

Record: 1

Title: Restore 5th Amendment Property Rights.

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Source: Human Events; 7/4/2005, Vol. 61 Issue 23, p5-5, 1/2p, 1 bw

Document Type: Article

Subject Terms: LAND use
PERSONAL property
REAL property
COMMERCIAL real estate
RIGHT of property
EMINENT domain
PUBLIC use

Geographic Terms: NEW London (Conn.)
CONNECTICUT Report Available

Abstract: Presents an opinion on the decision of the U.S. Supreme Court to grant the city of New London, Connecticut the right to seize private properties and hand over to private developers for commercial development. Implications of the decision for the property rights of small businesses and homes; Provisions of the Protection of Homes, Small Businesses and Private Property Act of 2005 which declares that the power of eminent domain should be exercised only for properties that are for public use.

Lexile: 1340

Full Text Word Count: 596

ISSN: 00187194

Accession Number: 17541397

Database: MAS Ultra - School Edition

Section: Inside Washington

Exclusive to HUMAN EVENTS

Restore 5th Amendment Property Rights

There have been a number of controversial Supreme Court decisions in recent years, from the Lawrence decision that led to a nationwide litigation campaign against traditional marriage laws, to the court's refusal to protect the Pledge of Allegiance and the Ten Commandments. Rarely, however, has a decision of the nation's highest court generated as much attention from Congress--or so quickly--as the court's 5-to-4 decision in *Kelo v. New London*.

Why has *Kelo* caught such strong attention? Simple: 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. 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.'"

In *Kelo*, the court acknowledged that "it has long been accepted that the sovereign may not take the property of A for the sole purpose of transferring it to another private party

B," and that the power of eminent domain may be used only "for public use." Yet the court held that government may seize the home, small business, or other private property of one owner and transfer it to another private owner, simply by concluding this transfer would benefit the community through increased economic development.

The decision is alarming. As Justice Sandra Day O'Connor accurately noted in her dissenting opinion, the court has "effectively ... delete[d] the words 'for public use' from the Takings Clause of the 5th Amendment" and thereby "refus[ed] to enforce properly the federal Constitution."

Under Kelo, O'Connor warns, "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."

That's why last week I introduced the Protection of Homes, Small Businesses and Private Property Act of 2005 (S 1313). Since that time, two companion bills have been filed in the House, and the Senate bill already has 10 co-sponsors. The legislation would declare Congress's view that the power of eminent domain should be exercised only "for public use," as guaranteed by the 5th Amendment, and that this power to seize property should be reserved for true public uses. Most importantly, eminent domain should not be used to further private economic development. The act would apply this standard to two areas that are clearly within Congress's authority to regulate: 1) all exercises of eminent domain power by the federal government, and 2) by state and local government through the use of federal funds.

Kelo was a disappointment but is also a stark reminder of the importance of the judicial confirmation process. Recall that during the debate over the nomination of California Supreme Court Justice Janice Rogers Brown to the U.S. Court of Appeals for the D.C. Circuit opponents derided her personal passion for the protection of private property rights. But the reaction to Kelo demonstrates it was her opponents who were out of the mainstream and that concerns about excessive government interference with property rights is well-founded and well within the mainstream of American jurisprudence.

PHOTO (BLACK & WHITE): Justice J.P. Stevens, writing for the court's liberal bloc, gave the government greater power over property in Kelo v. New London.

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By John Cornyn, Sen.

Sen. Cornyn (R.-Tex.), a member of the Judiciary Committee, previously served as Texas attorney general and Texas Supreme Court justice.

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