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Eminent Domain Abuse

by Scott Bullock*

In June the U.S. Supreme Court ruled that the government may use the power of eminent domain to seize a person's home or business and give it to another private party in order to promote private economic development. The property owners in Kelo v. New London *were represented by the Institute for Justice, a public interest law firm in Washington, D.C. Scott Bullock, senior attorney with the Institute for Justice, has been involved with the case from the start and made the oral argument to the Court on behalf of the homeowners. On July 26, as part of AIER's Summer Fellowship program, Mr. Bullock came to Great Barrington to talk about the Kelo decision and its aftermath.*

I want to talk today about the issue of eminent domain abuse. I've been involved with this issue for a number of years and people have gradually become more aware of it over that time, but now it seems that the entire nation is aware of it, given what the Supreme Court did in June.

In that decision, *Kelo v. New London,* the Court upheld the use of eminent domain for private economic development. This astonished a lot of people. They could not believe that the Supreme Court would sign off on allowing government to take your land, your home, or your small business and give it to Wal-Mart or to a shopping mall developer. People couldn't believe it, and they are rightly outraged by it.

Many people did not realize, however, that this has been going on for a number of years. It was largely a local controversy, coming up in cities throughout the country, but it was national in scope. Now that the Supreme Court has said there are no limits under the Fifth Amendment's "takings clause" for this type of use of eminent domain, it really has risen to the level of national consciousness. People are very concerned about what this decision means, not only for their property, but for the fate of the constitutional rights of home and small business owners throughout the country.

Justice Sandra Day O'Connor put it best in her dissenting opinion when she said that under the majority's opinion a Motel 6 can be taken for a Ritz Carlton, a home can be taken for a shopping mall, and any farm can be taken for a factory.

The framers of the Constitution were so concerned about the abuse of eminent domain that they placed limits on takings. Every state constitution has a similar provision. The Founders recognized that eminent domain sometimes had to be used, but that it was, as one of the earliest Supreme Court decisions said, a "despotic power" of government. It is the power of the despot. One of the most serious things that a government can do to you, apart from putting you in jail and perhaps killing you, is to take away your home or your land—something that you probably worked hard to obtain and that is probably the most important asset to you.

The takings clause in the Constitution says that "private property shall not be taken for public use without just compensation." Notice the two important limitations on takings. If the government takes your property,

* This article is a transcript of a speech given in Great Barrington, Massachusetts by Scott Bullock to the AIER Summer Fellowship Program on July 26, 2005. Mr. Bullock is a Senior Attorney with the Institute for Justice, which represented the homeowners in the *Kelo v. New London* eminent domain case decided by the Supreme Court in June. He is also an alumnus of the Summer Fellowship Program.

they have to pay you for it. And they can only take it in the first instance if it is for a public use.

That language is fairly clear; it should be pretty self-evident what the framers meant. They were talking about roads, bridges, and reservoirs; government buildings, court houses, and post offices; sometimes national or public parks. Things that are owned by or used by the public, or that the public has a right of access to. They were not talking about some of the things I mentioned before, such as a Costco or a shopping plaza—but this is what the Supreme Court actually approved in its recent decision.

The New London Case

I want to talk about this case—how it came about, what is really at issue, and what is happening in the wake of the decision. We at the Institute for Justice got involved with the New London case, or the Kelo case, back when it began in 2000. The Institute for Justice is a public interest law firm that litigates cases in a wide variety of constitutional areas, but one of the main areas in which we litigate is eminent domain abuse and the protection of private property rights.

One of our first cases got quite a bit of attention in the mid to late 1990s, when we represented a woman, Vera Coking, whose home was sought by the Casino Reinvestment Development Authority in Atlantic City, New Jersey. Her home was going to be taken to give to Donald Trump to build a limousine parking facility for one of his casinos. He couldn't get Mrs. Coking to sell, so, rather than that ending the matter, he went to the Casino Authority, a government body, and asked it to condemn Mrs. Coking's land. His justification was that the casino industry was extremely important to the state of New Jersey and certainly to Atlantic City; that Trump Casino was one of the primary casinos in the area; and that the limousine service was going to help him economically and would thereby help the town.

We fought and won that case. We represented Mrs. Coking. She is still in her home, and Mr. Trump still has his casino. He'll just have to go without the limousine staging area that he wanted. This touched off a whole series of cases that we were involved in, and led to our involvement in the New London case.

The New London case had a lot of aspects that you see in any number of eminent domain situations. First of all, it had a very important legal issue. This issue, the one the Supreme Court addressed, was whether or not eminent domain could be used simply for private economic development. The Supreme Court had never addressed this before.

The Court had expanded the use of eminent domain for "public use" back in the 1950s, when it ruled that the government could take property in an area in northwest Washington D.C. that was deemed "blighted." Reading the "public use" clause broadly, the Court said that the use of eminent domain was justified because the elimination of the blight served as a public use, or a public purpose. This purpose is acceptable, the Court said, therefore we are not going to worry about whether or not the property was transferred to another owner.

The Supreme Court also upheld the use of eminent domain to break up an oligopoly of land ownership in Hawaii in the 1980s. Hawaii was essentially a monarchy before it became a state in the 1950s. About half the land was owned by the Federal government, and the other half was owned by a dozen or so families in Hawaii. Oligopolies have long been generally recognized by the Court as harmful, so it approved breaking up this oligopoly of land ownership.

But the New London case involved something different. The local government was pushing eminent domain further than it had gone in the past.

A Dangerous Precedent

The local government said that New London, Connecticut is a poor city, with depressed economic conditions, and we want more tax revenue, more jobs, and to improve our economy. The homeowners represented by the Institute for Justice, Susette Kelo and others, happened to live in an area, Fort Trumbull, that city planners said would be perfect for new development projects. This was to be private development, designed to complement a Pfizer facility that recently had been built adjacent to the Fort Trumbull neighborhood.

The sole justification the government used was the projected increase in tax revenue and jobs. They said this justified the use of eminent domain, under a very broad reading of the "public use" clause. "Public use" was read to mean "public purpose" in earlier cases from the 1950s; in Connecticut they were saying, let's read it even more broadly and say "public benefit."

The supposed public benefit of jobs and taxes comes, of course, from private enterprise. This has been referred to as the trickle-down effect of private economic development, because the businesses make money (if they're profitable), the community gets more tax revenue, and more jobs are created, all as a result of private enterprise.

That was the sole justification, and we knew this had

to be challenged. Because if that is the justification for the use of eminent domain, then there really is no limit on its use. Every home would produce more tax revenue if it were a business. Every business could conceivably produce more tax revenue and create more jobs if it were a larger business. Small businesses could be taken for larger businesses, and any home could be taken for virtually any business, because of the potential to create more tax revenue. So this was an extremely dangerous precedent.

It's Not About Money

Another special aspect of the New London case was the wonderful people who were trying to save their homes. They weren't opposed to new development. The city and the New London Development Corporation, the private body it was working with, actually had a lot of land available to them to develop, and the homeowners were not saying they did not want this to happen. They simply wanted to hold on to their homes, to what was rightfully theirs. Their homes meant a lot to them—and it wasn't just the monetary value.

Susette Kelo is a registered nurse. She works three jobs (although she just gave up one of them because speaking out against this case is essentially a full-time job). She's worked very hard to get a modest pink Victorian cottage that has, as she says, a millionaire's view on a nurse's salary. It has a beautiful view of the Thames River in New London and looks out onto Long Island Sound. It was her dream home, she fixed it up, and it's where she wants to be.

Another family that we represent has lived in Fort Trumbull for over one hundred years. Mrs. Wilhelmina Dery was born in her home in 1918. She has lived there her entire life. She is 87 years old, and she has lived there with her husband for 60 years. They just celebrated their 60th anniversary. Her son lives behind her with his family. These are special places to them, and they want to hold on to them. It's not a matter of getting more money for their properties; they simply want to hold on to them. They're very genuine and sincere about that, and dedicated to fighting not only for their rights, but for the rights of every home and small business owner throughout the country. They are offended, as I think many Americans are, by the idea that the government can move people out, not to build a public project or something like that, but simply to put in people who are essentially identical to them, i.e., other private parties.

Indeed, these developers planned to build residences as well—but just wealthy residences. High-end condominiums, a five-star luxury hotel, and private office space. The city was essentially saying, we want you people out so that wealthier businesses and individuals can move in and our city can hopefully make more money as a result. That is an offensive concept, and the homeowners there are dedicated to fighting it.

It's About Abuse of Power

We saw something else in the New London case that I've seen over and over in such cases: terrible abuses of power. When you give government the power to throw people out of their homes and don't place many limits on it, and governments combine that power with private parties who also want to see this happen so they can make money, they tend to really take advantage of people. As soon as the government and the real estate agents hired by the government and by the private parties met with the property owners in New London, they threatened them. They said, we want to buy your property. This is what we're willing to pay for it, and if you don't sell it to us, we'll use eminent domain to take it away from you. That's the mindset that people have when they know that behind them is the force of government.

You don't see private parties sitting down and saying, "Listen, we'd like this project to happen, and we're willing to work with you, and we know that you love this home and it has a beautiful view. Let's go around and find another home for you and let's work with you." They don't have to do that. If they know that at the end of the day they are able to get the property, there's no incentive to work with the people and try to make an arrangement and let the marketplace work.

So they threatened them, they intimidated them, and they pressured a lot of people. Some people sold voluntarily, and that's fine. Some people are willing to sell if they get the right price for their home. That's totally up to them. But other people felt like they didn't have a choice, and there were also some elderly people who were scared. They sold their properties—and as soon as the city and the New London Development Corporation got the properties, they tore them down. A not-so-subtle message to the people who were still living there, that your home is next. That this is a done deal, it's time for you to sell to us also.

The head of the New London Development Corporation was Claire Gaudiani, who was also the president of Connecticut College at the time. She decided that she was going to try to improve the city of New London

and stake out her territory in this project. She was somebody who was always quotable in the newspaper. She justified what she was doing in the city of New London by saying that "everything that's working in this country is working because someone left skin on the sidewalk." That was her justification for the eminent domain. Never her skin, though, I'm sure.

She also liked to compare the work she was doing in New London to the work of Martin Luther King, Jr. and Jesus. You always know you have a big fight ahead of you when somebody compares their work to the work of Jesus.

The other person really pushing this effort was the governor of Connecticut at the time, John Rowland. He was very active in promoting this project and was determined to see it through.

So we knew we had to get involved in this case, and we filed a challenge back in 2000. It was a very hard-fought battle throughout the Connecticut court system. We mostly won at the trial court. We lost by a 4-3 vote at the Connecticut Supreme Court, but the court was so divided, and so many states are divided on this issue, that we filed a petition to the U.S. Supreme Court, which agreed last September to hear the case and to look at the issue of whether or not eminent domain can be used simply for private economic development. That, again, was the question at issue in the New London case. This was not a blighted property, and nobody alleged that. There was no oligopoly of land ownership. There was nothing harmful about this property whatsoever; it simply was less productive in the current owners' hands than it would be in private development projects.

Fallout From the Supreme Court Decision

We briefed the case, we had the oral argument this past February, and the Supreme Court handed down its decision in June. It is generally considered to be one of the worst Supreme Court decisions in recent memory, and I cannot think of a decision in decades that has so galvanized public opposition to it. This opposition spreads across ideologies, political affiliations, and geographical divides.

The polls on this are unbelievable. Online polls are admittedly unscientific, but when the CNN poll asks "do you agree with the Supreme Court's decision" and 94 percent or more answer "no," it's pretty clear that people are strongly opposed. The Court issues a lot of controversial opinions on abortion, religion, and many other issues, but public opinion on those is typically 50/50. This split represents the so-called divided America, the "blue-red" phenomenon. Not on this issue. This issue really unites people who oftentimes have very little in common, and that's true across the country.

Let me talk about what the decision says and how the court justified this, and then I'll talk about the encouraging response. I was depressed for about a half hour after the decision was handed down, but since then I have been incredibly busy and incredibly energized, trying to turn this public outrage into productive activism to try to change the law for the better throughout the country.

As I said, the Supreme Court decided that private economic development was justified for the use of eminent domain and that there was no bar under the Fifth Amendment's takings clause for doing so. This has already opened up the floodgates for the use of eminent domain. Private parties essentially have received a signal from the Supreme Court that this is okay. A lot of people who have defended the decision—and it seems like the only people in favor of it are city officials who want the tax dollars, private developers who want profits, and a couple of academics who say that this isn't as bad as everybody makes it out to be—claim that it doesn't really change very much. They say that Justice O'Connor was overstating the case when she talked about taking a Motel 6 to replace it with a Ritz Carlton. But, in fact, she was not. Those situations were not hypothetical.

Hours after the decision was filed, Freeport, Texas filed condemnation actions against two family-owned seafood companies along the coast, in order to give the properties to a private developer to build an $8 million private boat marina. That's the equivalent of taking a Motel 6 for a Ritz Carlton. That was Justice O'Connor's point, that businesses producing lower tax revenues would be taken and replaced by others producing higher taxes. Two weeks ago in Sunset Hills, Missouri, the city approved the taking of 85 homes and small businesses to build a $165 million shopping mall. That's taking homes for a shopping mall, just as Justice O'Connor said was going to happen, and was happening even before this decision was handed down. The threats to property owners are very real.

Defenders of the opinion also say the New London case is different because the town had a plan—a development plan that described what they wanted to do and all the benefits it would supposedly bring. Having a plan supposedly means there was no abuse of eminent domain. This argument really shows, I think, how dis-

connected from reality the majority opinion is. I've been involved in many of these cases through the years—and there is *always* a plan. Governments are very good at putting together plans. They bring in the consultants, they have the PowerPoint presentations, they have public hearings, and they listen to what people have to say. There might be one or two cases where they were just too dumb or in too much of a hurry to put together a plan, but almost always there is one. However, it is ridiculous to think that this provides any type of substantive check on the use of eminent domain, because in most cases it does not.

Defenders of the decision also said there was no evidence of any corruption in the New London case. The government was trying to do something for the city, not just trying to benefit private parties. What the Court missed, however, is that you don't have to have outright corruption. You don't have to have sacks of money passing hands between private parties and the city. Even if you did, that's not really a public use problem, although it could be a violation of any number of conflict-of-interest statutes, fraud statutes, and the like. The public use problem is a separate issue, and arises even where there is no corruption.

What happened in New London is that when Pfizer came in next door to the Fort Trumbull neighborhood and agreed to build its facility, it wanted certain things done. It wanted the land cleaned up environmentally. It wanted the state park cleaned up. It wanted the nearby waste water treatment facility cleaned up. And it also wanted the Fort Trumbull neighborhood to be redeveloped. According to documents we were able to obtain, Pfizer required a five-star luxury hotel for its visitors to stay in. It also wanted high-end condominiums for its short-term employees and private office space for its subcontractors.

And guess what the city's plan included? A five-star luxury hotel, private office space, and high-end condominiums. As the plan went forward, they had public hearings, they listened to people, and people said, why don't you work on this, and retain some of the housing? At the end of the day, guess what the final plan still had? A five-star luxury hotel, private office space, and high-end condominiums.

Was the city doing this because its leaders were stockholders in Pfizer or were somehow paid off by them? No. They did it because this was the largest taxpayer in the city of New London. They wanted to please Pfizer because they thought this plan was actually going to improve the city. But one of Justice O'Connor's points is that once you allow eminent domain for private development, public benefit (if you want to agree that public benefit is a legitimate use for eminent domain) and private benefit are merged. They become one and the same, and it's very difficult to separate them, because the only way the public is going to benefit is if the private businesses are successful. Of course you want to give as many benefits to private businesses as possible, because you're only going to gain the benefits of successful private businesses if the businesses succeed.

Another reason this decision is so dangerous is that under previous rulings there at least had to be some showing that there was some type of problem with the land. It had to be a blighted neighborhood, or there had to be something like an oligopoly present. To be sure, there are abuses of blight laws. That's another area in which we litigate, because governments often are not truly interested in cleaning up a so-called blighted area; they simply want to declare an area blighted in order to use eminent domain power to give it to a private developer. There are a lot of problems with the abuse of blight laws. But at least the government had to meet certain criteria. They had to say, "this neighborhood is blighted, there are problems with it," and the statutes set out certain criteria you have to meet.

You don't have to do that in economic development condemnations. It could be any neighborhood, anywhere, that's in perfectly fine condition—except it just could be more productive in somebody else's hands. This is yet another reason why this decision is dangerous and why people are right to be concerned about it.

The Good News

The good news, however, is that this decision has touched off a firestorm of controversy and outrage, which is manifesting itself in a number of different ways. One very good aspect of the Court's majority opinion is that it recognized that state supreme courts are free to interpret their own state constitutions differently. It is actually almost inviting them to do so. It says, in effect, we at the Supreme Court are interpreting the U.S. Constitution, and we're saying there are no limits under the U.S. Constitution for private development; however, if state courts want to interpret their own state constitutions differently, go right ahead, that's fine.

This means that this important limit is still available to property owners, and the good news is that there is a trend in state courts to give greater protections to prop-

erty owners. For example, the supreme courts of Michigan and Illinois recently held that their own state constitutions prohibit the use of eminent domain for private development. I think this trend will continue, especially since the majority opinion almost invited them to limit these private development takings.

State supreme courts are also looking to their own state jurisprudence and their own state case law. They also realize that this Supreme Court was very divided on this issue and that the dissents by Justice O'Connor and Justice Thomas were powerful.

Indeed, another thing that has really galvanized public opposition to this decision is the power of Justice O'Connor's dissent. She is not a Justice known for overstatement. She prides herself on moderation. You can tell in her dissent that she was outraged by this decision, and I think that really was important in showing there's a lot at stake in this.

Another encouraging development is that citizens are now rising up against this. We've been trying to fight this for a number of years. We formed a group called the Castle Coalition, named after the old adage that every person's home is his castle. On our website, castlecoalition.org, there are a number of examples of private development projects that were stopped because people rallied against eminent domain abuse. These efforts will continue as well, because people are outraged about this and when this situation arises in their area, they are going to try to help homeowners and small business owners in the hope that it doesn't happen in their community.

The legislative response also has been encouraging. For years, legislatures did little about this issue, mainly due to the power of local governments, mayors, and private parties that want these projects to go through, and want the public subsidies and the eminent domain power that go along with them. But following the Court's decision, in the space of a month 26 state legislatures either introduced legislation or promised to do so in the coming year. (A lot of state legislatures are out of session right now and won't go back into session until later this year or sometime next year.) There's real momentum now for states changing their laws to say that this cannot happen. This was virtually unheard of before. A couple of states had tried to do it; the bills were typically buried in committee and nothing really came of them. But now there is a real effort to try to change the law. Some of it is very well intentioned, while other efforts are undoubtedly driven by politicians looking at the polling on this and saying, now's the time to do something about the abuse of eminent domain. But it is a very real phenomenon.

Several bills already have been introduced on Capitol Hill. Congress cannot change the definition of "public use" outside of a constitutional amendment, because the Supreme Court has the final say on interpretation of the Constitution. However, the Federal government has the big club of its spending power. Bills introduced in Congress now that say that any project that uses eminent domain for private economic development will receive no Federal funding. Some legislation goes even further than that, and says that if a city uses eminent domain for private economic development it will lose *all* of its Federal funding for economic development projects, including such things as community block development grants and other things that cities heavily rely on.

So Congress, too, is outraged by the Court's decision, and I hope you're going to see some changes on that end as well. On this issue, you see some great pairings of people in Congress who you typically don't see together. I talked about how this is uniting people across the political and ideological spectrum. The best evidence of that in Congress is that shortly after the decision was handed down, the first person on the floor of the U.S. Senate to denounce the decision, saying something should be done by Congress if possible, was Senator John Cornyn, a conservative Republican from Texas; in the House of Representatives, the first person on the floor was Maxine Waters from Los Angeles, probably the most liberal Democrat in the House and maybe even in Congress. Both of them were equally outraged and equally determined to do something about the Supreme Court decision. When you have groups of people that typically see very little in common, uniting to try to counter the Supreme Court's decision, I think there's some real potential to change the law.

The Fight Continues

I will close with a brief comment on what's happening now in New London with the people who started this effort. Ms. Gaudiani, who was the head of the New London Development Corporation and the president of Connecticut College, was forced to resign from Connecticut College when about 75 faculty members demanded her resignation, not only for what happened in Fort Trumbull but also for things that happened at the college. I believe she is a research fellow somewhere, safely tucked away writing articles and giving speeches and not trying to use eminent domain to take away

anybody's property. Mr. Rowland, as you might be aware, apparently was a little too close to contractors and developers and is now spending a year in a Federal penitentiary in Pennsylvania.

And where are the homeowners of Fort Trumbull? They're where they've always been. They are in their homes, and that's where we hope to keep them. There is a big effort now underway in Connecticut to try to save the homeowners and to preserve the homes of the people who have fought this development plan for the past five years. Just yesterday we got word that the new governor of Connecticut, Jodi Rell, who is trying to clean up after the term of Governor Rowland, has come out against the Supreme Court decision. She said the use of eminent domain in Fort Trumbull was not defensible. She has called on the city and the New London Development Corporation to have a moratorium on eminent domain there and throughout the state until the legislature considers its laws. Connecticut is considering changing its laws, and just yesterday, the Development Corporation (fairly reluctantly) agreed that it would not move forward on any of the condemnations or the evictions of the homeowners until the legislature does consider the law.

We at the Institute for Justice will continue to press to keep the people in New London in their homes and to fight for the rights of homes and small business owners throughout the country. We will try to turn what was a very bad decision into the high water mark of eminent domain abuse in this country. Thank you.

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