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

COMMISSIONER KLADNEY: Thank you, Mr.
Chairman.

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

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

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

As at the last briefing, what I will do is
I will acknowledge commissioners who raise their hand.
And I will be fair and balanced in terms of the
opportunity.

Unlike the last briefing, we will have a
little more time here. So if a commissioner wants to
ask a follow-up question to their original question,
please do so. If you want a follow-up to your
follow-up, then we will ask you to hold that to the
next time so we can try to make sure that everyone has a fair opportunity to ask questions throughout the 50-minute period.

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

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

Our first panelist is Ilya Somin. He is an associate professor at George Mason University
School of Law. Professor Somin's research focuses on constitutional law, poverty law, and the study of popular participation and its implications for constitutional democracy.

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

Our second panelist is J. Peter Byrne, a professor of law at Georgetown University Law Center. He teaches property, land use, historic preservation, and constitutional law. In addition, he is Faculty Director of the Georgetown Climate Center and of the Georgetown Environmental Law and Policy Center.

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

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

The NAACP joined an amicus brief in support of the plaintiffs in the Kelo case. And Mr.
Shelton has testified before Congress regarding the civil rights implications of eminent domain use.

Our final panelist will be David Beito. Mr. Beito is a history professor at the University of Alabama. Much of Professor Beito's academic work has focused on African American history in the Twentieth Century.

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

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

In his presentation, Professor Beito is going to explain the work of this Alabama State Advisory Committee on this topic. It has already conducted two public hearings on the subject of eminent domain abuse in his state. So we are looking forward to hearing about that.
And, with that, I would like to ask Professor Somin to begin your remarks.

MR. SOMIN: Thank you, Mr. Chairman.

II. SPEAKERS' PRESENTATIONS

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

President Obama has written that "our Constitution places the ownership of private property at the very heart of our system of liberty."

Unfortunately, over the last several decades, both the courts and often legislatures as well have routinely consigned property rights to second class status, usually failing to give them the sort of protection that is accorded to other individual constitutional rights.

It is particularly appropriate, therefore, for the U.S. Commission on Civil Rights to consider this issue because property and the ownership of it were actually at the heart of the conception of civil rights that underlay the enactment of the Fourteenth Amendment. It was central to the rights that the framers of that amendment hoped to guarantee to African Americans and to other minorities.
In my presentation, I will first briefly speak about the constitutional law of eminent domain, particularly with respect to the Public Use Clause of the Fifth Amendment. Then I will talk in a bit more detail about the impact of eminent domain on racial minority groups, which both historically and today has often inflicted great harm upon them.

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

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

There has been a longstanding debate as to whether public use means an actual use by the government or by the general public or whether it merely means anything that might potentially benefit the public in some conceivable way.
During the founding era, there was not a lot of discussion of the meaning of public use. However, most jurists and commentators did have an understanding that takings of transferred property from A to B, as it was said, from one private individual to another, that those were not permitted by the Constitution.

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

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

Moreover, as I have already noted, for
framers of the Fourteenth Amendment, one of their principal reasons for wanting to incorporate the Bill of Rights against a government was to protect the property rights of African Americans and also white supporters of the union in the South against the deprivations of state governments that were threatening those property rights in many ways.

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

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

In my written testimony, I describe in some detail why this modern jurisprudence is deeply flawed. Here I will just make one point about it.
And that is that their position really makes very little sense given the whole point of having a constitutional right in the first place.

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

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

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

Since World War II, hundreds of thousands
of people have been forcibly displaced by blight
condemnations and also by economic development takings
of the sort that the Supreme Court approved in the
Kelo case. And the vast majority of those people who
were forcibly displaced are, in fact, poor African
Americans or Hispanics.

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

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

And in most cases, when people are
displaced by these sorts of condemnations, although
they do get some compensation payments, they are left
off significantly worse off than they were previously
because the payments rarely, if ever, fully account for their losses.

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

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

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

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

I think this argument is greatly overstated for a couple of reasons. One is that these sorts of condemnations often actually destroy far more economic assets than they create. They routinely
destroy large numbers of businesses, schools, homes, and other valuable assets for the community.

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

Finally, it should be noted that respect for property rights is itself an important engine of economic growth. Recent research in urban economics and development economics strongly suggests that areas which respect property rights see more investment, people are more secure in their homes and businesses. And that tends to promote growth; whereas, unconstrained government intervention in property rights or reassortment of them tends to have the opposite effect. Economic growth is an important objective. And so is the removal of blight. However, I would argue that we do not need to destroy a community in order to save it from blight. There are more humane
and also more effective methods of alleviating blight than the use of eminent domain and ones that don't forcibly displace large numbers of people.

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

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

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

Only four states have completely banned all blight condemnations. And, therefore, only in those states are the rights of the poor against these sorts of takings completely secure.
I think in the aftermath of Kelo, there
has been some genuine progress made. And certainly
public awareness of this issue has risen. However,
there is a great deal more work to be done before we
can fully guarantee constitutional property rights to
all Americans, particularly those who are most
vulnerable, such as the minority poor.

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

Thank you very much.

CHAIRMAN CASTRO: Thank you, Professor
Somin.

Professor Byrne?

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

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

Professor Somin as a remedy would prohibit
all eminent domain for economic development, including
elimination of blight requirements. In my view, this
is a non sequitur to remedy a nonexistent problem.

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

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

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

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

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

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

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

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

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

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

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

The plaintiffs in the Kelo case were
white, middle class people, which explains a good bit of the political hysteria that surrounded the decision.

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

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

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

The most controversial exercise of eminent domain in Washington, D.C. in the past decade has been the condemnation of stores in the Skyland strip mall in Anacostia to permit the construction of a badly
needed private supermarket for an under-served community.

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

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

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

Many of the most brutal condemnations in the urban renewal period were accomplished for highways and public housing, where the government
would actually own the site. Government has the same
general incentive to seek less expensive or
flourishing lands for condemnation, whatever the use
to be made.

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

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

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

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

The evidence that they marshall, such as
the lurid Victimizing the Vulnerable, presents
ambiguous data and highly colored language. The study
shows no more than that communities are somewhat more likely to pursue redevelopment in poor areas than in more affluent ones. It does not show what properties were taken or show who the owners of those properties were.

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

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

If one were worried about disproportionate impacts of eminent domain on the poor minorities, there are remedies that would address that directly. One might provide more procedural protections or
compensation to residents than to commercial property owners.

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

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

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

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

CHAIRMAN CASTRO: Thank you, Professor
Mr. Shelton?

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

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

Given our nation's sad history of racial prejudice, racism, bigotry, and a basic disregard on the part of too many elected and appointed officials to the concerns and rights of racial and ethnic minority Americans, it should come as no surprise that eminent domain has been misused for centuries against African Americans and other racial and ethnic minorities and the economically disadvantaged at highly disproportionate rates.
Although nobody knows the exact number of people displaced through eminent domain across the nation, everyone seems to agree that African Americans are disproportionately affected. One source cites that since World War II, it is estimated that between three and four million Americans have been forcibly displaced from their homes as a result of urban renewal takings. It should surprise no one that a vast majority of these people are racial and ethnic minorities.

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

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

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

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

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

The motives behind the disparities are varied. Many who have observed these patterns throughout our history contend that the twisted goal
of the majority of these displacements is to segregate and maintain the isolation of poor racial and ethnic minorities and otherwise outcast populations.

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

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

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

As I said at the beginning of my
testimony, not only are African Americans and other racial and ethnic minorities more likely to be subject to eminent domain, but the negative impact of these takings on these men, women, and families is much more severe.

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

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

When the goal is to increase the area's tax base, it only makes sense that the previous low-income residents will not be able to remain in the area. This is borne out of not only the common sense but also by statistics. One study from the mid 1980s showed that 86 percent of those relocated by the exercise of eminent domain power were paying more rent
at their new residence, with the median rent almost
doubling.

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

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

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

As I have discussed in my testimony, too
many of our communities, racial and ethnic minorities,
the elderly, the low-income, have witnessed an abuse
of eminent domain powers that has too often been
devastating.
Given the numerous chronicles of abuse, it is the hope of the NAACP that all responses, legislative, administrative, and others, to address eminent domain abuse be educated and well-informed by our shared history and challenges.

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

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

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

Even these more traditional uses of eminent domain have disproportionately burdened communities with the least political power: the poor, racial and ethnic minorities, and working class families.
Furthermore, it is not only our owners that are suffering but also our renters, whether they are residents or proprietors of small businesses, who are often provided no protections and no pay and pay a heavy and uncompensated price, even eminent domain is imposed.

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

The process must be open and transparent. And the full participation of those potentially impacted communities needs to be guaranteed as well as fair compensation must be given. Fair or just compensation should include replacement costs, not just technical appraisal value.

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

Thank you again, Chairman Castro and Commission members, for allowing me to testify before you today about the NAACP's position on the civil
rights implication of eminent domain abuses. The NAACP stands ready to work with the federal, state, and local municipal officials to develop policy and legislation to end eminent domain abuse while focusing on real community development concerns, like building safe, clean, and affordable housing in communities with good public schools and effective access to high-quality health care systems, small business development, opportunities in growth, and a significant available living wage job pool. Again, I thank you very much for the opportunity to speak with you and look forward to your questions and our discussion.

CHAIRMAN CASTRO: Thank you, Mr. Shelton.

Professor Beito, you are up.

MR. BEITO: Thank you.

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

Thank you, Chairman Castro, for inviting me here today. It reflects the spirit of bipartisanship that we also found very much in Alabama, where we decided to pursue this unanimously. Democrat, Republican, black and white decided to pursue this issue.
Let me start by saying that I speak for myself today, rather than in my capacity as Chair of the Alabama Advisory Committee. And I have little to add to Ilya Somin's very insightful and well-researched overview.

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

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

And we have had two public forums. The first was in 2008, which was at the historic 16th Street Baptist Church in Birmingham. And the witnesses at that meeting recounted some disturbing example of how blacks were losing. Especially in the City of Montgomery, we have seen more and more information coming out. Blacks in the City of Montgomery, city often called the cradle of civil rights, were losing their property through an
extensive application of section 11-53B-1, et. seq., of the Alabama Code. And I quote that more extensively in my longer paper.

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

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

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

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

Now, at our forum -- if you could go to the first, next slide, please? Oh, yes. There is a quotation from Frederick Douglass that was in my
longer paper, but I think it does reflect the concern
for property rights that you see in the history of
civil rights. And I think it is something that we
could all learn today about the application of
property rights, regardless of economic class.

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

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

If you could go to the next slide, please?

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

Now, another witness, who testified at
another forum that we had, which was in Montgomery,
was -- actually, this was at the Montgomery meeting as well. We had two meetings: the first in Birmingham and then the second one in Montgomery. And this was presented at the second meeting.

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

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

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

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

From the outset, the city showed unremitting hostility. And he almost lost count of
the number of roadblocks that it threw in his way,
including the citation for keeping the necessary
building materials on the back of his property, which
is not even visible from the road.

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

Please go to the next one. All right?

There is his home prior to demolition.

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

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

But, as I said, he fought back. He hired
an experienced local lawyer. He negotiated a
court-enforced agreement, which gave him 18 months to
Only a month after the agreement took effect in 2008, the city demolished the structure. And local bureaucrats were very much in a hurry. They did not give him notice when they sent in the bulldozers on the same day as the court order authorizing them.

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

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

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

The authorities charged that the property was a nuisance because the front porch was in disrepair.
Please go to the next slide. That shows the property. She had no photographs to share, but we got this from, a reporter got this from, Google Earth, interestingly enough.

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

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

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

Despite asserting that Jones is not the owner, the city is -- well, let's go on.
In May of this year, the city tried to sell the property at auction, still naming the deceased Forie Jones as the owner and again in the official online information --

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

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

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

Okay.

(Whereupon, a video was played.)

CHAIRMAN CASTRO: Thank you.

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

ACTING STAFF DIRECTOR TOLHURST: May I --

CHAIRMAN CASTRO: I'm sorry.

ACTING STAFF DIRECTOR TOLHURST: For one second.

CHAIRMAN CASTRO: Sure.

ACTING STAFF DIRECTOR TOLHURST: I thought this was an excellent panel. And I wanted to
recognize Margaret Butler, who put it together, and her staff in OCRE. Thank you.

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

(Applause.)

CHAIRMAN CASTRO: Commissioner Kirsanow?

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

III. QUESTIONS BY COMMISSIONERS AND STAFF DIRECTOR

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

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

Does that signal a tension between Tenth Amendment concerns and Fifth Amendment concerns? If it does, does primacy, should primacy, be accorded to
Fifth Amendment individual concerns, individual property right concerns, over Tenth Amendment concerns?

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

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

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

MR. SOMIN: As far back as the Nineteenth Century, some people made that argument in some state courts, albeit a minority at that time held that under state constitutions. But the federal Supreme Court
did not adopt that as an interpretation of the Public Use Clause of the Fifth Amendment until the Berman versus Parker case in 1954.

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

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

However, in the rare instances during that period when the federal government undertook a condemnation that was challenged in federal court, the Supreme Court actually made clear in the 1896 Gettysburg case that a higher level of scrutiny should apply when the taking transfers property to a private individual.
Unfortunately, there is some misunderstanding over this, fostered in part by the Supreme Court in Kelo, where they claim there was 100 years of precedent backing their position. There was indeed precedent beginning in Berman in 1954, but every one of the cases they cited before then was, in fact, a case that had nothing to do with the Public Use Clause of the Fifth Amendment but was in reality a so-called substantive due process case under the Fourteenth Amendment.

COMMISSIONER KIRSANOW: Thank you.

CHAIRMAN CASTRO: Commissioner Yaki?

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

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

And I think that that was, unfortunately, mirrored in a comment that Mr. Beito just stated on the video, where he said that the Commission calls this eminent domain abuse, which we have not yet done. We have not yet said that. This briefing does not
state that. This is a very different kind of --

MR. BEITO: I misstated that.

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

MR. BEITO: Although our local committee unanimously --

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

MR. BEITO: You're right.

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

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

I also know that there's a lot of good that has been done as well. In fact, when you see parts of San Francisco now that have been through the
In the redevelopment process, it is a wonder what has occurred in terms of the jobs and the economic growth that has occurred.

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

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

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

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

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

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

So, you know, one can't say that there is never abuse of eminent domain in contemporary cities, but I think that the realities of the political process today, in which there is not a federal pipeline like that, in which the political processes
of nearly every American city have been substantially
democratized in terms of race and ethnic participation
and in which the money to be able to accomplish these
things, a lot of it, has to come through local
sources.

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

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

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

MR. SHELTON: I would agree. There are
still too many challenges and problems with those who
don't have political power, economic power, and so
forth, when the issues of eminent domain come about,
especially those as we look at the African American
community.
Quite frankly, we are disproportionately poor. The property values are disproportionately low. And it becomes a bargain for those who want to buy mini lines in one place and actually do some major project, whether it's a local government project or a private project for that matter. So it becomes extremely concerning to us.

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

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

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

COMMISSIONER YAKI: Right.

MR. SHELTON: -- and coming back in at the
same rate. That is not done everywhere. And we would love to see those as more examples that should be utilized across the country, but the safeguards are necessary because there are those officials who exploit the opportunity.

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

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

MR. SHELTON: Absolutely. And, again, the problem is those are still too few and far between.
We would love to see more of that happen. What we have seen too often is major projects like these occur, we see our folks find themselves in situations they cannot afford to come back into the communities they left.

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

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

CHAIRMAN CASTRO: Professor? Just briefly, go ahead.

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

And, again, we have the death certificate
here of somebody they still identify as the owner of a
property. If that isn't eminent domain abuse or abuse
of property rights, I don't know what is.

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

CHAIRMAN CASTRO: The Chair recognizes
Vice Chair Ternstrom.

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

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

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

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

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

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

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

MR. SOMIN: Sure.

VICE CHAIR THERNSTROM: -- of these processes.

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

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

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

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

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

In addition, obviously both in New London and in other places, powerful interest groups are heavily involved in the process, politically connected developers and others. And in the New London case, a key role was played by the Pfizer Corporation, which had lobbied for the taking. One of the city's own experts in the case testified that Pfizer was the "10,000-pound gorilla" behind the taking. The New
London Development Corporation the quasi-governmental agency that organized the condemnation, was heavily influenced by Pfizer.

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

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

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

The one last point I will make about this is I agree that it is a sign of great progress that
African Americans have much more political power than they used to in the past in urban areas. But that does not prevent in many cases this kind of abuse because the people usually targeted by this sort of thing are, in fact, the urban and minority poor. And lots of studies as well as common sense suggest that those groups have only very limited political influence.

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

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

MR. BYRNE: Yes. Thank you.

So I didn't mean to say that there was a blight finding in the Kelo case. If I did, I misspoke. In fact, I had an interesting conversation with a Connecticut state official, who said to me that they proceeded under a different provision of the Connecticut state law involving eminent domain, which allowed there to be eminent domain when there was a finding of economic distress in a city and that it could be shown that the project would address the economic distress of the city. Connecticut used that process because they thought it was more transparent.
Professor Somin before correctly I said that the blight determinations that exist are often quite elastic. And the term "blight" is a kind of a stand-in for a need for economic development. And it is a troubling term. Connecticut was trying to avoid that in making it more transparent.

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

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

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

Now, look, nobody says that politics at the local level, as at the federal level, is without
the influence of powerful entities. What is needed, of course, is more transparency and more participation. And I strongly back that.

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

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

COMMISSIONER GAZIANO: Whatever order.

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

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

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

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

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

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

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

CHAIRMAN CASTRO: Thank you, Professor Byrne.
Commissioner Gaziano?

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

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

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

It certainly isn't the case that those who are concerned about voting rights generally couldn't have been powerfully moved in the North by some of the examples that this Commission showed of the plight of blacks in the deep South in the '50s and the '60s. So that is one concern I have.
The second is the notion that seemed to animate part of your written submission and oral, that as long as government has the right motives, then government will usually help minorities more. And I am glad we are beyond the stage where a lot of eminent domain may be motivated by racism, but the history of urban renewal is littered with so many devastating mistakes. The HUD probably had the best motives to group people in the huge, horrible housing.

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

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

But back then the City of Houston wanted to end mixed uses because to them in their restricted covenant neighborhoods, mixed uses that the poor had -- and I was in one of the more well-off neighborhoods -- were ugly, but his path-breaking book Land Use Without Zoning and many other follow-up studies show that, in fact, what was unappealing to government at
the time really decreased rents from minorities compared to Dallas and other cities.

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

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

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

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

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

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

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

I mean, urban renewal has a very mixed legacy. And the definitive book has not been written on that yet, but plainly mistakes were made. And mistakes are being made today in government policy involving urban development. However, the understanding of urban planning has come a long way since the 1950s.
We have much less grandiose ideas. We understand the value of mixed development. And we understand the limited role that government can play as a catalyst in helping particularly redevelopment of areas that need it.

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

Government can assemble plots of land in a way that private developers cannot. They can overcome holdouts. They can insist on a planning process that involves the community. And I think that is valuable. And the larger issues perhaps we save for another day.

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

(Laughter.)

MR. SOMIN: I've been a libertarian since I was 15 years old and even published an autobiography, where I describe how I first became a libertarian.
Perhaps more relevant to your specific question, I think there is no contradiction between advocating for property rights for the poor while also believing that the same property rights should apply to the wealthy and others, just as defenders of the First Amendment would argue that these protections should apply to powerful media entities, like the New York Times, and not just to unpopular speakers. So, similarly, I think property rights apply to all.

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

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

And the government does have a tendency to favor the politically powerful over the politically weak, particularly in areas like eminent domain, where the issue is complex and it is difficult for the general public to scrutinize what is going on. You
don't have to be a libertarian to recognize this particular problem. But I think the libertarian's contribution is to see the systematic nature of the problem.

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

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

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

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

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

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

I think, as others have indicated, similar problems sometimes do arise with traditional takings for roads and the like. And I certainly agree with Professor Byrne and Mr. Shelton that those sorts of takings also deserve consideration and concern. I do think there is a better justification for those condemnations than for ones that transfer land to private parties because, as I indicated, the way private developers get around holdout problems is by
operating in secret and not letting people know that
this is a big assembly project going on.

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

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

(Laughter.)

CHAIRMAN CASTRO: The Chair recognizes
Commissioner Heriot.

COMMISSIONER HERIOT: Thank you, Mr.
Chairman.

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

(Laughter.)

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

Professor Somin, you had mentioned that
there are more effective methods of dealing with this urban blight. Can you elaborate on that a little bit for us?

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

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

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

In addition, while long-term growth is the best solution, there are other more targeted measures that can be taken. For instance, public health codes in situations where maybe there are infectious
diseases bleeding in a property owner's area. And
also in some cases one can use nuisance abatement and
private lawsuits.

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

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

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

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

Takings that target small businesses often
inflict as much harm as those that target homes, even
though the public sympathy in those cases tends to be
CHAIRMAN CASTRO: We have less than ten minutes left for questions. I have Commissioner Kladney, who has indicated -- and he will be next, and Commissioner Yaki has also asked. But prior to doing that, I would ask if Commissioner Achtenberg has an opportunity. She has not had an opportunity to ask questions. So we will add you on that. So that may be our time.

So Commissioner Kladney?

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

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

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

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

(Laughter.)

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

COMMISSIONER KLADNEY: I was. And I think that their redevelopment plan has been successful.
You do not agree?

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

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

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

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

MR. SOMIN: Yes.

COMMISSIONER KLADNEY: Have you ever been around that property?

MR. SOMIN: Yes. Yes, I have.

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

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

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

MR. SOMIN: You're referring to the Pappas
COMMISSIONER KLADNEY: Pappas.

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

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

COMMISSIONER KLADNEY: And then your last remark in your comments was that more work was needed to ensure constitutional property rights. Have any of these types of cases shown a violation of civil rights or property rights, like Kelo and Hawaiian Housing Authority and things like that, or have they withstanded
these court tests, constitutionality?

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

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

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

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

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

This is a much broader hearing than that. But in terms of what you are talking about, I think that could be a potential abuse of a police power that I think we could have a very significant interest in.

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

I want to get all of your reactions, as briefly as possible, because to me having watched that and seen that happen in various cities across the country, including my own, the one thing that comes up is the fact that in many ways, one, I don't
necessarily think that the developers are paying the
highest investment price for some of those properties,
they're paying any more than the government would;
and, number two, by doing it in the sort of shell game
frequently using nominees, shell corporations, other
kinds of things to do so, it actually becomes almost
undemocratic.

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

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

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

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

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

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

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

Now, you might say, "Well, it is undemocratic in the sense that obviously until the project is later announced, it is secret." But part of the point of my argument is that a better way for
people to participate is to be able to make their own decisions about the disposition of their property and to be able to say "Yes" or "No" to the offers that are brought to them, rather than having a voice in a political process where as an individual, particularly as a poor one, your chance of actually influencing the outcome is infinitesimally small.

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

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

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

If, in fact, the current owners of the property value it more than the developer does, then even if all you care about, economic efficiency. If you, like the evil libertarian of stereotype, only care about economic growth then you still would want the secret assembly rather than eminent domain. You
would want to sift out those projects that are not
worth more than the existing uses that they would
displace.

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

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

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

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

We really don't know very much about the
incidence and who is affected by it. And so I think
that would be an enormous benefit and I think something that is agreed across the political spectrum that a better understanding of what actually occurs would be helpful.

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

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

(Laughter.)

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

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

That's publiccomment@usccr.gov.

And so thank you all. And we are now
going to move immediately into our regular business meeting. So thank you, panelists. You may go about your business. Feel free to stay and watch our business meeting. It will be open to the public.

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