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"Liberal" Court Okays Eminent Domain Abuse

by George C. Leef

On June 23, the Supreme Court delivered its much-anticipated decision in *Kelo v. City of New London.* The case squarely presented an important constitutional issue — whether it is permissible for units of government to use the power of eminent domain to seize private property where the land is to be used for "economic development" purposes. The Constitution allows government to take private property only where it is for a "public use" and only when just compensation is paid.

Going back to 1954, the Court has allowed property seizures where the reason is not for the construction of some item of public infrastructure, such as a road or bridge, but for a private investment where it is alleged that there will be a public benefit. The plaintiff in *Kelo* sought to have the Court draw a sharp line between the former category and the latter. Sad to say, the Court declined to do so; with its blessing, eminent domain abuse will continue.

Justice Stevens wrote the majority opinion in the 5-4 decision. His opinion was grounded on two highly questionable ideas: first, that "economic development" is a crucial governmental function, and, second, that the judiciary should defer to the judgment of political officials as to the need for invoking eminent domain. The trouble is that the first idea is false and the second is an abdication of the Court's responsibility.

It is one of those statist clichés so beloved of power-hungry politicians that economic development (and thereby the people's standard of living) needs to be fostered by government action. Stevens wrote, "Promoting economic development is a traditional and long accepted function of government." No doubt he and the rest of the majority believe that, but is that dictum true? Traditionally, the role of government included the preservation of order, the administration of justice, and the provision of a few "public goods" that some believe to be beyond the capacity of voluntary activity. (Murray Rothbard, among others, has argued that there are in fact no cases where government activity is necessary to provide any good or service, but I'll just refer the interested reader to his book *Power and Market* and move on.) Throughout most of our history, it

was not regarded as the role of government to try to boost the level of economic activity within its jurisdiction. That is a notion that took root only within the latter half of the twentieth century.

Moreover, Stevens and his allies on the Court implicitly assume that government-sponsored economic development works and creates benefits for "the general public." As Justice Kennedy wrote in his pivotal concurring opinion, "A broad per se rule or a strong presumption of invalidity ... would prohibit a large number of government takings that have the purpose and expected effect of conferring substantial benefits on the public." Had the justices bothered to look past the standard political rhetoric, they would have discovered that these government-fostered "development" or "revitalization" projects often fail miserably. Whether you look at so grandiose a project as Britain's "Millenium Dome" or one as modest as Flint, Michigan's, "Auto World" theme park, you find that the history of governmental planning to boost the economy is littered with wrecks.

Stevens writes naively about "carefully considered" development plans, but the truth is that the only kind of development plan that can be carefully considered is one where the investing entity has to bear the full costs and risk of his action. Where government risks taxpayer money or induces private investment by offering land on the cheap, it inevitably distorts the evaluation of costs and benefits. Maybe Stevens and friends think that American economic planners are better than those of the old Soviet Union, but they aren't.

Even if some project should prove to be commercially profitable, there isn't much reason to believe that "the public" will receive "substantial benefits." If a luxury hotel is built on the New London redevelopment site, it will undoubtedly hire quite a few workers, but, in all likelihood, very few of them would be former workers at the Navy's Undersea Warfare Center, the closing of which in 1996 is largely responsible for the "economically depressed" nature of New London. Suppose, further, that the hotel and shops the politicians envision end up paying taxes that add to the city's revenues. Why assume that "the public" is going to benefit? Will tax rates in general be reduced? Certainly not. Will the added governmental expenditures those tax revenues make possible make life markedly better for the inhabitants? Will, for example, New London's streets get any better? Will the government schools educate any better? No and no. It's far more likely, experience teaches us, that most of the benefit of the added tax revenue will go to those interest groups who are good at dipping into the public trough. The ordinary residents won't notice an improvement in their lives.

On the basis of nothing but myths about the benefits of government "economic development" projects, the Court decides that it must defer to local authorities. In his dissenting opinion, Justice Thomas asks why this deference is appropriate: "[A] court owes no deference to a legislature's judgment concerning the quintessentially legal question 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."

He's absolutely right. The "liberal" justices would never defer to legislative judgments about questions of criminal law and procedure or other rights that they think are "fundamental." What *Kelo* ultimately boils down to, then, is the Court's well-known tendency to treat some constitutional rights as important and others — especially property rights — as unimportant. If New London were in any way restricting Susette Kelo's right to vote, you can bet that the Court would not have been the least bit deferential to local government power, but since this is merely the loss of an old and beloved home, the justices shrug and say that the city can send in the bulldozers.

Commenting on *Kelo* in *The Wall Street Journal,* constitutional scholar Richard Epstein called the ruling "shameful" and that is exactly the word for this decision.

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This article was originally published in July 2005.