

Five Years After Kelo: The Sweeping Backlash Against One of the Supreme Court's Most-Despised Decisions

Introduction

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

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 threw the issue to the states, completely 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 launched a national campaign called "Hands Off My Home." IJ was determined to focus the outrage over *Kelo* and turn it 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, state court decisions, and lessons learned from the New London case:

- *Kelo* educated the public about eminent domain abuse, and polls consistently show that Americans are overwhelmingly opposed to *Kelo* and support efforts to change the law to better protect property rights.
- Citizen activists defeated at least 44 projects that sought to abuse eminent domain for private gain in the five-year period since *Kelo*.
- Forty-three states improved their laws in response to *Kelo*, more than half of those providing strong protection against eminent domain abuse.
- Nine state high courts restricted the use of eminent domain for private development since *Kelo* while only one (New York) has so far refused to do so.
- The New London project for which the property was taken in *Kelo* has been a complete failure and is now Exhibit A in what happens when governments engage in massive corporate welfare and abuse eminent domain. Although the project failed, Susette Kelo's iconic little pink house has been moved to downtown New London and preserved. It still stands as a monument in honor of the families who fought for their rights and who inspired the nation to change its laws to better protect other property owners.

These dramatic changes are briefly addressed in this report.

The Change in Public Opinion

¹ 546 U.S. 807 (2005).

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, nearly every reasonably well-informed person in the nation now knows about the issue—and, according to survey after survey, the vast majority of them overwhelmingly oppose eminent domain for private development. Polls consistently show that well over 80 percent of the public oppose *Kelo*.²

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, that is no longer the case. Property law expert Dwight Merriam noted: "The reaction to *Kelo* has chilled the will of government to use eminent domain for private economic development." Eminent domain supporter John Echeverria lamented: "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 Pruett, general counsel for the Georgia Municipal Association, confessed: "I describe *Kelo* as the worst case we ever won."

Grassroots Activists Fight Back Against Eminent Domain Abuse—and Win

Before the *Kelo* decision came down, many property owners faced with eminent domain abuse did not think that they could fight City Hall and win. The *Kelo* backlash changed all of that. As the polls mentioned above reflect, this issue resonated with Americans in a way few U.S. Supreme Court decisions do. The decision awoke the grassroots, infusing threatened property owners with a new-found confidence that they really could challenge politically powerful and well-funded adversaries.

Immediately following the decision, the Institute for Justice's Castle Coalition took its message on the road 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.

In just five years since *Kelo*, 44 projects and proposals that threatened the use of eminent domain for private gain have been defeated by grassroots opposition—and there are more to come. Among the examples are:

- Hard-working homeowners and small business owners became respected advocates for reform in the halls of state legislatures, like Ed Osborne, who owns an auto body shop in Wilmington, Del. When Ed 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 Ed took his fight to the statehouse where, after a grueling two-year battle, he was instrumental in securing eminent domain reform that not only protects his business, but other properties across Delaware, too.
- The shy found their powerful voices, like Princess Wells, who grew out of her comfort zone and learned to be her own best advocate, leading her neighborhood to victory over a

² See Castle Coalition, Public Opinion Polls, http://castlecoalition.org/index.php?option=com_content&task=view&id=43&Itemid=143.

project that threatened nearly 2,000 homes and businesses in Riviera Beach, Fla., which is a predominantly African-American neighborhood.

- Small groups of leaders started local revolutions, like 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 over 90 percent of the predominantly Latino city. They invited the Castle Coalition to speak at a community forum, where it helped the large group gathered create a cohesive grassroots coalition, San Pablo Against Eminent Domain. In the following weeks they protested at public hearings, drawing hundreds of supporters. When the city could not take the heat anymore, they tried to indefinitely postpone their vote; but these activists would not stand for it, and that same night, the same city council pursuing this proposal 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 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 about *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, 43 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, with some states (such as Florida, South Dakota, Michigan and Arizona) providing very strong protections against eminent domain abuse while other states (such as Minnesota, Colorado and Wisconsin) strengthened their laws but still permitted some wiggle-room for ambitious politicians and business interests to engage in some forms of eminent domain abuse. Other states (such as Maryland and Kentucky) passed only minor reforms. Although the quality and type of reform varies, the bottom line is that virtually all of the reforms amount to net increases in protections for property owners faced with eminent domain abuse.³

To comprehensively reform eminent domain, legislation should contain two essential elements: It should ban "economic development" takings—using eminent domain for the possibility of creating more tax revenue and jobs—while also changing so-called "blight" laws to stop blight statutes from being used as a back-door method of taking property for private development. Of the 43 states that changed their laws, at least 35 now do not allow condemnations for economic development. And more than half of the 43 states (22 states) went even further by reforming their laws involving condemnations to supposedly eliminate supposed "blight."

³ For a full report card that grades all the state reform efforts, see Castle Coalition, 50 State Report Card, http://castlecoalition.org/index.php?option=com_content&task=view&id=2412&Itemid=129.

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, Mississippi, after three attempts to change its eminent domain laws, 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 in 2010 to finally change Mississippi law to protect property owners.

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.⁴ 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 decision in *Kelo*. At that point, eminent domain laws in virtually every state were awful and completely rigged 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, and as this paper documents, dramatic changes for the better have occurred in a variety of contexts, including judicial decisions, citizen activism, initiatives and legislation.

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 new “higher and better” uses of property justify the takings. This is what was at 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 based on a fifty-year old precedent, *Berman v. Parker*, 348 U.S. 26 (1954), with a blight declaration comes the power of eminent domain.

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.) So in those states that have changed their blight laws—and at least 22 have done so—property owners are actually better protected than they would have been even if *Kelo* had come out the right way.

⁴ Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 Minn. L. Rev. 2100 (2009).

Despite the overwhelming public opposition to *Kelo*, the cards were stacked against eminent domain reform. The parties who gain from eminent domain abuse—in particular, local government officials and financially powerful private 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 that 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

One of the other reasons for this fundamental shift in eminent domain policy has been the response of state courts to *Kelo*. When the U.S. Supreme Court decided not to correctly interpret the U.S. Constitution, the state high courts began to fill that void. Three state supreme courts—Ohio, Oklahoma and South Dakota—explicitly rejected the *Kelo* decision.⁵ 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.⁶

Moreover, the New Jersey Supreme Court implicitly rejected *Kelo* while also curtailing the use of redevelopment and blight as an excuse for private development.⁷ New Jersey has historically been one of the worst states in the country—its municipalities seem to all 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 redevelopment designations, have totally changed the eminent domain landscape for home and small business owners in New Jersey.

The Hawaii, Pennsylvania, Rhode Island and Missouri supreme courts all 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 paying close attention to evidence that the claimed purpose of the taking is a pretext for the real purpose of benefitting a private party.⁸ 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 on the legality of the taking.⁹

⁵ *Norwood v. Horney*, 853 N.E.2d 1115 (Ohio 2006); *Muskogee County v. Lowery*, 136 P.3d 639 (Okla. 2006); *Benson v. State*, 710 N.W.2d 131 (S.D. 2006).

⁶ See DANA BERLINER, PUBLIC POWER, PRIVATE GAIN 159-70 (Castle Coalition 2003), available at http://www.castlecoalition.org/pdf/report/ED_report.pdf (showing pre-*Kelo* abuses).

⁷ See *Gallenthin Realty Dev., Inc. v. Borough of Paulsboro*, 924 A.2d 447 (N.J. 2007).

⁸ See *County of Hawaii v. C&J Coupe Family Ltd. Partnership*, 198 P.3d 615 (Haw. 2008); *Middletown Township v. Lands of Stone*, 939 A.2d 331 (Penn. 2007); *Rhode Island Economic Development Corporation v. The Parking Company*, 892 A.2d 87 (R.I. 2006); *Centene Plaza Redev. Corp. v. Mint Props.*, 225 S.W.3d 431 (Mo. 2007).

⁹ *Mayor and City Council of Baltimore v. Valsamaki*, 916 A.2d 324 (Md. 2007); *Sapero v. Mayor and City Council of Baltimore*, 920 A.2d 1061 (Md. 2007).

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) seems stuck in the days when courts routinely ignored evidence of eminent domain abuse, refusing to give the facts any real scrutiny at all. This latest ruling from the court, which completely ignores the fundamental role of the courts in properly interpreting essential constitutional rights, 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.¹⁰

The Court of Appeals does have a chance to redeem itself in another challenge to a completely trumped-up claim of blight, combined with concealment of relevant evidence, in another case currently pending before it.¹¹ New Yorkers can only hope the Court of Appeals will remove its head from the sand before reaching its final decision.

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 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 followed suit. After *Kelo*, state courts have gone in exactly the opposite direction. We expect this encouraging trend 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.¹² 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 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 an 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. After the decision, the remaining residents who had

¹⁰ *Matter of Goldstein v. N.Y. State Urban Dev. Corp.*, 921 N.E.2d 164, 172 (N.Y. 2009).

¹¹ *See Matter of Kaur v. N.Y. State Urban Dev. Corp.*, 892 N.Y.S.2d 8, 20-28 (N.Y. App. Div. 2009), *rev. granted*.

¹² 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* (Grand Cent. Publ’g 2009).

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.¹³ 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.¹⁴ Now, ten years after its initial plan was approved, the city has commissioned another study to see what might work in the area.¹⁵ 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.¹⁶ Ten years 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 plan was floundering well before the real estate downturn.¹⁷ With its massive taxpayer subsidies and catering to one large corporation, the plan was never market driven. But even if the economy alone were to blame, that is all the more reason why taxpayer dollars should not be put at risk in speculative development schemes.

And now, just before its 80 percent tax abatement expires, Pfizer announced it, too, is moving out. On November, 9, 2009, Pfizer announced that it would close its research and development headquarters and leave New London.¹⁸ For years, the disastrous Fort Trumbull project will be Exhibit A in demonstrating the folly of government plans that involve corporate welfare and that abuse 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.¹⁹

Even though the Fort Trumbull neighborhood was lost, Susette Kelo's little pink house, where this fight all began, still stands, now in downtown New London about one mile away from Fort Trumbull. Kelo's home was disassembled and moved piece-by-piece to its new location. It is once again a home for its new owner, local preservationist Avner Gregory. The beauty of the restored home obviously 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

¹³ David Collins, *Feral Cats Ignore Eminent Domain*, THE DAY, Dec. 10, 2008; Katie Nelson, *Conn. Land Vacant 4 Years After Court OK'd Seizure*, ASSOCIATED PRESS, Sep. 25, 2009.

¹⁴ Kathleen Edgecomb & Jennifer Grogan, *Coast Guard museum plan on hold*, THE DAY, July 24, 2009.

¹⁵ Stephen Chupaska, *NL Council panel supports hiring group for study of Fort Trumbull*, THE DAY, Apr. 13, 2010.

¹⁶ Kathleen Edgecomb & Stephen Chupaska, *NLDC to explore developer's plan for village theme at Fort Trumbull*, THE DAY, Feb. 20, 2010.

¹⁷ William Yardley, *After Eminent Domain Victory, Disputed Project Goes Nowhere*, N.Y. TIMES, Nov. 21, 2005, at A1.

¹⁸ Patrick McGeehan, *Pfizer to Leave City That Won Land-Use Suit*, N.Y. TIMES, Nov. 13, 2009, at A1.

¹⁹ 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/other_pubs/doomsday-no-way.pdf (documenting that eminent domain reforms have had no negative effect on development).

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, we receive far fewer. Of those, many 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 just one five-year period alone, an epidemic that affected property owners in most states.²⁰ Now, it is largely a problem 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 reforms must be strengthened. Moreover, property owners must be vigilant in making sure that 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.²¹ 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 will need to be fought and property owners must remain vigilantly aware of any efforts to repeal or undercut good judicial opinions, legislation or constitutional amendments. For property owners nationwide, however, *Kelo* remains the classic example of losing the battle but winning the war.

²⁰ See DANA BERLINER, PUBLIC POWER, PRIVATE GAIN 159-70 (Castle Coalition 2003), available at http://www.castlecoalition.org/pdf/report/ED_report.pdf.

²¹ Christine MacDonald, *Bing: I'll move some residents*, DETROIT NEWS, Feb. 25, 2010, at A4.