
Shunning activism, court brings certainty to eminent domain

By Peter G. Verniero

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For most Americans, a home is a person's most significant asset. We believe we should not be forced to sell our property unless there is a clear public need to do so. Moreover, because we are a nation with libertarian roots, there is something heartwarming about homeowners taking on the coercive power of government - and winning.

But the decision yesterday by the U.S. Supreme Court in *Kelo vs. City of New London* transcended the interest of any one group of homeowners. It answered the broader question of who gets to determine the public's needs in these circumstances.

The *New London* case centered on a straightforward concept. The Constitution forbids the government from taking a person's property unless it is for a "public use" and the person receives "just compensation." That process is called eminent domain. Most people do not oppose eminent domain when the acquired property is needed to make room for public roads or other structures widely viewed to be beneficial to the community.

In this case, a local government in Connecticut sought to acquire property as part of an economic development project expected to generate badly needed tax revenues. Rather than use the property to construct a road, the city wanted to lease it to private entities to develop a hotel, commercial stores and offices - all intended to revitalize a community that for years had experienced hard economic times, including high unemployment and declining schools.

A group of affected homeowners objected. They didn't want to sell their land and certainly didn't want the government to take it - regardless of the compensation that they might have received. In a nutshell, the homeowners believed that the *New London* development project did not amount to a "public use" and hence the government's attempt at condemning their land was unconstitutional.

With four justices dissenting, the court decided that the city was right. Writing for the court's majority, Justice John Paul Stevens reaffirmed the court's long-standing rule that the judiciary should refrain from second-guessing legislatures or local governments in this area of law unless those local determinations are palpably unreasonable.

"It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area," Stevens wrote, citing a previous court decision. He was quick to note, however, that states are free to impose greater restrictions on condemnation proceedings than those required under the federal Constitution.

In light of the court's prior decisions, the majority's opinion is not surprising. The premise behind the court's ruling - which conservatives normally cheer - is that elected officials are in a better position than judges to determine whether a property acquired by eminent domain will meet a public need.

Justice Sandra Day O'Connor issued a strong dissenting opinion, which was joined by Chief Justice William Rehnquist and Justices Antonin Scalia and Clarence Thomas - three of the court's famously conservative members. They proved once again that judges cannot easily be pigeonholed. In their view, the government went too far in condemning the property in this case. The dissenters apparently were willing to risk a little judicial activism to buttress the old adage that "a man's home is his castle." They also made a powerful observation that, left unchecked, the power of eminent domain could disproportionately affect low-income property owners who generally lack the means to fight city hall in these cases.

As a homeowner myself, I well understand the dissenters' position. I would not react happily to the thought of municipal bulldozers demolishing the home in which my children have been raised since their birth.

Still, in fortifying the ability of elected local officials to define such needs, the court has brought certainty to the condemnation process. Similarly, the decision limits the ability of the judicial branch to substitute its judgment for that of the elected branches.

Whether one agrees with the court's majority or dissenting members, the majority opinion is now the law of the land. In New Jersey, where we constantly weigh the benefits of commercial development against its costs, the *New London* case will be particularly important. It will be up to all involved with these issues to comply with the court's decision in good faith as that weighing process continues in the foreseeable future. Whether New Jersey accepts the court's invitation to impose local limits on the government's power to condemn land remains to be seen.

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