ACLJ LEGAL ANALYSIS OF SUPREME COURT'S DECISION IN EMINENT DOMAIN CASE
&
ANALYSIS OF CONGRESSIONAL RESPONSE
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***Kelo v. New London* – Summary of Case and Senator Cornyn's Bill**

I. *Kelo*'s Background – Statement of Facts

In 1990 the City of New London ("City") was designated a "distressed municipality," and in 1996 a major employer in the area closed costing many residence to lose their jobs.1[1] By 1998 "the City's unemployment rate was nearly double that of the State."2[2] "These conditions prompted state and local officials to target New London, and particularly its Fort Trumbull area, for economic revitalization."3[3] After both the State and Pfizer (a pharmaceutical company) announced intentions to invest substantial sums of money into the Fort Trumbull area (over 95% of the money invested would be by Pfizer), an "integrated development plan" that "focused on 90 acres of the Fort Trumbull area" was approved by the State.4[4] In January 2000 the City approved the plan, and later that same year in November condemnation proceedings were begun against any property owners who refused to voluntarily sell their land.5[5] One such person was Wilhelmina Dery who "was born in her Fort Trumbull house in 1918 and has lived there her entire life."6[6]

II. *Kelo*'s Holding – Summary of the Court's Decision

Although the Takings Clause of the Fifth Amendment is the very heart of this case the majority mentions its text just once, and that brief recitation appears only in a footnote.7[7] Stevens explains that actual words of the Constitution have little to no bearing on the actual meaning of the Constitution because the "Court long ago rejected any literal requirement that condemned property be put into use for the general public."8[8]

Even though the Constitution states that land may only be taken "for public use,"9[9] the majority suggests that it should actually given the "more natural

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1[1] Kelo v. Cit of New London, No. 04—108 slip op. at 2 (2005) (Stevens, J.).
2[2] *Id*.
3[3] *Id*. (Stevens, J.).
4[4] *Id*. at 2-3 (Stevens, J.).
5[5] *Id*. at 4.
6[6] *Id*.
7[7] *Id*. at 1 n.1.
8[8] *Id*. at 8 (Stevens, J.) (quoting *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 244 (1984)).
9[9] U.S. Const., Amdt. 5.

interpretation of 'public purpose.'"10[10] In fact, the Court starts their opinion by claming to "grant[] certiorari to determine whether a city's decision to take property for the purpose of economic development satisfies the 'public use' requirement of the Fifth Amendment,"11[11] but ends up deciding that the dispositive question in the case is "whether the City's development plan serves a 'public purpose.'"12[12]

Taking Clause Precedent

The Court claims that there are two very clear propositions when dealing with the Takings Clause, but that there is a gray area in between these two established ideas.

> Two polar propositions are perfectly clear. On the one hand, 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, even though A is paid just compensation. On the Other hand, it is equally clear that a State may transfer property from one private party to another if future 'use by the public' is the purpose of the taking. . . . Neither of these propositions, however, determines the disposition of this case.13[13]

The taking of private property by the government for economic development does not fall into the clearly permissible category of takings for "use by the public"; yet neither does it fall into the clearly impermissible use of "conferring a private benefit on a particular private party," or even the taking of property "under the mere pretext of a public purpose, when the actual purpose was to bestow a private benefit."14[14]

To determine whether such a taking would be permissible the majority turned primarily to another case in this supposed gray area of the Constitution, *Berman v. Parker*.15[15] There, the Court "upheld a redevelopment targeting a blighted area."16[16] The Court used this case to support the proposition that "community redevelopment programs need not . . . be on a piece meal basis—lot by lot, building by building."17[17] Thus, even if there are some areas, which do not represent a "blight," they also may be condemned along with the surrounding "blights" to serve the greater good of the redevelopment plan.

The Court further explained that "[p]romoting economic development is a tradition and long accepted function of government."18[18] The court also stated that

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10[10] *Kelo*, No. 04—108 slip op. at 8-9 (Stevens, J.).
11[11] *Id*. at 6 (Stevens, J.).
12[12] *Id*. at 10 (Stevens, J.).
13[13] *Id*. at 6-7 (Stevens, J.).
14[14] *Id*. at 7 (Stevens, J.).
15[15] 348 U.S. 26 (1954).
16[16] *Kelo*, No. 04—108 slip op. at 10 (Stevens, J.).
17[17] *Id*. at (quoting *Berman*, 348 U.S. at 35).
18[18] *Id*. at 14 (Stevens, J.).

Berman went beyond justifying government takings for the removal of blight, to establish the power of government to take land for economic development.

> It is a misreading of *Berman* to suggest, that the only public use upheld in that case was the initial removal of blight. The public use described in *Berman* extended beyond that to encompass the purpose of *developing* that area to create conditions that would prevent a reversion to blight in the future.19[19]

The Court established a "deferential approach"20[20] in *Berman* and stated "Congress and its authorized agencies have made a determination that take into account a wide variety of vales. It is not for us to reappraise them." 21[21]

Rational Basis Test: Deference to the Legislature and the Continual Evolution of the Constitution

The Court claimed that the legislature must be given "broad latitude in determining what public needs justify the use of the takings power," because "the needs of society have varied between different parts of the Nation, just as they have evolved over time in response to changed circumstances."22[22] It now seems that any governmental "determination that [an] area [is] sufficiently distressed to justify a program of economic rejuvenation is entitled to [the Court's] deference" as long as there is a rational basis for this determination.23[23]

> When the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of the takings—no less than debates over the wisdom of the other kinds of socioeconomic legislation—are not to be carried out in the federal courts.24[24]

All that the government must show is that it had a public purpose for the taking, and that it could rational believe that the public would benefit from the taking. The government need not be "reasonably certain" that the redevelopment plan will accomplish its objective, only that it rationally *could have believed* that the plan may *possibly* benefit the public at some future time.25[25]

19[19] *Id*. at 14 n.13 (Stevens, J.) (internal citations omitted).
20[20] *Id*. at 11 (Stevens, J.).
21[21] *Id*. (quoting *Berman*, 348 U.S. at 33).
22[22] *Id*. at 12-13 (Stevens, J.).
23[23] *Id*. at 13 (Stevens, J.).
24[24] *Id*. at 17 (quoting *Midkiff*, 467 U.S. at 242).
25[25] *See id*. at 17-18 n.20 "[W]e need not make a specific factual determination whether the condemnation will accomplish its objectives." (quoting *Nat'l R.R. Passenger Corp. v. Boston & Mane Corp*., 503 U. S. 407, 422-423 (1992)); "The proper inquiry before this court is not whether the provisions in fact will accomplish their stated objectives. Our review is limited to determining that the purpose is

This deference to the legislature extends not only to the need for a redevelopment plan, but also to the extent of the redevelopment needed.

> Just as we decline to second-guess the City's considered judgment about the efficacy of its development plan, we also decline to second-guess the City's determination as to what lands it needs to acquire in order to effectuate the project. 'It is not for the courts to oversee the choice of the boundary line nor sit in review on the size of a particular project area. Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch."26[26]

The Court declined to answer whether the Court's deference to the legislature would extend to the situation where a government decided to "transfer[] citizen A's property to citizen B for the sole reason that citizen B will put the property to a more productive use and thus pay more taxes."27[27] The court did state that "such an unusual exercise of governmental power would certainly raise a suspicion that a private purpose was afoot," but it declined to say that such governmental takings would be *per se* invalid. Under the courts current test as long as a legitimate public purpose was given for the taking, such a "one-to-one transfer of property" would be Constitutional.

Conclusion

The Court will look almost exclusively at whether there is a public or a private purpose for the taking. Once any public purpose is established, the court will do no further investigation except that the taking is not irrational. The Court is unclear what exactly constitutes a public purpose, instead it has deferred "to legislative judgments in this field."28[28] It does not matter that the current use of the land that is condemned and taken by the government is a profitable or beneficial use.29[29] It only matters that the legislature can establish that it would prefer that the land be used for a different purpose that it may defined itself, with judicial deference, as a public purpose.

III. *Kelo*'s Implications – The Dissenting Opinions

Justice O'Connor, joined by Chief Justice Rehnquist and Justices Scalia and Thomas,

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legitimate and that Congress rationally could have believed that the provisions would promote that objective." (quoting *Reckelshaus* v. *Monosanto Co*., 467 U.S. 986, 1015, n.18 (1984)).

26[26] *Id*. at 18 (Stevens, J.) (quoting *Berman*, 348 U.S. at 35-36).

27[27] *Id*. at 16 (Stevens, J.).

28[28] *Id*. at 10 (Stevens, J.).

29[29] The lands taken by the City in *Kelo*, were "condemned only because they happen to be located in the development area." *Id*. at 4-5 (Stevens, J.).

dissented from the Court's holding. Justice Thomas also wrote a separate dissenting opinion. The dissents outline many of the concerns and implications arising from the Court's holding.

"Public Use" Does Not Mean "Public Purpose"

As noted, the Takings Clause of the Fifth Amendment limits the government's power of eminent domain to situations where the taking was necessary for a "public use." But, as O'Connor wrote, in *Kelo*

> the Court abandons this long-held, basic limitation on government power. Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded—*i.e.*, given to an owner who will use it in a way that the legislature deems more beneficial to the public—in the process.30[30]

Kelo "wash[es] out any distinction between private and public use of property—and thereby effectively to delete the words 'for public use' from the Takings Clause of the Fifth Amendment"31[31] Much of Thomas's dissent is spent detailing the history of the Takings Clause of both the federal and in the state governments, noting primarily that the principle set forth in the Constitution allows "the government to take property not for 'public necessity' but instead for public use."32[32] Thomas rails against "replac[ing] the Public Use Clause with a '[P]ublic [P]urpose Clause (or perhaps the 'Diverse and Always Evolving Needs of Society' Clause).33[33]

The two limitations on eminent domain – public use and just compensation – "serve to protect the 'security of property,' which Alexander Hamilton described . . . as one of the 'great obj[ects] of Gov[ernment].'"34[34] These limitations "ensure stable property ownership by providing safeguards against excessive, unpredictable, or unfair use of the government's eminent domain power—particularly against those owners who, for whatever reasons, may be unable to protect themselves in the political process against the majority's will."35[35]

While the Court traditionally interprets the Constitution with the "unremarkable presumption that every word in the document has independent meaning, 'that no word was unnecessarily used, or needlessly added,'"36[36] *Kelo* eradicates the meaning of

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30[30] *Id*. at 1 (O'Connor, J., dissent).
31[31] *Id*. at 2-3 (O'Connor, J., dissent).
32[32] *Id*. at 1-16 (Thomas dissent).
33[33] *Id*. at 1 (Thomas dissent) (internal citations omitted).
34[34] *Id*. at 4 (O'Connor, J., dissent) (quoting 1 Records of the Federal Convention of 1787, p. 302 (M. Farrand ed. 1934)).
35[35] *Id*. (O'Connor, J., dissent).
36[36] *Id*. at 3 (O'Connor, J., dissent) (quoting *Wright v. United States*, 302 U.S. 583, 588 (1938)).

"public use" commonly understood for centuries. Public use meant that "[g]overnment may compel an individual to forfeit her property for the *public's* use, but not for the benefit of another private person. This requirement promotes fairness as well as security."37[37] The Court had previously identified three categories of "public use"38[38] First, "the sovereign may transfer private property to public ownership—such as for a road, a hospital, or a military base."39[39] Second, "the sovereign may transfer private property to private parties . . . who make the property available for the public's use—such as with a railroad, a public utility, or a stadium."40[40] Third, "in certain circumstances . . . takings that serve a public purpose also satisfy the Constitution even if the property is destined for subsequent private use."41[41] None of these categories applies in *Kelo*.

The Majority Misapplies Court Precedent

Although the majority cites the Court's holdings in *Berman* and *Midkiff* to defend the present taking it is a misapplication because both

> *Berman* and *Midkiff* were true to the principle underlying the Public Use Clause. "In both these cases, *the extraordinary, precondemnation use of the targeted property inflicted affirmative harm on society* . . . Thus a public purpose was realized when the harmful use was eliminated Because each taking *directly* achieved a public benefit, it did not matter that the property was turned over to private use. Here, in contrast, New London does not claim that [the] well-maintained homes are the source of any social harm. Indeed, it could not so claim without adopting the absurd argument that *any single-family home that might be razed to make way for an apartment building, or any church that might be replaced with a retail store* . . . is inherently harmful to society and thus within the government's power to condemn.42[42]
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> . . . [T]he Court today significantly expands the meaning of public use. It holds that the sovereign may take private property currently put to ordinary use, and give it over for *new, ordinary private use,* so long as the new use is predicted to generate some secondary benefit for the public—such as increased tax revenue, more jobs, maybe even aesthetic pleasure. But nearly any lawful use of real

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37[37] *Id.* at 4 (O'Connor, J., dissent).
38[38] *Id.* at 5 (O'Connor, J., dissent).
39[39] *Id.* (O'Connor, J., dissent).
40[40] *Id.* (O'Connor, J., dissent).
41[41] *Id.* (O'Connor, J., dissent).
42[42] *Kelo v. New London*, Slip Op. No. 04–108, at 8 (O'Connor, J., dissent) (emphasis added).

> private property can be said to generate *some incidental benefit* to the public. Thus, if predicted (or even guaranteed) positive side-effects are enough to transfer from one private party to another constitutional, then the words "for public use" do not realistically exclude *any* takings, and thus do not exert any constraint on the eminent domain power.43[43]

There is almost no restraint left to prohibit the government from taking private property from one citizen to give to another private citizen.

Kelo Leaves Virtually No Restrictions on the Government's Exercise of Eminent Domain Power

The majority's opinion "suggests two limitations on what can be taken after today's decision" however neither limit has any power or credibility.44[44] The first limit is that the courts will still have a role "in ferreting out takings whose sole purpose is to bestow a benefit on the private transferee."45[45] The Court however does not "detail[] how courts are to conduct that complicated inquiry," and even if they try "it is difficult to envision anyone but the 'stupid staff[er]' failing it."46[46] Furthermore, "the trouble with economic development takings it that private benefit and incidental public benefit are . . . merged and mutually reinforcing."47[47]

And "[i]f it is true that incidental public benefits from new private use are enough to ensure the 'public purpose' in a taking, why should it matter, as far as the Fifth Amendment is concerned what inspired the taking in the first place?"48[48] After all 'whatever the reason for a given condemnation, the effect is the same from a constitutional perspective—*private ownership is forcibly relinquished to new private ownership*."49[49]

The Majority tried to limit its holding here by implying "that eminent domain may only be used to upgrade—not downgrade—property."50[50] But O'Connor notes that "this constraint has no realistic import. *For who among us can say she already makes*

43[43] *Id*. at 8-9 (O'Connor, J., dissent) (emphasis added).
44[44] *Id*. at 9 (O'Conner, J., dissent).
45[45] *Id*. at 8-9 ((O'Conner, J., dissent) (citing *Kelo v. New London*, Slip Op. No. 04–108, 7 (Majority opinion).
46[46] *Id*. at 9-10 (O'Conner, J., dissent) (citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1025-26, n. 12 (1992)).
47[47] *Id.* at 10 (O'Conner, J., dissent).
48[48] *Id*. at 10 (O'Conner, J., dissent); *see also id*. at 10 (O'Connor dissent) ("How much the government does or does not desire to benefit a favored private party has no bearing on whether an economic development taking will or will not generate secondary benefit to the public.")
49[49] *Id*. at 10 (O'Conner, J., dissent).(emphasis added).
50[50] *Id*. at 10 (O'Conner, J., dissent).

the most productive or attractive possible use of her property? The 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."51[51] Or any church or religious organization – entities traditionally being exempt from property taxes – from *any* property tax paying owner, for that matter.

"The Court also puts special emphasis on the facts particular to this case" specifically that the proposed planning scheme is "the product of a relatively careful deliberative process . . . But none has legal significance to blunt today's holding."52[52] The specific facts of this case do not change the precedent set forth in this case because

> [i]f legislative prognostications about secondary public benefits of a new use can legitimate a taking, there is nothing in the Court's rule . . . to prohibit property transfers generated with less care, that are less comprehensive, that happen to result from less elaborate process, whose only projected advantage is the incidence of higher taxes, or that hope to transform an already prosperous city into an even more prosperous one."53[53]

Lastly, even though the Majority urges property owners to "turn to the States . . . to impose appropriate limits on economic development takings,54[54] O'Connor observes that federal courts – and the Supreme Court in particular – bear the responsibility for properly enforcing the Federal Constitution. States do not share this particular responsibility.55[55] O'Connor concludes by noting that although any

> property may now be taken for the benefit of another private party . . . the fallout form this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process . . . . As for the victims, the government now has license to transfer property from those with fewer resources to those with more. *The founders cannot have intended this perverse result.56****[56]***

The Court Incorrectly Holds that It Should Defer to Local Government

The majority relies on *United States v. Gettysburg Electric R. Co.* which states that "when the legislature has declared the use or purpose to be a public one, its judgment will be respected by the courts, unless the use be palpably without reasonable

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51[51] *Id*. at 10-11 (O'Conner, J., dissent).
52[52] *Id*. at 11 (O'Conner, J., dissent).
53[53] *Id*. at 11-12 (O'Connor, J., dissent).
54[54] *Id.* at 12 (O'Conner, J., dissent).
55[55] *Id*. (O'Conner, J., dissent).
56[56] *Id*. at 12-13 ((O'Conner, J., dissent).

foundation."57[57] Following this jurisprudence the Court must respect the stated purpose of the government unless there is no reasonable foundation for accepting the declared purpose. Thomas disagrees that the Court must show this deference because

> There is no justification . . . for affording almost insurmountable deference to legislative conclusions that a use serves a "public use." To begin with, a court owes no deference to a legislature's judgment concerning the quintessentially legal question of whether the government owns, or the public has a legal right to use, the taken property. Even under the "public purpose" interpretation, moreover, it is most implausible that the Framers intended to defer to legislatures as to what satisfies the Public Use Clause, uniquely among all the express provisions of the Bill of Rights. We would not defer to a legislature's determination of the various circumstances that establish, for example, when a search of a home would be reasonable, . . . or when a convicted double-murderer may be shackled during a sentencing proceeding without on-the-record findings, . . . or when state law creates a property interest protected by the Due Process Clause.
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> . . . The Court has elsewhere recognized "the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic," . . . when the issue is only whether the government may search a home. Yet today the Court tells us that we are not to "second-guess the City's considered judgments," . . . when the issue is, instead, whether the government may take the infinitely more intrusive step of tearing down petitioners' homes. Something has gone seriously awry with this Court's interpretation of the Constitution. Though citizens are safe from the government in their homes, the homes themselves are not. 58[58]

Thomas concludes by offerring a scathing critique of the Majority's interpretation not only of the Court's precedent, but also of the Constitution:

> It is far easier to analyze whether the government owns or the public has a legal right to use the taken property than to ask whether the taking has a "purely private purpose"– unless the Court means to eliminate public use scrutiny of takings entirely. . . . Obliterating a provision of the Constitution, of course, guarantees that it will not be misapplied.59[59]

IV. Congressional Response to *Kelo* – Senator Cornyn's Proposed Bill: *The Protection of Homes, Small Businesses, and Private Property Act of 2005.*

57[57] *Id.* at 13 (Thomas, J., dissent) (quoting *United States v. Gettysburg Electric R. Co.*, 160 U.S. 668 (1896)).
58[58] *Id.* at 13-14 (Thomas, J., dissent) (internal citations omitted).
59[59] *Id.* at 17 (Thomas, J., dissent) (internal citation omitted).

On June 27, 2005, U.S. Sen. John Cornyn introduced a bill entitled "The Protection of Homes, Small Businesses, and Private Property Act of 2005. The bill was introduced in response to the controversial ruling by the United States Supreme Court in Kelo v. City of New London. If enacted, this law would prohibit the transfer of private property from one private owner to another private owner, without the existing owner's consent, if federal funds were used, and the purpose of the transfer was for economic development instead of public use.

The legislation would restrict the government's use of eminent domain to public use only. Furthermore, the bill expressly states that 'Public use' does not include economic development. The scope of this bill would include (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.

Congress does not have the authority to restrict exercises of eminent domain by state and local government that do not use federal funds; however, Senator Cornyn's bill encourages state and local governments to voluntarily limit their own power of eminent domain.