



SCHWARTZ *Report*

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THE CASE OF THE LITTLE PINK HOUSE

Let's start with the premise that individual freedom cannot be separated from the protection of private property rights. On that premise I believe we would all agree. Suzette Kelo wanted to stay in the little pink house in the Fort Trumbull section of New London, Connecticut that she called home but eminent domain intervened. The ruling in her case and that of the other embattled property owners, which marked its 10th anniversary this past summer, set an important precedent reducing the limits on public taking of private property. Eminent domain is the term given to the power of government to appropriate private property for public use without the owner's consent. The terms "condemnation" and "taking" refer to the act of a government exercising its power of eminent domain. This power is recognized as fundamental to government. However, in the United States that power is restrained by the Fifth Amendment of the U. S. Constitution, which states that private property shall not be taken for public use without just compensation. The two key points that call out for a clear definition here are what constitutes public use and what constitutes just compensation. Until midway through the 20th century most courts interpreted "public use" to cover such things as roads, buildings, power lines, etc. These were to be projects owned either directly by the government or by private parties who would have a legal obligation to serve the entire public such as utility or transportation companies. This limited understanding of public use predominated at the time of the Constitution's ratification and was extended to the states when in 1868 the Fourteenth Amendment made the Bill of Rights apply to state governments. Early interpretations never envisioned transfer in eminent domain from one private individual or entity to another.



belonging to one citizen and giving it to another citizen." Or as Justice Clarence Thomas wrote 110 years later in his dissent on the Kelo ruling: "...Though citizens are safe from government in their homes, the homes themselves are not."

In recent years, the definition of public use has broadened cementing the belief that governmental planners should have nearly limitless authority to take property to promote growth or to combat blight afflicting depressed areas. The majority ruling in Kelo concluded that virtually any potential public benefit qualifies as a "public use" even if the government cannot prove those benefits will ever materialize (which in fact happened in Fort Trumbull). In other words, government could use its eminent domain powers to take private property for "economic development". This has created a unique set of circumstances whereby a government entity's eminent domain power may be used to transfer property from one private individual or entity to another private individual or entity without the other's consent all in the name of economic development. Eminent domain nowadays seems to be the one exception to Will Rogers' maxim that the way to get rich in America is to find out where everybody is going, get there first and buy the land.

Shortly after the Kelo ruling, the City Council of Arlington, Texas used eminent domain proceedings against 19 hold out properties which were part of the needed land to construct a new 75,000 seat retractable dome stadium. Go Cowboys! From an urban planner's perspective, this site was perfect. The project would allow a master plan to be completed that included private retail and residential development near the new stadium. The revenue stream to be generated by this mammoth undertaking certainly had the potential to dwarf any tax income from the meager basis on the homes, apartments and businesses that had existed on the site.

U. S. Supreme Court Justice William Paterson wrote in 1795 when the Constitution was not yet a decade old: "The despotic power, as it is called by some writers, of taking private property, where state necessity requires, exists in every government. It is, however, difficult to form a case, in which the necessity of a state can be of such a nature, as to authorize or excuse the seizing of landed property

Probably no set of bricks and mortar, save a revered national monument, could stand and compete with a \$650 million stadium. There is too much at stake for too many

people. Nonetheless, there is that nagging Fifth Amendment requirement of just compensation. From a purely real estate point of view, we would call that "fair market value" (the price that a ready, willing and able buyer would pay a ready, willing and able seller neither being under undue pressure to do so). But what is fair market value to someone who doesn't want to move? How can an appraiser determine the value of a bungalow on a small lot that in a few months will be on the 50 yard line of a super bowl contending team's stadium? As Ilya Somin points out in his recent book *The Grasping Hand/ Kelo v. City of New London and the Limits of Eminent Domain*, this question actually did come up in the Supreme Court's deliberations. However, no workable formula emerged from the discussion. One suggestion might be fair market value plus 50%; but would that encourage more holdouts, and what about people like Ms. Kelo who are just plain attached to their homes?

The saddest thing about *Kelo v. City of New London* was that the linchpin of the whole economic development plan for the Fort Trumbull area was the city's ability to attract and hold an anchor tenant, drug maker Pfizer, to the redeveloped area. That never happened. Unlike the stadium complex in Arlington, the condemned land in Fort Trumbull remains vacant. The court ruled in error, the houses came down or, as in the case of the little pink house, were moved and the land is used now for little more than a dumping ground. Mr. Somin sums it up this way: "In *The Wealth of Nations*, Adam Smith famously argued that private property and decentralized market transactions generate prosperity as if 'by an invisible hand.' The use of eminent domain to promote 'economic development' is based on the exact opposite assumption: that resources will often fail to generate as much wealth as they should unless their allocation is controlled by government."

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