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EMINENT DOMAIN AFTER *KELO V. CITY OF NEW LONDON*: COMPENSATING FOR THE SUPREME COURT'S REFUSAL TO ENFORCE THE FIFTH AMENDMENT

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"[N]or shall private property be taken for public use, without just compensation." U.S. Constitution, Amendment 5.

Governments, both state and federal, have the right to take private property for public use, provided that just compensation is paid. The Fifth Amendment to the United States Constitution sets the legal standard for these propositions; this power is known as the right of eminent domain. In the landmark decision, *Kelo v. City of New London*, the Supreme Court held that the taking of a citizen's private property for economic development qualified as a public use within the meaning of the Fifth Amendment. Several scholars, legislatures, and individuals, have objected to *Kelo's* extension of the power of eminent domain. The ruling has extended the government's power of eminent domain to areas once thought unimaginable.

Instead of critiquing the merits of the majority's decision, this commentary will focus on practical applications in a post-*Kelo* world. Its purpose is twofold: first, to serve as a guide to individuals and state legislators assessing what the *Kelo* decision says, and second, to assist all individuals attempting to protect their Fifth Amendment rights in meaningful way post-*Kelo*. Part I is a guide to the facts of the *Kelo* case. An understanding of the *Kelo* facts will allow practitioners to compare or distinguish future property rights and eminent domain cases. Following the facts section, Part II covers the legal framework of the *Kelo* decision by discussing and analyzing two prior eminent domain cases relied upon by the *Kelo* majority. This section provides an explanation for the Court's ultimate expansion of eminent domain power. Finally, Part III offers suggestions for post-*Kelo* actions individuals can lobby for and legislators can follow to ensure protection of their constituents' Fifth Amendment rights.

FACTUAL BACKGROUND OF *KELO V. NEW LONDON*

By the early 1990's, the City of New London, Connecticut already had experienced decades of economic decline. By 1998, the city witnessed an unemployment rate nearly double that of the rest of the state, and harbored a shrinking population of just under 24,000 residents, its lowest since 1920. These conditions prompted state and local officials to target New London, particularly its Fort Trumbull area, for economic revitalization. To help accomplish economic revitalization, the New London City Government reactivated the New London Development Corporation (NLDC), a private nonprofit entity. In January of 1998, the Connecticut legislature authorized \$15 million in bonds to help fund and support NLDC's planning, and for the creation of Fort Trumbull State Park.

In February 1998, Pfizer Inc., the pharmaceuticals manufacturer, announced that it would build a global research facility near the Fort Trumbull State Park and the Fort Trumbull residential neighborhood. Two months later, the New London City Council gave initial approval for the

NLDC to prepare the development plan, which later became the center of the *Kelo* lawsuit. It was a plan to develop 90 acres of the Fort Trumbull neighborhood that would complement the facility Pfizer was planning to build, creating jobs and increasing tax and other revenues.

The following developments would be included in the plan: 80 to 100 new residences, a resort hotel and conference center, a new state park, and retail, research and office space. It divided the area into seven parcels, but did not specify the exact plans for development in any but the first parcel (the resort and hotel conference center). In 2000, the City approved the development plan and authorized the corporation to begin acquiring land in the Fort Trumbull neighborhood.

The Fort Trumbull neighborhood was composed of 115 residential and commercial lots, which the NLDC immediately offered to buy. When the owners of fifteen of the properties did not wish to sell, the City of New London moved to acquire the properties through eminent domain. The homeowners in question owned properties in a total of just two of the plan's seven parcels, Parcel 3 and Parcel 4A. Further, the development plan only called for nominal use of these parcels; for instance, parcel 3 was slated for construction of research and office space as the market progressed for such space, and parcel 4A was slated for park support.

In response to the City's efforts, nine of the homeowners sued the City of New London and the NLDC to save their homes. The owners maintained that the U.S. Constitution prohibited the NLDC from condemning their properties for the sake of economic development, arguing that such development by private developers was not a public use under the Fifth Amendment. At oral argument, lawyers for the city noted the city's proposed use for parcel 3 and 4A was vague, with possible future use limited for parking facilities. Despite an ill defined and unclear conceptualized public use, the city's argument in favor of public use succeeded.

THE LEGAL FRAMEWORK FOR THE *KELO* CASE

The legal outcome of the *Kelo* case turned on the question of whether New London's economic development plan qualified as a **public use**, or rather, served a **public purpose**. In *Kelo*, the Court began by clarifying two established and opposite public use propositions. First, it was established that a state or local government could not take the private property of party A for the sole purpose of transferring it to another private party B, even if A was paid just compensation for the property. On the other hand, it was equally clear that a state could transfer property from one private party to another if future use by the public was the purpose of the taking. The condemnation of land for a railroad with common-carrier duties is an example of a public-use taking. Another example is the condemnation of property used for utility lines or irrigation ditches, all shared for use by the public.

THE *BERMAN* AND *MIDKIFF* CASES

Kelo was the first major case the U.S. Supreme Court heard involving the taking of real property by eminent domain since 1984, and only the second since 1954. Therefore, only two cases from the past fifty years helped guide the Court in confronting a case that fell somewhere between the two bedrock principles mentioned above. In order to understand *Kelo*, it is important to understand these two decisions.

In 1954, the Supreme Court upheld a redevelopment plan as being a public use in *Berman v. Parker*. *Berman* involved a blighted area of Washington, D.C. in which over half of the housing for the area's 5,000 inhabitants was beyond repair, and was a threat to public health and safety. The government's response to the area was to pass the 1945 District of Columbia Redevelopment Act. Under section 2 of that Act, Congress declared it the policy of the United States to eliminate all substandard housing in Washington, D.C. because such areas were injurious to the public health, safety, morals, and welfare. Under Congress's plan, the area would be condemned and property taken through the use of eminent domain in order that part of it could be utilized for the construction of streets, schools, and other public facilities. An owner of a department store located in the blighted area challenged the condemnation as an invalid public use on two grounds: first, his property was commercial and not residential or slum housing, and second, his property was being condemned for sale to a private agency for redevelopment.

Ultimately the *Berman* case concerned the constitutionality of the Act, and the use of eminent domain by Congress. A unanimous Court upheld the Act. It held that once the legislature had determined that the use of eminent domain was for a public use, the role of the courts in reviewing the legislature's judgment was extremely narrow.

Thirty years later, in 1984, the Court upheld another eminent domain case involving the taking of private property in *Hawaii Housing Authority v. Midkiff*. Again, deference to the legislature was involved in the Court's reasoning. The *Midkiff* case involved a scheme arranged by the Hawaii legislature whereby Hawaii used its eminent domain power to acquire lots owned by large landowners, and then transferred the lots to the tenants living on them, or to other non-landowners. The facts of the *Midkiff* case were unusual because of the tremendous inequality in land ownership in Hawaii at the time – a consequence of Hawaii's plantation past. For instance, on the island of Oahu, 22 landowners owned 75.5% of the privately-owned land, forcing thousands of homeowners to lease rather than to buy the land under their homes.

These circumstances helped promote social inequality and generated social unrest. Through redistribution of property, the problems attributed to the land oligopoly and deficiencies in the real estate market could be corrected, and a majority of the public would tangibly and directly benefit from the legislation. Importantly, since the scheme was a rational attempt to remedy a social evil, or correct a public harm, the Court held that it qualified as a public use. In explaining its decision, the *Midkiff* Court mentioned the need to give legislatures broad latitude to determine what public needs justify the use of the takings power.

THE *KELO* DECISION

Relying heavily on *Berman* and *Midkiff*, the Connecticut Supreme Court concluded that the economic development involved in the *Kelo* case constituted a public use under both the Connecticut State Constitution and the U.S. Constitution. The United States Supreme Court affirmed in a 5-4 decision led by Justice Stevens. Early in the opinion, Justice Stevens turned to *Berman* and *Midkiff* and made it clear that the Supreme Court granted great deference to state legislatures in determining which public needs justified the use of eminent domain in their particular circumstances. One unifying theme among these three cases is the general application of deference to state governments, and the evolution of this deference.

While *Berman* and *Midkiff* deferred, *Kelo* represents the first time the Court used deference to avoid the constitutional question completely. Instead, the Court turned deference to legislative judgment into a threshold question. The majority opinion gave a disappointing cursory review as to whether the economic development in *Kelo* qualified as a public use under the Fifth Amendment. Justice Stevens took the position that no principled way existed of distinguishing the *Kelo* economic development from the public purposes recognized in *Berman* and *Midkiff*. Such a position only left him with the possibility to grant the legislature deference and rely on its judgment prior judgment regarding the taking.

Although the *Kelo* Court articulated a deferential position towards state governments, the majority also noted three factors that limited its scope of review over the City of New London's taking. These factors could be important, as they may not be present in all takings cases. First, New London had invoked a state statute that specifically authorized the use of eminent domain to promote economic development. Second, the statute was comprehensive in character. Third, the statute had been thoroughly deliberated preceding its adoption. The state's due process in passing these statutes contributed greatly to the Court's deference. The absence of these factors may be one way to distinguish future cases from *Kelo*.

Justice O'Connor's dissent distinguished *Kelo* from both *Berman* and *Midkiff*, pointing out that both cases involved takings that were effected to remedy extraordinary situations that had inflicted affirmative harm on the public. There was no infliction of affirmative harm occurring in New London, however, and by authorizing the condemnation of well maintained property for the sole purpose of generating economic development O'Connor stated that, "the Court has so greatly expanded the definition of public use that it now includes virtually all exercises of eminent domain." Further, O'Connor pointed out that nearly all takings benefit the public in some way. Since large private companies could use private property in a more lucrative way, the majority's reasoning would create a standard under which no private property would be truly safe.

Justice Thomas wrote a separate dissenting opinion. He agreed with Justice O'Connor that by approving economic development as a public use, the Court was effectively removing any constitutional impediment on the use of eminent domain. Justice Thomas moved further, however, and pressed for revisiting the Public Use Clause cases and a return to the original meaning of the Public Use Clause: that the government may take property only if it actually uses or gives the public a legal right to use the property.

The other fundamental position and critical distinction Justice Thomas highlighted was the Court's confusion and error in equating the power of eminent domain with the police power of the States. Justice Thomas traced this confusion to the following statement the Supreme Court made in the *Midkiff* decision: "the public use requirement is conterminous with the scope of a sovereign's police powers." Thomas pointed out that these two powers are not the same. For example, traditional uses of the police or regulatory power of States, such as the power to abate a nuisance, does not require compensation, as does the use of eminent domain.

Furthermore, if the critical distinction discussed by Justice Thomas, the question of whether a State can take private property using the power of eminent domain becomes distinct from the

question of whether it can regulate property pursuant to the police power. Even *Berman* would have been decided on different grounds had these distinct lines been drawn. Simply, under Thomas's view, if the slums in *Berman* were truly blighted, then the state nuisance laws, not the power of eminent domain, should have provided the appropriate remedy.

Despite Justice Thomas' and Justice O'Connor's dissents, the *Kelo* decision presently affirms the use of eminent domain for economic development. Thus, we arrive at the best way to proceed post-*Kelo*.

WHAT ACTION TO TAKE POST *KELO*

After the *Kelo* decision, it has become clear that the protection of the Fifth Amendment is now in the hands of state governments. The Supreme Court itself has clearly stated that federal courts will defer to state legislatures in their determination of what constitutes a public use in the area of eminent domain. This is the common thread linking fifty years of Court jurisprudence, stretching from the *Berman* decision to the *Kelo* decision. The seminal event was reached in *Kelo*, when Justice Stevens instructed states to strengthen their own property rights if they were dissatisfied with the decision. Now, a proper legislative response should consider three things: (1) clearly defining the difference between a state's regulatory or police power, and its eminent domain power; (2) clearly defining what qualifies as a public use under eminent domain; and, (3) creating a property rights ombudsman office.

Clearly Define the Difference Between State Regulatory Power and State Eminent Domain Power

One of the most important steps a legislature can take to compensate for the *Kelo* decision is to draft legislation that makes clear the distinction between its state's regulatory or police power, and its eminent domain power. Simply, the purpose of the police power is to secure rights by prohibiting harms. The purpose of the eminent domain power is to provide public goods by taking private property, but only after paying the owner just compensation. Therefore, it may be said that the state takes property by eminent domain when it is useful to the public, while the state takes property under the police power when it is harmful. Thus, a legislature may clarify that its state's police power will be used to solve nuisance-type problems and prohibit harms, and reserve eminent domain power to situations that provide a public use or public good.

Circumstances that fit into neither definition are out of the grasp of the government's hands and are firmly protected for the individual. This is an important and balanced provision, as it keeps individual property owner's rights intact, while still allowing municipalities to fight problems that are creating public harms. Cities, states, and legislators have many options when confronting eminent domain issues, and they represent a large continuum of responses, many of which need not trample individual property rights to be successful.

In this regard, it is important for legislators and advocates to not engage in a debate that sets up a false dichotomy between economic development and strong property rights. For evidence of this proposition, it is worth examining the City of Anaheim, California. Anaheim's old downtown had been obliterated in the 1970s through past uses of eminent domain for urban renewal, which were not successful and were costly to their taxpayers. When recently faced with economic and city redevelopment, instead of trying eminent domain again, the city pursued deregulation. By

forming an overlay zone that removed zoning restrictions and allowed almost any imaginable use of the downtown property, they created a land value premium in the depilated area. Because owners could suddenly sell to a wider range of buyers, the area boomed, and billions of dollars of investment money flowed in. In short, Anaheim succeeded in protecting property rights by deregulating land uses and promoting competition.

Clearly Define What Qualifies as a Public Use or Purpose

Second, a proper legislative response should clearly define what qualifies as a public use. There are only two constitutional requirements for the exercise of eminent domain power: that the use be public, and that the owner receive just compensation. The most straightforward manner in which to compensate for the *Kelo* decision is to draft legislation that clearly explains that economic development does not constitute a public use in your state.

Consider Establishing Ombudsman Offices

Finally, a proper legislative response to *Kelo* would be to establish a property-rights ombudsman office within your state. A property-rights ombudsman office could be available to individuals when they are confronting a condemnation by the government and trying to assess whether the government's proposed use fits the definition of a public use, or whether the government's valuation of their property is fair and accurate. An ombudsman could also encourage state and local government agencies to regulate and acquire land in a manner that is consistent with applicable statutes and laws.

An ombudsman office is important because the burden of eminent domain falls disproportionately on the poor, and the poor are the least likely to be able to afford legal assistance. This is especially true when individuals want to contest whether a proposed eminent domain action fits the definition of a public use, since there is no guaranteed monetary value to attract legal assistance on a contingent fee basis. A state can help solve this problem by making a property-rights ombudsman available to all individuals; some states already do.

CONCLUSION

Post *Kelo*, it is necessary for individuals and state legislators to realize that the protection of Fifth Amendment rights is now in their hands. I have detailed three steps states can take to help ensure the protection of these rights. Undoubtedly, there are other steps states can take. Even though the Supreme Court upheld the Connecticut Supreme Court's decision in *Kelo*, there is no reason why legislatures cannot take steps to protect the Fifth Amendment private property rights of their citizens in a meaningful way.

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