

The Breakfast Club

Constitutional Minute for 22 February 2022

Can the Government Take My Property?

“Susette Kelo, a registered nurse, purchased her dream home in East Street in Fort Trumbull in July 1997. From her dining room window on a clear day, she can see Montauk Point at the tip of Long Island.

“When Susette first purchased the cute little Victorian, it was so overgrown with weeds that she literally needed a hatchet to reach the front door. But soon thereafter, the house was lovingly restored into a little pink “show home” for herself and her husband Tim. They were happy there until a notice was posted on their door the day before Thanksgiving in 2000 by the New London Development Corporation. It informed Susette that she and Tim would have to leave their home by March 2001 or the police would forcibly remove them and their belongings.”ⁱ

Thus began the saga that would end in one of the Supreme Court’s most infamous rulings: *Kelo v. City of New London (2005)*.ⁱⁱ

The Backstory: The City of New London, Connecticut, gave the New London Development Corporation (NLDC), a private, non-profit corporation, the authority to use the city’s eminent domain power as necessary to develop an older, rundown section of the city. Fort Trumbull, a 90-acre residential subdivision located near a founding-era coastal fort of the same name, consisted of older single-family homes; one neighbor of Susette’s was still living in the home in which he had been born in 1918. In 1998, Pfizer Corporation announced its intent to build a global research facility in the Fort Trumbull area. NLDC saw an opportunity: they would take the residential land at Fort Trumbull by eminent domain and turn it into an office park, a parking lot, and a new park to “sweeten the deal” for Pfizer. The new development would also significantly increase the tax revenue generated by the land.

What they didn’t count on was that Susette Kelo didn’t want to leave the home she had spent so much time and effort turning into an attractive showpiece. Kelo didn’t much care whether her land was purchased or simply condemned and taken. She sued, arguing that the city had misused its eminent domain power. She lost, and lost, and kept appealing until she arrived at the door of the Supreme Court. The Supreme Court ruled 5-4 that even though the land was being taken from a private owner and given to private corporations, it satisfied the U.S. Constitution’s requirement of “public use” found in the Fifth Amendment, which reads: “*nor shall private property be taken for public use, without just compensation.*” In effect, the Court ruled that “*public use*” wasn’t limited to actual *use* by the *public*, such as with a road or public park, but could encompass the idea of public “*benefit.*” After seeing where the Supreme Court’s ruling was headed, 43 state legislatures, including Virginia,ⁱⁱⁱ passed laws or even constitutional provisions preventing governmental entities in their state from using eminent domain simply to increase tax revenue.

So where does this “eminent domain” concept come from?

The term "eminent domain" or *dominium eminens* (Latin for "supreme ownership"), is first found in *On the Law of War and Peace*, written by the Dutch jurist Hugo Grotius in 1625, an author known to America's founders. Grotius explained:

"The property of subjects is under the eminent domain of the state, so that the state or those who act for it may use and even alienate and destroy such property, not only in the case of extreme necessity, in which even private persons have a right over the property of others, but for ends of public utility, to which ends those who founded civil society must be supposed to have intended that private ends should give way. But, when this is done, the state is bound to make good the loss to those who lose their property." (emphasis added)

Another issue surrounding the 5th Amendment's "Takings Clause" involves the word "taking." Does "taking" mean only a physical taking of the property or are there other governmental actions which can result loss of use of the property short of loss of ownership?"

In 1922, the Supreme Court^{iv} recognized that regulation could result in taking the value or use of private property, thus coining the phrase "regulatory taking."

In 1986, David Lucas paid \$975,000 for two residential lots on the Isle of Palms in Charleston County, South Carolina, on which he intended to build single-family homes. Two years later, the South Carolina Legislature enacted the Beachfront Management Act, which had the direct effect of stopping Mr. Lucas from erecting any permanent habitable structures on his two parcels. A state trial court found that the Act rendered Lucas's parcels essentially "valueless" and that Mr. Lucas was entitled to \$1,232,387 in "just compensation." Without taking ownership of the land, the South Carolina government had "taken" the land's value. South Carolina appealed and the SC Supreme Court reversed the lower court. The U.S. Supreme Court remanded the case back to the SC Supreme Court since, in the meantime, the Beachfront Management Act had been amended in such a way that might have given Mr. Lucas the ability to negotiate a deal with the state over his use of the land. Nevertheless, regulatory takings are a real "thing." There are other abuses of the Takings Clause we could discuss,^v but we're simply out of time for this week.

What happened to Susette Kelo? Fortunately, her little pink cottage—the home that became a national symbol in the fight against eminent domain abuse—was relocated and spared the wrecking ball (who paid for this relocation has not been made public). In the greatest of ironies, Pfizer Corporation encountered difficulty obtaining loans for the construction of its new plant and cancelled their plan. The Fort Trumbell neighborhood land sits vacant as I write this.^{vi}

Next week: Land use and public land development. Stay tuned.

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ⁱ Quoted from: <https://ij.org/client/susette-kelo/>

ⁱⁱ https://en.wikipedia.org/wiki/Kelo_v._City_of_New_London

ⁱⁱⁱ <https://law.lis.virginia.gov/uncodifiedacts/2012/session1/chapter738/>

^{iv} *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393(1922)

^v See: <https://ij.org/case/woodcrest-homes-inc-v-carousel-farms-metro-dis/>

^{vi} <https://tinyurl.com/34nhvepv>