The *Kelo* Case: Taking Liberty With the Takings Clause

Ten years ago court justices deemed it OK to use eminent domain to take property from one American and give it to another if such a move would aid the city in almost any way.

by Jack Kenny

"The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail, its roof may shake; the wind may blow through it; the storm may enter, the rain may enter — but the King of England cannot enter; all his force dares not cross the threshold of the ruined tenement."

— William Pitt the elder

"... nor shall private property be taken for public use without just compensation."

— Amendment V, Constitution of the United States

"Something has gone seriously awry with this Court's interpretation of the Constitution. Though citizens are safe from the government in their homes, the homes themselves are not."

— Supreme Court Justice Clarence Thomas, dissenting opinion in *Kelo v. New London*, 2005

Justice Thomas may have been optimistic in asserting citizens are safe from government in their homes, given the government's predilection for spying and the high-tech resources at its disposal for doing so. But the eminent jurist was certainly justified in his conclusion that the 5-4 majority in the *Kelo* decision had made citizens' homes less safe from government seizure. For the majority upheld a Connecticut Supreme Court ruling that allowed a redevelopment agency for the city of New London to take 15 homes from residents who had refused to sell them to accommodate an economic development plan to lure private enterprises to a waterfront commercial park. It was possibly the most controversial eminent domain case in U.S. history and it sparked a national uproar over judicial interpretations of the "takings clause" of the Fifth Amendment to the U.S. Constitution.

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Susette Kelo has her name forever enshrined in one of the most controversial eminent domain cases of all time. Despite the honor of it all, she would have rather kept her home.

With the courts' blessing, the government seized and razed the homes of Susette Kelo and 14 other homeowners of the city's Fort Trumbull area, which juts out into the Thames River at the point where the river meets the Long Island Sound. Kelo purchased and repaired her Victorian house in 1997. Another house taken for the project had been owned by the same family since the late 19th century. The properties were taken by eminent domain, but plans for multi-million dollar economic development remained just that — plans, until they were finally abandoned. The 91-acre site that once encompassed a residential neighborhood is now a large vacant lot, for which the city occasionally finds an ad hoc use. In 2011, it served as a dumping ground for fallen branches and other debris strewn through the city by Hurricane Irene. That destruction caused

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by the hurricane and the havoc wrought by the courts had at least one thing in common: Both were predictable. The damage caused by the hurricane, however, was, for the most part, temporary. That which has been done to constitutional liberty is of longer duration.

Economic Development Trumps Property Rights

Like most man-made disasters, the plan was full of good intentions. The Fort Trumbull area and the city as a whole had been suffering a decades-long economic decline. As Justice John Paul Stevens noted in the majority opinion of the U.S. Supreme Court, the situation worsened considerably in 1996, when the federal government closed the Naval Undersea Warfare Center, which had employed more than 1,500 people. By 1998, New London's unemployment rate was nearly double that of the state's, and its population, at 24,000, was the lowest it had been since 1920. In an effort to arrest and reverse the decline, the city reactivated the New London Development Corporation (NLDC), a private nonprofit agency created some years earlier to assist in planning and promoting economic development. In January 1998, the state of Connecticut authorized a $5.35 million bond issue to support NLDC's planning activities and another $10 million bond for the creation of a Fort Trumbull State Park. In February, the pharmaceutical company Pfizer, Inc. announced plans for a $300 million research facility on a site adjacent to Fort Trumbull. Seizing on the economic good news, city planners envisioned the Pfizer facility drawing other businesses to the area. The NLDC forged ahead with its plans for Fort Trumbull State Park, receiving initial approval from the City Council and holding a series of neighborhood meetings to educate the public on the project. After gaining approval from various state agencies, the City Council gave its final approval to the plan in January 2000 and designated NLDC as the agency to implement it.

It was an ambitious project, calling for not only acres of commercial development, but also 80 new residences, a pedestrian riverwalk, restaurants, and retail establishments, along with opportunities for leisure and recreational activities on the waterfront and in the park. Anticipated results would include more than 1,000 new jobs, a significant boost of revenue to the city, and an economic revitalization of its distressed downtown and waterfront areas. Some fortunate developer would have a 91-acre waterfront site to develop for the magnificent sum of $1 a year. All that stood in the way of that real estate bonanza were 115 privately owned properties. The NLDC negotiated the purchase of most of the properties but failed to convince Susette Kelo and 14 other homeowners in the area to sell their properties and move out. The agency then began the condemnation proceedings that led to one of the most controversial eminent domain cases in U.S. history.

In the popular mind, the description of a property as "condemned" might conjure up images of rundown shacks lacking adequate plumbing and other amenities, razed for public health or safety reasons in what is commonly called "slum clearance." But that is often not the case in eminent domain proceedings, and it was surely not the case in *Kelo*. As Justice Stevens noted: "There is no allegation that any of these properties is blighted or otherwise in poor condition; rather, they were condemned only because they happen to be located in the development area."

The homeowners took their case to the New London Superior Court, which found some of the takings valid and issued a restraining order regarding the others. Both sides then appealed to Connecticut's Supreme Court, where the justices upheld the lower court ruling that under Connecticut law the taking of land for an economic development project constitutes a "public use" by being in the "public interest." The state's high court found the takings of the properties "reasonably necessary" to the intended "public use" for "reasonably foreseeable needs." By a 4-3 vote, the court determined that all the takings were valid. Even the three dissenters based their objections not on principled, but on pragmatic considerations. They agreed the plan accommodated the constitutionally required "public use," but argued the city failed to show "clear and convincing evidence" that the projected economic benefits of the project would indeed come to pass. The homeowners' appeal eventually reached the U.S. Supreme Court.

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Pfizer, Inc., the giant pharmaceutical company, cancelled its plans for expansion of its New London facility and instead left the city.

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Workers disassemble the house that was Susette Kelo's to make room for the economic development project that never was.

The High Court's "Deference"

"Those who govern the City were not confronted with the need to remove blight in the Fort Trumbull area," Justice Stevens wrote in the majority opinion issued June 23, 2005, "but their determination that the area was sufficiently distressed to justify a program of economic rejuvenation is entitled to our deference." Concern for the "deference" and "great respect" the court owes state legislative decisions, emphasized repeatedly in the majority opinion, might seem ironic coming from a judicial body that swept away virtually all state abortion laws and is even considering whether states may be free to define marriage the way it has been universally defined and understood for millennia. But in his review of previous rulings on the takings clause, Stevens, now a retired justice, showed how the "literal" meaning of public use had "eroded" over time, giving way to "public purpose" as the requirement for compelling people to sell their property to a government agency.

Lands taken for "public use" have typically involved plans for public schools, public parks, or public highways. The taking of land for a railroad company has also been regarded as a public use, since the railroad operating the line will be open to the public, meaning all paying customers. The New London development case, Justice Stevens conceded, was not one in which "the City is planning to open the condemned land — at least not in its entirety — to use by the general public. Nor will the private lessees of the land in any sense be required to operate like common carriers, making their services available to all comers." But "this Court," Stevens wrote, "long ago rejected any literal requirement that condemned property be put into use for the general public." That, he said, "proved to be impractical given the diverse and always evolving needs of society."

Originally the Bill of Rights was understood to apply only to the federal government. But following the adoption of the 14th Amendment in 1868, the Supreme Court began interpreting the amendment's "due process" to require guarantees of rights in the federal constitution to be barriers to encroachments by government at all levels. Thus the courts, in applying the Fifth Amendment to the states at the end of the 19th century, "embraced the broader and more natural interpretation of public use as 'public purpose,'" Stevens wrote, citing an 1896 decision upholding a mining company's use of an aerial bucket to transport ore over property it did not own, and a similar outcome in a suit against a gold mining company in 1906.

"Public use" took on an even broader meaning by the middle of the 20th century when cities became enamored of urban renewal and the federal funds used to promote it. In *Berman v. Parker* (1954), the Supreme Court upheld a redevelopment plan for a blighted area of Washington, D.C., that involved razing the homes of some 5,000 residents for construction of streets and schools and other public facilities, as well as the sale or lease of properties to private parties for redevelopment, including the construction of low-cost housing. The owner of a "condemned" department store in the area sued to prevent the taking of the store, arguing it was not blighted and that the plan's stated purpose of creating a "better balanced, more attractive community" did not constitute a valid "public use." The high court unanimously rejected the argument, with Justice William O. Douglas asserting the power of government to take property even for aesthetic reasons.

"It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled," Douglas wrote. "In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way."

In the 1984 case of *Hawaii Housing Authority v. Midkiff*, the court considered a Hawaii statute authorizing the forcible taking of land titles from lessors and transferring them to lessees for just compensation in order to reduce the concentration of land ownership. The Ninth Circuit Court of Appeals ruled the taking unconstitutional, declaring it "a naked attempt on the part of the state of Hawaii to take the property of A and transfer it to B solely for B's private use and benefit." Yet the Supreme Court, in what Stevens again described as its "deferential approach to legislative judgments in this field," unanimously determined that eliminating the "social and economic evils of a land oligopoly" qualified as a valid public use.

The "Specter of Condemnation"

The court was far from unanimous in the New London case, upholding the takings in one of its many contentious 5-4 decisions. "As the submissions of the parties and their amici make clear, the necessity

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and wisdom of using eminent domain to promote economic development are certainly matters of legitimate public debate," Stevens wrote for the majority. "This Court's authority, however, extends only to determining whether the City's proposed condemnations are for a 'public use' within the meaning of the Fifth Amendment to the Federal Constitution. Because over a century of our case law interpreting that provision dictates an affirmative answer to that question, we may not grant petitioners the relief that they seek." Thus the judgment of the Supreme Court of Connecticut was affirmed. Not surprisingly, dissenting opinions were sharply critical of Stevens' reasoning.

"Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded — i.e., given to an owner who will use it in a way that the legislature deems more beneficial to the public — in the process," wrote Sandra Day O'Connor, often a "swing vote" between the liberal and conservative blocs during her 25-year tenure on the court. "To reason, as the Court does, that the incidental public benefits resulting from the subsequent ordinary use of private property render economic development takings 'for public use' is to wash out any distinction between private and public use of property — and thereby effectively to delete the words 'for public use' from the Takings Clause of the Fifth Amendment." It also enables "those citizens with disproportionate influence and power in the political process, including large corporations and development firms" to victimize the weak, she protested. Thanks to the majority decision, O'Connor charged, 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 mall, or any farm with a factory."

O'Connor was joined in her dissent by Chief Justice William Rehnquist and Justices Antonin Scalia and Clarence Thomas. Thomas also wrote a dissent of his own, also deploring the substitution of the Public Use Clause with a public purpose clause or, he added parenthetically "perhaps the 'Diverse and Always Evolving Needs of Society' Clause." He also called into question the court's "extreme deference" to legislature in eminent domain cases, a deference not accorded lawmakers on other issues involving personal rights.

"The Court has elsewhere recognized 'the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic,'" Thomas wrote, "when the issue is only whether the government may search a home. Yet today the Court tells us that we are not to 'second-guess the City's considered judgments' … when the issue is, instead, whether the government may take the infinitely more intrusive step of tearing down petitioners' homes."

A Justice's "Regret"

So following the rulings of two eminent tribunals — the Supreme Court of Connecticut and the U.S. Supreme Court — the homes of the 15 petitioners were taken to make room for a marvelous economic development that never occurred. The justices, of course, couldn't have known the plans would fall through, which makes puzzling the regret expressed by Connecticut Supreme Court Justice Richard N. Palmer when he met Susette Kelo years later at a public event. As recalled by Jeff Benedict, author of a book (*Little Pink House*) about the case, Benedict had just given a talk on the subject when Palmer approached him and Kelo. "Had I known all of what you just told us," Palmer told Benedict, "I would have voted differently."

"I was speechless," Benedict recalled. "So was Susette. One more vote in her favor by the Connecticut Supreme Court would have changed history. The case probably would not have advanced to the U.S. Supreme Court, and Susette and her neighbors might still be in their homes." Then, as he recalled, the judge took Kelo's hand and offered his apology. "Tears trickled down her red cheeks," Benedict wrote. "It was the first time in the 12-year saga that anyone had uttered the words 'I'm sorry.'" But when he later sought the judge's consent for including that poignant moment in his book, Palmer qualified his statement.

"Those comments," he informed Benedict, "were predicated on certain facts that we did not know (and could not have known) at the time of our decision and of which I was not fully aware until your talk — namely, that the city's development plan had never materialized and, as a result, years later, the land at issue remains barren and wholly undeveloped." He did

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Justice Richard Palmer of the Connecticut Supreme Court offered a strange "apology" to Susette Kelo years after the high court's controversial decision.

tell Kelo he was sorry, he recalled. "But I was expressing my regret for what she had gone through. I would not want the reader to think that I was apologizing for my vote, which I was not doing."

So perhaps the dissenting justices on the state Supreme Court were right. Perhaps New London and its development agency had failed to show "clear and convincing" evidence that the economic benefits of the development plan would ever be realized. No one, however, could reasonably expect judges ruling on the constitutionality of a project to be omniscient concerning its chances of success. That's not what they are called upon to judge. What both Palmer and the dissenting judges seem to be saying is that it's still a good idea to rob Peter of his house and to give the land to private developer Paul, so long as Paul comes through with the benefits expected from that "public purpose" taking.

By the time the case reached the U.S. Supreme Court, it had received national attention and public reaction to the high court's decision was swift and overwhelmingly negative. Groups as diverse as the AARP, NAACP, the Libertarian Party, and the property-rights advocacy group the Institute for Justice, which provided the lead attorneys for the plaintiffs, were among those panning the decision. Owners of family farms spoke out against it as they feared it could be the basis for seizing farmland for private development. One activist sought to dramatize the popular sentiment by proposing that one of the justices in the *Kelo* majority be given a taste of the court's own judicial medicine. California developer and libertarian Logan Clements proposed the taking of Justice David Souter's "blighted" home in rural Weare, New Hampshire, for the "public purpose of building a 'Lost Liberty Hotel,' with a 'Just Desserts Café.'"

An "Insult to the Whole Constitution"

Souter, now retired, was never in any danger of losing his home, but other reactions to the *Kelo* decision produced more substantial results. A total of 44 states now have laws curbing, in various degrees, the power of the state to take land for private economic development. Sometimes an aroused citizenry actually does rise up to take an effective stand in defense of liberty.

Pfizer, meanwhile, completed a merger with rival pharmaceutical company Wyeth, along with a consolidation of the research facilities of both companies. The pharmaceutical giant had closed its New London facility by the end of 2010, eliminating more than 1,000 jobs. The move came just ahead of the expiration of the company's tax breaks that would have increased its tax bill by almost 400 percent.

"They stole our home for economic development," ousted homeowner Michael Cristofaro told the *New York Times*. "It was all for Pfizer, and now they get up and walk away." Pfizer makes an apt villain, but a greater share of the blame lies with public officials, including eminent judges, who ignored the ancient principle of justice stated long ago by a legendary lawmaker of ancient Greece. Asked which is the most perfect form of popular government, Solon is said to have replied: "That where the least injury done to the meanest individual, is considered as an insult on the whole constitution." ■