

# **States Curbing Right to Seize Private Homes**

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Published: February 21, 2006

In a rare display of unanimity that cuts across partisan and geographic lines, lawmakers in virtually every statehouse across the country are advancing bills and constitutional amendments to limit use of the government's power of eminent domain to seize private property for economic development purposes.

The measures are in direct response to the United States Supreme Court's 5-to-4 decision last June in a landmark property rights case from Connecticut, upholding the authority of the City of New London to condemn homes in an aging neighborhood to make way for a private development of offices, condominiums and a hotel. It was a decision that one justice, who had written for the majority, later all but apologized for.

The reaction from the states was swift and heated. Within weeks of the court's decision, Texas, Alabama and Delaware passed bills by overwhelming bipartisan margins limiting the right of local governments to seize property and turn it over to private developers. Since then, lawmakers in three dozen other states have proposed similar restrictions and more are on the way, according to experts who track the issue.

The National League of Cities, which supports the use of eminent domain as what it calls a necessary tool of urban development, has identified the issue as the most crucial facing local governments this year. The league has called upon mayors and other local officials to lobby Congress and state legislators to try to stop the avalanche of bills to limit the power of government to take private property for presumed public good.

The issue is not whether governments can condemn private property to build a public amenity like a road, a school or a sewage treatment plant. That power is explicit in the takings clause of the Fifth Amendment, provided that "just compensation" is paid. The conflict arises over government actions to seize private homes or businesses as part of a redevelopment project that at least partly benefits a private party like a retail store, an apartment complex or a football stadium.

"It's open season on eminent domain," said Larry Morandi, a land-use specialist at the National Conference of State Legislatures. "Bills are being pushed by Democrats and Republicans, liberals and conservatives, and they're passing by huge margins."

Seldom has a Supreme Court decision sparked such an immediate legislative reaction, and one that scrambles the usual partisan lines. Condemnation of the ruling came from black lawmakers representing distressed urban districts, from suburbanites and from Western property-rights

absolutists who rarely see eye to eye on anything. Lawmakers from Maine to California have introduced dozens of bills in reaction to the ruling, most of them saying that government should never seize private homes or businesses solely to benefit a private developer.

The Supreme Court seemed to invite such a response in its narrowly written ruling in the case, *Kelo v. City of New London*. Justice John Paul Stevens, writing for the majority, expressed sympathy for the displaced homeowners and said that the "necessity and wisdom" of the use of eminent domain were issues of legitimate debate. And, he added, "We emphasize that nothing in our opinion precludes any state from placing further restrictions on its exercise of the takings power."

Two months after the ruling, addressing a bar association meeting, Justice Stevens called it "unwise" and said he would have opposed it had he been a legislator and not a federal judge bound by precedent.

Plenty of legislators took the hint.

The issue was one of the first raised when Connecticut lawmakers returned to session early this month. There are bills pending in the Legislature to impose new restrictions on the use of eminent domain by local governments and to assure that displaced businesses and homeowners receive fair compensation.

(The New London project is essentially delayed, even after the Supreme Court go-ahead, because of contractual disputes and an unwillingness to forcibly remove the homeowners who sued to save their properties.)

In the New Jersey Legislature, Senator Nia H. Gill, a Democrat from Montclair who is chairwoman of the Commerce Committee, proposed a bill to outlaw the use of eminent domain to condemn residential property that is not completely run down to make room for a redevelopment project. The bill, which is pending, would require public hearings before any taking of private property to benefit a private project.

In New York, State Senator John A. DeFrancisco, a Republican, has proposed a measure similar to one in other states that would remove the right to exercise condemnation power from unelected bodies like an urban redevelopment authority or an industrial development agency.

Texas was one of the first states to act after the *Kelo* ruling, taking up the issue in a special legislative session that was supposed to focus solely on education. Gov. Rick Perry, a Republican, signed a bill on Sept. 1 that prohibits use of eminent domain to benefit a private party, with certain exceptions. Among those exceptions is the condemnation of homes to make way for a new stadium for the Dallas Cowboys.

The sponsor of the Texas measure, Senator Kyle Janek, Republican of Houston, said the state was weighing an amendment to cement the eminent domain restrictions, but that process can take years. He sponsored his bill, he said, because "We wanted something in place quickly that the governor could sign and would take immediate effect."

The bill could affect a huge highway project now in the planning stages known as the Trans-Texas Corridor, a public-private toll road and rail project that would require the taking of large swaths of privately owned land.

There are six proposed laws and five constitutional amendments before the California Legislature, as well as several proposed citizen initiatives to curb the eminent domain power. The bills are supported by, among others, the California Farm Bureau Federation, which fears that the Kelo ruling will empower cities to gobble up more farmland to build subdivisions and strip malls.

The lobbyist for California's local economic development agencies said the ruling and the resultant legislation had been a nightmare.

"My life hasn't been the same since June 23, 2005," said the lobbyist, John F. Shirey, executive director of the California Redevelopment Association, referring to the date the Supreme Court handed down the ruling. The group represents 350 local redevelopment authorities around California and believes such agencies need the eminent domain power to rebuild distressed cities.

Ohio's legislature, acting swiftly and unanimously after the Kelo decision, declared a moratorium on all government takings until the end of 2006. The state has created a 25-member bipartisan panel to study the issue and make recommendations for changes, if necessary, in Ohio's eminent domain statutes. The sponsor of the moratorium measure, Senator Timothy J. Grendell, a Republican lawyer who specializes in property rights cases, noted that the Ohio Supreme Court was now weighing a potentially crucial eminent domain case involving the city of Norwood, a suburb of Cincinnati.

In that case, city officials have approved a plan to condemn about 60 homes to make way for an upscale office and retail complex. The homeowners are represented by lawyers from the Institute of Justice, a public interest law firm that litigates against what it calls eminent domain abuse and that represented the plaintiffs in the New London case.

Scott G. Bullock of the Institute for Justice described the Norwood case as an important test of property rights law in the post-Kelo era, but would not predict how the Ohio court would rule. He said he hoped to take another case before the Supreme Court in the next few years to determine whether the courts can curb eminent domain power further, even as state legislatures act on their own.

Mr. Bullock said he expected municipal officials and redevelopment authorities to try to fight the wave of eminent domain legislation by offering cosmetic changes to existing law, for example by requiring an extra hearing or an economic impact statement. But he said that major changes were coming in how the takings power of government is used.

"Our opposition to eminent domain is not across the board," he said. "It has an important but limited role in government planning and the building of roads, parks and public buildings. What

we oppose is eminent domain abuse for private development, and we are encouraging legislators to curtail it."

More neutral observers expressed concern that state officials, in their zeal to protect homeowners and small businesses, would handcuff local governments that are trying to revitalize dying cities and fill in blighted areas with projects that produce tax revenues and jobs.

"It's fair to say that many states are on the verge of seriously overreacting to the Kelo decision," said John D. Echeverria, executive director of the Georgetown Environmental Law and Policy Institute and an authority on land-use policy. "The danger is that some legislators are going to attempt to destroy what is a significant and sometimes painful but essential government power. The extremist position is a prescription for economic decline for many metropolitan areas around the county."