

Statement of

The Honorable John Cornyn

United States Senator
Texas
September 20, 2005

Statement Before the U.S. Senate Committee on the Judiciary
U.S. Senator John Cornyn (R-TX)

"The Kelo Decision: Investigating Takings of Homes and other Private Property"
Tuesday, September 20, 2005

Mr. Chairman, Ranking Member Leahy - I want to congratulate you on holding this important hearing - a hearing about the right of every American to be protected from government seizure of their homes, their businesses, and their property generally.

As you know, this week is Constitution Week - a week that is dedicated to celebrating the great principles of our nation's founding document - principles of liberty and equality, and the principle that there are certain rights that are so fundamental - so important - that they deserve protection under our laws. Without question, private property rights rank among those important rights outlined by our founding fathers. As Thomas Jefferson wrote on April 6, 1816, the protection of such rights is "the first principle of association, 'the guarantee to every one of a free exercise of his industry, and the fruits acquired by it.'"

Accordingly, these protections were enshrined in the Fifth Amendment to the Constitution - providing that "private property" shall not "be taken for public use without just compensation."

Yet on June 23rd of this year, the United States Supreme Court issued its controversial 5-4 decision in *Kelo v. City of New London*. In that decision, the Court held that government may seize the home, small business, or other private property of one owner, and transfer that same property to another private owner, simply by concluding that such a transfer would benefit the community through increased economic development.

The majority's decision was sharply criticized by Justice Sandra Day O'Connor in her dissent, joined by the Chief Justice and Justices Scalia and Thomas. She wrote, "[the Court] effectively [has] . . . delete[d] the words 'for public use' from the Takings Clause of the Fifth Amendment" and thereby "refus[ed] to enforce properly the Federal Constitution."

Under the Court's decision in *Kelo*, Justice O'Connor warns, "[t]he 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." She further warns that, under *Kelo*, "[a]ny property may now be taken for the benefit of another private party," and "the fallout from this decision will not be random."

Indeed, as an amicus brief filed by the National Association for the Advancement of Colored People, AARP, and other organizations noted, "[a]bsent a true public use requirement the takings power will be employed more frequently. The takings that result will disproportionately affect and harm the economically disadvantaged and, in particular, racial and ethnic minorities and the elderly."

Suffice it to say, the Kelo decision was a disappointment. But I want to thank Susette Kelo, the lead plaintiff in the case, and congratulate the attorneys at the Institute for Justice for their exceptional legal work and for their devotion to liberty. Mr. Chairman, I am pleased to see that Ms. Kelo is here today to testify. Ms. Kelo, I look forward to hearing from you.

But what I find troubling is that yours is just one of many examples of the abuse of the eminent domain power throughout our nation. Its use for private development is widespread. The Institute for Justice has documented more than 10,000 properties either seized or threatened with condemnation for private development in the five-year period between 1998 and 2002.

Despite the fact that so many abuses were already occurring, since the Kelo decision, local governments have become further emboldened to take property for private development. For example, in my home state of Texas - in the coastal town of Freeport - just hours after the Kelo decision, officials in Freeport began legal filings to seize some waterfront businesses (two seafood companies) to make way for others (an \$8 million private boat marina).

And even as this pattern has continued elsewhere, Courts are already using the decision to reject challenges by owners to the taking of their property for other private parties. On July 26, 2005, a court in Missouri relied on Kelo in reluctantly upholding the taking of a home for a shopping mall. As the judge commented, "The United States Supreme Court has denied the Alamo reinforcements. Perhaps the people will clip the wings of eminent domain in Missouri, but today in Missouri it soars and devours."

Mr. Chairman, I firmly believe that legislative action is appropriate and necessary. And I am not alone in this belief. Several state legislatures took immediate action. Indeed, my home state of Texas passed legislation that was signed into law by the Governor just a few weeks ago that protects property from seizure for purposes of economic development.

It is also appropriate for Congress to take action, consistent with its limited powers under the Constitution, to restore the vital protections of the Fifth Amendment. That is why in response to the Supreme Court's decision, I introduced Senate Bill 1313, titled the Protection of Homes, Small Businesses, and Private Property Act of 2005. I was happy to be joined with bipartisan support, including the immediate support of the Senior Senator from Florida, Bill Nelson. Mr. Chairman, I am happy to report that today a total of 28 of our colleagues have joined me as co-sponsors of this important legislation.

The bill declares that the power of eminent domain should be exercised only "for public use," as guaranteed by the Fifth Amendment, and that this power to seize homes, small businesses, and other private property should be reserved only for true public uses. Most importantly, the power of eminent domain should not be used simply to further private economic development. The Act would apply this standard to (1) all exercises of eminent domain power by the federal

government, and (2) all exercises of eminent domain power by state and local government through the use of federal funds.

Mr. Chairman, I note that while the principles of the legislation as introduced are sound - it requires refining to ensure its purposes are achieved. I know that staff have been working to craft the appropriate definitions and scope of the legislation, and I look forward to working together to advance an appropriate final product.

The protection of homes, small businesses, and other private property rights against government seizure and other unreasonable government interference is a fundamental principle and core commitment of our nation's Founders. In the aftermath of Kelo, we must take all necessary action to restore and strengthen the protections of the Fifth Amendment. I ask my colleagues to lend their support to this effort, by supporting the Protection of Homes, Small Businesses, and Private Property Act of 2005.

Senator Cornyn currently chairs the Judiciary Committee's subcommittee on Immigration, Border Security and Citizenship, and in the last Congress he was chairman of the Constitution, Civil Rights and Property Rights subcommittee. He is the only former judge on the Judiciary Committee, and served previously as Texas Supreme Court Justice, Texas Attorney General, and Bexar County District Judge.