

**THEFT BY ANOTHER NAME: EMINENT
DOMAIN TEN YEARS AFTER
KELO v. CITY OF NEW LONDON**

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BEFORE THE
SUBCOMMITTEE ON THE CONSTITUTION
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THURSDAY, OCTOBER 8, 2015

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

The Subcommittee met, pursuant to notice, at 2:02 p.m., in Room 226, Dirksen Senate Office Building, Hon. John Cornyn (presiding), Chairman of the Subcommittee.

Present: Senators Cornyn [presiding], Tillis, and Durbin.

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

Chairman CORNYN. Good afternoon. This hearing of the Constitution Subcommittee of the Senate Judiciary Committee will come to order.

I want to begin by thanking the witnesses for being here today and sharing your experiences and expertise with us. We look forward to hearing from you.

Private property rights are civil rights. This is a fact that is often forgotten, but secure property rights are as fundamental to liberty as freedom of speech or religion. Our Founders understood this. As John Adams wrote, "Property must be secured or liberty cannot exist."

Recognizing that, the Founders built property protections into the U.S. Constitution. Central among these is the Fifth Amendment's declaration that private property shall not "be taken for public use, without just compensation." This language imposes 2 requirements on a Government's ability to take private property: first, it must be for a public use; and, second, the owner must be paid just compensation.

The first limitation is a critical requirement and a way to rein in Government power. It says that Government may take property under appropriate circumstances, but that the Government must use that property directly or make it open to the public.

Unfortunately, 10 years ago, in the *Kelo* case, the Supreme Court wrote the public use requirement out of the Constitution when it found that any public purpose, including economic development, justifies the taking of property. Oddly, this public purpose test is not in the Constitution, but it is now the law of the land.

Under this standard a city could take any person's home or business and give it to another for any use the city thinks may be more

profitable or produce more jobs, for example. In most cases, it is a development of condos, big-box stores, and hotels. The potential for abuse is obvious.

When the Government is empowered to decide the most valuable use of personal property and redistribute it fulfill that judgment, no one's property is truly their own. As the dissenting Justices in *Kelo* noted, "In such a world, the specter of condemnation hangs over all property."

The public was, rightly, outraged by the *Kelo* decision. Between 70 to 90 percent of every race, gender, and party opposed the decision. Most States, to their credit, have responded to the public's concerns and enacted new property protections. In Texas, for example, we have enacted both statutory and constitutional protections against the takings for private development.

Some of the reforms have been more successful in some States than others, and States like New York and Massachusetts have enacted no reforms at all.

While eminent domain abuse has slowed, it has not disappeared. The question we must ask 10 years after *Kelo* is: Are existing protections enough? That is what we hope the witnesses will be able to illuminate and elucidate.

Do recent reforms provide the same level of protection that the Constitution should have provided—or did before the *Kelo* case? I suspect the answer is no, but I hope our witnesses can give us more insight.

Where abuse still exists, we in Congress must ask ourselves if and how the Federal Government is complicit. Does the Federal Government make it more or less difficult for States and local governments to take someone's home and build a shopping mall? These are questions I hope the witnesses can help us answer today.

As James Madison wrote, "Government is instituted to protect property of every sort . . . that alone is a just Government, which impartially secures to every man, whatever is his own." This is the standard by which we should judge the use of eminent domain in the United States, and I fear we are not measuring up to that.

At this point I would like to ask consent to offer the statement of the Chairman, Senator Grassley, and absent any objection, his statement will be made part of the record.

[The prepared statement of Chairman Grassley appears as a submission for the record.]

Chairman CORNYN. Senator Durbin.

**OPENING STATEMENT OF HON. RICHARD J. DURBIN,
A U.S. SENATOR FROM THE STATE OF ILLINOIS**

Senator DURBIN. Mr. Chairman, thank you very much, and I am going to put my entire statement in for the record. Thank you. I want to welcome especially the witness Professor David Dana from Northwestern University School of Law in Chicago, Illinois.

I did not know when I went to law school nor when I was elected to Congress that I would be debating eminent domain. It seemed to me to be an issue that probably would not come my way. As the Chairman noted, the Supreme Court decision has at least raised the issue and raised the debate, and that is why we are here today.

It is interesting that not only have we raised the debate, we have actually had a chance to vote on it this year. The Senate held votes on eminent domain earlier this year, on January 22nd. There was a bill on the floor that sought to authorize the construction of the Keystone XL pipeline to run through America. The pipeline's owner is a foreign company called "TransCanada." It wanted to use eminent domain to build the pipeline across private farms in Nebraska and other States over the objection of landowners. The Senate was offered an amendment by Senator Menendez of New Jersey to ensure that private property would not be "seized through condemnation or eminent domain for the private gain of a foreign-owned business entity."

It sounded pretty reasonable to me, and I voted for it. We lost. The amendment was defeated 43-to-54. One Republican, Rand Paul, supported the amendment. Many Senators who criticized the *Kelo* decision in speeches before that vote voted against the Menendez amendment.

There was a side-by-side amendment that passed 64-to-33. Here is what it said. The amendment said that the land taken to build Keystone XL may only be acquired consistently with the Constitution. That is an interesting vote given that the *Kelo* decision is part of the constitutional case law on eminent domain.

While Senators may have disagreed over Keystone amendments, I hope we can agree the debate over striking the right balance on eminent domain is an important one. I look forward to the discussion. Thank you.

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

Chairman CORNYN. I would like to now introduce the witnesses.

Clemente Casillas is president of the Community Youth Athletic Center. CYAC seeks to give youth what they seek through gang membership in an alternative socially positive environment. CYAC's programs focus on physical fitness, alternative education services, youth development, and employment-based learning opportunities. Mr. Casillas has also worked in the real estate industry for more than 19 years as a real estate broker and business owner. He earned his undergraduate degree in business administration from the University of Southern California. Welcome.

Dan Alban is an attorney with the Institute for Justice. He litigates constitutional cases protecting free speech, property rights, economic liberty, and other individual liberties. Before joining the institute, Mr. Alban practiced employment law with Littler Mendelson P.C. and clerked for Chief Judge Royce Lamberth on the United States District Court for the District of Columbia. He received his law degree at Harvard Law School in 2006, where he was executive editor of the Harvard Journal of Law and Public Policy, and he earned his undergraduate degree in political rhetoric from Berry College in Rome, Georgia, and originally hales from Nampa, Idaho.

David Dana is the Kirkland & Ellis Professor of Law at Northwestern, as Senator Durbin said. He is a leading scholar in the fields of environmental law, property, land use, and professional responsibility. Before becoming a professor, he was a litigator with Wilmer, Cutler & Pickering and the Department of Justice. He

taught at Boston University before going to Northwestern, and he has been a visiting professor at Harvard and Virginia. He received both his undergraduate degree and J.D. degree from Harvard University.

Could I get you please to stand and take the oath? Do you affirm that the testimony you are about to give before the Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. CASILLAS. I do.

Mr. ALBAN. I do.

Mr. DANA. I do.

[Witnesses are sworn in.]

Chairman CORNYN. Thank you very much. Mr. Casillas, I think we have 5 minutes for opening statements for each of the witnesses and then some questions. We will start with you.

**STATEMENT OF CLEMENTE CASILLAS, PRESIDENT,
COMMUNITY YOUTH ATHLETIC CENTER,
NATIONAL CITY, CALIFORNIA**

Mr. CASILLAS. Thank you for the opportunity to speak with you about eminent domain abuse and how it affected me and my non-profit organization.

My name is Clemente Casillas, and I am the president of the Community Youth Athletic Center, south of San Diego. CYAC is a nonprofit boxing and after-school mentoring program for at-risk, inner-city youth, staffed mostly by volunteers. We bought a little building in National City and turned it into a boxing gym and mentoring center.

Nonprofit boxing gyms do not generate as much property tax as luxury condos. The City of National City and its federally funded Community Development Commission tried to seize our gym using eminent domain in order to hand it over to a private developer who wanted to replace it with high-rise luxury condos.

I would like to share my story with you to help you understand how eminent domain abuse affects real people and why the Federal Government should stop funding it.

When I was a teenager, I participated in a youth boxing program similar to CYAC. I was already involved in with the wrong crowd. Because of boxing and the discipline that comes with boxing, I was able to avoid kids who were in gangs. That led me to USC where I received a bachelor's degree and became a professional real estate agent and broker. If boxing made the difference in my life. I came from some of the same streets that these kids come out of, and I went to some of the same schools. I want boxing to make a difference in their lives as well.

CYAC began in 1991 with a punching bag hung up in a backyard. Over the years we have opened up our doors to thousands of kids. These kids face the challenges of poverty, but have strong spirit and determination. All they seek is a shot at opportunity. That is what CYAC gives them. Our motto is: "Making a difference, one round at a time."

The world these kids face every day has drugs, gangs, obesity, and oftentimes an educational system that assumes that they will fail. When they step into my ring, I see winners, eager to fight for

their dreams. CYAC supplies the gloves and the ring. They supply the heart.

We also have a tutoring program to help them succeed academically. We require that all of our students maintain good grades in order to participate in the boxing program. Several of our kids have been successful at national tournaments and are among the top-ranked youth boxers in the Nation. No doubt one or more will represent the U.S. in the Olympics. Every kid that we bring home tonight and put into a classroom tomorrow morning is our gold medal.

In 2001, we used generous donations to buy an old gun store on National City Boulevard. It was the perfect location for students to be able to come to the gym on the bus after school. We remodeled it with volunteer labor and donated materials into a boxing gym and mentoring center for kids. That is true community-based redevelopment.

In 2005, National City and the CDC gave a developer their permission to build luxury condos on our property. One day we even found a sign stuck in the ground in front of our building that said "Coming Soon" with an image of the luxury condos. The CDC and the developer sent us threatening letters saying we had to sell the building or face eminent domain. This was not about the money. This was about staying at the perfect location for after-school programs in a gym we had built with our own sweat and blood.

We tried to negotiate with the city and the developer to find out if it was possible to keep the gym on the first floor of the proposed development, with the luxury condos on the floors above. We were told that the people who could afford to live in those condos would not want our kids around. That was when we realized we needed to stand up for our kids and show them that sometimes you have to take a stand and fight for your rights—not in the ring or in the streets, but in city hall and in the courts.

Fortunately, we were represented pro bono by the Institute for Justice, which won our lawsuit. IJ litigated the case for 8 years, in a case as grueling as a 15-round boxing match, and saved our gym from eminent domain. It never should have come to that.

What happened to us should not happen to anyone else. Congress needs to send a message to local governments that this kind of abuse of power will not be funded or tolerated. Congress should pass legislation to withhold Federal development funding for cities that abuse eminent domain.

Special interests are working to convince the public that there is not a problem. What happened to our gym, and countless other people, proves otherwise. What we have now amounts to "Government by the highest bidder," and that has got to stop.

Eminent domain abuse affects real people. Homeowners, small businesses, and even nonprofit boxing gyms need the protections guaranteed by the Constitution. The Supreme Court failed to enforce these protections 10 years ago in *Kelo v. New London*, but Congress still has that opportunity. I ask you to please stop funding redevelopment for local governments like the city of National City that use Federal dollars to take away homes, businesses, and even nonprofits for private gain. Thank you very much for the opportunity.

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

Chairman CORNYN. Thank you. Mr. Alban.

**STATEMENT OF DAN ALBAN, ATTORNEY,
INSTITUTE FOR JUSTICE, ARLINGTON, VIRGINIA**

Mr. ALBAN. Thank you for the opportunity to testify on eminent domain abuse. It is an important issue that has received significant national attention as a result of the Supreme Court's notorious decision in *Kelo v. City of New London*, which was handed down 10 years ago in June.

My name is Dan Alban. I am an attorney at the Institute for Justice, a nationwide, nonprofit public interest law firm that represents people whose rights are being violated by the Government, including those whose homes or businesses or nonprofit boxing gyms are being taken by the Government through the power of eminent domain and transferred to another private party. I have successfully represented property owners across the country—from the CYAC in Southern California, to an elderly piano tuner in Atlantic City, New Jersey—all of whom are fighting this abuse of the eminent domain power.

The Institute for Justice represented the homeowners in *Kelo*, the infamous 2005 case in which the Supreme Court ruled 5-to-4 that eminent domain could be used to transfer perfectly fine private property to a private developer based solely on the mere promise of increased tax revenue. Ten years later, and after \$80 million in taxpayer money was spent, the Fort Trumbull neighborhood where Susette *Kelo's* little pink house once stood is a barren field that is home to nothing but feral cats. The developer abandoned the project while Pfizer, the intended beneficiary, closed its plant and left New London.

On its tenth anniversary, legal observers described *Kelo* as “a grave error,” “one of the most destructive and appalling decisions of the modern era,” and “the worst Supreme Court decision of the 21st century.” Overwhelming majorities in every major poll taken after *Kelo* have condemned the result, and it continues to be wildly unpopular. Forty-four States have reformed their eminent domain laws in the wake of the decision. Nine State supreme courts have made it more difficult for the Government to engage in eminent domain abuse, three of them even explicitly rejecting the reasoning of *Kelo*.

These State-level reforms vary greatly. Some States did little or nothing to reform their laws, and *Kelo* opened floodgates for eminent domain abuse, which tripled in the year after the decision was issued. That is, in part, because Federal law still allows Federal funds to be spent on condemnations for the benefit of private developers, which continues to encourage widespread eminent domain abuse, as I detail in my written testimony. The Federal Government should not be complicit in an abuse of power already deemed intolerable by most States.

Unfortunately, Congress' previous efforts to restrict the use of Federal funds for eminent domain have been ineffective. Immediately after *Kelo* was decided in 2005, Senator Christopher Bond introduced an appropriations bill amendment which stated that

Federal dollars could not be spent on any project where eminent domain is used for “economic development that primarily benefits private entities.” This language continues to appear in appropriations bills, including the currently pending bill. The Bond amendment has no enforcement mechanism and, thus, relies on agencies and grant recipients to police themselves. There is no way for individuals to enforce the spending restriction, and it does not appear that any agency has ever investigated or enforced a violation of that spending limitation.

Funding restrictions like the Bond amendment will only work if they can be enforced. Any Federal reform must include an enforcement mechanism to halt Federal funding if the funds are used for a prohibited purpose, as well as a private method of enforcement so that homeowners, tenants, or small business owners who are threatened by the abuse of eminent domain can take immediate action to prevent the misuse of Federal funds. One bill that does include such enforcement measures is the Private Property Rights Protection Act. The original version of that bill passed the House 376-to-38 back in 2005. It has been reintroduced several times over the years, most recently in July by Representative Sensenbrenner as H.R. 3013.

The Private Property Rights Protection Act is common-sense legislation that will stop the Federal Government from being complicit in an abuse of power that most States have already rejected. I encourage this Committee to work with the House Judiciary Committee to find a way to finally pass this bill and prevent Federal taxpayer dollars from being used to violate the private property rights of homeowners and small business owners.

Reform at the Federal level would not only reduce funding for eminent domain abuse nationwide, but it may also encourage further State-level reforms once Federal funds dry up and are not available for projects that abuse eminent domain. It also sends an important message to the American people. When the power of eminent domain is used so that a richer, better connected person can live or work on the land you used to own, it tells everyday Americans that their hopes, dreams, and hard work do not matter as much as money or political influence. Commercial developers everywhere need to be told that they can only obtain property through private negotiation, not Government force, and that the Federal Government will not be a party to these private-to-private transfers of property. Thank you.

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

Chairman CORNYN. Professor Dana.

**STATEMENT OF DAVID A. DANA, KIRKLAND
& ELLIS PROFESSOR OF LAW, NORTHWESTERN
UNIVERSITY, CHICAGO, ILLINOIS**

Professor DANA. Chairman Cornyn, Ranking Member Durbin, thank you for inviting me here today. I would like to make several points about eminent domain in my testimony. The first is—

Senator DURBIN. Could you check and see if your microphone is on? There should be a red light.

Professor DANA. Okay.

Senator DURBIN. Thank you.

Professor DANA. They do not train us at law school.

The first is, as you have heard, in some ways the post-*Kelo* reaction is an example of how federalism is supposed to work. The States have really owned up to the question of how to address eminent domain, and there has been a variety of responses suited to the different circumstances of each State. I would urge the Committee and the Congress to allow the States to continue to address the problem.

The second issue is while some have advocated a complete ban on eminent domain for economic development, there are good reasons based in economic theory and in experience to believe that that actually would harm overall poor communities in cities that need urban development. There is a strong rationale based in economic theory that eminent domain, cautiously used, is necessary.

The third point I would make is that while a complete ban on eminent domain for economic development is not appropriate, there are reforms that could be adopted at the State level and even at the Federal level that would encourage eminent domain to be used in a way that is more sensitive to the needs of low-income communities.

The final point I guess I would like to make, picking up on some of the opening remarks, is eminent domain can be problematic whether it is used for economic development or whether in the context of urban redevelopment or whether it is used for transportation or infrastructure or pipelines. Any kind of reform really should look at the impact of eminent domain broadly across all sorts of categories.

Just to go through those points in a little greater detail, by one count 47 States have enacted some response to *Kelo*. The numbers keep going up and down, however you count it. The responses have really been incredibly broad. Some States like Florida have essentially banned the use of eminent domain for almost all uses, both for economic development and for blight removal. Other States have tightened the definition of "blight" and added procedural safeguards. Some States have greatly increased the compensation formula. Other States have provided other kinds of protections. Many States have combined these in an ongoing process.

One way to look at what has happened after *Kelo* is States have adapted or responded to their own particular needs and circumstances in trying to reform eminent domain, and that is really what federalism is supposed to do, the sort of notion of laboratories of democracy. Given that and given that States are still actively involved in that, I think there should be a heavy burden against Federal intervention unless it is shown that it is absolutely necessary.

The second point I would make is that there is a good rationale for when eminent domain really is needed sometimes in the context of urban redevelopment. Urban areas tend to have more fragmented land holdings. In older cities and inner-ring suburbs, land is held in a variety of different ways. You will have many different owners. Sometimes it is an extraordinary effort just to figure out who owns exactly what. For developers or for city agencies or public-private partnerships, that makes it much harder to assemble land for redevelopment.

By contrast, in outer-ring suburbs, ex-urban areas, greenfields, it is much easier to assemble land or land is already in larger groups. What that means is assembly costs are higher in urban areas, and there is a problem or greater risk of holdouts, essentially having negotiations fail over holdouts.

The possibility of eminent domain, cautiously used, addresses this holdout problem. It allows redevelopment, successful redevelopments like the Baltimore City Harbor to go forward where they might have floundered in the absence of it. Without eminent domain as a possibility for urban areas, it may be those areas will have a much harder time attracting capital relative to ex-urban or more rural areas. That will tend to sort of impact lower-income communities that need more revenue.

I should say also that we know a great deal about eminent domain, but there is also a lot we do not know about it. There are instances where certainly it has not been used well, but there are instances where it clearly has been used well. One of the things that is important to do when thinking about any kind of reform is to really get an understanding of the overall universe of the categories that exist today.

The third point I would make is even though eminent domain—I guess another point I would like to make is one argument that has been made by a number of academics and commentators for why the holdout problem is not really a problematic one is that large areas can be assembled through secret purchases, that basically developers working with cities or governments can do redevelopment by quietly or without publicly announcing the fact that they are assembling land. I think that that is really not a solution. We want redevelopment projects to be subject to public debate. If an area in a city is going to be redeveloped, we want public engagement. What that means is governments have to redevelop in a public, open way, and that does invite a holdout problem, and eminent domain is one response to that problem and an important one. I am running out of time. Law professors tend to be very long-winded, so I apologize for this.

I guess the final point I would just say is there really are a number of reforms, including greater tenant relocation assistance—tenants are not protected constitutionally—greater compensation for good will for small businesses, that I think would be useful in the context of eminent domain. I also think greater attention to the loss of affordable housing to eminent domain is important.

Finally, I would say that whatever reforms are done, it is important to realize eminent domain can hurt poor and low-income minority communities when it is done to build a road or when it is done to build a pipeline or other infrastructure just as much as when it is done for luxury condos. I think the debate has to be framed more broadly than simply concerns about eminent domain in the context of urban redevelopment. Thank you.

[The prepared statement of Professor Dana appears as a submission for the record.]

Chairman CORNYN. Thank you, Professor Dana. We will start with 5-minute rounds. Mr. Alban, it seems to me that the Supreme Court substituted “public purpose” for “public use,” and that undefined phrase has given rise to the potential for abuses that you

talked about. Is that the source of these problems? Or is it more complicated than that?

Mr. ALBAN. I would say essentially that is the key problem, Senator. It actually happened prior to the *Kelo* case, but the *Kelo* case sort of cemented the understanding that that not only applied to some sort of unique situations where the Supreme Court had considered it in urban renewal in DC and in redistributing property that had been formerly owned by the King of Hawaii in Hawaii, but now could apply to any instance of redevelopment where a locality determined that the use of eminent domain would generate greater tax revenue. And that is really the outrage over *Kelo*.

Chairman CORNYN. It seems to be a tempting thing for a locally elected city council that maybe is dependent—an individual councilmember is dependent on political support from local developers to be lobbied to designate some property as being for a public purpose when that public purpose may just be generating more revenue for the local municipality's tax base, so Mr. Casillas' point that his boxing club and facility could be taken for no other reason than the fact that city council wanted to generate more revenue. Is that about right?

Mr. ALBAN. That is exactly right. I mean, you often have these instances of capture where special interests lobby, developers get in tight with city councilmembers, and, you know, the redevelopment policies of a city are really driven by the interests of developers, and folks who are minorities or low-income or do not have as much political influence are really not able to affect the process as much. I think that actually goes to Professor Dana's point earlier about how, you know, States have considered a variety of reforms that may be appropriate for their State. I think that is, frankly, a very naive view of democracy. The State-level legislatures are also influenced by special interests, the developers and real estate lobby, lots of folks that have influenced the direction of the reforms. Professor Dana has even written about how many of those reforms do not adequately protect the poor and low-income from bogus blight designations and actually end up only protecting sort of the middle class and the wealthy. Frankly, that is a concern that I share, not with respect to every single State but there are certainly States where that is the case.

Chairman CORNYN. To Senator Durbin's point about the Keystone XL pipeline actually being owned by a foreign corporation, that really is not covered in the Fifth Amendment to the United States Constitution, is it? It is a question of is it a public use and is there just compensation for a taking for a public use? Isn't that what the Constitution calls for?

Mr. ALBAN. I am not aware of anything in the Fifth Amendment about who is the owner of the property or who the property is transferred to, whether it is foreign or domestic. Frankly, I do not know a lot about the facts of the Keystone XL pipeline and who owns it. Yes, the Constitution does not discuss the foreign ownership issue.

Chairman CORNYN. I suspect that the people along the railroad lines where this oil travels, where they have occasionally had derailings and safety incidents, clearly it seems to me that the

pipeline would be for a public purpose. I want to get to last questions on my time.

First of all, part of the concern at the Federal level—I understand Professor Dana is talking about an example of federalism, and I want to follow up on that. There are Federal funds being used for these takings and to pay the landowners where there is potentially abuse of the eminent domain power. Isn't that right, Mr. Alban?

Mr. ALBAN. That is correct, although I would say most of the Federal funds are not actually used to compensate the landowners. They are used for whatever the pie-in-the-sky development projects are that get built on the land after the fact. The benefit is really to the private developer who gets the property, not to the original owner of the property that is condemned and loses their property.

Chairman CORNYN. Okay. Professor Dana, you talked about federalism working, given the fact that the States have—many of them have enacted post-*Kelo* reforms. How would you respond to Mr. Alban's comment about use of Federal funds? That clearly implicates the Federal spending authority and Federal responsibility and not just leaving that up to the States and local governments.

Professor DANA. It is complicated in the sense that Federal funds are heavily involved in a lot of what States do, even in areas where there is a lot of State leeway. There are Federal transportation and transit funds. Those could be related to kind of redevelopment projects. There is some Federal funding directly for redevelopment. It is usually part of a whole suite of things.

I think one thing to be cautious about is if the Federal Government is going to withdraw funds every time anything that is done at the State and local level basically for good reason, but the particular case does not seem to be in the judgment of the Federal authorities, then it is very hard to have a general Federal support policy, because I think these categories are quite vague. So, "economic development" is a very broad and vague term, and so if you say that you are not going to provide Federal funding for economic development takings, it is not really clear what that means. That could mean funding for transportation projects because those are often tied to economic development. It could mean a lot of projects that you actually might be very, very comfortable with and actually think there is a strong Federal need for.

I think "economic development" is a malleable term, and that is one of the problems with creating it as a category of kind of the use of eminent domain we do not like. It raises a question about Federal legislation as well. The only other thing I would say about the federalism issue is I think these eminent domain issues involve a balancing of interests, and it is a difficult balance. States that have deteriorating urban areas and really want to bring in revenue and have a different kind of balance that they may strike compared to other areas that have different levels of urban growth or different levels of urbanism. I do think there is a reason to be sensitive to the different needs of the States.

Chairman CORNYN. I will hand it off to Senator Durbin, but I will note that even the subject of eminent domain has gotten involved in the Presidential primaries, the subject of some discussion, strangely enough. Senator Durbin.

Senator DURBIN. Now, I know why we are here.

[Laughter.]

Senator DURBIN. Mr. Alban, the website ThinkProgress wrote an article on March 1st titled, "TransCanada Is Seizing People's Land to Build Keystone, But Conservatives Have Been Dead Silent." The article discussed the story of Julia Trigg Crawford of Direct, Texas. I do not know where that town is, but I will bet Senator Cornyn does. A portion of Ms. Crawford's farm was condemned through eminent domain and used to construct part of the southern leg of the Keystone pipeline. The article said Ms. Crawford "cannot wrap her head around why TransCanada, a foreign company, was granted the right of eminent domain to build a pipeline that would not be carrying Texas oil through the State of Texas."

ThinkProgress interviewed Steve Anderson, the managing vice president of your employer, the Institute for Justice, and asked why the institute, which ably represented Mr. Casillas, has not taken a position on the use of eminent domain for transferring land to TransCanada for the Keystone XL pipeline. Mr. Anderson said the group focuses on "obvious private to private transfers" and not "traditional public uses."

I ask you, do you think it is problematic when landowners who do not want an oil pipeline to be built across their land have their land taken through eminent domain? Do you sympathize with the Texas farmers, the Nebraska landowners, and others who have challenged the taking of their land for the pipeline? Let me dismiss immediately the notion that the foreign corporation makes this different. Any corporation, private, profit-making corporation.

Mr. ALBAN. Yes, Senator, I find it deeply troubling, and I share your concerns about depriving people of private property for even a pipeline. I think the reason that the Institute for Justice has not gotten involved legally in these matters is because there is a long tradition in the common law of common carriers being treated as a public use under the common law of most States. Although we object to how people's property is being taken away, the legal avenue to challenge that has long since been foreclosed in many instances, although we continue actually to explore the possibility of cases challenging such takings.

Senator DURBIN. Even if the common carrier is a private, profit-making corporate entity, you are arguing that it is a public use and that they can use eminent domain to seize property?

Mr. ALBAN. I am not arguing that at all, Senator. I am telling you my understanding of the common law is that the common law treats that as—in many States, most States, treats that as a common carrier. Common carriers as a general matter are private entities, and in many cases private, profit-making entities. What makes them a common carrier, at least in theory, is that they are open to any member of the public to use them.

Obviously, in the case of an oil pipeline, there are not a whole lot of us that ship oil, so the common carrier designation for oil pipelines is perhaps quite questionable. Nonetheless, when certain areas of legal challenge are foreclosed by the long tradition of the common law, we try to use our donors' resources wisely and, you know, not waste time challenging things that we do not think we could win.

Senator DURBIN. Professor Dana, I am trying to sort out this notion of public use. Mr. Alban says we are talking about a common carrier exception here. I vaguely remember that from law school, not enough to fill in a question on a final, I am sure. How do we define public use in general terms? It seems to me that if a city wanted to take land by eminent domain to build a park, they say, Okay, public use. If they wanted to put a concession in that park, then, question: Has it gone beyond public use to something else? If they seize the land to have it owned by the city but then to lease it out for the construction of a football stadium, is that a public use? How do you sort out these varieties? Should we do it on a Federal basis, imposing it from Washington, as opposed to allowing the States under, here I go again, States' rights to assert their own definitions?

Professor DANA. Yes, well, defining public use is a conundrum. Once you move away from Justice Thomas' definition, which is the public actually is using it, so a park that you can actually go into or a pipeline you can actually tap oil out of, I guess, or use, once you move away from that definition, which has not really been our historical definition, then there is a real question of where do you draw the line and what counts as a good public use or not a good public use and who gets to decide and is it contextual. I agree with you. I think that that is a very difficult decision, and there is going to be a lot variation balancing of factors. It is a situation where I think there is wisdom in a certain deference to the States. I think the *Kelo* opinion, as criticized as it is, I think reflected that in its reasoning. Essentially, the opinion said we understand there is this situation here, but we have allowed eminent domain for a variety of things, and we have called it public use. How do we decide, how does the Federal constitutional law decide this one is not? Maybe it is better for the States and localities to decide that or kind of shape those definitions.

Senator DURBIN. Thanks.

Chairman CORNYN. Senator Tillis.

Senator TILLIS. Thank you, Mr. Chair. Professor Dana, when you were talking about the complexities of defining or getting to the matter of public use, I was having a *deja vu* over my time as Speaker of the House in North Carolina when we put forth a constitutional amendment in reaction to the *Kelo* decision that passed out of the House, but unfortunately, we could not get our colleagues in the Senate to—I think they had more attorneys over there, and we just could not get them all to come to a consensus on how to do that right. There are very clearly instances where you have to have that ability to gain property for things that are legitimately public use.

The States in reaction to *Kelo*, are there any best practices out there, people that seem to be—I personally believe a lot of this needs to be solved in the States, is what I attempted to do as speaker. Do you have any suggestions or examples of best practices out there in reaction to the *Kelo* decision? I will expand that to anyone on the panel who would like to answer.

Professor DANA. I think one thing, for example, Minnesota has done is it has narrowed the definition of what "blight" is. Under most States' statutes, you have to have a finding of blight to use

eminent domain, even apart from the *Kelo* decision. There is a fair point that blight is often vaguely defined, and there is a lot of deference. Minnesota enacted a statute that required much more specific findings. They essentially said in less deference to the findings, and they provided more procedural protections for the property owners. California has also done that, although obviously in some cases it required a lot of litigating to get it enforced. I think that is statutory refinement of what blight meant so that you are really requiring much more fact finding by the local agency before they—

Senator TILLIS. I think that is a great point. What concerns me is that blight sometimes gets defined by the contrast between what somebody may want it to be versus what it is, and not necessarily—you know, people talk about the neighborhoods that are just destroyed, no real use, no tax base, versus just older sections of a community that happen to be functioning just fine. It may not be the highest economic use for it, but people are being responsible in the community, and somehow they use the system to define that as blight. I think that is blatantly unfair to the property owners. Anyone else?

Mr. ALBAN. I certainly think Professor Dana and I agree that the definitions of “blight” need to be tightened up. I would probably say further than Professor Dana does, but that is certainly an area that is widely abused. As you said, Senator, it is often just a matter of sort of subjective perception, “Oh, I wish we had better-looking houses here, so we are going to declare this area blighted.” Blight should really be limited to when there is a serious public health threat, a fire hazard, a building that is about to fall over, something like that.

Senator TILLIS. A threat to public safety—

Mr. ALBAN. Some sort of threat to public health and safety.

Senator TILLIS. It should not be based on the differences in potential future economic value. I do not think that that is a fair basis for defining blight, and that is a discussion we went through. Mr. Casillas.

Mr. CASILLAS. Say again?

Senator TILLIS. Again, I was just kind of curious. What I am trying to do is find out, when I go back to my State—I was just speaker there last year; I have friends in the legislature—what more we could do to actually make progress in the State. I would like for North Carolina to take action, put into our Constitution, subject to a referendum, obviously, things that better define it within our State.

The other thing I will say is I do not agree with Senator Durbin by using the Keystone example. I think if you take a look at power transmission lines, you take a look at the Colonial pipeline that runs through my State, and a number of other things, it very clearly fits more into a legitimate definition of public use. Concerns with takings of property notwithstanding, as long as there is a fair process to go through. I think that it is a lot easier to argue the case for something like an energy pipeline just as you would energy transmission lines as a legitimate public use versus taking a neighborhood that somebody has just decided they can get a better return on equity by clearing houses in a neighborhood that is func-

tioning just fine. We know that that occurs from time to time, hopefully no more in my State. Thank you.

Chairman CORNYN. I am glad you mentioned that, Senator Tillis, because I had the same reaction. Just because you do not drive on a highway personally does not mean the highway itself is not condemned for public use, that property that the highway is built on. It cannot be limited to that.

I guess the concern I have is that the words of the Constitution, "public use," I think seem to have a pretty generally well accepted definition and understanding. When the Supreme Court talked about "public purpose," that seems to open things up almost to the point where it is impossible to know what the limit may be.

Mr. Casillas, if you had not found the Institute for Justice to represent you, what would you have done?

Mr. CASILLAS. We fought the city as far as we could, and if it had not been for the Institute for Justice, there was no way we could have taken on the city. I think the amount of legal fees went up in excess of \$1.9 million. We have about a \$150,000 budget. I stretch my resources. I stretched, you know, even the fight I could alone, but had it not been for IJ, we would not exist, and we probably would be an empty lot right now.

Chairman CORNYN. If there was ever a David versus Goliath sort of issue, this would seem to be it. I find so many times the arguments are—we find ourselves in unusual positions because those of us who are trying to protect the private property rights of individual citizens, we are talking about people like you and other individuals who perhaps cannot stand up to the financial wealth and resources and law firms and suffer the delay and the time it takes for litigation against big companies that have limitless resources. Hence, the importance of this topic.

Mr. Alban, Professor Dana talked about other ways that we could get at this issue, and, again, you mentioned the Federal financial resources that basically facilitate or enable the development once this taking occurs. Do you have any recommendations or thoughts for us—or would you perhaps like to send those to us later—about other ways we might constrain the use of Federal resources for clearly what is not a public use but condemnations which are of the kind we have been describing here, which are subject to abuse?

Mr. ALBAN. Sure. As I mentioned before, the Bond Amendment is already law, and it gets passed each time the appropriations act gets passed, and it already contains a prohibition against using Federal funds for eminent domain that is designed primarily to benefit private parties. The key is to put some enforcement mechanisms in there. Just as in the case of the CYAC in California, if there had not been a private enforcement mechanism, if the CYAC had not been able to go to the courts and challenge the attempted taking, you know, the CYAC would not exist anymore.

There needs to be something similar at the Federal level where private parties whose property is being threatened by a development funded by Federal dollars are able to bring a cause of action in order to stop those Federal funds from being used inappropriately. It is those folks who have the most interest, the greatest interest, that need to be empowered to take action. The Private Property Rights Protection Act contains one such idea of how that

would go about, and it also contains other protections such as having the Attorney General and DOJ investigate any misuse of funds by State or local agencies.

I think those are the sorts of proposals we need, and I would be happy to further brief the Senator if he has any additional questions.

Chairman CORNYN. I think maybe this is—there are other areas in which takings can effectively occur through regulatory overreach and other circumstances where private property rights are threatened by Government. Perhaps Senator Tillis and I and the Committee can work together with you and others who are interested in helping us put together something that might be not just focused on this limited issue but a broader private property rights protection piece of legislation.

Mr. ALBAN. That is certainly the case, and we would welcome the opportunity to work with you on that. I focused my remarks on eminent domain because the topic of the hearing was on *Kelo*. Regulatory takings are also a very serious issue that affects many homeowners and business owners.

Chairman CORNYN. Senator Tillis.

Senator TILLIS. I wanted only to say that I think *Waters of the U.S.* may be one of the most profound potential regulatory takings in U.S. history and something that we need to spend a lot of time on, having people understand it. It amazes me how few people know about it and the extent to which they are going to be affected if those rules go into place.

Incidentally, it does not really relate to the subject of this Committee meeting, but there are other practices that I think the States really have to take a look at, and that has to do with annexation and annexation reform. We passed sweeping annexation reform a couple of years ago in North Carolina to vest a lot more power in the rights of the property owners, but you see how that is sometimes used as a chess game, first to expand your jurisdiction, and then to do the kinds of takings that we are talking about in this Committee. Thank you for being here.

Mr. ALBAN. Thank you, Senator. That is absolutely right. Related to that is amortization, which is a process by which local governments often do an end run around whatever protections are available in the State for eminent domain, often without compensating the property owners.

I did not get a chance earlier to identify States that maybe act as models in terms of their eminent domain reform. I think Professor Dana identified Florida earlier as a State that actually had effectively stopped eminent domain abuse, eminent domain that is used to benefit private entities. My home State of Virginia has also passed a constitutional amendment that largely prohibits that sort of activity.

It is important for States to pass constitutional protections rather than mere statutory protections because those can always be changed. In California, they passed redevelopment protections that increased the standards for blight, and then a few years later, they abolished redevelopment agencies. Just 2 weeks ago, they were revived under a new name, and these new redevelopment agencies

are not subject to the post-*Kelo* reforms. That is why constitutional amendments are so important.

Chairman CORNYN. As we are talking about it, I can think of another category of ways that the Federal Government grabs private property through declaration of endangered species and the like. Maybe we can have a working list of subjects we can deal with in this Private Property Protection Act that we might be able to cobble together with your help.

I want to thank all the witnesses and by who is here today. The record for this hearing will remain open for 1 week for any additional questions or statements that might be propounded or offered. Thank you again for being here with us, and this hearing is adjourned.

[Whereupon, at 2:53 p.m., the Subcommittee was adjourned.]

[Additional material submitted for the record follows.]

Testimony of Dan Alban
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United States Senate Committee on the Judiciary
Subcommittee on the Constitution

Hearing on “Theft By Another Name: Eminent Domain
Ten Years After *Kelo v. City of New London*”

October 8, 2015

Thank you for the opportunity to testify about eminent domain abuse, an important issue that has received significant national attention as a result of the United States Supreme Court's notorious decision in *Kelo v. City of New London*, which was handed down ten years ago this past June. This Committee is to be commended for responding to the American people by continuing to examine this misuse of government power to violate the property rights of many Americans.

My name is Dan Alban, and I am an attorney at the Institute for Justice, a nationwide, nonprofit public interest law firm headquartered in Arlington, Virginia that represents people whose rights are being violated by the government. One of the main areas in which we litigate is property rights, particularly in cases where homes or small businesses are taken by the government through the power of eminent domain and transferred to another private party. I have successfully represented property owners across the country—from National City, California to Atlantic City, New Jersey—who are fighting against the abuse of eminent domain.

The Institute for Justice represented the homeowners in *Kelo v. City of New London*, the notorious 2005 case in which the U.S. Supreme Court ruled by a bare majority that eminent domain could be used to transfer perfectly fine private property to a private developer based simply on the mere promise of increased tax revenue. On its tenth anniversary in late June, law professors, legal commentators, and other observers described *Kelo* as “one of the Supreme Court's most controversial modern decisions... a grave error,” “truly horrible,” “one of the most destructive and appalling decisions of the modern era,” and “the worst Supreme Court decision of the 21st Century.”¹

The *Kelo* case demonstrated that a majority of justices sitting on the Supreme Court believed the U.S. Constitution provides very little protection for the private property rights of Americans faced with eminent domain abuse. Indeed, the Court ruled that it is acceptable 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's no wonder, then, that the decision caused Justice Sandra Day 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.”

Justice O'Connor further warned in her dissent that “the fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more.”

¹ Prof. Ilya Somin, *The Grasping Hand: Kelo v. City of New London and the Limits of Eminent Domain*, American Constitution Society ACSblog, June 23, 2015, <http://www.acslaw.org/acsblog/the-grasping-hand-ke-lo-v-city-of-new-london-and-the-limits-of-eminent-domain>; Prof. Richard Epstein, *Kelo v. City of New London Ten Years Later*, Nat'l Rev., June 23, 2015, <http://www.nationalreview.com/article/420144/ke-lo-v-city-new-london-ten-years-later-richard-epstein>; Damon Root, *The Kelo Debacle Turns 10*, Reason Hit & Run Blog, June 23, 2015, <http://reason.com/blog/2015/06/23/the-ke-lo-debacle-turns-10>; David Burge, Iowa Hawk Blog Twitter Account, June 23, 2015, <https://twitter.com/iowahawkblog/status/613340586653777920>.

An Institute for Justice study confirmed Justice O'Connor's concerns, finding that eminent domain disproportionately impacts minorities, the less educated, and the less well-off.² As Justice O'Connor concluded her dissent in *Kelo*: "The Founders cannot have intended this perverse result."

In part because of the threat posed to the rights of everyday Americans—particularly those disadvantaged by a lack of financial resources and political influence—there has been a considerable public outcry against the closely divided *Kelo* decision. Organizations spanning the political spectrum have united in opposition to eminent domain abuse, including the National Association for the Advancement of Colored People, Mexican American Legal Defense and Education Fund, League of United Latin American Citizens, the Farm Bureau, and the National Federation of Independent Business. Overwhelming majorities in every major poll taken after the *Kelo* decision have condemned the result, and it continues to be wildly unpopular ten years after the case was decided. Forty-four states have reformed their eminent domain laws in the wake of the decision. Nine state supreme courts have made it more difficult for the government to engage in eminent domain abuse, and three of those have explicitly rejected *Kelo*.

Unfortunately, while several bills have been introduced in both the House and the Senate to combat the abuse of eminent domain with significant bipartisan support, Congress has yet to pass any legislation that enacts any meaningful reform. The federal government should not be complicit in an abuse of power already deemed intolerable by most states; Congress should take action to prevent federal dollars from being used to fund projects that abuse the power of eminent domain by taking property from one private person to give to another.

Before *Kelo*, the use of eminent domain for private development had grown to become a nationwide problem, and the Court's decision quickly encouraged further abuse.

Eminent domain, called the "despotic power" in the early days of this country, is the power to force citizens from their homes, small businesses, churches, and farms. 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 or used—schools, courthouses, post offices, and the like. Over the past 60 years, however, the meaning of "public use" has been stretched past its breaking point by courts that have abdicated their role to enforce this important constitutional limitation on the power of eminent domain. Today, the courts have redefined "public use" to mean any "public purpose," which includes ordinary private uses like luxury 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

² See Dick M. Carpenter & John K. Ross, *Victimizing the Vulnerable: The Demographics of Eminent Domain Abuse*, June 2007, <http://www.ij.org/1621>; see also Dick M. Carpenter & John K. Ross, *Testing O'Connor and Thomas: Does the Use of Eminent Domain Target Poor and Minority Communities?*, 46 Urb. Stud. 2247 (2009), <http://www.thecyberhood.net/documents/papers/carpenter09.pdf>.

eminent domain. Urban renewal wiped out entire communities, most typically African-American communities, earning eminent domain the nickname “negro removal.”³

This “solution,” which critics and proponents of urban renewal alike consider a dismal failure, was given ultimate approval by the U.S. Supreme Court in 1954 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—and still does—to remove blighted properties through public nuisance law. By effectively changing the wording of the Fifth Amendment, the Court opened up a Pandora’s box, and in the wake of that decision properties were routinely taken pursuant to redevelopment statutes when there was absolutely nothing wrong with them, except that some well-heeled developer coveted them and the government hoped to increase its tax revenue.

The use of eminent domain for private development was widespread. In the five-year period between 1998 and 2002, IJ documented more than 10,000 properties either seized or threatened with condemnation for private development.⁴ Because this number was reached by counting properties listed in news articles and cases, it grossly underestimates the number of condemnations and threatened condemnations. For example, in Connecticut, IJ found 31, while the true number of condemnations was 543.

After the Supreme Court actually sanctioned this abuse in *Kelo*, the floodgates opened; the rate of eminent domain abuse tripled in the one year after the decision was issued.⁵ With the high court’s blessing, local governments became 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).
- Oakland, Calif.: A week after the Supreme Court’s ruling in 2005, Oakland city officials used eminent domain to evict John Revelli from the downtown tire shop his family had 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 our last chance.”
- Hollywood, Fla.: Twice in one month, Hollywood officials used eminent domain to take private property and give it to a developer for private gain. Empowered by the *Kelo* ruling, City commissioners took a bank parking lot to make way for an exclusive condo tower. When asked what the public purpose of the taking was, City Attorney Dan Abbott didn’t hesitate before answering, “Economic development, which is a legitimate public purpose according to the United States Supreme Court.”

³ See Dr. Mindy Fullilove, *Eminent Domain & African Americans: What is the Price of the Commons?*, Feb. 14, 2007, <http://castlecoalition.org/pdf/publications/Perspectives-Fullilove.pdf>.

⁴ See Dana Berliner, *Public Power, Private Gain: A Five-Year State By State Report Examining the Abuses of Eminent Domain*, April 2003, <http://castlecoalition.org/public-power-private-gain>.

⁵ See Dana Berliner, *Opening the Floodgates: Eminent Domain Abuse In the Post-Kelo World*, June 2006, <http://castlecoalition.org/pdf/publications/floodgates-report.pdf>.

- Arnold, Mo.: The *St. Louis Post-Dispatch* reported that Arnold Mayor Mark Powell “applauded the [*Kelo*] decision.” The City of Arnold wanted to raze 30 homes and 15 small businesses, including the Arnold VFW, for a Lowe’s Home Improvement store and a strip mall—a \$55 million project for which developer THF Realty would receive \$21 million in tax-increment financing. Powell said that for “cash-strapped” cities like Arnold, enticing commercial development is just as important as other public improvements.
- Sunset Hills, Mo.: 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.
- Mount Holly, N.J.: For over a decade, township officials used the threat of eminent domain to systematically dismantle the Gardens, a lower-income, tight-knit neighborhood once home to over 300 row houses. Officials wanted to replace the well-kept and treasured homes with newer, fancier town homes.

More recent abuses include:

- New York, N.Y.: In 2010, the New York Court of Appeals—the state’s highest court—allowed the condemnation of perfectly fine homes and businesses for two separate projects. First, a new basketball arena and residential and office towers in Brooklyn, and then for the expansion of Columbia University—an elite, private institution—into Harlem.
- Philadelphia, Penn.: Starting in 2012, the Philadelphia Redevelopment Authority (PRA) sought to condemn the art studio of world-renowned artist James Dupree to pave the way for a new grocery store. The City initially seized his deed just four days before a loophole in the state’s post-*Kelo* eminent domain reform was closed, which would have protected the owner from the taking. After a long campaign of grassroots activism, the PRA finally relented and terminated the condemnation proceedings in early 2015.
- Atlantic City, N.J.: New Jersey’s Casino Reinvestment Development Authority (CRDA) has long abused its eminent domain powers for the benefit of casinos and continues to do so in a large swath of Atlantic City designated as the Tourism District. In spring 2014, CRDA filed condemnation papers against 62 properties in the South Inlet neighborhood near the Boardwalk, including the well-kept longtime family home of Institute for Justice client Charlie Birnbaum, in what appears to be a “bulldoze first, plan later” scheme. Unlike in *Kelo*—where there was a development plan for the proposed taking—CRDA admits it has no specific development plans for the area and merely says it is for a “mixed-use development” that is intended to “complement the new Revel Casino and assist with the demands created by the resort.” But the \$2.4 billion Revel Casino has filed twice for bankruptcy and closed in early September 2014. Despite this turn of events, CRDA is still trying to seize the Birnbaum house for unspecified and unknown “Tourism District uses,” even though the current residential use is a permitted use in the Tourism District. In August of this year, a judge on the New Jersey Superior Court reversed his earlier opinion that CRDA could take Charlie’s longtime family home, noting that the court had serious concerns about the uncertainty of any planned redevelopment projects. The judge gave CRDA 180 days to “reevaluate the feasibility of the proposed project” and provide the court with more evidence to justify the taking.

- Charlestown, Ind.: In 2014, the mayor of Charlestown was prepared to use eminent domain to seize 354 well-kept homes—an entire working-class neighborhood, called Pleasant Ridge—in order to transfer the land to a private developer for new homes and retail. Fortunately, grassroots activists ultimately brought those plans to a halt.
- Glendale, Colo.: In 2015, the City Council authorized its urban renewal authority to condemn Authentic Persian Rugs, a popular, successful store on the busiest road in Denver. The mayor wants to hand this family business and surrounding property over to a private developer for an entertainment district.

As mentioned above, heeding a deafening public outcry against eminent domain abuse, 44 states have reformed their eminent domain laws in the wake of *Kelo*. These reforms varied greatly—indeed, no two states enacted the same legislative reforms. Eminent domain abuse has become virtually non-existent in some states, while in others there remains much room for improvement. A few states have even rolled back their post-*Kelo* reforms. This demonstrates an ongoing need to remain vigilant in the fight against eminent domain abuse.

Congress should take this opportunity to stop being complicit in eminent domain abuse where it exists and where it may reappear in the future by restricting federal funds from being used where the power of eminent domain is abused for private development.

Despite the nationwide revolt against *Kelo*, federal action is still needed, as federal law and funds currently support eminent domain for private development.

Federal agencies themselves rarely if ever take property for private projects, but federal funds support condemnations and support agencies that take property from one person to give it to another. There has been improvement from state legislative reform, but not enough. Although eminent domain for private development is less of a problem in nearly half of the states in the wake of *Kelo*, it remains a major problem in many other states. Unfortunately, some of the states that were the worst before *Kelo* in terms of eminent domain abuse did little or nothing to reform their laws. New York remains the worst state in the country on this issue, and it has gotten even worse since *Kelo*. Missouri, also a major abuser, passed only weak reform, as did Illinois.

In other states, like Washington and Texas, the prospect of federal money for Transit Oriented Development has inspired municipalities to seek enormous areas for private development (areas not needed for the actual transportation).

Other states have regressed from previous reforms. Alabama recently passed legislation to roll back its eminent domain reform, after being the first state to react legislatively to give its citizens stronger protections against this abuse of power after *Kelo*. California passed legislative reforms after *Kelo* that imposed stricter standards for creating a redevelopment area, and then abolished redevelopment agencies in 2012. Such agencies have frequently abused the eminent domain power in the past, and often with federal funding (as in National City, California, discussed below). But just last month, Governor Brown signed a bill into law that will revive redevelopment agencies under a new name, Community Revitalization and Investment Authorities (CRIAs), and with *expanded authority*. The previously strict requirements for creating redevelopment areas no longer apply to CRIAs, giving them free rein to take almost any

property they wish. This is a catastrophe for property owners in California; allowing these new agencies to use federal dollars for redevelopment purposes will make things even worse.

Eminent domain abuse is still a problem, and federal money continues to support the use of eminent domain for private commercial development. A few examples of how federal funds have been used to support private development include:

- New London, Conn.: This was the case that was the subject of the Supreme Court's *Kelo* decision. Fifteen homes were taken for a private development project that was planned to include a hotel, upscale condominiums, and office space. The project received \$2 million in funds from the federal Economic Development Authority—and ultimately failed. The former neighborhood remains an empty lot, over a decade later.
- Brea, Calif.: The Brea Redevelopment Agency demolished the city's entire downtown residential area, using eminent domain to force out hundreds of lower-income residents. The Department of Housing and Urban Development (HUD) launched an investigation into the potential misappropriation of federal development grants totaling at least \$400,000, which made their way to the city in the late 1980s and early 1990s. FBI agents investigated the Redevelopment Agency based on evidence that the Agency used coercive tactics to acquire property.
- Garden Grove, Calif.: Garden Grove has used \$17.7 million in federal housing funds to support its hotel development efforts—efforts that included, at least in part, the use of eminent domain. In 1998, the City Council declared 20 percent of the city “blighted,” a move that allowed the city to use eminent domain for private development. Using that power—and federal money—the city acquired a number of properties, including a mobile-home park full of senior citizens, apartment renters and small businesses, in order to provide room for hotel development.
- National City, Calif.: In 2007, the National City Community Development Commission, which received significant federal funding, authorized the use of eminent domain over nearly 700 properties in its downtown area, calling the area “blighted.” One of the planned projects was the replacement of the Community Youth Athletic Center, a boxing gym and mentoring program for at-risk youth, with an upscale condominium project. Fortunately after years of hard-fought litigation by the Institute for Justice, we prevailed in getting the blight designation struck down.
- Normal, Ill.: Normal officials condemned the properties of Orval and Bill Yarger and Alex Wade, including the Broadway Mall, for a Marriott Hotel and accompanying conference center being built by an out-of-town developer. The town secured at least \$2 million in federal funding for downtown projects, and once the cost of the Marriott nearly doubled, approved giving the developer \$400,000 in Community Development Block Grant money.
- Baltimore, Md.: In December 2002, the Baltimore City Council passed legislation that gave the city the power to condemn up to 3,000 properties for a redevelopment project anchored by a biotechnology research park. The development is supposed to contain space for biotech companies, retail, restaurants and a variety of housing options. HUD provided a \$21.2 million loan to the city. Nearly thirteen years later, the project is still under construction and much of the seized land remains vacant. Many projects in

Baltimore involving the use of eminent domain for private development are overseen by the Baltimore Development Corporation, which receives federal funding.

- Somerville, Mass.: In October 2012, Somerville authorized the use of eminent domain over a 117-acre neighborhood, identifying seven blocks with 35 properties to be acquired first. The Union Square Revitalization Plan is a transit-oriented development with residences, retail, restaurants, and office space. The city has received at least \$29 million in stimulus funds and around \$35 million in other federal and state funding. The owner of a threatened gym said that he believes in the revitalization of Union Square through private means: “That’s why I purchased the property.” But he said it would be difficult to develop his business with “the threat of seizure hanging over our head.” The project is currently moving forward.
- St. Louis, Mo.: In 2003 and 2004, the Garden District Commission and the McRee Town Redevelopment Corporation demolished six square blocks of buildings, including approximately 200 units of housing, some run by local non-profits. The older housing was to 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.
- Elmira, N.Y.: Eight properties—including apartments, a garage, carriage house, and the former Hygeia Refrigerating Co.—were condemned and six were purchased under the threat of eminent domain for Elmira’s South Main Street Urban Development project. HUD funds were used to create a 6.38-acre lot for development.
- Mount Vernon, N.Y.: In October 2012, this suburb of New York City declared almost eight acres in a neighborhood that is 90 percent black “blighted” and subject to condemnation. The blight study was paid for by the developer who wants to build there. Threatened properties include homes, churches, and businesses including a daycare with a well-maintained playground, a nail salon, delis, a Jamaican restaurant, and small grocery stores. Mount Vernon received at least \$1.7 million in CDBG and HOME funds in 2012.
- New Cassell, N.Y.: St. Luke’s Pentecostal Church saved 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. The land remained vacant for at least six years.
- New York, N.Y.: Developer Douglas Durst and Bank of America enlisted the Empire State Development Corporation to clear a block of midtown Manhattan for their 55-story Bank of America Tower at One Bryant Park. The ESDC put at least 32 properties under threat of condemnation and initiated eminent domain proceedings. All of the owners eventually sold. Durst had abandoned the project prior to 9/11, but an infusion of public subsidies—including \$650 million in the form of Liberty Bonds—and a \$1 billion deal with Bank of America put plans back on track.
- Ardmore, Pa.: The Ardmore Transit Center Project had some actual transportation purposes, but Lower Merion Township officials also planned to remove several historic local businesses, many with apartments on the upper floors, so that they could be replaced with mall stores and upscale apartments. The project received \$6 million in federal funding, which went to the Southeastern Pennsylvania Transit Authority. But for

a tirelessly waged grassroots battle—which no American should have to wage to keep what is rightfully theirs—that ultimately stopped the project, the federal government would have been complicit in the destruction of successful, family-owned small businesses.

- Washington, D.C.: The National Capital Revitalization Corporation received \$28 million in HUD funds to buy or seize up to 18 acres of land for a private developer to replace old retail with new retail. Over the course of seven years, affected business owners challenged the District in a dozen different eminent domain cases—but the city won or settled every dispute.

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

The *Kelo* decision continues to cry out for congressional action, ten years later. Even Justice Stevens, the author of the opinion, stated in a speech that he believes eminent domain for economic development is bad policy and hopes that the country will find a political solution.

Some states did, but those reforms not embedded in state constitutions will always be subject to repeal or exception whenever a pie-in-the-sky project catches the eye of state legislators or local officials. Congress needs to finally make its opposition heard on this issue, and should provide property rights protections to Americans that the Supreme Court denied in 2005.

The Bond Amendment was ineffective because it had no enforcement mechanism.

Congress's previous efforts to restrict the use of certain federal funds for eminent domain (from the Departments of Transportation, Treasury, Housing and Urban Development (HUD) and other agencies) have unfortunately been ineffective. In 2005, just after *Kelo* was decided, Senator Christopher Bond (R-Mo.) introduced an appropriations bill amendment that was intended to limit federal funding for eminent domain abuse.⁶

The Bond Amendment purported to restrict the use of funds by HUD and other agencies for projects involving eminent domain to only those projects where eminent domain is employed “only for a public use.” The Bond Amendment lists a number of approved public uses, but provides that “public uses shall not be construed to include economic development that primarily benefits private entities.”

However, the Bond Amendment has no enforcement mechanism and relies on agencies and grant recipients to police themselves. There does not seem to be any way for individuals to enforce this restriction. Nor does it appear that any of these agencies have ever investigated a violation of the spending limitation or enforced the limitation. Instead, the local governments that receive the funds are expected to understand and apply the prohibition. In other words, the same local governments that are planning to use eminent domain are also expected to limit their own

⁶ The Bond Amendment first appeared as Section 726 of the FY 2006 appropriations bill that was signed into law by President Bush on November 30, 2005. See Pub. L. No. 109-115, § 726, 119 Stat 2396 (2005).

funding, despite the fact that there is no prospect of enforcement. It is therefore not surprising that the funding restriction has not protected the rights of people faced with eminent domain.

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

The language of the Bond Amendment has reappeared in provisions of appropriations bills for fiscal years 2008, 2009, 2010, 2014, and 2015, and it also appears in the current draft of the bill for FY 2016, which was passed by the House in June and awaits approval by the Senate.⁷ Putting teeth in the language of the Bond Amendment by adding an enforcement mechanism would be an important first step toward federal eminent domain reform.

The Private Property Rights Protection Act (PPRPA) has effective enforcement mechanisms.

The Private Property Rights Protection Act (PPRPA) both prohibits federal funding of eminent domain for economic development and includes several enforcement measures—including both a private cause of action for property owners and investigation and enforcement by the Department of Justice—to ensure that the prohibition is effective. The PPRPA also includes a serious penalty to discourage violation of the prohibition against federal funding of eminent domain abuse: a state or locality becomes ineligible to receive any federal economic development funds for two fiscal years, *unless* the state or locality returns all property that was taken and replaces or repairs anything that has been destroyed, with penalties and interest.

The original version of that bill, H.R. 4128 in the 109th Congress, passed the House by a vote of 376–38.⁸ It has been reintroduced several times since then, including in July when it was introduced by Rep. Sensenbrenner as H.R. 3013.⁹ The bill has been referred to the House Judiciary Committee, Subcommittee on the Constitution and Civil Justice.

The Private Property Rights Protection Act is common sense legislation that will stop the federal government from being complicit in an abuse of power already deemed intolerable by most states. I encourage Congress to find a way to finally pass this bill and prevent federal taxpayer

⁷ See Transportation, Housing and Urban Development, and Related Agencies Appropriations Act, H.R. 2577, 114th Cong. § 407 (2015), <https://www.congress.gov/bill/114th-congress/house-bill/2577/text>.

⁸ See Private Property Rights Protection Act, H.R. 4128, 109th Cong. (2005), <https://www.congress.gov/bill/109th-congress/house-bill/4128/actions>.

⁹ See Private Property Rights Protection Act, H.R. 3013, 114th Cong. (2015), <https://www.congress.gov/bill/114th-congress/house-bill/3013/text>.

dollars from being used to violate the private property rights of homeowners and small business owners.

Given the climate in the states as a result of *Kelo*, congressional action would do even more to both discourage the abuse of eminent domain nationwide and encourage sensible state-level reform. Reform at the federal level would be a strong statement to the country that this awesome government power should not be abused. It would restore the faith of the American people in their ability to build, own and keep their homes and small businesses, which is itself a commendable goal.

Federal funding restrictions that prohibit eminent domain abuse can still allow cities and agencies to continue to receive federal funding when they acquire abandoned property and transfer it to private parties. When the public thinks about “redevelopment,” it is most concerned with the ability to deal with abandoned property. With such legislation, cities can continue to clear title to abandoned property and then promote private development there without risking losing their federal funding. Similarly, it may also be useful to have a clear and strictly limited exception for the exercise of eminent domain to remove “harmful uses of land provided such uses constitute an immediate threat to public health and safety” in order to discourage local governments from taking perfectly fine homes and businesses as is common practice under some state’s vague blight laws.

It should also be noted that development occurs every day across the country without eminent domain and will continue to do so should this committee act on this issue, which I recommend. Public works projects like flood control will not be affected by any legislation that properly restricts eminent domain to its traditional uses, since those projects are plainly public uses. But commercial developers everywhere need to be told that they can only obtain property through private negotiation, not government force, and that the federal government will not be a party to private-to-private transfers of property. As IJ demonstrated in a 2008 study, restricting eminent domain to its traditional public use in no ways harms economic growth.¹⁰

Conclusion

Congress should not be sending scarce economic development funds to projects that abuse eminent domain and strip hard-working, tax-paying home and small business owners of their constitutional rights, particularly when these projects may ultimately fail. Let New London be a lesson: After \$80 million in taxpayer money spent, years tied up in litigation and ten years after the disastrous U.S. Supreme Court ruling, the Fort Trumbull neighborhood where Susette Kelo’s little pink house once stood is now a barren field that is home to nothing but feral cats. The developer balked and abandoned the project. Pfizer—the intended beneficiary of the project—closed its plant and left New London.

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 luxury condominiums. Real people lose the

¹⁰ See Institute for Justice, *Doomsday? No Way: Economic Trends and Post-Kelo Eminent Domain Reform*, Jan. 2008, <http://ij.org/1618>; see also Dick M. Carpenter & John K. Ross, *Do Restrictions on Eminent Domain Harm Economic Development?*, 24 Econ. Dev. Q. 337 (2010), <http://edq.sagepub.com/content/24/4/337.short>.

businesses they count on to put food on the table and watch as they are replaced with shopping malls. And all this happens because local governments prefer the taxes generated by condos and malls 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. 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 on this important subject.

**Testimony of Clemente Casillas
President, Community Youth Athletic Center**

**Before the United States Senate Judiciary Committee,
Subcommittee on the Constitution**

**Hearing on “Theft By Another Name: Eminent Domain
Ten Years After *Kelo v. City of New London*”**

October 8, 2015

I thank the Chairman and the members of the Committee for the opportunity to testify about eminent domain abuse and why federal tax dollars should stop funding it.

My name is Clemente Casillas and I am the President and Executive Director of the Community Youth Athletic Center (CYAC) in National City, California, just south of San Diego. The CYAC is a nonprofit boxing and after-school mentoring program for at-risk, inner-city youth, staffed mostly by volunteers. We started out in our founder's backyard. With the help of generous sponsors, we bought a little building on National City Boulevard and turned it into a boxing gym and mentoring center.

But nonprofit boxing gyms don't generate as much property tax revenue as luxury condominiums. So the City of National City and its federally funded Community Development Commission (CDC) tried to seize our gym using eminent domain in order to hand it over to a private developer who wanted to replace it with high-rise luxury condos for the wealthy.

I'd like to share my story with you, to help you understand how eminent domain abuse affects real people, and why the federal government should stop funding it.

When I was a teenager, I participated in a youth boxing program similar to the CYAC. At the time, my life could have gone in one of two ways. I could have easily gotten involved with the wrong crowd. But because of my boxing program, I was able to avoid kids who were in gangs. I was exposed to good role models, and eventually received a Bachelor's degree from USC and became a professional real estate agent and broker. If it wasn't for boxing and, especially, learning the discipline that comes with boxing, I would never have been able to do what I have done. I came from some of the same streets these kids come out of, and I went to the same schools. I know what a difference it can make in a kid's life. I am committed to making that same difference in the lives of other kids.

The CYAC began in 1991 with a punching bag hung up in a backyard, but over the years we have opened our doors to thousands of kids. Many of these kids come from broken homes and have broken spirits. We try to build them back up and show them how strong, smart, and successful they can be. Our motto is: “Making a difference, one round at a time.”

We help keep kids off the street and teach them about important values that you can learn through the sport of boxing, such as discipline, commitment, and perseverance. We also have tutoring programs to help them succeed academically. We require that all of our students maintain good grades in order to participate in the boxing program.

Several of our kids have been successful at national tournaments and are among the top-ranked youth boxers in the nation. But that is not why we do this. We know that few of our kids will ever win a national title or compete in the Olympics. But we want to help make them winners in life.

In 2001, we used generous donations to buy an old gun store on National City Boulevard; it was the perfect location for students to be able to come to the gym on the bus after school. We remodeled it with volunteer labor and donated materials into a boxing gym and mentoring center for the kids. *That* is true community-based redevelopment.

But in 2005, National City and the CDC gave a developer *their permission* to build luxury condos on *our property*, which we owned free and clear. They seemed to think *our gym* was theirs to do with what they wanted. One day we even found a sign stuck in the ground in front of our building that said “Coming Soon” with an image of the proposed luxury condos. The CDC and the developer sent us threatening letters saying we had to sell the building or face eminent domain. The developer’s first letter gave us a week to sell the building below market value or they would have the CDC take it using eminent domain. But this wasn’t about the money; it was about staying at the perfect location for after-school programs in a gym we had built with our own sweat and blood.

We tried to negotiate with the City and the developer to find out if it might be possible to keep the gym on the first floor of the proposed development, with the luxury condos on the floors above. But we were told that the people who could afford to live in those high-rise condos would not want our kids around. That was when we realized we needed to stand up for our kids because no one else was going to stand up for them. We wanted to show our kids that they were important and deserved the same dignity and respect that everyone deserves. We wanted to lead by example and show our kids that sometimes you have to take a stand and fight for your rights. Not in the ring or on the street, but in City Hall and in the courts.

Fortunately, we were represented *pro bono* by the Institute for Justice (IJ), which won our lawsuit challenging the City’s attempt to wrongly declare that our gym and almost 700 other properties were supposedly “blighted,” even though the property values had soared. IJ litigated the case for eight years, in a case as grueling as a 15-round boxing match, and saved our gym from eminent domain. But it never should have come to that.

What happened to us should not happen to anyone else. Congress needs to send a message to local governments that this kind of abuse of power will not be funded or

tolerated. Federal lawmakers should pass legislation that will withhold federal development funding for cities that abuse eminent domain for private development.

Special interests—especially developers who benefit from this use of government power—are working to convince the public and legislatures that there isn’t a problem. But what happened to our gym, and countless other people, proves otherwise. What we have now amounts to “government by the highest bidder,” and that has got to stop.

Eminent domain abuse affects real people. Homeowners, small businesses and even nonprofit boxing gyms need the protections guaranteed by the Constitution that their property is their castle. The Supreme Court failed to enforce these protections ten years ago in *Kelo v. New London*, but Congress still has that opportunity. This country is full of people like the volunteers who help make the CYAC a success story, people who work hard and save up to buy something to call home. I ask you to please stop funding redevelopment for local governments like the City of National City that use federal dollars to take away homes, businesses, and nonprofits for private gain.

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

Testimony of Professor David A. Dana
 Professor of Law
 Northwestern University School of Law

Hearing before the Senate Judiciary Committee Subcommittee on the Constitution
 on "Theft by Another Name: Eminent Domain Ten Years After *Kelo v. City of New London*"
 Dirksen Senate Office Building, Room 226
 October 8, 2015

Chairman Cornyn, Ranking Member Durbin, Members of the Subcommittee, thank you for inviting me here today. I would like to make several key points in my testimony. First, in the aftermath of the *Kelo* decision and the invitation by the *Kelo* majority for the states to reassess their own laws on eminent domain, nearly all states have instituted reforms that restrict to some degree the use of eminent domain for economic development. Second, while some commentators propose going further and imposing an outright ban on the use of eminent domain for economic development, there is reason for concern that such a ban may work to the detriment of lower-income Americans in certain contexts. And third, while an outright ban may go too far, there are several other reforms that should be considered to make sure eminent domain operates more fairly to protect those with lower incomes.

1. State reforms after *Kelo* have placed state-specific restrictions on eminent domain for economic development.

It has been ten years since the *Kelo* decision, and the impact of *Kelo* at the state level has been broad and varying. States have enacted many different kinds of reforms, reflecting their own particular situations, in a vivid display of federalism in action. The majority opinion in *Kelo* called upon the states to devise eminent domain restrictions suited to their own individual needs, and there is good reason to believe they have done just that. With the exception of Florida and Mississippi, no state has purported to ban the use of eminent domain for economic redevelopment altogether. In all, however, 47 states according to one recent count have restricted the use of eminent domain in some way since *Kelo*. Some states have imposed substantive and/or procedural limitations on the use of eminent domain for economic development where non-blighted properties are at issue; some states have tightened the definition of and requirements for finding blight as a prerequisite for the use of eminent domain; and some states have added procedural protections for property owners seeking just compensation and/or have added to what is included within the compensation paid property owners. And many states have combined a variety of reforms. The full range of state responses to *Kelo* is well summarized by the *National Conference of State Legislatures*, <http://www.ncsl.org/research/environment-and-natural-resources/eminent-domain-legislation-and-ballot-measures.aspx>, but reforms continue to be adopted, assessed and modified. The key point is that the states have assumed responsibility for shaping eminent domain law to meet their citizens' needs and address legitimate concerns about the use of eminent domain. In our federal system, this is exactly how this is supposed to work – states are

supposed to find tailored solutions to their own circumstances, rather than being subjected to a one-size-fits-all federal solution.

2. Outright bans on eminent domain for economic development go too far and risk hurting lower-income communities.

One of the concerns that animated some of the post-*Kelo* state legislation, and that Justice Thomas powerfully invoked in his dissent in *Kelo*, is that eminent domain for the purpose of urban or suburban redevelopment can have negative impacts on poor, low-income, often heavily minority communities. And there is no doubt at all that, as a historical matter, the use of eminent domain for a range of purposes – and not just redevelopment – harmed some low-income, minority communities. Eminent domain was used heavily in the post-World War 2 era to aid the construction of the national highway systems, and very often highways were constructed through low-income and working-class, in many instances heavily minority neighborhoods. During the federally-funded urban renewal boom of the 1950s and 1960s, poor areas were again the focus, and eminent domain sometimes simply resulted in the massive displacement of low-income households to their disadvantage, rather than, as had been the stated goal, their betterment.

But while there are instances where eminent domain has had a negative impact on low-income communities, there are also notable cases where the use of eminent domain has clearly helped revitalize cities with large low-income populations who rely on city funding for essential services. The Baltimore Inner Harbor project is one prime example. That eminent domain can be a necessary tool for urban redevelopment is suggested by the fact that flat-out bans on its use for urban redevelopment have not been adopted generally – indeed Florida is the only state where eminent domain was ever used in a meaningful way for urban redevelopment before *Kelo* that has essentially banned its use for redevelopment now.

One of the reasons states have not banned the use of eminent domain for redevelopment is that, without the tool of eminent domain, holdouts can defeat efforts to assemble fragmented land holdings into a parcel of a suitable size for redevelopment. It is in heavily urbanized, long-developed areas – big, old cities, long-settled inner ring suburbs – that land holdings are the most fragmented and in which the threat of holdouts creates the greatest obstacle to redevelopment. And it is these areas that are most in need of tax revenue and jobs to meet the needs of low-income residents. Without the tool of eminent domain, urban areas with low-income populations are at a disadvantage in attracting development capital relative to less urbanized areas with less fragmented land holdings. As numerous scholars have pointed out, these holdout problems cannot be avoided by having developers assemble land holdings in secret because large-scale development inevitably is and should be a matter of public debate and discussion.

Some commentators today call for an outright ban on the use of eminent domain for economic development. This is often in response to particular cases of redevelopment in which eminent domain was used in a way that after-the-fact seems unwise from an economic perspective or

seems unfair or unreasonably burdensome to low-income residents or business owners. As redevelopment professionals and local officials have explained, however, without the tool of eminent domain urban redevelopment would be much more difficult or impossible for communities in need of redevelopment to achieve. Proponents of a ban on the use of eminent domain for economic redevelopment have not met the burden of showing that a ban is needed to override the many state reforms already in place; they have certainly not shown that a ban would help, rather than hurt, poor communities.

3. Other reform proposals can make eminent domain more just for low income Americans.

Nonetheless, there are several reforms that states can and should consider to make eminent domain more just for lower-income Americans. First off, residential tenants deserve more protection in urban redevelopment in which eminent domain is used. Tenants sometimes qualify for relocation assistance, but they have no constitutional rights to compensation and the statutory relocation assistance sometimes is inadequate. Greater tracing and evaluation of what assistance is promised and given, at a minimum, is required.

Second, compensation for property owners sometimes leaves out important elements of relevance to low-income property holders, such as goodwill for small and informal businesses. There is also some empirical work suggesting that owners of larger, higher value parcels quite often receive higher than fair market value, while owners of smaller, lower-value parcels sometimes do not receive even fair market value. Reforms such as auditing of the appraisals and offers made by governments in the eminent domain process could help address these inequities.

Finally, eminent domain has sometimes been used by localities to remove low-income housing even when these localities already have a shortage of such housing, and are in metropolitan areas that have unmet needs for such housing. Where the use of eminent domain worsens the shortage of affordable housing without providing substitute housing, the proposed use of eminent domain should receive special scrutiny under state law and under the Federal Housing Act. One possible reform would be that state and local governments at least be required to formally and publically assess the effects of proposed uses of eminent domain on shortages of affordable housing before being allowed to use eminent domain.

To the extent reforms are adopted to make eminent domain more sensitive to issues of poverty and lack of affordable housing, it is essential that the reforms cover not only eminent domain for redevelopment but also eminent domain for the siting and expansion of roads, pipelines, and other infrastructure. The uses of eminent domain for transportation and other infrastructure raise at least as great concerns regarding equity and fairness and the special vulnerabilities of poor and minority communities as do uses of eminent domain for redevelopment.

Conclusion

Basic economic theory explains why eminent domain for land assembly as part of economic redevelopment is an important aid to redevelopment, and especially so for lower-income, urbanized communities with highly fragmented land holdings. Of course, state and local officials in particular cases do not always exercise their powers wisely, and states have appropriately and indeed energetically adopted a range of reforms to ensure that eminent domain is used in the most sensible, fairest ways. Courts are enforcing these reforms, as they should. A ban on the use of eminent domain for economic development is not necessary or prudent given wide ranging state reforms and the need to address the problem of hold outs in land assembly. However, as explained, there are additional measures such as greater relocation assistance that could be adopted to address the needs of lower-income communities, lower-income property owners and lower-income tenants in both the context of eminent domain for economic redevelopment *and* the context of eminent domain for the siting of transportation and other infrastructure.

**Opening Statement for Senator Dick Durbin
Constitution Subcommittee Hearing on “Theft by Another Name:
Eminent Domain Ten Years After *Kelo v. City of New London*”
October 8, 2015**

- Thank you Chairman Cornyn.
- Today’s hearing examines the issue of eminent domain ten years after the Supreme Court’s 2005 decision in *Kelo v. City of New London*.
- I want to welcome our witnesses, especially Professor David Dana from Northwestern University School of Law in my home state.
- Americans from all sides of the political spectrum agree that a careful balance needs to be struck when eminent domain is used to take private property.
- While the Fifth Amendment’s Takings Clause makes clear that private property may be taken by government for public use if just compensation is paid, there has been much debate and litigation over what exactly constitutes a “public use.”
- The caselaw is clear that eminent domain may be used for things like roads and military bases, and for public purposes like addressing blighted properties.
- But there are many who feel that the *Kelo* decision went too far in allowing the taking and transfer of property from one private party to another as part of an economic development plan.
- The Justices writing for the majority in the *Kelo* case invited the states to revisit their laws governing eminent domain, and nearly all states have instituted reforms over the last ten years.

- As a result of this exercise of federalism, we now have an array of state-specific systems governing the use of eminent domain.
- Today's hearing will consider the various reforms that states have made and evaluate whether further reforms are appropriate.
- I hope that this hearing will pay careful attention to the moderate- and low-income Americans who are often caught in the middle of eminent domain decisions.
- This isn't just an abstract debate over property rights. Eminent domain decisions create winners and losers on the ground.
- Sound eminent domain policy must make sure to protect the poor against the rich and the vulnerable against the politically-connected. But it must also allow for the appropriate use of eminent domain to revitalize communities and help create growth and opportunity for low-income Americans. It's a tricky balance.
- I would note that sometimes the fairness of eminent domain can be in the eye of the beholder.
- The Senate actually held votes on eminent domain earlier this year, on January 22. There was a bill on the floor seeking to authorize the construction of the Keystone XL Pipeline to run through our nation.
- The pipeline's owner, a foreign company called TransCanada, was seeking to use eminent domain to build the pipeline across farms in Nebraska and other states over the objection of the landowners.

- The Senate voted on an amendment by Senator Menendez of New Jersey to ensure that private property would not be “seized through condemnation or eminent domain for the private gain of a foreign-owned business entity.”
- It sounded pretty reasonable to me, and I voted for it. But the amendment was defeated on a 43-54 vote with only one Republican Senator supporting the amendment.
- Many Senators who criticized the *Kelo* decision voted against the Menendez amendment.
- A side-by-side amendment, offered by Chairman Cornyn, succeeded on a 64-33 vote. This amendment said that the land taken to build Keystone XL “may only be acquired consistently with the Constitution.”
- This was an interesting vote, given that the *Kelo* decision is part of the constitutional caselaw on eminent domain.
- While Senators may have disagreed over these Keystone amendments, I hope we can agree that the debate over striking the right balance on eminent domain is an important one.
- I look forward to the discussion today and to hearing from our witnesses.