

Brief

Testimony on Takings of Private Property

Presented Before the Senate State Affairs Committee

By Bill Peacock, Economic Freedom Policy Analyst

Thank you Mr. Chairman, members.

My name is Bill Peacock, economic freedom policy analyst with the Texas Public Policy Foundation, which is based on the core principles of limited government, free markets, private property rights, individual liberty and personal responsibility.

Too often when we testify before legislative committees we move quickly past these core principles to get to the details. So today I'd like to emphasize the importance of these principles and note that there is no better example of why governments should adhere to these principles than the issue before us today.

In particular, I'd like to remind you of that which you already know, that there is no individual liberty where private property rights do not exist, and where private property rights are being eroded, so is individual liberty.

It is unfortunate that we have to gather here today to propose legislative action to reinstate a bedrock constitutional principle such as this. But I am here today to offer the Foundation's support for your efforts to do so.

The Kelo Decision

In its recent *Kelo* decision, the Supreme Court essentially rewrote the Public Use Clause in the U.S. Constitution. This was rightly decried in dissent by Justice Sandra Day O'Connor as hanging "the specter of condemnation . . . over all property." The decision produced similar reaction and surprise across the country.

Yet the decision should not be so much a surprise as a wakeup call. *Kelo* is really the logical conclusion to the court's jurisprudence over the last fifty years on the Constitution's Public Use Clause. Your predecessors probably should have been holding this hearing in the 1960s.

Of course, the important issue today is how Texans are affected by the decision, and what you can do about protecting Texans from unconstitutional takings of property.

Texans Vulnerable to Economic Development Seizures

Based on our research into this issue, Texans are vulnerable to the same type of economic development takings as highlighted in *Kelo*.

This is not because *Kelo* changes Texas law, but because it exposes the flaws in Texas law when it comes to protecting private property rights.

The Texas Constitution has a Public Use Clause very similar to its federal counterpart, and Chapter 21 of the Government Code regulating eminent domain contains the same reference to public use as contained in both constitutions.

However, other parts of Texas law appear to expand the definition of public use much like the Supreme Court has, and this is where the main problem is.

Perhaps the most problematic Texas law is the Development Corporation Act of 1979, which allows cities to create economic development corporations that can exercise eminent domain powers for public purposes. Such purposes could include "the promotion and development of new and expanded business enterprises."

Likewise, the Texas Urban Renewal Law allows cities to seize land for "urban renewal activities" such as "slum clearance, redevelopment, rehabilitation, and conservation activities" that can then be sold to private investors. However, it is unclear if this law has ever been used for these purposes.

Chapter 335 of the Local Government Code, which provides for sports and community venue districts, allows eminent domain to be used for "a facility site or related infrastructure."

Two Examples

Perhaps the best evidence that the abuse of eminent domain is a threat to Texas property owners are the following two examples of how Texas cities intend on using these laws.

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The first example is a quote from the site of the Texas Municipal League. It says, “The *Kelo* decision is good for Texas cities. . . . It simply confirms what cities have known all along: under the Fifth Amendment to the U.S. Constitution, economic development can be as much a ‘public use’ as a road, bridge, or water tower.”

The second example involves two property owners in Freeport.

Acie Frizzell owns a couple of vacant lots in the City of Freeport. The city attorney has told her that if she won’t sell her lots as part of a planned economic development project, the city will condemn her land at the price of \$100 per lot. The lots might then be turned over to a private developer.

Another property owner in Freeport, Wright Gore, is the owner of Western Seafood Company. The city also wants to condemn part of his property—330 feet along the old Brazos River—and turn it over to his next door neighbor to build a marina. Gore says the condemnation threatens the viability of his \$40 million-a-year business.

Now that the U.S. Supreme Court has issued its decision in *Kelo*, the city has said it will move “aggressively” to condemn these and other properties necessary to enhance the city’s economic development.

Freeport Mayor Jim Phillips said of *Kelo*, “This is the last little piece of the puzzle to put the project together.”

This “last little piece” is the ability of governments to ignore the U.S. and Texas constitutions’ plain language referring to “public use” and transfer the private property of one landowner to another for the public purpose of economic development using eminent domain.

Restoring Texan’s Rights

The Foundation supports changing the Texas Constitution to make clear what it already says—that the government can only take property for public use.

There are several ways to do this. One approach is the one is SJR 9 by Sen. Janek, which simply states that public use does not include economic development. A similar approach is taken in SJR 10 by Sen. Deuell, which bans the taking of property for economic development purposes. However, a recent study by the Cato Institute shows that this approach, while moving us in the right direction, does not offer comprehensive protection from eminent domain abuse.

The study’s author Ilya Somin points out that court cases that have overturned takings for the purposes of economic development have still left open the door for takings that transfer private property from one owner to another.

She cites Michigan Supreme Court’s *Hathcock* decision, which overturned its 1981 *Poletown* decision, in which the court allowed the City of Detroit to displace 28,000 residents for a General Motor’s plant. Even though *Hathcock* overturned *Poletown*, the court still allowed for three exceptions in which using eminent domain to accomplish a private to private transfer of property would be allowed.

They are: 1) Where “public necessity of the extreme sort” requires collective action; 2) Where the property remains subject to public oversight after transfer to a private entity; and 3) Where the property is selected because of facts of independent public significance rather than the interests of the private entity to which the property is eventually transferred.

I’ve attached copies of this study to my testimony.

In order to avoid this judicial interpretation of a prohibition on takings for economic development purposes, another approach would be to define what actually constitutes a public use.

In his dissent on *Kelo*, Justice Clarence Thomas says “the most natural reading of the [Public Use] Clause is that it allows the governments to take property only if the government owns, of the public has a legal rights to use, the property, as opposed to taking it for any public purpose of necessity whatsoever. . . . The term ‘public use,’ then, means that either the government or its citizens as a whole must actually ‘employ’ the taken property.”

Taking this approach, you could more clearly define the meaning of public use both positively and negatively, or you could simply enumerate the uses which would constitute public use—roads, railroads, utility right-of-ways, public parks and public buildings housing public offices.

Of course, some might complain that this approach would significantly limit the powers of eminent domain in the state. But shouldn’t the taking of private property be reserved only for the most important and legitimate functions of government?

We would also encourage this committee to conduct an interim study on this issue to identify specific Texas laws that violate or abrogate the Public Use Doctrine and make recommendations on how they can be changed.

Thank you for your efforts today to support the fundamental principle that economic freedom is the foundation of our individual freedom. I’d be happy to answer any questions.

Bill Peacock is the economic freedom policy analyst for the Texas Public Policy Foundation.

