



# Undoing Kelo: Congress Takes on an Activist Supreme Court Decision

**“The right to procure property and to use it for one’s own enjoyment is essential to the freedom of every person, and our other rights would mean little without these rights of property ownership.” - Thomas Jefferson**

## **Background**

Both the federal government and the states have the power of eminent domain, the right to take private property when necessary for government activities. The Fifth Amendment to the Constitution invests the federal government with this limited power, which was later granted to state and local governments through the Fourteenth Amendment.<sup>1</sup> However, government cannot take private property without just compensation and must do so for public use.

The United States Supreme Court established the “public use” doctrine as a test for using eminent domain, following the principle that “one person’s property may not be taken for the benefit of another person without a justifying public purpose, even though compensation be paid.”<sup>2</sup> Over the years, the Supreme Court greatly expanded the meaning of the phrase “public use,” eventually encompassing anything “rationally related to a conceivable government purpose.”<sup>3</sup> In the case of Kelo v. City of New London,<sup>4</sup> the court expanded the “public use” doctrine far beyond any commonly understood meaning of that term.

## **Kelo v. City of New London**

In 1998, the City of New London, Connecticut invoked eminent domain to take private land and give it to the Pfizer Corporation as part of an economic development scheme, arguing that would contribute to overall reinvigoration of the economy.

On June 23, 2005, the Supreme Court ruled in the city’s favor. Justice John Paul Stevens, writing for the majority, expanded “public use” to essentially mean “public benefit,” an interpretation far broader than the plain meaning of the phrase in the

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<sup>1</sup> U.S. Const. Amend. V: “nor shall private property be taken for public use without just compensation.”

<sup>2</sup> Thompson v. Consolidated Gas Corp., 300 U.S. 55, 80 (1937).

<sup>3</sup> See Hawaii Housing Authority v. Midkiff, 465 U.S. 1097.

<sup>4</sup> 2005 Westlaw 1469529 (No. 04-108) (U.S. June 23, 2005).

Constitution. The result is that governments may now legally exercise their eminent domain authority to build shopping malls and supermarkets or anything else a developer proposes and the government approves.

In her dissent, Justice Sandra Day O'Connor wrote: "Today 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."

To give governments the power to take property for "economic development purposes" is to essentially give governments the power to take property whenever they see fit. Since the Court's ruling, thirty-eight states have taken some kind of action to protect property owners from abuse of this newly expanded eminent domain power.<sup>5</sup>

### **The Private Property Rights Protection Act of 2005**

Congress is responding as well, with the Private Property Rights Protection Act of 2005 (H.R. 4128), a measure that boasts broad bipartisan support of 97 cosponsors. Under the bill, the federal government is prohibited from using its eminent domain power for economic development, and states and localities will lose federal economic development funds if they do so.

Specifically, *if a state or locality receives federal economic development funds during any fiscal year*, it may not exercise its eminent domain power for economic development purposes during that year. Should a state or locality violate this provision, it will not receive any federal economic development funds for a period of two fiscal years following a final judgment on the merits.

A state deemed to have wrongfully taken property may cure the violation, and once again become eligible for federal economic development funds by returning the property back to its owner. If the property is damaged or destroyed, the government must return it to its original state, including rebuilding homes and other buildings. The legislation specifically grants a private right of action that allows an individual to bring an action in either federal or state court to enforce this act.

### **Conclusion**

Under our "checks and balances" system of government, when one branch – the judiciary in this case - exceeds its Constitutional authority, the other branches must correct the mistake. This bill is an effective means of protecting private property owners from eminent domain abuse following the Supreme Court's ruling.

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<sup>5</sup> See, <http://www.castlecoalition.org/legislation/states/index.asp>