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Our Amicus Brief Urging the Supreme Court to Hear *Ilagan v. Ungacta* – An Important Post-Kelo Property Rights Case

Ilya Somin » January 8, 2013 10:50 am

We recently filed an amicus brief urging the Supreme Court to hear *Ilagan v. Ungacta*, an important property rights case on the Public Use Clause of the Fifth Amendment. I wrote the brief on behalf of the National Federation of Independent Business Small Business Legal Center, twelve other organizations (including the Cato Institute, the Becket Fund for Religious Liberty, the Owners' Counsel of America – a nationwide organization of eminent domain lawyers, and the American Forest Resource Council), and several prominent constitutional law and property scholars, including co-bloggers Randy Barnett and Todd Zywicki.

Ilagan v. Ungacta is a fairly egregious case where land was condemned for the purpose of benefiting a powerful private party, in this case the then-mayor of Agana, Guam, and his family (the new owners of the condemned property). In *Kelo v. City of New London*, one of the most widely opposed decisions in Supreme Court history, the Court ruled that the Public Use Clause of the Fifth Amendment allows condemnations for virtually any "public purpose," including transferring property from one private owner to another in hopes of stimulating greater "economic development." But the Court also noted that government may not "take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit." Unfortunately, neither *Kelo* nor other Supreme Court decisions have made clear what it means for a taking to be "pretextual."

As I explain in the brief (pp. 4-13), lower federal courts and state supreme courts have come up with at least five different approaches to deciding what counts as a pretextual taking. Some courts emphasize the motives of the condemning authority, some focus on the distribution of benefits from the taking, and some on the extent and quality of the planning process behind the taking. The Third Circuit has emphasized the presence or absence of a private beneficiary of the condemnation whose identity was known in advance. Finally, some courts – including the Guam Supreme Court in this case – define pretext so narrowly as to permit even the most egregious favoritism.

Ilagan is a great case for the Court to clarify the meaning of pretext because it includes all four possible indicators of pretext identified by various lower court decisions: dubious motives, a highly skewed distribution of benefits, lack of careful planning, and a major private beneficiary whose identity was obvious in advance of the taking.

Because the official rationale for this taking, like the one in *Kelo*, is the promotion of "economic development," this case is also a good opportunity for the Court to consider overruling *Kelo*. As the brief outlines (pp. 21-25), the case for overruling *Kelo* easily qualifies under the Court's traditional standards for overruling a constitutional decision: Among other things, the ruling was based on poor reasoning, it has been widely criticized, and its recent nature ensures that it has not yet created much in the way of reliance interests. Most strikingly, the Court should reconsider *Kelo* because retired Justice John Paul Stevens, the author of the *Kelo* majority opinion, has publicly admitted that his reasoning was based in part on what he calls an "embarrassing to admit" mistake. Here is the relevant passage from the brief:

> Even Justice John Paul Stevens, author of the Court's opinion, has admitted that its reasoning was based in part on an "embarrassing" error: the assumption that a series of late nineteenth and early twentieth century "substantive due process" Supreme Court decisions applying a highly deferential approach to state government takings were actually decided under the Takings Clause of the Fifth Amendment. John Paul Stevens, Address at University of Alabama School of Law, Albritton Lecture (Nov. 16, 2011), 14-18.... These cases were relied on by the Court as key precedents supporting the proposition that the outcome in Kelo was dictated by "more than a century" of precedent. Kelo, 545 U.S. at 483.... An "embarrassing" error in reasoning—acknowledged by the author of the Court's opinion—provides strong justification for the Court to at least consider overruling *Kelo*.

I discussed Stevens' mistake and its significance in greater detail in this article (pp. 241-44).

Justice Stevens himself continues to believe that *Kelo* was rightly decided, but only on the basis of the radical and historically inaccurate claim that the Public Use Clause imposes no constraints on government's power to take property. Both *Kelo* itself and decades of other precedents go against that view.

I don't claim that this error by itself proves that *Kelo* should be overruled. But its exposure, combined with other factors, amounts to a strong case for the Court to at least reconsider the issue.