

Testimony of Dana Berliner
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United States Senate Committee on the Judiciary
September 20, 2005

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

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

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

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

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

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

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

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

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

- Freeport, Texas Hours after the *Kelo* decision, officials in Freeport began legal filings to seize some waterfront businesses (two seafood companies) to make way for others (an \$8 million private boat marina).
- Sunset Hills, Mo. On July 12, less than three weeks after the *Kelo* ruling, Sunset Hills officials voted to allow the condemnation of 85 homes and small businesses for a shopping center and office complex.

- Oakland, Calif. A week after the Supreme Court’s ruling, Oakland city officials used eminent domain to evict John Revelli from the downtown tire shop his family has owned since 1949. Revelli and a neighboring business owner had refused to sell their property to make way for a new housing development. Said Revelli of his fight with the City, “We thought we’d win, but the Supreme Court took away my last chance.”
- Ridgefield, Conn. The city of Ridgefield is proceeding with a plan to take 154 acres of vacant land through eminent domain. The property owner plans to build apartments on the land, but the city has decided it prefers corporate office space. The case is currently before a federal court, where the property owner has asked for an injunction to halt the eminent domain proceedings. Ridgefield officials directly cite the *Kelo* decision in support of their actions.
- Hollywood, Fla. For the second time in a month, Hollywood officials have used eminent domain to take private property and give it to a developer for private gain. Empowered by the *Kelo* ruling, City commissioners took a bank parking lot to make way for an exclusive condo tower. When asked what the public purpose of the taking was, City Attorney Dan Abbott didn’t hesitate before answering, “Economic development, which is a legitimate public purpose according to the United States Supreme Court.”
- Arnold, Mo. The St. Louis Post-Dispatch reported that Arnold Mayor Mark Powell “applauded the decision.” The City of Arnold wants to raze 30 homes and 15 small businesses, including the Arnold VFW, for a Lowe’s Home Improvement store and a strip mall—a \$55 million project for which developer THF Realty will receive \$21 million in tax-increment financing. Powell said that for “cash-strapped” cities like Arnold, enticing commercial development is just as important as other public improvements.

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

Federal funds currently support eminent domain for private use

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

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

- New London, Conn. This was the case that was the subject of the Supreme Court's *Kelo* decision. Fifteen homes are being taken for a private development project that is planned to include a hotel, upscale condominiums, and office space. The project received \$2 million in funds from the federal Economic Development Authority.
- St. Louis, Mo. In 2003 and 2004, the Garden District Commission and the McRee Town Redevelopment Corp. demolished six square blocks of buildings, including approximately 200 units of housing, some run by local non-profits. The older housing will be replaced by luxury housing. The project received at least \$3 million in Housing and Urban Development (HUD) funds, and may have received another \$3 million in block grant funds as well.
- New Cassel, New York St. Luke's Pentecostal Church had been saving for more than a decade to purchase property and move out of the rented basement where it held services. It bought a piece of property to build a permanent home for the congregation. The property was condemned by the North Hempstead Community Development Agency, which administers funding from HUD, for the purpose of private retail development. As of 2005, nothing has been built on the property, and St. Luke's is still operating out of a rented basement.
- Toledo, Ohio In 1999, Toledo condemned 83 homes and 16 businesses to make room for expansion of a DaimlerChrysler Jeep manufacturing plant. Even though the homes were well maintained, Toledo declared the area to be "blighted." A \$28.8 million loan from HUD was secured to pay for some parts of the project. The plant ultimately employed far fewer people than the number Toledo expected.
- Ardmore, Pa. The Ardmore Transit Center Project has some actual transportation purposes. However, Lower Merion Township officials are also planning to remove several historic local businesses, many with apartments on the upper floors, so that it can be replaced with mall stores and upscale apartments. The project receives \$6 million in federal funding, which went to the Southeastern Pennsylvania Transit Authority. This is an ongoing project in 2005.

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

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

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

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

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

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

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

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

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

Conclusion

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

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