Kelo’s Unanswered Questions

Policy Issues Raised By The Use of Eminent Domain For Economic Development

John D. Echeverria
Georgetown Environmental Law & Policy Institute
Georgetown University Law Center

Annie E. Casey Foundation
September 21, 2006
Background on the Takings, or Property Rights, Issue

- The “Takings Clause” of the Fifth Amendment to the U.S. Constitution: “[N]or shall private property be taken for public use, without just compensation.”

- Takings Clause implicitly authorizes use of the eminent domain power, subject to two conditions:
  -- for a “public use.”
  -- payment of “just compensation.”

- The “other” taking issue is whether regulations restricting or conditioning uses of private property are “takings.”
  - E.g. Inclusionary or rent stabilization laws?

- Also state constitutional analogs.
Economically depressed city used eminent domain to acquire land for comprehensive redevelopment project.

Majority of owners agreed to sale, but several homeowners and investors challenged the taking.

Issue: Is taking for a public use? Answer: Yes, in large part because the taking was pursuant to a comprehensive development plan.

5 to 4 ruling a source of heated public and political debate.

A model of judicial restraint?
Basic Policy Questions

- Is Eminent Domain Needed to Accomplish Urban Redevelopment Projects?
- Does Payment of Just Compensation (and Relocation Assistance) Mitigate Effectively For Taking Property?
- Does the Use Eminent Domain Improperly Promote Private Interests?
- Do Exercises of Eminent Domain Target Vulnerable Populations and Properties?
Is Eminent Domain a Necessary Tool for Urban Economic Development?

- Is eminent domain necessary for land assembly for urban redevelopment?
- Does the success of redevelopment projects require the involvement of private developers?
Is ED a Necessary Tool (2)

- Basic justification for eminent domain: allows gov’t to facilitate efficient reconfiguration of property rights by overcoming “holdouts.”
- Fragmented inner-city ownership patterns resist assembly by private market.
- City officials claim eminent domain has been instrumental in wide array of urban redevelopment projects: Times Square, Baltimore Inner Harbor, DC Stadium.
Is ED a Necessary Tool (3)

- Could cities assemble urban sites without eminent domain?
- Are better negotiation tactics and more money the answer?
  - Cities already favor private negotiation and offer above-market premiums to avoid need for condemnation.
  - Secrecy appears inconsistent with transparent, inclusive planning process.
- Can cities build around holdouts?
  - DC Stadium without third base?
Is ED a Necessary Tool (3)

- Can cities pursue redevelopments without private developers?
- Involvement of private developers in economic development projects using eminent domain triggers strong public suspicion.
- But engaging private enterprise offers important efficiencies in achieving economic goals.
- Public-private partnerships integral to virtually all large scale mixed-use redevelopment efforts.
What are the opportunity costs?
- lost jobs?
- lost housing?
- lost taxes?
- lost community improvements?
- do we really know; how do we find out?
Are Property Owners Fairly Compensated?

- Just compensation defined as “fair market value.”
- Relocation costs often covered under federal and state law; are the amounts adequate?
- Does not include important costs and elements of value for some owners
  - Subjective values
- But owners often get substantially more than market value in practice (sometimes less, too)
- Does/would additional compensation overcome the objections to ED?
Is eminent domain used improperly to promote private interests?

- Suspicion that eminent domain used to advance interests of powerful companies: Poletown, Costco.
- One-to-one transfers particularly suspicious.
- Concern is dignitary harm.
- Procedural safeguards?: integrated development plan, public involvement, judicial scrutiny.
Does Eminent Domain Target Vulnerable Populations or Properties?

- Highway and urban renewal programs in 1950s-1970s sometimes targeted minority populations
- “Blight” theory inherently targets poor inner city neighborhoods
- But has political culture has changed?
- And do beneficiaries of economic redevelopment include inner-city residents themselves?

- Concern that cities may target churches and other non-profits
- But empirical evidence suggests city officials try to avoid taking churches; religious property also protected under First Amendment and federal law.
The initial response to *Kelo*:

- Statements comparing *Kelo* to the *Dred Scott* decision.
- Nearly unanimous House resolution condemning *Kelo*.
- Useful policy focus on an unexamined issue.
- But threat of very serious policy overreaction.
- Emergence of “the *Kelo* plus strategy.”


- GOTV aspect
The Federal Response

- Bond Amendment (November 2005)
  - No Funds in the HUD appropriations bill may be used to support use of eminent domain, “unless eminent domain is employed only for public use.”
  - “Public use shall not be construed to include economic development that primarily benefits private entities.”
- Various enumerated uses are expressly defined as public uses.
- General Accounting Office investigation of ED
The Federal Response (2)

- Bush Executive Order: “Protecting the Property Rights of the American People.”
- Issued June 23, 2006, first anniversary of the *Kelo* decision.
- **Limited practical significance, especially for community economic development.**
The Federal Response (3)

- “Private Property Rights Protection Act,” HR 4128, passed House by a vote of 376 to 38; would impose a two-year cut off on federal financial assistance for economic development assistance for violations; would impose broad and vaguely worded restrictions on use of eminent domain.

- No action yet on permanent ED legislation in the Senate.

- Prospects for action in 109th Congress dim and becoming dimmer.

- *Kelo*-plus element: HR 4772, regulatory takings legislation reported by the House Judiciary Committee.
The State Response

- In 2005, four states (Alabama, Delaware, Ohio, and Texas) passed some type of ED legislation; Michigan passed a constitutional amendment that will go to voters in November 2006.
- In 2006, all 44 legislatures in session considered the issue.
- 24 states passed some type of bill.
- Pacific Legal Foundation list of states that have adopted “real” reforms (FL, GA, IND, SD, PA, MN)
“Prohibiting eminent domain for economic development purposes, to generate tax revenue, or to transfer private property to another private entity.

Defining what constitutes "public use," generally the possession, occupation or enjoyment of the property by the public at large, public agencies or public utilities.

Restricting eminent domain to blighted properties and redefining what constitutes blight to emphasize detriment to public health or safety.

Requiring greater public notice, more public hearings, negotiation in good faith with landowners and approval by elected governing bodies.

Requiring compensation greater than fair market value where property condemned is the principal residence.

Placing a moratorium on eminent domain for economic development.

Establishing legislative study committees or stakeholder task forces to study and report back to legislature with findings.”
The State Response (3)

- November 2006 Ballots.
- *Kelo* Ballot Measures:
  - Florida, Georgia, Louisiana, Michigan, New Hampshire, Nevada, North Dakota, Oregon, South Carolina
- “*Kelo*-Plus” Ballot Measures:
  - Arizona, California, Idaho, Montana
- Pure Takings Measure: Washington.
The State Response (4)

- **District of Columbia**
  - Nothing, that I know of.

- **Maryland**
  - Numerous widely varying legislative proposals.
  - Then gridlock and then nothing.
New Jersey

- Again, numerous widely varying proposals

- Broad coalition – including NJ Future, NJ League of Municipalities, NJ Builders Association, Housing and Community Development Network, and others -- developed a “consensus approach.” Bills introduced in both houses. Relatively modest reforms, including amended blight definition and more procedural protections.

- Public Advocate, who issued an influential report on ED, weighed in urging further tightening (e.g. shifting of burden of proof).

-- Legislature ended in gridlock over two quite similar but different proposals; next year?
The State Response (6)

- **Connecticut**
  - Once again, numerous widely varying proposals.
  - Competing proposals -- one sharply restricting the eminent domain power, and one providing new procedural protections.
  - Debate was dominated by *Kelo*, which was finally settled this summer.
  - Legislature ended in gridlock; next year?
Georgia

- H.B. 1313
  -- relatively tight definition of blight
  -- generally prohibiting ED for ED
  -- broad utility exception
  -- condemning authority assigned burden of proof on issue of public use
  -- reconveyance rights
  -- enhanced procedural protections

- Proposed Constitutional Amendment
  -- would require approval by the elected governing body of a local government before eminent domain may be used for a redevelopment purpose, as defined by law.
Concluding Thoughts

-- The laboratories of democracy will surely flourish.

-- Public and political interest in *Kelo* remains very high.

-- Pressure will probably weaken over time to enact sweeping reforms; good and bad.

-- Need to banish “blight” from our vocabulary.

-- Need more research/action on (1) relocation assistance standards, (2) enhanced procedural protections, (3) values and functions of planning, (4) housing replacement options, (5) possible compensation reforms.