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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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