Testimony of

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Kelo v. City of New London, 125 S.Ct. 2655 (2005), is unique in modern annals of law in terms of the negative response it has evoked. The initial reaction by lawyers familiar with the case was one of unsurprise. Within days, however, the decision began to gather widespread criticism in the media and among others less familiar with the process of eminent domain and the history of judicial decisions interpreting the "public use" requirement.

Before undertaking far-reaching reforms of the eminent domain system that would seek to prohibit States and local governments from using eminent domain for economic development purposes, it is important to understand just what Kelo did and did not decide, and what may be significant about the decision. Accordingly, I will begin by addressing five myths about Kelo which I believe need to be dispelled. I will then turn to a general consideration of reform strategies, highlighting two that I believe hold particular promise for protecting home owners and owners of small business from the disruptive effects of eminent domain.

I. Five Myths About Kelo

Myth One: Kelo breaks new ground by authorizing the use of eminent domain solely for economic development.

Echoing Justice O'Connor's dissenting opinion, it is widely asserted that Kelo is the first decision in which the Supreme Court permitted the use of eminent domain solely for economic development. By giving its approval to this new use of eminent domain, it is asserted, the Court has provided a roadmap for an unprecedented - and frightening - expansion in the use eminent domain.

The claim that economic development takings had never been previously upheld by the Court requires that one engage in considerable gymnastics with the relevant precedent. In particular, it requires that two propositions be established: (1) the universe of relevant precedent is limited to two decisions -- Berman v. Parker and Hawaii Housing Authority v. Midkiff - and (2) those precedents are implicitly limited (it cannot be claimed that they are expressly so limited) to takings designed to overcome some "precondemnation use" that inflicts "affirmative harm on society."

As Justice Stevens patiently explained in his majority opinion, however, neither proposition is true. The universe of prior precedent includes more than Berman and Midkiff. It also includes numerous Supreme Court decisions upholding "takings that facilitated agriculture and mining"

because of the importance of these industries to the economic welfare of the states in question. And it includes Ruckelshaus v. Monsanto Co., upholding the condemnation of trade secrets in order to promote economic competition in pesticide markets. Moreover, in none of these previous decisions (or even in Berman with respect to the parcel of property before the Court) could it be said that the property was being taken because of some "precondemnation use" that inflicted "affirmative harm." Justice Stevens concluded that "[p]romoting economic development is a traditional and long accepted function of government" - surely an irrefutable proposition - and that there was "no principled way" of distinguishing what the petitioners characterized as economic development "from the other public purposes that we have recognized."

Myth Two: Kelo authorizes condemnations where the only justification is a change in use of the property that will create new jobs or generate higher tax revenues.

The possibility that eminent domain could be justified solely on the ground that it would increase the assessed valuation of property was raised at the oral argument in Kelo. Justice O'Connor's dissenting opinion, which is based largely on a slippery slope argument, makes much of this possibility, building to her famous line - "Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory."

The Court in Kelo did not have to decide whether an isolated taking to produce a marginal increase in jobs or tax revenues satisfies the public use requirement. The New London Redevelopment Project before the Court was designed to do much more than achieve an "upgrade" in the use of one tract of land. A Justice Stevens' recounted, the project was also designed to generate a number of traditional public "uses": a renovated marina, a pedestrian riverwalk, the site for a new U.S. Coast Guard museum, and public parking facilities for the museum, an adjacent state park, and retail facilities. Later in his opinion, in discussing the petitioners' argument that the Court should draw a bright line prohibiting takings for economic development, he noted that the "suggestion that the City's plan will provide only purely economic benefits" was "unpersuasive" as applied to the taking before the Court.

Admittedly, the holding of Kelo is not limited to multiple use projects that provide both economic benefits and traditional public "uses." The majority - perhaps unwisely - chose to write more broadly than the facts of the case required. But the facts are set forth in the opinion for all to read, and provide a basis for distinguishing Kelo if in the future the Court decides (on some theory not yet articulated) that creation of jobs or tax revenues without more is insufficient to constitute a public use.

Myth Three: Kelo dilutes the standard of review for determining whether a particular taking is for a public use.

One of the most surprising claims about Kelo is that it lowers the level of scrutiny that courts are to apply to public use determinations. In fact, it was the Court's last major decision on the public use requirement before Kelo - the Midkiff decision of 1984 - that marks the nadir in formulation of the standard of review of public use claims. Midkiff equates the applicable standard of review with the minimum rationality test the Court uses in reviewing substantive due process and equal protection challenges to economic regulation.

Significantly, not once does the majority opinion in Kelo invoke rationality review or any of its synonyms in support of its judgment. Instead, the decision suggests that courts should carefully review condemnations that result in a private retransfer of property, or are not carried out in accordance with some planning exercise, in order to determine whether the government is taking property "under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit." Justice Kennedy's concurring opinion makes explicit that the Court's decision

upholding the condemnation in Kelo "does not foreclose the possibility that a more stringent standard of review than that announced in Berman and Midkiff might be appropriate for a more narrowly drawn category of takings."

In truth, therefore, Kelo intimates that the Court in the future may impose a higher standard of review in public use cases than has prevailed before. Before Kelo, courts merely had to ask whether the use of eminent domain is "rationally related to a conceivable purpose." After Kelo, courts are instructed to investigate the factual circumstances to determine whether the invocation of a public purpose is a "mere pretext" to justify a transfer driven by "impermissible favoritism to private parties." In terms of the formulation of the standard of review, Kelo was a significant victory for property rights advocates, a development completely obscured by the widespread denunciation of the decision.

Myth Four: The original understanding of the Takings Clause limits the use of eminent domain to cases of government ownership or public access.

Justice Thomas filed a separate dissenting opinion in Kelo, arguing that the Court should return to the original understanding of the Takings Clause, which he claimed limited eminent domain to acquisitions of property for the government or for actual use by the public. Justice Stevens did not respond to Justice Thomas's opinion, which may have reinforced the impression in some circles that the Court's decision was a clear departure from the original understanding.

Unfortunately, other than the language of the Takings Clause itself ("nor shall private property be taken for public use without just compensation"), there is virtually no direct evidence about what the Framers understood by the words "for public use." The phrase modifies "taken," and thus clearly establishes that the Takings Clause is about a subset of takings - those for public use as opposed to other possible types of takings. But this narrowing language does not necessarily mean that the Clause imposes an affirmative requirement that a taking must be for a "public use." It is also possible that the Framers were simply describing the type of taking for which just compensation must be given - a taking of property by eminent domain as opposed to some other type of taking, such as a taking by tort or taxation. This reading would not, as Justice Thomas argued, render the words "surplusage." No other words in the Clause tell us the just compensation requirement is about eminent domain (the term "eminent domain" did not enter constitutional discourse until sometime later). Moreover, for all his parsing of old dictionary definitions, Justice Thomas never explained why the prohibitory word "without" is placed before "just compensation" rather than before "public use" - a piece of textual evidence that seems to cut against the thesis that the Clause imposes a public use requirement.

Given the utter lack of direct evidence, the debate over original meaning probably comes down to whether the Framers understood the power of eminent domain from an "English" perspective, reflecting the views of Locke and Blackstone, or from a "continental" perspective, reflecting the views of natural rights thinkers such as Pufendorf, Grotius, and Vattel. The English perspective emphasized the importance of the property owner's constructive consent to the taking through the owner's representation in Parliament. If the Framers viewed takings this way, the most plausible interpretation of "for public use" is that it was just descriptive of the power of eminent domain, i.e., a taking of property authorized by the legislature. The continental perspective emphasized that eminent domain should be used only for certain types of public purposes. If the Framers viewed takings this way, the most plausible interpretation is that public use is an implied limitation on eminent domain. Since the Framers left no clues as to which body of thought was more influential in their thinking, the issue cannot be resolved with any certainty. But it would be hazardous to bet against the English perspective, which was almost certainly familiar to more

participants in the ratification process.

Myth Five: Takings for economic development pose a particular threat to "discrete and insular minorities."

Justice Thomas concluded his dissenting opinion with a powerful passage predicting that takings for economic development would disadvantage poor communities, which "are not only systematically less likely to put their lands to the highest and best use, but also are the least politically powerful." Strict enforcement of the public use requirement, he argued, can therefore be seen as a type of judicial review designed to protect "discrete and insular minorities." Justice O'Connor's dissent echoed these concerns.

There are many disputable propositions here. Justice Thomas's preferred position would restrict eminent domain to takings for government use or actual use by the public. Any other type of real estate development would have to use market transactions. Consequently, one way to test his prediction about the impact of eminent domain on poor communities would be to compare the benefits poor communities receive from real estate projects that rely solely on market transactions with the benefits they receive from projects facilitated by eminent domain. Because of the high transaction costs of assembling large tracts of land in developed areas, market-based development projects tend to be concentrated in greenfield sites at the perimeters of urban areas, far from most poor communities. Thus, unless one believes that new real estate development is inevitably bad for poor communities, there is reason to doubt that leaving all commercial real estate development to market transactions would improve the welfare of poor communities.

Justice O'Connor's position is even more bizarre. Her position is that "public purpose" takings are permissible, but only if the taking is designed to overcome some "precondemnation use" that inflicts "affirmative harm on society." Translated, this means that eminent domain can be used for economic development only if there is a finding the property is "blighted." Would requiring a determination of "blight" reduce the danger of poor and minority communities being targeted for economic development takings? The history of urban renewal projects in the post-World War II era - much of which proceeded under statutes requiring a blight determination - strongly suggests that poor and especially minority communities were disproportionately singled out for condemnation under these schemes. Making "blight" a precondition of economic development takings seems designed largely to reassure the middle class that its property will not be targeted for such projects, not to protect the very poorest communities.

More generally, economic development schemes limited to "blighted" property are backward looking. They ask whether the existing use of the property has fallen below some benchmark that the dominant community regards as "normal." In contrast, pure economic development statutes - such as the one in Connecticut - are forward looking. They focus on the prospective benefits the community might obtain from a transformation in the use of the property. The forward looking approach requires that development planners think strategically about where and how to intervene in the market. At least arguably, this approach will lead to more surgical interventions designed to jump start growth, in contrast to the backward looking approach, which would justify bulldozing any property that falls below the benchmark of blight. Liberating economic development projects from any requirement of a "blight" determination might therefore result in fewer and more selective takings of property than the approach favored by Justice O'Connor.

II. Three Strategies for Reforming Eminent Domain

There are three general types of strategies for reforming eminent domain: prohibitory reforms, procedural reforms, and compensation reforms.

Prohibitory reforms declare certain ends or objectives of government off limits for eminent

domain, e.g., the use of eminent domain for "economic development." In essence, the prohibitory strategy seeks to discover and impose as law a restrictive definition of "public use." This is the centerpiece of the Institute for Justice's campaign against eminent domain. Its idea is that eminent domain should be prohibited for economic development. Various other prohibitory strategies are imaginable, however, such as prohibiting all condemn-and-retransfer schemes outside the public utility context.

Procedural reforms focus on the process used to decide whether to employ eminent domain. Since eminent domain procedures are badly out of date, there are a host of possibilities here. One approach would try to assure more political accountability for the used of eminent domain: for example, pushing decisions to use eminent domain down to the local level and by trying to assure that the decision is made by elected rather than unelected officials. Another approach would seek to improve condemnees' access to the judiciary. One simple but quite powerful proposal here would put the burden on the condemning authority to establish the legality of the taking, including whether it constitutes a public use, before title changes hands. Many jurisdictions today have "quick take" statutes that presume the validity of the taking, and require condemnee to file an independent action seeking to enjoin the taking. This procedure puts the burden of proof on the condemnee, including the burden of proving that the taking is not a public use.

The compensation strategy would increase the amount of compensation paid to condemnees above the current fair market value formula. This could be done either under an indemnification theory - seeking to provide more complete recovery of losses, analogous to allowing recovery for pain and suffering in addition to out of pocket losses in tort cases. Or it could be done under a restitution theory - requiring the condemning authority to disgorge or at least share with the condemnee the assembly gains realized through the exercise of eminent domain. Either way, enhanced compensation would have two effects: it would soften the blow to condemnees, and it would reduce the incidence of eminent domain by increasing the costs of condemning property.

I am not a fan of the prohibitory strategy. This strategy would enlist courts in an effort to strike down exercises of eminent domain that are prohibited, while allowing those that are not prohibited to go forward. The history of controversy over the use of eminent domain suggests that courts are not very good at policing the uses to which eminent domain is put. In the nineteenth century, there was a movement among state courts to limit eminent domain to actual use by the public. But with the rise of new types of utility services like telegraph lines, electric lines, telephone lines, and gas pipelines, these courts began to backtrack. Clearly there is no literal use by the public of these sorts of distribution systems (as opposed to the services they provide). And in many cases property was taken where the persons affected did not even have access to the services. Yet courts contorted with find that these takings were public uses. Later in the 1930s and 1940s, municipalities began taking property in order to construct public housing projects. Here too, the property was not open to the general public. But again, courts generally upheld these takings as consistent with the requirement of public use. In the face of these multiple difficulties with the use by the public interpretation, virtually every state supreme court in the country retreated, and adopted some form of the understanding that "public use" means public purpose.

However, once one takes the step of interpreting public use to mean public purpose, and once one becomes only modestly sophisticated about the concept of external benefits, one realizes that the government can reconfigure the ownership of property in countless ways that will produce external benefits for society. In addition to utility services and public housing projects,

landlocked property can be made accessible, scenic easements can be imposed, waterfronts can be opened to greater public use, compulsory licenses of intellectual property rights can be required - list is virtually endless. Not surprisingly, once courts started down the public purpose path, they became increasingly reluctant to make categorical pronouncements about what is and is not a "public use."

The basic problem with the prohibitory strategy, this history suggests, is that lawyers and judges are not particularly good at anticipating the ways in which reconfigurations of ownership rights may produce significant public benefits. Nor are they very good at articulating abstractions that will capture a high percentage of the situations in which reconfiguration would be desirable. All of which suggest that the decision to use eminent domain is one that should be exercised by politically accountable actors, not courts.

There is another serious problem with imposing a prohibitory limitation on the use of eminent domain at the federal level, either by decision of the U.S. Supreme Court or by legislation enacted by Congress: this strategy disserves the values of federalism. Problems in assembling property rights vary greatly from one part of the country to another. In dense, highly developed urban areas like New York City the problem is often the need to assemble multiple contiguous tracts in order to create a site for a larger project. In empty rangeland in the West, the problem may be that one parcel is landlocked by a single neighbor who refuses to grant any kind of access. It is far from clear that eminent domain law should be the same in both circumstances. In fact, some States permit the use of eminent domain for economic development without regard to whether property is blighted, others do not. About half the States have provisions for condemnation of rights of way to landlocked property, and about half do not. It is hard to see why these variations should be wiped out by a single federal rule for when property can be condemned and when not. Those who decry eminent domain abuse are right to identify a potential problem, but what they do not often point out is that state courts have often put an end to abuses as a matter of state law. Congress should await clearer evidence of a national problem of overuse of eminent domain before ending all state experimentation and variation in this area.

A related federalism problem associated with the prohibitory strategy is that it would inject federal courts into local land use disputes to a degree that has never existed before. Under current practices, state courts handle all issues about eminent domain, ranging from whether there is a "public use" to whether statutory procedures were followed, to whether the compensation is adequate. The federal courts tend not to get involved in these local issues - accept in the very rare cases accepted for review from the state supreme court by the U.S. Supreme Court. In theory, property owners could file actions under 42 U.S.C. § 1983 challenging the public use determination. But given the generally deferential approach to public use followed by federal courts as a matter of federal law (state courts have been more willing to be assertive in this matter), property owners have generally not availed themselves of this option. Imposing a new federal restriction on eminent domain for "economic development" would change this equation, and would likely mean that many local projects would be delayed for significant periods of time while piecemeal judicial review - some in state court, some in federal court - was pursuing by opponents of those projects. These delays would greatly increase the costs of local projects using eminent domain, increasing the burden on local taxpayers.

There are two other drawbacks to the prohibitory strategy. First, such a strategy only helps property owners whose cases fall near the margins of the prohibition. Those who experience takings regarded as clearly permissible - including those whose property is taken for new highways, airport expansions, public convention centers, and public stadiums - get no relief. Of

particular concern, many condemnations for economic development can be recharacterized as condemnations to eliminate "blight," which Justice O'Conner would permit. Indeed, the New London taking itself could plausibly have proceeding on a blight rationale, if development planners were not permitted to use the more straightforward economic development option. Second, under the prohibitory approach it will be difficult for ordinary landowners to find a lawyer to bring an action challenging a taking as beyond the pale of permitted public uses. Most condemnation lawyers work on a contingent fee basis, and are paid a percentage of any additional just compensation they obtain from the state beyond the state's initial offer. A no-public use action, if it succeeds, means that there will be no fund of money with which to pay the lawyer. So this compromises the incentives of lawyers to bring and aggressively prosecute such actions.

I find the procedural and compensation strategies more promising. First a couple general points. I assume these strategies would be implemented across the board, applying to all exercises of eminent domain, not just a narrow subset described as entailing condemnation for "economic development." Consequently, the process and compensation strategies promise to provide relief to all property owners who experience eminent domain, not just a select few. The process strategy does this by providing more information to decisionmakers about the intensity of opposition to eminent domain projects and by compounding the costs of using eminent domain, which leads to substitution away from eminent domain toward other modes of resource acquisition. The compensation strategy does this by providing more money to persons whose property is taken in eminent domain. And it too leads to a substitution away from eminent domain, insofar as the costs go up relative to other modes of resource acquisition.

A related general point is that these two strategies are more likely to be implemented by lawyers retained by property owners under contingent fee arrangements. The compensation strategy dovetails nicely with the use of contingent fee representation, since higher compensation leads directly to higher fees for those who represent property owners in eminent domain. The process solution is also more compatible with contingent fee representation, insofar as enhanced process rights in eminent domain proceedings themselves magnify the leverage of property owners in negotiations over settlement amounts.

Turning more specifically to process reform, as an administrative law professor I am struck by how outmoded eminent domain processes appear to be in most jurisdictions. Eminent domain procedures were developed in the nineteenth century, and have scarcely been modified since. They generally assume that a legislative body will decide to condemn property without providing any explanation, and that a court will then hold a hearing to see whether the condemnation meets the court's understanding of the meaning of public use.

Contrast this to the process followed in deciding, for example, whether a "major federal action" should go forward under the National Environmental Policy Act (NEPA). Under NEPA, the action agency must consider a range of options to the proposed project, make available background information to the affected community, allow for public comment, and hold public hearings. Persons dissatisfied with the final report and recommendation can seek judicial review, in which the court focuses not on the wisdom of the project, but on whether the process afforded a full and fair consideration of all affected interests, and whether a reasoned response was provided to all objections.

Adopting an analogous type of process requiring open, public, participatory inquiries into the need for the exercise of eminent domain would, I believe, provide better protection for property owners than imposing an abstract definition of prohibited categories of eminent domain enforced

by courts. Modernizing the process in the fashion would allow the real objections to the project to come to the fore, would create a mechanism for identifying way to proceed that would involve less or no use of eminent domain, and would allow property owners a forum in which to voice their objections to being uprooted.

Another promising reform idea would be to require more complete compensation for persons whose property is taken by eminent domain. The constitutional standard requires fair market value, no more and no less. Congress modified this when it passed the Uniform Relocation Act in 1970, which requires some additional compensation for moving expenses and loss of personal property. Congress could modify the Relocation Act again, in order to nudge the compensation formula further in the direction of providing truly "just" compensation.

For example, Congress could require that when occupied homes, businesses or farms are taken, the owner is entitled to a percentage bonus above fair market value, equal to one percentage point for each year the owner has continuously occupied the property. This would provide significant additional compensation for the Susette Kelos and Wilhelmina Derys who are removed from homes they have lived in for much of their lives.

Alternatively, Congress could require that when a condemnation produces a gain in the underlying land values due to the assembly of multiple parcels, some part of this assembly gain has to be shared with the people whose property is taken. Under current law, all of the assembly gain goes to the condemning authority, or the entity to which the property is transferred after the condemnation.

Either one of these adjustments in the measure of just compensation - or others that might be advanced - would do more to protect homeowners against eminent domain than declaring a federal prohibition on takings for economic development. Adjustments in compensation would protect all property owners - those whose property is taken for highways and public housing projects, as well as those whose property is taken for economic development projects. Such a requirement would be vigorously enforced by the attorneys who represent property owners in condemnation proceedings. Providing additional compensation in cases of greatest concern would discourage local governments from using eminent domain in these cases, without prohibiting its use altogether. Perhaps most importantly, assuring a more "just" measure of compensation would leave the ultimate decision about when to exercise this power in the hands of local elected officials, where it has long been lodged, and where it belongs.