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PROTECTING PROPERTY RIGHTS AFTER KELO

HEARING

BEFORE THE

SUBCOMMITTEE ON
COMMERCE, TRADE, AND CONSUMER PROTECTION

OF THE

COMMITTEE ON ENERGY AND
COMMERCE
HOUSE OF REPRESENTATIVES

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PROTECTING PROPERTY RIGHTS AFTER KELO

WEDNESDAY, OCTOBER 19, 2005

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ENERGY AND COMMERCE,
SUBCOMMITTEE ON COMMERCE, TRADE,
AND CONSUMER PROTECTION,
Washington, DC.

The subcommittee met, pursuant to notice, at 2:05 p.m., in room 2123 of the Rayburn House Office Building, Hon. Cliff Stearns [chairman] presiding.

Members present: Representatives Stearns, Bass, Otter, Blackburn, Schakowsky, and Green.

Staff present: Brian McCullough, majority professional staff; David Cavicke, general counsel; Chris Leahy, policy coordinator; Will Carty, majority professional staff; Andy Black, deputy policy staff director; Lisa Miller, deputy communications director; Shannon Jacquot, majority counsel; Jonathon Cordone, minority counsel; Jonathon Brater, staff assistant; Chris Treanor, staff assistant; and Billy Harvard, clerk.

Mr. STEARNS. Good afternoon. The subcommittee will come to order. Let me say first of all, to my colleagues, I welcome this opportunity, and I think all of us should in Congress, to learn more about one of the most important Supreme Court decisions in recent memory. Kelo v. the city of New London is a decision that has implications for every commercial interest in the country. Kelo also challenges widely held notions about the nature of private property and the power of the government to take that property, albeit with due compensation, in the name of economic progress. The economic and social implications of the Supreme Court's current "economic development" analysis, applied in Kelo and somehow derived from the Fifth Amendment's Takings Clause, I think should concern all consumers in the private property marketplace.

I must also confess, like many Americans, this decision has made me think about any commercial property that I have or even a home. You know, developers' eyes could be looking at it an saying, you know, I think I could use that for a new golf course, a coffee shop, or a movie house. I have nothing against any of those things, in fact, many of us can't live without them, but the economic relationship to my community and its tax base takes on new significance in light of Kelo. And this is not just another not-in-my-backyard knee-jerk reaction. To many, Kelo represents the ability of a powerful economic interest to not only take the backyard, but also the house, the garage, and the whole darn neighborhood if the eco-

nomics applies. And this is wrong and it is a great concern to me and others here in Congress, and that is why today's hearing is an essential step in trying to unpack Kelo's legal rationale, what it means for our neighborhoods, our communities, and our society.

Historically, the condemnation of private property through the Fifth Amendment power of eminent domain has followed a continuum. In the 19th Century, the Supreme Court generally regarded the concept of public use as synonymous with public purpose. In other words, after a condemnation, the property had to be government-owned or, in the case of an exclusively private transfer, had to involve a private party allowing some sort of public access to the property, similar to the railroads and public utilities common carrier duties. But as private property development continued around the country during the 20th Century, the court began to reject the notion that public use always means public purpose. In fact, a notion of public use in eminent domain causes—in cases involving private transfers evolved into an economic benefit analysis regardless of whether the public actually had physical access. A collective economic development benefit analysis began to trump the traditional public purpose and function test.

Over the last 30 years, the eminent domain battle has been waged over whether an economic development benefit constitutes a public use. Many contend, including Mrs. Kelo, that developers, to advance their project in the name of redevelopment of blighted or economically underperforming areas, have simply co-opted the so-called economic development test. The problem is that one man's blight is another man's bliss. The additional challenge is then how the government is going to equitably and accurately reflect intangibles, like what makes a house a home, in an antiseptic economic analysis. And don't forget that these hard-fought local battles can just, can just get as political as they do in the great body here in Congress. Unfortunately, more times than not, the Nation's Mrs. Kelos, with their modest but blissful slice of the world, lose out to big money and redevelopment issues. That is a very scary proposition for the vast majority of Americans who, like Mrs. Kelo, want to live freely in communities they know and love without fear of being removed in favor of so-called progress. That concern is even more urgent for our fellow Americans living in economically depressed areas.

While Kelo might be just another step down the continuum that started with the Supreme Court of the 1890's, 1890's, I hope it is the beginning of the end for the proposition that if your private—if your private land or property is not being put to its best economic use, you are vulnerable. No American should have to relent to a private party under the guise of government and give up his home or business. I doubt if many of us would sell our homes if given twice the value. But after Kelo, the sad truth is that the use of eminent domain to take private property and give it directly to another private party is the de facto standard. At this point, it is only the Congress and the States that can stop the erosion and work to reestablish the original intent of the Fifth Amendment Takings Clause to protect Americans from government action, not subject them to government-sponsored unfair bargaining sweetheart deals in the name of the greater good.

I would like to thank our distinguished panel of witnesses for joining us this afternoon, and I look forward to their testimony.

[The prepared statement of Hon. Cliff Stearns follows:]

PREPARED STATEMENT OF HON. CLIFF STEARNS, CHAIRMAN, SUBCOMMITTEE ON COMMERCE, TRADE, AND CONSUMER PROTECTION

Good afternoon. I welcome this opportunity to learn more about one of the most important Supreme Court decisions in recent memory. Kelo v. City of New London is a decision that has implications for every commercial interest in the country. Kelo also challenges widely held notions about the nature of private property and the power of the government to "take" that property, albeit with due compensation, in the name of economic progress. The economic and social implications of the Supreme Court's current "economic development" analysis, applied in Kelo and somehow derived from the Fifth Amendment's "takings" clause, should concern all consumers in the private property marketplace.

I also must confess, like many Americans, this decision has made me think about my own little piece of the world that perhaps might, in developers' eyes, make an enticing site for a new golf course, a coffee shop, or a movie house. I have nothing against any of those things, in fact, many of us can't live without them, but their economic relationship to my community and its tax base takes on new significance in light of Kelo. And this is not just another "Not-In-My-BackYard" knee jerk reaction. To many, Kelo represents the ability of powerful economic interests to not only take the backyard, but also the house, the garage, and the whole darn neighborhood if the economics warrant it. This is wrong and of great concern. And that is why today's hearing is an essential step in trying to unpack Kelo's legal rationale and what it means for our neighborhoods, our communities, and our society.

Historically, the condemnation of private property through the Fifth Amendment power of eminent domain has followed a continuum. In the 19th century, the Supreme Court generally regarded the concept of "public use" as synonymous with "public purpose." In other words, after a condemnation, the property had to be government-owned or, in the case of an exclusively private transfer, had to involve a private party allowing some sort of public access to the property, similar to the railroads and public utilities common carrier duties. But as property development continued around the country during the 20th century, the Court began to reject the notion that "public use" always meant "public purpose." In fact, the notion of "public use" in eminent domain cases involving private transfers evolved into an economic benefit analysis regardless of whether the public actually had physical access. A collective economic development benefit analysis began to trump actual the traditional public purpose and function test.

Over the last thirty years, the eminent domain battle has been waged over whether an economic development benefit constitutes a "public use." Many contend, including Mrs. Kelo, that developers to advance their projects in the name of "redevelopment" of blighted or economically underperforming areas have simply co-opted the so-called "economic development" test. The problem is that one man's blight is another man's bliss. The additional challenge is then how the government is going to equitably and accurately reflect intangibles, like what makes a house a home, in an antiseptic economic analysis. And don't forget that these hard-fought local battles can get just as political as they do in this great body. Unfortunately, more times than not, the nation's Mrs. Kelos, with their modest but blissful slice of the world, lose out to big money and redevelopment plans. That is a very scary proposition for the vast majority of Americans who, like Mrs. Kelo, want to live freely in communities they know and love without fear of being removed in favor of so-called progress. That concern is even more urgent for our fellow Americans living in economically depressed areas.

While Kelo might be just another step down the continuum that started with the Supreme Court of the 1890s, I hope it is the beginning of the end for the proposition that if your private land or property is not being put to its best economic use you are vulnerable. No American should have to relent to a private party under the guise of government and give up his home or business. I doubt many of use would sell our homes if given twice the value. But after Kelo, the sad truth is that the use of eminent domain to take private property and give it directly to another private party is the de facto standard. At this point, it is only the Congress and the states that can stop the erosion and work to reestablish the original intent of the Fifth Amendment takings clause to protect Americans from governmental action, not subject them to government-sponsored unfair bargaining and sweetheart deals in the name of the greater good.

I would like to thank our distinguished panel of witness for joining us this afternoon. We look forward to your testimony. Thank you.

Mr. STEARNS. And with that, I will give the opening statement to the ranking member, Ms. Schakowsky.

Ms. SCHAKOWSKY. Thank you, Mr. Chairman. I, too, want to welcome our panel, and I want to extend a special welcome to Mr. Shelton, whose work and his organization I respect so much. Thank you for holding this hearing to discuss the Supreme Court's recent decision in Kelo v. New London, and potential congressional responses.

The Kelo decision issued June 23, 2005, held that economic development can be a public use under the Fifth Amendment's taking clause. Essentially, the court held that a private developer may take homes and put the property on which they sit to public use, as long as the development plan would provide some benefits to the community, such as creating new jobs or increasing tax revenues. The court decision approving the government's taking of private property for commercial development has been met with strong disapproval by the American public. According to a Wall Street Journal/NBC News poll, "in the wake of the court's eminent domain decision, Americans, overall, cite private property rights as the current legal issue they care most about." And according to an American Survey poll conducted in July among 800 registered voters nationwide, "public support for limited the power of eminent domain is robust and cuts across demographic and partisan groups; 60 of self-identified Democrats, 74 percent of Independents, and 70 percent of Republicans support limits."

Indeed, in response to this decision, legislators in 35 States, including Illinois, are considering changes to eminent domain laws to prevent the taking of private land for private development, because they argue, the Kelo decision went too far in taking private property; however, local governments, including my hometown, the city of Evanston, Illinois, stand by the Kelo decision, citing that Federal law should not constrain their ability to decide when to use the power of eminent domain for the benefit of their communities. Few would question that there is a legitimate role for eminent domain. It is allowed by the Constitution, provided the condemnation is for a public use, and it is a vital and necessary tool for local government that must find for public uses such as roads and schools and public utilities. Because of the potential harm and good that will result from the Kelo decision, I believe we need to thoroughly examine all consequences of the decision, and whether further congressional action is needed. This is a serious issue and a timely debate, beyond a simple resolution of disapproval that we passed, and this debate is necessary.

In the aftermath of Hurricane Katrina and Hurricane Rita, the Gulf Coast will be the center of a colossal rebuilding effort, costing an estimated $200 billion. We may see an increased use of eminent domain and the Takings Clause to rebuild blighted and flood-devastated areas. What we learned from Katrina is not just the failure of government to respond to a natural catastrophe, but the failure to respond to people living without opportunity and in poverty. It will be a shame if we fail once again to protect the poor and vulner-

able, which could happen if eminent domain is abused by government officials as a way to provide favors to selected businesses.

Today, we will hear from the NAACP about how the history of eminent domain shows that the poor minority neighborhoods are specifically targeted, and minorities and elderly are disproportionately displaced when takings occur. I am concerned about how eminent domain invariably diminishes lower-cost housing and replaces it with either businesses or higher-cost housing. This reduces the supply of affordable housing in the area and drives up prices, making it more and more difficult for the underprivileged racial and ethnic minorities and the elderly to live in the neighborhoods they call home. Additionally, we need to discuss whether compensation in eminent domain cases is fair, especially if those who are displaced are unable to find comparable housing they can afford.

Even Justice John Paul Stevens, who wrote the Kelo decision for the five justice majority, has said publicly, he has concerns about the results of Kelo. Justice Stevens recently told the Clark County, Nevada, Bar Association that if he were a legislator instead of a judge, he would have opposed the results of his own ruling by working to change current law. Justice Sandra Day O'Connor and the other dissenting justices also raised serious concerns with the case and claimed that, pursuant to the decision, "nothing is to prevent the State from replacing any Motel 6 with a Ritz, any home with a shopping mall, or any farm with a factory." Specifically, Justice O'Connor states that "the government now has the license to transfer property from those with fewer resources to those with more." Considering the broad implications of the Kelo decision, I really look forward to hearing from the witnesses today, about how eminent domain can be used to help or hurt the property rights and well-being of the public, especially those who may vulnerable to the abuses of eminent domain. Thank you, Mr. Chairman.

Mr. STEARNS. I thank my colleague. The gentleman from Texas, Mr. Green.

Mr. GREEN. Thank you, Mr. Chairman. And I have a full statement I would like to place into the record.

Mr. STEARNS. By unanimous consent, so ordered.

[The prepared statement of Hon. Gene Green follows:]

PREPARED STATEMENT OF HON. GENE GREEN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Thank you, Chairman Stearns and Ranking Member Schakowsky for holding this hearing today.

The issue we face today is a complicated one. The use of eminent domain varies greatly by region, and there are various view points on this issue on both sides of the aisle.

In Texas, we place a strong value on the right to own property.

The decision in Kelo vs. City of New London has weakened citizens of their constitutional right to own property.

The premise of eminent domain under the Takings Clause of the Fifth Amendment is to protect the rights of property owners.

It states, "Private Property can not be taken for public use without just compensation."

Over time, this premise has been tested in the courts and gradually, the definition of what constitutes public use has been expanded to include the economic development of areas in need of revitalization.

I'm afraid the Supreme Court's ruling in Kelo v. New London may have opened the door for "public use" to be interpreted as "private gain" in some cases. This was not the intention of the 5th Amendment.

In the past, local governments have been able to acquire property from private owners under a more strict definition of "public use" such as to build highways, schools, parks, or to eliminate property that endangers the public.

I believe the spirit of the law is absent when the government condemns or purchases private property through eminent domain then sells it to another private owner.

The Kelo decision tips the scales in favor of the right of government to execute economic development plans than it does in protecting the rights of property owners.

I strongly support economic development. Enterprise zones have been effective in revitalizing neighborhoods with input from the citizens that live there. Local governments often use tax incentives to entice businesses to locate in their area.

I believe that eminent domain can be used to achieve outstanding results and boost local economies, but it has to be done responsibly.

When local governments can use eminent domain to take away private property and turn it over to developers in order to benefit from higher tax revenues, the spirit of the 5th Amendment is broken.

Clearly, the Consitution calls for "just compensation" when eminent domain is used. We must examine what this means, because often, a person who has lived in a home or run their own business for all their lives will say that fair market value is not just compensation at all.

It is difficult to argue that there is just compensation when your home is taken away so that a strip mall can be built in its place.

In Texas, the state legislature has already taken action to protect property owners by enacting a law prohibiting the local government or private entities from taking property through eminent domain for private benefit or economic development purposes.

I hope this hearing will give us a place from which we can craft solid solutions that will protect the rights of property owners and preserve the ability if local governments to use eminent domain for the public good.

Thank you Mr. Chairman, I yield back the balance of my time.

Mr. GREEN. I think that we have heard so far, there is bipartisan concern on the Kelo case v. the city of New London, and I think the issue was, we have always had the right for governments to take property for public use, highways, schools, parks, things like that, but when you actually take it and then sell it to a private sector person for the economic development, that is where I think it crosses the line. We do have, historically, railroads have the right of eminent domain as of private property and frankly, I guess, that was from two centuries ago, now, but I think that is what the concern is about this. And I am glad that Congress is actually taking—making an effort to do it. I know, in the State of Texas, our legislature actually has already changed the law because of the Supreme Court case, and that is where most eminent domain laws come from, on the State level, anyway. But I am glad to see local governments and State governments are responding. And if we can, on our Federal level, I am glad to be able to do it. And, Mr. Chairman, again, I ask that my full statement be placed in the record.

Mr. STEARNS. And I thank my colleague. If there are no more opening statements, we will move to the panel.

We have Professor Michael Ramsey, Professor of Law, the University of San Diego Law School; we have Mr. Steven Anderson, Castle Coalition Coordination, the Institute for Justice; Mr. Hilary O. Shelton is direction of the NAACP in the Washington Bureau; Mr. Jeff Finkle, President and CEO of International Economic Development Council; and last we have Mr. James B. DeLong, Senior Fellow and Director of the IPCentral Information Progress and Freedom Foundation.

And with that, we welcome all of you. And Professor Ramsey, we will start with your opening statement. And if you can, just pull

the mike close to you and make sure it is on. And I think you can get it a little closer to you. There you go, there you go. Good.

STATEMENTS OF MICHAEL D. RAMSEY, PROFESSOR OF LAW, UNIVERSITY OF SAN DIEGO LAW SCHOOL; STEVEN D. ANDERSON, CASTLE COALITION COORDINATOR, INSTITUTE FOR JUSTICE; HILARY O. SHELTON, DIRECTOR, NAACP, WASHINGTON BUREAU; JEFFERY FINKLE, PRESIDENT AND CEO, INTERNATIONAL ECONOMIC DEVELOPMENT COUNCIL; AND JAMES V. DELONG, SENIOR FELLOW AND DIRECTOR, IPCENTRAL.INFO, PROGRESS AND FREEDOM FOUNDATION

Mr. RAMSEY. Thank you very much. I thank you very much for having me here to express my views on this case. I wanted to address Kelo from the perspective of constitutional law, and I have two fairly simply points. The first is that the decision was wrongly decided. And the second is that Congress has power to substantially correct it, if it so chooses.

The Fifth Amendment states that private property cannot be taken for public us without just compensation. The clear negative implication from that is, that any taking must be for "public use," which has historically been understood to mean a direct benefit to the public. Normally, as we have heard already, this is understood to mean either actual use by the public, that is, property open to the public, use by the government on behalf of the public, or use by a common carrier, such as a railroad, with a legal obligation to serve the public. Kelo, in contrast, allowed taking of private homes to make way for a private economic development, much of which, at least, would not be open to the public at all. The benefit to the public was wholly indirect. Different private use of the property, it was said, would lead to higher taxes and more jobs and thus a benefit to the community indirectly.

The court reached its result by rewriting the Constitution's language. The court—and it did not make any bones about what it was doing. It rejected "use by the public as the proper definition of public use." Instead, it found, "the diverse and always evolving needs of society" require it to "embrace the broader and more natural interpretation of public use" as "public purpose," then applied the public purpose requirement to give substantial, indeed, I would say, essentially complete deference to the city to determine what would constitute a public purpose. If any conceivable benefit to the public could be imagined, the court said, then the city could go forward with the condemnation. As a result, as Justice O'Connor said in dissent, "the specter of condemnation hangs over all property." Or, if I could put it in my own words, if you do not use your property to the satisfaction of the government, then the government can take it away and give it to someone else who will use it as they think would be better.

Now, I find the court's decision to be deeply corrosive of constitutional rights, because, if the court believes that a right stated in the Constitution's text can be eliminated, rewritten, as in effect they did in Kelo, to serve the "diverse and always evolving needs of society," meaning the needs of the government, then we effectively have no constitutional rights, beyond what five members of the court think is appropriate to place on government at any par-

ticular time. That is contrary to the way we understand the written Constitution to operate; to be written limitations upon the power of government to act against the people.

So finally, let me turn to what Congress is empowered to do about this, if it so chooses. Congress cannot directly overrule the Supreme Court, as the Supreme Court held in the Boerne v. Flores case, with respect to the Religious Freedom Restoration Act some years ago. However, Congress can use its spending power to limit the use of Federal money in projects that rely on private takings, or perhaps under current law, to limit the use of Federal money by any State and local entity that uses private takings in that project or elsewhere. This is on the authority of the case of South Dakota v. Dole from the 1980's. Further, Congress can use its commerce power to prohibit private takings in projects that operate in interstate commerce. Under current law, the definition of Congress' interstate commerce power is quite broad, particularly, as held in the most recent case of Raich v. Gonzales just this term. And many, if not most, projects that could use private takings, in the way Kelo imagined, could, I think, also be limited by Congress' interstate commerce power.

In conclusion, the combination of spending power and interstate commerce power will likely give Congress the ability to constitutionally correct the court's error and restore the property rights guaranteed by the Constitution. Thank you.

[The prepared statement of Michael D. Ramsey follows:]

PREPARED STATEMENT OF MICHAEL D. RAMSEY, PROFESSOR OF LAW, UNIVERSITY OF SAN DIEGO LAW SCHOOL

I thank the Committee for the opportunity to express my views of the protection of private property rights after the Supreme Court's decision in *Kelo v. City of New London.* My views are, in sum, as follows.

(1) The plain text of the Constitution, and its undisputed historical understanding, is that the government's power to take private property by eminent domain is limited by the Fifth Amendment to situations in which the property will be put to "public use." This means situations in which the property will be used by the government itself to fulfill one of the traditional public functions of government, such as providing a park or a highway, or situations in which the property is operated by a "common carrier," such as a railroad, with an obligation to serve the public.

(2) In *Kelo v. City of New London,* the U.S. Supreme Court greatly reduced this protection for private property. It ruled that the City could seize and demolish private homes to make way for private office buildings and other private development that the City believed would increase its tax revenues and create new jobs, even though the land would be privately owed and not open to the public.

(3) The Court did not pretend to base its conclusion upon the text and historical understanding of the Constitution. Instead, it said that the evolving modern needs of society required that it substitute the phrase "public purpose" for the Constitution's phrase "public use"—so that the government could seize private land any time that seizure would facilitate "economic development." As Justice O'Connor pointed out in dissent, this effectively removes all constitutional limits on the eminent domain power.

(4) The *Kelo* decision is an attack, not only upon private property rights, but upon the whole idea of constitutional rights. If a right written into the text of the Constitution can be altered by five members of the Supreme Court simply because they believe that the evolving modern needs of government require it to give way, then we have no fixed rights, but only those rights the Court is willing to accept at any given time.

(5) Congress can remedy the Court's error in several ways. It cannot directly overrule the Court. However, it can, for example, use its spending power to insist that no federal money be spent in any project that takes private property for private use. It can use its commerce power to prohibit the operation in interstate commerce of

any project that take private property for private use. Using these powers, it can largely restore the rights denied in *Kelo.*

I. THE CONSTITUTION'S PROTECTION FOR PRIVATE PROPERTY

The plain text of the Constitution, and its undisputed historical understanding, is that the government's power to take private property by eminent domain is limited to situations in which the property will be put to "public use." The Fifth Amendment, made applicable to states and local governments by the Fourteenth Amendment, provides: "[N]or shall private property be taken for public use, without just compensation." The most obvious meaning of this provision is that if the government wants to take private property for "public use," it must pay "just compensation"—thus assuring that the public a whole, not just the property owner, bears the cost.

Although the text does not say so in exactly these words, the clear and undisputed indication is that private property may *not* be taken, *other* than for "public use," under any circumstances. Otherwise, the clause would be incoherent: it would mean that the government could take private property for private use without paying any compensation at all. No court or commentator reads the clause in that way. Rather, everyone agrees that the Fifth Amendment, as historically understood, imposes two restrictions on the eminent domain power: the property must be taken "for public use" and the government must pay "just compensation."

The question here, then, is the meaning of "public use." As a historical matter, that phrase meant exactly what it appears to mean. Most obviously, it refers to situations in which the property will be used by the government itself to fulfill one of the traditional public functions of government, such as providing a park or a highway. Additionally, it may refer to situations in which the property will be operated by a "common carrier," such as a railroad, with an obligation to serve the public. It emphatically did not include situations in which the government transferred property from one private owner to another. Under no possible meaning of the phrase could that be considered taking land "for *public* use."

II. THE DECISION IN KELO V. CITY OF NEW LONDON

In *Kelo v. City of New London,* 125 S.Ct. 2655 (2005), the U.S. Supreme Court greatly reduced the Fifth Amendment's protection for private property. It ruled that the City could take private homes to make way for private office buildings and other private development that the City believed would increase its tax revenues and create new jobs, even though, after the taking, the land would be privately owed and not open to the public. As the Court explained: "The City has carefully formulated an economic development plan that it believes will provide appreciable benefits to the community, including—but by no means limited to—new jobs and increased tax revenue." (at p. 2665). In particular, the Court concluded, the plaintiffs' private homes could be seized and demolished, and replaced by private "research and office space" that would "complement" an adjacent facility planned by Pfizer, Inc., the multinational pharmaceuticals company. (at. p. 2659; dissent at p. 2671-72).

The Court specifically held that "promoting economic development" qualifies as a "public use" of property under the Fifth Amendment. As it concluded, "[p]romoting economic development is a traditional and long accepted function of government," and "the City's interest in the economic benefits to be derived from the development" on the land taken from the plaintiffs—by which the Court principally meant increased tax revenue from the expected new commercial use—had enough of a "public character" to satisfy the Amendment. (p. 2665).

The Court added that it would not second-guess the City's determination that the re-development would, in fact, boost economic development and hence tax revenues. As Justice Kennedy acknowledged in concurrence, the Court would uphold a taking "as long as it is rationally related to a conceivable public purpose" (p. 2669). Under this very low standard, it is hard to imagine any seizure of private property being unconstitutional under the "public use" requirement. As Justice O'Connor stated in dissent,

> Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded—i.e., given to an owner who will use it in a way that the legislature deems more beneficial . . .
>
> [The Court] holds that the sovereign may take private property currently put to ordinary private use, and give it over for new, ordinary private use, so long as the new use is predicted to generate some secondary benefit for the public—such as increased tax revenue, more jobs, maybe even aesthetic pleasure. But nearly any lawful use of real private property can be said to generate some inci-

dental benefits to the public. Thus, if predicted (or even guaranteed) positive side effects are enough to render transfer from one private party to another constitutional, then the words "for public use" do not realistically exclude *any* takings, and thus do not exert any constraint on the eminent domain power. (pp. 2671, 2675)

III. THE BASIS OF THE COURT'S DECISION

The *Kelo* Court did not pretend to base its conclusion upon the words and historical understanding of the Constitution. Instead, it effectively admitted that it was re-writing the key phrase in the Fifth Amendment to produce what it thought was a better outcome. According to the Court, modern needs required it to substitute the phrase "public purpose" for the Constitution's phrase "public use." This would allow the government to seize private land and transfer it to other private parties any time that such transfer would facilitate "economic development," even though neither the government nor the public would end up owning or using the land.

Indeed, in a move of Orwellian proportions, the Court specifically rejected "'use by the public' as the proper definition of public use." (p. 2663). Instead, it declared that "the diverse and always evolving needs of society" required it to "embrace[] the broader and more natural interpretation of public use as 'public purpose.'" (at p. 2663).

Only this re-definition allowed the Court to reach its conclusion that "economic development" in the sense of (supposedly) higher tax revenues satisfied the Fifth Amendment. It is at least plausible to say, as the Court did, that the New London development plan has a "public purpose," but no possible stretch of language would allow one to say that the City's plan allowed "public use" of the property.

The Court purported to be following prior precedent in reaching these conclusions. It is true that at least two prior decisions had allowed a transfer of property from one private owner to another, without any guarantee of public use. *Hawaii Housing Authority v. Midkiff,* 467 U.S. 229 (1984); *Berman v. Parker,* 348 U.S. 26 (1954). These decision were themselves in some tension with the plain language of the Constitution, and illustrate the danger of bending constitutional rules even for the best of purposes. But as Justice O'Connor pointed out in her *Kelo* dissent (p. 2674-75), *Midkiff* and Berman only created a limited exception to the general rule of "public use." In both cases, prior to the taking the property had been used in a way that was harmful to the public interest. *Kelo* abandoned any such limitation. No one argued that there was anything injurious about the plaintiffs' use of their property in *Kelo* (these are "well-maintained homes") (p. 2675). Instead, *Kelo* allows seizure whenever the government thinks some *better* use (not a non-injurious use) could be made of the property. As Justice O'Connor concluded, this effectively eliminates any constitutional limit on the eminent domain power.

IV. THE EFFECT ON CONSTITUTIONAL LAW

The *Kelo* decision is an attack, not only upon private property rights, but upon the whole idea of constitutional rights. If a right written into the text of the Constitution can be eliminated by five members of the Supreme Court simply because they believe that "the diverse and always evolving needs of society" require it to give way, then we have no fixed rights, nor, for that matter, any fixed structure of government. Everything depends upon what the Court thinks most useful at any particular moment.

Such an approach is contrary to the basic function of a written Constitution. The reason a phrase such as "public use" is written into the Constitution is so that it—and not some other standard, such as "public purpose"—is the measure of our rights. This approach is also contrary to the basic function of a constitutional court. As Alexander Hamilton argued in *Federalist 78*, "A constitution is, in fact, and must be regarded by the judges as, a fundamental law"; thus he referred to "that inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice." Just as courts exceed their authority by inventing new limits on government that do *not* exist in the written Constitution, they shirk their duty when they fail to enforce rights that *do* exist in the written Constitution.

V. HOW CONGRESS MAY RESTORE PRIVATE PROPERTY RIGHTS

Congress can remedy the Court's attack upon property rights in several ways. It cannot directly overrule the Court on a matter of constitutional law. In parallel circumstances, the Supreme Court held that Congress lacked power to overturn a constitutional holding by statute, even though Congress sincerely believed that the Court had failed to enforce individual rights guaranteed by the plain text of the

Constitution. *Boerne v. Flores,* 521 U.S. 507 (1997) (invalidating part of the Religious Freedom Restoration Act, which sought to correct the Court's perceived misinterpretation of the First Amendment's Free Exercise Clause).

However, Congress has a number of constitutional options available. First, it can declare that, with respect to the exercise of eminent domain power by the U.S. government, the constitutional rule of "public use" remains in force. There is precedent for this approach: the Religious Freedom Restoration Act directed that federal laws would remain subject to the constitutional rule of the Free Exercise Clause, as Congress understood it, despite the Court's contrary holding. No one doubts that this part of the Act is constitutional, and remains in effect: Congress can always limit the scope of federal action.

Congress also has several options for limiting the scope of state and local government exercise of eminent domain power. Under current law, Congress may use its spending power to insist that no federal money be spent in any state or local project that takes private property for private use. *South Dakota v. Dole,* 438 U.S. 203 (1987). If the limitation is strictly linked to state and local projects that themselves use federal money, the limitation would not be at all constitutionally problematic; even the dissenting opinion in *South Dakota* would uphold such a provision. A more aggressive approach would ban any state or local entity that takes private property for private use from receiving any federal money for *any* redevelopment project (or, even more controversially, from receiving any federal money for any purpose). The less direct the link between the federal money and the state or local taking, the more constitutionally-suspect the law would become.

Finally, under current law, Congress can use its commerce power to prohibit any project that takes private property for private use, if the project operates in or substantially affects interstate commerce. Because current law defines Congress' interstate commerce power quite broadly, *Gonzales v. Raich,* 125 S.Ct. 2195 (2005), this would likely reach most "economic development" projects such as the one proposed in New London. Even under the dissent's view in *Raich,* a key element was that the activity in that case was non-economic, and thus (said the dissent) beyond Congress' power. Here, the economic elements would be much greater, and thus the argument for Congress' power would be correspondingly stronger. It is worth noting, though, that this broad reading of Congress' interstate commerce power (that is, that it reaches all economic activity) remains controversial in some circles, and it is possible that some (though probably not many) redevelopment project could be considered so localized as to be beyond Congress' power.

Mr. STEARNS. I thank the gentleman. Mr. Anderson.

STATEMENT OF STEVEN D. ANDERSON

Mr. ANDERSON. Thank you, Chairman Stearns and Ranking Member Schakowsky for the opportunity to testify today about Kelo v. New London. The subcommittee is to be commended for examining this issue and this misuse of government power. I work for the Institute for Justice, the nonprofit law firm that represented the plaintiffs in the New London case. It is a law firm that is dedicated to defending the individual rights of individuals and protecting the basic notions of a free society.

I personally work with homeowners and small business owners around the country to fight eminent domain for private development. In the wake of the Kelo case, we have launched our Hands Off My Home campaign, which is a initiative, an aggressive initiative, to effect real change at the Federal, State, and local level, and it is that desire to do that that brings me here today.

In Kelo, a narrow majority of the Supreme Court decided that under the United States Constitution, property could indeed be taken for another use that would potentially generate more jobs and taxes, as long as the project was pursuant to a development plan. The Kelo case was, unfortunately, the final signal that the United States Constitution, at least according the Supreme Court, provides no protection for private property rights for any American. Indeed, the court ruled that it is okay to use the power of eminent

domain when there is a mere possibility that something else could make more money than the homes or small businesses that currently occupy the land. It is no wonder, then, as the ranking member mentioned, that Justice O'Connor remarked in her dissent that the specter of condemnation hangs over all property.

Because of this threat, there has been a considerable public outcry against this closely divided decision. Overwhelming majorities in every poll I have seen have overwhelming said the Kelo decision was wrong. Several bills have been introduced in the House and Senate, which shows that there is bipartisan support against the abuse of eminent domain. Eminent domain in the early days of this Republic was called the despotic power, because it is the power to force citizens from their homes and small businesses. Because the founders were acutely aware of this power, the Fifth Amendment provides a simple restriction: nor shall private property be taken for public use without just compensation.

As the chairman mentioned, historically, with very few exceptions, the power of eminent domain was used for things that the public actually used, schools, courthouses, roads, and post offices. Over the last 50 years, particularly after Berman v. Parker in a 1954 Supreme Court decision, the meaning of public use has expanded to include ordinary private uses, like condominiums and big-box stores. After Berman v. Parker, the Supreme Court effectively opened a Pandora's Box and now properties are routinely taken pursuant to redevelopment statutes when there is absolutely nothing wrong with them, except that some well-heeled developer covets them and the government hopes to increase its tax revenue.

We did a study from 1998 to 2002 that showed there were more than 10,000 actual or threatened condemnations around this country for private use. This number was reached in counting properties that were mentioned in the local news report, and because of this, it is a gross underestimation. In Connecticut, for instance, we only found 31 examples, but Connecticut also keeps track of its economic development condemnations and they found 543.

Now that the Supreme Court has actually sanctioned the abuse of eminent domain in Kelo, the floodgates to abuse have further 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 decision, local governments have become further emboldened to take property for private development. For instance, in Freeport, Texas, just hours after the Kelo case came down, officials in Freeport began legal filings to take away two waterfront businesses to hand over to another. In Sunset Hills, Missouri, a couple of weeks after the Kelo ruling, Sunset Hills officials voted to allow the combination of 85 homes and small businesses for a shopping center. In Oakland, California, John Revelli's tire shop that he has owned since 1949 was taken. What Revelli said to the paper was, we thought we would win, but the Supreme Court took away my last chance.

Courts are already using the decision to reject challenges by owners to the taking of their property for other private parties. On July 6, 2005, a court in St. Louis, Missouri relied on Kelo in reluctantly upholding the taking of a home for a shopping mall. 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.

Of course, Federal agencies take property for public uses, like military installations, Federal parks, Federal buildings. These are all legitimate uses of the Fifth Amendment of the Constitution. While agencies themselves generally do not take property and transfer the private properties, they certainly do fund them. Thus, Federal money does currently support the abuse of eminent domain for private commercial development. A few examples include New London, Connecticut. Two million dollars in funds from the Economic Development Authority were used for that project. In St. Louis, Missouri, 200 units of housing, including some owned by a local ministry, were taken pursuant to Housing and Urban Development block grants. St. Luke's Pentecostal Church was taken from the congregation, who is now relegated to the basement that they owned before, based on HUD funds. HUD was involved in the Toledo, Ohio expansion of a Daimler-Chrysler Jeep manufacturing plant. Ardmore, Pennsylvania, there is a transit, part of a project in Ardmore, Pennsylvania, but it also involves a retail and residential development.

The Kelo decision cries out for congressional action. Even Justice Stevens, as a ranking member, suggested—stated in a recent speech that he believes eminent domain for economic development is bad policy. Congress and this subcommittee are to be commended for their efforts to provide protections that the court itself has denied.

As the professor mentioned, Congress has the power to deny Federal funding to projects that use eminent domain for private commercial development, and to deny Federal economic funding to government entities that abuse eminent domain in this way. Congress may restrict Federal funding under the case of South Dakota v. Dole. One of the most important requirements, though, is that there be a relationship between the Federal interests and the funded program, and that Congress be clear about the conditions under which Federal funds will be restricted. The purpose of Federal funds is to aid States in their 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. Development is not the problem. It occurs every day across the country without eminent domain and will continue to do so. A very recent example is in Scottsdale, Arizona, where they continue to lift free development area designations, and as a result of that, a billion dollars in development funds have poured into that city.

Mr. STEARNS. Can I have you sum up pretty soon?

Mr. ANDERSON. Sure. 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 condominiums and malls preferable to modest homes and small businesses. Federal law currently allows the expending of Federal funds to support condemnations for the

development of private developers. By doing so, it encourages this abuse nationwide. Using eminent domain so that another richer, better connected person may live 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, I thank this—opportunity to testify.

[The prepared statement of Steven D. Anderson follows:]

PREPARED STATEMENT OF STEVEN D. ANDERSON, CASTLE COALITION COORDINATOR, INSTITUTE FOR JUSTICE

Thank you for the opportunity to testify 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 subcommittee is to be commended for responding to the American people by examining this misuse of government power.

My name is Steven Anderson and I am the Coordinator of the Castle Coalition, a project of the Institute for Justice. The Castle Coalition is a nationwide network of grassroots activists committed to ending eminent domain abuse through outreach and activism. The Institute for Justice is a non-profit public interest law firm dedicated to defending the fundamental rights of individuals and protecting the basic notions of a free society. One of the Institute for Justice's core issues is private property rights and we are the nation's leading critic of and legal advocate against the abuse of eminent domain laws. To this end, we represented the homeowners in the *Kelo* case and publish *Public Power, Private Gain,* a report about the use of eminent domain for private development throughout the United States, which is available online at www.castlecoalition.org/report.

I personally work with home and business owners throughout the country to combat eminent domain for private development. In the wake of the *Kelo* decision, we launched our Hands Off My Home campaign, an aggressive and focused initiative to effect real change at the federal, state and local level. It is that desire that brings me here today.

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 the U.S. Constitution, according to the Court, 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.

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 subcommittee 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.

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.

Development is not the problem—it occurs everyday across the country without eminent domain and will continue to do so. But developers everywhere need to be told that they can only obtain property through private negotiation, not public force.

THIS HOUSE IS CURRENTLY CONSIDERING SEVERAL GOOD APPROACHES TO CURBING THE ABUSE OF EMINENT DOMAIN NATIONWIDE

H.B. 3405 achieves a vitally important goal. Americans throughout the country have expressed their dismay at the *Kelo*

ruling, and this bill would provide desperately needed reform. First and foremost, it states in no uncertain terms that state and local governments will lose economic development funding if they take someone's home or business for private commercial development. H.R. 3135 similarly restricts the use of eminent domain where federal funds are involved and provides for a common sense approach to the use of eminent domain by allowing it only for historic public uses or to cure harmful effects. H.R. 3315 prohibits the use of Housing and Urban Development funds where property is transferred from one private owner to another for commercial or economic development. H.R. 3083 and H.R. 3087 explicitly provide that the term "public use" does not include economic development and applies to exercises of eminent domain through federal power or funding.

These are appropriate responses. Congress provides significant funding throughout the country for economic development. Currently, that 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 the best approach.

Moreover, like H. Res. 340, passed shortly after the *Kelo*

decision and condemning the result, and H.J. Res. 60, a proposed constitutional amendment limiting private-to-private transfers except for public transportation purposes, all these bills represent a strong statement that this awesome government power should not be abused. Each is aimed at a commendable goal—restoring the faith of the American people in their ability to build, own and keep their homes and small businesses. 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. The bills also specifically tell state and local government entities what funds they risk losing. I suggest, however, the bills be amended to spell out even more explicitly under what conditions local government will forfeit federal economic development funding. I would also make sure to provide definitions that are as unambiguous as possible. Specificity and clarity are the most important requirements of any law that potentially restricts federal funding.

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 testify before this committee.

Mr. STEARNS. Now, Mr. Shelton, welcome.

STATEMENT OF HILARY O. SHELTON

Mr. SHELTON. Thank you very much, Chairman Stearns, Ranking Member Schakowsky, a good friend to the NAACP, ladies and gentlemen of the panel, for inviting me here today to talk about property rights in a post-Kelo world. And you mentioned, my name is Hilary Shelton and I am director of the NAACP's Washington Bureau, our Nation's oldest and largest and most widely recognized grassroots-based civil rights organization.

Given our Nation's sorry history of racism, bigotry, and a basic disregard on the part of too many elected and appointed officials of concerns and the rights of racial and ethnic minority Americans, it should come as no surprise the NAACP was very disappointed by 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 the 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 the abuse of specifically targeting racial and ethnic minorities and poor neighborhoods. Indeed, the displacement of African-Americans in urban renewal projects are so intertwined that urban renewal was often referred to as black removal. The vast disparities

of African-Americans and other racial and ethnic minorities that have been removed from their 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. They include segregation and maintaining the insulation—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 are often unable, to contest the action either politically or in our Nation's courts.

Last, municipalities often look to areas with low property values when deciding where to pursue redevelopment projects because it costs the condemning authority less, and thus the State and local governments gain more financially when they replace areas of low property values with those with higher property values. Thus, even if you dismiss all the motivations allowing municipalities to pursue eminent domain for private development, as was upheld in the Supreme Court case of Kelo, will clearly have 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, or subject to the eminent domain, but the negative impact of these takings of these women, men, 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 or designated for economic development almost certainly means that the markets are currently undervaluing that property, or that the property has some trapped valued that the market has not yet recognized.

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 revitalized neighborhoods. The remaining affordable housing in the area is almost certain to become less so.

Furthermore, the extent that such an exercise of 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—likely to upset organized minority communities. This dispersion both eliminates established communities' support mechanisms, and has a deleterious effect on these groups' ability to exercise the little political power they may have established.

In conclusion, allow me to reiterate that 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. As I have discussed in my testimony, too many of our communities, the minority, the elderly, the low-income, have witnessed an abuse of eminent domain powers. Given

this history of abuse, it is the hope of the NAACP that all legislative responses to Kelo to be sensitive to that.

As this Congress advances these policies and works with the various interests to do so, we need to ensure that certain segments of our population that have long been voiceless in the takings issue have a voice. We need to understand how it has been easy to exploit these communities by exposing eminent domain, not only in the pursuit of economic development, but also in the name of addressing blight. Historically and today, it has been too easy to characterize minority, elderly and low-income communities as blighted for eminent domain purposes and subject them to the will of the government. If the legislative purposes contain language that could potentially exclude these communities from protections against eminent domain abuses, we have failed in our responsibility to serve and to give a voice to these constituencies. These communities should be afforded the same right of protection that all homeowners, business owners, and other property owners will be afforded in a Federal policy response to Kelo.

Additionally, in considering the interest of our communities, we raise a broader concern regarding the use of eminent domain for any purpose, including those purposes traditionally viewed as public purposes, such as highways, utilities, and waste disposal. Even these more traditional uses of eminent domain have disproportionately burdened those communities with the least political power, the poor, minorities, and working class families. Furthermore, it is not only our owners that suffer, but our renters, whether they be residents or small businesses, who are provided no protection and pay a heavy, uncompensated price when eminent domain is imposed. For these reasons, as the majority in Kelo suggest, there must be a sufficient process of protection for minority communities regardless of the purpose of however beneficial to the public. The process must be open and the participation of the communities needs to be guaranteed. This is the voice that our communities deserve.

Thank you again, Chairman Stearns and Ranking Member Schakowsky 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 landscape. The NAACP stands ready to work 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.

[The prepared statement of Hilary O. Shelton follows:]

PREPARED STATEMENT OF HILARY O. SHELTON, DIRECTOR, NAACP WASHINGTON BUREAU

Thank you, Chairman Stearns, Ranking Member Schakowski 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 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 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 we 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.

The history of eminent domain is rife with abuse 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 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 our Nation's 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 of low property values 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 by the US Supreme Court in Kelo will clearly have a disparate impact on African Americans and other racial and ethnic minorities in our country.

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 communities and find that they cannot afford to live in the "revitalized" neighborhoods; 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

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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.

[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

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 these groups' ability to exercise what 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, 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 and improvement 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 Stearns, Ranking Member Schkowski and members of the subcommittee, 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 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.

Mr. STEARNS. Thank you. Mr. Finkle, you are next and your comments are welcome.

STATEMENT OF JEFFERY FINKLE

Mr. FINKLE. Good afternoon, Chairman Stearns, Ranking Minority Schakowsky, subcommittee members, and fellow panelists. Thank you for the opportunity to be with you today. We hope that hearing about our experiences are helpful as you and your colleagues review the rights of State and local officials to regulate and exercise eminent domain. My name is Jeff Finkle and I serve as the president and CEO of the International Economic Development Council. IEDC is the premier membership organization dedicated to economic development. Like you and your colleagues, our 4,000 members work every day to create high quality jobs, development vibrant communities, and improve the quality of life in their communities.

From IEDC's perspective, eminent domain is an economic development tool that allows local communities to assemble land for redevelopment projects that generate jobs, investment and tax base. We agree with the Supreme Court's decision in Kelo v. New London. It affirms eminent domain as an important tool for local governments, and leaves eminent domain decisions where they should be, in the hands of States and localities. The Supreme Court decision did not in any way expand the power of eminent domain; rath-

[5] Herbert J. Gans, The Urban Villagers: Group and Class in the life of Italian Americans, p.380

er, the court simply upheld the longstanding inclusion of economic development as a public use.

Eminent domain has succeeded in improving the economies of urban, suburban, and rural communities. For example, the city of Newport, Kentucky voted to condemn several properties to create Newport on the Levee, an entertainment complex that now attracts three million visitors a year and generating hundreds of jobs. This is a complete transformation of a community that once had a terrible reputation for poverty, blight, and crime.

As many inner city residents know, missing essential services, such as local grocery stores, have been provided after land has been assembled using eminent domain. There is no question that eminent domain is a power that, like any government power, must be used prudently, and there are many built-in checks. Once such check is the public nature of the takings process. A few government or elected officials are willing to risk their position in pursuit of a project overwhelmingly opposed by their community.

Communities impacted by Hurricanes Katrina and Rita are of special concern to us as well. While IEDC members in the region are grateful for the Federal Government's support of economic and infrastructure redevelopment, Gulf Coast communities impacted by the hurricanes will face incredibly complicated redevelopment challenges. In order to redevelop devastated communities, States and localities will first need to raze crumbling homes and businesses. We are concerned that proposed congressional legislation limiting the use of Federal funds from eminent domain would allow one holdout to stop the redevelopment of an entire distressed area. This would have the practical effect of thwarting the ability of communities with demolished, ruined infrastructure and begin redevelopment plans, further distressing an already devastated area. Traditional uses of eminent domain for elimination of slums and blights needs to be preserved.

Should Congress act to prohibit the use of eminent domain for economic development purposes, the economies of many communities will, in fact, suffer. In fact, the Department of Defense has pit two cities against one another to protect an airfield and the subsequent jobs. Will it be Virginia Beach or will it be Cecil Field in Jacksonville, Florida, where, one, the Department of Defense needs 900 homes torn down in one community, or 27 homes acquired using eminent domain in another community? At a time when so many of our businesses and communities are being confronted with intense competition from the global economy, and areas of our cities and regional rural areas is in decline, Congress should be expanding its efforts to solve the problems of economic deterioration, not imposing restrictions on community growth and development.

Thank you again for the opportunity to speak to you today. I am happy to answer questions you might have.

[The prepared statement of Jeffery Finkle follows:]

PREPARED STATEMENT OF JEFFERY FINKLE, PRESIDENT AND CEO, INTERNATIONAL ECONOMIC DEVELOPMENT COUNCIL

Chairman Stearns, Ranking Member Schakowsky, and Subcommittee members, thank you for the opportunity to appear before you today. I am honored to be here and to discuss the experiences of economic development professionals. We hope our

experiences can be an important source of information as Congress reviews the rights of local officials to exercise eminent domain in an effort to protect the economic health and vitality of their communities.

My name is Jeff Finkle, and I am the President and CEO of the International Economic Development Council (IEDC.) IEDC is the premier membership organization dedicated to helping economic development professionals create high-quality jobs, develop vibrant communities and improve the quality of life in their regions. You and your colleagues here in Congress work with our members each and every day to create economically vibrant communities in your districts back home. IEDC provides information to its members on the appropriate use of eminent domain through two publications we have included at the end of our testimony.

Before I begin my formal comments, I'd like to tell you about my experience in our profession. I have been in the economic development field for nearly 25 years and am the former U.S. Department of Housing and Urban Development (HUD) Deputy Assistant Secretary of Community Planning and Development during the Reagan Administration. In that role, I was HUD's Deputy Assistant Secretary in charge of the Urban Development Action Grant Program (UDAG), the Community Development Block Grant Program (CDBG), and the Housing Rehabilitation program from 1981-1986. Since then I have been leading our professional association as our members build vibrant local economies.

For our profession, eminent domain is an economic development tool that allows local communities to acquire and assemble land for new development projects that generate new jobs, investment and taxes. The Supreme Court's 5-4 decision in Kelo v. New London leaves eminent domain in the hands of states and affirms eminent domain as an important tool for local governments in the redevelopment and revitalization of economically distressed areas.

The court stated in its opinion that the pursuit of economic development is a "public use" within the meaning of the Fifth Amendment's Takings Clause. The New London economic development project at issue in the case is similar to projects across the country aimed at revitalizing depressed communities.

It is IEDC's understanding, based on conversations with attorneys familiar with the decision, that the Supreme Court decision did not in any way expand the power of eminent domain. Rather, the Court simply upheld the long-standing inclusion of economic development as a "public use."

It is therefore unlikely that the Supreme Court's decision will result in city officials exercising eminent domain randomly or without balanced consideration. The Court's decision affirmed years of interpretations allowing the use of eminent domain to redevelop our nations' communities and to protect our local economies.

Judiciously used eminent domain is critical to the economic growth and development of cities and towns throughout the country. Assembling land for redevelopment can be an important element in the process of revitalizing local economies, creating much-needed jobs, and generating revenues that enable cities to provide essential services. When used prudently and in the sunshine of public scrutiny, eminent domain helps achieve a greater public good that benefits the entire community.

There are many examples of the public benefit of the judicious use of eminent domain. One example of can be seen in the return of retail to our urban cores. Eminent domain has been crucial in encouraging retailers, particularly anchor tenant supermarkets, to locate in the heart of inner cities rather than on the periphery where they have traditionally positioned themselves. A combination of educational efforts, land assembly, and economic development incentives are encouraging the supermarkets that abandoned inner cities in the 1970s to return.

For example, South Los Angeles, CA, a densely populated urban area that is critically underserved by retail, will soon have a vibrant shopping area thanks to the successful employment of eminent domain. The Slauson Central Shopping Center will be the first retail shopping center in the community in over 20 years. The supermarket-anchored shopping center will include a state-of-the-art grocery store along with small shop space, two freestanding commercial areas and a community Educational Training Center. The project will create approximately 150 new permanent jobs in the community and will bring grocery services close to thousands of low-income residents.

Successful redevelopment projects facilitated by eminent domain are proving that there are underserved populations/markets, and that perceived or actual higher costs of doing business in inner cities can be absorbed by sales volume. Without the ability to exercise the power of eminent domain for redevelopment purposes, the public would be unable to support many inner-city retail projects, and those neighborhoods would continue to decline.

Eminent domain has also strengthened suburban economies. In the early 1990's the city of Lakewood, CO was a Denver suburb at an economic crossroads due to

a struggling shopping mall. Then, the Lakewood Reinvestment Authority and a developer decided to redevelop the mall into a mixed-use town center. The result is Belmar, 22 city blocks of stores, entertainment, office space, and residences that have emerged as the symbolic heart of the community and center of Denver's Metro West Side.

Eminent domain has also helped our struggling rural communities. In March 2002, Shawnee County, Kansas exercised its power of eminent domain to acquire the last few remaining parcels of a 432-acre site intended in part for a new Target Corporation distribution center. Although two property owners fought the condemnation proceedings primarily on the grounds that the distribution center did not satisfy a "public use," the Kansas Supreme Court ultimately ruled that the taking of private property for industrial and economic development was in fact a valid public purpose. The $80 million, 1.3 million square-foot warehouse distribution center opened in June 2004 to the tune of over 600 new jobs, with the expectation of adding an additional 400 jobs within the next three years.

Whether you represent an urban, suburban or rural area, the use of eminent domain is never the first choice of any community. The eminent domain process is time consuming and expensive; it is therefore the last resort pursued during a land assembly process. Many local authorities rarely exercise their power of eminent domain, particularly when it deals with occupied housing. Public officials who do use eminent domain comply with existing rules protecting individual property owners, and they have the ultimate accountability to the citizens and voters.

There is no question that eminent domain is a power that, like any government power, must be used prudently, and there are many built in checks. One such check is the public nature of the takings process. Probing questions should be raised about any complex undertaking financed by taxpayers, and nothing in local government attracts more scrutiny or more criticism than eminent domain.

In their majority opinion in Kelo, the Supreme Court refers favorably to New London's long engagement in an open and comprehensive planning process. There are many other examples of public officials engaging their constituents. When Lakewood, CO began the process of redeveloping their failing mall, the city underwent an extensive public process that over the course of one year established a citizens advisory committee and invited members of the community to comment on potential redevelopment options.

Each of your states and localities legislates the use of eminent domain, and a public purpose or benefit needs to be clearly demonstrated. Authorities that abuse this privilege risk creating volatile political situations. Few government or elected officials are willing to risk their position and political stability in pursuit of a project overwhelmingly opposed by the community.

In another check on abuse, the Fifth Amendment requires that anyone whose property is taken for a public use be fairly compensated, and in practice, most takings are compensated generously. In case after case, the majority of property owners willingly accept just compensation for their property. According to our research, some are compensated as much as 25% above market value for their property. Just compensation allows property owners to relocate with an equal or improved quality of life.

Critics of the Kelo decision have said that it authorizes seizing the property of one person merely to give it to another. While it is true that once the public entity acquires title to the property, it is conveyed to a developer or end user to carry out the project, the public sector intervenes so that the private sector can bring much needed investment to a distressed area. Government agencies are not and should not be in the private real estate development business; therefore, the assembled land is typically leased or sold to the private sector for redevelopment. As a matter of policy, cities should not be in the long-discredited practice of building redevelopment projects; rather they should facilitate the use of private capital and private management to achieve the same end.

The use of eminent domain has evolved over the years from a "bulldozer" technique to today's careful surgical approach. In the 1960s the federal government gave cities resources under the Urban Renewal Act to plow down hundreds of acres of land and thousands of homes and commercial buildings. That left many cities with land vacant for years. This policy has since been attacked by many as an inefficient use of resources. Today, economic development professionals wait until there is a specific market opportunity before we use eminent domain to acquire distressed properties. If your district's officials have to wait for land assembly holdouts, your communities will see jobs and market opportunities disappear.

In closing, I would like to comment on pending eminent domain legislation. In response to the Kelo decision, Congress is offering legislation that would prohibit the use of federal funds for economic development projects that involve the exercise of

eminent domain. Should Congress act to prohibit the use of eminent domain for economic development purposes, the economies of many Congressional districts will suffer. No municipality in America could use eminent domain to carry out an economic development project.

Communities impacted by hurricanes Katrina and Rita are of special concern to us all. While IEDC members in the region are grateful for the billions of dollars the federal government has pledged to support economic and infrastructure redevelopment, gulf coast communities impacted by the hurricanes will face incredibly complicated and expensive redevelopment challenges. In order to redevelop devastated communities, states and localities will first need to raze crumbling homes and businesses.

We are very concerned that proposed Congressional legislation limiting the use of federal funds for eminent domain would allow one landowner to veto the redevelopment of an entire distressed area. This would have the practical effect of thwarting the ability of communities to demolish ruined infrastructure and begin successful redevelopment plans, further distressing an already devastated area.

In IEDC's opinion, Congress should not preempt or displace existing state and municipal laws that govern the local application of eminent domain. The Supreme Court's decision keeps the economic health of communities in the hands of local leaders who are not out to destroy communities, but rather who work for the best interests of their communities at large. State or federal bills prohibiting the use of eminent domain for economic development are job-killing pieces of legislation.

Assembling land for redevelopment helps revitalize local economies, create much-needed jobs, and generate revenues that enable your communities to provide essential services. Exemplified by New London, eminent domain is used to breathe new life and give new hope to residents.

Thank you again for the opportunity to speak with you today.

EMINENT DOMAIN GUIDING PRINCIPLES

1. When a public agency engages in land assembly, the process should be open to community stakeholders such as residents and local businesses.
2. Eminent domain should be employed as a last resort in the land assembly process and only when a property owner, after attempted negotiations, refuses to sell at a fair market value. To protect landowners, independent appraisals should be conducted.
3. All reasonable efforts should be made to avoid taking occupied residences and active businesses. A community must carefully weigh the benefits of redevelopment against the hardship associated with displacement.
4. When eminent domain is used in the taking of occupied property, relocation costs should be covered for the property owner. This may also include providing assistance to homeowners in finding a new home.
5. Before initiating the eminent domain process, municipalities should carefully review the legal parameters of the process as provided in their local charter. The process should be fully documented and completely transparent.
6. States that only allow the use of eminent domain for blighted land and property need to establish a clear definition of blight. This will reduce ambiguity for municipalities initiating the eminent domain process. Municipalities should establish a standardized approach in land assembly and eminent domain to provide consistent expectations amongst stakeholders.

EMINENT DOMAIN: MYTH VS. REALITY

Myth 1: Eminent domain is a quick and low cost means of acquiring land.

Reality: Eminent domain is more expensive and time consuming than the traditional method of land acquisition through negotiated purchase. Land acquired through eminent domain is often acquired at a price above fair market value. Unfortunately, the related legal fees frequently nullify any sales price premium benefits for the landowner. The acquiring agency is often affected even more by the premium price and legal costs associated with eminent domain.

Myth 2: Eminent domain is typically used as the first option in the land assembly process.

Reality: The eminent domain process is time consuming and expensive; it is therefore the last resort pursued during a land assembly process. Many local authorities rarely exercise their power of eminent domain.

Myth 3: State and local authorities promote urban redevelopment for the sole purpose of increasing the tax base.

Reality: Eminent domain is an important tool in revitalizing declining areas. Redevelopment projects remove blight, create jobs, and increase private investment in an area. Tax base growth is only one potential benefit.

Myth 4: The use of eminent domain violates private property rights.

Reality: Local and state authorities have the constitutional power to acquire property through eminent domain on the condition of just compensation.

Myth 5: Eminent domain is a government tool used to strip individuals of their private property rights.

Reality: Each state legislates its use of eminent domain. A public purpose or benefit generally needs to be clearly demonstrated. Authorities that abuse this privilege risk creating volatile political situations. Few government or elected officials are willing to risk their position and political stability in pursuit of a project overwhelmingly opposed by the community.

Myth 6: Local authorities and private developers undertake land assembly and eminent domain without involving the community.

Reality: Most local governments or redevelopment agencies incorporate community participation early on in a redevelopment initiative. There are many cases that demonstrate successful collaboration between community, private sector, and government representatives in the revitalization of distressed areas.

Myth 7: The government employs eminent domain to take property from one owner and give it to another owner that is financially or politically stronger. State and local governments use eminent domain as part of corporate incentive packages that benefit specific businesses.

Reality: Eminent domain is part of the land assembly process for redevelopment with the intent to remove blight and/or create jobs and/or create housing. The public sector intervenes so that the private sector can bring in much needed investment in a distressed area. Government agencies are not in the private real estate development business, therefore, the assembled land is typically leased or sold to the private sector for redevelopment. Often the prices and terms of the deals are very favorable because 1) the location and characteristics of the property are otherwise very unfavorable, and/or 2) the private party can create or retain much-needed jobs.

Myth 8: The flexible definition of blight facilitates the state's power in repossessing land.

Reality: Each state has its own definition of blight. Some have a strict test for blight, requiring physical or economic decline. Others have a more flexible definition. A few states do not have a blight requirement as a condition of eminent domain, but require that the project lead to job creation. There have been some highly publicized cases of local governments who have abused the blight designation to justify government repossession of land. These negative cases highlight the need for states to clarify their intentions and incorporate community involvement in defining eminent domain regulations.

Myth 9: The public money spent on assembling land for private use is tax money that will forever be lost to the community.

Reality: Initial public money invested is recaptured through increased tax revenue generated by the increase in property values and retail sales. In a well-planned project, the return on investment usually exceeds the initial cost. Furthermore, the benefits of redevelopment go beyond tax recovery to include job creation and area revitalization.

Myth 10: Land assembly and condemnation activities position a municipality as a real estate broker and developer in what has traditionally been private land deals. The free market can and will allow for redevelopment of older areas without any government intervention.

Reality: In many cases, a large, blighted area is comprised of numerous small properties. Private developers are reluctant to spend the time and money necessary to acquire each property with no assurance that they will ever assemble a large enough site to develop. Without land assembly assistance in urban areas, developers are likely to choose large tracts of undeveloped land on the suburban/city fringe. Such actions promote sprawl. Urban land assembly curtails sprawl and encourages smart growth.

Myth 11: Eminent Domain is an unnecessary tool for economic development.

Reality: Eminent domain is an important tool for economic development. Eminent domain gives communities a last resort option to help ensure that significant development opportunities are not hindered when reluctant landowners refuse to negotiate fair sale of their property. Without this valuable tool, local economic development professionals would not be able to sufficiently assemble land for beneficial redevelopment and public gain.

Mr. STEARNS. Thank you. Mr. DeLong?

STATEMENT OF JAMES V. DELONG

Mr. DELONG. Thank you, Mr. Chairman. I also realize that my biography left out a very important fact, which is that I am graduate of Evanston Township High School, but it has been more years than I like to admit, I must say. I appreciate being here today to talk about one of my favorite topics, which is the importance of property rights.

I spent about 10 years working on what you would call dirt property, involving with Endangered Species Act and environmental issues and other property rights issues. I actually wrote a book about it 10 years ago. The last few years I have been with the Progress and Freedom Foundation here in D.C., which is a think tank that is devoted to fostering public awareness of the crucial nature of property rights and markets. And as the director of its Center for the Study of Digital Property, which is also called "IBCentral.Info," I spend my time on intellectual property issues.

Now, I wrote two papers for PFF, connecting Kelo to other issues of property rights, especially intellectual property, one called "One Degree of Separation, Kelo and H.R. 1201," and the other called "Intellectual Property, the Endangered Species Act and the Property Rights Alliance," and I would like to submit those for the record and have those including in the hearing record, if I could.

Mr. STEARNS. By unanimous consent, so ordered.

[The papers are retained in subcommittee files.]

Mr. DELONG. Thank you. Now, I have also, of course, submitted my written testimony and one-pager, and I won't waste your time recounting that. But I would like to take my time just to emphasize two basic general points here.

The first is that everyone, including me, uses the term property rights. And in fact, his is a shorthand, but it is not quite correct, because it tends to put them at a subordinate level. As the Supreme Court noted in 1972 in Lynch v. Household Finance, property does not have rights; rather, each person in the United States has a personal right to own and use property. And this right is every bit as important as the other great rights in our society, such as freedom of speech or religion. And the late Chief Justice Rehnquist, speaking in Dole a decade ago, commented, 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.

Speaking for myself, I regard my right to own and use property as somewhat more important than my right to engage in nude dancing. And others may disagree, but property rights are a crucial issue for many people, as they are showing in response to Kelo.

Now second, the situation in Kelo is not an isolated incident, in a sense that it is simply the latest example of the casualness of government at all levels, including, most emphatically, the Federal level, is now treating this individual right to property. Now, in Napoleonic times, England staffed its navy through impressment. If they could catch you in a seaport town and you had anything to do with the sea, you were now a sailor, and everybody said all right. The Confederate States of America, I might add, also financed its war largely through impressment of property, just took it, and we all know what happened to them.

But in the U.S., governments tend to follow the same policy, not just for redeveloping cities or finding locations for big-box stores or, in fact, I think, as has been noted, the owners may get compensated, but certainly not at any level that anyone would consider adequate or just. But for protecting endangered species or wetlands or historic structures or securing open space, it is impressing property through regulation. The use of impressment is not limited to real estate or to dirt property, it is applied to intellectual property, where Congress enacts compulsory licensing statutes, or redefines various uses as fair, to the behest of special constituencies, or because of special purposes it regards as important. Impressment is being used in telecommunications. You know, TelReg, under the 1996 telecom act, was an appropriation of telecom property. And the cable companies are now protesting mightily that the extension must carry provisions into HDTV is an impressment of their property. And the roster of examples could continue.

And I think, from the point of view of an organization devoted to the idea that free markets will indeed work things out, this governmental itch for central planning, especially when combined with a need to reward supporters and constituents, can be a devastating combination.

So my conclusion, further to, what is general? It is not—the committee doesn't not need to, or should not focus entirely on enacting particular laws to put a band-aid on the Kelo problem. What is needed is leadership in a general reorientation of governments to restore respect for the personal right to property as one of the great bulwarks of individual freedom and economic progress. And my second recommendation is more specific, and that is, the key in most of these areas I think is compensation; and that is, that if the governments are forced to pay adequate compensation, then the incentive structures will tend to fall into line, and the incentives to take the property through impressment will, of course, be reduced. But I would recommend focusing on that dimension of the issue in all of these contexts. Thank you.

[The prepared statement of James V. DeLong follows:]

PREPARED STATEMENT OF JAMES V. DELONG, SENIOR FELLOW & DIRECTOR, CENTER FOR THE STUDY OF DIGITAL PROPERTY, PROGRESS & FREEDOM FOUNDATION

It is a pleasure to be here today to discuss the implications of the Supreme Court decision in *Kelo v. New London,*[1] a case which has triggered a Katrina-like deluge of reaction and criticism.

I have four points to make to the Committee today. Let me state them, then go back and elaborate on each.

(1) Given the existing case law, the decision in *Kelo* was not a surprise.
(2) As property rights horror stories go, *Kelo* is second-rank. Ms. *Kelo* got paid for her property; there are uncounted numbers of regulatory takings for which no compensation is paid.
(3) The strong public reaction of antipathy to the result in *Kelo* was a surprise—a pleasant and, hopefully, productive one.
(4) One's understanding of the implications of *Kelo* is enriched by viewing it in a more general context that includes rights to intangible and intellectual property as well as to real estate.

These points are taken up in order.

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

(1) Given the existing case law, the decision in *Kelo* was not a surprise.

To recapitulate the basic issues, a clause of the Fifth Amendment to the U. S. Constitution says "nor shall private property be taken for public use, without just compensation." The phrase "public use" has always been regarded as a limitation on governmental power to take property; that is, it has been assumed by judges and scholars that government has no power to take property for private use—to take from A to give to B—even if compensation *is* paid.[2]

So, the question in *Kelo* was whether some houses could be condemned by the city pursuant to a redevelopment plan for a part of New London even if the houses could in no way be classified as public nuisances or part of a blighted area, and even if the use to which the land was to be devoted involved transfer to a private developer.

A five-member majority of the Supreme Court upheld the validity of the city's action, emphasizing the fact that it was part of an overall redevelopment plan, not an individualized action, and that the city's conclusion that the overall public weal would be served by the plan was not unreasonable.

The most surprising thing about this conclusion was that it was by a 5 to 4 vote; ahead of time, I had thought that under the existing case law this result would be reached far more decisively.

In 1997, I published a book entitled *Property Matters: How Property Rights Are Under Assault—And Why You Should Care* (Free Press, 1997). It is still in-print and available on Amazon, but if you seek illumination on this point of the meaning of "public use," you are out of luck. The reason is that the Supreme Court cases, stretching back over at least half a century, appeared to make the public use requirement a dead letter—if the government exercising condemnatory powers decided the use was public, that was conclusive.

As the Supreme Court summed it up in 1992, in *NRPC v. Boston & Maine Corp.*:[3]

> We have held that the public use requirement of the Takings Clause is coterminous with the regulatory power, and that the Court will not strike down a condemnation on the basis that it lacks a public use so long as the taking "is rationally related to a conceivable public purpose."

The power granted government by such a test is almost total. As Justice Scalia has pointed out, and Justice O'Connor reiterated in *Kelo*, a rational basis test should be renamed "the stupid staffer" test—any legislative or executive branch staffer who cannot dream up a chain of logic that meets it, no matter how outrageous the government action, is too dumb to hold his or her job.[4]

If *Boston & Maine* was not sufficient to establish that the "public use" requirement was a paper tiger, then *Lingle v. Chevron,*[5] decided a mere month before *Kelo*, should have finished the job. In some prior cases, the Court had indicated that assessing a claim that a regulatory taking had occurred—a regulation so intrusive that it should be treated as a "taking" under the Fifth Amendment even though title did not pass—it would look at whether the regulation "substantially advance[d] legitimate state interests." In *Lingle,* it repudiated the applicability of this test to a takings claim. The logical conclusion to be drawn was that for takings of any sort, the Court was getting itself out of the business of assessing the legitimacy of the purpose of the exercise of power.

In *Kelo*, the four dissenters retreated considerably from such total deference. Even the majority went to some pains to justify the rationality of the city's action, focusing on its status as part of an overall plan rather than a random regulatory act.

In sum, on this issue of the meaning of "public use," *Kelo* contains a significant verbal retreat from the sweeping deference to governmental action exhibited in the prior cases. It indicates some degree of judicial uneasiness with what the courts have wrought. The retreat may be no more than verbal, since the majority of the Court seemed willing to accept as a "public use" anything that claims an economic development rationale, including higher tax production. As Justice O'Connor said, it is difficult to see how any competent staffer could fail to pass this test, but it is possible that a future case will erect some substantive structural limitations on this verbal foundation.

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[2] The Supreme Court cases usually cited for the "no transfers from A to B" are collected in H. Christopher Bartolomucci, Statement on H.R. 3405 Before the Committee on Agriculture, U. S. House of Representatives, Sept. 7, 2005. Most of these are from the 19th or early 20th centuries, and the validity of such pre-New Deal constitutional precedents is dubious, to say the least, but they are still quoted by the Court in *dicta* so apparently they remain valid in the collective minds of the Justices.

[3] 503 U.S. 407, 422 (1992). There were dissents in the case, but not from this language.

[4] Kelo, 125 S. Ct. 2655, 2671, 2675 (2005) (O'Connor, J. dissenting); Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1025-1026, n.12

[5] 125 S.Ct. 2074 (2005).

It is instructive to compare *Kelo* with the recent decision of the Michigan Supreme Court in *County of Wayne v. Hathcock,* which reversed the famous, and infamous, 1981 *Poletown* decision.[6]

In *Poletown,* the Michigan Supreme Court had allowed the destruction of a vibrant ethnic community to clear land for an auto assembly plant. The decision applied a test similar to that used by the majority in *Kelo*: that the "public use" requirement allowed a project designed to "alleviat[e] unemployment and revitalize[e] the economic base of the community." In overruling this decision, *Hathcock* repudiated this test, and said that a transfer of property from one private party to another meets the public use requirement under only three conditions:

(1) "The project generates public benefits whose very existence depends on the use of land that can be assembled only by the coordination of the central government." This applies primarily to infrastructure projects—roads, railroads, pipelines—which present particularly acute hold-out problems.
(2) Situations in which the private entity remains accountable to the public, and (possibly—it is a bit unclear) the property remains available for use by the public. Again, infrastructure is the prime example. (This may actually be an add-on to the first point—this, too, is a bit unclear.)
(3) Clearing a blighted area, if the clearance is the primary purpose and the transfer is incidental.

The *Hathcock* standards most emphatically *do not* include wholesale condemnation of land for the purpose of letting a developer erect an "office park," or "tech center," or any other buzzword *de jour.* The court noted:[7]

> [T]he landscape of our country is flecked with shopping centers, office parks, clusters of hotels, and centers of entertainment and commerce. We do not believe . . . that these constellations required the exercise of eminent domain or any other form of collective public action for their formation.

However, it is not clear that the Michigan Supreme Court would refuse to uphold the use of eminent domain to take unblighted property within a generally-rundown area, and it is entirely possible that it would have decided *Kelo* the same way as the U.S. Supreme Court, albeit after applying a different test. In *Kelo, New London* was "not confronted with the need to remove blight in the Fort Trumbull area, but [its] determination that the area was sufficiently distressed to justify a program of economic rejuvenation is entitled to our deference."[8]

(2) As property rights horror stories go, *Kelo* is second-rank. Ms. *Kelo* got paid for her property; there are uncounted numbers of regulatory takings for which no compensation is paid.

As the above mention of *Lingle* indicates, the outcome in *Kelo* was also foreshadowed by the trend of the Court's decisions in cases involving "regulatory takings," situations in which government does not take title, but regulates the use of property significantly, often appropriating not just the juice but the pulp, and leaving the landowner the worthless rind.

Indeed, Susette *Kelo* was not treated as badly as many other people. She at least got paid for her property.[9] Uncounted others have lost most or even all of their rights via regulatory takings with no recompense whatsoever. As long as a government avoids actual physical seizure, and as long as it avoids a complete destruction of economic value, it can inflict huge losses on property owners. It can, in essence, seize their property for public or private benefit with no payment whatsoever.[10]

Perhaps Ms. *Kelo* should be grateful that New London did not zone her land to make it into an open space, or declare it an endangered species habitat, or find a wetlands plant, or classify her house is a historic structure that cannot be changed and must be maintained at the expense of the owner (no "demolition by neglect"), or decide that building on a lot she bought years ago would cause unacceptable run-

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[6] County of Wayne v. Hathcock, 471 Mich. 445, 684 N.W. 2d 765 (Mich. Sup. Ct. 2004); Poletown Neighborhood Council v. Detroit, 410 Mich. 616, 304 N.W. 2d 455 (Mich. Sup. Ct. 1981).

[7] 684 N.W. 2d at 783-84.

[8] 125 S. Ct. at 2665-66.

[9] However, newspaper accounts over the summer said that the New London Redevelopment Authority is taking the position that the compensation due Ms. *Kelo* should be set at the property's value as of the original notice of taking five years ago (apparently without interest), and that she should also pay rent for the time she occupied the house during the litigation, with the rent adjusted upward to reflect the inflation in property values. The accounts were not terribly clear, however.

[10] James V. DeLong, *Property Matters: How Property Rights Are Under Assault—And Why You Should Care* (New York: 1997), *passim.*

off into the Atlantic Ocean. Any of these could result in a de facto taking without compensation.

If Ms. *Kelo* owned an apartment building, it could be made subject to rent control, which would transfer most of the value to the tenants. If she owned a small business, it could be subjected to price controls. If she wanted to change the use of a commercial structure, she could be forced to pay exorbitant "impact fees."

If Ms. *Kelo* lived in the western United States, where the Federal government owns more than half the land, and in theory holds it in trust as a commons to which the people of the area are to have reasonable access, she would find her access rights squeezed away, year by year and right by right, by a hostility to the all productive uses of the land, ranging from lumbering to mineral extraction to ranching to farming. The result has been destruction of large numbers of psychologically and economically rewarding jobs, along with the communities and ways of life that depended on them. She would not be losing a legally-recognized property right; but the principle of reasonable access to the Federal commons was one of the basic bargains of western settlement.

(Here it is necessary to put in an aside. There is no conflict between reasonable environmental protection and viable natural-resource-dependent industries and communities. For example, I once saw the great East Texas Oil Field, and it was mostly cows, grazing among an occasional pump. There is a conflict between these industries and environmental protection as a fundamentalist religion, which maintains the view that any productive use of the earth represents a criminal rape of the planet.)

The list of possible regulatory exactions is exceedingly long. And if Ms. *Kelo* tried to protest any of these exactions in court, she would run into a hedgerow of delaying tactics and arcane legal doctrines about "exhaustion of remedies" and "ripeness" cynically deployed to exhaust her psychologically and financially, and prevent effective enforcement of the few rights that she possessed.

As constitutional scholar Roger Pilon said recently before the House Committee on Agriculture:[11]

> [In the] classic regulatory takings case, of course, the government takes uses, thereby reducing the value of the property, sometimes drastically, but refuses to pay the owner for his losses because the title, reduced in value, remains with the owner. Such abuses today are rampant as governments at all levels try to provide the public with all manner of amenities, especially environmental amenities, "off budget." There is an old-fashioned word for that practice: it is "theft," and no amount of rationalization about "good reasons" will change the practice's essential character.

The Supreme Court has occasionally nullified a particularly outlandish regulatory taking, but for the most part it has acquiesced in serious erosion of the principle that private property should not be taken without just compensation, even when the purpose of the government action is to produce a public benefit rather than to avoid some noxicity caused by the landowner.

The Court regularly states, but then ignores, the lodestar principle that the Takings Clause of the Fifth Amendment is "designed to bar Government from forcing some people alone to bear burdens which, in all fairness and justice, should be borne by the public as a whole."[12]

(3) The strong public reaction of antipathy to the result in *Kelo* was a surprise—a pleasant and, hopefully, productive one.

On the other hand, the strong public reaction to *Kelo* has indeed been a surprise, and a pleasant one. It is also a bit of a mystery. None of the prior cases or the exactions by governments that triggered them roused serious interest from the public, the media, or the Congress, despite the tantrums that some of us threw. Books on the topic had little impact.[13] OpEd editors yawned. I cannot remember the last time

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[11] Roger Pilon, Statement Before the House Committee on Agriculture on Strengthening the Ownership of Private Property Act of 2005, U. S. House of Representatives, Sept. 7, 2005, p. 4.

[12] Armstrong v. United States, 364 U.S. 40, 49 (1960).

[13] The classic work is Richard Epstein, *Takings: Private Property and the Power of Eminent Domain* (Cambridge: 1985). Two excellent works that came out about the same time as my book, *Property Matters: How Property Rights Are Under Assault—And Why You Should Care* (New York: 1997), were Richard Pipes, *Property and Freedom: The Story of How Through the Centuries Private Ownership Has Promoted Liberty and the Rule of Law* (New York: 1999), and Tom Bethell, *The Noblest Triumph: Property and Prosperity Through the Ages* (New York: 1998).

Continued

Congress held serious hearings on the issue. If any did occur, they received no press attention.

Explanations as to why *Kelo* hit the collective nerve can be only speculation, of course, but I think three main factors are involved.

The first is the nakedness of the city's assertion of its right and intent to engage in massive central planning, and to exercise unlimited power in pursuit of its vision. This power existed in law, but the demonstration of its reality shocked most people, who were unaware of the extent to which their legislatures have endorsed, and courts have upheld, an ideology of central planning that dominates municipal government.

Oh, everyone knew that cities have master plans and all that sort of thing—newspapers are always yapping about them—but no one took these seriously. People assumed that these plans are a glorified name for zoning, of which everyone approves, at least in theory. Zoning keeps the heavy industry away from the houses, ensures that commercial enterprises are located on the main roads, and in general protects property values.

Thus the idea that the New London or any other city could choose to remake its map by fiat was a surprise to most people. The public had assumed that city action, such as zoning, was designed as an adjunct of a regime that depends on and defends private property rights. It was not contemplated that city action would supplant the private sector.

A second major factor is that the abuse of eminent domain, by which I mean the taking from A to give to B, has become exceedingly common. Dana Berliner of the Institute for Justice reported on this in a report on *Public Power, Private Gain:* in the five years 1998-2002, there were over 10,000 documented cases of filed or threatened condemnations designed to benefit private parties. And this figure covers only the instances that reached the newspapers; the actual total could be 10 or 20 times as great.[14]

There may have been a pause in the pace of such actions while *Kelo* was pending, but now, with their power to issue the takings equivalent of *lettres de cachet* reaffirmed by the Supreme Court, localities are making up for the lost time.[15]

At some point, such activity reaches a level where everyone knows someone who has been affected. Then, the possibility ceases to be an abstract misfortune that threatens someone far away and becomes a personal threat. We may have reached such a tipping point. I certainly hope so.

A third major factor is the growing distrust of government's competence and good faith as a central planner and real estate developer. No one believes that the asserted unlimited authority to remake the urban terrain will be exercised in some spirit of abstract *pro bono publico.* Real estate development, in most times and most places, is and always has been a sinkhole of corruption and special influence.[16] The public knows this full well. But the public thought that it was protected from the direct effects of these dreary realities. Now it has learned that it is not. If someone with influence decides he wants your property, he can take it, through your local city council.

The most recent issue of *Reason* describes such a scenario. A state agency, acting in concert with a developer and a large corporation, used eminent domain to seize land needed for a new 52-story corporate headquarters. No effort to purchase the land was made, but, under cover of the need to eliminate "blight," 11 buildings were seized and 55 businesses evicted, including "a trade school, a student housing unit, a Donna Karan outlet, and several mom-and-pop stores." The property was bought at a bargain price, and if the legal settlements with the original owners and tenants exceed it, the state agency will be on the hook. In addition, the city and state offered the corporation $26 million in tax breaks for the project.[17]

The definitive legal treatise is Steven J. Eagle, *Regulatory Takings* (3d ed.)(New York: 2005), and a useful look at the cases is Bernard H. Siegan, *Property and Freedom: The Constitution, the Courts, and Land Use Regulation* (New Brunswick: 1997).

[14] Dana Berliner, *Power, Private Gain: A Five Year State-By-State Report Examining the Abuse of Eminent Domain.* Castle Coalition (April 2003), p. 2. To get some idea of the relationship between reported and actual cases, Berliner checked the numbers for Connecticut, the only state that keeps systematic track of such cases. During the 5-year period, Connecticut courts recorded 543 redevelopment condemnations whereas only 31 were reported in the newspapers. [http://www.castlecoalition.org/report/pdf/ED—report.pdf]

[15] Dana Berliner, Statement Before the Committee on Agriculture, U. S. House of Representatives, Sept. 7, 2005.

[16] See Richard Babcock, *The Zoning Game* (Univ. of Wisconsin Press: 1966).

[17] Matt Welch, "Why the New York Times Loves Eminent Domain," *Reason* (Oct. 2005), p. 18 [http://www.reason.com/0510/co.mw.why.shtml]

The corporation was the *New York Times,* which, not surprisingly, quite liked the *Kelo* decision. According to *Reason:*

> [T]the *Times,* in an editorial entitled "The Limits of Property Rights," let out a lusty cheer. *Kelo*, the paper declared, is "a welcome vindication of cities' ability to act in the public interest" and "a setback to the 'property rights' movement, which is trying to block government from imposing reasonable zoning and environmental regulations."

Dana Berliner's *Public Power, Private Gain* is full of similar tales, and Professor Jonathan Turley recently summarized more examples of takings that have been upheld by courts as legitimate "public uses." Included are condemnations of: [18]

Property of six different private owners of lots in Manhattan to allow the New York Times to expand and to construct a more valuable array of condos and galleries.

Property next to Donald Trump's casino so that he could have a waiting station for limousines. (This was ultimately overturned)

A lease held by a company in a shopping center in Syracuse to allow the owner to redevelop the property free of its obligations under the leasehold.

Property in Kansas for the sole purpose of attracting a new and more promising business to the area.

Minneapolis property held by one business to give to another to develop, despite the interest of the original owner in developing the property in a similar fashion.

A Walgreens drug store in Cincinnati to build a Nordstrom department store, which then required condemnation of a CVS pharmacy to relocate the Walgreens, which then required condemnation of other businesses to relocate the CVS. (The deal then fell apart, and as of 2003 the Nordstrom's site was a parking lot.)

A parking lot in Shreveport to give it to another business for use as a parking lot.

Granted, the dispossessed owners are supposed to be compensated, but this will not pay for moving, or for disrupting their lives. And compensation is often inadequate on any scale.

There is a broader point to be made here. It would be incorrect to classify the Founders of this nation as cynics. But they were indeed realists, and they did not trust government. It is not that government officials are any worse than anybody else—it is that they are no better. Officials are tempted by offers of political support, and sometime by outright corruption.

The Founders did not have the vocabulary of "public choice" and "rent seeking" that characterizes contemporary discussions of political theory,[19] but they certainly understood the basic concepts. The *Federalist Papers* are a long meditation on the implications of public choice theory for practical government.

And even the most upright of public officials are vulnerable to the potent seductions of power. The idea "we can remake this city!" can be irresistible.

Of course, such efforts rarely work. Cities are organisms, not machines, and they evolve and grow. For the most part, rigid plans are never implemented. And even when the plans are executed, we usually regret it. It turns out that one decade's urban planning fad is the next decade's candidate for demolition. And in the meantime private initiative is paralyzed by the dithering that accompanies broad land-use initiatives.

Part of the genius of the Founders was their recognition that government is simply one part of that entirety that we call a civilization or a culture. It is important that government officials recognize this, and recognize that it is not their job to be responsible for everything, and it is not true that nothing good can happen that they do not direct. Quite the contrary; their job is to establish the conditions that make it make it possible for the other institutions of society to function. (Or, to phrase this more negatively, their job is to avoid making it impossible for other institutions to function.)

Hence, as the Fifth Amendment provides, government officials are to have the power to acquire property needed for public uses, but it is not necessary for government to take on itself the responsibility for "shopping centers, office parks, clusters of hotels, and centers of entertainment and commerce," in the words of the Michigan Supreme Court.

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[18] Prof. Jonathan Turley, "Eminent Domain and the Supreme Court's Public Use Doctrine," Statement on H.R. 3405 Before the Committee on Agriculture, U. S. House of Representatives, Sept. 7, 2005

[19] See, *e.g.*, Fred S. McChesney, *Money for Nothing: Politicians, Rent Extraction, and Political Extortion* (Harvard Univ. Press: 1997).

The perspective represents not just the view of the Founders, but the contemporary good sense of the American people, "90% of [whom, according to polls] disapprove of the kind of seizures allowed by *Kelo*."[20]

In other words, the American people think that the virtues of the free market and its invisible hand attach to land use as well as to other economic activities. The people are content with the idea that government does not bear total responsibility for urban perfection, and that for the most part we will, rightly, let our urban spaces grow organically.

But one place that has not gotten the word about this is the Supreme Court. The Justices are still back in the New Deal era, or perhaps even the Progressive Era, when the idea that the government is responsible for everything, and hence must PLAN, came to dominate political theory. The governmental Platonic Guardians depicted in Supreme Court opinions bear little resemblance to the officials of Richard Babcock's books on zoning, or to the decision-makers in situations cited by Dana Berliner, or with the common sense of the American people.

A Lexis search of Supreme Court opinions for the phrases "public choice" and "rent seeking" produced zero results. This result is quite extraordinary. Two concepts that are fundamental to any realistic analysis of government, its problems, and its control are absent from authoritative legal thought. *Of course* the Supreme Court's treatment of Takings has become incoherent hash—it is impossible to analyze something adequately if one has barred oneself from using the intellectual tools required to deal with it in a serious way. On this issue, there is a wide gap between the perceptions of the Court and those of the people—with the latter having by far the more sophisticated understanding of applied political science.

(4) One's understanding of the implications of *Kelo* is enriched by viewing it in a more general context that includes rights to intangible and intellectual property as well as to real estate.

There is, I think, a final reason that *Kelo* has struck the nerve of the American people—the growing attention commanded by issues involving intellectual property.

During the past five years or so, the nature and importance of intellectual property—the debate over the level of hegemony that should properly be exercised over the creations of the mind—has received a tremendous amount of attention, in the media and in the venues in which national attitudes are truly determined: conversations in car pools, at parties, and around office water coolers.

Economic value in the contemporary world has become far more dependent on the creations of the mind than on bricks and mortar or the real estate on which they stand, and several high-profile controversies have driven this point home—for example, the Microsoft antitrust case, P2P file-sharing, reimportation of pharmaceuticals, the telecom bust (which resulted largely from the confusion over property rights created by the implementation of the 1996 Telecommunications Act).[21] The whole computer/high tech industry depends on intellectual property rights in the form of the patents and copyrights without which no firm could attract investment capital.

I think the increased prominence of intellectual property is causing people to refocus on property rights in general, and to realize that any trend of events that undermines the security of all property is not good.

About four years ago, I attended a panel session in which representatives of the entertainment industry, mostly from Los Angeles, expressed concern about the rise of unauthorized file sharing of music, and bemoaned the lack of respect for property rights shown by the sharers.

During the question period, I said to the panelists: "Look, there has not been an uncompensated taking of real estate in the last 20 years that you entertainment industry people have not endorsed, as long as it could be justified in the name of endangered species protection, or wetlands, or open space.[22] You have taught a generation of young people to hold property rights in contempt, and now you object that they are practicing exactly what you preached."

For the most part, the reaction was blank looks. What could the one possibly have to do with the other?

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[20] The Economist, *Hands Off Our Homes,* Aug. 20, 2005.

[21] One can argue with some cogency that telecom networks should be classified as physical rather than intellectual property. But the whole industry is so dependent on technological innovation, from the technologies for making optic fiber to the software that runs the network, that it seems reasonable to include this area in the list. It also serves to make the point that tangible and intangible property, and property rights, are becoming inextricably mixed.

[22] Actually, this was not completely true. Some in the entertainment industry have objected strenuously to having public access rights of way created across their Malibu beachfront properties.

That reaction has changed. Now, there is general agreement that property rights must be treated on a continuum, that the basic philosophical principles supporting property rights as an institution are constant across both tangible and intangible property, and that an attack on one kind of property cannot be quarantined from an attack on all.

The list of amici supporting the importance of the intellectual property rights in the recent Grokster case contains not just the Progress & Freedom Foundation, but the Defenders of Property Rights, represented by former Solicitor General Theodore B. Olson. DPR has long been one of the staunchest defenders of rights in physical property.

The most recent evidence of this evolution of attitudes is the creation of a group called The Property Rights Alliance,[23] which is bringing together a Noah's Ark of property rights interests—inventors concerned with patents; content industries concerned with file-sharing; cable companies concerned with must-carry rules; land-rights groups devoted to maintaining access to the commons of the public lands; land-owners whose property has been taken by the Endangered Species Act; victims of rent control; and so on.

By no means do the members of this alliance hold any unified positions, and in some cases they are quite opposed. But for those of us who have long regarded property rights as a crucial block in the structure of political freedom and economic progress—the "guardian of every other right"[24]—it is tremendously encouraging to see this disparate collection of interests debating the issues in terms of "what is the pro-property rights position?"

In consequence, you in the Congress can expect to hear an increasing number of arguments phrased in terms of their impact on property rights. To take one example, H.R. 1201, Digital Media Consumers' Rights Act of 2005, which is pending before this committee, raises profound issues of property rights. In effect, it redefines the rights of creators and consumers by fiat, both prospectively and retroactively. And, just as *Kelo* uses the concept of public benefit as an all-purpose excuse for unlimited governmental power, H.R.1201 uses the concept of fair use to justify a massive redefinition of intellectual property rights. [25]

CONCLUSION

In *Lynch v. Household Finance Corp.,*[26] the lower court ruled that a particular statute served only to protect "personal" rights, not "property" rights. The Supreme Court rejected this distinction:

> [T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. **The right to enjoy property** without unlawful deprivation, no less than the right to speak or the right to travel, **is in truth a "personal" right,** whether the "property" in question be a welfare check, a home, or a savings account. 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. J. Locke, Of Civil Government 82-85 (1924); J. Adams, A Defence of the Constitutions of Government of the United States of America, in F. Coker, Democracy, Liberty, and Property 121-132 (1942); 1 W. Blackstone, Commentaries * 138-140 [emphasis added].

Unfortunately, the Supreme Court seems to have forgotten these principles. As in *Kelo*, on questions of the personal right to own and use property it accords almost total deference to governmental authority, deference certainly not accorded in other areas of constitutional protection.

However, as the reaction to *Kelo* shows, and fortunately for the health of the republic, the people of the nation have not forgotten the principle expressed in Lynch. Now it is up to the Congress to show that it, too, remembers,

Mr. STEARNS. I thank the gentleman. I will start with the questioning.

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[23] http://www.propertyrightsalliance.org/

[24] "The right of property is the guardian of every other right, and to deprive a people of this, is in fact to deprive them of their liberty." Arthur Lee, *An Appeal to the Justice and Interests of the People of Great Britain, in the Present Dispute with America,* 4th ed. (New York: 1775), p. 14 (Quoted in John W. Ely, *The Guardian of Every Other Right,* (New York 1992), p. 26).

[25] James V. DeLong, *One Degree of Separation: Kelo & H.R. 1201,* Progress & Freedom Foundation Progress Snapshot Release 1.7 August 2005. [http://www.pff.org/issues-pubs/ps/ps1.7kelo.html]

[26] 405 U.S. 538, 552 (1972) .

And, Professor Ramsey, it just occurred to me, with this case, the Supreme Court—that you could have a case where the government decides they want to take something for intellectual property rights. If the government has decided, under the Kelo case, they can take private property for a better economic use and let the local governments do it, couldn't you extend that same reasoning to intellectual property rights, the government could take over intellectual property rights?

Mr. RAMSEY. I see no reason, based on Kelo, that they could not.

Mr. STEARNS. I mean, isn't there—I mean, intellectual property is intellectual property, and personal property is personal property. And I mean, I think this is something that we have to—I am just curious what your opinion is on this, a little more nuanced question and ask you a little bit of a hypothetical here, but it just occurred to myself and the staff, why not intellectual property, if the Supreme Court thinks personal property is okay?

Mr. RAMSEY. Well, my job is to ask people hypothetical questions, so I guess it is only fair that I get to answer one. It is an excellent question and I think the answer is, I don't see anything in Kelo that would prevent it. Obviously, as you say, the facts in Kelo are quite different, and so perhaps a differently inclined court could come up with some factual distinction that would allow it to decide differently.

But the fundamental underpinning of Kelo is that if the government decides that the property can be used to a better economic benefit in the hands of a different person, and therefore indirect benefits will go down to the public through greater employment or greater tax revenues to the government entity, then that is a sufficient public purpose to justify the use of the eminent domain power, and I don't see any reason why that would be limited to taking real property. It seems like the same argument could be made for intellectual property. So I don't see—I think that the extension could be done quite easily.

Mr. STEARNS. Okay. Now, Mr. Finkle, you are in sort of the spot here defending the decision and I understand that, so we are all going to come to you a little bit. Recently in an article that was published in the Washington Times, concerning the flow to this Riviera Beach community, they want to take over a whole section of the beach because they said the beach is one of the nicest beaches in all of Florida, and they want to put in a mega-port for yachts and high-end housing, retail, office space, a multi-level garage for boats, a 96,000 square foot aquarium and manmade lagoon, and that all sounds good.

And so what they need to do is displace about 6,000 local residents to do it, and most of these people are making less than $19,000 a year. The mayor, I believe it was, went on to say, people with large yachts need a place to keep them and service them. So obviously, you can't agree with that; that if you are making the argument, because it is more aesthetically pleasing, then I can take your house, that is just a spurious argument as opposed to one economically. Because if you are saying it is economically you make more money, then there is a conflict of interest when the city or town comes in and says okay, Mr. Stearns, we are going to take your little property here and we are going to make a mega-yacht

pier, you are not going to reimburse me for the value of the property later one, you are giving me what the value is right there in my piece of property, which is, you know, unattended and probably dilapidated. So there is a conflict of interest, and there is a fact that you are taking a property cheap and selling it a high price. Don't all those things bother you a bit?

Mr. FINKLE. Mr. Chairman, I am not prepared to sit here and defend every public officials' prognosis about what should happen.

Mr. STEARNS. You are not defending a place for mega-yachts, then?

Mr. FINKLE. And the removing of 6,000 people from their homes. I don't know the situation in Riviera Beach, but I will tell you, there are lots of examples where an important factory to a community, if it could expand, could employ another hundred people in some rural community, where you—if you don't figure out a way to expand them in place, they may leave the community all together. There are places where we need to redevelop, that—where eminent domain is an important tool to allow redevelopment to go further. Now, I can't sit here and say that what the mayor is proposing to do on Riviera Beach makes sense or not. But moving 6,000 people seems to be a little strong on the imagination.

Mr. STEARNS. Yes. Well, my time has expired. Ms. Schakowsky.

Ms. SCHAKOWSKY. Am I hearing right, that Mr. Anderson and Mr. DeLong, and maybe others of you except for Mr. Finkle, and I don't think Mr. Shelton, either, I don't know, would say that the Takings Clause itself is an abuse of power in some way, that if you could you would remove the Takings Clause?

Mr. ANDERSON. We recognize that the Takings Clause has a public use component to it, and we are not opposed to takings for public use when there is just compensation. Our problem is, that when it goes beyond public use, and to kind of piggyback on the intellectual property question, what is happened is the court has defined it so much differently than it what it actually says. It went from public use to public purpose in Berman v. Parker, despite the fact that that doesn't protect——

Ms. SCHAKOWSKY. And so by public use, you mean used by the public, as Professor Ramsey was describing?

Mr. ANDERSON. Correct. And even if you have—and then, from then, it went from public purpose to public benefit. Now it really doesn't mean anything anymore.

Ms. SCHAKOWSKY. Okay, okay. All right. And, Mr. DeLong?

Mr. DELONG. No, I concur. I mean, obviously, we need public facilities of all sorts. And certainly, as the Nation developed industrially, it turned out that you needed things, like lots of network industries, you know, and the power of public domain.

Ms. SCHAKOWSKY. So then let me go to a specific that Mr. Finkle raised. We are all facing the situation now in the Gulf area.

Mr. ANDERSON. Yes.

Ms. SCHAKOWSKY. And he described a situation where one holdout could stop Gulf, the Gulf Coast redevelopment. I would like comments on that. Let me ask Mr. Shelton about that first, and then the others as well.

Mr. SHELTON. Well, there, of course, are deep concerns about what is happening in the Gulf Coast now, in other words, when you

have a circumstance, like a hurricane hitting, how do we determine which property is actually blighted at this point, and which property actually needs to be rebuilt, and what kind of powers those who are now being—having to deal with the new blighted situation, that will have to negotiate and making sure that they can protect their own property rights in those cases. And certainly, even beyond that, Congresswoman, when we talk about those who are renting and now going to be displaced into other areas, what kind of rights these Americans have as well.

Ms. SCHAKOWSKY. Okay. Anybody else want to comment?

Mr. DELONG. Yes, I would place—that is exactly the problem or the reason, the intractability of that and of the holdout problem, or the transaction cost problem, is exactly why I would place far more emphasis on the compensation side.

Ms. SCHAKOWSKY. Right.

Mr. DELONG. And like Mr. Shelton's point.

Ms. SCHAKOWSKY. Right. And I appreciated that. You know, Mr. Shelton, you point out, in the real world, because of all of the inequities when it come so to lower income or people of color that are built in, it is kind of hard to have a discussion about this decision separate from those kinds of realities. But I am wondering, if we were to focus on this issue of just compensation in a real way, or I also want to get to, doesn't Kelo—some of you gave examples of individual cases that could happen. But doesn't it set up a process, a total planning process, that, were everybody fully invested in that and all voices were really heard, would that be sufficient protection? Now I am going to shut up and let all of you answer. And, Mr. Finkle, you said you don't see this decision as expanding the power of eminent domain. I hear different views and I wanted that more fully explored as well. So, Mr. Shelton, you wanted to comment.

Mr. SHELTON. What I was going to say, as we talk about the real life, real world scenario, you are really talking about moving entire communities, communities that have become interdependent, particularly if you are a community that is of color, and more specifically a community that is quite port. Many of the things that we take for granted, for instance, in being able to pay for babysitting, or being able to pay to own a car to drive where you need to go, become things that are quite different under these scenarios. If we look at the hurricane victims in New Orleans, we are talking about a community that has almost a 35 percent unemployment rate, where 50 percent of the population actually rent the homes that they live in. So we are talking about the interdependency of a community, we are talking about now uprooting relationships between the person one side of the street who baby sits for the person on the other side of the street in exchange for picking up extra groceries for them, and now having to create these new scenarios or new support mechanisms for these poor Americans.

Mr. FINKLE. Yes. You covered a lot of issues. Let me answer in three ways. First, you know, we are actually—on Monday I am going to Baton Rouge to actually work on some of the Katrina relief issues, or the redevelopment issues, dealing with what the Gulf States are having to deal with. One of the things that hit me instantly after the hurricane hit is, if those communities did not have

the ability to use eminent domain as they start to rebuild some of these communities that were completely destroyed, that you would have development looking like, and the analogy I have been using is a hockey player's teeth, you would have a home rebuilt and then you would have one not. And you would have another home rebuilt and two not. And unless there was a way to come across with a redevelopment that you could implement, then some of the places, like the 9th Ward in New Orleans, which we are all learning about, would be very difficult to redevelop, or the parish immediately next to it.

Second, the question was, you know, if you have a redevelopment plan where the people have participated in that plan, there was a lot of communication and a lot of public discussion, couldn't you go forward with a plan after that, whether it is in the Gulf States or not? I would point out, in two of the cases which the Institute for Justice have shown a great deal of interest, both Norwood, Ohio and New London, Connecticut, there was redevelopment plans that had lots of public hearings, lots of public participation, and the vast majority of people in those neighborhoods actually were willing to sell and it was the holdouts that we ended up—that we are talking about today. So those would be the couple of points.

Oh, then finally the question was, what did the Supreme Court do? Economic development practices, or eminent domain with economic development, has been going on for quite some time. The Supreme Court just upheld what communities have been doing across the country up until this point.

Mr. DELONG. I think one point that should be made, and that is, I think, with Mr. Anderson, am far less enamored of the idea of massive redevelopment planning and centralized planning and such. In accord with our basic view in most other areas, we tend to think that if you get your property rights right and then let your markets work, that you will get redevelopment. You know, we are getting redevelopment all over Washington without massive plans, whereas, Pennsylvania Avenue sat for what, 20 years? And you do get extraordinary situations like Katrina, but I think, to a larger extent, we sort of rely far less on government and far more on sort of the genius of the civilization, and on people knowing that they have property rights, and they will then invest and prosper. Cities are organisms rather than machines.

Mr. OTTER [pesiding]. All right, the chair will now go to the gentleman from New Hampshire, Mr. Bass. Five minutes.

Mr. BASS. Thank you, Mr. Chairman. My home State of New Hampshire is considering a change in definition to its constitution that would define eminent domain or limit eminent domain to projects having public use—excuse me, public purpose versus public use. Now, as you know, the U.S. Constitution uses the term public use. I was wondering if any member of the panel, perhaps starting with Professor Ramsey, would wish to comment on that change and what it might imply, substitution of the word purpose for use after public.

Mr. RAMSEY. Well, that is a very interesting question, because in my view that is exactly what the Supreme Court of the United States already did for us in the Kelo case, and it is one of the reasons that Kelo troubles me so much as the constitutional matter,

because I don't think the Supreme Court is entitled to rewrite rights in that way. The people of New Hampshire are, of course, are entitled to do that in their State constitution for State law purposes. My opinion as to what that would do, it is difficult to say, of course, as a matter of State law, but I think that it likely would bring State law in parallel with what the Kelo court said in Kelo was permitted under Federal law. So I would view it as substantial widening of State eminent domain power.

Mr. BASS. Any other members of the panel wish to comment on that?

Mr. ANDERSON. I would also say that it would decrease any protection. As we all know, the United States Constitution provides the baseline rights, and the States are free to provide even more than that, but to the extent that the New Hampshire citizens want to lower the rights that they have under the New Hampshire Constitution to what has been provided under Kelo, then I think that they are in big trouble.

Mr. FINKLE. If I could, I would add that I would be concerned for any State that put any damper on their ability to use eminent domain at some point in the future. I fear for places like Texas and Alabama that have already rushed and passed State legislation to put a limit without considering the issues of blight and redevelopment that they may need. And places like Birmingham in Alabama will need to do redevelopment from time to time, and are they going to allow an occasional holdout to keep a blighted area stay blighted because they have put some type of cap on their ability or hindered their ability to redevelopment at some point in the future.

Mr. ANDERSON. I would say—point out that both Alabama and Texas do have exemptions for blight removal.

Mr. BASS. Are there alternatives to eminent domain proceedings to achieve the same objective of acquiring property for public use?

Mr. FINKLE. I mean, clearly, from the municipal, from the economic development point of view, eminent domain is the choice of last resort.

Mr. BASS. Yes.

Mr. FINKLE. In the deals that I am aware of, and I am familiar with lots of them around the country, you typically try to get the private sector to either—the government, if it is doing a redevelopment plan, you try to get them to do the deals through negotiated sale. You try to make offers and you try to get that done in the private sector. And there just are situations where you end up having a holdout. That is why eminent domain has been useful in allowing for redevelopment of a number of areas around the country.

Mr. BASS. Mr. Chairman, I have no further questions.

Mr. OTTER. The chair recognizes that the gentleman yields back, and the chair would recognize Congresswoman Blackburn.

Ms. BLACKBURN. Thank you, Mr. Chairman. I want to thank all of you for taking the time to be with us today and we really do appreciate this. And I will tell you, quite honestly, I am from Tennessee and have heard a lot from my constituents about Kelo and their concerns about this and the Supreme Court taking property.

And in Tennessee, we talk about it in terms of also of intellectual property. And I will tell you what, Mr. Finkle, if you were out of Nashville, I think right now we would be writing a country music

song about you saying, if the mind can achieve and conceive and believe, the government can take. And unfortunately, I feel like that that is the opinion that you have. It concerns me, sir, that you choose to refer to private property owners as holdouts. By and large, sir, they are American citizens who have worked hard, have earned some money, have put together a little piece of the pie that they turn into their American dream and their nest egg, and they are choosing to protect that. So what you see as being a grand plan of redevelopment, I would very respectfully disagree with you and say I see it as massive government intervention and planning.

And so on that, we are going to have to disagree, but I go want to come to you for some questioning, if we may, sir. You say in your testimony that government agencies should not be in the real estate development business, but then you turned around and you keep talking about underdeveloped areas and areas that look like, unfortunately, I think you used the term hockey player's teeth. Some of my Nashville Predators might not appreciate that term. But you are putting—talking about putting government in the real estate business with redevelopment, because government has decided that an area is underdeveloped. So should not the private sector and the property owners and not the government or the economic professionals determine what is the best use of that land? So where are you going to come down on this?

Mr. FINKLE. Let me respond in a couple ways. First——

Ms. BLACKBURN. You can do without a song, right?

Mr. FINKLE. You know, I thought you had a good start of the song, too, but I think the rest of my family would be most impressed, even if it had a little snide remark to it, that my name in a song would be interesting.

At the end of the day, what we have done national is, we have set up cities, in many cases, to fail. And we have set up tax schemes that require cities to hold onto what jobs they can, grow jobs where they can, and build tax base where they can. And we pit their suburban community against a central city, or a suburban community against another suburban community, in the way that they have to pay for fire services, police services, sanitation services, Meals on Wheels, homeless shelters, is to generate taxes and jobs in the territory, the land that is within their municipal boundaries.

With that, and with property taxes being one of the largest parts of their tax base, they have to be cognizant as to where they can get the highest and best use out of their taxes. So government should not be in the development business. That is what the private sector is for. But the government does need to think about, how do you expand jobs in the community? That is where your taxes are going to come from, if you have—and listening to Mr. Shelton's testimony, he talked about, how do we provide living wages to people in communities? We need to think about, where are those places that we can put businesses, how can those businesses grow, and where is it possible to grow them?

Ms. BLACKBURN. So in essence, what you are telling me is that you favor a centralized elitist approach to this and not a local government-community involvement?

Mr. FINKLE. No, that is not what I said.

Ms. BLACKBURN. That is not what you are saying?

Mr. FINKLE. No. What I am saying is—and we have been talking about redevelopment plans somewhat during this hearing so far. You know, when a redevelopment plan is proposed for an area, you are involving the private sector, the lenders. You are involving neighborhood residents in helping to think about what those future plans are for an area.

Ms. BLACKBURN. Well, my time is expired, but I will respectfully say to you that I am delighted that we have had this hearing, and I appreciate the debate from you all, and I would continue to err on the side of allowing the local communities and private property owners to work together to decide how they want to use what is there for the city's use, and private property owners, what they want to do with their own property, but thank you very much.

Mr. OTTER. The gentlelady's time has expired. The chair would now recognize himself for 5 minutes. And I would begin by asking unanimous consent that the opening statement which I did not make be put in the record without objection.

Now, I am going to go along with everybody else, Mr. Finkle, and probably pick on you because, you know, in Idaho, we have one of the most liberal eminent domain laws in the Nation, and we didn't know that until Kelo. Kelo was for us in this generation, I think, the Boston Massacre. We have been on a slippery slope on private property rights, whether it is intellectual, and I see no difference between creative genius and dirt, I see none whatsoever; in fact, I think one supports the other. But when I took a look at Kelo, and when it first came about, suddenly people started talking about private property; suddenly there was a recognition that our Constitution will not survive in a country that doesn't believe in private property rights and hold that sacred, as well as all the rest of the amendments.

But let first off go to the blight question, and there is always a problem in the declaration of eminent domain. We have got a lot of problems with that and we have got to clean that up. But as I said, in Idaho, we have got one of the most liberal ones, because nobody would ever think of taking away, no public official would ever think of approaching anybody on eminent domain, unless it was for a highway, or unless it was for some very purpose that government needs to use it, not just benefit by it, and that is the big difference that I think Professor Ramsey mentioned but hadn't really spoken to. The Constitution, I think, meant for public use, and the Supreme Court interpreted it as public benefit. Well, there is a lot of public benefit that we can get out of using somebody else's property. We have been doing that for years with the Endangered Species Act and the Wetlands Act and lots of others.

And by the way, while I am on the subject of the problems that we have got in the Gulf, and I am certainly sympathetic with those problems, but we do have planning and zoning laws, and those are—will take care of most of that, No. 1. We do have—in the 9th Ward, we do also have flood plain laws and floodway laws, and there is a lot of places in Idaho, and we are 2800 feet above sea level, that we can't build because it is too close to a river and in 500 years there might be a flood. We have them in every State, and most of those are endowed some kind of Federal official sanction.

So you know, I think I am thankful for the Kelo decision, because I think it really brings to the forefront how far afield that we have actually gone.

But in declaring an eminent domain, why wouldn't we give, or what would be wrong, then, with giving the property owner who is going to lose the use of his property as a result of this action, why don't you say, okay. Well, you can either take the money or half the money, and you take a share in this development that is going to happen as a result of investing your property right into this new development. We are going to give you the option. What would be wrong with that?

Mr. FINKLE. Mr. Chairman, I was asked that question when I testified before Congress in the Congressman Hayes' committee when he had a field hearing in Ohio, and I guess my trite answer back at that particular point in time was, would the person be willing to take part of the loss if the project lost money as well? And I would think somebody would want just compensation. And you know, I think the issue that many of us struggle with over this issue is, maybe we should be talking about just compensation as opposed to, you know, whether you can use eminent domain? Is it 150 percent of value that somebody should get? Is it 125 percent of value? Is it 200 percent of value when you use eminent domain for an economic development purpose? If you start giving somebody a share of the upside, what if there is no upside, and then you have put that person in worse shape as opposed to coming up with the solution that you thought was going to make them rich.

Mr. OTTER. Well, I believe that there is a basic concept that is probably more important than even the private property rights and the Fifth Amendment, and that is personal responsibility. If you want to make the choice and take the risk, be bold, be daring. That is the risk that you take. It happens every day in this country and that is what has built this country.

Mr. FINKLE. But as Mr. Shelton said, too often these are located in distressed communities. We are talking with people that may not be as educated because they are in poverty. They may not have made it through high school, and you are putting them in a Catch 22, you know, the great riches or the ability to have a home somewhere else that is equal to or better than what they currently have.

Mr. OTTER. My time has expired, and if the committee wants, we will have a second go around. But I would only mention to you that the last great effort we had in that direction was called urban renewal.

Mr. FINKLE. Yes.

Mr. OTTER. And in Boise, Idaho, we still have holes in the ground that were left from all the buildings they tore down and never rebuilt. So I would now recognize Ms. Schakowsky for 5 minutes.

Ms. SCHAKOWSKY. Thank you, Mr. Chairman.

I would assume, Mr. Shelton, that the issues of just compensation existed before the Kelo decision, even when something was for a clearly defined public use. And I am just wondering if you think there is any way to write a law or to focus on this issue of just compensation that would take into account more equitably the renters

you are talking about, or if any others think, Mr. DeLong, since you suggested it, whether or not we actually could do that.

Mr. DELONG. I would think the human disruption cost seem to me——

Ms. SCHAKOWSKY. Let me get Mr. Shelton and then——

Mr. DELONG. Oh, I am sorry.

Ms. SCHAKOWSKY. Okay, go ahead.

Mr. SHELTON. I believe that the short answer is yes. I think there is a possibility of doing just that, but it is going to require a number of things being taken into consideration. No. 1, usually when we are talking about just compensation, you are looking at what the property is worth just in the context of the way things are then and there.

Ms. SCHAKOWSKY. Right.

Mr. SHELTON. But also, any negotiation requires there to be power on each side to be able to negotiate. If the options are, you can sell it to us at this price, I was going take it anyway, which has a tendency to be exactly what we experience in most communities.

Ms. SCHAKOWSKY. Yes.

Mr. SHELTON. You have taken away the power of that person to actually negotiate what is just and then being compensated.

Ms. SCHAKOWSKY. And you are suggesting, again, in the real world, that these are not empowered communities or individuals to begin with.

Mr. SHELTON. Absolutely. And finding tools to actually empower the community so they can make decisions along these lines so they can actually actively negotiate the deal to provide the just compensation, is one that we would have to find a way to work out.

Ms. SCHAKOWSKY. Mr. DeLong?

Mr. DELONG. Yes. There are indeed a lot of sticky issues, but I think this would be an excellent start. I think this has been a problem for years, and that is, that people will tend to get strictly the real estate value and they don't get the real, the value of the loss, whether it is the human disruption or whether it is the loss of a going concern value of a business.

Ms. SCHAKOWSKY. Yes.

Mr. DELONG. And it does seem to that this is an area where the courts have been a bit remiss, and where Congress might really—should really look at this is as a possible way of solving the problem without getting into all these issues about just what is public use and what is not.

Ms. SCHAKOWSKY. Mr. Otter raised the issue of zoning laws, et cetera, and, Mr. Finkle, you were shaking your head, that those are not applicable here or not sufficient to address this.

Mr. FINKLE. Thank you. It was specifically in relationship to the question of the 9th Ward in New Orleans, that unless there is an overall redevelopment effort as you are acquiring the land, and I don't—I guess I am going back to—I don't see us being able to redevelop those neighborhoods without, you know, some abuse, if you want to call it abuse, of property rights, grabbing the land in some way and redevelop, and then pay people for the value of it or give them a new home at the end of the process, whether it is on their plot of land or not in the future. I don't see that as planning or

zoning laws actually helping to resolve that. It becomes an equity trade, so to speak, as you start the redevelopment process. As you rebuild some of the homes, whether it is in the 9th Ward or whether it is elsewhere in New Orleans, how do you give it back to them after you have taken it? And if you decide that it is in flood zone and you are not going to rebuild, you still have a compensation question, it seems to me, as you have prevented them from going back and using their property rights at all.

Ms. SCHAKOWSKY. Well, you have the compensation question in any case, right?

Mr. FINKLE. Absolutely.

Ms. SCHAKOWSKY. And you know, we had, after a big flood on the Mississippi River in 1993, a whole town that was moved off the flood plain onto higher ground. I don't know if these were all the questions that were involved, but I am certain that people were compensated to help do that.

Mr. FINKLE. Yes. I do know that some of the delegation from North Dakota have had one hearing on this question, and did raise this whole issue of what do you do, because they had their river flow out its banks and then ended up having to acquire some of the land, whether they were houses that were once used, and there became an issue of eminent domain, and they were particularly concerned about how do you address those issues if you started to limit the Federal Government's financial participation if you use eminent domain, and they were saying that it is not practical.

Ms. SCHAKOWSKY. Thank you.

Mr. OTTER. The chair would recognize Mr. Bass. Ms. Blackburn?

Ms. BLACKBURN. Thank you, Mr. Chairman. I do have just a couple of other things.

Going back, Mr. Finkle, you just—you are going to feel like you have just had a day of it, aren't you?

Mr. FINKLE. I am beginning to believe that you and I are going to be real friends before the day is over.

Ms. BLACKBURN. Absolutely. The same song, second verse, how is that? We will have at it.

Let us talk about the redevelopment again, because in reading your testimony, I will have to tell you, it just intrigues me to see your point of view. It is different from my. You and I don't share the same philosophical underpinning, I would assume. And as I said previously, I feel like you go for the centralized approach; I would go for the local control approach. Listening to you, I feel like that you believe, in order for someone to be educated enough to know what the value of their property is, they have got to have a Harvard degree. I went to Mississippi State University, which is Cal College to a lot of folks, and I think it had served me just fine. I appreciate a good plot of dirt, and I think a lot of my constituents from Nashville to Memphis to Clarksville, Tennessee appreciate a good plot of dirt, too.

So let us talk for just a minute, because you state that eminent domain facilitates redevelopment projects, because the public would be unable to support many inner city projects. And if they are not able to support it, then are we—you mentioned earlier that you thought tax schemes and the way we organize cities many times set up cities to fail. So if you are going to practice eminent domain

to facilitate redevelopment into areas that could not support redevelopment, would that not be the same thing, are you not creating an artificial market, are trying to therefore create an artificial market through acquiring the properties in local communities that you have organized for their development, but it is an underserved population or an area that cannot support it. So again, I turn the question back around to you. Are you not setting them up to fail?

Mr. FINKLE. I would agree with most of what you said and disagree with your conclusion. At the end of the day, what we are doing with economic development, either through your State Department of Economic Development in the State of Tennessee or in the city of Nashville's Economic Development Department, is, we are engaging in some type of intervention technique to help create jobs, sustain tax base, and enhance the wealth of the people that live in that local community. Is it an intervention technique? It is. That is what the Economic Development Administration is all about. That is what the CDBG Program is all about. That is what many of the Federal tools are all about that we use. It is to support places that are having a difficult time in one way or the other. CDBG Program is specifically used for low and moderate income neighborhoods, and there are very specific definitions around it, but is to prop up those neighborhoods. So yes, I would agree with you. Now, once those investments have been made, you are hoping that that hasn't set them up to fail in the future.

Ms. BLACKBURN. Okay. I thank you for that. I think the difference, then, is that when we look at these programs when I served in the State senate in Tennessee or here at the Federal level, we don't take action unless the local community comes to us with a request. And what you are saying is, you should override that and take action in place of their making a request.

Ms. SCHAKOWSKY. Would the gentlewoman yield?

Ms. BLACKBURN. Sure.

Ms. SCHAKOWSKY. In the case Kelo, though, we weren't talking about the local——

Ms. BLACKBURN. Oh, I am aware of that. I am aware of that. I am referring back to part of his testimony.

Ms. SCHAKOWSKY. Okay.

Ms. BLACKBURN. But thank you.

Mr. FINKLE. We elect local officials to think about the future for their communities. And you know, most of them do so at a public request, and they understand where their areas of opportunities are within their communities, and that is why local officials are put in positions to lead, and that is what we hope that they do.

Ms. BLACKBURN. We certainly do, and we thank you for your time.

Mr. OTTER. The chair would recognize himself for the second round.

I wanted to get back on how we make local decisions about the kind of development or the kind of planning and zoning, the kind of neighborhoods we are going to have. Don't we do a lot of that actually with planning and zoning laws and taxation? Mr. Finkle.

Mr. FINKLE. Is that a question? Yes.

Mr. OTTER. Yes, that is a question.

Mr. FINKLE. Of course, we do it with planning laws, zoning laws. And you know, one of the additional tools that the communities use is enterprise zones, and we provide tax incentives for businesses to locate in particular places, or we reduce taxes across the board, either at the State level or the local level, to support local enterprise.

Mr. OTTER. Yes. Professor Ramsey, do you see an opportunity in the Kelo decision for one level of government to actually supercede the use of another level of government's land? For instance, at the State level in Idaho, we may want to see something developed in one of the little cities or counties, and decide through eminent domain to actually take the government land away from the government. Actually, I think Mr. Finkle is the one that generated this thought to me, is that the State might decide that they have got a better use, a higher economic purpose, and thus a better return in jobs and everything else, to establish perhaps a Yucca Mountain site someplace where they have—where the government already owns the land, only it is just the wrong level of government. Could the government of the State of Idaho supercede the government of, say, a county in Idaho and say, we are going to take this land away from you through eminent domain and use it?

Mr. RAMSEY. Well, you really should be a law professor because you ask the most excellent hypotheticals. Let me see what I can do with that one.

My answer to that, I think, and it may not be satisfying to you, is that I think that would be a question of Idaho State law. I think the Kelo decision actually would not go to that at all, because I don't think that the local government, you know, locality in Idaho would have a constitutional right to property. The eminent domain clause goes to the taking of private property.

Mr. OTTER. I understand. And not only that, the county is a creation of the State.

Mr. RAMSEY. Exactly.

Mr. OTTER. Let us go one further. Because the Federal Government is the creation of the States, and this is really where I was headed, would it then be an opportunity for the State to say, well, there is 35 million acres of Federal land in Idaho, and we would like to build a dam on some of that land. And so we are going to—because you are a creature of the States and not vice versa, we are now going to take this land and do with it what we want, let us say.

Mr. RAMSEY. I think that would not be constitutional, although, again, it would not come out of the Kelo——

Mr. OTTER. Because of the supremacy law?

Mr. RAMSEY. Exactly. Because of the supremacy clause and because of Federal immunity against State interference, I think that the State would not be constitutionally entitled to do that. And if it were, there is certainly no doubt that Congress could direct the State to stay well clear, and I actually assume Congress has implicitly done that in authorizing the use of the Federal land that is going forward right now. So I think the State could not interfere with the Federal land.

Mr. OTTER. I understand. I have no further questions. Did you have any? This meeting is now over.

[Whereupon, at 3:35 p.m., the subcommittee was adjourned.]

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