



Kelo v. City of New London, Connecticut A QUICK PRIMER ON EMINENT DOMAIN

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The United States Supreme Court's recent decision in the case of *Kelo v. City of New London, Connecticut*, 125 S.Ct. 1241, 73 U.S.L.W. 3493, 160 L.Ed. 1093 (U.S. Conn. 2004), is only the most recent salvo in a battle that has raged since the beginning of our great republic. The framers of the Constitution had an inherent fear of governmental excesses after years of abuse from the English crown. Taxation without representation, the quartering of British troops, and other governmental invasions on the colonists' property rights led to the inclusion of certain protections in the Bill of Rights.

Among the safeguards provided for in the first ten amendments to the Constitution is the Takings Clause. Although the Fifth Amendment is known better for its role in criminal proceedings, it also states that no private property can be taken for public use without due process of law and just compensation. It is the "public use" requirement that has garnered the most attention recently, and it was the central issue in the *Kelo* case. More specifically, *Kelo* centered on whether a desired increase in tax revenue is a sufficient "public use" to justify a taking.

The *Kelo* case arose when the City of New London, Connecticut, attempted to exercise its power of eminent domain to claim several pieces of private property in order to build new homes and retail space. The municipality wanted to redevelop the area to enlarge the tax base, thereby increasing tax revenue. The local residents whose homes would be taken challenged the seizure on the grounds that increased tax revenue is not a sufficient public use under the Fifth Amendment.

The Supreme Court was closely divided on the issue, but ruled in a 5-4 decision that increased tax revenue was a sufficient public use to justify the utilization of eminent domain. The Court used

a broader "public purpose" test and ruled that the legislative body is entitled to deference when it defines the public purpose. In a stinging dissent, Justice Sandra Day O'Connor disagreed, stating that the deference allotted by the Court deprives the Court of its role in "checking" the power of the legislature. She continued by arguing that permitting an increase in the tax base to serve as a "public purpose" opens the door to abuse of the power of eminent domain. By analogy, she argued that the Court's decision suggested that a local municipality could condemn an Econo Lodge Motel in order to sell the property to a private developer to build a Ritz Carlton Hotel because the more expensive hotel might increase tax revenue.

Justice O'Connor's dissent struck many people as the correct approach. American opinions on this issue have not changed substantially since the 18th Century. Current polls suggest that eighty percent of Americans oppose the use of eminent domain, and the polling data cuts across all demographic and political lines. Understanding this fact, Congress and state legislatures have started to react. Alabama passed new laws this summer to curb the use of eminent domain. Many other states, including Pennsylvania, are considering legislation which would ban or limit the use of eminent domain. Since the U.S. Supreme Court only set the outer limits and deferred to state legislatures on its use, legislatures can take steps to defang the Supreme Court's ruling.

This is an issue worth tracking, as many communities in our region and across the country are facing similar dilemmas to those faced in New London. Stagnant tax bases are causing local governments to consider the use of eminent domain to redevelop areas for new uses that will increase the taxable base. Court challenges will likely result as residents and business owners affected by the use of eminent domain try to block the seizure of their property. Others will support its use for an array of reasons. Elected officials are taking steps intended to address the problems discussed in *Kelo*, but only time will tell if the statutes will be effective. For now, the use of eminent domain to redevelop an area is legal, but it remains largely unpopular with the public.

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