

U.S. COMMISSION ON CIVIL RIGHTS

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BRIEFING ON EMINENT DOMAIN

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FRIDAY, AUGUST 12, 2011

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The Commission convened in Room 540 at 624
Ninth Street, Northwest, Washington, D.C. at 9:35
a.m., MARTIN R. CASTRO, Chairman, presiding.

PRESENT:

MARTIN R. CASTRO, Chairman

ABIGAIL THERNSTROM, Vice Chairman

ROBERTA ACHTENBERG, Commissioner

TODD F. GAZIANO, Commissioner

GAIL L. HERIOT, Commissioner

PETER N. KIRSANOW, Commissioner

DAVID KLADNEY, Commissioner

MICHAEL YAKI, Commissioner

KIMBERLY TOLHURST, Delegated Authority of the
Staff Director

STAFF PRESENT:

TERESA BROOKS

MARGARET BUTLER

CHRISTOPHER BYRNES, Senior

Attorney-Adviser to the Office of the
Staff Director

PAMELA DUNSTON, Chief, ASCD

ALFREDA GREENE

LATRICE FOSHEE

TinaLOUISE MARTIN, Director, OM

TORRANCE MONTGOMERY

MICHELE RAMEY-YORKMAN

DAVID SNYDER, Attorney-Adviser

VANESSA WILLIAMSON

AUDREY WRIGHT

COMMISSIONER ASSISTANTS PRESENT:

NICHOLAS COLTEN

ALEC DEULL

TIM FAY

DOMINIQUE LUDVIGSON

JOHN MARTIN

ALISON SOMIN

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(9:35 a.m.)

I. INTRODUCTORY REMARKS BY CHAIRMAN

CHAIRMAN CASTRO: Good morning, everyone.

As we know, this is the auspicious date of August 12th. This is a meeting --

COMMISSIONER YAKI: The ides of August?

CHAIRMAN CASTRO: Yes.

(Laughter.)

CHAIRMAN CASTRO: This is a meeting of the U.S. Commission on Civil Rights. It is now 9:35 on August 12th. This meeting is taking place at the Commission's headquarters located at 624 9th Street, Northwest in Washington, D.C. I'm Chairman Marty Castro.

The first part of today's meeting is going to be devoted to a briefing on the topic of the civil rights implications of eminent domain abuse. Immediately following the briefing, we will conduct our regular monthly business meeting.

Before I begin introductions of the panelists in our briefing, I would like to do something that isn't always a good thing to do: welcome a new member to the team.

I would like to welcome David Kladney, our

1 newest commissioner, who was just appointed about a
2 week ago today, I believe. Welcome.

3 COMMISSIONER KLADNEY: Thank you, Mr.
4 Chairman.

5 CHAIRMAN CASTRO: Thank you. We are glad
6 to have you on board.

7 Today's briefing features four
8 distinguished panelists. Each panelist will speak in
9 turn for approximately ten minutes. I will be the
10 timekeeper. And I have developed a specialty at that
11 from our last briefing, I am told.

12 After all of the panelists have had their
13 presentations made, we will then turn to our
14 commissioners for questions. We will have
15 approximately 50 minutes of questions. That will be
16 commissioners asking the panelists.

17 As at the last briefing, what I will do is
18 I will acknowledge commissioners who raise their hand.

19 And I will be fair and balanced in terms of the
20 opportunity.

21 Unlike the last briefing, we will have a
22 little more time here. So if a commissioner wants to
23 ask a follow-up question to their original question,
24 please do so. If you want a follow-up to your
25 follow-up, then we will ask you to hold that to the

1 next time so we can try to make sure that everyone has
2 a fair opportunity to ask questions throughout the
3 50-minute period.

4 To the speakers, you will see these little
5 traffic lights in front of us. So when the light goes
6 from green to yellow, that means it is time to start
7 wrapping up. When it gets to red, of course, that
8 means stop. When you see yellow, that means you will
9 have two minutes remaining in your time. So I will
10 again do my best to strictly enforce that so that we
11 have a full opportunity to hear from you, at the same
12 time have commissioners ask their questions.

13 With those bits of housekeeping, let me
14 just add that this is a briefing that was proposed by
15 our colleagues in the former Commission majority. And
16 in the interest of bipartisanship, we're pleased to be
17 able to do this briefing today because it does raise
18 some very interesting issues, issues that we all have
19 reviewed the materials that were distributed
20 beforehand. We're very much looking forward to
21 hearing the statements. And I know we have a lot of
22 questions to delve into this topic. But we're pleased
23 to be able to do this in a bipartisan fashion.

24 Our first panelist is Ilya Somin. He is
25 an associate professor at George Mason University

1 School of Law. Professor Somin's research focuses on
2 constitutional law, poverty law, and the study of
3 popular participation and its implications for
4 constitutional democracy.

5 Among his many accomplishments is his
6 amicus brief on behalf of the urban planning scholar
7 Jane Jacobs, which was cited by the Supreme Court in
8 its majority opinion in Kelo versus the City of New
9 London.

10 Our second panelist is J. Peter Byrne, a
11 professor of law at Georgetown University Law Center.

12 He teaches property, land use, historic preservation,
13 and constitutional law. In addition, he is Faculty
14 Director of the Georgetown Climate Center and of the
15 Georgetown Environmental Law and Policy Center.

16 I visited Georgetown last month. And it
17 is a beautiful campus. I had never been there.

18 My third panelist is not here yet, but I
19 will give you his background when he arrives so that
20 he can immediately go into his statement. It is
21 Hilary Shelton. Mr. Shelton presently serves as the
22 Director of the NAACP's Washington Bureau and Senior
23 Vice President for Advocacy and Policy.

24 The NAACP joined an amicus brief in
25 support of the plaintiffs in the Kelo case. And Mr.

1 Shelton has testified before Congress regarding the
2 civil rights implications of eminent domain use.

3 Our final panelist will be David Beito.

4 Mr. Beito is a history professor at the University of
5 Alabama. Much of Professor Beito's academic work has
6 focused on African American history in the Twentieth
7 Century.

8 Professor Beito is also Chairman of the
9 Alabama State Advisory Committee. And I just want to
10 acknowledge that because as a former SAC member, SAC
11 chair as well, I am pleased to see you here. And
12 something that the Commission wants to do is engage
13 more of our SACs in the work that we are doing. And
14 it is always good to have a member of our extended
15 Civil Rights Commission family at the table.

16 And also Professor Somin I understand is
17 the spouse of one of our special assistants: Alison
18 Somin. So we have family at the table. And we always
19 appreciate having that.

20 In his presentation, Professor Beito is
21 going to explain the work of this Alabama State
22 Advisory Committee on this topic. It has already
23 conducted two public hearings on the subject of
24 eminent domain abuse in his state. So we are looking
25 forward to hearing about that.

1 And, with that, I would like to ask
2 Professor Somin to begin your remarks.

3 MR. SOMIN: Thank you, Mr. Chairman.

4 II. SPEAKERS' PRESENTATIONS

5 MR. SOMIN: I would like to start by
6 thanking Chairman Castro, Vice Chair Thernstrom, and
7 the other members of the Commission for your interest
8 in this very important issue.

9 President Obama has written that "our
10 Constitution places the ownership of private property
11 at the very heart of our system of liberty."
12 Unfortunately, over the last several decades, both the
13 courts and often legislatures as well have routinely
14 consigned property rights to second class status,
15 usually failing to give them the sort of protection
16 that is accorded to other individual constitutional
17 rights.

18 It is particularly appropriate, therefore,
19 for the U.S. Commission on Civil Rights to consider
20 this issue because property and the ownership of it
21 were actually at the heart of the conception of civil
22 rights that underlay the enactment of the Fourteenth
23 Amendment. It was central to the rights that the
24 framers of that amendment hoped to guarantee to
25 African Americans and to other minorities.

1 In my presentation, I will first briefly
2 speak about the constitutional law of eminent domain,
3 particularly with respect to the Public Use Clause of
4 the Fifth Amendment. Then I will talk in a bit more
5 detail about the impact of eminent domain on racial
6 minority groups, which both historically and today has
7 often inflicted great harm upon them.

8 And, finally, I will briefly talk about
9 the reforms that have been enacted since the Supreme
10 Court's decision in Kelo versus City of New London and
11 explain why those reforms, while they have improved
12 the situation in many cases, do not go far enough to
13 fully protect the rights of minorities and others
14 threatened by eminent domain.

15 I will start off by looking at the law of
16 eminent domain with respect to the Public Use Clause
17 of the Fifth Amendment. That clause, like similar
18 clauses in most state constitutions, allows the taking
19 and condemnation of private property only if it is for
20 a public use.

21 There has been a longstanding debate as to
22 whether public use means an actual use by the
23 government or by the general public or whether it
24 merely means anything that might potentially benefit
25 the public in some conceivable way.

1 During the founding era, there was not a
2 lot of discussion of the meaning of public use.
3 However, most jurists and commentators did have an
4 understanding that takings of transferred property
5 from A to B, as it was said, from one private
6 individual to another, that those were not permitted
7 by the Constitution.

8 Perhaps more relevant to our current
9 debate is the fact that there was a lot more
10 discussion of this during the time surrounding the
11 enactment of the Fourteenth Amendment in the 1860s.
12 And, of course, it's the Fourteenth Amendment which
13 applies the Public Use Clause and the rest of the Bill
14 of Rights to state and local governments, the
15 government entities that conduct the vast majority of
16 takings.

17 During that period, opinion certainly was
18 divided. However, as my recent research suggests, the
19 majority of state supreme courts and also the majority
20 of treatise writers on the subject of eminent domain
21 took the view that public use does, in fact, have to
22 be a use by the government or at least by the general
23 public, not merely something that might benefit the
24 public in some way.

25 Moreover, as I have already noted, for

1 framers of the Fourteenth Amendment, one of their
2 principal reasons for wanting to incorporate the Bill
3 of Rights against a government was to protect the
4 property rights of African Americans and also white
5 supporters of the union in the South against the
6 deprivations of state governments that were
7 threatening those property rights in many ways.

8 And so it would not have made sense given
9 that objective to apply an interpretation of public
10 use that essentially let state and local governments
11 condemn property for whatever reason that they want.
12 Those are, of course, the very entities that the
13 amendment was supposed to constrain and prevent from
14 engaging in abuses.

15 Now, unfortunately, modern Supreme Court
16 cases over the last 50 or 60 years, particularly the
17 Berman case in 1954 and most recently the Kelo case,
18 have taken the view that a public use is almost any
19 potential public benefit of any kind. They have even
20 taken the view that the government does not have to
21 prove that the supposed public benefit will actually
22 be achieved.

23 In my written testimony, I describe in
24 some detail why this modern jurisprudence is deeply
25 flawed. Here I will just make one point about it.

1 And that is that their position really makes very
2 little sense given the whole point of having a
3 constitutional right in the first place.

4 The position of the Supreme Court is that
5 the definition of public use is largely left up to
6 state and local governments. But, of course, the
7 whole point of having a constitutional right is
8 precisely to constrain the power of government and its
9 ability to abuse individual rights.

10 So it really makes no sense to leave up to
11 that very same government the definition of the scope
12 of that right. And, of course, the court has not
13 taken a similar view with respect to any other
14 individual right enumerated in the Constitution. This
15 is a unique case almost.

16 Now, given the state of affairs where over
17 several decades the Supreme Court and lower federal
18 courts have given very little protection to property
19 rights against takings, there has been a tremendous
20 social impact on Americans of all racial and ethnic
21 groups. However, by far the biggest impact has been
22 that on racial and ethnic minorities. And this has
23 been recognized by scholars, activists, and others
24 across the political spectrum.

25 Since World War II, hundreds of thousands

1 of people have been forcibly displaced by blight
2 condemnations and also by economic development takings
3 of the sort that the Supreme Court approved in the
4 Kelo case. And the vast majority of those people who
5 were forcibly displaced are, in fact, poor African
6 Americans or Hispanics.

7 During the 1950s and '60s, the prejudice
8 in these sorts of takings was so blatant that urban
9 renewal takings were referred to by many people as
10 "Negro removal."

11 Today minorities continue to be
12 disproportionately victimized by blight condemnations
13 and other takings of that type. In my view, today the
14 motive is rarely open and explicit prejudice against
15 minorities. However, the political weakness of the
16 urban minority poor is a big factor and the reason why
17 they tend to be targeted for these sorts of
18 condemnations. And that political weakness is, of
19 course, at least in part, a consequence of the
20 prejudice and discrimination that these groups have
21 suffered for decades in our society.

22 And in most cases, when people are
23 displaced by these sorts of condemnations, although
24 they do get some compensation payments, they are left
25 off significantly worse off than they were previously

1 because the payments rarely, if ever, fully account
2 for their losses.

3 In recent years, in addition to takings in
4 areas which one might consider to be truly blighted,
5 in many states, the definition of blight has expanded
6 so much that almost any area can be declared blighted
7 and taken.

8 In recent years, courts have ruled that
9 such areas as downtown Las Vegas and Times Square in
10 New York City are blighted, thereby justifying
11 condemnations in those areas. And, of course, if
12 Times Square is blighted, then almost any area could
13 be so considered.

14 In addition to blight takings, pure
15 economic development takings of the sort upheld in
16 Kelo also tend to disproportionately affect
17 minorities.

18 Now, some people have argued that blight
19 and economic development takings actually benefit the
20 minority poor because they promote economic growth in
21 their communities.

22 I think this argument is greatly
23 overstated for a couple of reasons. One is that these
24 sorts of condemnations often actually destroy far more
25 economic assets than they create. They routinely

1 destroy large numbers of businesses, schools, homes,
2 and other valuable assets for the community.

3 Second, in those situations where there is
4 a meritorious private development project that is
5 likely to produce more growth than it displaces, the
6 market has good methods to allow developers to acquire
7 the property without resorting to eminent domain,
8 methods that in many ways are actually superior to
9 eminent domain. I discuss this in my written
10 testimony. And I am happy to discuss it further in
11 questions.

12 Finally, it should be noted that respect
13 for property rights is itself an important engine of
14 economic growth. Recent research in urban economics
15 and development economics strongly suggests that areas
16 which respect property rights see more investment,
17 people are more secure in their homes and businesses.

18 And that tends to promote growth; whereas,
19 unconstrained government intervention in property
20 rights or reassortment of them tends to have the
21 opposite effect.

22 Economic growth is an important objective.

23 And so is the removal of blight. However, I would
24 argue that we do not need to destroy a community in
25 order to save it from blight. There are more humane

1 and also more effective methods of alleviating blight
2 than the use of eminent domain and ones that don't
3 forcibly displace large numbers of people.

4 In recent years since the Supreme Court's
5 Kelo decision in 2005, some 43 states have enacted new
6 eminent domain reform legislation. And some people
7 have said, "Well, this solves the problem of eminent
8 domain abuse." I wish that were the case, but for the
9 most part, it is not.

10 As I discuss more fully in my written
11 remarks, the majority of these new reform laws
12 actually will have little or no effect. They claim to
13 ban economic development takings, but they allow the
14 very same types of takings to go on under the name of
15 blight condemnation with blight being defined so
16 broadly that pretty much any area qualifies.

17 Even in states which have limited the
18 definition of blight to areas that a lay person would
19 consider blighted, the minority poor still tend to be
20 at risk because, of course, many of them tragically do
21 live in communities that fit that definition.

22 Only four states have completely banned
23 all blight condemnations. And, therefore, only in
24 those states are the rights of the poor against these
25 sorts of takings completely secure.

1 I think in the aftermath of Kelo, there
2 has been some genuine progress made. And certainly
3 public awareness of this issue has risen. However,
4 there is a great deal more work to be done before we
5 can fully guarantee constitutional property rights to
6 all Americans, particularly those who are most
7 vulnerable, such as the minority poor.

8 So I very much welcome the Commission's
9 interest in this issue. And I hope your interest will
10 stimulate further discussion and further and more
11 effective reform in this crucial area.

12 Thank you very much.

13 CHAIRMAN CASTRO: Thank you, Professor
14 Somin.

15 Professor Byrne?

16 MR. BYRNE: Thank you, Chairman Castro and
17 members of the Commission, appreciate the opportunity
18 to speak with you today.

19 This hearing addresses claims that the use
20 of eminent domain for economic development unfairly
21 and disproportionately harms racial and ethnic
22 minorities.

23 Professor Somin as a remedy would prohibit
24 all eminent domain for economic development, including
25 elimination of blight requirements. In my view, this

1 is a non sequitur to remedy a nonexistent problem.

2 The claims that eminent domain unfairly
3 harm minorities draws on the history of urban renewal
4 prior to the 1960s, when, indeed, many African
5 Americans and others were displaced by publicly funded
6 projects that bulldozed their homes in largely failed
7 attempts to modernize cities, just as Clarence
8 Thomas's dissent in *Kelo versus City of New London*
9 further argued that the use of eminent domain for
10 economic development would inevitably harm minorities
11 and the poor.

12 Such concerns in our time are seriously
13 misplaced. Redevelopment projects using eminent
14 domain continue to be an invaluable tool for
15 maintaining the economic competitiveness and
16 livability of urban areas, where property ownership is
17 fragmented and where minorities live in large numbers.

18 The discriminatory elements of older urban
19 renewal reflect the racism generally prevalent in
20 political life in the 1940s and '50s and have been
21 largely eliminated by the growth and power of African
22 Americans and other urban minorities as well as the
23 changed fiscal relations between the federal
24 government and local governments, the effects of which
25 have been to give greater control over redevelopment

1 projects to local political processes.

2 Use of eminent domain, rarely now applied
3 to residences, today requires political consent and
4 community buy-in.

5 Eminent domain is a crucial legislative
6 power exercised by governments around the world and
7 dating back at least to roman times. It empowers
8 government to acquire property in specific locations
9 for the construction of networks and the assembly of
10 large tracts, even when private owners do not wish to
11 sell or hold out for excessive payment.

12 Under our Constitution, owners are
13 protected by the requirement that the government pay
14 them just compensation. The meaning of the takings
15 clause of the Fifth Amendment relating to taking
16 property for public use long has been controversial,
17 but no -- and I repeat no -- Supreme Court decision
18 contradicts the holding of Kelo that public use
19 includes publicly approved condemnations for economic
20 redevelopment of economically distressed areas.

21 The quality of redevelopment projects, of
22 course, varies. But recent successful projects can be
23 found from the Ferry Building in San Francisco to
24 Times Square in New York.

25 Economic revitalization of urban areas

1 tends to aid poor minorities who disproportionately
2 dwell in cities by increasing employment and tax
3 revenues, education, and city services. Without such
4 eminent domain, large-scale development projects can
5 occur only on green field sites on the edge of cities,
6 exacerbating urban sprawl and pushing new employment
7 opportunities further from urban minorities.

8 Political realities have changed
9 dramatically since the urban renewal period.
10 Minorities have secured significant political power in
11 nearly every U.S. city as well as increased influence
12 in private real estate markets.

13 Redevelopment projects have largely come
14 under the control of local governments as federal
15 money and direction have disappeared. Local officials
16 strive to avoid displacement of homes because of
17 negative political repercussions and expensive
18 litigation.

19 Federal and state statutes have in many
20 instances increased the payments due property owners
21 above what just compensation requires. In these
22 circumstances, the condemnation of homes is rare and
23 has little or no identifiable ethnic or racial
24 character.

25 The plaintiffs in the Kelo case were

1 white, middle class people, which explains a good bit
2 of the political hysteria that surrounded the
3 decision.

4 The changes in the political comity of
5 economic development can be seen by comparing the
6 urban renewal in Southwest Washington, D.C. in the
7 1950s, approved by the Supreme Court in Berman versus
8 Parker, with the use of condemnation in D.C. today.

9 The massive condemnations bulldozing and
10 reconstruction of Southwest Washington comprised a
11 complex episode with many facets, but poor African
12 American residents seem to have suffered
13 disproportionate displacement.

14 At that time, there was no democracy or
15 elected government at all in Washington. The statute
16 authorizing the project was enacted by Congress, where
17 D.C. has no representation until today, which is a
18 good topic for this Commission to take up. And the
19 members of the Redevelopment Land Agency that carried
20 out the project were appointed by the federal
21 government or their D.C. appointees.

22 The most controversial exercise of eminent
23 domain in Washington, D.C. in the past decade has been
24 the condemnation of stores in the Skyland strip mall
25 in Anacostia to permit the construction of a badly

1 needed private supermarket for an under-served
2 community.

3 That action, although bitterly contested
4 in court by some owners, was supported by many members
5 of the local community, specifically approved by the
6 D.C. Council, the majority of which is African
7 American membership, and signed by Mayor Anthony
8 Williams.

9 Although specifically exercised in order
10 to convey the land to a private developer, it would be
11 absurd to suggest that the case presents a civil
12 rights issue appropriate for consideration by the U.S.
13 Commission on Civil Rights, but it would come within
14 the kinds of concerns of Professor Somin, to which I
15 will return.

16 Similar observations could be made about
17 the use of eminent domain by the Dudley Street
18 Neighborhood Initiative in Boston to assemble land for
19 affordable housing projects, nor is there reason to
20 suppose the condemnation for economic development are
21 more likely to harm minorities than condemnations for
22 traditional public uses.

23 Many of the most brutal condemnations in
24 the urban renewal period were accomplished for
25 highways and public housing, where the government

1 would actually own the site. Government has the same
2 general incentive to seek less expensive or
3 flourishing lands for condemnation, whatever the use
4 to be made.

5 If the goal really is to protect
6 minorities, why are the proponents not seeking to
7 constrain the uses of eminent domain that have
8 historically been of most harm to minorities?

9 Yet, legislation recently introduced in
10 Congress, H.R. 1433, ignores these exercises of
11 eminent domain for highway construction and other
12 public projects while prohibiting economic development
13 that has the power to aid low-income people.

14 It also protects speculative ownership of
15 vacant land. There is no special protection offered
16 to residents.

17 The case against eminent domain here had
18 been advanced largely on the basis of advocacy by
19 libertarians, for whom I have great respect for the
20 principled positions they take, which broadly opposed
21 the use of eminent domain because they value private
22 property more highly than local democracy.

23 The evidence that they marshall, such as
24 the lurid *Victimizing the Vulnerable*, presents
25 ambiguous data and highly colored language. The study

1 shows no more than that communities are somewhat more
2 likely to pursue redevelopment in poor areas than in
3 more affluent ones. It does not show what properties
4 were taken or show who the owners of those properties
5 were.

6 There is no consideration of the public
7 benefits to be gained from the projects, the
8 distribution of the benefits, or the scope or
9 character of citizen participation in the
10 decision-making. Nonetheless, the study leaps to the
11 astounding conclusion that "The only real solution is
12 prohibiting the use of eminent domain for private
13 development to protect the constitutional rights of
14 all citizens."

15 Thus, they oppose condemnation of the
16 property of our largest corporations just as much as
17 that of the most economically marginal minority
18 individual. The concern for the latter seems often
19 tactical since they know that they would get little
20 hearing in many quarters, simply advocating to reduce
21 the state of legislative power over private property.

22 If one were worried about disproportionate
23 impacts of eminent domain on the poor minorities,
24 there are remedies that would address that directly.
25 One might provide more procedural protections or

1 compensation to residents than to commercial property
2 owners.

3 One could mandate minimum payments to
4 tenants who don't own their own property, who normally
5 receive no compensation when rental housing has been
6 condemned.

7 The Fair Housing Act could be amended to
8 clarify that it applies to condemnation of residences
9 without regard to intent, a topic pursued by a student
10 of mine in a published paper that's cited in my talk.

11 These ideas are all worthy of study but
12 have not been because they do not meet the agenda of
13 property groups driving the issue, which is to limit
14 further the powers of government to court in favor of
15 private ownership. They, rather, would deprive the
16 D.C. government the power to use eminent domain to
17 build a supermarket in Anacostia.

18 In a world of growing economic inequality
19 and a political climate demanding cutting taxes as
20 well as medical and pension benefits, it is
21 unfortunate we are spending this time discussing the
22 non-issue of the effects of eminent domain on
23 minorities. And I look forward to discussing all
24 aspects of that in our questions.

25 CHAIRMAN CASTRO: Thank you, Professor

1 Byrne.

2 Mr. Shelton?

3 MR. SHELTON: Thank you, Chairman Castro,
4 ladies and gentlemen of the Commission, for inviting
5 me here to talk about property rights and the civil
6 rights implications of eminent domain abuse.

7 My name is Hilary Shelton. I am the
8 Director of the NAACP's Washington Bureau and Senior
9 Vice President for Advocacy and Policy. The NAACP, of
10 course, is our nation's oldest and largest, most
11 widely recognized grass roots-based civil rights
12 organization. We currently have about 2,200 members
13 throughout the United States. And we are located in
14 every state in our country. The NAACP Washington
15 Bureau is our federal, legislative, and national
16 public policy arm.

17 Given our nation's sad history of racial
18 prejudice, racism, bigotry, and a basic disregard on
19 the part of too many elected and appointed officials
20 to the concerns and rights of racial and ethnic
21 minority Americans, it should come as no surprise
22 that eminent domain has been misused for centuries
23 against African Americans and other racial and ethnic
24 minorities and the economically disadvantaged at
25 highly disproportionate rates.

1 Although nobody knows the exact number of
2 people displaced through eminent domain across the
3 nation, everyone seems to agree that African Americans
4 are disproportionately affected. One source cites
5 that since World War II, it is estimated that between
6 three and four million Americans have been forcibly
7 displaced from their homes as a result of urban
8 renewal takings. It should surprise no one that a
9 vast majority of these people are racial and ethnic
10 minorities.

11 Another study said that "Between 1949 and
12 1973, 2,532 projects were carried out in 992 cities to
13 displace one million people, two-thirds of them
14 African Americans, making African Americans 5 times
15 more likely to be displaced than they should have
16 given their numbers in our population."

17 The NAACP has a deeply held concern that
18 the newly sanctioned expansion of the use of eminent
19 domain to allow the government or its designee to take
20 property simply by asserting that it can put the
21 property to a higher use, as approved by the U.S.
22 Supreme Court in the 2005 Kelo versus City of New
23 London decision, will foster some more discrimination
24 as it sanctions easier transfers of property and
25 community stability from those with less resources to

1 those with more.

2 The history of eminent domain is rife with
3 abuses, specifically targeting racial and ethnic
4 minorities and poor neighborhoods. Indeed, the
5 displacement of African Americans and urban renewal
6 projects are so intertwined that oftentimes, as you
7 have actually heard before, urban renewal was often
8 referred to as black removal. Sadly, racial and
9 ethnic minorities are not just affected more often by
10 the exercise of eminent domain power, but we are
11 almost always affected differently and more
12 profoundly.

13 The vast disparities of African Americans
14 or other racial and ethnic minorities who have been
15 removed from their homes due to eminent domain actions
16 are well-documented.

17 In my written testimony, I give several
18 examples of studies as well as single examples of
19 instances in which racial and ethnic minorities have
20 been displaced at disproportionate rates through
21 eminent domain, but, for brevity's sake, I hope you
22 will review my more extensive written testimony.

23 The motives behind the disparities are
24 varied. Many who have observed these patterns
25 throughout our history contend that the twisted goal

1 of the majority of these displacements is to segregate
2 and maintain the isolation of poor racial and ethnic
3 minorities and otherwise outcast populations.

4 Furthermore, condemnation in low-income
5 and predominantly racial and ethnic minority
6 neighborhoods are often easier to accomplish because
7 these people usually lack the resources to effectively
8 contest the actions, either politically or in our
9 nation's courts.

10 Lastly, municipalities often look at areas
11 with low property values when deciding where to pursue
12 redevelopment projects because it costs the condemning
13 authority less. And, thus, the state or local
14 government gains more financially when they replace
15 areas of low property values with those of higher
16 property values.

17 Thus, even if you dismiss all other
18 motivations, allowing municipalities to pursue eminent
19 domain for private development as well as was it
20 upheld in the U.S. Supreme Court in the Kelo decision,
21 it will perpetuate, if not exacerbate, the disparate
22 impact of African Americans and racial and ethnic
23 minorities and the economically disadvantaged in our
24 country.

25 As I said at the beginning of my

1 testimony, not only are African Americans and other
2 racial and ethnic minorities more likely to be subject
3 to eminent domain, but the negative impact of these
4 takings on these men, women, and families is much more
5 severe.

6 First, the term "just compensation" when
7 used in eminent domain cases is almost always a
8 misnomer. The fact that a particular property is
9 identified and designated for economic development
10 almost certainly means that the market is currently
11 under-valuing the property or the property has some
12 tract value that the market has not yet recognized.

13 Moreover, when an area is taken for
14 economic development, low-income families are driven
15 out of their communities and find that they cannot
16 afford to live in the revitalized neighborhoods. The
17 remaining affordable housing in the area is almost
18 certain to become less so.

19 When the goal is to increase the area's
20 tax base, it only makes sense that the previous
21 low-income residents will not be able to remain in the
22 area. This is borne out of not only the common sense
23 but also by statistics. One study from the mid 1980s
24 showed that 86 percent of those relocated by the
25 exercise of eminent domain power were paying more rent

1 at their new residence, with the median rent almost
2 doubling.

3 Furthermore and to the extent that such
4 exercise of the takings power is more likely to occur
5 in areas with significant racial and ethnic minority
6 populations and even assuming a profit motive on the
7 part of the government, the effect will likely be to
8 stabilize, organize minority communities.

9 This dispersion both eliminates or at the
10 very least dramatically undermines estimates of
11 community support mechanisms that has the deleterious
12 effect on these communities' ability to exercise what
13 little political power they may have established. In
14 fact, the very threat of such takings will also hinder
15 the development of stronger ethnic and racial minority
16 communities.

17 The incentive to invest in one's own
18 community, financially and otherwise, directly
19 correlates with the confidence of one's ability to
20 realize the fruits of such efforts.

21 As I have discussed in my testimony, too
22 many of our communities, racial and ethnic minorities,
23 the elderly, the low-income, have witnessed an abuse
24 of eminent domain powers that has too often been
25 devastating.

1 Given the numerous chronicles of abuse, it
2 is the hope of the NAACP that all responses,
3 legislative, administrative, and others, to address
4 eminent domain abuse be educated and well-informed by
5 our shared history and challenges.

6 We need to ensure that certain segments of
7 our population that have too long been muted in the
8 takings issues have a voice. We need to understand
9 how it has been too easy to exploit these communities
10 by imposing eminent domain, not only in pursuit of the
11 economic development but also in the name of
12 addressing blight.

13 We also need to make sure that any
14 compensation is fair and equitable and will not result
15 in those who are being displaced being worse off.

16 In considering the interests of our
17 communities, we raise broader concerns regarding the
18 use of eminent domain for any purpose, including those
19 purposes traditionally viewed as public purposes, such
20 as highways, utilities, and waste disposal.

21 Even these more traditional uses of
22 eminent domain have disproportionately burdened
23 communities with the least political power: the poor,
24 racial and ethnic minorities, and working class
25 families.

1 Furthermore, it is not only our owners
2 that are suffering but also our renters, whether they
3 are residents or proprietors of small businesses, who
4 are often provided no protections and no pay and pay a
5 heavy and uncompensated price, even eminent domain is
6 imposed.

7 For those reasons, as the majority in Kelo
8 suggests, there must be a sufficient process as well
9 as protections for racial and ethnic minorities and
10 low-income communities.

11 The process must be open and transparent.

12 And the full participation of those potentially
13 impacted communities needs to be guaranteed as well as
14 fair compensation must be given. Fair or just
15 compensation should include replacement costs, not
16 just technical appraisal value.

17 We need to ensure compensation for the
18 loss of good will of a business and to fairly
19 compensate for the length of time a business or family
20 has been at that particular location. This is the
21 voice of our communities that all American communities
22 deserve.

23 Thank you again, Chairman Castro and
24 Commission members, for allowing me to testify before
25 you today about the NAACP's position on the civil

1 rights implication of eminent domain abuses. The
2 NAACP stands ready to work with the federal, state,
3 and local municipal officials to develop policy and
4 legislation to end eminent domain abuse while focusing
5 on real community development concerns, like building
6 safe, clean, and affordable housing in communities
7 with good public schools and effective access to
8 high-quality health care systems, small business
9 development, opportunities in growth, and a
10 significant available living wage job pool. Again, I
11 thank you very much for the opportunity to speak with
12 you and look forward to your questions and our
13 discussion.

14 CHAIRMAN CASTRO: Thank you, Mr. Shelton.
15 Professor Beito, you are up.

16 MR. BEITO: Thank you.

17 Before I begin, I've got three handouts
18 here. I've got ten of them. So it's not quite
19 enough. So maybe a couple of you could share.

20 Thank you, Chairman Castro, for inviting
21 me here today. It reflects the spirit of
22 bipartisanship that we also found very much in
23 Alabama, where we decided to pursue this unanimously.

24 Democrat, Republican, black and white decided to
25 pursue this issue.

1 Let me start by saying that I speak for
2 myself today, rather than in my capacity as Chair of
3 the Alabama Advisory Committee. And I have little to
4 add to Ilya Somin's very insightful and
5 well-researched overview.

6 I am not going to revisit these issues, at
7 least not in my talk right here, or even really talk
8 much about conventional eminent domain or eminent
9 domain as conventionally understood. Rather, I want
10 to highlight a generally overlooked threat to the
11 property rights of the poor and the vulnerable. For
12 lack of a better term, this threat could be called
13 eminent domain through the back door.

14 Now, we decided to pursue this issue
15 several years ago at the Advisory Committee. And all
16 of us agreed that this was an important issue.

17 And we have had two public forums. The
18 first was in 2008, which was at the historic 16th
19 Street Baptist Church in Birmingham. And the
20 witnesses at that meeting recounted some disturbing
21 example of how blacks were losing. Especially in the
22 City of Montgomery, we have seen more and more
23 information coming out. Blacks in the City of
24 Montgomery, city often called the cradle of civil
25 rights, were losing their property through an

1 extensive application of section 11-53B-1, et. seq.,
2 of the Alabama Code. And I quote that more
3 extensively in my longer paper.

4 This provision leaves a major loophole for
5 the indirect taking of property outside of
6 conventional eminent domain if a local government
7 deems a property structure blighted or a nuisance.

8 Now, in contrast to standard eminent
9 domain, Montgomery property owners -- and that's what
10 we especially focused on because that is where the
11 problem to us seemed the greatest, the complaints
12 seemed to be the most extensive.

13 Montgomery property owners on the
14 receiving end of this section 11-53B-1 do not have a
15 right to compensation, even in theory. Once declaring
16 the property a nuisance, the city typically demolishes
17 the structure and then bills the owner, often by
18 slapping a lien on the property, for the cost of
19 demolition, including the carting away of the rubble.

20 Because the owners are often poor, many
21 cannot afford to pay and, thus, have to sell or
22 abandon their property. All right?

23 Now, at our forum -- if you could go to
24 the first, next slide, please? Oh, yes. There is a
25 quotation from Frederick Douglass that was in my

1 longer paper, but I think it does reflect the concern
2 for property rights that you see in the history of
3 civil rights. And I think it is something that we
4 could all learn today about the application of
5 property rights, regardless of economic class.

6 We hold the civil government to be
7 solemnly bound to protect the weak against the strong,
8 the oppressed against the oppressor, the few against
9 the many, and to secure the humblest subject in the
10 full possession of his rights of person and of
11 property. All right?

12 Of course, Douglass was not referring to
13 slave owners there. He believed that was man
14 stealing, that was theft of legitimate property or
15 people that owned themselves, in effect.

16 If you could go to the next slide, please?

17 Now, this is the presentation that Jim Peera gave,
18 who is a developer in Montgomery -- I wish you could
19 see it a little bit better, but he showed on a map the
20 demolitions through this section 11-53B-1 in a single
21 year. Many were in a small area of Montgomery's most
22 heavily black areas, including Rosa Parks' old
23 neighborhood, which is in that area.

24 Now, another witness, who testified at
25 another forum that we had, which was in Montgomery,

1 was -- actually, this was at the Montgomery meeting as
2 well. We had two meetings: the first in Birmingham
3 and then the second one in Montgomery. And this was
4 presented at the second meeting.

5 Now, another witness we had was Jimmy
6 McCall. And he was a rarity among Montgomery's
7 property owners, threatened the demolition of their
8 homes. He decided he was going to fight back.

9 A little bit about his background. He had
10 scraped together a living, and still is as far as I
11 know, by salvaging raw materials from historic homes
12 and then selling them to private builders.

13 Finally, over time he was able to
14 accumulate enough money to purchase two acres of land
15 in Montgomery on a very busy thoroughfare. And he
16 started to build his dream home, what he called his
17 dream home. He did the work himself. He used
18 materials accumulated in his salvage operations,
19 including a supply of sturdy and extremely rare
20 longleaf pine.

21 Eventually his dream house, what he called
22 his dream house, took shape. He built this very much
23 incrementally.

24 From the outset, the city showed
25 unremitting hostility. And he almost lost count of

1 the number of roadblocks that it threw in his way,
2 including the citation for keeping the necessary
3 building materials on the back of his property, which
4 is not even visible from the road.

5 More seriously, in 2007, he was charged
6 under section 11B-1 under the grounds that his home,
7 then under construction, was a nuisance.

8 Please go to the next one. All right?
9 There is his home prior to demolition.

10 Go to the next one, please. I think
11 that's another view of it. Fortunately, he had
12 snapped these pictures right before, shortly before
13 the demolition. Otherwise, we wouldn't have known
14 what it looked like.

15 And the reaction of Montgomery city
16 fathers to this, to McCall's efforts, seemed very
17 strange to him. His view was that he was trying to
18 fight blight by building a new home in an
19 under-developed area. And he suspects that -- no
20 proof here -- wealthy developers are trying to get
21 their hands on the property, which is on a major
22 thoroughfare, two acres.

23 But, as I said, he fought back. He hired
24 an experienced local lawyer. He negotiated a
25 court-enforced agreement, which gave him 18 months to

1 complete the home.

2 Only a month after the agreement took
3 effect in 2008, the city demolished the structure.
4 And local bureaucrats were very much in a hurry. They
5 did not give him notice when they sent in the
6 bulldozers on the same day as the court order
7 authorizing them.

8 McCall then went back to the same judge
9 who had allowed the demolition. She stated that she
10 had been misled. She ordered the city to pay
11 compensation.

12 The City of Montgomery appealed the ruling
13 of the judge. They appealed it. And as of this
14 writing, McCall has not received a cent. And his view
15 is that the city is going to try to drag this out as
16 long as it can until his money runs out.

17 In 2010, I received a phone call from
18 Karen Jones, another property owner from Montgomery.
19 She related a case which was no less compelling. The
20 city had just demolished the day before her family
21 home, including furniture, family Bible, and old
22 photographs.

23 The authorities charged that the property
24 was a nuisance because the front porch was in
25 disrepair.

1 Please go to the next slide. That shows
2 the property. She had no photographs to share, but we
3 got this from, a reporter got this from, Google Earth,
4 interestingly enough.

5 Go to the next one, please. All right.
6 They said the property was a nuisance because the
7 front porch was in disrepair. Although the city had
8 sent out notices before sending out the bulldozers,
9 none of them went to Jones. Instead, they went to
10 Forie Jones.

11 You have Forie Jones' 1989 death
12 certificate, her grandmother, and Matthew Jones, who
13 is also deceased, deceased in the year 2000. You have
14 also the city still regards them, as you can see from
15 the official documents, as Forie Jones as the official
16 owner of the property, even though this has been
17 pointed out many times to them.

18 Now, the city, as I said, claims that
19 Karen Jones is not the owner, although she pays the
20 property taxes, and which are not in arrears, has a
21 warranty deed from 2002 indicating that she is an
22 heir. And apparently all of the other family members
23 support her decision.

24 Despite asserting that Jones is not the
25 owner, the city is -- well, let's go on.

1 In May of this year, the city tried to
2 sell the property at auction, still naming the
3 deceased Forie Jones as the owner and again in the
4 official online information --

5 CHAIRMAN CASTRO: I will ask you to begin
6 to wrap up.

7 MR. BEITO: Okay. Well, I'm going to end
8 there, but why don't we show this very short YouTube?
9 It's only a couple of minutes.

10 And I'm sorry I went over, but I would be
11 happy to answer further questions. I hope this works.

12 Okay.

13 (Whereupon, a video was played.)

14 CHAIRMAN CASTRO: Thank you.

15 So we will now begin for the next
16 approximately 50 minutes or so questions from the
17 commissioners. Commissioner Kirsanow, followed by
18 Commissioner Yaki?

19 ACTING STAFF DIRECTOR TOLHURST: May I --

20 CHAIRMAN CASTRO: I'm sorry.

21 ACTING STAFF DIRECTOR TOLHURST: For one
22 second.

23 CHAIRMAN CASTRO: Sure.

24 ACTING STAFF DIRECTOR TOLHURST: I thought
25 this was an excellent panel. And I wanted to

1 recognize Margaret Butler, who put it together, and
2 her staff in OCRE. Thank you.

3 CHAIRMAN CASTRO: Thank you. Appreciate
4 that. Thank you very much.

5 (Applause.)

6 CHAIRMAN CASTRO: Commissioner Kirsanow?

7 COMMISSIONER KIRSANOW: Thank you to all
8 of the witnesses. It was very informative. And,
9 again, I echo the fact that the Chair -- I'm sorry --
10 the staff has put together a very good panel.

11 III. QUESTIONS BY COMMISSIONERS AND STAFF DIRECTOR

12 COMMISSIONER KIRSANOW: One of the reasons
13 why we had proposed this, at least when I had
14 suggested this, was not just the concern with respect
15 to Kelo, but this probably predated Kelo. And it had
16 been the concern of a number of people crossing the
17 ideological spectrum: conservatives, libertarians,
18 and liberals.

19 Setting that aside for a moment, Professor
20 Somin, you had indicated that the determination of
21 what constitutes a public use is often or exclusively
22 left in many cases to state and local governments.

23 Does that signal a tension between Tenth
24 Amendment concerns and Fifth Amendment concerns? If
25 it does, does primacy, should primacy, be accorded to

1 Fifth Amendment individual concerns, individual
2 property right concerns, over Tenth Amendment
3 concerns?

4 MR. SOMIN: I don't believe there is any
5 tension here at all because the Tenth Amendment simply
6 says that powers that are not delegated by the
7 Constitution to the federal government are retained by
8 the states and the people.

9 However, any specific individual
10 constitutional rights that are protected by the
11 Constitution, including those protected by the Fifth
12 Amendment, they clearly are within the power of the
13 federal courts to enforce. And no one has ever
14 suggested, to my knowledge at any rate, that the Tenth
15 Amendment somehow prevents that.

16 COMMISSIONER KIRSANOW: And when did we
17 get to a point where the notion of what constitutes
18 public use has somehow evolved into something more
19 akin to a public benefit? Was that in the Berman or
20 was that in Hawaii Housing Authority? Where did that
21 happen?

22 MR. SOMIN: As far back as the Nineteenth
23 Century, some people made that argument in some state
24 courts, albeit a minority at that time held that under
25 state constitutions. But the federal Supreme Court

1 did not adopt that as an interpretation of the Public
2 Use Clause of the Fifth Amendment until the Berman
3 versus Parker case in 1954.

4 There were cases in the early Twentieth
5 Century and late Nineteenth Century which also were
6 fairly deferential to eminent domain. But if you look
7 at those cases, as I did in great detail in one of my
8 articles, none of them actually addressed the Public
9 Use Clause of the Fifth Amendment. Rather, those
10 cases were heard during a period when the Supreme
11 Court had not yet taken the view that the Bill of
12 Rights was incorporated against the states.

13 So, therefore, the only way to challenge a
14 state taking in a federal court was under the due
15 process clause of the Fourteenth Amendment. And under
16 that clause, the Supreme Court applied a fairly
17 deferential approach, though not as deferential as
18 later in Berman and Kelo under the Public Use Clause.

19 However, in the rare instances during that
20 period when the federal government undertook a
21 condemnation that was challenged in federal court, the
22 Supreme Court actually made clear in the 1896
23 Gettysburg case that a higher level of scrutiny should
24 apply when the taking transfers property to a private
25 individual.

1 Unfortunately, there is some
2 misunderstanding over this, fostered in part by the
3 Supreme Court in Kelo, where they claim there was 100
4 years of precedent backing their position. There was
5 indeed precedent beginning in Berman in 1954, but
6 every one of the cases they cited before then was, in
7 fact, a case that had nothing to do with the Public
8 Use Clause of the Fifth Amendment but was in reality a
9 so-called substantive due process case under the
10 Fourteenth Amendment.

11 COMMISSIONER KIRSANOW: Thank you.

12 CHAIRMAN CASTRO: Commissioner Yaki?

13 COMMISSIONER YAKI: Thank you very much,
14 Mr. Chair.

15 As a preliminary comment, I just want to
16 say that I had concerns about the title of this
17 briefing from the very beginning because it seemed
18 conclusory in its title, saying that there are civil
19 rights implications of eminent domain abuse as if that
20 were, indeed, a matter of fact.

21 And I think that that was, unfortunately,
22 mirrored in a comment that Mr. Beito just stated on
23 the video, where he said that the Commission calls
24 this eminent domain abuse, which we have not yet done.

25 We have not yet said that. This briefing does not

1 state that. This is a very different kind of --

2 MR. BEITO: I misstated that.

3 COMMISSIONER YAKI: I understand. And it
4 is something that we are very sensitive to here --

5 MR. BEITO: Although our local committee
6 unanimously --

7 COMMISSIONER YAKI: Yes, the committee,
8 but you said --

9 MR. BEITO: You're right.

10 COMMISSIONER YAKI: -- the Commission. It
11 was a step beyond. And that's why I was concerned
12 about this title. I am also concerned about whether
13 this panel is truly balanced or not, which I have
14 stated in years past.

15 But besides that, that is beside the
16 point. I want to talk about -- I was a local
17 government official. I was involved in the use of
18 eminent domain. And I know that abuses have occurred
19 in the past, abuses in the early '60s or the '50s.
20 There is a thriving African American neighborhood in
21 San Francisco in the West. And there is relocation
22 and uprooting through there.

23 I also know that there's a lot of good
24 that has been done as well. In fact, when you see
25 parts of San Francisco now that have been through the

1 redevelopment process, it is a wonder what has
2 occurred in terms of the jobs and the economic growth
3 that has occurred.

4 I am not someone who believes in throwing
5 the baby out with the bath water, which seems to be
6 part of what I have been hearing here today, because
7 if there are issues that need to be addressed, they
8 can be addressed, but I am not as unarguably convinced
9 that the whole notion of eminent domain is by in
10 itself an evil.

11 And I just want to ask a question to Mr.
12 Byrne and also to Mr. Shelton. I think that part of
13 the sort of the parade of horrors that I have heard
14 in the past is precisely because they occurred in the
15 past during a very different time before the Civil
16 Rights Act of '64, before the Voting Rights Act,
17 before, actually, more importantly, the redistricting
18 one person and one vote cases that helped create seats
19 for minorities to have political power at the table.

20 And I just would like your comment on
21 whether or not those changes in the last 10, 20, 30
22 years are important developments in protection against
23 the potential for uprooting, relocation of minority or
24 disempowered communities.

25 MR. BYRNE: Well, it's my view that it is.

1 One can't say that in every community that minorities
2 have the kind of political power that they have in San
3 Francisco, but I'm sure you know from your experience
4 in local government there that elected officials in a
5 city understand the difficulties of taking anybody's
6 home and particularly doing so in a way that has an
7 ethnic or racial tilt. It creates a kind of a
8 political firestorm that is a major deterrent.

9 One of the things about urban renewal was
10 that the structure of urban renewal was such that
11 mayors could bypass the local political processes by
12 working with federal agencies. The money would flow
13 directly to specialized local government entities
14 dominated by the mayor and pursue projects over which
15 the normal sort of citizen processes at the time, as
16 imperfect as they were, have really no effect.

17 This is wonderfully illustrated in a book
18 by Douglas Ray on the history of New Haven,
19 Connecticut, which is cited in my article, which I may
20 have said.

21 So, you know, one can't say that there is
22 never abuse of eminent domain in contemporary cities,
23 but I think that the realities of the political
24 process today, in which there is not a federal
25 pipeline like that, in which the political processes

1 of nearly every American city have been substantially
2 democratized in terms of race and ethnic participation
3 and in which the money to be able to accomplish these
4 things, a lot of it, has to come through local
5 sources.

6 The Kelo case itself is a reasonable
7 example of that where the use of eminent domain there
8 was pursuant to a specific state program. It was
9 approved by the New London City Council after
10 extensive political discussion.

11 And Justice Stevens in his opinion pointed
12 to the fact that there had been no elaborate political
13 process in place to determine that New London was
14 blighted and that this project was an appropriate
15 response or an appropriate attempt to remedy that
16 problem.

17 So can we do more to make participation
18 better? Yes. And I appreciated Mr. Shelton's
19 comments in that regard. But we have come a long way.

20 MR. SHELTON: I would agree. There are
21 still too many challenges and problems with those who
22 don't have political power, economic power, and so
23 forth, when the issues of eminent domain come about,
24 especially those as we look at the African American
25 community.

1 Quite frankly, we are disproportionately
2 poor. The property values are disproportionately low.

3 And it becomes a bargain for those who want to buy
4 mini lines in one place and actually do some major
5 project, whether it's a local government project or a
6 private project for that matter. So it becomes
7 extremely concerning to us.

8 We have got a lot of concerns of people
9 who feel that they have not had an opportunity to
10 fully participate in making the decision. And that's
11 why we make a recommendation to address the problem.

12 But also I think what you are getting at,
13 Commissioner Yaki, that we also strongly agree with,
14 is that there are a number of examples of eminent
15 domain projects that prove to be very, very helpful.
16 That is, you are sensitive to the issues of the poor
17 that live in those communities.

18 There are examples in Brooklyn and even in
19 Manhattan, where major construction projects actually
20 made sure they honed in on those who are poor,
21 creating rent control scenarios, in which those who
22 were eventually actually able to come in and get first
23 priority --

24 COMMISSIONER YAKI: Right.

25 MR. SHELTON: -- and coming back in at the

1 same rate. That is not done everywhere. And we would
2 love to see those as more examples that should be
3 utilized across the country, but the safeguards are
4 necessary because there are those officials who
5 exploit the opportunity.

6 COMMISSIONER YAKI: I'm just going to make
7 a comment, then, and that will be it. I mean, I was
8 going to agree with you because one of the things when
9 we were doing this new project called Mission Bay in
10 San Francisco, one of the negotiations I was engaged
11 in was setting aside a good proportion of homes, not
12 just for low-income permanent home ownership as well
13 as low-income permanent rentals.

14 So you actually see some of the sizes of
15 these buildings: homes in the low -- well, for San
16 Francisco, the low whatever it is, which is still way
17 beyond what any normal person would do. But it's
18 still a very affordable level that we deliberately
19 chose to ensure that we would have a diversified mixed
20 community and allow people the chance to come back.
21 And this is pretty much a brand new neighborhood,
22 where there is no displacement other than bricks,
23 mortar, and a lot of toxic stuff.

24 MR. SHELTON: Absolutely. And, again, the
25 problem is those are still too few and far between.

1 We would love to see more of that happen. What we
2 have seen too often is major projects like these
3 occur, we see our folks find themselves in situations
4 they cannot afford to come back into the communities
5 they left.

6 Indeed, what we also find is one of the
7 capitals that is not discussed an awful lot is when
8 you talk about people who have low and moderate
9 income, they develop a sense of their forms of capital
10 among themselves, whether it's one mother baby-sitting
11 for another mother while they go through the grocery
12 store, "You bring me back a gallon of milk, too," you
13 know, those kinds of things.

14 That is not taken into consideration too
15 often when people are displaced. And we have to talk
16 about those issues as we talk about issues of
17 compensation as well.

18 CHAIRMAN CASTRO: Professor? Just
19 briefly, go ahead.

20 MR. BEITO: Let me only briefly say the
21 issue of lack of balance -- Mayor Todd Strange,
22 officials of Montgomery were invited to come here
23 today. They did not come here. They have repeatedly
24 taken that position.

25 And, again, we have the death certificate

1 here of somebody they still identify as the owner of a
2 property. If that isn't eminent domain abuse or abuse
3 of property rights, I don't know what is.

4 My recommendation is that the Commission
5 bring in the mayor, ask him to come, ask Karen Jones
6 to come, ask these other property owners to come in.
7 At the very least, we want to avoid these kinds of
8 abuses. And it's not the only example of this kind of
9 abuse that has occurred.

10 CHAIRMAN CASTRO: The Chair recognizes
11 Vice Chair Thernstrom.

12 VICE CHAIR THERNSTROM: Thank you very
13 much. And thank you all -- I don't know that is the
14 matter with my voice, but, anyway, all members of the
15 panel. This has been an issue I have long been
16 indirectly involved in since I'm -- I'm sorry. My
17 voice wasn't picked up.

18 I was just thanking the panelists and
19 going on to say this is an issue that I have
20 indirectly been long involved with because I am on the
21 board and have been for ten years, the board of the
22 Institute for Justice, which, of course, put Kelo and
23 eminent domain on the national map, as it were. Even
24 though it lost that cause, one could argue it won in
25 the court of public opinion, though that is not what

1 the Institute for Justice regards as a victory.

2 I have a question for Professor Somin.
3 And, really, it is asking him to comment on something
4 that Professor Byrne said. Professor Byrne has
5 described these decisions as local democracy at work,
6 reflecting the political judgment of the local
7 communities. And, of course, the local democratic
8 processes are something that we all have some respect
9 for.

10 I wonder, Professor Somin, if you would be
11 willing to talk a little bit about that issue. And
12 you might want to -- and you can pick any example you
13 want, but I have got in mind New London.

14 I don't think that's really an accurate
15 description of the New London decision to go after
16 homes that were not blighted and, yes, were white,
17 lower middle class.

18 I'm not sure, Professor Byrne, why you say
19 the fact that homes like those in New London were
20 white and middle class explains the political
21 hysteria. I mean -- and I am very biased on this
22 white issue. I wish there were more political
23 hysteria.

24 But, in any case, Professor Somin, if you
25 would speak to the issue of the kind of democratic

1 quality --

2 MR. SOMIN: Sure.

3 VICE CHAIR THERNSTROM: -- of these
4 processes.

5 MR. SOMIN: Certainly. So just a brief
6 comment on the issue of blight. You are, of course,
7 correct. No one claimed, including the city
8 government, that these homes in New London were
9 blighted. In fact, that is the whole reason why the
10 Supreme Court took the case in the first place,
11 because it was a case of a pure economic development
12 taking, where there was no allegation of blight,
13 contrary to what I think Professor Byrne may have
14 inadvertently suggested a few moments ago.

15 On the broader issue of democracy, at some
16 level, yes, almost anything a local government does
17 can be characterized as the actions of local
18 democracy. But, of course, that doesn't resolve the
19 issue of whether there should be constitutional rights
20 that constrain that. What if a local government
21 engaged in censorship or racial discrimination or
22 unreasonable searches and seizures? All of those
23 things can be seen as exercise of local democracy as
24 well and sometimes have the support of the majority of
25 the population. But that doesn't mean they don't

1 violate the Constitution.

2 If you look more closely at how these
3 sorts of takings work, both in New London and
4 elsewhere, while there is a formal veneer of
5 democracy, it is actually often very difficult for
6 voters and ordinary people to exercise real influence
7 over what is going on for two reasons.

8 One is many of these projects are very
9 complex and difficult for non-experts to assess. And
10 often it is not evident for many years after the fact
11 whether the economic development that is supposedly
12 justified to taking is actually produced.

13 For that reason, because of the difficulty
14 of acquiring knowledge about these matters, often
15 ordinary voters have little or no real influence over
16 what is going on. Often they don't even know what is
17 going on.

18 In addition, obviously both in New London
19 and in other places, powerful interest groups are
20 heavily involved in the process, politically connected
21 developers and others. And in the New London case, a
22 key role was played by the Pfizer Corporation, which
23 had lobbied for the taking. One of the city's own
24 experts in the case testified that Pfizer was the
25 "10,000-pound gorilla" behind the taking. The New

1 London Development Corporation the quasi-governmental
2 agency that organized the condemnation, was heavily
3 influenced by Pfizer.

4 At the time the chair of the agency, her
5 spouse was actually an important Pfizer executive.
6 Now, having studied the case, it is not my view that
7 she undertook the condemnation just because she
8 thought it would benefit Pfizer. I think she
9 genuinely believed that it was in the public interest.
10 But at the same time our perception of what is in the
11 public interest is sometimes influenced by these sorts
12 of connections.

13 If you work for General Motors, you will
14 tend to believe that what is good for General Motors
15 is good for America. And if you have a close
16 connection to Pfizer, you might believe the same about
17 them.

18 So at some level, yes, this is an exercise
19 of local democracy, just as is anything that is done
20 by local government. But at the same time, this is an
21 area where the democratic process often works quite
22 poorly and is often heavily influenced by interest
23 groups.

24 The one last point I will make about this
25 is I agree that it is a sign of great progress that

1 African Americans have much more political power than
2 they used to in the past in urban areas. But that does
3 not prevent in many cases this kind of abuse because
4 the people usually targeted by this sort of thing are,
5 in fact, the urban and minority poor. And lots of
6 studies as well as common sense suggest that those
7 groups have only very limited political influence.

8 And urban politicians, like other
9 politicians, if they want to stay in power, they need
10 to favor the interest of those with political leverage
11 over those who do not.

12 CHAIRMAN CASTRO: Professor Byrne, you
13 wanted to ask --

14 MR. BYRNE: Yes. Thank you.

15 So I didn't mean to say that there was a
16 blight finding in the Kelo case. If I did, I
17 misspoke. In fact, I had an interesting conversation
18 with a Connecticut state official, who said to me that
19 they proceeded under a different provision of the
20 Connecticut state law involving eminent domain, which
21 allowed there to be eminent domain when there was a
22 finding of economic distress in a city and that it
23 could be shown that the project would address the
24 economic distress of the city. Connecticut used that
25 process because they thought it was more transparent.

1 Professor Somin before correctly I said
2 that the blight determinations that exist are often
3 quite elastic. And the term "blight" is a kind of a
4 stand-in for a need for economic development. And it
5 is a troubling term. Connecticut was trying to avoid
6 that in making it more transparent.

7 Now, the history of the taking in New
8 London is very complicated and interesting. But it is
9 fair to say that the dissenters in the Connecticut
10 Supreme Court, who voted to find that the use of
11 eminent domain was against state law, specifically
12 found that the project was not done for the benefit of
13 Pfizer.

14 It was done because Pfizer had already
15 located a test facility in New London at the same time
16 that the Coast Guard had abandoned a military site.
17 And the hope was that by redeveloping this part of
18 town, they could attract other corporate development.

19 There is no, there is absolutely no, proof
20 that there was anything untoward done on the basis of
21 the decisions. And, as I say, it wasn't just done by
22 the New London Development Corporation. It was
23 specifically approved by the New London City Council.

24 Now, look, nobody says that politics at
25 the local level, as at the federal level, is without

1 the influence of powerful entities. What is needed,
2 of course, is more transparency and more
3 participation. And I strongly back that.

4 I stand by my view that those are the
5 proper remedies and not taking away an entire power
6 from local governments to engage in economic
7 redevelopment.

8 CHAIRMAN CASTRO: I'm going to ask a
9 question. Then Commissioner Gaziano --

10 COMMISSIONER GAZIANO: Whatever order.

11 CHAIRMAN CASTRO: That's fine. And then
12 Commissioner Heriot, Commissioner Kladney.

13 Last week the Pew Research Center issued a
14 report that shows that net worth of minorities,
15 especially Latinos and African Americans, has
16 plummeted, particularly due to the current economic
17 conditions that we find, such that Latinos' and
18 African Americans' net worth now is 22 times less than
19 white Americans. And I think there is a civil rights
20 issue embedded there, but that's not what I am going
21 to ask you about.

22 Most of the wealth that minorities have
23 accumulated in the past has been based on our homes.
24 However, I think when you look at minority communities
25 and immigrant communities, one of the ways to find

1 success has been through entrepreneurial efforts.

2 And you in your comments, Professor Byrne,
3 mentioned the distinction between compensation for
4 homes and compensations for businesses. Do you make a
5 distinction between a business that may be a
6 family-owned business or a family-run business versus
7 something that is owned by a corporate entity? And
8 could you speak to that?

9 MR. BYRNE: Sure. I don't have any
10 problem with the idea that it would be a good idea to
11 provide going-concern value as part of compensation,
12 something Mr. Shelton referred to, particularly for
13 small businesses.

14 What I was trying to draw attention to was
15 the proposal to prevent or to prohibit the use of
16 eminent domain for economic development would also
17 prevent the use of eminent domain on vacant lots held
18 by investors, in which there is no going-concern value
19 but merely an attempt to try to speculate.

20 So I agree with you. And I think that the
21 remedies that look to increase compensation, which
22 shifts the calculus, involving the use of eminent
23 domain is a very fruitful avenue for further study.

24 CHAIRMAN CASTRO: Thank you, Professor
25 Byrne.

1 Commissioner Gaziano?

2 COMMISSIONER GAZIANO: Yes. Thank you
3 all, but I want to particularly thank Professor Byrne
4 because it helps me understand those people like you
5 who say there isn't a problem, that this is a solution
6 in search of a problem.

7 I would like to mention two matters that
8 you seem to raise that bother me and get your reaction
9 as well as Professor Somin.

10 The first is that if some of the people
11 involved in the coalition concerned about eminent
12 domain are libertarians and they happen to have a
13 concern about the scope of government power, you
14 didn't imply that they can't really be motivated by
15 the plight of minority students, but you seem to say
16 that that isn't. It bothers me to suggest that just
17 because one might be libertarian, one might be
18 concerned about, that one isn't powerfully moved by
19 the special plight of poor and particularly minority.

20 It certainly isn't the case that those who
21 are concerned about voting rights generally couldn't
22 have been powerfully moved in the North by some of the
23 examples that this Commission showed of the plight of
24 blacks in the deep South in the '50s and the '60s. So
25 that is one concern I have.

1 The second is the notion that seemed to
2 animate part of your written submission and oral, that
3 as long as government has the right motives, then
4 government will usually help minorities more. And I
5 am glad we are beyond the stage where a lot of eminent
6 domain may be motivated by racism, but the history of
7 urban renewal is littered with so many devastating
8 mistakes. The HUD probably had the best motives to
9 group people in the huge, horrible housing.

10 You in your testimony seemed to suggest
11 that mixed-use is a great thing and government is best
12 to decide what mixed use is.

13 I became involved in this issue about 24
14 years ago in a zoning fight in Houston, became
15 acquainted with a now deceased but beloved colleague
16 of Commissioner Heriot's on the University of San
17 Diego, USD, I should say, Bernie Siegan, who did a
18 study.

19 But back then the City of Houston wanted
20 to end mixed uses because to them in their restricted
21 covenant neighborhoods, mixed uses that the poor had
22 -- and I was in one of the more well-off neighborhoods
23 -- were ugly, but his path-breaking book Land Use
24 Without Zoning and many other follow-up studies show
25 that, in fact, what was unappealing to government at

1 the time really decreased rents from minorities
2 compared to Dallas and other cities.

3 So I suppose my question to both you and
4 Professor Somin is whether we should be so trusting of
5 government, even when they are supposedly
6 well-meaning.

7 MR. BYRNE: Well, thank you for your
8 question. First off, I thank you for making the
9 comment that -- and I totally agree -- that
10 libertarians can be motivated quite sincerely by
11 concern about the plight of the least among us who
12 have racial discrimination as part of the response
13 that they make.

14 But that was not what Kelo was about.
15 Kelo was not about racial minorities. And the focus
16 of the Institute for Justice has been on property
17 owners to court on eliminating eminent domain for
18 economic development entirely.

19 And so it seems to me -- and the way in
20 which the issue was framed to me for this hearing
21 today suggested that the main concern of the Civil
22 Rights Commission was the undue impact of eminent
23 domain on minorities. And that is what my remarks
24 were addressed to.

25 But the solution that is being suggested,

1 both by Professor Somin and I suppose by yourself, is
2 to eliminate eminent domain for economic development,
3 period. And that does not address the harms to
4 minorities that come from traditional eminent domain
5 projects, like highways or public housing, for that
6 matter. And it takes away one of the tools that has
7 been used to try to maintain the economic
8 competitiveness of cities with green field sites.

9 So I do have a concern as to what the
10 focus of this discussion is about. And I don't mean
11 to impugn anybody's motives at all, and I'm sorry if
12 it seemed as if I did.

13 Now, you're making, then, Commissioner, a
14 very broad argument about whether government has a
15 role in land use regulation at all. And I understand
16 that there are people -- and Bernard Siegan is
17 certainly one -- who have argued over the years that
18 that power is unhelpful. And mistakes have been made.

19 I mean, urban renewal has a very mixed
20 legacy. And the definitive book has not been written
21 on that yet, but plainly mistakes were made. And
22 mistakes are being made today in government policy
23 involving urban development. However, the
24 understanding of urban planning has come a long way
25 since the 1950s.

1 We have much less grandiose ideas. We
2 understand the value of mixed development. And we
3 understand the limited role that government can play
4 as a catalyst in helping particularly redevelopment of
5 areas that need it.

6 It is a very large question to discuss
7 whether government has a role, what the role of
8 government properly should be in land use planning and
9 regulation, goes well beyond the issue of eminent
10 domain, but it is certainly the case that we can point
11 to uses of eminent domain in the last decade that have
12 been, in fact, very helpful.

13 Government can assemble plots of land in a
14 way that private developers cannot. They can overcome
15 holdouts. They can insist on a planning process that
16 involves the community. And I think that is valuable.

17 And the larger issues perhaps we save for another
18 day.

19 COMMISSIONER GAZIANO: Professor Somin,
20 are you now or have you ever been a libertarian?

21 (Laughter.)

22 MR. SOMIN: I've been a libertarian since
23 I was 15 years old and even published an
24 autobiography, where I describe how I first became a
25 libertarian.

1 Perhaps more relevant to your specific
2 question, I think there is no contradiction between
3 advocating for property rights for the poor while also
4 believing that the same property rights should apply
5 to the wealthy and others, just as defenders of the
6 First Amendment would argue that these protections
7 should apply to powerful media entities, like the New
8 York Times, and not just to unpopular speakers. So,
9 similarly, I think property rights apply to all.

10 That said, as I discussed in my testimony,
11 it is the case that the poor and the politically weak
12 who own property rights, just as with respect to
13 speech, are more vulnerable. And that does get at the
14 question of the role of government.

15 One of the reasons why I am libertarian in
16 the first place and others are as well is that the
17 problems with government are not simply the result of
18 particular planning processes or particular
19 individuals who might make mistakes. They are
20 systematic.

21 And the government does have a tendency to
22 favor the politically powerful over the politically
23 weak, particularly in areas like eminent domain, where
24 the issue is complex and it is difficult for the
25 general public to scrutinize what is going on. You

1 don't have to be a libertarian to recognize this
2 particular problem. But I think the libertarian's
3 contribution is to see the systematic nature of the
4 problem.

5 Now, with regards to the question of the
6 broader role of government obviously, like Professor
7 Byrne, I don't think I can fully address that question
8 in this hearing. However, I would note that I think
9 both 1950s urban planning and modern urban planning
10 tend to overstate what the appropriate role of
11 government here is.

12 It's true there are holdout problems.
13 But, as I discussed in my testimony, private
14 developers have good ways of overcoming them, one of
15 them being secret assembly. And those have the
16 advantage that they don't victimize the poor and the
17 politically weak nearly as much. And they require the
18 developer to pay for the project with their own money.

19 When the developers pay with their own
20 money, they have more incentive to actually do a
21 project that really will promote more economic growth
22 than it destroys; whereas, when they can do so with
23 heavy public subsidies to transfer other people's
24 property to them, you often get very bad results, not
25 in every single case but I think in the majority of

1 the time.

2 I give a couple of examples in my written
3 testimony. For now, I will just mention the Kelo
4 case, which has already been discussed a lot. To
5 date, some \$80 million in public funds has been spent
6 there. And so far years after the taking, nothing has
7 been built.

8 The only beneficiaries of the taking so
9 far other than some of the officials and lawyers
10 involved are some feral cats that are currently living
11 on the site. Now, eventually I think something will
12 be built. But for a long time, the property will have
13 lain empty. And that is a significant economic cost.

14 In many other cases, where some things are
15 built, still you often get less economic development
16 than you would have gotten otherwise.

17 I think, as others have indicated, similar
18 problems sometimes do arise with traditional takings
19 for roads and the like. And I certainly agree with
20 Professor Byrne and Mr. Shelton that those sorts of
21 takings also deserve consideration and concern. I do
22 think there is a better justification for those
23 condemnations than for ones that transfer land to
24 private parties because, as I indicated, the way
25 private developers get around holdout problems is by

1 operating in secret and not letting people know that
2 this is a big assembly project going on.

3 With a public project where public funds
4 are being spent, we do want public scrutiny. And even
5 if we didn't want it, we probably would get it anyway
6 because government tends to leak. If they can't keep
7 military secrets, they probably can't keep development
8 project secrets either, even if we wanted them to do
9 so.

10 CHAIRMAN CASTRO: Professor, I'm pleased
11 that you answered Commissioner Gaziano's question
12 about your political philosophy because it would have
13 been highly ironic if you had exercised your Fifth
14 Amendment rights.

15 (Laughter.)

16 CHAIRMAN CASTRO: The Chair recognizes
17 Commissioner Heriot.

18 COMMISSIONER HERIOT: Thank you, Mr.
19 Chairman.

20 I want to say a word on behalf of the
21 feral cats, I suppose.

22 (Laughter.)

23 COMMISSIONER HERIOT: Eighty million
24 dollars, but at least I'm happy for the feral cats.

25 Professor Somin, you had mentioned that

1 there are more effective methods of dealing with this
2 urban blight. Can you elaborate on that a little bit
3 for us?

4 MR. SOMIN: Sure. I think urban blight is
5 a genuine problem by which, I mean, blight in areas
6 which really are blighted in the lay person's sense of
7 the term, where there is dilapidation, threats to
8 public health and the like, I think the best and most
9 effective long-term method of dealing with this is to
10 have long-term growth. And property rights are
11 actually an important part of that.

12 Most scholars in development economics
13 today say that a big part of the problem in
14 under-developed parts of the world is precisely
15 insecurity of property rights. Hernando de Soto, the
16 well-known Peruvian economist, has written a series of
17 books on this.

18 I think and a number of urban development
19 scholars also think that we have a similar problem,
20 albeit in less severe form, in some of the poor and
21 less developed areas of our own country.

22 In addition, while long-term growth is the
23 best solution, there are other more targeted measures
24 that can be taken. For instance, public health codes
25 in situations where maybe there are infectious

1 diseases bleeding in a property owner's area. And
2 also in some cases one can use nuisance abatement and
3 private lawsuits.

4 Finally, we should promote legislation, as
5 has already been done in many states, to have more
6 private planned communities so people can use their
7 own money and their own voluntary cooperation to
8 create a better living space for themselves.

9 Today over 50 million Americans already
10 live in private planned communities of various types.

11 And more can be done I think to make that option
12 available to even more people. And I think, actually,
13 that is the kind of participation, which is often more
14 effective in promoting people's interests than the
15 ordinary political processes.

16 So I don't think there is an absolutely
17 perfect solution to blight. However, there is a great
18 deal that can be done without resorting to eminent
19 domain. And especially since these other approaches
20 have the advantage that they don't forcibly displace
21 people from their homes or, by the way, from their
22 businesses.

23 Takings that target small businesses often
24 inflict as much harm as those that target homes, even
25 though the public sympathy in those cases tends to be

1 less.

2 CHAIRMAN CASTRO: We have less than ten
3 minutes left for questions. I have Commissioner
4 Kladney, who has indicated -- and he will be next, and
5 Commissioner Yaki has also asked. But prior to doing
6 that, I would ask if Commissioner Achtenberg has an
7 opportunity. She has not had an opportunity to ask
8 questions. So we will add you on that. So that may
9 be our time.

10 So Commissioner Kladney?

11 COMMISSIONER KLADNEY: Thank you, Mr.
12 Chairman. Thank the panel.

13 Professor Somin, I read your testimony.
14 And you were shocked that they actually had eminent
15 domain in Las Vegas as well as Times Square. Were you
16 ever in Times Square in the early '80s?

17 MR. SOMIN: Yes. Actually, I was. The
18 case I was referring --

19 COMMISSIONER KLADNEY: You don't want to
20 admit that, I would think.

21 (Laughter.)

22 MR. SOMIN: I'm sorry. I should let you
23 finish your question.

24 COMMISSIONER KLADNEY: I was. And I think
25 that their redevelopment plan has been successful.

1 You do not agree?

2 MR. SOMIN: To some extent. However, the
3 taking I was referring to took place many years after
4 the early 1980s. And it specifically was a taking to
5 transfer the property that by normal standards was not
6 in any way blighted to the New York Times for the
7 purpose of building a new headquarters.

8 COMMISSIONER KLADNEY: I thought you were
9 referring to the general condition of Times Square in
10 the early '80s.

11 MR. SOMIN: I was referring to the general
12 condition of Times Square at the time this case
13 occurred, which was in 2001.

14 COMMISSIONER KLADNEY: And then the taking
15 in downtown Las Vegas?

16 MR. SOMIN: Yes.

17 COMMISSIONER KLADNEY: Have you ever been
18 around that property?

19 MR. SOMIN: Yes. Yes, I have.

20 COMMISSIONER KLADNEY: And that taking was
21 really a problem of notice, was it not?

22 MR. SOMIN: No. It was the issue --

23 COMMISSIONER KLADNEY: Was it down about
24 having it ordered to --

25 MR. SOMIN: You're referring to the Pappas

1 case.

2 COMMISSIONER KLADNEY: Pappas.

3 MR. SOMIN: The fundamental issue there
4 was, in fact, whether the area was blighted. And the
5 owners of the land said that it was not. The Nevada
6 Supreme Court -- it went all the way up to the state
7 Supreme Court -- ruled that it was blighted on the
8 grounds that in Nevada, the definition of blight at
9 the time was any area that was under-developed in some
10 way or which essentially was any area which did not
11 have as much development as could potentially be
12 produced by an alternative use.

13 There may have been other procedural
14 issues in the case. But the aspect that I was
15 referring to, the one addressed by the Nevada Supreme
16 Court, was specifically the question of whether the
17 area was blighted or not. And the Nevada Supreme
18 Court ruled that it was on the basis of this very
19 broad standard.

20 COMMISSIONER KLADNEY: And then your last
21 remark in your comments was that more work was needed
22 to ensure constitutional property rights. Have any of
23 these types of cases shown a violation of civil rights
24 or property rights, like Kelo and Hawaiian Housing
25 Authority and things like that, or have they withstood

1 these court tests, constitutionality?

2 MR. SOMIN: Well, of course, Kelo was a
3 close, five to four, decision. I believe that the
4 majority in that case got it wrong, as many other
5 people do.

6 There have been, as I note in one of my
7 footnotes, some lower court decisions which have
8 struck down takings on the basis that the official
9 rationale was pretextual. And there also have been a
10 number of state Supreme Court decisions which have
11 invalidated Kelo-like takings under their state
12 constitutions.

13 But, of course, part of the central point
14 of my testimony was precisely that the federal courts
15 and some state courts as well have not done enough to
16 protect these sorts of rights. The fact that most of
17 these cases are won by the government, at least in
18 federal court, I view not as a positive sign that
19 nothing bad is going on but, rather, as a negative
20 sign that unfortunately, the courts have not been
21 doing their job in this area as well as they should.

22 CHAIRMAN CASTRO: The Chair recognizes
23 Commissioner Yaki. And thereafter Commissioner
24 Achtenberg will have the last question.

25 COMMISSIONER YAKI: Thank you very much.

1 I just wanted to say one word to Professor
2 Beito to begin with. And that is that what you have
3 been describing in your testimony today to me is very
4 powerful. And if it is indeed the case that they are
5 using this different method of demolition to deal with
6 homes that are primarily owned by African Americans in
7 Montgomery, it is something that I wish we could go
8 down there for because then we could use our subpoena
9 power to force these officials to come forward with
10 those records.

11 This is a much broader hearing than that.

12 But in terms of what you are talking about, I think
13 that could be a potential abuse of a police power that
14 I think we could have a very significant interest in.

15 I just wanted to address really quickly
16 the alternatives. One of the things you talked about
17 was secret assembly or, in other words, what we like
18 to call the developer shell game, in which they run
19 around and they buy little parcels here and there and
20 then hope they can come all together.

21 I want to get all of your reactions, as
22 briefly as possible, because to me having watched that
23 and seen that happen in various cities across the
24 country, including my own, the one thing that comes up
25 is the fact that in many ways, one, I don't

1 necessarily think that the developers are paying the
2 highest investment price for some of those properties,
3 they're paying any more than the government would;
4 and, number two, by doing it in the sort of shell game
5 frequently using nominees, shell corporations, other
6 kinds of things to do so, it actually becomes almost
7 undemocratic.

8 So that questions that Mr. Shelton would
9 want raised, where are these people going, what are we
10 doing with them, what is their right of return, what
11 actually is going to happen here, and whether that is
12 a good and efficient use of property, I don't think
13 those questions ever get answered in a secret
14 assembly-type thing until the very end, when they may
15 have to go to the planning commission to get it done.

16 By that time, you know, what you have,
17 your abilities may or may not be limited at that time
18 in terms of your ability to deal with the issues that
19 have been raised by Mr. Shelton, by Mr. Byrne, and
20 yourself, too, in terms of the impact of minorities.

21 So I just wondered if you could address
22 that and whether there are undemocratic aspects of
23 that that might actually militate against some of the
24 comments you were talking about in terms of the
25 perceived ills you see in eminent domain on racial

1 minorities.

2 MR. SOMIN: Thank you for that question.
3 It is an interesting point. I think the important
4 point about secret assembly is that when secret
5 assembly or any kind of voluntary assembly is going
6 on, people don't have to sell unless they agree to the
7 price that is offered to them.

8 So as a general rule, the people will not
9 sell unless they feel they are better off with the
10 money than they would be with the property. And that
11 is a fundamental difference from eminent domain.

12 Now, whether they always get paid the
13 highest and best price, you know, that may vary
14 depending on who is an effective negotiator in the
15 circumstance or whatnot. But at least they are all
16 paid a price that they believe is better than keeping
17 the property.

18 The most important aspect of property
19 rights is precisely the ability to say no when people
20 come and say, "I want your land" or whatever other
21 thing it is that you own.

22 Now, you might say, "Well, it is
23 undemocratic in the sense that obviously until the
24 project is later announced, it is secret." But part of
25 the point of my argument is that a better way for

1 people to participate is to be able to make their own
2 decisions about the disposition of their property and
3 to be able to say "Yes" or "No" to the offers that are
4 brought to them, rather than having a voice in a
5 political process where as an individual, particularly
6 as a poor one, your chance of actually influencing the
7 outcome is infinitesimally small.

8 By contrast, if you can say "Yes" or "No"
9 to offers that are brought to you, then you have a
10 much higher chance of actually having a say in your
11 own fate.

12 So if you believe the money is being
13 offered is not enough and that you will end up living
14 somewhere else where you will be worse off, then you
15 can just say no.

16 I think that's a good thing from a
17 fairness perspective. It is also, by the way, a good
18 thing from the perspective of maximizing economic
19 efficiency and economic development.

20 If, in fact, the current owners of the
21 property value it more than the developer does, then
22 even if all you care about, economic efficiency. If
23 you, like the evil libertarian of stereotype, only
24 care about economic growth then you still would want
25 the secret assembly rather than eminent domain. You

1 would want to sift out those projects that are not
2 worth more than the existing uses that they would
3 displace.

4 CHAIRMAN CASTRO: The Chair recognizes
5 Commissioner Achtenberg for the last question.

6 COMMISSIONER ACHTENBERG: I want to direct
7 this question to Professor Byrne, if I might. My
8 concern in reading the materials has been that the
9 data, at least as far as I can tell, is questionable
10 in terms of the statistics that are available to us
11 about what has happened, let's say, since 1980 or 1990
12 or in the most recent decade past in terms of the
13 allegations that it is clearly a disparate impact that
14 is being felt as a result of eminent domain on
15 minorities and other disempowered communities.

16 I'm wondering, am I missing something or
17 is the data as scanty as our current record makes it
18 appear?

19 MR. BYRNE: I think there is a big problem
20 with a lack of empirical study of the employment of
21 eminent domain, certainly, as you say, in the last two
22 decades or so, done to rigorous social science
23 standards.

24 We really don't know very much about the
25 incidence and who is affected by it. And so I think

1 that would be an enormous benefit and I think
2 something that is agreed across the political spectrum
3 that a better understanding of what actually occurs
4 would be helpful.

5 The study referred to in terms of the
6 victims and whatnot that is in there really doesn't
7 look at perspective. It just looks at the Census
8 tracts in which eminent domain is used. And that just
9 doesn't tell you very much. And we could all
10 understand this better.

11 CHAIRMAN CASTRO: Thank you. Please
12 everyone join me in thanking our panelists. I think
13 we had --

14 (Laughter.)

15 CHAIRMAN CASTRO: -- a very thoughtful and
16 thought-provoking discussion this morning.

17 I just want everyone to know who is
18 listening here today that we are going to have the
19 record remain open until September 10th for any public
20 comments. Those public comments can be mailed, either
21 to our office here at 624 9th Street, Northwest,
22 Washington, D.C. 20425 or emailed to:
23 publiccomment@usccr.gov.

24 That's publiccomment@usccr.gov.

25 And so thank you all. And we are now

1 going to move immediately into our regular business
2 meeting. So thank you, panelists. You may go about
3 your business. Feel free to stay and watch our
4 business meeting. It will be open to the public.

5 (Whereupon, the foregoing matter was
6 concluded at 11:15 a.m.)

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In the matter of: Briefing on Eminent Domain

Before: US CCR

Date: 08-12-11

Place: Washington, DC

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