U.S. Senate Committee on the Judiciary
U.S. Senator John Cornyn (R-TX)

The Protection of Homes, Small Businesses, and Private Property Act of 2005

Monday, June 27, 2005

Mr. President, I rise today to introduce new legislation, entitled the Protection of Homes, Small Businesses, and Private Property Act of 2005. I introduce this legislation in response to a controversial ruling of the United States Supreme Court issued just last Thursday.

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 famously 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.'"

The Fifth Amendment of the United States Constitution specifically provides that "private property" shall not "be taken for public use without just compensation." The Fifth Amendment thus provides an essential guarantee of liberty against the abuse of the power of eminent domain, by permitting government to seize private property only "for public use."

On June 23, 2005, the U.S. Supreme Court issued its controversial 5-4 decision in *Kelo v. City of New London*. In that ruling, 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 under the Fifth Amendment, the power of eminent domain may be used only "for public use."

Yet the Court nevertheless held, by a 5-4 vote, that government may seize the home, small business, or other private property of one owner, and transfer that same property to another private owner, simply by concluding that such a transfer would benefit the community through increased economic development.

This is an alarming decision. As the *Houston Chronicle* editorialized this past weekend: "It seems a bizarre anomaly. The government in China or Russia might take private property to hand over to wealthy developers to build shopping malls and office plazas, but it wouldn't happen in the United States. Yet, that is the practice the U.S. Supreme Court narrowly approved this week. Local governments, the court ruled, may seize private homes and businesses so that other private entities can develop the land into enterprises that generate higher taxes." I ask unanimous consent that a copy of this editorial be included in the *Record* at the close of my remarks.

The Court's decision in *Kelo* is alarming because, as Justice O'Connor accurately noted in her dissenting opinion, joined by the Chief Justice and Justices Scalia and Thomas, the Court has

"effectively . . . delete[d] the words 'for public use' from the Takings Clause of the Fifth Amendment" and thereby "refus[ed] to enforce properly the Federal Constitution."

Under the Court's decision in *Kelo,* Justice O'Connor warns, "[t]he specter of condemnation hangs over all property. 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." She further warns that, under *Kelo*, "[a]ny property may now be taken for the benefit of another private party," and "the fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more. The Founders cannot have intended this perverse result."

Indeed, as an amicus brief filed by the National Association for the Advancement of Colored People, AARP, and other organizations noted, "[a]bsent a true public use requirement the takings power will be employed more frequently. The takings that result will disproportionately affect and harm the economically disadvantaged and, in particular, racial and ethnic minorities and the elderly."

In a way, the *Kelo* decision at least vindicates supporters of the nomination of Justice Janice Rogers Brown to the U.S. Court of Appeals for the D.C. Circuit. That nomination attracted substantial controversy in some quarters, because of Justice Brown's personal passion for the protection of private property rights. The *Kelo* decision announced last Thursday demonstrates that her concerns about excessive government interference with property rights is well-founded and well within the mainstream of American jurisprudence.

The *Houston Chronicle* has called upon lawmakers to take action, editorializing this past weekend that "lawmakers would do well to pass restrictions on this distasteful form of eminent domain." I firmly agree.

It is appropriate for Congress to take action, consistent with its limited powers under the Constitution, to restore the vital protections of the Fifth Amendment and to protect homes, small businesses, and other private property rights against unreasonable government use of the power of eminent domain.

That's why I am introducing today the Protection of Homes, Small Businesses, and Private Property Act of 2005. The legislation would declare Congress's view that the power of eminent domain should be exercised only "for public use," as guaranteed by the Fifth Amendment, and that this power to seize homes, small businesses, and other private property should be reserved only for true public uses. Most importantly, the power of eminent domain should *not* be used simply to further private economic development. The Act would apply this standard to two areas of government action which are clearly within Congress's authority to regulate: (1) all exercises of eminent domain power by the federal government, and (2) all exercises of eminent domain power by state and local government through the use of federal funds.

It would likewise be appropriate for states to take action to voluntarily limit their own power of eminent domain. As the Court in *Kelo* noted, "nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power."

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. The *Kelo* decision was a disappointment, but I want to congratulate the attorneys at the Institute for Justice for their exceptional legal work and for their devotion to liberty. We must not give up, and I know that the talented lawyers at the Institute for Justice have no intention of giving up. In the aftermath of *Kelo*, we must take all necessary action to restore and strengthen the protections of the Fifth Amendment. I ask my colleagues to lend their support to this effort, by supporting the Protection of Homes, Small Businesses, and Private Property Act of 2005.

I yield the floor.

HoustonChronicle.com -- http://www.HoustonChronicle.com | Section: Editorial

June 25, 2005, 12:31AM

STEALING HOME
Decision to let government take private property for development risks abuse of eminent domain.

It seems a bizarre anomaly. The government in China or Russia might take private property to hand over to wealthy developers to build shopping malls and office plazas, but it wouldn't happen in the United States. Yet, that is the practice the U.S. Supreme Court narrowly approved this week. Local governments, the court ruled, may seize private homes and businesses so that other private entities can develop the land into enterprises that generate higher taxes.

The Supreme Court found, 5-4, that local elected officials are not barred by the Constitution from condemning whole neighborhoods and small businesses if, in their view, doing so would lead to redevelopment that increases tax collections.

A majority on the court was convinced that the possibility of improving the tax base for the benefit of the wider community satisfies the Fifth Amendment's requirement that private property can be taken by eminent domain only for a public purpose.

Justice Sandra Day O'Connor, who dissented, pinpointed the problem with the majority's argument. It cedes "disproportionate influence and power" to a community's most powerful and well-connected residents.

Public parks, schools and right of way for thoroughfares traditionally have provided the sort of public purpose to justify government's use of eminent domain. Grand redevelopment schemes,

especially when they are cooked up by government officials, often lack a sound economic basis and carry the potential of becoming boondoggles that hurt taxpayers.

Justice John Paul Stevens wrote for the majority that local officials are qualified judges of whether an economic development project will benefit the community. In this case, city officials in New London, Conn., plan to tear down private homes to make way for a riverfront hotel, offices and a fitness club.

"The city has carefully formulated an economic development that it believes will provide appreciable benefits to the community, including — but by no means limited to — new jobs and increased tax revenue," Stevens wrote.

But is that universally true? Municipal and county governing bodies frequently miscalculate or wildly overestimate the benefits of tax abatements and other incentives.

Besides that, individual taxpayers don't necessarily benefit from increased government revenues.

Sometimes the increased revenue proves insufficient to cover the cost of providing services to new development. Sometimes increased revenues are wasted on things other than essential services.

Now that the high court has cleared the way for elected officeholders to trump private property rights, abuse of eminent domain becomes more likely, particularly in neighborhoods populated by the least influential citizens. In Texas, lawmakers would do well to pass restrictions on this distasteful form of eminent domain.