

Georgetown Environmental Law & Policy Institute

Some Thoughts on Kelo and the Public Debate Over Eminent Domain

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I. Why the Public Needs the Power of Eminent Domain.

Why, one might ask, does the public possess the power to take private property without the owner's consent, even upon payment of just financial compensation? The answer is the "hold out" problem. Without the eminent domain power, any property owner could thwart an important public project by refusing to sell to the public or – what amounts to the same thing – by refusing to sell except at a ridiculous price. The need for eminent domain arises when property has unique locational advantages or characteristics that make it an essential piece of some public project. Without the eminent domain power, we would not have railroads, highways, electric transmission lines, or many of our most successful downtown redevelopment projects, like the Baltimore waterfront.

II. Why the Use of Eminent Domain Is Generally Fair.

Under the Constitution, an owner subject to eminent domain is entitled to "just compensation" – usually measured based on the property's fair market value. In practice, owners involved in condemnations usually receive more than fair market value. As Chief Justice Rehnquist once explained, the Takings Clause "does not prohibit the taking of private property, but instead places a condition" -- payment of financial compensation – "on the exercise of that power." There is nothing unconstitutional about a taking to advance some public purpose, provided the government is able and willing to pay just compensation. During the process of negotiation which generally precedes formal condemnation proceedings, owners can usually bargain for above-market compensation. In addition, under the federal relocation assistance law, which applies to federal projects as well as state and local projects supported with federal funds, owners are entitled to extra compensation for relocation expenses. Not surprisingly, there are many citizens who have had their property condemned, or who sold under threat of condemnation, who feel well treated and fully satisfied by their local communities' pursuit of economic development.

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III. Why Kelo Narrowed – Rather Than Expanded – the Eminent Domain Power.

Much of the congressional and public interest in the eminent domain issue has been fueled by the false impression that Kelo expanded government's authority to use eminent domain for economic development purposes. In fact, the result in Kelo is consistent with a long, unbroken line of Supreme Court precedent stretching back to the 19th century. If anything, the Court's opinion narrowed the eminent domain power, by strongly suggesting that eminent domain should only be exercised (1) to implement a comprehensive plan for community redevelopment based on wide public consultation and with the approval of the highest political authority in the jurisdiction, and (2) when the community has obtained contractual commitments from the redeveloper to achieve the public's redevelopment objectives.

IV. Why Private Homes Should Be – and Generally Are – Protected.

In a bit of wild exaggeration, the dissenters in Kelo said that the Court's decision means that "the specter of condemnation hangs over all property," especially private homes. This is simply not true. No sensible local elected official seeks to exercise the eminent domain power as a first, or even second, resort, and local officials virtually never focus redevelopment efforts on established residential areas. In an infamous case featured on 60 Minutes, the leaders of Lakewood, Ohio, did target a residential neighborhood. But at the next election the mayor was removed from office, and this unwise use of the eminent domain power was stopped in its tracks. The democratic process at the local level is capable of stopping unwise uses of the eminent domain power. The dissenters also suggested that the Court's decision made church properties vulnerable to eminent domain. But any use of eminent domain that intentionally targeted churches would plainly violate the First Amendment.

V. Why the Institute for Justice's Radical Position Is Mistaken.

The Institute's position is that, no matter how compelling the public objective, no matter the strength of public support for a project, no matter how willing other owners may be to sell their properties, and no matter how fair the price being offered, any single landowner should be entitled to exercise an absolute veto over economic progress. The Institute has let its libertarian ideology overcome common sense in arguing that property ownership can trump the public welfare in this fashion.

One of the ironies of the Institute position is that it promotes public ownership of economic development projects and discourages public/private partnerships. The Institute has never questioned the power of government to condemn property if the government will own the property; rather it only objects to eminent domain when a private company will end up with an interest in the property, even if only a long-term lease. As a result, the Institute is effectively arguing for government-owned shopping centers and government-owned stadiums. How does that promote the Institute's agenda of less rather than more government?

The Institute cannot draw a principled line between the types of projects it believes are acceptable and those it believes are not. The Institute thinks the use of eminent domain to

construct stadiums is acceptable, but not to construct shopping centers. Thus, for example, the Institute apparently thinks the use of eminent domain to assemble the site for the Texas Rangers stadium in Arlington, Texas, involved a permissible use of eminent domain, but it would be unacceptable for the District of Columbia to use the eminent domain power to redevelop the Skyland Mall in Anacostia. There is no principled basis for making this distinction; if anything, a shopping mall has more of a public character than a privately owned baseball stadium.

The Institute's myopic focus on the use of eminent domain for economic development purposes ignores the fact that the use of eminent domain for any purpose can burden private property owners. Whether land is taken for a road, a shopping center or a stadium, the owner is being forced to sell. If the Institute were serious about alleviating the burdens on those subject to eminent domain, it would seek to address the issue across the board.

The U.S. Senate recently passed an energy bill expanding the power of the Department of Energy to exercise eminent domain to aid electric utilities to obtain rights of way for transmission lines across private property. What principle can justify granting greater eminent domain power to the federal government to benefit the energy industry while stripping local governments of the power of eminent domain to assemble properties for redevelopment? Where was the Institute for Justice in defense of homeowners, family farmers, and other property owners when the Senate was debating the energy bill?

VI. Why Eminent Domain Promotes Smart Growth and Rational Urban Development.

The eminent domain power is a useful and important tool for promoting sensible land use. Important public goals – ranging from energy conservation, to farmland preservation, to reducing public infrastructure costs – are furthered by making more efficient use of previously developed areas. However, one of the biggest obstacles to revitalization of our cities and older suburbs, many of which were developed when different technologies and social conditions prevailed, is the difficulty of reassembling land parcels divided among many owners. When many different ownerships are involved, the ability to use eminent domain is essential to overcome the hold-out problem, to proceed with redevelopment in an open and transparent fashion, and to achieve efficient and effective redevelopment.

VII. Why Racial Minorities and the Poor Wouldn't Benefit from Destroying Eminent Domain.

The dissenters in Kelo suggest that the use of eminent domain for economic development purposes will impose a particular burden on minorities and the poor. There is no question that these groups have sometimes suffered from unwise use of eminent domain in the past. But the Kelo dissenters are not offering to resolve this problem. Under their view, the type of “negro removal” sanctioned by the Supreme Court in Berman v. Parker should continue to be allowed on the theory that eliminating a “slum” serves a public use. Ironically, by focusing on immunizing other types of property from the eminent domain power, the dissenters' position would likely have the effect of further concentrating uses of eminent domain in poor and minority communities. Many of the bills pending in Congress likewise contain a loophole allowing the use of eminent domain to eliminate “blighted” areas. More generally, eliminating

or restricting the power of eminent domain for economic development would destroy a tool that many minority and poor communities desperately need. The D.C. City Council would not have approved, with wide community support, the use of eminent domain to redevelop the Skyland Mall in Anacostia if it did not think it would benefit one of the city's poorest neighborhoods.

VIII. Why Planning Matters.

The single most important aspect of the Court's recent Kelo decision is the novel, powerful suggestion that eminent domain should only be used for economic development purposes in the context of a comprehensive plan for the area, developed through an open public consultation process, and adopted by the governing political body for the relevant jurisdiction. This new mandate will police the use of eminent domain, helping to ensure that it is used to advance genuinely public purposes, and not to advance the financial interest of some private investor at the expense of existing owners. This new mandate also should enhance the transparency and accountability of the political process, helping to ensure that the use of eminent domain is based on a legitimate democratic decision rather than a back door deal. The Institute for Justice has contended that the Court's new planning mandate will not add meaningful protection for property owners, but the fact is that the worst abuses the Institute has identified involved ad hoc uses of the eminent domain power outside the context of any plan.

IX. Why Eminent Domain for Economic Development Purposes is a Local Issue.

The use of eminent domain for economic development purposes raises a quintessentially local issue. The U.S. Supreme Court has long recognized that the types of projects and programs for which state and local governments may exercise the eminent domain power will vary widely, from case to case and between different regions of the country. In the West, for example, eminent domain was historically used to deliver irrigation water to farmers' lands; in the Northeast, the power has more frequently been deployed to promote urban redevelopment. The Court has basically adopted a policy of leaving to local jurisdictions the policy decision on when and how to use the eminent domain power. Given that the effects of eminent domain are generally quite local, and given the widely different conditions and needs across the country, Congress should adopt the same deferential approach. Some states prohibit the use of eminent domain for economic development purposes, and some support it, reflecting the diversity of policy approaches characteristic of our federal system. Already, different states are reexamining their policies in light of the publicity generated by the Kelo decision. There has been no showing of a need for a uniform federal resolution of this debate.

X. Why Bad Urban Redevelopment Projects Do Not Justify Eliminating Eminent Domain.

Critics of eminent domain sometimes cite some of the failed urban redevelopment efforts of the 1950's and 1960's that relied in part on the eminent domain power. But these examples hardly support a prohibition on the use of eminent domain for economic development purposes. There are many examples of the successful and positive use of eminent domain. Also, just as there are examples of successful private development, there are also notable examples of failed private development. The point is that, like a hammer, eminent domain is a tool that can be used

to produce a good or a bad result, and the blame for a bad result should rest on the user of the tool, not the tool itself.

XI. Why Congress Needs to Take a Deep Breadth.

Assuming there is an appropriate role for Congress in this essentially local issue, Congress needs to take a deep breadth before moving forward with legislation. First, many of the bills may sweep more broadly than Congress intends. For example, some of the pending bills appear to effectively repeal the Natural Gas Act, which grants natural gas companies the power of eminent domain upon issuance by the Federal Energy Regulatory Commission of a certificate of public convenience and necessity for a new gas pipeline. Does Congress really intend that result? Similarly, some of the eminent domain bills appear to contradict a recently passed energy bill discussed above providing for expanded use of eminent domain to site electric transmission lines. Does Congress want to take back from utilities with one hand what it has offered with the other? Plainly, condemning the use of eminent domain for “economic development” purposes generally is unworkable and unwise. More generally, Congress needs to think about whether it can sensibly discriminate between uses of eminent for different purposes, including energy projects, sports stadiums, downtown commercial centers, and so on. In addition, Congress needs to consider the severe economic challenges facing our cities and older suburbs. Does Congress really want to make job creation and economic revitalization in these areas harder than it already is?

XII. Other Options.

Again assuming there is a legitimate role for Congress on this issue, there are clearly better potential solutions to the expressed concerns. Most of the pending bills would prohibit, directly or indirectly, the use eminent domain for some set of vaguely defined “economic development” projects. Better alternatives might include: (1) reinforcing the Supreme Court’s suggestion in Kelo that eminent domain should only be used in the context of a comprehensive planning effort, (2) reinforcing the Court’s suggestion that redevelopers should be contractually bound to achieve the community’s redevelopment objectives, or (3) providing enhanced compensation, especially for homeowners and other residents, and in all condemnation cases, not only when eminent domain is being used for economic development purposes.