

THE HEARTLAND INSTITUTE

19 South LaSalle Street #903

Chicago, IL 60603

phone 312/377-4000 · fax 312/377-5000

<http://www.heartland.org>

States Take Action to Rein in Eminent Domain Abuses

Author: H. Sterling Burnett, Ph.D.

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Driven by a substantial outcry from homeowners and small businesses, the one-year anniversary of the U.S. Supreme Court's June 2005 decision in *Kelo v. City of New London, Conn.* was marked by proactive legislation in more than a third of the state legislatures.

Decision Sparked Outrage

On June 23, 2005, in a controversial 5-to-4 decision, the Court ruled the New London Development Corporation had acted within its authority in condemning the property of several homeowners in the Fort Trumbull neighborhood, which lay within a proposed development plan. The majority of the Court found the expected economic gains (new jobs and increased tax revenues to the city) qualified as a "public purpose," allowing the government to seize private citizens' property with just compensation.

Outrage at the decision was expressed in Washington, DC, in state capitols across the country, and in the mass media and popular press. In her dissent, Justice Sandra Day O'Connor summarized the objections of those unhappy with the Court's decision:

"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. ...

"[W]ho among us can say she already makes the most productive or attractive possible use of her property?" O'Connor continued. "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, or any farm with a factory."

States Debate Takings

In the year since *Kelo* was decided, more than 38 states debated legislation restricting eminent domain. Eighteen states enacted laws limiting the scope of state and local governments' ability to take private property via eminent domain. Most of those laws focus primarily on instances where the property at issue is to be transferred to a private party--rather than a government entity--in the hope that more revenue, and hence more jobs and taxes, will result from the new private use.

Three state legislatures--Arizona, Iowa, and Nevada--passed eminent domain legislation only to have their governors veto the laws. Iowa's bipartisan eminent domain legislation passed by wide majorities in the House (89-5) and the Senate (43-6), leaving many quite surprised when the governor vetoed the bill. In several states and localities, including Arizona, Colorado, Montana, New Hampshire, and California's Napa and Orange counties, eminent domain protections have been proposed for a public ballot.

New Laws Vary Greatly

As noted by the environmental policy publication *Greenwire* (May 9, 2006), the scope of these laws varies

greatly. For instance:

- Georgia lawmakers passed H.B. 1313, which defines public uses for which eminent domain may be exercised and prohibits the use of eminent domain for economic development purposes, including enhancement of the tax base or tax revenue.
- Indiana legislators cleared a measure that redefines blighted areas to emphasize properties that are detrimental to public health and safety. H.B. 1010 also requires payment of compensation, where the property condemned is the person's primary residence, at a rate equal to 150 percent of fair market value.
- The Kentucky Legislature approved H.B. 508 prohibiting the transfer of property to a private entity for economic development purposes, including enhancement of the tax base or tax revenue. The legislation also redefines public use in part to mean "ownership, possession, occupation or enjoyment of the property by a governmental entity."

Issue Remains Open

Policy analysts examining the year's flurry of state action on private property protection legislation have mixed feelings about the results. Bill Peacock, director of the Texas Public Policy Foundation's Center for Economic Freedom, said, "The rapid response to *Kelo* by so many states demonstrates the bipartisan understanding that it is simply wrong for local governments to use eminent domain to take private property from one person and give it to another."

Peacock added, "On the plus side, in some states, such as Virginia, that understanding has translated into legislation containing substantial property rights protections. Unfortunately, in others, such as Vermont, it has led only to legislation with little substance. There is still a lot of work to be done in restoring the property rights we lost with the *Kelo* decision."

Adrian Moore, vice president of research at the Reason Foundation in California, shared Peacock's concerns. "Most state legislatures responded to *Kelo* by considering some form of eminent domain reform legislation," Moore noted. "But what looked like a firestorm at first, soon fizzled out. Many states did not actually pass legislation. And what did pass often had loopholes big enough to shove a Home Depot through."

According to Moore, the loopholes remain because "local officials' grand redevelopment schemes emanate from a vision in which community needs trump individual ones on everything from public safety to how a privately owned building should be used."

Moore notes, "There is a reason the Constitution doesn't mention 'community rights'--they don't exist. Only individuals have rights. Communities have desires."

Moore and Peacock agree the issue is far from resolved and is likely to be revisited even in states that have passed eminent domain legislation.

H. Sterling Burnett (sterling.burnett@ncpa.org) is a senior fellow at the National Center for Policy Analysis.