Answers

Answers to questions submitted by Members of the committee to Professor Steven Eagle following the September 20, 2005, hearing on "The Kelo Decision: Investigating Takings of Homes and Other Private Property".

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"The *Kelo* Decision: Investigating takings of Homes and Other Private Property"
U.S. Senate Judiciary Committee Hearing – September 20, 2005

Written question from Senator John Cornyn:

Do you think cities or other political subdivisions should be allowed to exercise eminent domain simply because the project would bring taxes and jobs? Please define with specificity what limits, if any, should exist with respect to the use of economic development, increase of the tax base, or similar motive as a rational for eminent domain.

Response by Professor Steven J. Eagle, Professor of Law, George Mason University:

I am pleased to have the opportunity to respond to Senator Cornyn's question and to expand upon my written and oral testimony on this important issue.

I believe that the Public Use Clause of the Fifth Amendment is an independent source of protection for the liberty and property of citizens of the United States and that the Public Use Clause was included in the Bill of Rights for that purpose. The Clause also applies to actions of state and local governments by dint of the Fourteenth Amendment to the U.S. Constitution, which was deemed to incorporate the Fifth Amendment Takings Clause in *Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226 (1897). The interpretation of the Public Use Clause holding that it is synonymous with, or subsumed within, "public purpose" or the "general welfare" has the effect of vitiating public use as an important Constitutional safeguard. Yet that interpretation was accepted by a narrow majority of the Supreme Court in *Kelo v. City of New London*, 125 S.Ct. 2655 (2005).

A hallmark of the rule of law is that citizens have the right to settled expectations regarding their property. The importance of an individual's home or business to that person includes, but is not limited to, its value as an economic asset. The home is a center of family life, a repository of individual memories, and an extension of the owner's personality. Ownership of one's home, and also ownership of one's business, gives a sense of independence that permits and encourages participation in civic and political life as a full member of the community, and not as a supplicant dependent upon government largess.

Astute and well-connected developers, investment bankers, lawyers, and other professionals are well positioned to spot arbitrage opportunities in real estate markets. They can make substantial profits by finding homes and businesses that, when condemned by government and combined with other parcels, have considerably higher market values. The processes by which they work with local government officials are by no means transparent, and the "comprehensive" planning and due process hearings that Justice Stevens envisions will protect against condemnation for private benefit might well be just a veneer in many cases. Justice O'Connor, perhaps because of her extensive experience as a legislator before becoming a judge, understood that businesspeople and government officials benefit from condemnation for retransfer for economic development. The losers are the small businesspeople and homeowners whose personal, subjective, value in their property is destroyed and who receive inadequate compensation for their out-of-pocket losses.

Unlike condemnation for traditional purposes such as schools or highways, which are built on a larger scale or which provide little scope for manipulation, condemnation for redevelopment is a device custom-tailored for astute speculation. The result is that everyone's property is always, and involuntarily, "in play." Having one's home and business treated as an asset subject to speculation for the benefit of others is the antithesis of living under the rule of law.

While condemnation for retransfer for economic development harms individual liberty, it does not necessarily benefit the economy. It is true that parcels of land may provide additional employment opportunities and generate additional tax revenues after they have been redeveloped. But that does not necessarily mean that such redevelopment is a benefit for the community or the Nation.

Judges and economists do not have to ascertain the justice of free market transactions. That justice is implicit in the fact that each of the parties to a private real estate transaction considers himself or herself better off. All parties benefit from consensual transactions, and the regional and national economies gain correspondingly. There is no such guarantee of benefit where sales are forced by government against the will of the sellers.

Government might obtain a parcel using eminent domain, paying a modest sum as just compensation. The parcel might be worth somewhat more after being combined with other lands. However, those facts provide no guarantee that the parcel did not have *even more* value to the original owner. While owners typically are described as greedy hold-outs, their unwillingness to sell often is based on their special attachment to the land resulting from sentimental reasons or the economic value derived from good will or customization of the land or building to suit their particular business needs.

Aside from the issue of uncompensated losses to condemnees of homes and businesses, the economic advantages of condemnation for redevelopment are significantly overstated. Even where jobs and increased tax revenues result from condemnation followed by redevelopment, there is no guarantee that those jobs and taxes represent net additions to the economy.

When localities subsidize the assembly of large parcels by using eminent domain, and also provide taxpayer-provided infrastructure improvements as additional incentives, they often are successful in luring businesses to relocate from elsewhere. However, those lures might do little more than offset the disadvantages of doing business in that community, as compared with the communities in which those businesses currently are located. Cities and states often dangle incentives to attract businesses from other jurisdictions. Frequently, however, this is a zero-sum game, with benefits to one jurisdiction being offset by losses of jobs and tax revenues in the other. The use of federal funds in this process would mean that Congress is complicit in subsidizing the takings of homes and businesses to induce business relocations that themselves are economically inefficient. Condemnees and federal taxpayers lose, and those who distribute and facilitate the flow of largess win.

In *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004), the Supreme Court of Michigan repudiated its infamous *Poletown* doctrine and limited condemnation for retransfer to private interests to three distinct situations. The first, "public necessity of the extreme sort," refers to projects such as highways and pipelines that require dozens or hundreds of miles of contiguous rights-of-way and are otherwise at the mercy of hold-outs. The second, situations where "the private entity remains accountable to the public in its use of that property," refers to continual and effective monitoring to ensure that specific public goals are accomplished. Finally, "condemned land may be transferred to a private entity when the selection of the land to be condemned is itself based on public concern." which refers to the elimination of blight. *Id.* at 781-783.

There is no assurance that the restrictions imposed in *Hathcock* will not be abused. Undoubtedly, legislatures and courts will have to develop measures to prevent condemnation for retransfer from being misused. But the *Hathcock* limitations are a salutary beginning.

In my testimony before the Judiciary Committee, I noted two ways in which the Congress could police abuse in the use of federal funds for state or local projects involving eminent domain. The first involves explicit statutory language not only proscribing the use of federal monies for "economic development," but also affirmatively indicating permissible uses of the funds. As an illustration, the alleviation of "blight" is an acceptable public use justifying condemnation under both *Kelo* and *Hathcock*. However, "blight" is a term often abused.

A good recent example is *Concerned Citizens of Princeton, Inc. v. Mayor and Council of Borough of Princeton*, 851 A.2d 685 (N.J. Super. Ct. App. Div. 2004). There, a group of citizens in an affluent community challenged the application of a "blighted area" designation to a municipal parking lot, thus permitting borough authorities to condemn and redevelop it. The court upheld the condemnation, noting that state law permits condemnation for *any* reason contained in a long enumeration that includes items such as "obsolescence," "faulty arrangement or design," "deleterious land use or obsolete layout," and "a growing lack . . . of proper utilization of areas caused by the condition of the title, diverse ownership of the real property therein or other conditions, resulting in a stagnant or not fully productive condition of land potentially useful and valuable for contributing to and serving the public health, safety and welfare."

The New Jersey statute in question also includes, as blighting conditions, "the generality of buildings are substandard, unsafe, unsanitary, dilapidated, or obsolescent, or possess any of such characteristics, or are so lacking in light, air, or space, as to be conducive to unwholesome living or working conditions." This is much closer to the mark, but still permits the condemnation of perfectly sound groups of buildings so long as they are in the general vicinity of genuinely blighted structures and are categorized as within the blighted area.

For this reason, a limitation on the use of federal funds for projects involving eminent domain that are to be justified by "blight" removal must confine "blight" to its narrow sense of physically unsafe conditions.

Another device for ensuring that homes and small businesses are not taken in disregard of any restrictions on the use of federal funds that Congress wishes to impose is to accord standing to aggrieved property owners. Landowners facing ongoing or imminent state or local condemnation actions employing federal funds would be able to challenge those actions in federal court. As a practical matter, federal agencies providing funds to states and localities generally would place a low priority on monitoring the use of federal funds for condemnations not conforming to restrictions on the use of eminent domain. This is especially true where the funds are used in a manner that advances the specific substantive concerns of the federal agency. Without a specific grant of standing, it would take years of litigation to establish whether, under general principles of law, landowners have standing or not.

If I might summarize my response, the use of eminent domain for the condemnation of homes or business for redevelopment purposes reduces the liberty of condemnees and imposes financial hardship upon them. It would entail substantial expenditures by interests jockeying for favorable treatment and by other localities and business competitors acting in self-defense. It is by no means clear that a net increase in jobs, tax revenues, and the public's welfare would result. Hence federal funds should not be employed for economic redevelopment.

I appreciate the opportunity to express these views.

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