Testimony of Dana Berliner
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Thank you for the opportunity to testify regarding eminent domain abuse, an issue that has received significant national attention in the wake of the U.S. Supreme Court's dreadful decision in *Kelo v. City of New London*. This committee is to be commended for responding to the American people by examining this misuse of government power.

My name is Dana Berliner, and I am a senior attorney at the Institute for Justice, a nonprofit public interest law firm in Arlington, Virginia, that represents people whose rights are being violated by government. One of the main areas in which we litigate is property rights, particularly in cases where homes and small businesses are taken by the government through the power of eminent domain and transferred to another private party for private development. I have represented property owners across the country fighting eminent domain for private gain, and I am one of the lawyers at the Institute who represented the homeowners in *Kelo v. City of New London*, the case in which the U.S. Supreme Court ruled by a bare majority that eminent domain could be used to transfer perfectly fine private property to a private developer based simply on the mere promise of increased tax revenue. I also authored two reports about the use of eminent domain for private development throughout the United States (available at http://www.castlecoalition.org/312 and http://www.castlecoalition.org/189).

The *Kelo* case was the final signal that the U.S. Constitution simply provides no protection for the private property rights of Americans. Indeed, the Court ruled that under the U.S Constitution, it is okay to use the power of eminent domain when there's the mere *possibility* that something else could make more money than the homes or small businesses that currently occupy the land, as long as the project is pursuant to a development plan. It's no wonder, then, that the decision caused Justice O'Connor to remark in her dissent: "The specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping center, or any farm with a factory." One Institute for Justice study found that eminent domain disproportionately impacts minorities, the less educated, and the less well-off. That report, *Victimizing the Vulnerable: The Demographics of Eminent Domain Abuse,* can be found at http://www.ij.org/1621 and is the subject of "Testing O'Connor and Thomas: Does the Use of Eminent Domain Target Poor and Minority Communities?" (*Urban Studies*, October 2009, vol. 46, no. 11, at 2447-2461).

Because of this threat, there has been a considerable public outcry against this closely divided decision. Overwhelming majorities in every poll taken after the *Kelo* decision have condemned the result (see http://www.castlecoalition.org/43). Several bills have been introduced in both the House and Senate over the past six years to combat the abuse of eminent domain, with significant bipartisan support. The original version of the bill, H.R. 4128 in the 109th Congress, passed the House by a vote of 376 – 38.

The use of eminent domain for private development has become a nationwide problem, and the Court's decision encouraged further abuse in its wake.

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

Historically, with very few limited exceptions, the power of eminent domain was used for things the public actually owned and used—schools, courthouses, post offices and the like. Over the past 60 years, however, the meaning of public use has expanded to include ordinary private uses like condominiums and big-box stores.

The expansion of the public use doctrine began with the urban renewal movement of the 1950s. In order to remove so-called "slum" neighborhoods, cities were authorized to use the power of eminent domain. Urban renewal wiped out entire communities, typically African American, earning eminent domain the nickname "negro removal." (See "Eminent Domain & African Americans: What is the Price of the Commons?" by Dr. Mindy Fullilove at http://www.castlecoalition.org/187.) This "solution," which critics and proponents alike consider a dismal failure, was given ultimate approval by the Supreme Court in *Berman v. Parker*. The Court ruled that the removal of blight was a public "purpose," despite the fact that the word "purpose" appears nowhere in the text of the Constitution and government already possessed the power—and still does—to remove blighted properties through public nuisance law. By effectively changing the wording of the Fifth Amendment, the Court opened up a Pandora's box, and in the wake of that decision properties are routinely taken pursuant to redevelopment statutes when there is absolutely nothing wrong with them, except that some well-heeled developer covets them and the government hopes to increase its tax revenue.

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

After the Supreme Court actually sanctioned this abuse in *Kelo*, the floodgates opened; the rate of eminent domain abuse tripled in the one year after the decision was issued (see *Opening the Floodgates: Eminent Domain Abuse in a Post-*Kelo *World*, available at http://www.castlecoalition.org/189). With the high court's blessing, local government became further emboldened to take property for private development. For example:

- Freeport, Texas: Hours after the *Kelo* decision, officials in Freeport began legal filings to seize some waterfront businesses (two seafood companies) to make way for others (an $8 million private boat marina).
- Oakland, Calif.: A week after the Supreme Court's ruling, Oakland city officials used eminent domain to evict John Revelli from the downtown tire shop his family had owned

since 1949. Revelli and a neighboring business owner had refused to sell their property to make way for a new housing development. Said Revelli of his fight with the city, "We thought we'd win, but the Supreme Court took away our last chance."

- Sunset Hills, Mo.: Less than three weeks after the *Kelo* ruling, Sunset Hills officials voted to allow the condemnation of 85 homes and small businesses for a shopping center and office complex.
- Mount Holly, N.J.: For the past decade, township officials have been using the threat of eminent domain to buy up and tear down over 300 row homes in the Gardens, a predominantly African American and Hispanic community that was home to elderly widows and first-time homebuyers. The township wants to transfer the land to a private developer for luxury townhomes and apartments.
- New York, N.Y.: Last year, the New York Court of Appeals—the state's highest court—allowed the condemnation of perfectly fine homes and businesses for two separate projects. First, a new basketball arena and residential and office towers in Brooklyn, and then for the expansion of Columbia University—an elite, private institution—into Harlem.

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

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

In the wake of the *Kelo* decision, 43 states enacted reforms that to varying degrees restrict the power of the government to seize for private development. 22 states passed legislation that effectively prevents the abuse of eminent domain for private gain, while 21 states still have more progress that needs to be made legislatively to effectively protect private property owners from this abuse of power. Seven states have yet to do anything in the past six years since *Kelo* to stop the abuse of eminent domain.

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

states, like Washington and Texas, the prospect of federal money for Transit Oriented Development has inspired municipalities to seek enormous areas for private development (areas not needed for the actual transportation). Eminent domain abuse is still a problem, and federal money continues to support the use of eminent domain for private commercial development. A few examples of how federal funds have been used to support private development include:

- New London, Conn.: This was the case that was the subject of the Supreme Court's *Kelo* decision. Fifteen homes were taken for a private development project that was planned to include a hotel, upscale condominiums, and office space. The project received $2 million in funds from the federal Economic Development Authority—and ultimately failed.
- Brea, Calif.: The Brea Redevelopment Agency demolished the city's entire downtown residential area, using eminent domain to force out hundreds of lower-income residents. The Department of Housing and Urban Development (HUD) launched an investigation into the potential misappropriation of federal development grants totaling at least $400,000, which made their way to the city in the late 1980s and early 1990s. FBI agents investigated the Redevelopment Agency based on evidence that the Agency used coercive tactics to acquire property.
- Garden Grove, Calif.: Garden Grove has used $17.7 million in federal housing funds to support its hotel development efforts—efforts that included, at least in part, the use of eminent domain. In 1998, the City Council declared 20 percent of the city "blighted," a move that allowed the city to use eminent domain for private development. Using that power—and federal money—the city acquired a number of properties, including a mobile-home park full of senior citizens, apartment renters and small businesses, in order to provide room for hotel development.
- National City, Calif.: In 2007, the National City Community Development Commission, which receives significant federal funding, authorized the use of eminent domain over nearly 700 properties in its downtown area, calling the area "blighted." One of the planned projects was the replacement of the Community Youth Athletic Center, a boxing gym and mentoring program for at-risk youth, with an upscale condominium project. The gym (represented by my organization, the Institute for Justice) has been challenging that eminent domain authorization ever since.
- Normal, Ill.: Normal officials condemned the properties of Orval and Bill Yarger and Alex Wade, including the Broadway Mall, for a Marriott Hotel and accompanying conference center being built by an out-of-town developer. The town secured at least $2 million in federal funding for downtown projects, and once the cost of the Marriott nearly doubled, approved giving the developer $400,000 in Community Development Block Grant money.
- Baltimore, Md.: In December 2002, the Baltimore City Council passed legislation that gave the city the power to condemn about 3,000 properties for a redevelopment project anchored by a biotechnology research park. The development would contain space for biotech companies, retail, restaurants and a variety of housing options. HUD provided a $21.2 million loan to the city. Many projects in Baltimore involving the use of eminent domain for private development are overseen by the Baltimore Development Corporation, which receives federal funding.
- St. Louis, Mo.: In 2003 and 2004, the Garden District Commission and the McRee Town Redevelopment Corporation demolished six square blocks of buildings, including

approximately 200 unites of housing, some run by local non-profits. The older housing was to be replaced by luxury housing. The project received at least $3 million in Housing and Urban Development (HUD) funds, and may have received another $3 million in block grant funds as well.

- Elmira, N.Y.: Eight properties—including apartments, a garage, carriage house and the former Hygeia Refrigerating Co.—were condemned and six were purchased under the threat of eminent domain for Elmira's South Main Street Street Urban Development project. HUD funds were used to create a 6.38-acre lot for development.
- New Cassell, N.Y.: St. Luke's Pentecostal Church saved for more than a decade to purchase property and move out of the rented basement where it held services. It bought a piece of property to build a permanent home for the congregation. The property was condemned by the North Hempstead Community Development Agency, which administers funding from HUD, for the purpose of private retail development. The land remained vacant for at least six years.
- New York, N.Y.: Developer Douglas Durst and the Bank of America enlisted the Empire State Development Corporation to clear a block of midtown Manhattan for their 55-story Bank of America Tower at One Bryant Park. The ESDC put at least 32 properties under threat of condemnation and initiated eminent domain proceedings. All of the owners eventually sold. Durst had abandoned the project prior to 9/11, but an infusion of public subsidies—including $650 million in the form of Liberty Bonds—and a $1 billion deal with Bank of America put plans back on track.
- Ardmore, Pa.: The Ardmore Transit Center Project had some actual transportation purposes, but Lower Merion Township officials also planned to remove several historic local businesses, many with apartments on the upper floors, so that it could be replaced with mall stores and upscale apartments. The project received $6 million in federal funding, which went to the Southeastern Pennsylvania Transit Authority. But for a tirelessly waged grassroots battle—which no American should have to wage to keep what is rightfully theirs—that ultimately stopped the project, the federal government would be complicit in the destruction of successful, family-owned small businesses.

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

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

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

Funding restrictions will only be effective if there exists a procedure for enforcement, so any reform must also include a mechanism by which the economic development funding for the state or local government can be stopped. Part of this procedure should be a private method of

enforcement, whether through an agency or court, so that the home or small business owners or, importantly, tenants that are affected by the abuse of eminent domain, or any other interested party like local taxpayers, can alert the proper entity and funding can be cut off as appropriate. The diligence of ordinary citizens in the communities where governments are using eminent domain for private development, together with the potential sanction of lost federal funding, will most certainly serve to return some sense to state and local eminent domain policy—especially in the absence of substantive eminent domain reform that effectively protects property owners.

This legislation also allows cities and agencies to continue to receive federal funding when they acquire abandoned property and transfer it to private parties. When the public thinks about "redevelopment," it is most concerned with the ability to deal with abandoned property. With this legislation, cities can continue to clear title to abandoned property and then promote private development there without risking losing their federal funding. Additionally, the clear and limited exception for taking property to remove "harmful uses of land provided such uses constitute an immediate threat to public health and safety" will discourage cities from taking perfectly fine homes and businesses as is common practice under many state's vague blight laws.

Congress's previous efforts to restrict the use of certain federal funds for eminent domain (from the Departments of Transportation, Treasury and/or Housing and Urban Development) have unfortunately been ineffective. There does not seem to be any way for individuals to enforce this restriction. Nor does it appear that any of these departments have ever investigated a violation of the spending limitation or enforced the limitation. Instead, the local governments that receive the funds are expected to understand and apply the prohibition. In other words, the same local governments that are planning to use eminent domain are also expected to limit their own funding, despite the fact that there is no prospect of enforcement. It is therefore not surprising that the funding restriction has not protected the rights of people faced with eminent domain.

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

It should also be noted that development is not the problem—it occurs everyday across the country without eminent domain and will continue to do so should this committee act on this issue, which I recommend. Public works projects like flood control will not be affected by any legislation that properly restricts eminent domain to its traditional uses since those projects are plainly public uses. But commercial developers everywhere need to be told that they can only obtain property through private negotiation, not public force and that the federal government will not be a party to private-to-private transfers of property. As we demonstrate in a recent study, restricting eminent domain to its traditional public use in no ways harms economic growth. (See report at http://ij.org/1618, and Carpenter, D.M. and John K. Ross. "Do Restrictions on Eminent Domain Harm Economic Development?" *Economic Development Quarterly*, 24(4), 337-351.) Indeed, congressional action will not stop progress.

Conclusion

In this economy, Congress does not need to be sending scarce economic development funds to projects that not only abuse eminent domain and strip hard-working, tax-paying home and small business owners of their constitutional rights, but projects that may ultimately fail. Let New London be a lesson: After $80 million in taxpayer money spent, years tied up in litigation and a disastrous U.S. Supreme Court ruling, the Fort Trumbull neighborhood is now a barren field home to nothing but feral cats. The developer balked and abandoned the project, and Pfizer—for whom the project was intended to benefit—also left New London.

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

Again, thank you for the opportunity to testify before this subcommittee.