certainly serve to return some sense to state and local eminent domain policy.

Given the climate in the states as a result of *Kelo*, congressional action will encourage much needed reform by state legislatures. Many states are presently studying the issue and considering legislative language, and they will most certainly look to any bill passed by Congress as an example. Reform at the federal level would be a strong statement to the country that this awesome government power should not be abused. It would restore

the faith of the American people in their ability to build, own and keep their homes and small businesses, which is itself a commendable goal.

It should also be noted that development is not the problem—it occurs every day across the country without eminent domain and will continue to do so should this committee act on this issue, which I recommend. Public works projects like flood control will not be affected by any legislation that properly restricts eminent domain to its traditional uses since those projects are plainly public uses. But commercial developers everywhere need to be told that they can only obtain property through private negotiation, not public force, and that the federal government will not be a party to private-to-private transfers of property. Congressional action will not stop progress.

Conclusion

Eminent domain sounds like an abstract issue, but it affects real people. Real people lose the homes they love and watch as they are replaced with condominiums. Real people lose the businesses they count on to put food on the table and watch as they are replaced with shopping malls. And all this happens because localities find condos and malls preferable to modest homes and small businesses. Federal law currently allows expending federal funds to support condemnations for the benefit of private developers. By doing so, it encourages this abuse nationwide. Using eminent domain so that another, richer, better-connected person may live or work on the land you used to own tells Americans that their hopes, dreams and hard work do not matter as much as money and political influence. The use of eminent domain for private development has no place in a country built on traditions of independence, hard work, and the protection of property rights.

Again, thank you for the opportunity to submit testimony to this committee.

United States Senate
Judiciary Committee
Attn: Dimple Gupta

Subject: Testimony Submission for the Senate Judiciary Cmte. Hearing on Eminent Domain

Honorable Members of the Judiciary Committee:

First let me thank you and the members of the Judiciary Committee for giving me the opportunity to share my experience with Eminent Domain used for Private Development.

I am the 3rd generation family member to be involved in a luggage business. My Grandfather started a luggage business, Rosslyn Luggage, in the Rosslyn Hotel (Downtown LA) in the early 1920s. My parents started Bernard Luggage Company near the corner of Hollywood and Vine over 55 years. I was brought back into the business to help my Mom run it after my father passed away in 2002.

Our business has been in the same building, 1642 N. Vine Street (90028) (Next door to the Taft Building near Hollywood and Vine) since 1950. To insure that we maintained our well-established location, my parents purchased the small building 30 years ago. We have many returning customers who remember our location more than our name—they remember the luggage store "near the corner of Hollywood and Vine".

The Community Redevelopment Agency (Los Angeles) (CRA) and the Metropolitan Transportation Agency (MTA) has signed an agreement with a developer to build a $300 dollar a night W-Hotel, mixed use retail and residential development. The MTA currently owns 75% of the land and our building isn't even in the way of the Hotel or the condos (in fact they plan to keep the front of it). Up to $6.5 million of taxpayer money will be contributed by the City. Across the street from this property, the Nederlanders (owners of the Pantages Theater) are preparing a similar-sized project without taxpayer assistance, government help, or the use of eminent domain.

I spoke against the agreement with the City at a May 31st hearing and I am quoted in the 8th paragraph in the NBC4 (LA) story at the following link:
http://www.nbc4.tv/news/4551212/detail.html

There was an opinion piece by the Los Angeles Daily News titled "W for Welfare" which sums up the stupidity of government assistance for this project (they incorrectly stated that the subsidy would be $4.8 million, I wrote in to correct the number to $6.5 M).
http://motorway.dailynews.com/Stories/0,1674,200%257E20951%257E2899108,00.html

We have been told by the developer and the CRA that we have only two choices—either sell or be condemned (this can be found in the L.A. City Council and CRA Reports). The cloud of eminent domain has been over our head since 2003 and has affected our decision to make any long-term investments in the building and the business.

One of the requirements for re-establishing a Redevelopment area in Los Angeles is that Private Enterprise cannot or will not pursue developments on their own. An article in the LA Business Journal dated February 21, 2005 by Andy Fixmer titled "Hollywood's Close Up" talks about how financially viable the Hollywood area now is (comparing the Real Estate prices to Beverly Hills). This same article tells how small projects are more successful than large projects are. http://www.findarticles.com/p/articles/mi_m5072/is_8_27/ai_n12412903/print

Our business has survived in the same location through good times and bad while many larger businesses have come and gone. But our City has chosen to give money and an unfair advantage through eminent domain to large companies over a small business and hasn't given us the light of day.

All of this happened before the Kelo decision was rendered by the Supreme Court. You can imagine how aggressive the city will be after this decision.

Sincerely,
Robert (Bob) Blue
For the Blue Family and Bernard Luggage Company
1642 N. Vine St.
Hollywood, CA 90028
Phone: (310) 420-4918
Email: bob_b_blue@yahoo.com
Submitted via email

Statement of Linda Brnicevic and Cameron McEwen

Eminent Domain Congressional Hearings

The use of eminent domain in Bound Brook, New Jersey, provides a timely example after New Orleans of how government action can retard or outright prevent recovery from a national disaster. At the same time it illustrates the questionable use of federal government funding to motivate local government exercise of the eminent domain power.

The facts of the situation are these. In September 1999, Hurricane Floyd unleashed the largest flood in recorded New Jersey history which was concentrated in the small Borough of Bound Brook. President Clinton declared the area a national disaster. Although on a much smaller scale than New Orleans and the Gulf Coast, the all-too-familiar results were similar: dead neighbors, thousands of residents evacuated, homes and businesses inundated, people in shock, irreplaceable possessions lost, victims suddenly faced with the need to find medical attention, emergency housing, food and clothing, kids needing new schools, all transportation lost, victims needing, all at the same time, to pump out water, fight mold, register with FEMA, deal with insurance, help elderly and disabled neighbors – and so on – and on and on.

While the floodwaters were still covering the streets of Bound Brook, local government officials were meeting behind closed doors, not to consider how victims might be helped, but to consider how the disaster might be used to dispossess them. Redevelopment would be declared through which the flooded homes and businesses would be subjected to condemnation and then replaced by a private developer's office park.

But this redevelopment was not to take place immediately. Instead it was to follow completion of an Army Corps of Engineers federal flood control project which had just started as Hurricane Floyd hit and which would be finished in 10 to 15 years. Condemnation could take place at any time during this period – or during extensions to it.

Flood victims were therefore required to repair their homes and businesses absent knowledge of if, or when, they might be condemned. For local government officials, the national disaster had not hit these victims hard enough. Now they had to learn that their own non-flooded neighbors only wanted to make their recovery more difficult and, at some unknown time in the future, to get rid of them entirely. The flood victims would not benefit from flood control; only their non-flooded neighbors would benefit.

Because a high percentage of the flood victims were Hispanic, the redevelopment 'plan' was included in a 2004 consent decree the DOJ reached with Bound Brook regarding discriminatory practices in the Borough.

Despite the bizarre timing and circumstance of a redevelopment plan declared on the basis of a national disaster not to help the victims, but to take over their properties, despite the bizarre idea of declaring redevelopment which could not take place, or even be planned, for a decade or two, despite a DOJ consent decree acknowledging discriminatory action within the redevelopment plan, state courts in New Jersey, including the state supreme court, have ruled, astonishingly, that Bound Brook's use of the redevelopment statute and its eminent domain power do not violate state law.

The government's use of eminent domain to take property from one private owner and give it to another therefore trumps, at least in New Jersey, the right of victims of a national disaster to decent help and recovery. Not to mention their right to equal treatment under the law and the enjoyment of their property. The NJ courts even ruled that there was no harm to state notification and open meeting requirements from the fact that flood victims were not able to live in their homes, were often not resident in Bound Brook at all and had, as we all know from New Orleans, a few other things to do than attend meetings with their dry fellow citizens.

The lessons the federal government might draw from the Bound Brook experience are these:

a) while use of federal money for flood control and other disaster prevention is absolutely necessary, local sponsors should be required to certify that their project will not be used to trigger eminent domain takings upon its completion;

b) the use of eminent domain takings in minority and low-income areas should explicitly be made subject to the equal treatment provisions in federal law;

c) the majority supreme court opinion in Kelo that restrictions to eminent domain might usefully be left to state legislatures should be seen as questionable. In New Jersey, at least, the eminent domain power is absolute, at least in minority and low-income areas.

Linda Brnicevic
20 Talmage
Bound Brook, NJ 08805

Cameron McEwen
338 W Main St
Bound Brook, NJ 08805

OPENING STATEMENT OF SENATOR SAM BROWNBACK

SENATE JUDICIARY COMMITTEE HEARING ON "THE *KELO* DECISION: INVESTIGATING TAKINGS OF HOMES AND OTHER PRIVATE PROPERTY"

SEPTEMBER 20, 2005

The Supreme Court's recent decision in *Kelo v. City of New London*[1] has dealt a serious blow to the sanctity of private property in this country. This case has caused a national uproar, and rightly so, as Americans consider their homes and other property to be sacred. I am pleased that Chairman Specter has called this hearing today; as the Chairman of the Subcommittee on the Constitution, Civil Rights, and Property Rights, I believe that we need to investigate the revolution this decision threatens to unleash both in rural communities and urban centers, and among individuals, small businesses, and churches.

Property long has been recognized as the touchstone of our free society. Even before the existence of the United States, William

[1] 125 S.Ct. 2655 (2005).

Blackstone stated that "the law of the land . . . postpone[s] even public necessity to the sacred and inviolable rights of private property." Mindful of this sentiment, the Framers of our Constitution established a strict limitation on the government's ability to take private property.

And so it is that the Fifth Amendment to the Constitution provides that private property shall not "be taken for public use, without just compensation." Since this country's founding, this provision has meant that the government may not exercise its "eminent domain" power unless it is using the property to be seized for a clear public purpose, such as building a road or a bridge. However, this past June, the narrowest of Supreme Court majorities jettisoned this understanding in *Kelo* by redefining what constitutes a "public use." By holding that private economic development satisfies the public use requirement of the Takings Clause, the Supreme Court effectively eliminated meaningful checks on the power of eminent domain. And, as I suggested at the confirmation hearing of Judge Roberts last week, it is now much easier for one man's home to become another man's castle.

The facts of the *Kelo* case demonstrate, with results all too real, why this decision is so alarming. In the effort to increase tax revenue and revive the local economy, the city of New London, Connecticut promoted an economic development plan which called for the condemnation of the property of private homeowners. When presented with the city's plan, some residents made clear that they did not want to leave their homes. Among them was Wilhemina Dery. Mrs. Dery was born in her house in 1918, and has made it her home for the past 87 years. Fortunately, Connecticut Governor Jodi Rell issued an order forcing the development commission to rescind the eviction notices that it sent to Mrs. Dery and other homeowners. However, this does not end the battle. For after the Supreme Court's decision, Mrs. Dery – along with Mrs. Susette Kelo, who will be testifying here today – could be forced to leave her home if the local government can assert a plausible public gain from private economic development.

The *Kelo* decision opened wide a door for the abuse of eminent domain powers which several local governments already had cracked. For instance, in 2003, the Norwood, Ohio City Council accepted the results of an "urban renewal study" that found Carl and Joy Gamble's attractive, middle-class neighborhood to be "deteriorating" and "blighted" – and thus deemed their house eligible to be taken by eminent domain. Conveniently, the study was initiated and funded by the very same developer to whom the Council would transfer the property for commercial development! With the *Kelo* decision in hand, the developers and the Norwood City Councils of this country now have a clear path to kicking the Gambles out of their homes.

Fred Jenkins, one of today's witnesses, can also attest to the potential for abuse of eminent domain powers. As he will describe for us, he and his church have been forced to remain in a rented basement because their property was condemned by the North Hempstead Community Development Corporation for private development. After

five years, nothing has been built, and his church still is left to languish in its rented basement.

In her eloquent dissent in Mrs. Kelo's case, Justice O'Connor pointed out that the Court effectively deleted the words "for public use." As she put it, "Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory."

I see this hearing as a welcome opportunity to test Justice O'Connor's prediction. If, as I suspect, *Kelo* represents an alarming departure in Takings Clause jurisprudence which threatens good citizens like Susette Kelo and Fred Jenkins, action may be necessary by either or both the Congress and the states.

That action is well underway. My colleagues Senator Cornyn and Senator Nelson have already introduced a bill to address this issue. There has also been action on the state level; twelve states have introduced legislation limiting eminent domain power to actual public uses. The vigor of the response to *Kelo* from both federal and state governments, and from both Republicans and Democrats, suggests that the Supreme Court has indeed misconstrued a fundamental part of the Bill of Rights. I look forward to exploring with our witnesses how our tradition of private property ownership can be preserved.

Statement of Mark Bryant

My name is Mark Bryant and I live in Smith County, Mississippi. My family and I were recent victims of eminent domain abuse in our state.

Our family owns a tract of land that has been in our family for generations. My father had inherited this land from his mother who had inherited it from her parents. The foundation stones of the log cabin occupied by my great-grandparents still remain on the property underneath a magnolia tree that is one of the largest most people have ever seen. It had been my dream that one day I would build a house on that property for my family. That dream is now destroyed.

An oil company, Denbury Onshore, approached us in September of last year and told us they were putting a pipeline through the area and that the pipeline was going through our property. We informed them at the time that we were not interested in selling the land or in granting an easement. They told us that if we didn't agree, they could take the land by eminent domain. Some other families in the area did not want to give up their land either, but gave into coercion and the threat of eminent domain court proceedings which they could ill afford.

My family and I chose to try and fight the effort, with a firm belief in our nation's Constitution, our Bill of Rights, and in a very kind Providence. We knew that this company's pipeline was not a public utility, and the only ones who would benefit from this venture would be the company's stockholders. We looked to the legal system for justice. We felt confident that the company could not prove "public use."

Our attempt to force the company to prove "public use" was futile. Although the law says that we have a right to challenge the "taking" and make the condemnor show public use, the right is token at best under the present legal precedence. All it took was for the company's attorneys to say the word, "revenue," and it was all over. At one point, during the course of our legal fight with Denbury, the company's attorneys requested that the judge rule that we should have to pay for their legal costs; we figured this was an attempt to scare us into settling out of court, or as punishment for having resisted their attempts to take our property. The judge did not grant their request; had he done so, we would have been severely hurt financially. It shocked us that a company with millions at their disposal would make such a callous suggestion. We were appalled to think that, in this country, citizens could be punished for trying to resist injustice and stand up for what they thought was right.

We believe that this taking was unnecessary, that this company modified or changed the route of this pipeline to avoid other properties prior to their bringing legal proceedings against us, even though they denied in court that they could not change the route for anyone. It is believed that the company favored the well-connected in determining the final route of this pipeline. The route does not cross the state in a straight line, but zig-zags across the countryside, avoiding some properties entirely, for no apparent reason.

My father served in this nation's military and retired to our farm in Mississippi to raise three sons on land that he hoped to leave to them. My mother, his widow, is 77 years old and had

hoped to spend the twilight years of her life knowing that this land would pass to her sons to build their homes on. I cannot describe how heartbroken she was when she realized that the old magnolia tree would be cut down, and that the ancestral home site would be wiped away by bulldozers. My two brothers and I have also served this country and had hopes of raising our families on this land. That won't happen for me and my family. The place where I had planned on building a home, the best part of the property, will have a pipeline running through it, and the "just compensation" for losing this dream of a future home is not enough to buy a similar tract of land with such an ideal home site somewhere else. My father, my brothers, and I wore uniforms and protected this nation, believing that this nation's government would, in turn, protect our rights. We were mistaken.

The legal system called us "defendants," yet we had done no wrong to be accused of, except that we had resisted the will of powerful men. Our land had been "condemned," yet there was no slum. The land was plentiful with trees, many planted by hand by my family, and wild game.

This experience has left us with no faith in our legal system and no confidence in our government or our laws. Our government has given the power of eminent domain to private entities whose only god is money and whose only motive is profit. We pray that our Congress will see its way clear to restore our faith in it and protect the rights of the citizens of this great nation.

I thank you for your time in this matter.

Mark S. Bryant

Statement Before the U.S. Senate Committee on the Judiciary
U.S. Senator John Cornyn (R-TX)

"The Kelo Decision: Investigating Takings of Homes and other Private Property"
Tuesday, September 20, 2005

Mr. Chairman, Ranking Member Leahy – I want to congratulate you on holding this important hearing – a hearing about the right of every American to be protected from government seizure of their homes, their businesses, and their property generally.

As you know, this week is Constitution Week – a week that is dedicated to celebrating the great principles of our nation's founding document – principles of liberty and equality, and the principle that there are certain rights that are so fundamental – so important – that they deserve protection under our laws. Without question, private property rights rank among those important rights outlined by our founding fathers. As Thomas Jefferson wrote on April 6, 1816, the protection of such rights is "the first principle of association, 'the *guarantee* to every one of a free exercise of his industry, and the fruits acquired by it.'"

Accordingly, these protections were enshrined in the Fifth Amendment to the Constitution – providing that "private property" shall not "be taken for public use without just compensation."

Yet on June 23rd of this year, the United States Supreme Court issued its controversial 5-4 decision in *Kelo v. City of New London*. In that decision, the Court held that government may seize the home, small business, or other private property of one owner, and transfer that same property to another private owner, simply by concluding that such a transfer would benefit the community through increased economic development.

The majority's decision was sharply criticized by Justice Sandra Day O'Connor in her dissent, joined by the Chief Justice and Justices Scalia and Thomas. She wrote, "[the Court] effectively [has] . . . delete[d] the words 'for public use' from the Takings Clause of the Fifth Amendment" and thereby "refus[ed] to enforce properly the Federal Constitution."

Under the Court's decision in *Kelo*, Justice O'Connor warns, "[t]he specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory." She further warns that, under *Kelo*, "[a]ny property may now be taken for the benefit of another private party," and "the fallout from this decision will not be random."

Indeed, as an amicus brief filed by the National Association for the Advancement of Colored People, AARP, and other organizations noted, "[a]bsent a true public use requirement the takings power will be employed more frequently. The takings that result will disproportionately affect and harm the economically disadvantaged and, in particular, racial and ethnic minorities and the elderly."

Suffice it to say, the *Kelo* decision was a disappointment. But I want to thank Susette Kelo, the lead plaintiff in the case, and congratulate the attorneys at the Institute for Justice for their exceptional legal work and for their devotion to liberty. Mr. Chairman, I am pleased to see that Ms. Kelo is here today to testify. Ms. Kelo, I look forward to hearing from you.

But what I find troubling is that yours is just one of many examples of the abuse of the eminent domain power throughout our nation. Its use for private development is widespread. The Institute for Justice has

documented more than 10,000 properties either seized or threatened with condemnation for private development in the five-year period between 1998 and 2002.

Despite the fact that so many abuses were already occurring, since the *Kelo* decision, local governments have become further emboldened to take property for private development. For example, in my home state of Texas – in the coastal town of Freeport – just hours after the *Kelo* decision, officials in Freeport began legal filings to seize some waterfront businesses (two seafood companies) to make way for others (an $8 million private boat marina).

And even as this pattern has continued elsewhere, Courts are already using the decision to reject challenges by owners to the taking of their property for other private parties. On July 26, 2005, a court in Missouri relied on *Kelo* in reluctantly upholding the taking of a home for a shopping mall. As the judge commented, "The United States Supreme Court has denied the Alamo reinforcements. Perhaps the people will clip the wings of eminent domain in Missouri, but today in Missouri it soars and devours."

Mr. Chairman, I firmly believe that legislative action is appropriate and necessary. And I am not alone in this belief. Several state legislatures took immediate action. Indeed, my home state of Texas passed legislation that was signed into law by the Governor just a few weeks ago that protects property from seizure for purposes of economic development.

It is also appropriate for Congress to take action, consistent with its limited powers under the Constitution, to restore the vital protections of the Fifth Amendment. That is why in response to the Supreme Court's decision, I introduced Senate Bill 1313, titled *the Protection of Homes, Small Businesses, and Private Property Act of 2005*. I was happy to be joined with bipartisan support, including the immediate support of the Senior Senator from Florida, Bill Nelson. Mr. Chairman, I am happy to report that today a total of 28 of our colleagues have joined me as co-sponsors of this important legislation.

The bill declares that the power of eminent domain should be exercised only "for public use," as guaranteed by the Fifth Amendment, and that this power to seize homes, small businesses, and other private property should be reserved only for true public uses. Most importantly, the power of eminent domain should *not* be used simply to further private economic development. The Act would apply this standard to (1) all exercises of eminent domain power by the federal government, and (2) all exercises of eminent domain power by state and local government through the use of federal funds.

Mr. Chairman, I note that while the principles of the legislation as introduced are sound – it requires refining to ensure its purposes are achieved. I know that staff have been working to craft the appropriate definitions and scope of the legislation, and I look forward to working together to advance an appropriate final product.

The protection of homes, small businesses, and other private property rights against government seizure and other unreasonable government interference is a fundamental principle and core commitment of our nation's Founders. In the aftermath of *Kelo*, we must take all necessary action to restore and strengthen the protections of the Fifth Amendment. I ask my colleagues to lend their support to this effort, by supporting the *Protection of Homes, Small Businesses, and Private Property Act of 2005*.

Senator Cornyn currently chairs the Judiciary Committee's subcommittee on Immigration, Border Security and Citizenship, and in the last Congress he was chairman of the Constitution, Civil Rights and Property Rights subcommittee. He is the only former judge on the Judiciary Committee, and served previously as Texas Supreme Court Justice, Texas Attorney General, and Bexar County District Judge.

9-21-2005

Statement of Mark T. Dahl, M.D.

Regarding: Afton, Minnesota intends to use eminent domain for private development

To Whom It May Concern:

Property owners in Minnesota and across the country have reacted against municipal and state planners using the power of eminent domain to take and transfer property to private developers for private profit. The U.S. Supreme court has muddled the issue with the recent 5-4 decision in *Kelo vs. City of New London*, changing the original constitutional intent of eminent domain. The Court's majority opinion that a "skeptical eye" must be kept on "private to private" transfers of land ownership leaves the door open for unscrupulous government agencies and officials to take land for the use of private developers, claiming the "public benefit" will be from increased tax revenues. This means private property owners are at risk for having their land and businesses taken by cities under the direction of a mayor or city council.

In February, the Afton, Minnesota city council voted to do just that. They have decided to use the power of eminent domain to take land from certain owners to create a public road which will create a second access point for another private landowner. The landowner-developer's stated intention is to create a minor subdivision, a private land development. The city council has gone so far as to hire an attorney specializing in eminent domain, at tax payer's expense, to help guide them through this process, for the benefit of the developer. In the mean time, the landowners being threatened by this intrusion of their privacy are forced to either resist at great expense, or relent and let the developer or city have access for little or no compensation, disguised as "fair market value".

This is not the kind of action we want in Afton, Minnesota. We do not want a city council, under the direction of the mayor, at the request of a former planning commissioner, to have the discretion to take land for some vaguely disguised "public purpose" so they "can turn a profit".

The Afton mayor's support of a private landowner gaining access through another's land for the purpose of a minor subdivision is poor public policy, poor leadership, and improper use of eminent domain. This egregious abuse of eminent domain will be resisted to the highest court necessary, at considerable expense to all.

I request immediate punitive action against cities abusing eminent domain. I invite you to call me to discuss this matter.

Sincerely,

Mark T. Dahl, M.D.

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Senator Arlen Specter
United States Senate
Washington, DC

Re; Hearings on Eminent Domain

Dear Senator Specter,

My name is Bart A. Didden, a 45 year resident, along with my wife and two children of the Village of Port Chester, NY. Since 1982, I have been employed as president of U.S.A. Central Station Alarm Corp., an alarm monitoring service company employing over 60 professionals dedicated to the well being of our clients and their property located across the United States.

I apologize in advance for this late submittal, but I had to throw something together for your hearings because I am a victim of eminent domain and could not sit here and let the opportunity go by with nothing being submitted. My story is so strange that everyone who hears it agrees that I have been robbed. Should anyone on your staff be interested I would be happy to follow up with more material and visit your offices for a meeting to demonstrate what happen to me.

In the meantime,

I am the victim of government policies and laws that have become so twisted that they resemble nothing of the original intent. I am talking about eminent domain and takings that are planned in back room negotiations and sweetheart deals made between developers and elected government officials so hungry for renewal development that they would do and say anything, including violating my civil rights and the natural laws of our society.

Port Chester, NY is a Village of 28,000 residents packed into 2.5 square miles, on Long Island Sound. In its earliest years it started as a shipping port. With the deployment of the railroads the Village of Port Chester, became a manufacturing center with a concentration of various factories. Port Chester has the manufacturing home of Life Saver candies, and you knew when they were making the peppermint candies. All of the plants were gone by 1975, and the commercial tax base was in dire straits.

During the 70's, 80's & 90's, in response to a quickly diminishing tax base and job opportunities, the Village Leadership began to use Federal, State and County of Westchester funds to designate Urban Renewal Zones as the vehicle to re-invent itself, shore up the tax base and create job opportunities.

During the 80's & 90's I began to purchase various properties, well before a "preferred developer" with a real project appeared because I believed in the ability of Port Chester to come back to what it once was. In the end these properties became a contiguous assemblage of note.

Progress was slow in regards to the governmental process but a development agreement was eventually approved between the village and a "preferred developer", plans approved and a feeling of euphoria existed in the Village.

As redevelopment activity was focused on the other side of town, a section of my assemblage was also included in the designated area labeled as "blight". We always disagreed with the "blight" designation as our properties were rented and maintained. Blight is not what was going on on my property.

It was not until CVS Corporation approached us about developing our property that we learned that all of our rights, under the laws of New York State were lost 4 years earlier.

The Eminent Domain Procedure Law (EDPL) of New York State limits the rights of the property owner to file a challenge to being designated as "blighted" to 30 days from a public hearing and findings issued by the local government.

The EDPL is that it contains a provision that allows the municipality to grant a "phasing" status to a project. This provision enables the community to maintain a cloud of uncertainness for 10 years. In fact my property was designated before I owned it, back in the 1980's.

Then once a developer was chosen in the late 90's, it was not until I had a signed deal with CVS did the "preferred developer" make, what I consider EXTORTIONATE DEMANDS FOR REAL MONEY, if I wanted to keep my property and my deal.

The "preferred developer" demanded $800,000.00 dollars not to condemn my property and keep my deal with CVS.

In this case, there is no public benefit because I would have no tax deals on building materials or phased in tax advantages for being the "preferred developer".

And you may wonder what the "preferred developer" has planned for the property that was mine, A WALLGREENS DRUG store!

Senator, the bigger problem here is the New York State Law that precludes me from challenging the blight designation for 10 years. The developer has the ability to play the land speculation game, which is what happened to me.

When they received the rights to condemn my property almost 5 years earlier they did not take it. They allowed me to pay the taxes and continue to maintain it, but when a multimillion dollar corporation, CVS, showed interest and we received ALL NEEDED GOVERNMENTAL APPROVALS to build a new building, I was victimized by politics, governmental deals and bad laws that stripped my rights years earlier.

Senator Specter, why should I have been required to pay my taxes if I really did not own the property anymore? Why should they have been allowed to take it without additional processes when clearly the status changed with the fully executed lease for a drug store, when it is a drug store that they intend to do?

Maybe your committee can fix what is obviously broken.

Respectively submitted to the United States Senate Judiciary Committee,

Bart A. Didden

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HEARING BEFORE THE

UNITED STATES SENATE

COMMITTEE ON THE JUDICIARY

ON

THE *KELO* DECISION:
INVESTIGATING TAKINGS OF HOMES AND OTHER PRIVATE PROPERTY

SEPTEMBER 20, 2005

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TESTIMONY OF STEVEN J. EAGLE

PROFESSOR OF LAW

GEORGE MASON UNIVERSITY SCHOOL OF LAW

Mr. Chairman, Senator Leahy, and distinguished members of the Committee:

My name is Steven J. Eagle. I am a professor of law at George Mason University School of Law, in Arlington, Virginia. I testify today in my individual capacity as a teacher of property and constitutional law. My principal research interest is the study of the relationship between private property rights and government regulatory powers. I am the author of a treatise on property rights, *Regulatory Takings* (3d ed. 2005), write extensively on takings issues, and regularly lecture at programs for lawyers and judges. I serve as group vice-chair of the Land Use and Environmental Group of committees of the American Bar Association's Section of Real Property, Probate and Trust Law and co-chair of the Condemnation Committee of the Section of State and Local Government. I thank the Committee for giving me this opportunity to appear.

On June 23, 2005, the United States Supreme Court handed down *Kelo v. City of New London*, 125 S.Ct. 2655 (2005). The majority opinion was written by Justice Stevens and joined without qualification by Justices Souter, Ginsburg and Breyer. Justice Kennedy, whose vote was necessary to the 5-4 majority, joined the Stevens opinion, but also wrote a concurrence suggesting significant limitations on the scope of the decision for subsequent cases. Justice O'Connor wrote the principal dissent, in which she was joined by the late Chief Justice Rehnquist and Justices Scalia and Thomas. She stressed practical defects in the majority opinion. Justice Thomas also wrote a separate dissent, stressing that the majority opinion was not necessitated by the Court's prior holdings and was not consistent with the intent of the Framers.

The Fifth Amendment to the United States Constitution says that "nor shall private property be taken for public use, without just compensation." In declaring that "public use" means no more than "public purpose," *Kelo* grants government at all levels almost unlimited deference in condemning non-blighted private residences and other property for subsequent retransfer to private parties for economic redevelopment. As Justice O'Connor emphasized, under the majority's holding, "[n]othing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory. *Kelo*, 125 S.Ct. at 2676 (O'Connor, J., dissenting).

As most Americans understand, the case thus represents a dramatic departure from the traditional constraints on government's power of eminent domain. Justice Stevens has acknowledged that his *Kelo* opinion has been "much criticized." John Paul Stevens, "Judicial Predilections," Address to the Clark County (Nevada) Bar Association, August 18, 2005, typescript at 7. The force of the public's reaction to *Kelo* largely results from lack of prior awareness of the situation. For well over a decade, eminent domain had more aggressively been used by localities for economic development purposes, but this occurred in scattered individual instances with low visibility, thus making the pattern hard to recognize.

The growth of public awareness of condemnations for retransfer largely came about through a series of articles by *Wall Street Journal* reporter Dean Starkman. In 1998, he wrote:

> Local and state governments are now using their awesome powers of condemnation, or eminent domain, in a kind of corporate triage: grabbing property from one private business to give to another. A device used for centuries to smooth the way for public works such as roads, and later to ease urban blight, has become a marketing tool for governments seeking to lure bigger business.

Dean Starkman, "Take and Give: Condemnation Is Used To Hand One Business Property of Another," *Wall St. J.*, Dec. 2, 1998, at A1. By late 2004, it seemed that localities valued eminent domain for retransfer more than ever:

> Desperate for tax revenue, cities and towns across the country now routinely take property from unwilling sellers to make way for big-box retailers. Condemnation cases aren't tracked nationally, but even retailers themselves acknowledge that the explosive growth of the format in the 1990s and torrid competition for land has increasingly pushed them into increasingly problematic areas—including sites owned by other people.

Dean Starkman, "Cities Use Eminent Domain to Clear Lots for Big-Box Stores," *Wall St. J.*, Dec. 8, 2004, at B1.

The most comprehensive study of eminent domain for retransfer to private interests was prepared by the Institute for Justice, the libertarian public interest organization that also represented the *Kelo* petitioners. Dana Berliner, *Public Power, Private Gain* (2003) (available at http:// www.castlecoalition.org/report/pdf/ED_report.pdf).This analy-

sis, which reviewed condemnation activity in 41 states during the years 1998-2002, indicated that a total of 10,282 takings were threatened or filed in which the real property involved would be retransferred to a private entity. *Id.* at 2.

I will review briefly the importance of private property rights in historical context, then discusses both the Constitutional and practical infirmities of the *Kelo* decision. I conclude by respectfully suggesting elements that the Committee should incorporate in responsive legislation.

***Kelo* and Our Heritage of Private Property and Liberty**

While the focus of this hearing is on practical aspects of prevention of condemnation that is not truly for public use, it is entirely fitting to begin with first principles—our Anglo-American heritage of private property rights as a component of individual liberty and the intent of the Framers.

The Glorious Revolution of 1688 had affirmed that even the King of England was subject to the rule of law. As the leading thinkers of the English and Scottish Enlightenment understood, government was a compact among individuals for the preservation of their liberties. The best known of those authors to eighteenth century Americans was John Locke, whose *Second Treatise of Government* famously declaimed: "Lives, Liberties, and Estates, which I call by the general Name, *Property*." William Pitt's assertion that the "poorest man may in his cottage bid defiance to all the force of the Crown" was the root of John Adams' declaration to a colonial jury that "an Englishman's dwelling House is his Castle."

When their proprietors attempted to lure settlers to the American colonies, they found that the irresistible lure was fee simple title—ownership free and clear. Many who lived under the remnants of feudalism, where tenants still "held of" the nobility, aspired to own absolute title in the land and would resettle in America to achieve that goal. See James W. Ely, Jr., *The Guardian of Every Other Right: A Constitutional History of Property Rights* 11 (2d ed 1998).

Weeks before the Declaration of Independence, the Preamble of the Virginia Constitution, drafted by George Mason, was unanimously adopted on June 12, 1776. It declared: "All men are created equally free and independent and have certain inherent and

natural rights... among which are the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety." As even leading critics of the Lockean perspective have noted, "[t]he great focus of the Framers was the security of basic rights, property in particular." Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism* 92 (1990).

While an artificial and incorrect distinction sometimes is drawn between "property rights" and "human rights," the Supreme Court has noted: "Property does not have rights. People have rights. . . . In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized." *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972). Furthermore: "We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances." *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994).

Prior to *Kelo*, one could say that private property was limited by the police power, which gives government the authority to protect the health, safety, and welfare of the community from uses of property that are harmful, and by the power of eminent domain, which allowed government to arrogate to itself beneficial uses of private property, conditioned by the separate Constitutional requirements of "just compensation" and "public use." By equating "public use" with "public benefit," however, *Kelo* transmutes fee simple ownership into conditional ownership. When an owner fails to use his or her land in a manner that maximizes job creation, tax revenues, or whatever other goal sought by a government entity that is a potential condemnor, that private ownership is subject to termination. In effect, the individual whose ownership of property was cherished by the Framers precisely because it facilitated political and economic independence from government now becomes a tenant at will. Under *Kelo*, Americans who assumed that their homes and shops were indeed their castles find that, once again, they "hold of" the government.

Perhaps anticipating the widespread public indignation that would follow its decision, the majority opinion in *Kelo* "emphasize[d] 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." *Kelo*, 125 S.Ct. at 2668. However, as Justice O'Connor responded in her dissent, the States "may or may not choose to impose appropriate limits on economic development takings. This is an abdication of our responsibility. States play many important functions in our system of dual sovereignty, but compensating for our refusal to enforce properly the Federal Constitution (and a provision meant to curtail state action, no less) is not among them." *Id.* at 2677 (citation omitted).

Justice O'Connor's wisdom in this matter becomes more apparent when we observe that while New London is a distressed city, Connecticut is a wealthy state. The path of least resistance for state legislators is to avoid making hard choices concerning taxes, social needs, and among programs competing for public funding. It is easier to encourage distressed cities to profit from condemning homes and small businesses, assembling their small lots into large parcels more attractive to commercial development, and transferring these at nominal cost as a subsidy for businesses that might bring jobs and taxes. In a real sense, then, condemnation for economic development is of direct financial benefit to the State. As the Supreme Court earlier declared, there is the need for more judicial oversight when "the State's self-interest is at stake." *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 26 (1977).

While this subsidy might be a boon for government, it is not free. It comes at the expense of the individuals whose land is condemned. Their sense of community, personal ties, and sentimental attachments to their homes are destroyed, although, strictly speaking, they are not taken. While owners of condemned homes and businesses incur heavy pecuniary and other relocation costs, these also are not part of the taking (and mostly are not reimbursed by statutory relocation benefits). For these reasons, "[c]ompensation in the constitutional sense is . . . not full compensation." *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 464 (7th Cir. 1988). Since "just compensation" is not full compensation, condemnees suffer uncompensated losses even where the taking is for cru-

cial public needs and meets the traditional criteria for public use. Since at least some losses are impossible to avoid, Congress should not fund takings unless they comport with traditional public use criteria. These criteria include use by government employees, use by the general public, use by regulated transportation companies and utilities required to serve the general public, and the alleviation of conditions, such as urban blight, that are harmful to the health, safety, and welfare of the public.

In the much-noted *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004), the Michigan Supreme Court concluded that, under the state constitution, the transfer of condemned property is a "pubic use" when it involved "public necessity of the extreme sort" pertaining to pipelines, railroad rights of way, and the like; where the transferee remained accountable to the public; and where the condemnation itself was based on a matter of public concern, principally removal of blight. *Id.* at 781-783 (citations omitted). *Hathcock* achieved its notoriety by repudiating *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981), the case giving broad deference to the transfer of an ethic neighborhood of 1,400 homes, schools, 16 churches, 144 local business to General Motors Corp. for a Cadillac assembly plant and generally regarded as the high-water mark of activist condemnation.

Kelo Builds Upon Extravagant and "Errant" Dicta

In his *Kelo* majority opinion, Justice Stevens asserted that, for over a century, the Court has "embraced the broader and more natural interpretation of public use as 'public purpose.' . . . We have repeatedly and consistently rejected that narrow test . . . ." 125 S.Ct. at 2662-63. The cases Stevens included in his discussion sometimes did contain broad dicta. Nevertheless, a narrow rationale would have explained their holdings. For instance, in *Fallbrook Irrigation District v. Bradley*, 164 U.S. 112, 161-162 (1896), the condemnation for purposes of constructing an irrigation ditch did serve the traditional public purpose of providing common infrastructure for the community, since, as Justice Thomas noted in his analysis of the cases in dissent, all landowners affected by the ditch had a right to use it. *Kelo*, 125 S.Ct. at 2683 (Thomas, J., dissenting).

The Court's leading modern public use cases are *Berman v. Parker*, 348 U.S. 26 (1954), upholding the condemnation of a sound department structure so that the blighted

area in which it was located could be comprehensively revitalized, and *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), upholding the condemnation of underlying fee interests concentrated in a few eleemosynary trusts and retransferring the titles to the individual residential parcels to the homeowners who had long-term ground leases. These were justified as a means of ending feudalism in Hawaii.

In *Berman*, the Court's opinion by Justice Douglas declared: "Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end." 348 U.S. at 33. *Berman* captures the notion that the Public Use Clause is superfluous. Likewise, in *Midkiff*, Justice O'Connor built upon *Berman*, declaring: "The 'public use' requirement is thus coterminous with the scope of a sovereign's police powers." 467 U.S. at 240. Here, again, to say that "public use" has the same bounds as the sovereign's powers to protect public health, safety, and welfare is to say that it has no independent significance at all.

In her *Kelo* dissent, Justice O'Connor noted the roots of *Berman* and *Midkiff* in blight and the need for land reform, respectively. She repudiated what she termed the "errant language" quoted above, and added: *This language was unnecessary to the specific holdings of those decisions. Berman* and *Midkiff* simply did not put such language to the constitutional test. . . ." 125 S.Ct. at 2675 (O'Connor, J., dissenting) (emphasis added).

> Because each taking [in *Berman* and *Midkiff*] *directly* achieved a public benefit, it did not matter that the property was turned over to private use. Here, in contrast, New London does not claim that Susette Kelo's and Wilhelmina Dery's well-maintained homes are the source of any social harm. Indeed, it could not so claim without adopting the absurd argument that any single-family home that might be razed to make way for an apartment building, or any church that might be replaced with a retail store, or any small business that might be more lucrative if it were instead part of a national franchise, is inherently harmful to society and thus within the government's power to condemn.

Id. at 2674-75 (O'Connor, J., dissenting).

In short, the dissent of Justice Thomas is a powerful analysis of why the conflation of "public purpose" and "public benefit" is not compelled by the holdings of the Court's earlier cases. The dissent of Justice O'Connor, the author of *Midkiff*, indicates

why it and *Berman*, the Court's more contemporary public use cases, do not compel that result, either.

The concurring opinion of Justice Kennedy raises important questions about whether, as a matter of constitutional law, the *Kelo* decision should lead courts to defer to *all* types of takings for subsequent retransfer for private revitalization, or only those types less apt to be abused. "There may be private transfers in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted under the Public Use Clause." *Id.* at 2670 (Kennedy, J., concurring).

While this inquiry is laudable in principle, it is almost certain to provide little, if any, check on abusive condemnation in practice. The federal courts have been notoriously uninterested in scrutinizing state or local land use decisions for such abuses. The Supreme Court recently reaffirmed its unique "ripeness" test for regulatory takings claims against state or local governments—a test that makes it almost impossible to assert such claims in federal court. *San Remo Hotel, L.P. v. City of San Francisco*, 125 S.Ct. 2491 (2005). See also, *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985). The lower courts have found it easy to be dismissive of takings and similar property-based Constitutional claims, as well. The U.S. Court of Appeals for the Seventh Circuit, for instance, characterized one property owners claim as a "garden-variety zoning dispute dressed up in the trappings of constitutional law." *Coniston Corp.*, 844 F.2d at 467. One could hardly imagine, by way of contrast, that the denial of a parade permit would be deemed a "garden variety political dispute."

The Quest for Bad Motives and Avoidance of Waste in Economic Development Takings is Based on Illusion

The *Kelo* opinions of both Justices Stevens and Kennedy were predicated largely on the ability of state or local legal process to eliminate abusive or "pretextual" takings. The Stevens majority opinion emphasized "the comprehensive character of the [New London redevelopment] plan, the thorough deliberation that preceded its adoption, and the limited scope of our review," *Kelo*, 125 S.Ct. at 2665, together with the Court's conclusion that the "plan unquestionably serves a public purpose." *Id.*

Likewise, Justice Kennedy did not find it necessary in *Kelo* to "conjecture" when heightened judicial review of condemnations for development would be necessary. "The city complied with elaborate procedural requirements that facilitate review of the record and inquiry into the city's purposes." *Id.* at 2670 (Kennedy, J., concurring).

There are at least three problems with these reassurances. The first is the supposition of judicial monitoring that is unlikely to be present. Justice Stevens brushed aside fears of abusive condemnations by stating that courts can confront them "if and when they arise," *Kelo*, 125 S.Ct. at 2667, and grandly quoting Justice Holmes admonition that "[t]he power to tax is not the power to destroy while this Court sits." *Id.* at 2667 n.18 (quoting *Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U.S. 218, 223 (1928) (Holmes, J., dissenting). Yet, as earlier noted, the federal courts in general and the Supreme Court in particular have seemed generally unwilling to sit to sift through the facts of property deprivation cases to see if the police power has been exercised properly.

A second problem is the Court's apparent notion that condemnation for retransfer for private development is a tidy process whereby expert staff utilize professional judgment to discern the need for economic development and revitalization, plans subsequently are formulated, but only after broad input from all segments of the community, and, finally, private businesses are engaged to help in the effort. In most communities, of course, that description would appear rather naive. Political, commercial, and financial elites are personally well acquainted with each other and connected through a myriad of social, civic, and professional relationships. One hand, as the saying goes, washes the other. This does not necessarily imply corruption or overt favoritism. Nevertheless, in the nature of things, the well-connected have a decided edge. Correlatively, the path of least resistance dictates that the raw material from which elites fashion personal and community advantage is the property of the less well off and less well connected. That is why groups such as the NAACP and the Southern Christian Leadership Conference were amici in the Supreme Court in support of Mrs. Kelo. As Justice Thomas recounted, urban renewal long has been associated with the displacement of the elderly, the poor, blacks, and other minorities. *Kelo*, 125 S.Ct. at 2687 (Thomas, J., dissenting).

Even apart from the problem of the powerful displacing the powerless, the *Kelo* majority does not grasp the dynamics that underlie the redevelopment process. Justice O'Connor, whose more acute understanding might in part be attributable to her former experience as a state legislator, put it as follows:

> Whatever the details of Justice Kennedy's as-yet-undisclosed test, it is difficult to envision anyone but the "stupid staff[er]" failing it. The trouble with economic development takings is that private benefit and incidental public benefit are, by definition, merged and mutually reinforcing. In this case, for example, any boon for Pfizer or the plan's developer is difficult to disaggregate from the promised public gains in taxes and jobs.

125 S.Ct. at 2675-76 (O'Connor, J., concurring) (citation omitted).

The implication of Justice O'Connor's observation is that the quest for the "smoking gun"—the *quid pro quo* between the City of New London and Pfizer, in the *Kelo* case—not only is illusive, it is irrelevant. First and foremost, cities like New London, and states like Connecticut, which very actively participated in the New London project, are concerned not about contractual liability, but rather about their reputations as redevelopment partners. If major companies are pleased with the sites they enjoy as the result of condemnation for redevelopment, or, like Pfizer in the *Kelo* case, are pleased with the upscale hotels, executive housing, attractive shops, and other amenities on condemned and redeveloped land adjoining their own parcels, other corporations that might be significant redevelopment partners in the government entity's future projects will learn of it. Correspondingly, if companies like Pfizer are unhappy, future redevelopment efforts would become more difficult. Everyone involved understands that explicit promises are unnecessary.

If a condemnation for retransfer results in a large increment in amenities, jobs, and tax revenues, should the condemnation nevertheless be invalidated because the redeveloper obtained the primary benefit, or because the local official was acting to benefit the redeveloper instead of his or her employer? Likewise, if the city obtains a poor deal, either in terms of the absolute amount of benefit that it receives, in relation to better deals that were available, or compared with the condemnee's subjective (and therefore non-compensable) losses, should the city officials' fidelity to the goal of primary public benefit obviate even an irrational disregard of the negative factors?

One of the examples cited in Justice Stevens's majority opinion of judicial vigilance in uncovering pretextual condemnations, 125 S.Ct. at 2667 n.17, was *99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F.Supp.2d 1123 (C.D. Cal. 2001). There, the major player in local redevelopment efforts, a leading national "big box" chain, threatened to leave the city unless the competing 99 Cents Only store was condemned and retransferred to it. While the city's ostensible reasons for the condemnation were inaccurate, there is no indication that its officials were bribed or in any other way acted for other than the city's welfare. The big box chain sought only its own profit, but that hardly distinguishes it from many redevelopers motivated economic incentives. If one looks at the city's economic redevelopment efforts as a whole, was its "pretextual" action necessarily wrong? The problem is that Justice Stevens is looking towards whether the city *or* the redeveloper is the primary beneficiary of the condemnation, whereas the fact is that *both* benefit, in ways often difficult to ascertain in the long run, at the expense of the individual whose home or business is condemned.

Likewise, there is no firm evidence that the immediate community, the State, or the Nation as a whole benefits from condemnation for economic development and that government funds are not wasted. Since there is no way to determine how much the condemnee *really* values his or her residence or business parcel, and since subsidies are convoluted, there is no way to be sure that condemnation and retransfer to private developers adds to, or subtracts from, society's welfare.

Also, subsidies provided by government—often resulting from the destruction of condemnees' enjoyment of their property—may do no more than offset the benefit that a relocating company would naturally enjoy in another location, or its former hometown, perhaps one that itself is suffering from economic distress. In an anomaly involving the Interstate Commerce Clause, the Supreme Court has said that, while a State cannot discriminate against out-of-state businesses, it can subsidize in-state firms or business that relocate from elsewhere. See *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564 (1997). See also, Dan T. Coenen, "Business Subsidies and the Dormant Commerce Clause," 107 *Yale L.J.* 965 (1998). Whatever the constitutionality of this rob-Peter-

to-pay-Paul behavior, it makes little sense for Congress to subsidize one or both sides of the bidding wars with federal funds for economic development projects.

There is perhaps no better authority on this point than Justice Stevens himself. In a recent speech, he announced that "my opinion of what the law authorized [in *Kelo*] is entirely divorced from my judgment concerning the wisdom of the program that was attacked on constitutional grounds." "My own view," he added, "is that the allocation of economic resources that result from the free play of market forces is more likely to produce acceptable results in the long run than the best-intentioned plans of public officials." Stevens, "Judicial Predilections," typescript at 10. Congress is free to disregard Justice Stevens' view of what the Constitution permits, but does not require, in making the legislative choice to reject funding for condemnation for economic development.

Suggestions for Legislation

In order for Congress to fashion an effective response to the unconstrained condemnations countenanced by *Kelo*, it may impose limitations upon its own acts of eminent domain and those of state and local programs receiving federal funds. Given the amorphous nature of "public use" adjudications and the considerable institutional and financial incentives mitigating against change, useful legislation must accomplish several tasks. It must, for purposes of federal agency actions and federally-funded state and local programs, specify (1) what "public use" is, (2) what "public use" is not, (3) a method by which landowners subject to impermissible condemnation might vindicate their own property rights, and (4) a mechanism allowing for more substantial compensation to those losing their homes or business property for purposes of remediation of blight while, at the same time, reducing the financial incentives for miscasting economic development projects as intended for removal of blight.

Limiting the Use of Federal Funds to Condemnation for "Traditional Public Uses" and Excluding Condemnation for Economic Development

The heart of a legislative response to the *Kelo* decision ought to be a ban on the exercise of the eminent domain power by the Federal Government, or by state and local governments using federal funds, for other than "traditional public uses." In turn, "tradi-

tional public uses" should be defined to encompass only (1) facilities used predominantly by government employees, (2) facilities available for use by the general public, (3) facilities owned or operated by regulated transportation companies or utilities whose services are available to the general public, and (4) alleviation of blighted conditions harmful to the public health, safety, or welfare, where the harm is no more than incidentally of an economic nature. This definition (5) specifically should exclude economic development.

The Need for a "Realistic Availability of Owner Participation" Requirement for Blight Condemnation

An important ingredient of a legislative response to *Kelo* is that owners of land condemned for blight have a realistic opportunity to participate in the subsequent redevelopment of the area.

One glaring disparity evident to the justices in the *Kelo* case is the profit made by municipalities and redevelopers on condemned land and the fact that the condemnees are barred from the fruits of improvement of their own lands. Government entities pay low just compensation awards for small residential or business parcels, then assemble them with neighboring parcels acquired through condemnation or its threat, and use the resulting high-value parcels for income or development subsidies. At the *Kelo* oral argument, several of the justices seemed concerned about this. For instance, Justice Kennedy asked whether there were "any writings or scholarship that indicates that when you have property being taken from one private person ultimately to go to another private person, that what we ought to do is to adjust the measure of compensation, so that the owner—the condemnee—can receive some sort of a premium for the development?" *Kelo* Transcript, Feb. 22, 2005, available at 2005 WL 529436 *15. Likewise, Justice Breyer observed: "So going back to Justice Kennedy's point, is there some way of assuring that the just compensation actually puts the person in the position he would be in if he didn't have to sell his house? Or is he inevitably worse off? *Id.* at *33-34.

This discrepancy between the city's gain and the owner's compensation is important for two reasons. The more obvious one is the unfairness to condemnees that the justices noted. Perhaps the more important reason, from the perspective of dealing with condemnation abuse, is that the discrepancy provides a strong incentive to mischaracterize

what are essentially economic revitalization projects as projects for the alleviation of blight.

Given the theory that the governmental purpose for blight condemnation is achieved by the removal of the blighting condition, there should be no objection to giving the condemnee of the subsequently remediated land a stake in its future development. Such a step also would encourage voluntary participation in development projects by individuals and small business owning blighted property, who may not have the wherewithal to improve it independently. An example of such a provision is California Health and Safety Code § 33380, which provides: "An agency shall permit owner participation in the redevelopment of property in the project area in conformity with the redevelopment plan adopted by the legislative body for the area."

Private Rights of Action

It is imperative that legislation limiting the use of Federal funding for projects involving eminent domain provides for a private right of action to enforce the statutory requirements. A narrowly drafted standing provision would limit the right to sue to property owners seeking to enjoin ongoing or impending condemnation actions with respect to their land, or for damages incurred as the result of a condemnation of their land contrary to statutory requirements.

Standing for such owners is appropriate. Since the object of the legislation would be their protection, they would be the statute's third party beneficiaries. Standing for such owners also is necessary, since it would be difficult to imagine that those state or local governments that benefit from abuse would enforce the statute's limitations with vigilance. It also strains credulity to think that the federal government would devote the necessary resources to investigation of such wrongdoing or prosecution of officials. This is especially so given the heavily fact-bound nature of the typical claim.

Plaintiffs alleging the violation of the statute by federal agencies should have the option of filing their complaints for both injunctive relief or money damages in the United States district courts or in the United States Court of Federal Claims. The Supreme Court has described its *Williamson County* ripeness rule as "prudential." *Suitum v.*

Tahoe Regional Planning Agency, 520 U.S. 725, 733 (1997). "Prudential" rules are rules of justiciability designed to prevent courts from hearing cases better resolved in another forum. When such rules are designed by the Supreme Court, they are not dictated by the Constitution, but, rather, reflect principles of judicial self-governance. See *Flast v. Cohen*, 392 U.S. 83, 95 (1968). Congress has the power to abolish or modify prudential rules governing justiciability. See, e.g. *Bennett v. Spear*, 520 U.S. 154 162, 164-65 (1997) (stating prudential standing requirements may be "modified or abrogated by Congress.").

A prime example regarding the ineffectiveness of reform of the Federal Government's stance on property rights if there is no private right of action is the fate of Executive Order 12630, "Governmental Actions and Interference with Constitutionally Protected Property Rights," 53 Fed. Reg. 8859 (Mar. 15, 1988). The Order trumpeted recognition that "[r]esponsible fiscal management and fundamental principles of good government require that government decision-makers evaluate carefully the effect of their administrative, regulatory, and legislative actions on constitutionally protected property rights." *Id.* at § 1(c). However, the Order was explicitly "not intended to create any right or benefit, substantive or procedural, enforceable at law. . . ." *Id.* at § 6. Not coincidentally, the Order has proven ineffective.

In 2003, a report was prepared for Congress by the then-General Accounting Office on "Regulatory Takings: Implementation of Executive Order on Government Actions Affecting Private Property Use," U.S. General Accounting Office Report 03-1015 (Sept. 19, 2003). As a GAO report subheading gingerly put it: "Agencies Report That They Fully Consider the Takings Implications of Their Planned Actions but Provided Little Evidence to Support This Claim." GAO Report at 16.

Conclusion

The hallmark of a society under the rule of law is that individuals may rest secure in their basic rights, and that the possessions and liberties of all are not continually "up for grabs." The Supreme Court's decision in *Kelo v. City of New London* encourages the talented and well-off to enhance their own good, and perhaps the short-run good of their community as well, by putting in play the homes and businesses to which others hold fast.

The Supreme Court has ruled as narrowly as possible that this approach to local economic development is constitutional.

If Congress is to discourage what in the long term is socially demoralizing and probably economically inefficient actions by government, it should respond to *Kelo* with legislation that forbids Federal funds from being used for condemnation for other than traditional public purposes. It must tightly define its terms and provide durable enforcement mechanisms.

Statement of Don and Lynn Farris

just wanted to briefly share with you our experience with Eminent Domain.

Our city, Lakewood, Ohio, did a study and decided that our business was in one of the most desirable areas of the inner ring suburbs of Cleveland. We had invested heavily in our property as well as other residents and business people. All of a sudden the plan to "update" our area was changed by the mayor and the developer in a memorandum of understanding signed well before it became public, that she would take our properties by eminent domain. No longer were we part of the plan but our property seized to be given to another private individual for their gain.

To accomplish this, she had to go through an exercise of a community development plan in which she had our area declared blighted. The reasons used for this "bogus blight" was the lack of a two car attached garage, central air, 2 full baths (not the 1 1/2 baths most of the homes had) and other amenities of new construction. One of the worst reasons used to blight us in my opinion was "diversity of ownership". The fact that people owned their own homes and businesses made it blighted. (The American Dream is not blight.) The definition used for blight met the criteria of 93% of the homes in our city. A city that was largely developed many years ago. This was highlighted in the Mayor's appearance on **60 Minutes** when she admitted to Mike Wallace that her home was as blighted as the homes that she was taking.

Additionally the Mayor had agreed to a TIF with the city backing the developer with 42 Million dollars in Bonds. They also planned to use Federal and State funds as well.

Fortunately for us, the Institute for Justice agreed to represent us. It is extremely difficult for an individual or small business to fight city hall with all the resources they bring to bear (e.g., our taxes). We were also fortunate in the fact that we live in a very politically active city and not only was a law suit filed on our behalf by the Institute for Justice, community groups went out and filled a referendum on the Project, an Initiative Petition on the Blight and a Charter Amendment to prevent this from happening again. The city with the developer and the attorneys representing the developers outspent us considerably.

Without the assistance of the Institute for Justice, which can't help everyone, we would have had no chance of winning this battle. They were able to assist us in making the big national media contacts such as the Fleecing of America and 60 Minutes who were not controlled by local politicians which helped us sway public opinion our way. In short, we won by a mere 47 votes. But our win was nothing short of a miracle. Those of us that had our homes and business threatened spent almost 2 1/2 solid years fighting to save them. The loss in productivity was amazing in our business alone. Hundreds of thousands of dollars were spent that could have been used to revitalize neighborhoods instead of fighting each other.

What cities need to rebuild is financial instruments to allow us to do this cost effectively and to address small infill projects. We need to be able to cost effectively fix the infrastructure. The slash and burn policy offered by Eminent Domain is not a good solution. I'm sure you are looking at research that shows the fallibility and the risk in these large non public projects. Putting all of your eggs in 1 basket is never a good idea. Doing many small projects, spreading the risk and allowing citizens to help rebuild their city is more successful.

The court has assumed that the city does a good job in evaluating their community. Normally I would agree. But having lived through this. I found that the city and the city officials did a great job of going through the motions of holding all the meetings. These were all meaningless steps to them. The law said they had to find a pretense for the blight - so they did. It didn't matter if the data was accurate or a reasonable person would have found it blighted. The whole thing was a charade so that they could transfer land from middle class Americans to a rich politically connected developer. Kelo makes it even easier. Now they don't even have to pretend. Please save the American dream of allowing people to own their own homes and businesses. Protect our right to own property.

Thank you,
Don and Lynn Farris

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News From:

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Statement of U.S. Senator Russ Feingold

At the Senate Judiciary Hearing on
"The Kelo Decision: Investigating Takings of Homes and Other Private Property"

September 20, 2005

Mr. Chairman, I want to thank you for raising the profile of a critically important issue by holding this hearing today on the Supreme Court's decision in *Kelo v. City of New London.* Government's use of its eminent domain power for the purpose of economic development, as occurred in the *Kelo* case, is without question an issue that raises significant constitutional and policy questions. It involves not only time-honored property rights and eminent domain principles, but also the proper roles of the legislative and judicial branches of government. As I have attended "listening sessions" across the state of Wisconsin this summer, I have been hearing from a large number of my constituents about this case. It is not often that a single Supreme Court case generates the public attention and passionate reaction that *Kelo* has, and I think Congress needs to carefully evaluate the issues at stake.

I want to note one irony in this discussion. The dissenters in the *Kelo* decision, whose arguments are quite powerful in my view, have been in the forefront of the federalism movement in the Court over the past decade that has seriously undermined Congress's ability to do anything about the decision. One might have thought, for example, that protecting citizens' rights not to have their property seized by a state or local government and given to another private party for purposes of economic development might be something that Congress could do under its power to enforce the 14th Amendment. But the Court, led by the very Justices who dissented in *Kelo,* may well have foreclosed that option. Therefore, legislative proposals to address the *Kelo* case all are based on Congress's constitutional spending power, which means that we can protect the rights of our constituents only if federal funds are used in exercising the eminent domain power. That may not be sufficient protection for constitutional rights. And, of course, some members of the Court want to constrain Congress's spending power, which would make it even more difficult for Congress to act.

We have an impressive array of witnesses with us here today to help us study this issue. The witnesses address the eminent domain issue from a variety of experiences and viewpoints – from a civil rights perspective, from the academic world, from city government, and from the standpoint of people whose homes and property have been directly affected by the implementation of redevelopment projects. I look forward to studying the testimony carefully as the Committee moves forward in considering the *Kelo* case, and as we attempt to determine the appropriate role for Congress in this important public policy debate.

Statement of Dan Freier

My father left my sister and I an 18 unit apartment building in Champlin Minnesota. It has a huge backyard on the banks of the Mississippi River. Although my sister and I own the property in a trust, all the Income goes to support my aging mother of 83 years. The Property has been in our hands for over 40 years and has no debt. We are happy to keep the building filled with good quality renters at a little less than Market rates. This is by choice and in keeping with my fathers spirit. A fully leveraged property would have to squeeze every dollar it could.

The city feels this land is better suited for Condo's and a much Higher up scale class of people. The senior couples, grandmothers, struggling young family's and single parents must give up their big green backyard and balcony views of the Mississippi. The ED justification is Economic Development and a Higher Tax basis.

The city is doing quite well and John Cox the Economic Development Director brags about how the Tax revenue has increased 4 fold over the last 7 years. So why must they take this land from our family if the city is well into the black? EGO Mr. Cox is kissing himself as if he should solely take credit for the Cities Prosperity.

There is no plan to provide any low income housing in the city, let alone this development. The renters have leases but will be given little compensation and it will not cover the higher rents forced upon them

It is public knowledge that the mayor plans on running for State Senate. This project will be an nice handprint to point at while running his campaign. Ironically this Mayor, Steve Boynton is an endorser of the National Affordable Housing Campaign, which seeks to preserve this type of inexpensive housing. The gap between the rich and the working poor/struggling middle class keeps on growing.

Higher Taxes so you can spend more, but on what. Well these renters will have to put up with smaller noisier apartments and views of a parking lot. So decrees the Regime at Champlin City Hall.

I started to managed the building while my father was still alive. I asked him why the rents were so low. He said he had enough money and people need a place to live.

My father was a Survivor of the Holocaust. He lost his first wife and child in the flames of Auschwitz. After liberation he returned to his father house in Poland. Many refugees had nowhere to go. Dad would take them in at night so they won't have to sleep out in the cold.

Latter in life he was rewarded. While on vacation, at a resort in Mexico, a stranger came up to him at poolside. "Are you Henry Freier?" he asked. "Yes" my father said. The man had recognized my father from the sound of his voice. He wanted to thank my father for letting him sleep on the floor of the kitchen 35 years earlier. They cried from joy, embraced and became close friends.

Well, I fall short in my father's shadow but what are these renters to do?

And what is this Power that claims my birthright. I doubt if I can find a property in such a nice location with the same ease of Management. What's worse is having to deal with the would be developer. He made me a low ball offer and said if I don't accept it the city will just take it for him. I felt like a little boy at Neverland Ranch.

Please stop this abuse by Egoistic Self promoting city officials that feel God is on their side. I don't know which one they pray to, but they surely have forgotten the poor.

Dan Freier
1305 W 34th St.
Mpls., MN 55408

September 18, 2005

The Honorable Arlen Specter

Chairman

Senate Judiciary Committee

711 Hart Building
Washington, DC 20510

Dear Sen. Specter:

I am writing to testify on the impact that eminent domain for "economic development" has had on my family's 55-year-old business. My grandfather purchased our wholesale shrimping business in 1949. Both my father and he have worked seven days a week for most of their lives in this hardscrabble business. The business has overcome many serious adversities over the decades including environmental upheaval, dozens of hurricanes, and even the entry of a Fortune 100 company (whose operations we now own and use). But my family's business has finally met an adversary that may destroy us: our own city government.

The City of Freeport teamed up with a multimillionaire heir developer to take my family's business property, which is entirely dependent on its access to the waterfront, and to immediately convey title to this developer for a marina project. We subsequently offered to share over half of the contested property with the developer, who simply decided that wasn't enough. In the one meeting the developer granted us, we asked him to drop his eminent domain threats so that we could negotiate in good faith. His response was that eminent domain was a tool at his disposal, and that "we're going to use this hammer." Then he proceeded to serve me with a lawsuit for speaking up against this injustice by my publishing of a website, http://scandalinfreeport.com.

Our case is the one that was mentioned by Sen. Cornyn during his June 30 press conference introducing his bill in response to the Supreme Court's Kelo decision, when he was asked if there were any examples of eminent domain abuse in Texas.

Our case also involves the use of federal funds in order to take our property by eminent domain and give it to our next-door neighbor. The U.S.
Army Corps of Engineers is intimately involved in working with the City and the developer, because the project is located along a federally regulated waterway.

The City of Freeport has literally rented out its power of eminent domain in what many, including myself, believe to be a quid pro quo arrangement. The developer, whose family also owns the local bank, donated the bank building (the only office building with elevators in

town) to the City of Freeport. A few months later, the City's Master Plan explicitly stated that it would use eminent domain to take property from my family and several other waterfront property owners, and convey title to the developer for his proposed marina project. The developer never approached us about his project. He simply went to the city fathers and said, "I want that property."

We would like to see the definition of federal funds involved in eminent domain projects expanded to include not only direct federal funds used in the assembly and construction of a project, but also to include other federal resources used to promote such projects, such as the hundreds of hours of federal employees' efforts being used to implement this legalized theft of my family's property.

Despite the passage of Texas' Senate Bill 7 during the second called session this summer, my family's property may yet still be taken. Freeport's City Manager testified in a deposition that the developer's marina project would employ 10-15 people. My family's business directly employs 56 people along the waterways in Freeport. Hundreds more workers can be found on the docks during the shrimp season. This project would result in the net destruction, not creation, of jobs.

Our case made nationwide news when we became the first victim of the Kelo decision. Within hours of the decision, the City of Freeport filed in federal court to condemn my family's property, cutting off access to our unloading facilities. Losing access to this property means that we would be unable to take in shrimp from boats as we have for over 50 years.

In this regard, the eminent domain abuse we are facing is even more egregious than the process in New London, where the City of New London would own the property and lease it for a nominal amount. Rep. Kucinich had it right when he asserted that Kelo turned every municipality into "a carnival of real estate bargains" on the backs of homeowners and business owners. Our case is on appeal at the Fifth Circuit Court of Appeals, and is currently stayed pending further legislative action on the federal, state, and local levels.

On behalf of my family's business and of the hundreds of homeowners and business owners all across the country who eminent domain cases are stayed pending legislative action on this subject, I urge the committee to pass meaningful restrictions on eminent domain by municipal governments in the name of "economic development."

Yours truly,

Wright Gore III

Western Seafood Co.

Freeport, Texas

Dear Sirs,
I am currently dealing with a situation where The City of Shady Cove, Oregon is using it's powers of eminent domain to take a portion of my land for the benefit of a private developer. I have lived in this town for 20 years and have been unable to get a response from the city or the developer. I have offered to sell my property to the developer many months ago but he evidently feels my property is not worth what I am asking. I even lowered my offer by 30% and I still get ignored. So the rich and powerful developer uses his friends at city hall to do his bidding for him. The part of my land they want is to make a dead-end city street into an upscale gated community. This obviously does not benefit "all the citizens of Shady Cove" as is the spin from the Mayor of this town. The City of Shady Cove is financially poor with the city hall open only a few hours a week, we have inadequate police protection and our sewer rates keep going up every few months all because the city claims to have no money. Yet, they are willing to spend many thousands of taxpayer dollars to take my land from me so the developer can get what he wants. This is immoral and just plain wrong. I have no money to fight these people and it looks like in 39 days from now the city will own my land. They will give it to the developer to improve and then the developer will "give it back" to the city as a dead end city street to his private development.
Michael B. Hetzel
mbhnfuic1@earthlink.net

Testimony of Fred Jenkins
Before the Senate Judiciary Committee of the U.S. Congress
September 20, 2005

I thank Chairman Specter and the rest of the Senate Judiciary Committee for the opportunity to testify about legislation to stop federal funding to local governments that abuse eminent domain for private development.

My name is Fred Jenkins, and I am the Pastor of St. Luke's Pentecostal Church in North Hempstead, New York. After years of meeting in a rented basement and saving up our money, we were able to find a permanent home. But it was taken from us by the North Hempstead Community Development Agency, which uses funding from HUD, for private retail development. Six years later, the place we wanted to call home sits empty. Our experience has happened countless times around the country, and the *Kelo* decision has further encouraged local governments to continue seizing private property for private development.

I'd like to share my story with you, to help you understand how eminent domain affects real people.

I founded St. Luke's in 1979, and over the years, our congregation grew to almost 100 parishioners. Since 1990, St. Luke's has rented the basement of a building in the Prospect Avenue neighborhood of North Hempstead. In the early 1980s, we began raising and saving money to purchase a permanent home for our beloved church. For years, members sacrificed and contributed money and time to our building fund. We're certainly not a wealthy church, but everyone pitched in.

We began looking for a building to call our own in 1994. Some time that same year, I spoke to the pastor of Jeremiah Baptist Church, who wanted us to purchase their land that had a mostly-completed church structure on it. Jeremiah had all of the permits for their building, but not the financing to finish its construction.

We'd looked hard for a perfect place for our church, and we all agreed that this was it. Nothing else fit St. Luke's needs like this building. The size would fit all 100 of us, and the price was manageable. It was where most of my parishioners live, and in the area where we help people. My congregation has always been very active in our community. We pay for members' funerals, help the homeless, assist parishioners with drug counseling, and provide rent money and heating oil to needy families.

We purchased the land at 822 Prospect Avenue and the almost-completed church building that December. Before purchasing the building and getting our mortgage, we obtained a list of exactly what we would need to do to get all the necessary permits to finish construction. The Commissioner of the Department of Building even shared our enthusiasm over our project.

The congregation was so excited to finally have a permanent home. We were eager to start building. People went down to the site and began cleaning up. We spent considerable money responding to the list of things we needed to do to get the permits. We had completed almost everything and submitted our application for a new building permit just four months after we bought the property. We also took out a mortgage of more than $207,000 – we are still making mortgage payments.

In 1998, we were denied our building permit because we couldn't provide enough off-street parking. Apparently, the NHCDA was developing the building across the street from ours with retail, and the town thought there would be too many cars around our church – this suddenly became our problem to solve.

For a year and a half, we fought to get our permit. Meanwhile, not one person from the Town told us that our property was going to be condemned. During this time, the congregation became very discouraged. We were still in a rented space in the basement of a retail building that was too small to accommodate the congregation. We lost around 50 members.

In November 1999, we received a letter from the NHCDA offering to buy our property for $80,000. This was $50,000 less than what we had paid for the property and far less than our mortgage. This was the first time we heard that the Town had a plan to take our property. That March, the Town officially seized our new home.

We had no idea that our new building had been slated for redevelopment in 1994. Nobody bothered to tell us this during the discussions about the building permits or when we were struggling to get the parking variance. While the Commissioner of the Department of Building told us how excited he was over our redevelopment of the property, he not once mentioned that the Town planned on seizing it. Even when the Executive Director of the NHCDA testified against issuing us the parking variance, he never pointed out that St. Luke's was only wasting its time and money because he planned on condemning the property whether or not we solved *their* parking problem.

When St. Luke's tried to object to the condemnation, the NHCDA argued that our opportunity to object had been lost in 1994 – before we even owned the property! At that time in New York, property owners only had 30 days to object to a redevelopment plan after it was passed, even if their property wasn't yet condemned. We filed a federal lawsuit, challenging the New York procedures that allowed us to lose our property. After the NHCDA took over our new church and during the federal lawsuit, we discovered that the time limit didn't even apply to us – but it was too late. The state court refused to reopen our case. After years of fighting, we lost our church.

St. Luke's has always taken care of the community. And in return, we were kicked off our property and it was taken for retail development. It is now being used to store building materials for the construction going on across the street. And we're still in the basement of the space we've rented for years, back at square one, but with half the

congregation and with broken hearts. We're still paying mortgage on the property that was seized from us, and we have yet to receive compensation.

We never would have purchased the property had we known the Town planned to acquire it for retail development. We were so excited when we found that half-built church for sale, right in our own neighborhood. After two decades of saving, my parishioners were so proud to finally be able to move into our own church. The Town seized that excitement and pride when it seized our new home and forced us to stay in our rented basement.

Eminent domain abuse affects real people. Homeowners, businessmen and churchgoers need the protections guaranteed by the Constitution that their property is their castle. The Supreme Court failed to enforce these protections, but you have that opportunity now. This country is full of people like my parishioners, who work hard and save up to buy something to call home. I ask you to please stop funding local governments like North Hempstead that use federal dollars to take away homes, businesses, and churches for private gain.

Thank you very much for the opportunity to testify before this committee.

Kelo v. City of New London: What it Means and the Need for Real Eminent Domain Reform

In *Kelo v. City of New London*, the U.S. Supreme Court held that the Constitution allows governments to take homes and businesses for potentially more profitable, higher-tax uses. In the aftermath of that decision, the defenders of eminent domain abuse have already begun desperate attempts to keep the power to take homes and businesses and turn them over to private developers. And they are struggling to convince outraged Americans that ordinary citizens shouldn't care. The beneficiaries of the virtually unrestricted use of eminent domain – local governments, developers, and planners – will frantically lobby to prevent any attempt to diminish their power.

Their main message is that nothing has changed and there's nothing to worry about, because local officials always have the best interests of their citizenry at heart. Nothing could be further from the truth. The *Kelo v. City of New London* decision represents a severe threat to the security of all home and business owners in the country. Not only does it give legal sanction to a whole category of condemnations that were previously in legal doubt, but it actually encourages the replacement of lower income residents and businesses with richer homeowners and fancier businesses. The vast majority of Americans understand what is at stake, even if many so-called experts do not.

What the Supreme Court Actually Said in *Kelo*

The Court ruled that 15 homes in the Fort Trumbull waterfront neighborhood of New London, Connecticut, could be condemned for "economic development." There was no claim that the area was blighted. The project called for a luxury hotel, upscale condominiums, and office buildings to replace the homes and small businesses that had been there. The new development project would supposedly bring more tax revenue, jobs, and general economic wealth to the city. Connecticut's statutes allow eminent domain for projects devoted to "any commercial, financial, or retail enterprise." Conn. Gen. Stat. § 8-187.

The Fifth Amendment to the U.S. Constitution states, "[N]or shall private property be taken for public use, without just compensation." Yet in the *Kelo* decision, Justice Stevens explains that the fact that property is taken from one person and immediately given to another does not "diminish[] the public character of the taking." The fact that the area where the homes sit will be leased to a private developer at $1 per year for 99 years thus, according to the Court, has no relevance to whether the taking was for "public use." Instead, the *Kelo* decision imposes an essentially subjective test for whether a particular condemnation is for a public or private use: Courts are to examine whether the governing body was motivated by a desire to benefit a private party or concern for the public. Thus, because the New London city officials intended that the plan would benefit the city in the form of higher taxes and more jobs, the homes could be taken.

The Court's decision allows cities to take homes or businesses and transfer them to developers if they think the developers *might* generate more economic gains with the property. The Court also rejected any requirement that there be controls in place to ensure that the project live up to its promises. According to the majority, requiring any kind of controls would be "second-guess[ing]" the wisdom of the project.

Worse yet, cities do not need to have any use for the property in the foreseeable future in order to take it. In fact, the opinion encourages cities to condemn first and find developers later; the Court claims that it is "difficult to accuse the government of having taken *A*'s property to benefit the private interests of *B* when the identity of *B* was unknown." In the future, then, cities can negotiate a sweetheart deal but wait until after the condemnation to actually sign it. Or they can simply take property first and market it to developers later. Some of the homes in Connecticut were being taken for some unidentified use and others for an office building that the developer had stated it would not build in the foreseeable future.

So, according to the Supreme Court, cities can take property to give to a private developer with no idea what will go there and no guarantee of any public benefit.

If the majority thinks they offered any meaningful protection to home and business owners, they are completely disconnected from reality. The decision suggests some extremely minor limits to the use of eminent domain for private development. Those few condemnees in cities that don't bother to do a plan, fail to follow their own procedures, or actually engage in corruption may still find some hope in federal court. But there is almost always a plan; cities are quite adept at following their own procedures; and most cases of eminent domain abuse do not involve outright and blatant corruption, such as bribes. Consequently, the vast majority of individuals are left entirely without federal constitutional protection.

The Supreme Court's *Kelo* Decision Changes the Law and Threatens All Home and Business Owners.

Some commentators are claiming that *Kelo* didn't change anything and therefore no one needs to worry about it. This statement is wrong on two levels: *Kelo* did change the law, and to the extent that governments were already taking homes and businesses for private commercial development, that's cause for greater concern, not less. *Kelo* threw a spotlight on an already-existing practice that an overwhelming majority of people find outrageous and un-American. More importantly, by declaring that there are virtually no constitutional limitations on the ability of cities to take property from A and give it to B, the Court invited more abuse and thus made the problem of eminent domain abuse much worse.

The law before *Kelo* did sometimes allow condemnation of property that would result in private ownership, but each of these situations was extremely limited.[1] None

[1] *National Railroad Passenger Corp. v. Boston and Maine Corp.*, 503 U.S. 407 (1992) (railroad track transferred to another common carrier); *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229 (1984) (land ownership transferred to lessees as part of program to break up remnants of feudal land system dating from Hawaii's pre-state monarchy); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) (pesticide research results available to later pesticide producers; obviously related to public health); *Berman v. Parker*, 348 U.S. 26 (1954) (single unblighted building in severely blighted area taken as part of large project to clear slum and redevelop); *Strickley v. Highland Bay Mining Co.*, 200 U.S. 527 (1906) (aerial bucket line for mining ore, available to any user); *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112 (1905) (condemnation for construction of irrigation ditch as part of statewide irrigation infrastructure program); *Head v. Amoskeag*, 113 U.S.

necessitated the decision of the majority in *Kelo*.

Indeed, four members of the Court agreed that its prior decisions did not dictate the result in *Kelo*. Justice Sandra Day O'Connor broke those previous cases into three categories: (1) transfers of property from private ownership to public ownership; (2) transfer of property to a privately owned common carrier or similar public infrastructure; (3) transfer of property to eliminate an identifiable public harm. But, as pointed out by Justice O'Connor, "economic development" fits into none of these categories. Now, government may condemn property as long as there is a plan to put something more expensive there.

The text of the Constitution does not change, so the question in any constitutional case is how the Court will apply that law to the facts. How far will it go in either enforcing or ignoring constitutional rights? For example, we know that the First Amendment protects free speech. But how far will the Court go in enforcing that right? The Court has applied free speech protections to everything from advertising and the internet to criticism of the government and Nazi marches. In one sense, of course, the "law" did not change; the Constitution reads the same, and the Court still says that free speech is important. But in fact, each of these decisions did change the law, because they applied it to a new situation. In the same way, in *Kelo*, the Court applied the Fifth Amendment to a different and far more extreme type of use of eminent domain and upheld it. In *Kelo*, the Court went to extraordinary lengths to ignore the constitutional mandate that property only be taken for "public use," and thus went much further than it ever had before.

So when some law professors say that nothing has changed, what they mean is that the Court's general statements about public use have not changed. The Court has said for a number of years that it applies great deference to government decisions that a condemnation served a public use. At the same time, the Court had always said that there was a limit, that government could not take property from A in order to give it to B for B's private use. But in constitutional law, it's the application of general statements to facts that tells how seriously the Court takes constitutional rights. The question in every case, therefore, was whether the particular use of eminent domain fell into the category of deference or whether it went too far and would be held unconstitutional. Before *Kelo*, we knew that government could take property in deeply troubled, almost uninhabitable areas and transfer it to private developers. Now we know that government can take **any** property and transfer it to private developers. Only a lawyer would be unable to tell the difference.

Commentators are right that local governments, as a matter of practice, have been using eminent domain to assist private developers on a regular basis for years. That fact should be a cause for deep concern, not comfort that nothing has changed. More than 10,000 properties were either taken or threatened with condemnation for private development in a five-year period.[2] Because this number was reached by counting properties listed in news articles and cases, it grossly underestimates the number of condemnations and threatened condemnations. In Connecticut, the only state that keeps separate track of redevelopment condemnations, we found 31, while the true

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9 (1885) (riparian rights for private mill; Court explicitly refused to hold that economic benefits justified condemnation).

[2] Dana Berliner, *Public Power, Private Gain: A Five Year, State-By-State Report Examining the Abuse of Eminent Domain* (2003) (available at http://www.castlecoalition.org/report/).

number was 543. Now that the Supreme Court has actually sanctioned this abuse in *Kelo* and refused to provide any meaningful limits, the floodgates to further abuse have been thrown open. Home and business owners have every reason to be very, very worried now. As Justice O'Connor noted in her dissent, "The specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping center, or any farm with a factory."

So while there may be no change to the general idea of deference to legislative determinations of public use, there has been a different, more far-reaching application of it. That new application will change property ownership as we know it. That is not an overstatement. There had been many condemnations for private use going on before this decision. But cities still knew that there was no case upholding eminent domain for economic development. That provided some restraint or caution. Now, there is no reason to show any restraint.

Eminent Domain Is Not Necessary for Economic Development.

City officials often claim that without the power of eminent domain, they will be unable to do worthwhile projects and their cities will fall into decline.

These claims are at best disingenuous, and at worst outright dishonest. There are many, many ways to encourage economic growth that do not involve taking someone else's property. These include, for example, economic development districts, tax incentives, bonding, tax increment financing, Main Street programs, infrastructure improvements, relaxed or expedited permitting, and small grants and loans for façade improvements.[3] Will a developer be able to put condos and a superstore on whatever piece of prime real estate it selects without using eminent domain? Maybe, maybe not. Will the city be able to have economic development? Absolutely.

Development happens every day, all across the country, without the use of eminent domain. At the same time, projects that do use eminent domain often fail to live up to their promises, and they also impose tremendous costs – both economic and social – in the form of lost communities, uprooted families, and destroyed small businesses. Urban renewal is now widely recognized as one of the worst policy initiatives ever undertaken in our cities, destroying inner cities and displacing thousands of minorities and elderly citizens.[4] But at the time, of course, it was touted as a brilliant tool of revitalization. The condemnation of the Poletown neighborhood in Detroit for a General Motors manufacturing plant in 1981, one of the most infamous economic development condemnations, failed to bring prosperity to the city. Indeed, it cost the city millions of

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[3] *See* Brief *Amicus Curiae* of John Norquist on behalf of Petitioners in *Kelo v. City of New London* (John Norquist is the former mayor of Milwaukee and President of the Center for New Urbanism); Brief *Amicus Curiae* of Goldwater Institute, *et al.* on behalf of Petitioners in *Kelo v. City of New London*. (All of the amicus briefs cited in this paper are available at http://www.ij.org/kelo.)

[4] *See* Mindy Thompson Fullilove, *Root Shock: How Tearing Up City Neighborhoods Hurts America, And What We Can Do About It* (One World 2005); Wendell Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1 (2003); Brief *Amicus Curiae* of Jane Jacobs on behalf of Petitioners in *Kelo v. City of New London*; Brief *Amicus Curiae* of NAACP, AARP, *et al.* on behalf of Petitioners in *Kelo v. City of New London*; Brief *Amicus Curiae* of Better Government Assoc., et al. on behalf of Petitioners in *Kelo v. City of New London*.

dollars and may well have destroyed more jobs than it created.[5] Defenders of eminent domain for private development present a false choice between protecting people's rights and economic development. In fact, we can have both.

Eminent Domain Is Not Used as a "Last Resort."

Many municipal officials claim that they use eminent domain responsibly and only as a "last resort." This is simply not true. In most cases, the threat of eminent domain plays an important role from the very beginning of negotiations. Cities know that most home and business owners will be unable to afford the tremendous legal costs associated with fighting eminent domain; this fact gives cities a strong incentive to threaten property owners with condemnation. People are told that if they do not sell, their home or business will be taken from them and they will get even less money. Cities plan projects on the assumption that there is no need to incorporate existing homes or businesses, because they can simply be taken. After cities design and pursue such projects, current owners are told to sell. If they do not, then eminent domain becomes a "last resort." In practice, the power of eminent domain often makes voluntary sales less likely, because owners who would have sold if treated with respect will refuse to once they have been threatened.

Changes to Planning and Hearing Procedures Will Not Stem the Tide of Eminent Domain Abuse.

Various commentators are suggesting that legislators can take a "moderate," "sensible" approach to the *Kelo* decision and just require a process with more public input and better planning. These measures will do nothing to protect the rights of home and business owners. The City of New London had a lengthy process, with studies, plans and public hearings. None of this lengthy process made any difference, however, because a deal had been cut before the process even began. Local legislators typically know the outcome they want and then follow the procedures necessary to get it. City councilors and planning officials don't even need to listen at public hearings, because they already know how they are going to vote.

Better planning is also no solution and will do nothing to protect home and business owners from losing their property to private developers. Planners call for even more of the kind of planning that, if implemented, necessitates forcing some people out of their homes and businesses to make way for other, supposedly better-planned uses. Thus, we hear calls for comprehensive plans that outline every future use of property in the city and integrated redevelopment plans that implement the comprehensive plans for replacing current owners with other ones. While all of this additional planning will no doubt bring lots of money to planners, it will not prevent the use of eminent domain for private commercial development and in practice will probably encourage more abuse.

The Floodgates Are Opening and the Situation Will Only Get Worse If No Legislative Action Is Taken.

In the wake of the U.S. Supreme Court's decision in *Kelo v. City of New London* upholding the use of eminent domain for private development, the floodgates are

[5] *See* Brief *Amicus Curiae* of Jane Jacobs on behalf of Petitioners in *Kelo v. City of New London.*

opening to abuse. Already, the ruling has emboldened governments and developers seeking to take property from home and small business owners. Despite claims that eminent domain will be used sparingly, there have been a flood of new condemnations and new proposals of eminent domain for private commercial development after the *Kelo* ruling. In the first two months after the decision, more than 30 municipalities began condemnation proceedings for private development or took action to authorize them in the near future. Thousands of properties are now threatened with eminent domain for private commercial development, and those numbers will continue to swell unless state legislatures and Congress listen to their constituents and end the abuse of eminent domain.

Creating an Effective Statutory Protection Against Eminent Domain Abuse

Basic elements of a good law:

The outline below sets forth the basic elements of a law that will genuinely protect citizens from losing their land to other private parties for private development.

- Remove statutory authorizations for eminent domain for private commercial development.
- Explicitly forbid eminent domain for private commercial development and/or require that condemned property be owned and used by government or a common carrier.
- Prohibit "ownership or control" by private interests. In many cases, a government entity will technically own the property but lease it for $1 per year to a private party.
- Ensure that the statute or constitutional amendment applies to all entities that engage in eminent domain, using a term like "all political subdivisions."
- Clearly state any exceptions, i.e., any circumstances where property can be taken for private commercial entities. The main exception that should be made is private entities that are "common carriers" – these include railroads and utilities.
- If blight is an exception, revise blight definitions to clearly define the type of blight required to justify the use of eminent domain and require that the property has serious, objective problems before it can be taken for private development.
- Disentangle the designation of a redevelopment area for funding purposes and an area where property may be taken for private development. This allows cities to still get funding and acquire property voluntarily but prevents the use of eminent domain for private development.
- Require government to bear the burden of showing public use or blight, or at least put the parties on equal footing, with no presumption either way. The current rule typically means that the government's finding of public use or blight is conclusive, unless the owner can prove fraud, arbitrariness, or abuse of discretion.
- If allowing condemnation of unblighted property in blighted areas, require that the property be essential for the project.

Additional useful provisions

- Have blight designations expire after a certain number of years.
- Give owners the opportunity to rehabilitate property before it can be condemned.
- Return property to former owners if it is not used for the purpose for which it was condemned.

Common pitfalls in proposed reform legislation:

- Giving a complete exemption for any property taken under urban development laws and failing to change the definition of blight.
- Forbidding eminent domain for economic development without defining economic development.
- Forbidding condemnation for "solely" or "primarily" for economic development or private benefit. Whether a particular condemnation is solely or primarily for a particular purpose requires a judge to look at the intent of the governmental decision-makers. The legality of eminent domain should not depend on the subjective motivations of city officials, and proving intent as a factual matter is extremely difficult.
- Creating specific exemptions for pet projects. This will set a bad precedent for the future.
- Forbidding only ownership by private parties but not control. This leaves open the common practice of sweetheart lease arrangements.
- Making loopholes or accidentally omitting some of the political entities that engage in condemnation for private development.

Testimony of Susette Kelo
Before the Senate Judiciary Committee of the U.S. Congress
September 20, 2005

I thank Chairman Specter and the rest of the Senate Judiciary Committee for the opportunity to testify about legislation to cut off funding to governments that abuse eminent domain law.

My name is Susette Kelo and I live in New London, Connecticut. I am the Kelo in *Kelo v. City of New London* – the now-infamous U.S. Supreme Court case in which the Court ruled that private property, including my home, could be taken by another private party who promises to create more jobs and taxes with the land. Just last week, three of my neighbors were served with eviction notices, telling them they have between 30 and 90 days to leave their homes. I received just such a notice five years ago, the day before Thanksgiving, which marked the beginning of my fight to defend what is rightfully mine. A news report recently informed me to expect another notice to leave in the coming days. Thankfully, the Governor has just recently ordered that the evictions be halted – at least for now, while the state contemplates changing its eminent domain laws.

I sincerely hope that Congress will do what judges and local legislators so far have refused to do for me and for thousands of people like me across the nation: protect our homes under a plain reading of the U.S. Constitution. Federal lawmakers should pass legislation that will withhold federal development funding for cities that abuse eminent domain for private development – such as the one that could take my home, which received $2 million in federal funds. What we have now at the local, state and federal level amounts to "government by the highest bidder," and that has got to stop.

I would like to tell you a little more of my story so you can hopefully see why the law needs to be changed.

In 1997, I searched all over for a house and finally found this perfect little Victorian cottage with beautiful views of the water. I was working then as a paramedic and was overjoyed that I was able to find a beautiful little place I could afford on my salary. I spent every spare moment fixing it up and creating the kind of home I always dreamed of. I painted it salmon pink, because that is my favorite color.

In 1998, a real estate agent came by and made me an offer on the house on behalf of an unnamed buyer. I explained to her that I was not interested in selling, but she said that my home would be taken by eminent domain if I refused to sell. She told me stories of her relatives who had lost their homes to eminent domain. Her advice? Give up. The government always wins.

So why did the City and the New London Development Corporation (NLDC) want to kick us out? To make way for a luxury hotel, up-scale condos, and other private developments that could bring in more taxes to the City and possibly create more jobs. The poor and middle class had to make way for the rich and politically connected. As quickly as the NLDC acquired homes in my neighborhood, they came in and demolished them, with no regard for the remaining residents who lived there, most of whom were elderly.

In late 1999, after graduating from nursing school, I became a registered nurse and began working at Backus hospital in Southeastern Connecticut. Early in 2000, the public hearings were eventually held, and the Fort Trumbull plan was finalized. Our homes were not part of that plan. By that time, I had met a man who shared my dreams and the two of us spent our spare time and money fixing up our house. We got a couple of dogs, we planted flowers, I braided my own rugs, we found a lot of antiques which were just perfect for our home, and Timmy – who is a stone mason – did all kinds of stone work around the house. When I first bought it, it had been run down. Today it is beautiful.

On the day before Thanksgiving in 2000, the sheriff taped a letter to my door, stating that my home had been condemned by the City of New London and the NLDC. We did not have a very pleasant holiday, and each Thanksgiving since has been bittersweet for all of us; we're happy that we are still in our homes, but afraid we could be thrown out any day. The following month, the Institute for Justice agreed to represent us. Without them, none of us would be here today. None of us could have afforded the tremendous legal costs that we would have incurred over the years.

A year later, in 2001, we went to trial in New London, and after hearing 10 different reasons why our homes were being seized – from so-called "park support," to roads, to a museum, to warehousing – the judge decided no one could give him a straight answer and he overturned the demolition sentences on our homes.

Then one night in late 2002, I was working at the hospital in the emergency room when a trauma code was called and a man who had been in a car accident was wheeled into the trauma room. To my horror, after several minutes of working alongside doctors and nurses I realized it was my partner Tim. For two weeks he lay in a coma and we did not know if he would live or die. He finally pulled through and although permanently disabled, it was a miracle he was finally able to walk out alive two months later.

While he was still hospitalized, the Connecticut Supreme Court heard our case. A while later, after Tim was well enough, we made it official by getting married. We still had no idea if we would get to keep our home, as the Connecticut court would take 15 months to reach a decision. When they ruled against us by a 4-3 decision, we were stunned. Our lives were on hold for another year as we waited for the U.S. Supreme Court to hear our case. We had high hopes that the Supreme Court would protect our home, but by one vote, they let us and all other Americans down.

My neighborhood was not blighted. It was a nice neighborhood where people were close. Even though many of the homes have been destroyed, the people that remain are still neighbors and good friends. We don't want to leave.

None of us asked for any of this. We were simply living our lives, working, taking care of our families and paying our taxes.

The City may have narrowly won the battle on eminent domain, but the war remains, not just in Fort Trumbull but also across the nation.

What is happening to me should not happen to anyone else. Congress and state legislatures need to send a message to local governments that this kind of abuse of power will not be funded or tolerated.

Special interests – who benefit from this use of government power – are working to convince the public and legislatures that there isn't a problem, but I am living proof that there is. This battle against eminent domain abuse may have started as a way for me to save my little pink cottage, but it has rightfully grown into something much larger – the fight to restore the American Dream and the sacredness and security of each one of our homes.

Thank you very much for your time.

Statement of Senator Herb Kohl
Senate Judiciary Committee Hearing
"The Kelo Decision: Investigating Takings of Homes and other Private Property"
September 20, 2005

Thank you, Mr. Chairman, for holding this very timely hearing today. One of the most fundamental liberties guaranteed to us by our Constitution is that the government cannot seize our property except when necessary for public use, and then only after paying just compensation. This protection – enshrined in the Bill of Rights – places strict limits on the government's power of "eminent domain" so as to protect our homes from being seized by the government to benefit any private interests.

Unfortunately, a 5-4 decision by the Supreme Court last term in the Kelo case has placed this liberty at risk. In this case, the Supreme Court allowed the city of New London, Connecticut to seize private homes against the wishes of their owners in order to permit the creation of a private industrial park on which the pharmaceutical giant Pfizer would build a "global research facility." This land seizure endorsed by a majority of the Supreme Court will force an 87 year old woman to lose her house, a house owned by her family for over 100 years and in which she has lived since her birth.

While we can all agree that there may be some occasions when it is necessary for the government to take private property from private landholders for the public good – for example to build a public park or a railroad, or to clear dilapidated and unsafe slum housing for a public housing project -- if the government pays the landholder fair compensation. But the land seizure endorsed by the Supreme Court in New London, Connecticut is not such an example. It is simply unjust for the government to order an that honest, hard working citizens to abandon their lifelong homes so that a large corporation can build an industrial park. To permit such a "taking" places at risk one of our most fundamental liberties – the right of every citizen to be secure in his or her property.

Defenders of New London's actions argue that industrial park will create jobs and tax revenues. This logic would imperil virtually any private property, as almost anyone's house or business could be put to better use on the grounds of "economic redevelopment."

The Supreme Court majority's misguided ruling in Kelo requires that we in Congress now consider how to safeguard citizens' basic Constitutional right to be secure in their private property from arbitrary seizures by government. We must insist that citizen's property is only taken when needed for truly public uses, and not merely to benefit a wealthy private developer on the pretext of "economic redevelopment." I believe our hearing today will be an important step to protecting this most basic Constitutional right.

U.S. SENATOR PATRICK LEAHY

CONTACT: David Carle, 202-224-3693 VERMONT

Statement of Senator Patrick Leahy
Ranking Member, Senate Judiciary Committee
Eminent Domain Hearing
September 20, 2005

Mr. Chairman, Vermont was the first state to include a takings clause in its Constitution, so we Vermonters stand second to none in our respect for private property rights.

The language of the Vermont Constitution, and our U.S. Constitution, make clear there are times when private property can appropriately be used for public purposes – so long as the taking is for a truly "public use" and so long as the owners receive just compensation. The most difficult question is what constraints and procedures should control the exercise of this significant power.

But even where the justification is widely understood -- for example, to build a needed highway -- that will not alleviate the pain felt by property owners who are in the path of that highway. Multiply that pain over and over again when families are displaced from their homes.

Ms. Kelo, I am one of probably millions of Americans who were distressed when we learned your story and who are concerned about what happened to you.

I intend to work with others on this Committee to fashion some solutions – some better, fairer and more sensible ways for local governments to use, and not use, the significant powers they have over property owners.

It has been said that tough cases make bad law. It could also be said that bad law can lead to bad remedies. As we work on solutions, we must use care and caution and

foresight, as well as hindsight.

I have heard about legislative proposals to address this decision which could potentially benefit land speculators wanting to make a quick buck or major corporations wanting to gain more power to seize private property to install pipelines, create utility rights of way, or even to build privately owned for-profit facilities such as baseball stadiums.

I am also concerned about people like Ms. Kelo even when their land is taken for completely legitimate public uses. The distress a family suffers from having their home condemned can be just as painful if it is taken to build a road or a school.

The Uniform Relocation Act, which applies to federal use of eminent domain powers, contains some useful ideas that could improve fairness and help affected families.

I have one final point, Mr. Chairman. When Congress exercises its power to impose new conditions on local and state governments in areas that local and state governments have traditionally handled, we should move cautiously to prevent unintended consequences.

I know that many, many states are already acting to impose additional restrictions and establish new procedures governing the use of the eminent domain power. As we act in Congress, we should do so with respect for and awareness of the remedies the states are also considering. I want to thank the members of this panel.

I hope that Professor Merrill of Columbia University Law School, Mayor Perez of Hartford, Connecticut, and Professor Eagle of George Mason University will help the Committee in figuring out solutions to the problems which will be highlighted by other members of the panel.

# # # # #

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September 21, 2005

ATTENTION: SENATE JUDICIARY COMMITTEE

I am Dorothy Littrell, a 77-year old great-grandmother, who became involved in April, 2004 in a fight to stop the use of eminent domain by the Ogden Redevelopment Agency (RDA) in Ogden, Utah to seize private property from some 50 business owners and home owners.

I became involved when I saw the injustice being done to these property owners by the use of a blight study to justify the use of eminent domain. I actually bought a lot in the condemned area and a set of the Utah Code (Unannotated) so that I could learn about RDA's and how to file my own law suit against Ogden City because residents in the condemned area did not have the education nor resources to fight back.

Even though I am a CPA I had not realized the abuse of power by RDA's. Elected officials, the mayor and City Council members, can go into their positions as the RDA members and circumvent the wishes of the electorate. I experienced this in North Ogden regarding a $5 million swimming pool that the voters had defeated by 67% on a bond issue.

The Ogden RDA members voted to use eminent domain to seize property to sell to Wal-mart for $2.1 million less than it was costing to acquire the property. They planned to borrow the $2.1 million deficiency by pledging sales tax revenue for five years from Wal-mart to pay off the Revenue bonds they were going to issue to subsidize Wal-mart to

come to Wall Avenue in Ogden.

I organized my opposition from the general public in Ogden as well as homeowners in the condemned area. We held press conferences and rallies and TV appearances to educate the general public. The movement spread across the State.

I filed my lawsuit and went to court pro se in January, 2005 because I could not afford to hire an attorney at $250.00 per hour. In the meantime, Utah Senator Bramble introduced an eminent domain bill which the Utah Senate passed with no dissenting votes and which Governor Huntsman signed into law in March, 2005.

I became involved because of the abuse of constitutional rights by the Ogden RDA against property owners. Intimidation was used. I experienced it personally. The amounts offered for the properties was not sufficient to replace the properties being seized. The amounts offered discriminated against some owners. As the deadline approached the RDA offered some owners a bonus to sign an option to sell. Ogden City RDA members definitely violated the law in trying to obtain the properties.

I urge you to pass legislation to prohibit the use of eminent domain to seize private property to sell it to another private party. I urge you to look at the abuses of RDA's. RDA's do not always result in the creation of new jobs.

Ogden City, Utah is a perfect example of failed RDA projects. Ogden City now owes $76 million in dead RDA projects which did not turn out to be the bonanza the City Fathers represented them to be.

Greetings All,

I, Bruce R. MacCloud, feel compelled to inform all Americans of the nightmare and abuse of the use of eminent domain to my family and what's happening to the residents in the City of Long Branch, N.J.. This is not what our forefathers created the Constitution of the United States, and in particular, the 5th Amendment. To allow a developer to take the homes and property of the residents, and allow him to build luxury condominiums for his profit.
26 years ago, I purchased my 3 story, 17 room, 100 year old Victorian style home with a full basement. It was situated just 300 feet from the Atlantic Ocean. My profession is and has been in the historical restoration of buildings. For 23 years I toiled with the restoration of my home, from below grade, to the chimney caps above the roof. I created a family here in Long Branch, N.J., was a part of the community, and had a small business here.
10 years ago, the city of Long Branch, N.J. develops an idea to redevelop parts of the city, 6 redevelopment areas,
To date each area keeps expanding, using eminent domain as the mechanism to exploit this plague on the residents of it's city. They first started by proposing infill redevelopment of the oceanfront. Then they designate a developer- Joe Barry of the Applied Development Organization, who is in prison at this time, for bribery, extortion and embezzlement of elected politicians and officials in another city in N.J.--to use eminent domain to wipe out an entire existing neighborhood, to profit a crook. The city blighted my neighborhood first, then they go thru (what they say) legal procedures, at warp speed.
As far as the general public goes, just up until this year, not many people were aware of what eminent domain is. Now, after victimizing innocent people by taking their homes, their domain, destroying some family's, people are dying due to the stress caused by this threat of loosing their equity and the torture to their existence for not knowing the future of their homes.
Our legislators, federal, state and local, are introducing bills to protect home owners from this atrocity which is happening all across this country.
Just about 3 years ago, when my neighborhood was amidst evictions and quick demolition's, my wife left our home with my children. After trying to find a competent law firm to handle my case, I'm told that it would cost me 10's of thousands of dollars to fight this, and that in their professional opinion and experience, that I should not try to fight this because I would lose. They also suggested at that time that I should not divorce, because in the

course of a jury trial for eminent domain, that it would appear to be a little more favorable for me, and that is where my marriage is at this time. A week before Thanksgiving Nov. 2002, I was speaking on the telephone with my lawyer in my 2nd floor room looking at the ocean, with a friend packing boxes on the 3rd floor, when he yells to me, that they looped Shadow (my dog). My response- I jumped to attention, go out into the hall and stairwell and was confronted by a large uniformed police officer who asked me if I was who I am, and then told me he was here to serve me with a formal eviction. As I looked down the stairs- I see 5 or 6 police officers with their guns drawn and pointed at me. I later learn that the city had a locksmith pick my front door lock, they had the dog catcher come in my house, loop my dog around his neck. My dog was 13 years old and was resting on the 2nd floor landing and drag him down the stairs, assaulting him as he yelped on every stair coming down. His health deteriorated rapidly and after 3 weeks of suffering he died. Then in came the police, and I was removed from my home of 23 years. The city immediately had 3 moving outfits pack and move most of my belongings, but not all, and not any of my business material or equipment, and to compound things, we had our first snow fall of the season. They moved my belongings to 3 separate facilities, eventually paid for 1 year by the city. It took the moving people 3-4 weeks to accomplish. From the start of the moving people they had the demolition people starting to dismantle my house. About 2 weeks before Christmas 2002, they razed my house.

3 years later, May 2005, this same law firm of mine asked the court to be dismissed from my case, and was granted.

Months after my eviction from my home and the razing of it, the city of Long Branch deposited $140,000.00 in my lawyers escrow account. This was over 3 years ago. I support the present roof over my family's head and my own, which is seperate. I no longer have a home, a place to conduct a business, no equity and no longer any retirement security due to the loss of my home.

After research, I come to find that the developer is deriving in excess of 25 million dollars on my property alone. When developer Joe Barry gets out of prison in 2 years, his business is involved in a billion dollar operation, here in Long Branch, N.J. His son is operating the business at this time.

They stopped demolition in my backyard. Their project is Beachfront North, phase 1, and the last of my neighborhood is phase 2. The 3 dozen of my surviving neighbors have an alliance called MTOTSA of Long Branch, N.J.. And just last week at the city council meeting, the city council passed a resolution to execute eminent domain on MTOTSA.

I now have new lawyers and appraiser, as of June 2005. A trial by jury is to start this Oct. 11, 2005. This will be my trial for "just compensation". "Just Compensation"- 4 years of nightmare, loss of home and family,and it will be up to a jury what my just compensation will be. I should be made whole again, and I should also be given a percentage of the developers profit as well. Even with the "just compensation" I'm to be awarded, after all of this, it is not just!! Here in the U.S.A., to have a family, a home and a job, and then have a private developer and the city government profit at the loss of it's residents, by the taking of their homes, it is deplorable, a crime and un-American.

Thank you,

Bruce R. MacCloud
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Bruce R. MacCloud

Testimony of
Thomas W. Merrill
Chalres Keller Beekman Professor
Columbia Law School

September 19, 2005

Kelo v. City of New London, 125 S.Ct. 2655 (2005), is unique in modern annals of law in terms of the negative response it has evoked. The initial reaction by lawyers familiar with the case was one of unsurprise. Within days, however, the decision began to gather widespread criticism in the media and among others less familiar with the process of eminent domain and the history of judicial decisions interpreting the "public use" requirement.

Before undertaking far-reaching reforms of the eminent domain system that would seek to prohibit States and local governments from using eminent domain for economic development purposes, it is important to understand just what *Kelo* did and did not decide, and what may be significant about the decision. Accordingly, I will begin by addressing five myths about *Kelo* which I believe need to be dispelled. I will then turn to a general consideration of reform strategies, highlighting two that I believe hold particular promise for protecting home owners and owners of small business from the disruptive effects of eminent domain.

I. Five Myths About *Kelo*

Myth One: Kelo breaks new ground by authorizing the use of eminent domain solely for economic development.

Echoing Justice O'Connor's dissenting opinion, it is widely asserted that *Kelo* is the first decision in which the Supreme Court permitted the use of eminent domain solely

for economic development.[1] By giving its approval to this new use of eminent domain, it is asserted, the Court has provided a roadmap for an unprecedented – and frightening – expansion in the use eminent domain.

The claim that economic development takings had never been previously upheld by the Court requires that one engage in considerable gymnastics with the relevant precedent. In particular, it requires that two propositions be established: (1) the universe of relevant precedent is limited to two decisions -- *Berman v. Parker*[2] and *Hawaii Housing Authority v. Midkiff*[3]– and (2) those precedents are implicitly limited (it cannot be claimed that they are expressly so limited) to takings designed to overcome some "precondemnation use" that inflicts "affirmative harm on society."[4]

As Justice Stevens patiently explained in his majority opinion, however, neither proposition is true. The universe of prior precedent includes more than *Berman* and *Midkiff*. It also includes numerous Supreme Court decisions upholding "takings that facilitated agriculture and mining" because of the importance of these industries to the economic welfare of the states in question.[5] And it includes *Ruckelshaus v. Monsanto Co.*,[6] upholding the condemnation of trade secrets in order to promote economic competition in pesticide markets. Moreover, in none of these previous decisions (or

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[1] *See* Kelo v. City of New London, 125 S.Ct. 2655, 2673 (2005) (O'Connor., J. dissenting) (characterizing the question presented as one of "first impression.").

[2] 348 U.S. 26 (1954).

[3] 467 U.S. 229 (1984).

[4] *Kelo*, 125 S.Ct. at 2674 (O'Connor, J., dissenting).

[5] *Id.* at 2665; *see also id.* at 2663-63 & nn. 7-10 (describing decisions).

[6] 467 U.S. 986 (1984). *See Kelo* at 2666-67; *see also id.* at 2664 (describing decision).

even in *Berman* with respect to the parcel of property before the Court) could it be said that the property was being taken because of some "precondemnation use" that inflicted "affirmative harm." Justice Stevens concluded that "[p]romoting economic development is a traditional and long accepted function of government" – surely an irrefutable proposition – and that there was "no principled way" of distinguishing what the petitioners characterized as economic development "from the other public purposes that we have recognized."[7]

Myth Two: Kelo authorizes condemnations where the only justification is a change in use of the property that will create new jobs or generate higher tax revenues.

The possibility that eminent domain could be justified solely on the ground that it would increase the assessed valuation of property was raised at the oral argument in *Kelo*. Justice O'Connor's dissenting opinion, which is based largely on a slippery slope argument, makes much of this possibility, building to her famous line – "Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory."[8]

The Court in *Kelo* did not have to decide whether an isolated taking to produce a marginal increase in jobs or tax revenues satisfies the public use requirement. The New London Redevelopment Project before the Court was designed to do much more than achieve an "upgrade" in the use of one tract of land. A Justice Stevens' recounted, the project was also designed to generate a number of traditional public "uses": a renovated marina, a pedestrian riverwalk, the site for a new U.S. Coast Guard museum, and public

[7] *Kelo*, 125 S. Ct. at 2665.

[8] *Id.* at 2676 (O'Connor, J. dissenting).

parking facilities for the museum, an adjacent state park, and retail facilities.[9] Later in his opinion, in discussing the petitioners' argument that the Court should draw a bright line prohibiting takings for economic development, he noted that the "suggestion that the City's plan will provide only purely economic benefits" was "unpersuasive" as applied to the taking before the Court.[10]

Admittedly, the holding of *Kelo* is not limited to multiple use projects that provide both economic benefits and traditional public "uses." The majority – perhaps unwisely – chose to write more broadly than the facts of the case required. But the facts are set forth in the opinion for all to read, and provide a basis for distinguishing *Kelo* if in the future the Court decides (on some theory not yet articulated) that creation of jobs or tax revenues without more is insufficient to constitute a public use.

Myth Three: Kelo dilutes the standard of review for determining whether a particular taking is for a public use.

One of the most surprising claims about *Kelo* is that it lowers the level of scrutiny that courts are to apply to public use determinations. In fact, it was the Court's last major decision on the public use requirement before *Kelo* – the *Midkiff* decision of 1984 – that marks the nadir in formulation of the standard of review of public use claims. *Midkiff* equates the applicable standard of review with the minimum rationality test the Court uses in reviewing substantive due process and equal protection challenges to economic regulation.[11]

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[9] *Id.* at 2659.

[10] *Id.* at 2665.

[11] See *Midkiff*, 467 U.S. at 239-41.

Significantly, not once does the majority opinion in *Kelo* invoke rationality review or any of its synonyms in support of its judgment. Instead, the decision suggests that courts should carefully review condemnations that result in a private retransfer of property, or are not carried out in accordance with some planning exercise, in order to determine whether the government is taking property "under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit."[12] Justice Kennedy's concurring opinion makes explicit that the Court's decision upholding the condemnation in *Kelo* "does not foreclose the possibility that a more stringent standard of review than that announced in *Berman* and *Midkiff* might be appropriate for a more narrowly drawn category of takings."[13]

In truth, therefore, *Kelo* intimates that the Court in the future may impose a *higher* standard of review in public use cases than has prevailed before. Before *Kelo*, courts merely had to ask whether the use of eminent domain is "rationally related to a conceivable purpose."[14] After *Kelo*, courts are instructed to investigate the factual circumstances to determine whether the invocation of a public purpose is a "mere pretext" to justify a transfer driven by "impermissible favoritism to private parties."[15] In terms of the formulation of the standard of review, *Kelo* was a significant victory for property rights advocates, a development completely obscured by the widespread denunciation of the decision.

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[12] *Kelo*, 125 S.Ct. at 2661.

[13] *Id.* at 2670 (Kennedy, J. concurring).

[14] *Midkiff*, 467 U.S. at 241.

[15] Kelo, 125 S.Ct. at 2669 (Kennedy, J. concurring).

Myth Four: The original understanding of the Takings Clause limits the use of eminent domain to cases of government ownership or public access.

Justice Thomas filed a separate dissenting opinion in *Kelo*, arguing that the Court should return to the original understanding of the Takings Clause, which he claimed limited eminent domain to acquisitions of property for the government or for actual use by the public. Justice Stevens did not respond to Justice Thomas's opinion, which may have reinforced the impression in some circles that the Court's decision was a clear departure from the original understanding.

Unfortunately, other than the language of the Takings Clause itself ("nor shall private property be taken for public use without just compensation"), there is virtually no direct evidence about what the Framers understood by the words "for public use."[16] The phrase modifies "taken," and thus clearly establishes that the Takings Clause is about a subset of takings – those for public use as opposed to other possible types of takings. But this narrowing language does not necessarily mean that the Clause imposes an affirmative requirement that a taking must be for a "public use." It is also possible that the Framers were simply *describing* the type of taking for which just compensation must be given – a taking of property by eminent domain as opposed to some other type of taking, such as a taking by tort or taxation.[17] This reading would not, as Justice Thomas argued, render the words "surplusage."[18] No other words in the Clause tell us the just compensation

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[16] *See* DAVID A. DANA AND THOMAS W. MERRILL, PROPERTY: TAKINGS 8-25 (Foundation Press 2002).

[17] JOHN LEWIS, A TREATISE ON THE LAW OF EMINENT DOMAIN, at ii (1st ed. 1888).

[18] *Kelo*, 125 S.Ct. at 2678.

requirement is about eminent domain (the term "eminent domain" did not enter constitutional discourse until sometime later). Moreover, for all his parsing of old dictionary definitions, Justice Thomas never explained why the prohibitory word "without" is placed before "just compensation" rather than before "public use" – a piece of textual evidence that seems to cut against the thesis that the Clause imposes a public use requirement.

Given the utter lack of direct evidence, the debate over original meaning probably comes down to whether the Framers understood the power of eminent domain from an "English" perspective, reflecting the views of Locke and Blackstone, or from a "continental" perspective, reflecting the views of natural rights thinkers such as Pufendorf, Grotius, and Vattel.[19] The English perspective emphasized the importance of the property owner's constructive consent to the taking through the owner's representation in Parliament. If the Framers viewed takings this way, the most plausible interpretation of "for public use" is that it was just descriptive of the power of eminent domain, *i.e.*, a taking of property authorized by the legislature.[20] The continental perspective emphasized that eminent domain should be used only for certain types of public purposes. If the Framers viewed takings this way, the most plausible interpretation is that public use is an implied limitation on eminent domain. Since the Framers left no clues as to which body of thought was more influential in their thinking, the issue cannot be resolved with any certainty. But it would be hazardous to bet against

[19] For summaries and further citations, see Dana and Merrill, *supra* note 16 at 19-25; William B. Stoebuck, *A General Theory of Eminent Domain*, 47 Wash. L. Rev. 553 (1972).

[20] *See* Matthew P. Harrington, *"Public Use" and the Original Understanding of the So-Called "Takings" Clause*, 53 Hastings L.J. 1245 (2002) (elaborating this argument).

the English perspective, which was almost certainly familiar to more participants in the ratification process.

Myth Five: Takings for economic development pose a particular threat to "discrete and insular minorities."

Justice Thomas concluded his dissenting opinion with a powerful passage predicting that takings for economic development would disadvantage poor communities, which "are not only systematically less likely to put their lands to the highest and best use, but also are the least politically powerful."[21] Strict enforcement of the public use requirement, he argued, can therefore be seen as a type of judicial review designed to protect "discrete and insular minorities."[22] Justice O'Connor's dissent echoed these concerns.

There are many disputable propositions here. Justice Thomas's preferred position would restrict eminent domain to takings for government use or actual use by the public. Any other type of real estate development would have to use market transactions. Consequently, one way to test his prediction about the impact of eminent domain on poor communities would be to compare the benefits poor communities receive from real estate projects that rely solely on market transactions with the benefits they receive from projects facilitated by eminent domain. Because of the high transaction costs of assembling large tracts of land in developed areas, market-based development projects tend to be concentrated in greenfield sites at the perimeters of urban areas, far from most poor communities. Thus, unless one believes that new real estate development is

[21] *Kelo*, 125 S.Ct. at 2687 (Thomas, J. dissenting).

[22] *Id.*, quoting United States v. Carolene Products Co., 304 U.S. 144, 152 n. 4 (1938).

inevitably bad for poor communities, there is reason to doubt that leaving all commercial real estate development to market transactions would improve the welfare of poor communities.

Justice O'Connor's position is even more bizarre. Her position is that "public purpose" takings are permissible, but only if the taking is designed to overcome some "precondemnation use" that inflicts "affirmative harm on society." Translated, this means that eminent domain can be used for economic development only if there is a finding the property is "blighted." Would requiring a determination of "blight" reduce the danger of poor and minority communities being targeted for economic development takings? The history of urban renewal projects in the post-World War II era – much of which proceeded under statutes requiring a blight determination – strongly suggests that poor and especially minority communities were disproportionately singled out for condemnation under these schemes.[23] Making "blight" a precondition of economic development takings seems designed largely to reassure the middle class that its property will not be targeted for such projects, not to protect the very poorest communities.

More generally, economic development schemes limited to "blighted" property are backward looking. They ask whether the existing use of the property has fallen below some benchmark that the dominant community regards as "normal." In contrast, pure economic development statutes – such as the one in Connecticut – are forward looking. They focus on the prospective benefits the community might obtain from a transformation in the use of the property. The forward looking approach requires that development planners think strategically about where and how to intervene in the market.

[23] *See* Wendell Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 Yale L. & Pol'y Rev. 1 (2003).

At least arguably, this approach will lead to more surgical interventions designed to jump start growth, in contrast to the backward looking approach, which would justify bulldozing any property that falls below the benchmark of blight. Liberating economic development projects from any requirement of a "blight" determination might therefore result in fewer and more selective takings of property than the approach favored by Justice O'Connor.

II. Three Strategies for Reforming Eminent Domain

There are three general types of strategies for reforming eminent domain: prohibitory reforms, procedural reforms, and compensation reforms.

Prohibitory reforms declare certain ends or objectives of government off limits for eminent domain, e.g., the use of eminent domain for "economic development." In essence, the prohibitory strategy seeks to discover and impose as law a restrictive definition of "public use." This is the centerpiece of the Institute for Justice's campaign against eminent domain. Its idea is that eminent domain should be prohibited for economic development. Various other prohibitory strategies are imaginable, however, such as prohibiting all condemn-and-retransfer schemes outside the public utility context.

Procedural reforms focus on the process used to decide whether to employ eminent domain. Since eminent domain procedures are badly out of date, there are a host of possibilities here. One approach would try to assure more political accountability for the used of eminent domain: for example, pushing decisions to use eminent domain down to the local level and by trying to assure that the decision is made by elected rather than unelected officials. Another approach would seek to improve condemnees' access to the judiciary. One simple but quite powerful proposal here would put the burden on the

condemning authority to establish the legality of the taking, including whether it constitutes a public use, before title changes hands. Many jurisdictions today have "quick take" statutes that presume the validity of the taking, and require condemnee to file an independent action seeking to enjoin the taking. This procedure puts the burden of proof on the condemnee, including the burden of proving that the taking is not a public use.

The *compensation strategy* would increase the amount of compensation paid to condemnees above the current fair market value formula. This could be done either under an indemnification theory – seeking to provide more complete recovery of losses, analogous to allowing recovery for pain and suffering in addition to out of pocket losses in tort cases. Or it could be done under a restitution theory – requiring the condemning authority to disgorge or at least share with the condemnee the assembly gains realized through the exercise of eminent domain. Either way, enhanced compensation would have two effects: it would soften the blow to condemnees, and it would reduce the incidence of eminent domain by increasing the costs of condemning property.

I am not a fan of the prohibitory strategy. This strategy would enlist courts in an effort to strike down exercises of eminent domain that are prohibited, while allowing those that are not prohibited to go forward. The history of controversy over the use of eminent domain suggests that courts are not very good at policing the uses to which eminent domain is put. In the nineteenth century, there was a movement among state courts to limit eminent domain to actual use by the public. But with the rise of new types of utility services like telegraph lines, electric lines, telephone lines, and gas pipelines, these courts began to backtrack. Clearly there is no literal use by the public of these sorts

of distribution systems (as opposed to the services they provide). And in many cases property was taken where the persons affected did not even have access to the services. Yet courts contorted with find that these takings were public uses. Later in the 1930s and 1940s, municipalities began taking property in order to construct public housing projects. Here too, the property was not open to the general public. But again, courts generally upheld these takings as consistent with the requirement of public use. In the face of these multiple difficulties with the use by the public interpretation, virtually every state supreme court in the country retreated, and adopted some form of the understanding that "public use" means public purpose.

However, once one takes the step of interpreting public use to mean public purpose, and once one becomes only modestly sophisticated about the concept of external benefits, one realizes that the government can reconfigure the ownership of property in countless ways that will produce external benefits for society. In addition to utility services and public housing projects, landlocked property can be made accessible, scenic easements can be imposed, waterfronts can be opened to greater public use, compulsory licenses of intellectual property rights can be required – list is virtually endless. Not surprisingly, once courts started down the public purpose path, they became increasingly reluctant to make categorical pronouncements about what is and is not a "public use."

The basic problem with the prohibitory strategy, this history suggests, is that lawyers and judges are not particularly good at anticipating the ways in which reconfigurations of ownership rights may produce significant public benefits. Nor are they very good at articulating abstractions that will capture a high percentage of the situations in which reconfiguration would be desirable. All of which suggest that the

decision to use eminent domain is one that should be exercised by politically accountable actors, not courts.

There is another serious problem with imposing a prohibitory limitation on the use of eminent domain at the federal level, either by decision of the U.S. Supreme Court or by legislation enacted by Congress: this strategy disserves the values of federalism. Problems in assembling property rights vary greatly from one part of the country to another. In dense, highly developed urban areas like New York City the problem is often the need to assemble multiple contiguous tracts in order to create a site for a larger project. In empty rangeland in the West, the problem may be that one parcel is landlocked by a single neighbor who refuses to grant any kind of access. It is far from clear that eminent domain law should be the same in both circumstances. In fact, some States permit the use of eminent domain for economic development without regard to whether property is blighted, others do not. About half the States have provisions for condemnation of rights of way to landlocked property, and about half do not. It is hard to see why these variations should be wiped out by a single federal rule for when property can be condemned and when not. Those who decry eminent domain abuse are right to identify a potential problem, but what they do not often point out is that state courts have often put an end to abuses as a matter of state law. Congress should await clearer evidence of a national problem of overuse of eminent domain before ending all state experimentation and variation in this area.

A related federalism problem associated with the prohibitory strategy is that it would inject federal courts into local land use disputes to a degree that has never existed before. Under current practices, state courts handle all issues about eminent domain,

ranging from whether there is a "public use" to whether statutory procedures were followed, to whether the compensation is adequate. The federal courts tend not to get involved in these local issues – accept in the very rare cases accepted for review from the state supreme court by the U.S. Supreme Court. In theory, property owners could file actions under 42 U.S.C. § 1983 challenging the public use determination. But given the generally deferential approach to public use followed by federal courts as a matter of federal law (state courts have been more willing to be assertive in this matter), property owners have generally not availed themselves of this option. Imposing a new federal restriction on eminent domain for "economic development" would change this equation, and would likely mean that many local projects would be delayed for significant periods of time while piecemeal judicial review – some in state court, some in federal court – was pursuing by opponents of those projects. These delays would greatly increase the costs of local projects using eminent domain, increasing the burden on local taxpayers.

There are two other drawbacks to the prohibitory strategy. First, such a strategy only helps property owners whose cases fall near the margins of the prohibition. Those who experience takings regarded as clearly permissible – including those whose property is taken for new highways, airport expansions, public convention centers, and public stadiums – get no relief. Of particular concern, many condemnations for economic development can be recharacterized as condemnations to eliminate "blight," which Justice O'Conner would permit. Indeed, the New London taking itself could plausibly have proceeding on a blight rationale, if development planners were not permitted to use the more straightforward economic development option.

Second, under the prohibitory approach it will be difficult for ordinary landowners to find a lawyer to bring an action challenging a taking as beyond the pale of permitted public uses. Most condemnation lawyers work on a contingent fee basis, and are paid a percentage of any additional just compensation they obtain from the state beyond the state's initial offer. A no-public use action, if it succeeds, means that there will be no fund of money with which to pay the lawyer. So this compromises the incentives of lawyers to bring and aggressively prosecute such actions.

I find the procedural and compensation strategies more promising. First a couple general points. I assume these strategies would be implemented across the board, applying to all exercises of eminent domain, not just a narrow subset described as entailing condemnation for "economic development." Consequently, the process and compensation strategies promise to provide relief to all property owners who experience eminent domain, not just a select few. The process strategy does this by providing more information to decisionmakers about the intensity of opposition to eminent domain projects and by compounding the costs of using eminent domain, which leads to substitution away from eminent domain toward other modes of resource acquisition. The compensation strategy does this by providing more money to persons whose property is taken in eminent domain. And it too leads to a substitution away from eminent domain, insofar as the costs go up relative to other modes of resource acquisition.

A related general point is that these two strategies are more likely to be implemented by lawyers retained by property owners under contingent fee arrangements. The compensation strategy dovetails nicely with the use of contingent fee representation, since higher compensation leads directly to higher fees for those who represent property

owners in eminent domain. The process solution is also more compatible with contingent fee representation, insofar as enhanced process rights in eminent domain proceedings themselves magnify the leverage of property owners in negotiations over settlement amounts.

Turning more specifically to process reform, as an administrative law professor I am struck by how outmoded eminent domain processes appear to be in most jurisdictions. Eminent domain procedures were developed in the nineteenth century, and have scarcely been modified since. They generally assume that a legislative body will decide to condemn property without providing any explanation, and that a court will then hold a hearing to see whether the condemnation meets the court's understanding of the meaning of public use.

Contrast this to the process followed in deciding, for example, whether a "major federal action" should go forward under the National Environmental Policy Act (NEPA). Under NEPA, the action agency must consider a range of options to the proposed project, make available background information to the affected community, allow for public comment, and hold public hearings. Persons dissatisfied with the final report and recommendation can seek judicial review, in which the court focuses not on the wisdom of the project, but on whether the process afforded a full and fair consideration of all affected interests, and whether a reasoned response was provided to all objections.

Adopting an analogous type of process requiring open, public, participatory inquiries into the need for the exercise of eminent domain would, I believe, provide better protection for property owners than imposing an abstract definition of prohibited categories of eminent domain enforced by courts. Modernizing the process in the fashion

would allow the real objections to the project to come to the fore, would create a mechanism for identifying way to proceed that would involve less or no use of eminent domain, and would allow property owners a forum in which to voice their objections to being uprooted.

Another promising reform idea would be to require more complete compensation for persons whose property is taken by eminent domain. The constitutional standard requires fair market value, no more and no less. Congress modified this when it passed the Uniform Relocation Act in 1970, which requires some additional compensation for moving expenses and loss of personal property. Congress could modify the Relocation Act again, in order to nudge the compensation formula further in the direction of providing truly "just" compensation.

For example, Congress could require that when occupied homes, businesses or farms are taken, the owner is entitled to a percentage bonus above fair market value, equal to one percentage point for each year the owner has continuously occupied the property. This would provide significant additional compensation for the Susette Kelos and Wilhelmina Derys who are removed from homes they have lived in for much of their lives.

Alternatively, Congress could require that when a condemnation produces a gain in the underlying land values due to the assembly of multiple parcels, some part of this assembly gain has to be shared with the people whose property is taken. Under current law, all of the assembly gain goes to the condemning authority, or the entity to which the property is transferred after the condemnation.

Either one of these adjustments in the measure of just compensation – or others that might be advanced – would do more to protect homeowners against eminent domain than declaring a federal prohibition on takings for economic development. Adjustments in compensation would protect all property owners – those whose property is taken for highways and public housing projects, as well as those whose property is taken for economic development projects. Such a requirement would be vigorously enforced by the attorneys who represent property owners in condemnation proceedings. Providing additional compensation in cases of greatest concern would discourage local governments from using eminent domain in these cases, without prohibiting its use altogether. Perhaps most importantly, assuring a more "just" measure of compensation would leave the ultimate decision about when to exercise this power in the hands of local elected officials, where it has long been lodged, and where it belongs.

700 N. 24th St.
Lincoln, NE 68503

September 19, 2005

Dear Senator Spector:

In the next few days you will be hearing a lot about eminent domain. Government agencies will tell you how necessary it is for urban redevelopment. Not so. My experiences with eminent domain have greatly not only greatly damaged my personal life, but also done long-term, irrevocable harm to the redevelopment of the urban areas where I have chosen to live. Eminent domain is not used for public benefit. It is used for private gain of the politically powerful under the guise of government.

Our United States Supreme Court, in *Kelo v. New London*, recently expanded the use of eminent domain to include "economic" benefits to private developers as a public purpose. How the court got to this is an easy history. After World War II, bureaucrats in Washington, D.C. wanted to redevelop an area. They were given the power, in *Berman v. Parker*, to take property that was not blighted because it was in an area declared blighted by the government. Such shame only occurs when people are afraid to challenge the government, such as after the stress of war. That redevelopment project brought a plain Jane look to Washington. The beautiful buildings that could have been restored are no longer. It destroyed people as well as buildings.

The courts are reluctant to criticize "takings" that are related to blight. Our legal system allows governments the power to rid blight through common law nuisance laws and specific codes enforcement. Thus, when the government wanted to expand that power it simply drew a circle large enough to engulf the blighted and non-blighted properties and call it a "blighted area." Blight has been expanded to include areas that have less than other areas.... Less than what? Less than what the bureaucrats chose. Less income, fewer bathrooms, shorter doorways, vacant land, under-utilized land, whatever. Billionare Warren Buffet lives in an area that was once declared blighted because the circle was drawn big enough to include land used as a golf course (that would be vacant or under-utilized land) and his home.

You are going to hear a lot from property owners that want the decision in *Kelo* to be reversed. In other words, economic gain alone won't be enough. Unfortunately, that will not do much good. You need to see further into the problem. In New London, the government could have declared the area blighted and then there would have been no issue. No, it is not blighted, but the definition would be expanded to include their properties. Reversing *Kelo* will only make bureaucrats more devious in defining blight.

If you wish to do something for property rights in this country, you need to go deeper and ***reverse the power to take unblighted properties*** in a redevelopment area. This would be the courageous and right thing to do. Redevelopment projects are more successful, more economically feasible, not to mention more fair, if the existing property owners are a part of the redevelopment.

My husband and I are educated, somewhat affluent, very hard-working individuals. We have owned unblighted properties in blighted areas. We have also had redevelopment plans for our property that far exceed the government's ideas in terms of economic development and quality. Because of nearby blight, the government has taken from us (and left us in stressful economic situations) land, restored homes, historic homes, and the home we live in. What we would have done with our property was develop extremely high quality residential/office units in one case, and carefully restored homes in another. The government instead took our property and ***gave*** it to the politically powerful. They deceived the public as to its future use. In one case, the property sat empty for years while they looked for someone who would build the kind of tacky shacks that they wanted. They called it "low income housing." The land was free for those who stayed five years. The development is less than 15 years old and is falling down. The original landowners are, of course, gone. The 'for sale' and 'for rent; signs typically went up within days of the five-year ownership requirement. They are now largely rental units. We are currently embroiled in another one of their schemes. This time they are divesting us of historic homes that have had the highest quality restoration.

Who wants to invest in America? The lack of property rights rivals that of Cuba, and are less than in third world countries that are trying to attract business and economic development.

The looting that recently took place in New Orleans would not be new to us. When the government takes property by eminent domain, the same kind of looting takes place. We had our properties stripped while we still had title – appliances, carpet, new kitchen cabinets, tools, electrical box (our food in the refrigerator rotted), and the front door. The lack of property rights in this country is unraveling the moral fabric of this country. Please don't do a band-aid approach to this problem. Think long and hard and then do the right thing. Reverse the government's power to take property unless it is through our historic common law nuisances or codes enforcement power. At least those processes still require a little due process.

Sincerely,

Barbara J. Morley

Hon. Senator Specter:

I Gopal K. Panday of 141 Broadway, Long Branch. NJ testify to the fact that the area where my property and the business is located has been declared to be a 'Redevelopment Area' inspite of the fact that according to State of New Jersey guide lines 20% of the properties in this area are Rated to be Good and 31% are Rated to be Fair.
The blatant abuse of this 'Eminent Domain' law provision is the fact that the redeveloper assigned is a local merchant with Political Connections. The local government simply put is in process of taking properties in this area which are Privately owned and handing over to a Private party in the same area which stands to gain tremendously at others cost with the help of local politicians interpreting a perfectly fine law to suit there ends.
I have owned and operated my business in the this area at the above mentioned location for twenty years. It is simply incomprehensible that such an arrogant approach is possible in our wonderful exemplary country by some politicians exhibiting total disregard for our 'Basic Entrenched Values' and ' Private Property.'
I thank you for this opportunity to testify at this critical juncture where if left unadvised by your good comity shall effect countless lives and families.

Humbly I Remain

Gopal K. Panday
141 Broadway
Long Branch. N.J. 07740
(732) 222-0160

Statement of Daryl Penner

September 19, 2005

Dear Senators, Congresspersons and others,

We may be the worst case of eminent domain abuse in the nation.

For 30 years my family battled to keep our valuable, Main Street property in Downtown Kansas City, Missouri.

Year after year, there were open and veiled threats of "take this deal, or we'll be forced to use Eminent Domain powers to seize your property."

As a small business owner, we could not just pick up and move our 70-year-old tuxedo and bridal shop business, as we did not have the financial resources at our disposal to relocate 32,000 square feet. We also had a huge downtown clientele base.

Last year, the mayor and her friends, finally seized our property against our will, (including sending over six, armed police officers with some inspectors, as if it were Nazi Germany) and paid us pennies on the dollar, for property located just one block from the highway, two blocks from the Bartle Hall Convention Center and one block from the tallest building in the state of Missouri. (In other words, our property and buildings were in the most prime spot in all of Downtown.)

The city continued to say the area was horribly blighted, although now they are building the world headquarters of H&R Block (an 18-story oval-shaped tower) and the new Sprint-Nextel Arena.

While we didn't want to stand in the way of growth of our great city, we did not deserve to be bulldozed and tossed aside by such bullying tactics. They said that in the 500,000 square feet of retail they are developing, that there was no room for a tuxedo store, and we didn't fit the right "mix" of tenants they were looking for. And of course, the rent in their space would've been impossibly high for us to pay.

We could not even afford to purchase a similar sized building in the general area, as the city of Kansas City shortchanged us, by at least two million dollars, on the free and open market (for Kansas City real estate).

On my behalf of my quiet, tax-paying, ailing father, who has tried to be an upstanding person, through all of this torment of the last 30 years, I hope you'll please make changes to the eminent domain laws, before he passes away. He has always fought like a gentleman, despite the city's less-than-ethical behavior.

Thank you for your time.

Sincerely,

Daryl Penner
American Formal & Bridal
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(formerly before eminent domain: 1331 Main, Kansas City, MO 64105)
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To strengthen and promote cities as centers of opportunity, leadership, and governance.

National League of Cities

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Written Testimony of

The Honorable Eddie A. Perez,
Mayor, Hartford, Connecticut

On behalf of the National League of Cities

Before the Senate Judiciary Committee
On
"The Kelo Decision: Investigating Takings of Homes and Other Private Property"

Tuesday, September 20, 2005

Good morning, Mr. Chairman, and members of the Committee. I am Mayor Eddie A. Perez of Hartford, Connecticut, and I am testifying this morning on behalf of the National League of Cities ("NLC").

NLC is the country's largest and oldest organization serving municipal government, with more than 1,800 direct member cities and 49 state municipal leagues, which collectively represents more than 18,000 United States communities. Its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance, and to serve as a national resource and advocate for the municipal governments it represents.

NLC appreciates the opportunity to present a municipal perspective on the Supreme Court's decision in *Kelo v. City of New London*. Since the Court issued its decision last June, the frenzied rhetoric and mis-information about the use of eminent domain for economic development purposes has been overwhelming and disappointing. To paraphrase Will Rogers, one of the early Twentieth Century's best political commentators, if all I knew about the Kelo decision was what I read in the newspapers, then even I would be worried that my hometown of Hartford would bulldoze my house.

Once we get past the hype, two important points stand out. First, eminent domain is a powerful economic development tool used sparingly that helps cities create jobs, grow business and strengthen neighborhoods. No locally-elected official whom I know would use eminent domain to undermine the integrity of or confidence in homeownership in his or her community. For urban America and communities of color, in particular, homeownership is the ticket to the American Dream. Second, if Congress were to pass legislation to hamstring state and local governments from using eminent domain, in some of our poorest communities I believe that we would have fewer people becoming homeowners, which means fewer participants in the Administration's concept of an "ownership society."

The Supreme Court's decision opened rather than settled the debate on the use of eminent domain for economic development purposes. It touched a raw nerve for most people about the boundaries between property rights of individuals and the authority of government. From the resulting fury, however, the Court's opinion creates opportunities like this morning's hearing for municipalities to contribute to a necessary national discussion about eminent domain.

I. The *Kelo* Decision Does Not Expand Municipal Power

The rumored death of private property rights is greatly exaggerated. The Kelo decision does not expand the use or powers of eminent domain by states or municipalities. Nor does the Court's decision overturn existing restrictions imposed at the state or local levels. The Kelo decision, as applied to the specific set of facts in New London, simply reaffirmed years of precedent that economic development is a "public use" under the Takings Clause. The Takings Clause, moreover, retains its constitutional requirement that property owners receive just compensation for their property.

Some legal scholars argue that the Kelo Court actually narrowed the eminent domain power. The majority opinion and concurrence by Justice Kennedy outline that eminent domain should only be exercised to implement a comprehensive plan for community redevelopment (1) based on wide public consultation and input, (2) that contains identifiable public benefits, (3) with reasonable promise of results that meet an evident public need, captured in a contract like a development agreement, and (4) with the approval of the highest political authority in the jurisdiction.

Hartford has pursued a model of public development based on transparency, community consensus building and true public benefit. As a result, we have used

eminent domain as a last resort on six projects in the past 30 years. However, without the unambiguous authority to take land for a public purpose, the City would have had school, housing and development projects that cost hundreds of millions of dollars stalled or completed over budget.

The Kelo decision affirmed that eminent domain, a power derived from state law, is one best governed by the states and their political subdivisions. The Kelo Court affirmed federalism and the Tenth Amendment. Its opinion does not preclude "any State from placing further restrictions" on the exercise of eminent domain." Since the opinion's release, state after state – including Connecticut – have taken the Court at its word. Many state legislators have begun, or will begin during upcoming legislative sessions to examine their laws governing the use of eminent domain through proposed bills and study commissions. Regardless of the individual state outcomes, the Court correctly concluded that eminent domain is not a one-size-fits-all power, and that states are better suited than Congress to govern its use.

Hartford's use of eminent domain in the past has underscored the City's appreciation for those individuals affected so that the Hartford community can prosper. Frequently, these individuals are not only compensated for their property at prices well above market value, but receive significant and lengthy additional government funding for their relocation.

Recognizing that owner-occupied homes are more than just an investment for homeowners, I would advocate that governments that do not already do so explore ways to provide additional compensation to homeowners beyond "fair market" value where eminent domain is used for economic development.

II. Post-*Kelo* Caution with Eminent Domain Increases Among Cities

Cities, which generally use eminent domain as a last resort because of its significant cost in financial, political, and human terms, are now under an even brighter spotlight when it comes to the use of eminent domain.

In today's post-Kelo environment, there will be increased public pressure to prevent the use of eminent domain and more public scrutiny applied to municipal decisions to insure that its use occurs sparingly and only after exhausting all other options.

However, the availability of eminent domain to the City of Hartford has facilitated great economic and community growth. Projects such as Adriaen's Landing, a $500 million mixed use development including a convention center, hotel, condominiums and retail, and The Learning Corridor, a $120 million, 16 acre complex of magnet schools developed by a non-profit developer in one of Hartford's poorest neighborhoods, would not have been possible without the City having eminent domain available as a development tool. These projects are pillars in our efforts to revitalize the City. These projects have created thousands of construction and permanent jobs. They have attracted new business, increased home values, and sparked millions of dollars in new private investment ranging from first-time homebuyers to large financial services companies. Their effect on the Hartford economy and the overall quality of life for our citizens is tremendous.

In addition to the economic value that these two projects create, it is important to consider both the short and long-term social implications of having these facilities and services available to Hartford citizens and the region as a whole. As Hartford continues to grow and become one of New England's most vibrant cities, the need for attracting new businesses is larger now than ever. Adriaen's Landing and The Learning Corridor will help foster a growing desire of businesses throughout the region to locate their headquarters in Hartford. The social and educational benefits of these projects will also provide a continuously

more educated and more attractive work force for businesses looking to relocate in the region. It is also important to consider the increase in potential homeownership gained through projects such as these. By creating economic growth, these development projects provide the City with the increased capital it needs to continue providing affordable homeownership opportunities for Hartford residents. The power of eminent domain helped bring these projects to life.

The Kelo decision did not condone eminent domain abuse. "There may be private transfers in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption of invalidity is warranted under the Public Use Clause," wrote Justice Kennedy in his concurrence. Let me remind the Committee that neither the majority nor dissent in any court found that the City of New London engaged in any illegal or improper action involving eminent domain for economic development. The U.S. Supreme Court wrote "the trial judge and all members of the Supreme Court of Connecticut agreed that there was no evidence of an illegitimate purpose in this case...promoting economic development is a traditional and long-accepted function of government." There is a way for citizens that are particularly upset with the use of eminent domain to voice their discontent. Hartford residents vote policy makers into office. If there is a concern over a certain policy, the remedy for citizens is to make their opinions heard not only through civic involvement and awareness, but also through the ballot box.

III. The *Kelo* Decision Highlights the Natural Tension Public Officials Confront Daily between Individual Rights and Community Needs

The anxiety people feel about eminent domain is real. Historical examples of governmental abuse to construct the interstate highway system and for urban renewal make people suspicious about how governments intend to use eminent domain following the Kelo decision. This history imposes a duty on local officials

to explain governmental use of eminent domain with greater sensitivity to its personal impact on individuals.

The press has incorrectly reported that the Kelo decision greatly expands local government authority giving city leaders permission to take homes without warning and without adequate compensation. This feeds the public's fears that bulldozers, which allegedly stand at Grandma's gate, engines roaring, are heading next for their homes.

A faulty distinction that places individual property rights in direct opposition to the use of eminent domain has emerged since the Kelo decision. Let me set the record straight with a brief review of the City of Hartford's commitment to homeownership. The City of Hartford has been at the forefront of the movement to increase homeownership in the State of Connecticut. Increasing the number of residents in Hartford who are able to own a home has been a cornerstone of my administration. I have a great concern for the City's homeowners whose opinions are of the utmost importance when discussing any development project in Hartford. The City has continued to take dramatic steps to provide millions of dollars each year to support citizens in their efforts to become homeowners. In the last year alone, the City of Hartford has spent over $5 million dollars on various initiatives to increase the homeownership rate, providing numerous Hartford residents with their first opportunity to own a home.

Additionally, the Neighborhoods of Hartford Initiative was developed to focus on the needs of each neighborhood and provide continuous support in helping each individual community address the issue of homeownership. From these initiatives and numerous others, there have been more than 1,000 new homeowners in the City of Hartford since 2001. Protecting and advocating for homeownership in Hartford is critical to help provide for the well-being of the Hartford community as a whole.

One of the most important responsibilities of any city government is to provide for the economic and cultural growth of the community while balancing the rights of the individuals that make up that community.

IV. Conclusion

Municipal officials know from experience what the judiciary has affirmed through precedent that economic development is a public use. By subjecting development projects to public debate and by planning these projects with the public welfare in mind, Hartford is able to use eminent domain prudently to allow the City and its citizens to develop the community in a way that is transparent and beneficial for all residents. The limited use of eminent domain for economic projects geared towards the well-being of the community will only increase the potential for more Hartford residents to realize their dream of owning a home.

Legislation that prohibits the use of eminent domain solely to provide for private gain is understandable. Property rights activists, however, cloud the issue for the public by linking the accepted legal principle that economic development is a public use with the inappropriate tactic of taking real property from A and giving it to B, for B's sole, private benefit.

NLC urges a careful examination of the underlying premise of the anti-Kelo bills pending in Congress. NLC also urges Congress generally, and the Senate in particular during its upcoming consideration of the Transportation, Treasury and HUD appropriations bill for fiscal year 2006, not to use the appropriations process to legislate on eminent domain.

Municipal leaders have a responsibility to engage in public conversation about eminent domain that can help dispel inaccuracies and stereotypes.

Property rights activists, on the other hand, need to understand there is a delicate balance between minimizing the burdens on individuals and maximizing benefits to the community.

The art of compromise is essential going forward.

Thank you.

###

September 16, 2005

Hon. Chairman Sensenbrenner
House Judiciary Committee

Hon. Chairman Specter
Senate Judiciary Committee

PLEASE INCLUDE AS TESTIMONY IN THE
HEARINGS REGARDING EMINENT DOMAIN

Dear Chairman Specter and Chariman Sensebrenner:

The threat that Eminent Domain poses to ordinary small businessmen and home owners is growing and rampant. We all appreciate your review of this subject in light of the madness of the recent Supreme Court decision which creates confusion about the rights of ordinary citizens to own property.

In October 1991, I woke up to find that the City Council of Evendale Ohio (Hamilton County, Ohio) had designated our entire business corridor (130 properties) a blighted area. The Council had hired a consultant to go out and come up with this creative definition of the area to allow them to create an Urban Renewal Plan. By creating this Urban Renewal Plan this meant that Evendale would be able to take any single piece of property in the area by Eminent Domain if the owner did not want to sell.

In no way was this particular area of Hamilton County (one of the most affluent in Ohio) deteriorating, deteriorated or blighted.. The blight designation was done simply to allow control and influence over property owners. The Council took this action because they thought they could. They were told this by their advisors and their Economic Development Director that everyone was doing it and the legislature had broad powers to make such a designation.

For two years several of us business Owners fought the designation. During our investigation process we were denied documents regarding the blight designation. We were forced to file a lawsuit against the City to turn over documents which we won had been withheld (we won). We uncovered fabrications in a consultant's report which had been paid for with taxpayer's money which they had tried to use to back up their efforts. In summation, the Village would go to any lengths to get their goal – control over a huge block of valuable property. (for more information go to www.blightedevendale.com).

The long and the short of it is that after fighting for two years we thought we lost and I went and bought a new building for my growing business. The move and the hassle cost me hundred's of thousands of dollars in lost time and acquisition costs. Please don't make other's go through this completely unfair and painful process. If you don't do something to hold the Eminent Domain process "in check" cities feel like they have unlimited power. Stop their hungry land grab now and affirm the rights of citizens to own and enjoy their property. Thank You!

Sincerely.

Daniel P. Regenold, CEO
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In 1996 my brother and I purchased the ground under three 29 story buildings in downtown St. Louis, the buildings are two apartment buildings and one hotel. The buildings are owned by three seperate parties, who pay us ground rent. All three parties have expressed an interest in buying the ground under their buildings, but we are not motivated sellers.

On Dec. 12, 2000, the owner of one apartment building sent us a letter which stated that the law will allow him to take our land by condemnation. We did not take his threat seriously because we did not think such a thing would be possible in the United States. The City of St. Louis has blighted all three buildings because there are only 19% two bedroom apartments, and because two buildings have some vinyl asbestos floor tile, and one building has nonfriable asbestos in the plaster ceilings. The building owners have refused to correct the blight, because if they did, the property would no longer be blighted, and they could not take our ground by eminent domain after the city transfers eminent domain power to them.

The building owners approached the city with this scheme to take our ground from us by force, and the city is cooperating with our tenants, and has accepted redevelopment proposals from two of them already. The hotel's plan talks about renovations such as a pool and a banquet facility, but mot much more, the hotel completed a renovation in 2004. We have asked the city to inform us of all meetings concerning our property, but they have intentionally kept all meeting dates from us, and have advised us that the statues do not require them to notify us.

Please stop cities from concocting bogus blight findings to transfer wealth or real estate from one private party to another private party. Why is the City of St. Louis using eminent domain authority to disrupt the commercial expectations of private parties? We also own ground leases in Canada, and our Canadian Attorney tells us that Canada would never buy into such a scheme.

I never dreamed many years ago when we bought eight ground leases in Canada, that those would be our safest and best investments. One of our tenants bragged to us that he spent a lot of money on donations to politicians to get them to cooperate with him in his eminent domain scheme. Please pass legislation that is meaningful. There are no Federal funds being used to steal our ground from us, so any legislation that is limited to eminent domain projects that receive Federal funds is worthless. States and cities that abuse eminent domain should lose all Federal funds period. It would be better that a couple of redevelopment projects never get done if the result is 280 million Americans can stop worrying about some well connected people grabbing their homes and businesses. It is no wonder that most Americans do not trust their government anymore.

I would be happy to provide any documentation you want to prove that everything I have stated is truthful, and would be happy to answer any questions that my email has not answered.

Sincerely,
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STATEMENT OF MR. HILARY O. SHELTON
DIRECTOR
NAACP WASHINGTON BUREAU
BEFORE THE SENATE JUDICIARY COMMITTEE

"The Kelo Decision: Investigating Takings of Homes and other Private Property"

September 20, 2005

Thank you, Chairman Specter, Ranking Member Leahy and ladies and gentlemen of the panel for inviting me here today to talk about property rights in a post-Kelo world.

My name is Hilary Shelton and I am the Director of the Washington Bureau for the National Association for the Advancement of Colored People, our Nation's oldest, largest and most widely recognized civil rights organization. We currently have more than 2,200 units in every state in our country.

Given our Nation's sorry history of racism, bigotry, and a basic disregard on the part of many elected officials to the concerns and rights of racial and ethnic minority Americans, it should come as no surprise that the NAACP was very disappointed by the Kelo decision. In fact, we were one of several groups to file an Amicus Brief with the Supreme Court in support of the New London, Connecticut homeowners.[1]

Racial and ethnic minorities are not just affected more often by the exercise of eminent domain power, but they are almost always affected differently and more profoundly. The expansion of eminent domain to allow the government or its designee to take property simply by asserting that it can put the property to a higher use will systemically sanction transfers from those with less resources to those with more.

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[1] The NAACP would like to offer our sincere gratitude and appreciation to the law firm of Bondurant, Mixson & Elmore, LLP, of Atlanta, Georgia, for their invaluable assistance in preparing the brief.

The history of eminent domain is rife with abuse specifically targeting minority neighborhoods. Indeed, the displacement of African Americans and urban renewal projects are so intertwined that "urban renewal" was often referred to as "Black Removal." The vast disparities of African Americans or other racial or ethnic minorities that have been removed from their homes due to eminent domain actions are well documented.

A 2004 study estimated that 1,600 African American neighborhoods were destroyed by municipal projects in Los Angeles[2]. In San Jose, California, 95% of the properties targeted for economic redevelopment are Hispanic or Asian-owned, despite the fact that only 30% of businesses in that area are owned by racial or ethnic minorities[3]. In Mt. Holly Township, New Jersey, officials have targeted for economic redevelopment a neighborhood in which the percentage of African American residents, 44%, is twice that of the entire township and nearly triple that of Burlington County. Lastly, according to a 1989 study 90% of the 10,000 families displaced by highway projects in Baltimore were African Americans[4]. For the committee's information, I am attaching to this testimony a document that outlines some of the higher-profile current eminent domain cases involving African Americans.

The motives behind the disparities are varied. Many of the studies I mentioned in the previous paragraph contend that the goal of many of these displacements is to segregate and maintain the isolation of poor, minority and otherwise outcast populations. Furthermore, condemnations in low-income or predominantly minority neighborhoods are often easier to accomplish because these groups are less likely, or often unable, to contest the action either politically or in the courts.

Lastly, municipalities often look for areas with low property values when deciding where to pursue redevelopment projects because it costs the condemning authority less and thus the state or local government gains more, financially, when they replace areas with low property values with those with higher values. Thus, even if you dismiss all other motivations, allowing municipalities to pursue eminent domain for private development as was upheld by the US Supreme Court in Kelo

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[2] Mindy Thompson Fullilove, Root Shock: How Tearing Up City Neighborhoods Hurts America, and What We Can Do About It, p.17
[3] Derek Werner: Note: The Public Use Clause, Common Sense and Takings, pp 335-350), 2001
[4] Bernard J. Frieden & Lynn B. Sagalyn, Downtown, Inc.: How America Rebuilds Cities, p.29

will clearly have a disparate impact on African Americans and other racial and ethnic minorities.

As I said at the beginning of my testimony, not only are African Americans and other racial and ethnic minorities more likely to be subject to eminent domain, but the negative impact of these takings on these men, women and families is much greater.

First, the term "just compensation", when used in eminent domain cases, is almost always a misnomer. The fact that a particular property is identified and designated for "economic development" almost certainly means that the market is currently undervaluing that property or that the property has some "trapped" value that the market is not yet recognizing.

Moreover, when an area is taken for "economic development," low-income families are driven out of their neighborhoods and find that they cannot afford to live in the "revitalized" communities; the remaining "affordable" housing in the area is almost certain to become less so. When the goal is to increase the area's tax base, it only makes sense that the previous low-income residents will not be able to remain in the area. This is borne out not only by common sense, but also by statistics: one study for the mid-1980's showed that 86% of those relocated by an exercise of the eminent domain power were paying more rent at their new residences, with the median rent almost doubling[5].

Furthermore, to the extent that such exercise of the takings power is more likely to occur in areas with significant racial and ethnic minority populations, and even assuming a proper motive on the part of the government, the effect will likely be to upset organized minority communities. This dispersion both eliminates, or at the very least drastically undermines, established community support mechanisms and has a deleterious effect on those groups' ability to exercise that little political power they may have established. In fact, the very threat of such takings will also hinder the development of stronger ethnic and racial minority communities. The incentive to invest in one's community, financially and otherwise, directly correlates with confidence in one's ability to realize the fruits of such efforts. By broadening the permissible uses of eminent domain in a way that is not limited by specific criteria,

[5] Herbert J. Gans, The Urban Villagers: Group and Class in the life of Italian Americans, p.380

many minority neighborhoods will be at increased risk of having property taken. Individuals in those areas will thus have even less incentive to engage in community-building for fear that such efforts will be wasted.

In conclusion, allow me to reiterate the concerns of the NAACP that the Kelo decision will prove to be especially harmful to African Americans and other racial and ethnic minority Americans. By allowing pure economic development motives to constitute public use for eminent domain purposes, state and local governments will now infringe on the property rights of those with less economic and political power with more regularity. And, as I have testified today, these groups, low-income Americans, and a disparate number of African Americans and other racial and ethnic minority Americans, are the least able to bear this burden.

Thank you again, Chairman Specter, Ranking Member Leahy and members of the committee, for allowing me to testify before you today about the NAACP position on eminent domain and the post-Kelo landscape. The NAACP stands ready to work with the Congress and state and local municipalities to develop legislation to end eminent domain abuse.

African-Americans threatened by eminent domain

Boynton Beach, Florida - The Heart of Boynton plan is the second stage of the city's five-part redevelopment, and involves clearing out long-time businesses, homes, and churches in a mostly-black, low-income neighborhood in order to replace them with unsurprisingly - different businesses and other residences, but no churches.

On February 20, 2003, the Community Redevelopment Agency decided to hire a contractor to start buying out stores and churches in the area. The city and the CRA wanted to raze the 4.7 -acre area surrounding the intersection of Seacrest and Martin Luther King Jf. boulevards to build new houses, stores, and expand a park. They targeted at least 26 commercial properties, two churches, and a 5.3-acre area of 42 homes west of Seacrest Boulevard. The director of the CRA told the city council that the reason he supported condemning the largely black neighborhood was "to compensate for the loss of one of the city's major taxpayers. Our property tax values are meager compared to other cities and this redevelopment is our attempt to enhance property values within this City."

Jackson, Mississippi - In order to revitalize the area around its campus, historically black Jackson State University decided in January 2004 to seize 15 surrounding properties through eminent domain. The area in which the condemnations took place has traditionally been one of the most vibrant African-American communities in the south, in terms of both economic might and strength in the civil rights movement. The new development, which will displace all of this, will include retail stores and restaurants. One of the property owners, Milton Chambliss, vigorously protested the taking of his property, but was soon appointed thereafter as the chair of the JSU e-City Historic Preservation Committee.

Camden, New Jersey - The majority black and Hispanic residents of the Cramer Hill neighborhood were granted a reprieve in May 2005 by a Superior Court judge from plans to replace 1,100 families with more expensive housing for wealthier buyers. Cherokee Investment Partners, in collusion with city officials, intends to build 6,000 homes and a golf course, and has drawn the ire of community residents and businesspeople. Equally unacceptable to the community, another private group, Michaels Development Co., had planned to build 162 "affordable housing" units in the neighborhood for residents displaced by Cherokee's proposed construction. In August 2005, an Appellate Division judge denied Michaels permission to move forward despite litigation on behalf of Camden residents.

Lawnside, New Jersey - On May 9, 2005, the Lawnside planning board voted to recommend to the city council a redevelopment plan for 120 acres on the borough's northeast side. The plan, which could affect up to 20 families, still needs the approval of the city council at its next meeting. Most ofthe residents learned about the plan only two weeks before the planning board decided to recommend it, and are not pleased with the lack of notification. "We're pretty happy with the lives we've carved out for ourselves," said Willa Coletrane of Everett Avenue. "We of the community had no input." Lawnside has been the site of a distinct African-American community since the late 1700s, and was

a stop on the Underground Railroad. Many of the residents who have lived in Lawnside their entire lives feel betrayed by the government's rush tQ redevelop the neighborhood they hold so close to their hearts.

Mount Holly, New Jersey - The original redevelopment plan in Mount Holly called for the demolition of all 379 houses in the largely black and Latino neighborhood. The area would be cleared as part of the proposed commercial component of the larger West Rancocas Redevelopment Plan that also calls for 228 new residential units. Citizens in Action - a group of affected residents in the area - filed a racial discrimination lawsuit against the township in an effort to halt demolition of their homes. A Superior Court judge recently ruled against the suit that the plan discriminates against the minority population.

Albany, New York - Residents of the majority African-American Park South neighborhood are awaiting the possible condemnation of their properties for one of the most excessive redevelopment plans in Albany since the 1960s. Park South is a nineblock, 26-acre neighborhood in Albany between Washington Park and Albany Medical Center. In March 2005, the city council voted to designate Park South as an urban renewal area, paving the way for the use of eminent domain to acquire properties for a future redevelopment project. The city wants to replace approximately 1,900 residents with a mix of office and retail space, apartments, homes, and housing for up to 400 students, but exact plans will not be nailed down until city officials pick a developer which they did in June 2005. Morris Street resident Velma McCargo considered the city's redevelopment aspirations a "cheap trick" by city officials to get properties that have suffered from blight at particularly low costs. And some African-American activists like Aaron Mair believe that the Park South plan is just a pretext to relocate poor minority residents and gentrify the area into a place for middle-class whites.

New York City, New York - In April 2004, Columbia University announced plans to expand into Manhattanville and develop a campus on an 18-acre area between 125th and 133rd streets, from Broadway to 12th Avenue. While Columbia insists that the $5 billion expansion plan would spur economic development in West Harlem, property owners fear the imminent bulldozing of their homes and businesses. Since the school only owns 42% of the property in the proposed expansion area, Columbia and the Empire State Development Corporation entered into an agreement - that they did not publicize providing for the potential condemnations of properties in the project path, with the University putting $300,006 into an interest-bearing account that the city may withdraw from to cover the acquisition of properties. The public eventually discovered that the agreement existed, and was emaged. As for the possibility of considering the Manhattanville properties blighted, Community Board 9 chairman J ordi Reyes-Montblanc said that the only property in Manhattanville that could be considered blighted is Columbia-owned property, which "has been vacant and decaying for years."

Washington, D.c. - The city is using eminent domain to replace the Skyland Shopping Center, a fully leased and thriving 1940s-era shopping center serving the working class residents of Southeast D.C., with an upscale shopping center anchored by a Target store. Yet Target has yet to express any interest in locating a store there. The National Capital Revitalization Corp. plans to condemn the 16 property owners for the private development.

One of the shopping center owners is an African-American couple whose business in northeastern D.c. was burned down in the 1968 riots; they moved to Skyland a short time later, worked hard, and prospered. Another family bought their share of the shopping center in the 1940's and poured millions into their property. But to the D.C. Council, Skyland is just a "slum" that must be seized, razed, and handed over to the highest bidder.

Beloit, Wisconsin - At the turn of the twentieth century, a large contingent of AfricanAmerican workers migrated to Beloit from Mississippi. Working at the FairbanksMorse factory, these laborers exclusively settled into Fairbanks Flats, a low-income housing project built on a nine-block swath ofland. Now, it seems that the flats might have to make way for a planned development project undertaken by the Beloit City Council and National Trust consultants. Beloit plans to raze the apartments ifits tenants cannot come up with a plan within a few months. The proposed redevelopment would include boutiques, restaurants, and other businesses.

S.T.O.P.

(Sumner Trousdale Opposing Pipeline)

OUR STORY

The countryside of middle Tennessee is among the most beautiful in our great country. Nashville being so close by is one of the great benefits of living in this area. Folks in rural Sumner & Trousdale counties enjoy life at a leisurely pace, reminiscent of days gone by. Deals are still made with just a handshake & your word is as good as any contract. The residents of Portland, Bethpage, Castalian Springs & Hartsville, TN have an important story to tell. Our story is much too detailed to print here, but what follows are the main facts in this case of tragic pursuit of Eminent Domain Abuse.

OUR AWAKENING - In October 2004 many residents of rural Sumner & Trousdale counties received letters or calls from Midwestern Gas Transmission Company (MGT). Their request was for survey permission in an effort to determine a route for their natural gas pipeline project proposal. The survey permission form was very simple in nature. Agents contacting the landowners were for the most part very friendly & spoke to us as if we were old friends, using our first names & coming by the house to sit & talk about the survey form & carry away a signed copy whenever possible. Public meetings were scheduled in November 2004 to answer questions any landowners may have & a representative from FERC – Federal Energy Regulatory Commission was also present at the public meetings. We really didn't know what to ask at the public meetings & largely felt that the only benefit to the meeting was seeing the aerial view of the full 31-mile route. Many landowners granted survey permission initially, but later revoked it once more information was gathered regarding MGT & the project itself & due to the disrespectful manner in which MGT treated many landowners

The "preferred" route runs Southeast from Portland, TN through Bethpage & Castalian Springs & into Hartsville. The route crosses approximately 140 parcels of land **diagonally**, 85% of the route is farmland. The majority of the landowners involved are farmers. Some have had this land in their families for a hundred years or more & one wonderful lady has had this property in her family since the Civil War days.

OUR COALITION - In late November 2004, many of the landowners involved organized a meeting to discuss options regarding how to research this issue & how best to defend our property rights. Many of us met our neighbors for the first time that night, and since then we have become more like family. We continue to meet weekly & work diligently to gather information relevant to the pipeline proposal in general & to help educate the public regarding Eminent Domain Power & the abuse thereof.

We have hired attorneys both locally & in Washington, DC, renowned Energy Experts & Environmental consultants. **We have spent tens of thousands of dollars – collected out of our own pockets to fund the defense of our property rights & we will likely spend tens of thousands more. To date, our Energy Experts have testified that the pipeline proposed by MGT is not necessary. The facts discovered show that enough capacity exists in the current grid of pipelines in place to accomplish moving**

gas from Portland to Hartsville & these facts are supported by other independent gas companies, most notably, Columbia Gulf.

OUR QUESTION - You may be asking yourself, as we were, why would MGT be so interested in constructing this 31-mile stretch of pipeline? With more help from industry insiders & experts, we learned that MGT (a private company) also a division of Northern Border Partners in Canada was owned by **Enron Corporation**. In January of 2005, Enron sold its' majority interest & former top executives from Enron now run Northern Borders Partners. **It seems that if MGT uses the current pipeline in place to transport their gas, they will have to pay a surcharge monthly to the gas companies that own the pipeline. However, if they can get the Federal government (FERC) to grant a permit to construct this new pipeline, MGT will have a tremendously valuable asset,** one that can be sold at a very high profit any time. By owning the right of way on each property, MGT also has the right to lease or sell said right of way for other ventures, such as cell phone towers, high voltage power lines, compressor stations etc.

OUR ISSUES - The construction of this pipeline would affect numerous wells & springs. The majority of the landowners involved use well & spring water exclusively for their farming & cattle operations. The karst terrain of this area may divert the water flow for decades to come. Farmers have the risk of hitting the line during normal farming operations & soil that is disturbed this deeply does not recover enough to grow crops. For the small percentage of properties that are wooded, thousands of hardwood trees would be destroyed. One of the properties involved is operating under a State of Tennessee Forest Management plan, but even it is not safe.

In addition to the above concerns of having a pipeline on our property, we add the fear for our safety. **This is a 930PSI high pressure line** that transports gas from one interconnect to another. This is not a gas line for local use, we can not hook on to this & use it in our homes. **Should this pipeline rupture due to a farming accident, karst terrain shift or erosion etc. the "circle of death" is approximately ½ mile.**

Property values for parcels of land that are dissected diagonally by this pipeline will drop significantly, but the property taxes will still be ours to enjoy. Resale & subdividing potential is lost. Some landowners have 500-1,000 acres at stake here.

Midwestern Gas has surveyed properties illegally. They have preyed upon our most elderly landowners to gain signed survey permits & actual contracts. In some cases **MGT has used outright trickery & lies** to gain access to survey & to convince folks to agree to contracts, even offering $1,000 signing bonuses which can be kept if the permit is not granted. Many of the landowners are very opposed to this project. The **underhanded means by which MGT operates** has not endeared them to the community. There are many examples too detailed to mention here where **MGT has falsified information & documents in their quest for this project to be completed.**

Please note that everyone agrees that bringing in gas from Canada is a good thing. The multi-sourcing of resources is an important strategic strength & goal & price competitiveness is a good situation for all. However, the fact remains that the gas can be transported from point A to point B via existing pipelines already in place.

OUR SUPPORTERS – Local, State & Federal - Support for the landowner position is strong. The local **city, county & state governments & our representatives in Washington DC** have all shown great support for the defense of our property rights. In February 2005 MGT summoned 29 landowners to court in Sumner County in an effort to gain survey access, the Honorable Buck Rogers denied MGT's request. MGT has since appealed but no date has been set. Should MGT be granted a permit by FERC, they can then evoke Eminent Domain power to condemn each of our properties & offer pennies on the dollar for what its worth. Portland City Council, Sumner County Commission & Trousdale County Commission have all passed resolutions opposing the pipeline. In addition, Sumner County Commission has passed a resolution prohibiting the use of Eminent Domain by a private company for private profit. State Representatives Mike McDonald, Diane Black, Debra Maggart & Congressman Bart Gordon & others worked tirelessly to present Joint Resolution # 7 which passed the House & Senate & was signed by Governor Phil Bredeson. **US Senator Lamar Alexander & US Senator Bill Frist M.D.** are committed to working on this issue in Washington. Tennessee Farm Bureau, the largest Farm Bureau in the nation, is also strongly supporting our efforts. We have collected over 2,200 petition signatures from county residents also opposed to this pipeline project & have had tremendous support from local TV stations in Nashville and local newspaper & radio media.

OUR CONCLUSION - Every property owner is at risk of Eminent Domain Abuse. So many people in the general population do not know what Eminent Domain means. This has been remedied somewhat with the media coverage regarding the current controversy over the Supreme Court's decision to allow local government in Connecticut to use Eminent Domain power. Most folks' reactions are that it can't be possible, but the truth is – it could happen to anyone. **We must regain the control of our right to own property,** this situation has slipped out of own hands slowly over many years & more & more **private companies are abusing the rights originally reserved for Governments to operate for the public good. Private companies are profiting hugely from these abuses** & though this may be a small 31-mile stretch of pipeline, we landowners are firmly rooted in the ground we love & we will fight courageously to defend our rights & save our land.

TO BE CONTINUED...

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Mr. Chairman and Members of the Senate Judiciary Committee:

I am writing to you today because a monumental injustice has been done to me by the local government of my city, Jersey City in New Jersey. I believe my case is a typical example of eminent domain abuse perpetrated by local authorities, against which small business owners like me have little recourse. Unquestionably, I believe the taking was racially motivated by ideologues who wish to decide who can reside in the up and coming and exclusive waterfront of Jersey City. With a new luxurious golf course in the making, and a $250,000 fee for its membership and Donald Trump announcing his new $ 415,000,000 residential project nearby, it does not take too much common sense to conclude what kind of inhabitants will eventually reside here. Real estate and rents are soaring to levels that the average Jersey City American family will no longer be able to afford. The major developers are literally remaking the downtown section of my city for the wealthy. They, are chasing out the original inhabitants who have settled here for decades, many of like me, property owners will have a difficult time relocating elsewhere when displaced. What happened to Life, Liberty and the Pursuit of Happiness?

My purpose today is to explain the wrongful taking of my very valuable commercial property through selective eminent domain under the guise of a Redevelopment Plan known as the "Tidewater Basin Redevelopment Plan" and the term of "blight" or "an area in need of redevelopment".
One of the ways to prevent me from developing this real estate on my own was the conversion of a prior zoning of (R-2 dual commercial use) into a recreational use area for open space or a ball field.
If the current zoning had been left as it was, I would build and augment my business and turn what was a mere $540,000 parcel into a multi million dollar enterprise. This in fact is the business plan for many other designated Tidewater Basin Project property owners. However, only two of us will not reap these immense benefits. And we two are minorities, Asian-Americans...small fish!

This is a taking planned to deliberately deprive me and one other owner of a fair piece of the prosperity said Tidewater basin Redevelopment will create. To complicate matters, the City is taking my property on behalf of a church and its partnerships that has form a corporation known as "The St. Peter's Athletic Foundation, Inc. " a New Jersey registered non-profit corporation . They were designated as the developer of choice.

Prior efforts to have a dialogue with city officials were in vain. The current mayor, my councilman, and even a freeholder of Hudson County ignored my pleas for help in addressing this injustice. We seem to be insignificant in their drive to achieve a mega-city neighbourhood of which only the powerful and politically connected will have a chance to enjoy.

Having now aired my grievances, please allow me to share some details of my case which is now set for hearing in the New Jersey Superior Court.

In the State of New Jersey the Eminent Domain Laws were written leaving the property owner with little option to challenge the right to take. Even my attorney refuse to represent me on the right to take since they are aware on the futility of launching such a lawsuit.
The State's Eminent Domain Statues written in 1971 clearly is in favor of the condemnor forcing the Defendant to settle for equity settlement in most of the cases.

1. Although the Fifth Amendment requires "fair compensation" for a public taking, a private to private taking has been prevalent due to recent hikes in property values.

The condemnee is never treated fairly in New Jersey since there is a cap of $10,000 for relocation expenses only. If a small business loses its property by condemnation he will only be compensated for the value of the real estate. Any non-tangible losses such as loss of business opportunities, business goodwill, and loss of location potential, equipment and fixtures of substantial value will not be compensated. In a free market of willing buyer, willing seller such non-tangibles and assets could be negotiated and command a price which can be substantial depending on market conditions. With the existing laws unchanged, the property owner has none of these rights.

The 14th Amendment to the Constitution provides that the aggrieved party is accorded equal protection of the law and in New Jersey this simply is not the case.

Further obstacles, such as limited discovery and the prohibition of Counterclaim unless leave of court is obtained at the discretion of the judge, make it very difficult to challenge the right to take successfully. The Judge can use his discretion to alter the course of the lawsuit anyway he wishes.

The seizure of title to the property even before the right to take can be done, simply by the filing of a complaint and the declaration of taking and after a deposit is made with the court. This in my opinion violates the 14th amendment.

The Kennedy Test as cited in the Final Opinion of the Court in Kelo vs. New London for a valid taking is summarized as follows:

a) Whether the takings of a particular properties at issue were "reasonably necessary" to achieving the City's intended public use and, second whether the takings were for reasonably foreseeable needs.

a) A State may transfer property from one private party to another if future "use by the public" is the purpose of the taking.

b) "A purely private taking could not withstand the scrutiny of the public use requirement: it would serve no legitimate purpose of government and thus be voided."

b) "Nor would the City be allowed to take property under the mere pretext of a public purpose when its actual purpose was to bestow private benefit."

c) "...The City's development plan was adopted to benefit a particular class of identifiable individuals.

d) The disposition of this case therefore turns on the question whether the City's development plan serves a "public purpose".

e) "It is only the taking's purpose and not its mechanics" we explained that matters in determining public use.

Having highlighted the above Supreme Court's opinion, the writer wishes to offer the following chronology of the events leading to the seizure of his property, and how the law has been abused.

1987 Owner purchased the real estate which was originally a Tavern.

1987 Preliminary site plans were submitted for development of multi-unit housing with retail for the property. Application was abandoned because of the real estate bust in the region during the late eighties. Completed condominiums by other developers in the area stood unoccupied and unsold for as long as four years. There were more sellers than buyers for properties.

1988 Owner renovated the existing structure and operated the existing business, a tavern and restaurant.

1999 July. Owner went into negotiations with the city to resume submission of plans as planned originally.
Owner was given a draft of the redevelopment (9/4/99) in the area and owner was invited to participate in the redevelopment. Owner obtained new drawings and met with city officials.
Owner was informed that his application will not be accepted.
Owner was told by city official that the Mayor had other plans for the area also known as the "Tidewater Basin Redevelopment Plan".
Owner obtained a revised draft of Plan (10/19/99) at city meeting which was substantially changed. The zoning changes hindered owner from development.of his property for best and highest use, and was limited to use as a ball-park or open space.
Owner found out the reason for this was another party had an interest in the property.
Owner contacted the interested party, The Church of Our Lady of Czestochowa, which owns part of the land proposed for the ball field.

The parish priest in charge of the church offered to exchange one of the church owned properties for another which the church owns. Owner declined the offer.

The Redevelopment Plan went before a public hearing. Owner voiced concerns about the unclear nature of the Plan since the questions raised about acquisition or eminent domain was vague and left unanswered even by the city's lawyers. However most property owners were given assurance their properties will not be acquired. All affected parties within the Plan were accommodated one way or another except writer's property. This was intended to minimize any opposition to the Plan.

Plan was approved by the City.

About this time owner's wife fell ill and was eventually diagnosed with Multiple Myeloma, a form of rare blood cancer. He was too preoccupied with taking care of his spouse then to challenge the approval of the Plan.

January 7, 2003 St. Peter's Athletic Foundation Inc. a New Jersey non-profit corporation, a consortium of three partnerships of which the church is a partner, filed plans for development of a practice ball field.. Again, owner appeared before the Board and raised concern that his property may face the possibility of being acquired and objected to the application.
The attorney who himself is also a priest, representing St. Peter's assured owner there was no need for his property and confirmed that the plan for the ball field has been finalized and owner's property will not be part of the project. The Project was thus approved and the ball field was completed.

A year passed and there was no interest on the part of St. Peter's for owner's property. Owner wrote to the city requesting guidelines for development of the properties.
The City responded in a letter dated April 16th 2004 indicating that since St. Peter's no longer has any need for the property he can proceed to process the necessary applications and changes for development of the property. A developer was located who agreed to purchase the property and jointly develop it with owner. They will be a joint developer within a new corporation of which owner will be a partner.

St. Peter's Athletic Foundation Inc. discovered the owner's plan and influenced the city to block any application that will be filed. They then approached owner and offered a price to purchase the property instead. Owner refused to sell to them since an ongoing project had been established, with a contract signed. St. Peter's said they will use condemnation to take the property by force of law.
Unable to proceed, the developer had to withdraw from the project.

August 28 2003

The American Civil Liberties Union of New Jersey filed a lawsuit to stop the state from distributing $250,000 to St. Peters since it violates the principle of religious freedom described in the First Amendment to the US Constitution and Article 1. Para. 4 of the New Jersey Constitution.
"Having religious freedom means having a government that treats religious groups with neutrality, so that people aren't favored or discriminated against based on their beliefs." stated Deborah Jacobs, ACLU-NJ Executive Director. "And with so many of our public schools in desperate condition how can our state justify giving taxpayer's money to private religious schools?"

A Complaint for condemnation and declaration to take was initiated on June 2005 after owner declined the offer from St. Peter's. The city seized title to the property immediately on behalf of St. Peter's and owner was given a 90 days eviction notice.

I sincerely hope the Senate Judiciary Committee will initiate a moratorium on the takings laws for at least two years until all the states have a chance to review and update their laws to provide equal protection to every property owner.

I see the following scenario happening if St. Peter's is successful in their taking:
Once the religious institution acquires the property, they will warehouse it for the time being. Any need to use it as part of the ball field is a smoke screen. They had already indicated they have no need for the property previously. The ball field is completed. After they succeed in acquiring the adjacent remaining lot currently owned by an elderly couple, in a few years time they will have amassed the most desirable and valuable piece of real estate on the Jersey City waterfront, consisting of more than 3+ acres of land. As a "religious institution", they may be able to invoke the Federal Religious Land Use and Institutionalized person Act which was enacted by Congress in 2000 to protect religious institutions from discrimination!
(RLUIPA 42 SC 2000). This will allow them to file for changes in the zoning and limitation of use in their favor which can then withstand almost any challenge from state or local municipality opposition. If this can happen it will be a great injustice to every property owner in a simliar situation.

Respectfully submitted on September 22, 2005 by:

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September 19, 2005

Via E-mail
Senator Mike DeWine
140 Russell Senate Building
Washington, DC 20510

Re: *Comments to Senate Judiciary Committee's hearing as to Kelo decision*

Dear Senator DeWine:

I am writing in response to the legislative initiatives that have arisen following the *Kelo v New London* decision by the United States Supreme Court. Having represented clients on both sides of the eminent domain issue and written nationally on the topic, I have but one request of the Senate before it acts on this important issue. Ensure that any action is taken only after a thorough and weighty consideration of the issue has occurred. The constitutional power of eminent domain, particularly in an economic development context, is too important to be accompanied by misinformation and hyperbole. This issue requires in depth study and deliberative hearings - not rash decisions espoused by ideologues. Restating Justice Stevens, the libertarian arguments advanced by the Institute for Justice were supported by "neither precedent nor logic." Despite the criticism that the Court has endured after its decision, I request that the Senate exercise the same judicious temperament that Justice Stevens and his colleagues demonstrated in affirming that economic development was a valid governmental objective and that courts should defer to such local legislative determinations.

Although I understand the despair felt by anyone forced out of his or her home for the sake of community goals, the larger issue involves whether or not the federal government will intervene to prevent local communities from having the resources and powers necessary to address their critical issues. The Senate should be cognizant of the overall benefits to those communities utilizing redevelopment plans even where the assemblage of the property is obtained through the exercise of eminent domain. Urban redevelopment accomplishes several commendable objectives. It fosters job growth, sustains essential governmental services, provides a more beneficial land use and improves public infrastructure such as sewers and utility lines upon the redevelopment of the project area. Attached to this letter is information on two of the more prominent urban redevelopment projects in Cincinnati, Ohio: "The Banks," on the Ohio

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river front and "The Calhoun Street Market Place" just south of the University of Cincinnati. The anticipated project investment will total more than $700 million dollars in investment bringing hundred of jobs, enhancing the urban landscape and improving the public infrastructure. But these projects will not occur if the federal government seeks to deprive communities of the financial incentives necessary for their success. Diminishing urban redevelopment eliminates one half of the revenue side of the equation for municipalities and, by discouraging urban renewal, conversely leads to the adverse consequences of suburban sprawl.

To the extent that there are valid concerns, the Senate may wish to consider the procedural protections, not highlighted in economic development projects, that typically accompany urban renewal projects. The urban renewal model works like a zoning overlay. Prior to any exercise of eminent domain, a municipality must review a study area for possible qualification as an urban renewal district. Several safeguards are thereby ensured. The initial step, which is legislative in nature, invites a full and open public debate. Another step involves a planning component that requires study of the existing and future land uses in the area. Finally, if a district is created, there is generally a requirement of a public/private contract for redevelopment which ensures on-going public input into the redevelopment and use of the property consistent with the community goals.

Elected officials should not be criticized but applauded for having the foresight to address problems before the "levees break." Local communities need federal incentives to successfully complete urban redevelopments. If the Senate strips away federal incentives, it would allow any holdout to effectively veto the legislative action adopted by a community's elected officials.

Accordingly, I emphasize the importance of deliberative hearings on this issue. Experts in law, economic development, social equity, and public administration should be solicited to address these very difficult social policy and legal issues before Congress acts.

I appreciate the opportunity to submit these comments.

Very truly yours,

Richard B. Tranter

RBT/jw

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ATTACHMENT A

September 19, 2005

RE: Urban Renewal Update - Cincinnati, Ohio

Urban Renewal Planning has played an important role in the development of the City of Cincinnati for the last fifty years. Such Planning remains vital to the City and is responsible for downtown projects such as office buildings, apartment buildings, hotels, and the Contemporary Arts Center.[1] Additionally, the Great American Ballpark (as well as its predecessor Riverfront Stadium), Paul Brown Stadium, the Freedom Center and the Aronoff Center for the Arts are all urban redevelopment projects. Currently, development groups are in the process of completing two projects that will enhance two distinct parts of Cincinnati: "The Banks" along the Ohio riverfront, and "The Calhoun Street Marketplace Project" near the University of Cincinnati.

- **The Banks**[2]

  Description

  - "When the Riverfront Advisors Commission was chartered by the City/County Riverfront Steering Committee in February 1999, they were charged with creating a comprehensive development program to build on the bold riverfront initiatives being undertaken by the community at the time. Not only were two new sports stadiums being built, but attractions such as the National Underground Railroad Freedom Center and the national Steamboat Monument were in the planning stages. At the same time, significant public improvements were under way in anticipation of the private sector investments to come. While the most dramatic was the reconfiguration of Fort Washington Way to make land available for The Banks, seven other major street and utility infrastructure projects have been constructed, or are under way, in support of riverfront initiatives. Thus, eight city blocks of land will be ready for development with streets and utilities in place."
  - "The result of the Riverfront Advisor's efforts was a far-reaching and spectacular vision for "The Banks," a development that will create a 24-hour seven-day-a-week diverse, pedestrian-friendly urban neighborhood with a mix of uses consisting of residential housing, specialty retail, restaurants, entertainment, office, boutique hotel space, public greenspace and parking. Located on the Ohio River, The Banks will become the focal point of the Greater Cincinnati Region."

[1] *See*, Susan Vela, "Group promotes fights against eminent domain," Cincinnati Enquirer, Sunday December 15, 2002; available at http://www.enquirer.com/editions/2002/12/14/loc_eminentdomain15.html. *See also*, City of Cincinnati's Community Development and Planning website at http://www.cincinnati-oh.gov/cdap.pages/-3496-/.
[2] All quotes describing The Banks taken from Port of Greater Cincinnati Development Authority's website, available at http://www.cincinnatiport.org/pa_pg5A.html.

- "Nowhere else has approximately 15 acres - eight city blocks - of prominent waterfront property been pre-assembled at one time."

Funding

- "The Port Authority issued $50 million in tax-exempt revenue bonds for the construction of Freedom Center improvements. Located at the northern terminus of the Roebling Suspension Bridge, the National Underground Railroad Freedom Center is a national interpretive and educational center designed to relate the lessons of the Underground Railroad Movement to contemporary freedom movements across the globe. The $110 million Freedom Center (totals) 160,000 square feet, with a park south of the facility connecting the Freedom Center to the Central Riverfront Park."
- "The Banks has pursued public funding opportunities at the federal, state, and local levels."
- "The Banks has aggressively pursued grant funding in order to bring the project to fruition."
- "The Port of Greater Cincinnati Development Authority was successful in its submittal of an application for a $10.4 million federal Congestion Mitigation/Air Quality grant for the creation of The Banks Intermodal Facility to replace the existing Cinergy Field Plaza Garage and surrounding surface parking lots with below-grade parking facilities. This is a joint project between the Port Authority, the City of Cincinnati, Hamilton County, and the Southwest Ohio Regional Transit Authority to provide a regional transportation hub near the riverfront."

- **Calhoun Street Marketplace Project (South of the University of Cincinnati)**[3]
  - "A corridor of new housing, shops and restaurants will rise opposite the university along Calhoun Street."
  - "New housing options will include 241 upscale condominiums atop ground-level retail shops and a 600-car underground garage."
  - "Led and owned by the Clifton Heights Community Urban Redevelopment Corporation (CHCURC), the redevelopment plan was approved by Cincinnati City Council in June 2001. The aim is to move from a drive-through, fast-food strip to a pedestrian-friendly, ethnically mixed hub of housing, international dining, shopping, entertainment and green spaces. Developer for the project is Higgins Development Partners out of Chicago working in partnership with CHCURC. All told, this project will cost about $125 million, partly funded by a $40 million loan from the University of Cincinnati, and $3 million in contributions for infrastructure improvements from the City of Cincinnati."

[3] All quotes describing the Calhoun Street Marketplace Project, *see* The University of Cincinnati's Community Partnership Projects: Upcoming Plans for 2005, available at http://www.uc.edu/ucinfo/commpart.htm.

Californias' Kelo

On September 10th and 11th, 2004, a glossy brochure came in the mail. What it contained astounded and angered residents in Swan Canyon and Castle neighborhoods of City Heights, an urban community of San Diego approximately 5 miles from the Downtown area.

This brochure came from the "San Diego Model School Development Agency", and it was a plan to create a "model" community around the Florence Griffith-Joyner Elementary School . This school was still in the design phase, though the homes on the site had already been obtained and leveled at least two years earlier. This "model" plan showed replacing mostly single-family homes with some apartments and a business strip with "market rate" condominiums and "affordable" apartments. The 509 "units" would replace approximately 120 -188 homes and businesses.

The brochure went on to explain that the Agency was made up of the City of San Diego, the City Redevelopment Agency, the Housing Commission (handles the Section 8 and 23 housing programs as well as their own housing units) and San Diego Unified School District (City Schools). It also stated that groups in the Community of City Heights had been involved in the development of the project, and that public meetings had been held for public input.

The reality is that until this brochure was received by the residents in September 2004, VERY FEW PEOPLE KNEW ABOUT THIS PROJECT. It was a shock to the majority of residents in this "potential" project area. People who had heard about it, like Jody Carey who bought into the neighborhood in early 2004, were told that their homes were safe because nothing was firm yet, and that the project possibly would not happen at all. There were a few who knew more about the project, such as the "Community Representative", but did NOTHING to inform the residents what was coming.

City Heights is a redevelopment district; it is also the most heavily minority and lower income community in the City of San Diego. Immigrants from all over the world and disabled/elderly/low income minority families live here. The neighborhoods that were selected were ones that had a higher income ratio, and were naturally revitalizing. Generational families live in some of the homes; very few had been sold over the previous 10 years.

As the residents organized and started obtaining evidence regarding the true nature of the project, we became more astounded and angry that this type of railroading could occur. The project was conceived in 2002 and pushed by a 501(c)(3) not-for-profit that "prided" itself in helping the community of City Heights "revitalize" itself. Then-State Assemblywoman Christine Kehoe took the idea of a "Joint Powers Authority" to the California State Legislature, and risked censure in pushing this JPA bill to a vote. The bill passed, with the caveat of Eminent Domain assigned to the Agency, and no recourse as the Agency is independent of City and State oversight. The respective organizations that sit on the JPA vote for each others' Board positions, admit that they do not have to follow California Redevelopment law, and answer to no one but themselves.

In October 2003 the project area was enlarged to allow for more "market rate" condominiums so that any "Master Developer" could recover their costs more easily and make a profit. The final project area was decided in April 2004, supposedly with massive community support and input. Community organizations were misrepresented

as being in support of the project, when in actuality they were not. Public meetings were not posted in local public places, and, again, residents in the affected areas were not told until they received the brochure. The Project Manager, tasked with due diligence, did not know the population they were dealing with, treating the residents as if they were "ignorant" of knowing what was good for them. They apparently did not even have an accurate list of homeowners, which was readily available from the Planning Department, saying it was mostly "renters" with only a small amount of resident homeowners, when the opposite it true.

The residents keep being told that this is not an "approved " project; however, the JPA acts as though it is. Residents were just required to fill out an Owner Participation Agreement/Proposal, which under normal California Redevelopment law is AFTER a project has gone through its Environmental Impact Report (which is still on-going) and has been approved by government agencies. The reason? JPA feels that since funding may not occur at the level they need, that the residents may be able to get better loan deals than the City could. The residents also keep being told that Eminent Domain is a last resort, but in a workshop held earlier this year, the JPA Legal Counsel stated that anyone who did not sell would be condemned, forced out of their homes, then "dealt" with in court. In essence, Eminent Domain is not used as a "tool", it is used as a legal threat of intimidation and persecution that for all due intent and purpose is against the law.

Because the Housing Commission sits on the Board, they have made clear that there would be Federal funds used, some of which they had been "setting aside" for several years to build the affordable apartments. There has been talk about receiving Federal funds at some point to "restore" the delicate ecosystems of the surrounding canyons that would be damaged by the project, as well as taking care of problems that had already been ignored for years by the City of San Diego itself.

When asked about senior/disabled and accessability, we are told that "families" only would be living in the condos and affordable housing, hence the designs of multiple levels and steps, no slopes or elevators. When asked about maintenance, they tell us they do not know who will take care of the properties, including the federally funded housing, and that it would take a JPA to get our basic maintenance done. Currently, because this is a "potential" project, the City is not required to maintain street lights, sewers, etc because "someone else" will take care of it within 5 years. This puts current residents at risk and allows using increase in crime and "blight" from ill maintenance as a reason to destroy a sustainable community to create gentrification under the banner of "smart growth".

The similarities between the San Diego Model School Agency and the Kelo case are so glaring that news agencies and State legislators are calling this the "Kelo Case of California".

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