

## The Kelo Case and Eminent Domain -- Setting the Record Straight and a Proposal for Reform

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### Overview

On June 23, the U.S. Supreme Court decided *Kelo v. City of New London*, a case involving the question of whether the government's eminent domain power can be exercised on behalf of private parties to take private homes, land, and businesses for private commercial development. The March 2005 issue of this newsletter, the feature article focused on the case, and predicted that the U.S. Supreme Court would uphold the Connecticut Supreme Court's approval of the exercise of the power on behalf of a private party. As expected, the U.S. Supreme Court did affirm the lower court. That outcome was not surprising - the Court has approved such takings for over 50 years. However, the decision has been criticized widely in the media and among those less familiar with the process of eminent domain and the long line of judicial decisions interpreting the Fifth Amendment's "public use" requirement.

Some agricultural groups and private property advocacy groups have begun pushing for the Congress to enact legislation designed to "protect" the property rights that the *Kelo* opinion supposedly has taken away. Similar calls have been made for states to also enact "corrective" legislation. However, before action is taken to reform the eminent domain system to prohibit state and local governments from using eminent domain for economic development purposes, it is important to understand just what *Kelo* did and did not decide; what, if anything, is significant about the decision; and what policy response, if any, should be taken.

### Sorting Fact From Distortion - Just What Exactly Did *Kelo* Do?

Clearly, *Kelo* does not break new ground by authorizing the use of eminent domain solely for economic development. The Court has ruled in two major cases dating back to 1954 that the practice is constitutional. In addition, the Court has upheld the use of eminent domain to facilitate agriculture and mining because of their importance to the states in question. Likewise, the Court has also upheld the condemnation of trade secrets in order to promote economic competition in pesticide markets. In none of these prior decisions was eminent domain exercised because of some "precondemnation use" that inflicted "affirmative harm." Indeed, Justice Stevens, the author of the *Kelo* majority opinion, 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." So, *Kelo* does not expand the government's power to take property when some "harm" to society is not trying to be avoided. The Court has authorized such takings for a long time.

Some have claimed that *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. That is an incorrect reading of the case. While that possibility was raised at oral argument, the Court did not have to decide whether an isolated taking to produce a

marginal increase in jobs or tax revenues satisfies the Constitution's "public use" requirement. The New London Redevelopment Project at issue in the case was designed to do more than simply achieve an "upgrade" in the use of one tract of land. Indeed, the project was also designed to generate a number of traditional "public uses," including a renovated marina, a pedestrian riverwalk, the site for a new U.S. Coast Guard museum (including public parking for the museum), an adjacent state park, as well as retail facilities.

*Kelo* also does not, as some have claimed, dilute the standard of review for determining whether a particular taking is for a public use. The Court's 1984 opinion in *Hawaii Housing Authority v. Midkiff*, establishes that the applicable standard of review is the same minimum rationality test the Court uses in reviewing substantive due process and equal protection challenges to economic regulation. That standard did not change. Indeed, the Court noted that condemnations should be reviewed carefully when they result in a private retransfer of property, or are not carried out in accordance with some comprehensive plan. This is to ensure that property is not being taken under the mere pretext of a public purpose, when the actual purpose is to bestow a private benefit. Importantly, the Court indicated that, in the future, it might impose a higher standard of review in public use cases. Relatedly, before *Kelo*, courts merely had to ask whether the use of eminent domain was "rationally related to a conceivable purpose." After *Kelo*, courts must determine whether the alleged public purpose is a "mere pretext" to justify a transfer driven by "impermissible favoritism to private parties." As such, *Kelo* was a significant victory for property rights advocates. That point has been obscured completely by the widespread criticism of the Court's opinion.

It is also not clear that the original understanding of the Takings Clause would limit 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, but it is unclear what the Framers meant by the words "for public use." The phrase "nor shall private property be taken for public use without just compensation" illustrates that "public use" modifies "taken." As such, there are various subsets of takings - those for public use, and those not for

public use. But that does not necessarily mean that the Clause requires that a taking must be for a "public use." Perhaps 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 by tort, taxation or regulation.

It is also questionable that takings for economic development pose a particular threat to "discrete and insular minorities," as Justice Thomas stated in his dissenting opinion. Under Justice Thomas's view, and that of the groups that have roundly criticized the *Kelo* opinion, eminent domain should be restricted to takings for government use or actual use by the public. Any other type of real estate development would have to use market transactions. However, the high transaction costs associated with assembling large tracts of land in developed areas result in market-based development projects being concentrated at the perimeters of urban areas, far from most poor communities. Thus, it is doubtful that leaving all commercial real estate development to market transactions would improve the welfare of poor communities which tend to occur most in inner-city urban areas.

### **Possible Responses to *Kelo***

Clearly, one possible approach is for the Congress to declare that the use of eminent domain for economic development is impermissible. This strategy would leave it up to courts to decide which exercises of eminent domain are prohibited. Unfortunately, courts have proven that they are not very good at policing the uses to which eminent domain is put. A better approach is that such decisions be exercised by politically accountable actors, not courts. Another problem is that this approach raises questions about federalism. While it is appropriate to correct eminent domain abuses, state courts have often eliminated such abuses as a matter of state law. Without evidence of a national problem of overuse of eminent domain, it is probably not a good idea for the Congress to take action. Another problem of the Congress prohibiting the use of eminent domain for private economic development is that it helps only 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. Also, it will be more difficult for ordinary landowners to find a lawyer to bring an action challenging a questionable taking. Many 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, the incentive for lawyers to bring and aggressively prosecute such actions is diminished.

Alternatively, the decision whether or not to use eminent domain could be pushed down to the local level with the requirement that the decision be made by elected rather than unelected officials. Another approach would be to 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 (landowner) to file a private 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. That could be changed as a means of strengthening landowner rights. Also, it may be possible to increase the amount of compensation paid to condemnees above the current requirement of fair market value.

### **Suggested Approach**

It is important that any legislative action provide "relief" to all property owners who experience eminent domain, not just a select few. A strategy that provides more money to persons whose property is taken by eminent domain accomplishes that objective and will minimize the actual use of eminent domain. Also, eminent domain procedures were developed in the nineteenth century and have been modified only slightly over time. Under the typical approach, a legislative body makes a decision to condemn property without providing any explanation, with a court then holding a hearing to see whether the condemnation meets the court's understanding of the meaning of public use. There is typically no detailed proposed project that is set forth for public comment and hearings. Disaffected persons generally cannot seek judicial review

concerning the wisdom of the proposed taking. Retooling current eminent domain procedures to require open, public, participatory inquiries into the need for the exercise of eminent domain would provide better protection for property owners than imposing an abstract definition of prohibited categories of eminent domain enforced by courts. Modernizing the process in this fashion would allow the real objections to the project to be addressed, and would create a mechanism for identifying a 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 reform might 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, to push the compensation formula further in the direction of providing truly "just" compensation.

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 the gain must 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.

### **Conclusion**

Adjusting the level of just compensation and/or reforming the current eminent domain process would do more to protect homeowners against eminent domain abuses than declaring a federal prohibition on takings for economic development. These techniques would protect all property owners - those whose property is taken for clear public uses, as well as those whose property is taken for private economic development. Moreover, the "takings" process would remain subject to the oversight of attorneys who represent property owners in condemnation proceedings. Providing additional compensation in cases of greatest concern would also discourage local governments

from using eminent domain without barring its use altogether. Perhaps most importantly, assuring a more “just” measure of compensation would leave the ultimate decision about when to exercise the eminent domain power in the hands of local elected officials who are politically accountable to local voters.

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