

FIVE YEARS AFTER *KELO*:

THE SWEEPING BACKLASH AGAINST ONE OF THE SUPREME COURT'S MOST-DESPISED DECISIONS

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INTRODUCTION

On June 23, 2005, the U.S. Supreme Court ruled that private economic development is a public use under the Fifth Amendment and that the government could take people's homes, small businesses, and other property and give them to private developers with the hope of raising more tax revenue and creating more jobs in a 5-4 decision called *Kelo v. City of New London*, 545 U.S. 469 (2005).¹

As a result of the Court's decision, Justice Sandra Day O'Connor warned in her compelling and passionate dissent, one of the last she authored on the Court: "The specter of condemna-

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1 *Kelo v. City of New London*, 545 U.S. 469 (2005).

tion 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.”²

The U.S. Supreme Court should have ruled in favor of the *Kelo* homeowners and established a federal baseline that would protect home and business owners throughout the nation. Instead, it passed the issue on to the states, abdicating its role as guardian of Americans’ rights under the U.S. Constitution.

Less than one week after the decision was handed down, the Institute for Justice (“IJ”), which litigated the case, launched a national campaign called “Hands Off My Home.” IJ was determined to focus the outrage over *Kelo* into meaningful reform. In the five years since the decision, there has been an unprecedented backlash against the *Kelo* ruling in terms of public opinion, citizen activism, legislative changes and state court decisions, and lessons learned from the New London case. These dramatic reactions are addressed in this article.

THE CHANGE IN PUBLIC OPINION

Kelo brought massive public awareness to the issue of eminent domain for private gain. Although there was growing concern about eminent domain abuse and some awareness before *Kelo*, after the decision many well-informed people in the nation knew about the issue. More importantly, according to numerous surveys, the vast majority of people overwhelmingly oppose emi-

2 *Id.* at 503.

ment domain for private development. Polls consistently show that well over 80 percent of the public oppose *Kelo*.³

This significant public opposition to eminent domain abuse led to a complete change in the zeitgeist on this issue. Although public officials, planners and developers in the past could keep condemnations for private gain under the public's radar screen and thus usually get away with the seizure of homes and small businesses, this is no longer the case. Property law expert Dwight Merriam notes: "The reaction to *Kelo* has chilled the will of government to use eminent domain for private economic development." Eminent domain supporter John Echeverria laments: "There are an awful lot of developers shying away because they don't want to get involved in a time-consuming, political mess." And as Susan Pruet, general counsel for the Georgia Municipal Association, confesses: "I describe *Kelo* as the worst case we ever won."

GRASSROOTS ACTIVISTS FIGHT BACK AGAINST EMINENT DOMAIN ABUSE—AND WIN

Before the *Kelo* decision, many property owners faced with eminent domain abuse did not think they could fight City Hall and win. *Kelo* changed that. As the polls mentioned above reflect, this issue resonated with Americans in a way few U.S. Supreme Court decisions do. The decision awakened threatened property owners with a new-found confidence that they really could challenge

3 See Castle Coalition, Public Opinion Polls, available at http://castlecoalition.org/index.php?option=com_content&task=view&id=43&Itemid=143.

politically powerful and well-funded adversaries.

The Institute for Justice's Castle Coalition took its message on the road immediately following the decision and held training sessions from coast to coast to educate property owners and activists on how to organize, mobilize and publicize their opposition to eminent domain abuse. The Coalition held 67 workshops at the local, regional, state and national levels, training more than 1,000 community leaders to fight these land grabs.

Forty-four projects and proposals that threatened the use of eminent domain for private gain have been defeated by grassroots opposition in just the five years since *Kelo*. Among the examples are:

*Ed Osborne, who owns an auto body shop in Wilmington, Del., heard about an urban renewal plan that threatened his business. He invited the Castle Coalition to speak to his community. After countless media appearances and events, the city *still* refused to listen—so Osborne took his fight to the statehouse where, after a grueling two-year battle, he was instrumental in securing eminent domain reform that not only protected his business, but other properties across Delaware.

*A woman named Princess Wells stepped out of her comfort zone and learned to be her own best advocate, leading her predominantly African-American neighborhood to victory over a project that threatened nearly 2,000 homes and businesses in Riviera Beach, Fla.

*Small groups of leaders started local revolutions, like the one in San Pablo, Calif., where a handful of home and business owners banded together to fight the city's proposal to reauthorize the use of eminent domain on properties that constituted over 90 percent of the predominantly Latino city. They invited the Castle Coalition to speak at a community forum. In the following weeks, the small group protested at public hearings, drawing hundreds of supporters. When the city could not take the pressure anymore, it tried to postpone the vote indefinitely, but these activists would not stand for it, and that night, the city council voted instead to ban eminent domain for private development.

Across the country, property owners and activists have testified before crowded public hearings and state legislatures. They have formed groups and started websites. They have stood tall on the steps of City Hall and held press conferences demanding officials keep their hands off their property. They have held neighborhood meetings, which have turned into citywide meetings. Their rallies and protests have been heard and heeded.

EMINENT DOMAIN LAW IS CHANGED THROUGH LEGISLATION AND INITIATIVES

There probably has never been as sweeping a legislative response to a U.S. Supreme Court decision as the response to *Kelo*. Following the public outcry against *Kelo*, constitutional amendments and legislation at the federal, state and local levels were introduced in legislative bodies nationwide. In the five years

since the decision, forty-three states have passed either constitutional amendments or statutes that have reformed eminent domain law to better protect private property rights.

The type and quality of legislation varies from state to state, but some states (such as Florida, South Dakota, Michigan and Arizona) have provided very strong protections against eminent domain abuse. Other states (such as Minnesota, Colorado and Wisconsin) strengthened their laws, but still permit some wiggle-room for ambitious politicians and business interests to engage in some forms of eminent domain abuse. Still other states (such as Maryland and Kentucky) passed only minor reforms. Although the quality and type of reform varies, virtually the entirety of the reforms produced net increases in protection for property owners faced with eminent domain abuse.⁴

Ideally legislation should contain two essential elements to comprehensively reform eminent domain legislation. First, it should ban “economic development” takings—using eminent domain for the possibility of creating more tax revenue and jobs. Second, it should stop blight statutes from being used as a backdoor method of taking property for private development because vague definitions of blight could be used to take perfectly good and functional properties. At least 35 of the 43 states that changed their laws no longer allow condemnations for economic development. And more than half of the 43 states (22 states) went even

4 For a full report card that grades all the state reform efforts, see Castle Coalition, 50 State Report Card, *available at* http://castlecoalition.org/index.php?option=com_content&task=view&id=2412&Itemid=129.

further by reforming their laws involving condemnations to eliminate supposed “blight.”

There are exceptions, of course. New York has remained steadfast in its determination to take private property for politically connected developers and to resist any attempt or demand by the public to limit this practice. Moreover, after three attempts to change its eminent domain laws, Mississippi finally passed solid reform in 2009 only to have Gov. Haley Barbour veto the legislation. When the legislature narrowly failed to override the veto, an effort was started to place an initiative on the ballot to change Mississippi law to protect property owners. In October 2010, the Mississippi Secretary of State declared that enough valid signatures had been gathered for the initiative to appear on the November 2011 ballot.⁵

Some academics—most notably, Professor Ilya Somin of George Mason Law School—argue that the backlash against eminent domain abuse has failed to produce significant nationwide changes in the legislative arena.⁶ Although Somin, to his credit, is a staunch opponent of eminent domain abuse, he and other critics are misguided about eminent domain reform legislation.

The fundamental problem with the critics’ analyses is that they lack historical perspective and real-world analysis. The proper starting point is the state of the law the day before the Court’s

5 *Signatures Verified; Eminent Domain Ban on Ballot*, SUN-HERALD, October 23, 2010.

6 Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100 (2009).

decision in *Kelo*. At that point, eminent domain laws in virtually every state were skewed against property owners. *Kelo* reinforced this near total deference to the eminent domain power and could have easily become the law of the land in almost all states. Since the decision, however, as this paper documents, dramatic changes for the better have occurred in a variety of contexts.

As noted, there are two primary ways eminent domain can be abused for private development. First, a government, like New London's, can simply declare that a new project will produce more economic benefits—tax revenue, jobs and an overall improved economy—and thus these “higher and better” uses of property justify the takings. This was the issue in *Kelo*. At least 35 of the states that have passed reform now prohibit these types of takings. So, at a minimum, most states have protected property owners at least to the extent of the protection they would have received in *Kelo*. But many states have done more.

The second way the government can abuse eminent domain is to rely on bogus blight designations, whereby neighborhoods are declared blighted through vague and expansive definitions that permit the government to proclaim virtually any poorer or even middle class neighborhood blighted. Governments do this because of the precedent in *Berman v. Parker*, 348 U.S. 26 (1954), which held that the power of eminent domain can be established by a blight declaration.

The critics' main complaint about the legislative changes is that many of the states that have reformed their eminent domain

laws have not changed their blight laws, so blight can still be used as a subterfuge to gain property for private development. What they ignore, however, is that *Kelo* was *not* a blight case; thus, even a favorable decision in *Kelo* would not have changed state blight laws. (Only Justice Thomas was willing to revisit the 1954 *Berman* decision, which upheld the use of eminent domain for so-called blight removal.) In those states that have changed their blight laws—and at least 22 have—property owners are actually better protected than they would have been even if *Kelo* had come out the right way.

Despite the overwhelming public opposition to *Kelo*, the cards were stacked against eminent domain reform. In their seminal work on public choice, James Buchanan and Gordon Tullock noted that “it is the opportunity to secure differential benefits from collective activity that attracts the political ‘profit-seeking’ group.”⁷⁷ They also noted that “[m]any collective projects are undertaken in whole or in part primarily because they do provide benefits to one group of the people at the expense of the other groups.”⁷⁸

Eminent domain abuse provides a classic example of public choice at work. Developers and private businesses gain highly concentrated benefits in the form of greater profits when they receive property through eminent domain. Likewise, city officials

7 JAMES BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LEGAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* 277 (1965).

8 *Id.* at 279.

gain from the possible extra tax revenue generated by the new projects and the political support that could come from improving the local economic climate. The individuals who pay the highest costs—home and small business owners who stand to lose their property—are small in numbers compared to the overall population. Moreover, projects that abuse eminent domain are typically funded either by the developers themselves or through general tax revenue so the costs to individual taxpayers are either non-existent or widely diffused among the population. Apart from those receiving direct benefits and those small number of home and small business owners paying the highest cost, most in a particular community remain “rationally ignorant” of the process since it does not directly affect their property or lives.

As public choice demonstrates, the parties who gain from eminent domain abuse—in particular, local officials and business interests—have disproportionate influence in the political arena. Not surprisingly, those groups have fought hard against eminent domain reform in virtually every state where it has been proposed. Given their tremendous influence, as well as the fact that ordinary home and business owners do not have lobbyists or special access, the question the critics should be asking is: “How on earth did the *Kelo* backlash meet with such success?” And, to gain some broader historical perspective, they should also ask, “What other national reform movement has achieved so much in just a five-year period of time?”

STATE COURTS STEP UP TO CURTAIL EMINENT DOMAIN ABUSE

The response of state courts to *Kelo* has been another arena in which there has been a fundamental shift in eminent domain policy. When the U.S. Supreme Court decided not to correctly interpret the U.S. Constitution, the states' high courts began to fill that void. Three states' supreme courts—Ohio, Oklahoma and South Dakota—explicitly rejected the *Kelo* decision.⁹ Ohio cities had frequently abused eminent domain and Oklahoma cities had occasionally abused the power, but we have heard of no new abuses in either state since their respective court decisions.¹⁰

Moreover, the New Jersey Supreme Court implicitly rejected *Kelo* while also curtailing the use of redevelopment and blight as an excuse for private development. New Jersey has historically been one of the worst states in the country for eminent domain abuse. Its municipalities all seem to be addicted to eminent domain for private projects. But the New Jersey Supreme Court decision in *Gallenthin* ruled that local governments could not declare areas blighted simply because they are “stagnant or not fully productive,” which was essentially the argument for taking the land in *Kelo*, in the hope of improving the local economy. *Gallenthin*, along with appeals court decisions emphasizing the importance of real evidence and procedural due process in challenging rede-

9 *Norwood v. Horney*, 853 N.E.2d 1115 (Ohio 2006), and *Muskogee County v. Lowery*, 136 P.3d 639 (Okla. 2006), and *Benson v. State*, 710 N.W.2d 131 (S.D. 2006).

10 See DANA BERLINER, PUBLIC POWER, PRIVATE GAIN 159-70 (Castle Coalition 2003), available at http://www.castle-coalition.org/pdf/report/ED_report.pdf (showing pre-*Kelo* abuses).

velopment designations, has totally changed the eminent domain landscape for home and small business owners in New Jersey.¹¹

The Hawaii, Pennsylvania, Rhode Island and Missouri supreme courts have begun examining the use of eminent domain for private development with a more jaundiced eye, requiring that the government produce real evidence substantiating its claims and pay close attention to evidence that the claimed purpose of the taking is a pretext for the real purpose of benefitting a private party.¹² Moreover, the Maryland Court of Appeals began imposing stricter procedural and evidentiary scrutiny to so-called “quick-take” condemnations, in which the government can quickly take and bulldoze someone’s home or other structures, even before an ultimate judicial ruling is made on the legality of the taking.¹³

There is one significant exception to this good news for property owners in state courts—New York. The Court of Appeals, New York’s highest court, routinely ignores evidence of eminent domain abuse, refusing to give the facts any real scrutiny at all. A recent ruling from the court, which denied the fundamental role of the courts in properly interpreting essential constitutional rights,

11 *See Gallenthin Realty Dev., Inc. v. Borough of Paulsboro*, 924 A.2d 447 (N.J. 2007).

12 *See County of Hawaii v. C&J Coupe Family Ltd. Partnership*, 198 P.3d 615 (Haw. 2008), *and Middletown Township v. Lands of Stone*, 939 A.2d 331 (Penn. 2007), *and Rhode Island Economic Development Corporation v. The Parking Company*, 892 A.2d 87 (R.I. 2006), *and Centene Plaza Redev. Corp. v. Mint Props.*, 225 S.W.3d 431 (Mo. 2007).

13 *Mayor and City Council of Baltimore v. Valsamaki*, 916 A.2d 324 (Md. 2007), *and Saperov v. Mayor and City Council of Baltimore*, 920 A.2d 1061 (Md. 2007).

tells the whole story:

It may be that the bar has now been set too low—that what will now pass as “blight,” as that expression has come to be understood and used by political appointees to public corporations relying upon studies paid for by developers, should not be permitted to constitute a predicate for the invasion of property rights and the razing of homes and businesses. But any such limitation upon the sovereign power of eminent domain as it has come to be defined in the urban renewal context is a matter for the Legislature, not the courts.¹⁴

The Court of Appeals had a chance to redeem itself in another challenge to a trumped-up claim of blight, combined with concealment of relevant evidence, in a case involving eminent domain abuse by Columbia University. But once again, the Court of Appeals upheld the use of eminent domain to benefit a private party.¹⁵

When the U.S. Supreme Court hands down a major constitutional ruling, often state courts follow the Court’s lead and interpret state constitutional provisions in the same or in a similar manner. For instance, when the Court decided *Berman v. Parker*, which upheld the use of eminent domain to engage in so-called urban renewal or slum clearance projects, 34 state supreme courts

14 *Matter of Goldstein v. N.Y. State Urban Dev. Corp.*, 921 N.E.2d 164, 172 (N.Y. 2009).

15 *See Kaur v. New York State Urban Dev. Corp.*, 892 N.Y.S.2d 8 (N.Y. App. Div. 2009), *rev’d*, 15 N.Y.3d 235 (N.Y. 2010).

followed suit. After *Kelo*, state courts have gone in exactly the opposite direction. This encouraging trend is expected to continue.

THE AFTERMATH OF *KELO* IN NEW LONDON

In New London, the Fort Trumbull project at the heart of the *Kelo* case has been an unmitigated failure.¹⁶ Under the original plan, New London provided land adjacent to Fort Trumbull to the pharmaceutical giant Pfizer at a nominal cost and also provided environmental cleanup to the site, which had previously been an old mill. Part of the package of incentives offered to Pfizer to encourage them to come to New London was the redevelopment of the neighboring Fort Trumbull area. Fort Trumbull was a working-class neighborhood. It housed approximately 75 homes, as well as a few smaller businesses and an abandoned Navy base. The plan called for this area to be replaced by an upscale hotel, office buildings and new housing. According to the plan, this redeveloped area would take advantage of the opportunities presented by the new Pfizer facility and would complement that facility, leading to job growth and increased taxes for New London. The state of Connecticut agreed to provide \$78 million for the project. Pfizer received 80 percent tax abatement for 10 years. The state agreed to pay 40 percent of the abated taxes to New London.

Now, five years after the *Kelo* ruling, there has been no new construction on any of the land that was acquired in Fort Trumbull.

16 For a compelling account of the history and back-story of the New London controversy, see JEFF BENEDICT, *LITTLE PINK HOUSE: A TRUE STORY OF DEFIANCE AND COURAGE* (2009).

After the decision, the remaining residents who had fought to save their homes, including Susette Kelo, were forced out. The Fort Trumbull site was completely razed. And it has remained empty ever since—brown, barren fields no longer home to people but rather to feral cats and migratory birds.¹⁷ After much controversy and many extensions of time given to the chosen developer, the city terminated the development agreement. The proposed Coast Guard museum for the area has been put on indefinite hold.¹⁸ Now, ten years after its initial plan was approved, the city has commissioned another study to see what might work in the area.¹⁹ Ironically, given that a majority of the area used to be filled with owner-occupied and residential rental property, the city is considering a proposal to build some rental property on a portion of the project area.²⁰ Ten years have been lost and more than \$80 million in taxpayer money spent to perhaps one day build a lesser version of what used to exist on the peninsula.

The city and the New London Development Corporation blame the economy for the failed project, but the redevelopment

17 David Collins, *Feral Cats Ignore Eminent Domain*, THE DAY, Dec. 10, 2008, and Katie Nelson, *Conn. Land Vacant 4 Years After Court OK'd Seizure*, ASSOCIATED PRESS, Sep. 25, 2009.

18 Kathleen Edgecomb & Jennifer Grogan, *Coast Guard museum plan on hold*, THE DAY, July 24, 2009.

19 Stephen Chupaska, *NL Council panel supports hiring group for study of Fort Trumbull*, THE DAY, Apr. 13, 2010.

20 Kathleen Edgecomb & Stephen Chupaska, *NLDC to explore developer's plan for village theme at Fort Trumbull*, THE DAY, Feb. 20, 2010.

plan was floundering well before the real estate downturn.²¹ The plan was never market driven, given that it used massive taxpayer subsidies and catered to one large corporation. Even if the economy alone were to blame, it merely stands as another reason why taxpayer dollars should not be put at risk in speculative development schemes.

Just before its 80 percent tax abatement expired, Pfizer announced that it too is moving out. On November, 9, 2009, Pfizer announced that it would close its research and development headquarters and leave New London.²² For years, the disastrous Fort Trumbull project will be Exhibit A in demonstrating the folly of government plans involving corporate welfare and abusing eminent domain for private development. Hopefully, city officials, planners and developers will take the Fort Trumbull experience to heart and pursue revitalization efforts only though voluntary, not coercive, means.²³

Even though the Fort Trumbull neighborhood was lost, Susette Kelo's little pink house, where this fight all began, still stands. Kelo's home was disassembled and moved piece-by-

21 William Yardley, *After Eminent Domain Victory, Disputed Project Goes Nowhere*, N.Y. TIMES, Nov. 21, 2005, at A1.

22 Patrick McGeehan, *Pfizer to Leave City That Won Land-Use Suit*, N.Y. TIMES, Nov. 13, 2009, at A1.

23 See CURT PRINGLE, DEVELOPMENT WITHOUT EMINENT DOMAIN (Castle Coalition 2007), available at <http://www.castlecoalition.org/pdf/publications/Perspectives-Pringle.pdf>; Dick M. Carpenter II & John K. Ross, *Doomsday, No Way* (Castle Coalition 2008), available at http://www.ij.org/images/pdf_folder/otherr_pubs/doomsday-no-way.pdf (documenting that eminent domain reforms have had no negative effect on development).

piece to its new location in downtown New London, about one mile away from Fort Trumbull. It is once again a home for a new owner, local preservationist Avner Gregory. The beauty of the restored home reflects the love Gregory has for the house and its historic importance. Like Betsy Ross' house in Philadelphia and Paul Revere's home in Boston, Susette Kelo's pink cottage stands as a monument to her and her neighbors' struggle, one that has changed this nation for the better.

CONCLUSION

The results of the *Kelo* backlash have been striking. The Institute for Justice used to get continual requests for assistance in fighting eminent domain for private gain. Now, the Institute receives far fewer. Of those, many attempts to abuse eminent domain are defeated by activism in the court of public opinion before they ever reach a court of law. Eminent domain abuse used to be a nationwide epidemic with more than 10,000 instances reported in a five-year period, an epidemic that affected property owners in most states.²⁴ Now, it is largely confined to certain reform-resistant states, like New York, that refuse to change their laws or listen to their own citizens. The Institute is focusing its efforts in litigation and advocacy in those states.

To be sure, challenging work remains to be done in fighting eminent domain abuse. Weak state reform must be strengthened. Moreover, property owners must be vigilant in making sure that

24 See DANA BERLINER, PUBLIC POWER, PRIVATE GAIN 159-70 (Castle Coalition 2003), available at http://www.castlecoalition.org/pdf/report/ED_report.pdf.

reforms are not repealed or watered down either through legislation or judicial opinion. Already, for instance, Detroit's mayor has mentioned that Michigan's strong constitutional protection against eminent domain abuse, passed in 2006, might need to be changed so that he can re-make the city along the lines central planners envision.²⁵ When the economy strengthens and the real estate market comes back, there will also likely be renewed efforts to take homes and small business for private gain.

Ultimately, the Institute for Justice's goal is to have the Supreme Court overturn *Kelo*. Until then, more battles remain to be fought. Property owners must remain vigilantly aware of any efforts to repeal or undercut good judicial opinions, legislation or constitutional amendments. For property owners nationwide, *Kelo* remains the classic example of losing the battle but winning the war.

25 Christine MacDonald, *Bing: I'll move some residents*, DETROIT NEWS, Feb. 25, 2010, at A4.