

***Kelo v. City of New London:* What it Means and the Need for Real Eminent Domain Reform**

In *Kelo v. City of New London*, the U.S. Supreme Court held that the Constitution allows governments to take homes and businesses for potentially more profitable, higher-tax uses. In the aftermath of that decision, the defenders of eminent domain abuse have already begun desperate attempts to keep the power to take homes and businesses and turn them over to private developers. And they are struggling to convince outraged Americans that ordinary citizens shouldn't care. The beneficiaries of the virtually unrestricted use of eminent domain – local governments, developers, and planners – will frantically lobby to prevent any attempt to diminish their power.

Their main message is that nothing has changed and there's nothing to worry about, because local officials always have the best interests of their citizenry at heart. Nothing could be further from the truth. The *Kelo v. City of New London* decision represents a severe threat to the security of all home and business owners in the country. Not only does it give legal sanction to a whole category of condemnations that were previously in legal doubt, but it actually encourages the replacement of lower income residents and businesses with richer homeowners and fancier businesses. The vast majority of Americans understand what is at stake, even if many so-called experts do not.

What the Supreme Court Actually Said in *Kelo*

The Court ruled that 15 homes in the Fort Trumbull waterfront neighborhood of New London, Connecticut, could be condemned for “economic development.” There was no claim that the area was blighted. The project called for a luxury hotel, upscale condominiums, and office buildings to replace the homes and small businesses that had been there. The new development project would supposedly bring more tax revenue, jobs, and general economic wealth to the city. Connecticut's statutes allow eminent domain for projects devoted to “any commercial, financial, or retail enterprise.” Conn. Gen. Stat. § 8-187.

The Fifth Amendment to the U.S. Constitution states, “[N]or shall private property be taken for public use, without just compensation.” Yet in the *Kelo* decision, Justice Stevens explains that the fact that property is taken from one person and immediately given to another does not “diminish[] the public character of the taking.” The fact that the area where the homes sit will be leased to a private developer at \$1 per year for 99 years thus, according to the Court, has no relevance to whether the taking was for “public use.” Instead, the *Kelo* decision imposes an essentially subjective test for whether a particular condemnation is for a public or private use: Courts are to examine whether the governing body was motivated by a desire to benefit a private party or concern for the public. Thus, because the New London city officials intended that the plan would benefit the city in the form of higher taxes and more jobs, the homes could be taken.

The Court's decision allows cities to take homes or businesses and transfer them to developers if they think the developers *might* generate more economic gains with the property. The Court also rejected any requirement that there be controls in place to ensure that the project live up to its promises. According to the majority, requiring any kind of controls would be “second-guess[ing]” the wisdom of the project.

Worse yet, cities do not need to have any use for the property in the foreseeable future in order to take it. In fact, the opinion encourages cities to condemn first and find developers later; the Court claims that it is “difficult to accuse the government of having taken A’s property to benefit the private interests of B when the identity of B was unknown.” In the future, then, cities can negotiate a sweetheart deal but wait until after the condemnation to actually sign it. Or they can simply take property first and market it to developers later. Some of the homes in Connecticut were being taken for some unidentified use and others for an office building that the developer had stated it would not build in the foreseeable future.

So, according to the Supreme Court, cities can take property to give to a private developer with no idea what will go there and no guarantee of any public benefit.

If the majority thinks they offered any meaningful protection to home and business owners, they are completely disconnected from reality. The decision suggests some extremely minor limits to the use of eminent domain for private development. Those few condemnors in cities that don’t bother to do a plan, fail to follow their own procedures, or actually engage in corruption may still find some hope in federal court. But there is almost always a plan; cities are quite adept at following their own procedures; and most cases of eminent domain abuse do not involve outright and blatant corruption, such as bribes. Consequently, the vast majority of individuals are left entirely without federal constitutional protection.

The Supreme Court’s *Kelo* Decision Changes the Law and Threatens All Home and Business Owners.

Some commentators are claiming that *Kelo* didn’t change anything and therefore no one needs to worry about it. This statement is wrong on two levels: *Kelo* did change the law, and to the extent that governments were already taking homes and businesses for private commercial development, that’s cause for greater concern, not less. *Kelo* threw a spotlight on an already-existing practice that an overwhelming majority of people find outrageous and un-American. More importantly, by declaring that there are virtually no constitutional limitations on the ability of cities to take property from A and give it to B, the Court invited more abuse and thus made the problem of eminent domain abuse much worse.

The law before *Kelo* did sometimes allow condemnation of property that would result in private ownership, but each of these situations was extremely limited.¹ None

¹ *National Railroad Passenger Corp. v. Boston and Maine Corp.*, 503 U.S. 407 (1992) (railroad track transferred to another common carrier); *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229 (1984) (land ownership transferred to lessees as part of program to break up remnants of feudal land system dating from Hawaii’s pre-state monarchy); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) (pesticide research results available to later pesticide producers; obviously related to public health); *Berman v. Parker*, 348 U.S. 26 (1954) (single unblighted building in severely blighted area taken as part of large project to clear slum and redevelop); *Strickley v. Highland Bay Mining Co.*, 200 U.S. 527 (1906) (aerial bucket line for mining ore, available to any user); *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112 (1905) (condemnation for construction of irrigation ditch as part of statewide irrigation infrastructure program); *Head v. Amoskeag*, 113 U.S.

necessitated the decision of the majority in *Kelo*.

Indeed, four members of the Court agreed that its prior decisions did not dictate the result in *Kelo*. Justice Sandra Day O'Connor broke those previous cases into three categories: (1) transfers of property from private ownership to public ownership; (2) transfer of property to a privately owned common carrier or similar public infrastructure; (3) transfer of property to eliminate an identifiable public harm. But, as pointed out by Justice O'Connor, "economic development" fits into none of these categories. Now, government may condemn property as long as there is a plan to put something more expensive there.

The text of the Constitution does not change, so the question in any constitutional case is how the Court will apply that law to the facts. How far will it go in either enforcing or ignoring constitutional rights? For example, we know that the First Amendment protects free speech. But how far will the Court go in enforcing that right? The Court has applied free speech protections to everything from advertising and the internet to criticism of the government and Nazi marches. In one sense, of course, the "law" did not change; the Constitution reads the same, and the Court still says that free speech is important. But in fact, each of these decisions did change the law, because they applied it to a new situation. In the same way, in *Kelo*, the Court applied the Fifth Amendment to a different and far more extreme type of use of eminent domain and upheld it. In *Kelo*, the Court went to extraordinary lengths to ignore the constitutional mandate that property only be taken for "public use," and thus went much further than it ever had before.

So when some law professors say that nothing has changed, what they mean is that the Court's general statements about public use have not changed. The Court has said for a number of years that it applies great deference to government decisions that a condemnation served a public use. At the same time, the Court had always said that there was a limit, that government could not take property from A in order to give it to B for B's private use. But in constitutional law, it's the application of general statements to facts that tells how seriously the Court takes constitutional rights. The question in every case, therefore, was whether the particular use of eminent domain fell into the category of deference or whether it went too far and would be held unconstitutional. Before *Kelo*, we knew that government could take property in deeply troubled, almost uninhabitable areas and transfer it to private developers. Now we know that government can take **any** property and transfer it to private developers. Only a lawyer would be unable to tell the difference.

Commentators are right that local governments, as a matter of practice, have been using eminent domain to assist private developers on a regular basis for years. That fact should be a cause for deep concern, not comfort that nothing has changed. More than 10,000 properties were either taken or threatened with condemnation for private development in a five-year period.² Because this number was reached by counting properties listed in news articles and cases, it grossly underestimates the number of condemnations and threatened condemnations. In Connecticut, the only state that keeps separate track of redevelopment condemnations, we found 31, while the true

9 (1885) (riparian rights for private mill; Court explicitly refused to hold that economic benefits justified condemnation).

² Dana Berliner, *Public Power, Private Gain: A Five Year, State-By-State Report Examining the Abuse of Eminent Domain* (2003) (available at <http://www.castlecoalition.org/report/>).

number was 543. Now that the Supreme Court has actually sanctioned this abuse in *Kelo* and refused to provide any meaningful limits, the floodgates to further abuse have been thrown open. Home and business owners have every reason to be very, very worried now. As Justice O'Connor noted 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."

So while there may be no change to the general idea of deference to legislative determinations of public use, there has been a different, more far-reaching application of it. That new application will change property ownership as we know it. That is not an overstatement. There had been many condemnations for private use going on before this decision. But cities still knew that there was no case upholding eminent domain for economic development. That provided some restraint or caution. Now, there is no reason to show any restraint.

Eminent Domain Is Not Necessary for Economic Development.

City officials often claim that without the power of eminent domain, they will be unable to do worthwhile projects and their cities will fall into decline.

These claims are at best disingenuous, and at worst outright dishonest. There are many, many ways to encourage economic growth that do not involve taking someone else's property. These include, for example, economic development districts, tax incentives, bonding, tax increment financing, Main Street programs, infrastructure improvements, relaxed or expedited permitting, and small grants and loans for façade improvements.³ Will a developer be able to put condos and a superstore on whatever piece of prime real estate it selects without using eminent domain? Maybe, maybe not. Will the city be able to have economic development? Absolutely.

Development happens every day, all across the country, without the use of eminent domain. At the same time, projects that do use eminent domain often fail to live up to their promises, and they also impose tremendous costs – both economic and social – in the form of lost communities, uprooted families, and destroyed small businesses. Urban renewal is now widely recognized as one of the worst policy initiatives ever undertaken in our cities, destroying inner cities and displacing thousands of minorities and elderly citizens.⁴ But at the time, of course, it was touted as a brilliant tool of revitalization. The condemnation of the Poletown neighborhood in Detroit for a General Motors manufacturing plant in 1981, one of the most infamous economic development condemnations, failed to bring prosperity to the city. Indeed, it cost the city millions of

³ See Brief *Amicus Curiae* of John Norquist on behalf of Petitioners in *Kelo v. City of New London* (John Norquist is the former mayor of Milwaukee and President of the Center for New Urbanism); Brief *Amicus Curiae* of Goldwater Institute, *et al.* on behalf of Petitioners in *Kelo v. City of New London*. (All of the amicus briefs cited in this paper are available at <http://www.ij.org/kelo>.)

⁴ See Mindy Thompson Fullilove, *Root Shock: How Tearing Up City Neighborhoods Hurts America, And What We Can Do About It* (One World 2005); Wendell Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1 (2003); Brief *Amicus Curiae* of Jane Jacobs on behalf of Petitioners in *Kelo v. City of New London*; Brief *Amicus Curiae* of NAACP, AARP, *et al.* on behalf of Petitioners in *Kelo v. City of New London*; Brief *Amicus Curiae* of Better Government Assoc., *et al.* on behalf of Petitioners in *Kelo v. City of New London*.

dollars and may well have destroyed more jobs than it created.⁵ Defenders of eminent domain for private development present a false choice between protecting people's rights and economic development. In fact, we can have both.

Eminent Domain Is Not Used as a "Last Resort."

Many municipal officials claim that they use eminent domain responsibly and only as a "last resort." This is simply not true. In most cases, the threat of eminent domain plays an important role from the very beginning of negotiations. Cities know that most home and business owners will be unable to afford the tremendous legal costs associated with fighting eminent domain; this fact gives cities a strong incentive to threaten property owners with condemnation. People are told that if they do not sell, their home or business will be taken from them and they will get even less money. Cities plan projects on the assumption that there is no need to incorporate existing homes or businesses, because they can simply be taken. After cities design and pursue such projects, current owners are told to sell. If they do not, then eminent domain becomes a "last resort." In practice, the power of eminent domain often makes voluntary sales less likely, because owners who would have sold if treated with respect will refuse to once they have been threatened.

Changes to Planning and Hearing Procedures Will Not Stem the Tide of Eminent Domain Abuse.

Various commentators are suggesting that legislators can take a "moderate," "sensible" approach to the *Kelo* decision and just require a process with more public input and better planning. These measures will do nothing to protect the rights of home and business owners. The City of New London had a lengthy process, with studies, plans and public hearings. None of this lengthy process made any difference, however, because a deal had been cut before the process even began. Local legislators typically know the outcome they want and then follow the procedures necessary to get it. City councilors and planning officials don't even need to listen at public hearings, because they already know how they are going to vote.

Better planning is also no solution and will do nothing to protect home and business owners from losing their property to private developers. Planners call for even more of the kind of planning that, if implemented, necessitates forcing some people out of their homes and businesses to make way for other, supposedly better-planned uses. Thus, we hear calls for comprehensive plans that outline every future use of property in the city and integrated redevelopment plans that implement the comprehensive plans for replacing current owners with other ones. While all of this additional planning will no doubt bring lots of money to planners, it will not prevent the use of eminent domain for private commercial development and in practice will probably encourage more abuse.

The Floodgates Are Opening and the Situation Will Only Get Worse If No Legislative Action Is Taken.

In the wake of the U.S. Supreme Court's decision in *Kelo v. City of New London* upholding the use of eminent domain for private development, the floodgates are

⁵ See Brief *Amicus Curiae* of Jane Jacobs on behalf of Petitioners in *Kelo v. City of New London*. Prepared by the Institute for Justice
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opening to abuse. Already, the ruling has emboldened governments and developers seeking to take property from home and small business owners. Despite claims that eminent domain will be used sparingly, there have been a flood of new condemnations and new proposals of eminent domain for private commercial development after the *Kelo* ruling. In the first two months after the decision, more than 30 municipalities began condemnation proceedings for private development or took action to authorize them in the near future. Thousands of properties are now threatened with eminent domain for private commercial development, and those numbers will continue to swell unless state legislatures and Congress listen to their constituents and end the abuse of eminent domain.

Creating an Effective Statutory Protection Against Eminent Domain Abuse

Basic elements of a good law:

The outline below sets forth the basic elements of a law that will genuinely protect citizens from losing their land to other private parties for private development.

- Remove statutory authorizations for eminent domain for private commercial development.
- Explicitly forbid eminent domain for private commercial development and/or require that condemned property be owned and used by government or a common carrier.
- Prohibit “ownership or control” by private interests. In many cases, a government entity will technically own the property but lease it for \$1 per year to a private party.
- Ensure that the statute or constitutional amendment applies to all entities that engage in eminent domain, using a term like “all political subdivisions.”
- Clearly state any exceptions, i.e., any circumstances where property can be taken for private commercial entities. The main exception that should be made is private entities that are “common carriers” – these include railroads and utilities.
- If blight is an exception, revise blight definitions to clearly define the type of blight required to justify the use of eminent domain and require that the property has serious, objective problems before it can be taken for private development.
- Disentangle the designation of a redevelopment area for funding purposes and an area where property may be taken for private development. This allows cities to still get funding and acquire property voluntarily but prevents the use of eminent domain for private development.
- Require government to bear the burden of showing public use or blight, or at least put the parties on equal footing, with no presumption either way. The current rule typically means that the government’s finding of public use or blight is conclusive, unless the owner can prove fraud, arbitrariness, or abuse of discretion.
- If allowing condemnation of unblighted property in blighted areas, require that the property be essential for the project.

Additional useful provisions

- Have blight designations expire after a certain number of years.
- Give owners the opportunity to rehabilitate property before it can be condemned.
- Return property to former owners if it is not used for the purpose for which it was condemned.

Common pitfalls in proposed reform legislation:

- Giving a complete exemption for any property taken under urban development laws and failing to change the definition of blight.
- Forbidding eminent domain for economic development without defining economic development.
- Forbidding condemnation for “solely” or “primarily” for economic development or private benefit. Whether a particular condemnation is solely or primarily for a particular purpose requires a judge to look at the intent of the governmental decision-makers. The legality of eminent domain should not depend on the subjective motivations of city officials, and proving intent as a factual matter is extremely difficult.
- Creating specific exemptions for pet projects. This will set a bad precedent for the future.
- Forbidding only ownership by private parties but not control. This leaves open the common practice of sweetheart lease arrangements.
- Making loopholes or accidentally omitting some of the political entities that engage in condemnation for private development.