SEN. JOHN CORNYN

Property Rights and Wrongs: The Coming Fight in Congress to End Eminent Domain Abuse

ENCOURAGING HOME OWNERSHIP has long been a national priority and for good reason: Nothing better symbolizes achievement of the American dream than owning a home. It provides economic security, peace of mind, and the assurance of passing on something of significant value. Similarly, our nation's chatacter and prosperity are strengthened by the tens of millions of U.S. small-business owners whose entrepreneurial spirit and can-do attitude inspire us to greatness. For family farmers, local dry cleaners, and corner grocers alike, real property ownership is often the backbone of their businesses. So imagine this scenario if you own your own home or small business: One day, using its power of eminent domain, the long arm of the government reaches out and makes a grab for your home or business property—not to build a road or a fire station or anything else reasonably "public" in nature—but for the construction of a privately owned parking garage, movie theater, or luxury condominium tower. This troubling hypothetical is now a reality as a result of the U.S. Supreme Court's infamous decision in *Kelo v. City of New London* in 2005.

The *Kelo* case began when local officials in New London, Conn., condemned the home of Susette Kelo along with 114 other residential and commercial lots in order to carry out the local government's economic development plan. The city's plan included building a new hotel and conference center to help attract a drug manufacturing plant to the area. Home owners, small-businesses owners, and property rights activists protested, but our nation's highest court ultimately found no constitutional prohibition against the city's heavy-handed transfer of property from its owner—who is unwilling to part with the property at the price being offered—to private developers. Disregarding, in my view, the Fifth Amendment's specific protections of private property, the Court ruled that a home, business, or family farm—indeed, any private land—may be seized by the government not just for "public use," but for the benefit of another private entity, such as a real estate developer. Under *Kelo*, the sole purpose of a government-mandated, private-to-private property transfer can simply be to generate more tax revenue for the local government or merely even to make an area more aesthetically pleasing.

Of course, the Fifth Amendment makes it clear that "private property" shall not "be taken for public use, without just compensation."[1] In other words, when a government wields the awesome power of eminent domain on a landowner who will not consent to sell his or her land to the government, the affected landowner is entitled by the U.S. Constitution to a fair amount for the property taken. But the same constitutional provision also provides important protection against abusive use of eminent domain by permitting the government to seize private property only for "public use."

In my view, *Kelo* veered dangerously off course, allowing property to be taken far outside the limits envisioned by America's Founders. As the Court acknowledged, "it has long been accepted that the sovereign may not take the property of A for the sole purpose of transferring it to another private party B," and that, under the Fifth Amendment, the power of eminent domain may be used only "for public use."[2] Nevertheless, simply by concluding that such a transfer would benefit the community through increased economic development, the Court held that government may seize the home, small business, or other private property of one owner and transfer that same property to another private owner.

The Court's decision was sharply criticized by Justice Sandra Day O'Connor in a dissent joined by the late Chief Justice Rehnquist and Justices Scalia and Thomas. Justice O'Connor worried that *Kelo* would effectively "delete the words 'for public use' from the Takings Clause of the Fifth Amendment."[3] She warned that "[t]he specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory."[4] Under *Kelo*, the only real prerequisites are a government-blessed "development plan" and some political clout.

The most vulnerable property owners in the post-*Kelo* regime are low- and middle-income home owners and small-business owners, especially those whose homes or businesses are located in prime inner-city redevelopment areas. An amicus brief filed in *Kelo* by the

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National Association for the Advancement of Colored People, AARP, and other organizations noted that, "[a]bsent a true public use requirement the takings power will be employed more frequently. The takings that result will disproportionately affect and harm the economically disadvantaged and, in particular, racial and ethnic minorities and the elderly."[5]

Our country was founded on a respect for private property. It's troubling to realize that right stands on such shaky ground for those who lack political clout. No American—rich or poor—should have to live under the constant threat of a questionable taking of his or her property by the government. The protections of the Fifth Amendment represent some of the most fundamental principles conceived by the framers of the Constitution, and we must take all necessary actions to preserve them.

Unfortunately, since the *Kelo* decision, many local governments appear further emboldened to take property for private development. For example, just hours after the *Kelo* decision, in my home state of Texas—in the coastal town of Freeport—city officials initiated legal filings to seize two small businesses on the waterfront (both seafood companies) to make way for other private interests (an $8 million private boat marina). State courts also immediately began relying on the Supreme Court's misguided decision to reject challenges by owners to the taking of their property for the benefit of other private parties. On July 26, 2005, a court in Missouri relied on *Kelo* when it reluctantly upheld the taking of a home for a shopping mall. As the Missouri judge lamented, "The United States Supreme Court has denied the Alamo reinforcements. Perhaps the people will clip the wings of eminent domain in Missouri, but today in Missouri it soars and devours."[6] Of course, while *Kelo* didn't create the abuse, it certainly put such practices on firmer legal ground.

But this grim and disturbing picture is only half of the story. Indeed, in the aftermath of *Kelo*, a silver lining has appeared. As an initial matter, the controversial decision caused a bigger and brighter spotlight to shine on property rights issues across the nation. And the public outcry by property rights activists, home owners, and business owners spawned a new awareness about abusive "blight" designation and eminent domain practices. Most important, this heightened awareness has translated into legislative action. At last count, 41 states have enacted post-*Kelo* reforms to curb the abuse of eminent domain. The legislative reactions primarily seek to guarantee that the phase "public use" means what it says.

For example, the Texas legislature reacted swiftly: in September 2005 it approved a bill that prohibits a government or a public-private development entity from taking property if the taking confers a private benefit, is pretextual, or is for economic development. Under the new Texas law, economic development can still be a secondary objective if the primary objective is to eliminate true blight. The Texas statute also prohibits courts from giving any deference to a local government or other condemning authority's determination that a particular condemnation is done for the sake of public use. According to property law experts at the Institute for Justice, a public-interest law firm that is often the tip of the spear in the fight against abuses of eminent domain, Texas' reforms and similar state measures should go a long way toward limiting these abuses. But some states, like California, have a much longer way to go. Currently, California law is interpreted to allow a local government to declare an entire neighborhood "blighted" based on justifications that have no connection to health or safety. Municipalities then invoke eminent domain to "redevelop" the area. The Institute for Justice is currently litigating a particularly egregious case of "blight" designation and eminent domain abuse in National City, Calif., a predominantly Hispanic, working-class community in San Diego County. The institute is battling the local government on behalf of the Community Youth Athletic Center, a nonprofit, all-volunteer youth boxing and after-school mentoring program for at-risk youth in the area. A few years ago, donors helped the athletic center acquire a building that happened to be in the heart of National City's absurdly expansive "blight" zone. More recently, National City officials promised the center's property to an influential private developer, who intends to build high-rise luxury condos on the site. The lawsuit brought by the Community Youth Athletic Center will be an important test of California's pernicious "blight" designation laws.

However, as *Kelo* demonstrates, courts cannot be relied upon to remedy eminent domain abuses. Legislation at all levels of government is the only sure-fire way to correct the problem. To that end, the federal government has also entered the arena. On June 23, 2006, President George W. Bush signed an executive order preventing taking of private property by the federal government "merely for the purpose of advancing the economic interest of private parties to be given ownership or use of the property taken."[7]

But Congress must also take action—consistent with its limited powers under the Constitution—to restore the vital protections that the Fifth Amendment provides. That is why, in response to the *Kelo* decision, I introduced Senate Bill 1313, titled the Protection of Homes, Small Businesses, and Private Property Act of 2005. The bill declares that the power of eminent domain should be exercised only "for public use" as guaranteed by the Fifth Amendment, and that this power to seize homes, small businesses, and other private property should be reserved only for true public uses. Most important, the power of eminent domain should not be used simply to further private economic development. The proposed legislation would apply

this standard to (1) all exercises of eminent domain power by the federal government and (2) all exercises of eminent domain power by state and local government through the use of federal funds.

During the last legislative session, I was happy to receive bipartisan support for the bill, including the immediate support of the senior senator from Florida, Bill Nelson (D). But despite the fact that 28 of my Senate colleagues joined me as co-sponsors of this important legislation, the bill stalled at the end of 2006. This fall, I plan to make a renewed push for Senate approval.

As we work to protect private property rights, I'm well aware that we must be cautious. There is no question that, where appropriate, eminent domain can play a positive role in society through true public use of property. However, the right to protect homes, small businesses, and other private property from government seizure and other unreasonable government interference is a fundamental principle and core commitment of our nation's Founders. In the aftermath of *Kelo*, we must take all necessary action to restore and strengthen these core protections of the Fifth Amendment. **TFL**

U.S. Senator John Cornyn (R-Texas) serves on the U.S. Senate Armed Services, Judiciary, and Budget Committees. In addition, he is vice chairman of the Senate Select Committee on Ethics. He serves as the top Republican on the Judiciary Committee's Immigration, Border Security, and Citizenship Subcommittee and the Armed Services Committee's Airland Subcommittee.

Endnotes

[1]U.S. Constitution, Amendment V.

[2]*Kelo v. City of New London*, 545 U.S. at 477 (2005) (No. 04-108).

[3]*Id.* at 494.

[4]*Id.* at 503.

[5]Brief of Amici Curiae, National Association for the Advancement of Colored People, et al. at 7, *Kelo v. City of New London*, 469.

[6]*Protecting Property Rights After* Kelo*: Hearings Before Subcomm. on Commerce, Trade, and Consumer Protection*, 109th Cong., 1st Sess. 133 (2005) (statement of Steven D. Anderson, Castle Coalition Coordinator, Institute for Justice).

[7]Office of the President, Executive Order No. 13406, 71 FED. REG. 36973 (June 23, 2006).