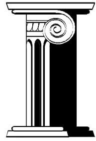

INSTITUTE BRIEF

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Does Iowa Need Stricter Eminent Domain Laws?

By Jonathan J. Miltimore

On 23 June, 2005 the Supreme Court held, by a 5-4 vote, that it was constitutionally permissible for the city of New London, Connecticut to use its power of eminent domain to remove a group of working class citizens from their homes and turn their property over to private parties. The raison d'être of the now famous case — *Kelo v. New London* — was that these parties would yield greater tax revenues and create jobs. The decision shocked many Americans who believed their property could not be taken from them save for some necessary or great civic purpose: a road, a utility, a government building, or some other ostensibly public use.

The Fifth Amendment of the Constitution states "nor shall private property be taken for public use, without just compensation." Since the inception of the Constitution, the Court's interpretation of "public use" has undergone an extensive evolution. However, a watershed decision was reached in 1954 in the case of *Berman v. Parker.* In *Berman,* the Court upheld the Constitutionality of a federal law authorizing takings for economic development projects in Washington D.C. to economically depressed areas declared "blighted." Arguing that such operations served a public *purpose* by purging areas "injurious to the public health, safety, morals, and welfare," the Court held that un-blighted properties in the targeted region were nonetheless subject to eminent domain.[1] *Berman* represented a dramatic shift in takings jurisprudence and would serve as the Pandora's Box from which the steady erosion of property rights would spring.

Due to the public outrage in the wake of *Kelo* and active opposition by organizations as ideologically diverse as the NAACP, AARP, Cato Institute, and Southern Christian Leadership Conference, many states, including Iowa, began reexamining their own takings laws. On 15 February, 2006, the Iowa House passed a bill (HF 2351) that would place greater restrictions on eminent domain by a vote of 83-15.[2]

An editorial in the 29 January, 2006, *Des Moines Register* cited sound evidence illustrating that there was scant indication of eminent domain abuse in Iowa. The *Register*, on less firm ground, suggested that Iowans were overreacting to "public hysteria based on misinformation — that the U.S. Supreme Court somehow changed the law of eminent domain in [*Kelo*]." Professing a sudden esteem for federalism the *Register* defended the Court's decision, stating "it is up to the states to assure [eminent domain] is used for the right reasons,"adding that commercial developments like *Kelo* have been legal "since the 19th century."[3]

Such claims notwithstanding, economic development takings are, in fact, a product of 1950s urban renewal programs intended to revive *blighted* areas. Yet in reading the Court's opinion in *Kelo,* Justice Stevens admitted that the property of the petitioners was not "blighted or otherwise in poor condition." Stevens argued that the city had met its burden by demonstrating it had "formulated an economic development plan that it believes will provide appreciable benefits to the community," particularly "new jobs and tax revenue."[4]

Kelo did, in fact, fundamentally change the meaning of "public use." As Justice O'Connor stated in her dissent, by interpreting "public use" to include incidental benefits resulting from the ordinary use of private property, the Court "effectively…delete[d] the words 'public use' from the Takings Clause of the Fifth Amendment."[5] After *Kelo,* Americans could no longer expect Constitutional protection from any development firm that could convince a local committee that its development plan would plausibly result in increased benefits to its community.

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In what O'Connor called "an abdication of [the Court's] responsibility," Justice Stevens did invite states to tighten their own eminent domain laws: "We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power."[6] So the Iowa House has proposed, and it has done so in a prudent and deliberate fashion. Salient points of the House bill include the following:

- A definition (currently absent in the Iowa Code in relation to condemnation) of what constitutes a "public use." The bill makes it clear that "public use" does not include takings for privately owned commercial or industrial developments that simply provide more tax revenues and jobs than would a home or smaller business. [Sec. 1 Sec. 6A.22-2.a & 22-2.b]
- Definitional standards of "blighted" property, including a stipulation requiring that 75% of property be declared blighted before an area is subject to condemnation. This is an important inclusion since developers often exploit weak, imprecise, or absent legal language on this point. [Sec. 1 Sec. 6A.22-2.a (5)]
- A provision placing the burden of proof on the municipality to demonstrate a taking is legitimate instead of requiring homeowners to demonstrate it is not. [Sec. 1 Sec. 6A.22-2.a (5)]
- Additional provisions to ensure that Iowans who are forced from their homes are justly compensated — not just for their property, but also for contingency expenditures such as legal fees and appraisal costs. [Sec. 15.Sec.6B.42][7]

Notwithstanding the angst of critics, localities would still possess the power to revitalize economically depressed and blighted areas through eminent domain. Bill HF 2351 would merely create additional safeguards to ensure eminent domain is used judiciously and fairly, while reducing the temptation to commandeer property under the pretense of economic development by providing a more narrow definition of the term "blight."

The power of government to seize the private property of its citizens is perhaps the most tyrannical weapon it possesses in its vast arsenal. True, Iowa has not demonstrated a proclivity to abuse this power. But nor has it yet faced many of the same urban challenges more densely populated metropolitan states have. In any matter, past prudence does not ensure future discretion.

Despite the wishes of ambitious developers and enlightened collectivists, individual liberties are not subservient to the interests of the whole or to the many. John Adams once stated, "The moment the idea is admitted into society that property is not as sacred as the laws of God, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence."

He was right, and so is the Iowa House.

(Endnotes)

[1] *Berman v. Parker*, 348 U.S. 26, 31 (1954).
[2] The Iowa Legislature General Assembly, Daily Session House, February 15, 2006, <http://www.legis.state.ia.us/LIO/sdaily/81GA/Session.2/House/hdaily0215.html> (March 23, 2006).
[3] "Calm down: Law Protects Property Rights" *The Des Moines Register*, January 29, 2006, <http://www.desmoinesregister.com/apps/pbcs.dll/article?AID=/20060129/OPINION03/601290319&SearchID=73234541161761> (March 3, 2006).
[4] *Kelo v. New London*, 545 U.S.4 (2005).
[5] *Ibid*.
[6] *Ibid*.
[7] Iowa Bill, House File 2351 by Judiciary Committee.

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