CRUSADERS & CRIMINALS, VICTIMS & VISIONARIES

Historic Encounters Between Connecticut Citizens and the United States Supreme Court

Supplement

This supplement includes updates to factual information provided in the original text, as well as to its cases. Information is updated as of 2007. Three additional, recent Connecticut landmark cases are also included.

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Crusaders and Criminals, Victims and Visionaries

Supplement

As you have probably noticed, if you have already read the *Crusaders and Criminals, Victims and Visionaries* text, having been written in 1986, there are many facts and case statuses that are now outdated. This supplement is meant to bring the 1986 information contained in the original text current to 2007, as well as to provide subsequent case law that has been decided in the last 20 years since the book was first published.

Updates to factual information:

1. From "Today's Federal Courts":
    a. There are 94 federal districts. 1Connecticut constitutes one federal judicial district. Court is held at Bridgeport, Hartford, New Haven, New London, and Waterbury.
    b. The Connecticut District Judges (as of 2007) are Chief Judge Robert N. Chatigny, Judge Janet Bond Arterton, Senior Judge Dominic J. Squatrito, Judge Alvin W. Thompson, Judge Janet C. Hall, Judge Christopher F. Droney, Judge Stefan R. Underhill, Judge Mark Kravitz, Senior Judge Alfred V. Covello, Senior Judge Warren W. Eginton, Senior Judge Ellen B. Burns, Senior Judge Alan H. Nevas, Senior Judge Peter C. Dorsey, Judge Vanessa Bryant, Magistrate Judge Thomas P. Smith, Magistrate Judge Joan Q. Margolis, Magistrate Judge Holly B. Fitzsimmons, Magistrate Judge Donna Fatsi, and Magistrate Judge William I. Garfinkle.
    c. There are twelve Circuit Courts (federal appellate courts). Connecticut is in the Second Circuit. The Second Circuit Judges from Connecticut (as of 2007) are Judge Thomas J. Meskill, Judge Jon O. Newman, Judge Ralph K. Winter, Judge Jose A.Cabranes, and Judge Guido Calabresi.
    d. The amount in controversy for diversity of citizenship in federal court is $75, 000.
2. From *Griswold v. Connecticut*: Planned Parenthood now has more than 860 health centers nationwide, as opposed to the 22 in 1986.
3. From *Tashjian v. Republican Party*:
    a. The U.S. Supreme Court affirmed the lower court decision. Subsequently, The Connecticut Republican Party approved the right of unaffiliated voters to vote in its primaries while Lowell Weicker was Senator and dominating the party. When Weicker was no longer the titular head of the party, the rule was repealed. So only enrolled party members may vote today.
4. From Chapter 7, *Columbe v. Connecticut,* "Lt. Sam Rome and the 'mad dog' killers":
    a. The first person to be executed in Connecticut since Taborski in 1960, was Michael Ross in 2005. Ross is now the last person executed in the State of Connecticut and the first person to be executed in New England in 45 years.
5. From *Maher v. Roe*:
    a. The current CT Medicaid rules do allow for medically necessary abortions.
6. From *Zemel v. Rusk*:
    a. The policy toward Cuba continues to be the same today. There is always talk, most recently from Senator Dodd, to restore more open relations with Cuba. As of now, Cuba is still off limits for American travelers.
7. From "Notes on Source Materials":
    a. Under *Fitzpatrick v. Bitzer*, the case of *Pineman v. Oechslin*, after several hearings and appeals, recognized that the state is free to establish any rational pension plan and that there was no contract right created. The State of Connecticut has now revised its pension

laws. Those hired before July 1, 1997 -- both male and female -- may retire at age 55. New hires must wait until age 65.

b. Under *Gaffney v. Cummings*, the citation for the case of *Davis v. Bandemer* is 478 U.S. 109 (1986), which distinguished *Gaffney v. Cummings*. In *Gaffney*, the Court refused to become involved in a bipartisan effort to assign seats according to party. In *Davis*, the court decided that it would review a re-apportionment based on political considerations, stating that sometimes it was appropriate to do so.

c. Under *Griswold v. Connecticut* for additional scholarly articles add David J. Garrow, "Liberty & Sexuality: The Right to Privacy and the Making of Roe v. Wade," University of California Press, 1998, for a well-researched study of *Griswold v. CT*.

d. Under *Tashjian v. Republican Party* the citation should be updated to 559 F.Supp. 1228; 770 F.2d 265 (1985), 479 U.S. 208 (1986). See also *Clingman v. Beaver*, 544 U.S. 581 (2005) which distinguished *Tashjian*. In *Clingman*, the STATE law allowed unaffiliated voters to vote in a party primary. Only independents could vote and not party members. The Court said that it was constitutional to mandate that the party members become independents or switch to the party. This was different from *Tashjian* where the state only allowed enrolled party members and forbade the party from inviting independents to vote. As usual, where the state and the party agree, the court will find no burden on registration; but if the state wants registration and the party does not, then the statute is likely unconstitutional.

8. For further supplemental reading, a good book on U.S. Constitution is Akhil Reed Amar, *America's Constitution* (2006).

<u>Subsequent relevant case law:</u>

1. *Kelo v. City of New London*

545 U.S. 469 (2005)

Kelo v. City of New London, 545 U.S. 465, was a case decided by the Supreme Court of the United States involving the use of eminent domain to transfer land from one private owner to another to further economic development. Eminent domain is the inherent power of the state to seize a citizen's private property, expropriate property, or rights in property, without the owner's consent. The property is taken either for government use or by delegation to third parties who will devote it to "public use." The most common uses of property taken by eminent domain are public utilities, highways, and railroads. Some states require that the government body offer to purchase the property before resorting to the use of eminent domain. The case arose from the condemnation, by New London, Connecticut, of privately owned real property so that it could be used as part of a comprehensive redevelopment plan. The Court held in a 5-4 decision that the general benefits a community enjoyed from economic growth qualified such redevelopment plans as a permissible "public use" under the Takings Clause of the Fifth Amdenment.

The Takings Clause of the Fifth Amendment to the U.S. Constitution forbids the states from the taking of private property except for "public use," after the payment of "just compensation." In the case of *Kelo v. City of New London*, the Supreme Court considered whether New London's taking of Kelo's home met the Fifth Amendment's "public use" requirement.

The City of New London, claiming that sections of the city had fallen on hard times, authorized its agent, the New London Development Corporation, to develop a plan to renovate the Fort Trumbull neighborhood. Concurrently, the pharmaceutical company Pfizer began construction of a major new research facility on the outskirts of Fort Trumbull. The Development Corporation's comprehensive plan included a hotel, conference center, a new state park, between 80 and 100 new residences, and office and retail space. In 2000, the City authorized the Development Corporation to acquire land in the area of Fort Trumbull.

Fort Trumbull was an older neighborhood, some 90 acres (364,000 m^2) in size and including 115 residential and commercial lots. The development corporation offered to purchase all 115 lots; however, the owners of 15 of these properties did not wish to sell to the corporation. Of the 15 properties, ten were

owned by occupants, and five by investors. Nine Owners, not all of whom were full-time residents, were the petitioners—people bringing the law suit-- in this case; the lead plaintiff, Susette Kelo, owned a small home on the Thames River in the development area.

The City of New London chose to exercise its power of eminent domain. The city ordered the development corporation, a private entity acting as the city's legally appointed agent, to condemn the 15 holdout owners' lots. The Development Corporation exercised its power of eminent domain to obtain Kelo's and the other holdouts' homes. The homeowners sued New London in the Connecticut Superior Court making the claim that the taking was not for public use. The plaintiffs contended that economic development did not qualify as public use. The owners argued that the city had misused its eminent domain power. The power of eminent domain is limited by the Fifth and Fourteenth Amendment to the U.S. Constitution. The Fifth Amendment, which restricts the actions of the federal government, says in part that "private property [shall not] be taken for public use, without just compensation"; under Section 1 of the Fourteenth Amendment, this limitation is also imposed on the actions of U.S. state and local governments. Kelo and the other appellants argued that economic development, the stated purpose of the Development Corporation, did not qualify as public use. In 2004, the Superior Court rejected the contention and the Connecticut Supreme Court, by a 4-3 margin, also ruled against the plaintiffs. The Connecticut Supreme Court found that the use of eminent domain for economic development--the central focus of the case--did not violate the public use clauses of the state and federal constitutions. The court found that if an economic project creates new jobs, increases tax and other city revenues, and revitalizes a depressed (even if not blighted) urban area, it qualifies as a public use. The court also found that government delegation of eminent domain power to a private entity was also constitutional as long as the private entity served as the legally authorized agent of the government.

Kelo's case was accepted on a petition for certiorari by the United States Supreme Court. This case was the first major eminent domain case heard at the Supreme Court since 1984. In that time, states and municipalities had slowly extended their use of eminent domain, frequently to include economic development purposes where applicable. In the *Kelo* case, there was an additional twist in that the development corporation was ostensibly a private entity; thus the plaintiffs argued that it was not constitutional for the government to take private property from one individual or corporation and give it to another, if the government was simply doing so because the repossession would put the property to a use that would generate higher tax revenue.

Kelo was the first eminent domain case to reach the Supreme Court since *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), a case in which the United States Supreme Court held that a state could use the eminent domain process to take land overwhelmingly concentrated in the hands of private landowners, and redistribute it to the larger population. *Kelo* became the focus of vigorous discussion and attracted numerous supporters on both sides. Some 40 amicus curiae--literally translated as "friend of the court" that refers to someone, not a party to a case, who volunteers to offer information on a point of law or some other aspect of the case to assist the court in deciding a matter before it--briefs were filed in the case, 25 on behalf of the petitioners. Suzette Kelo's supporters ranged from the libertarian Institute for Justice (the lead lawyers) to the NAACP, AARP and the late Martin Luther King's Southern Christian Leadership Conference. The latter three groups signed an amicus brief arguing that eminent domain has often been used against politically weak communities with high concentrations of minorities and elderly.

The case was argued on February 22, 2005. The case was heard by only seven members of the court with Associate Justice Sandra Day O'Connor presiding, as Chief Justice William Rehnquist was recuperating from medical treatment at home and Associate Justice John Paul Stevens was delayed on his return to Washington from Florida; both absent Justices read the briefs and oral argument transcripts and participated in the case decision. During oral arguments, several of the Justices asked questions that forecast their ultimate positions on the case. Justice Scalia, for example, suggested that a ruling in favor of the city would destroy "the distinction between private use and public use," asserting that a private use which provided merely incidental benefits to the state was "not enough to justify use of the condemnation power."

On June 23, 2005, a divided Supreme Court held in favor of New London. The five majority justices upheld the Connecticut courts' determination of "public use." Justice Stevens, the author of the decision, could not find an indication that the city was simply conferring a benefit on a particular private party. The term "public use" should be read broadly to mean "public purpose." Here the need of the city to meet its comprehensive development plan justified a finding of public purpose. The courts' role in reviewing the city's decision to use eminent domain should not go beyond ascertaining whether the

municipality had a legitimate reason for its actions. The dissents emphasized that the majority holding would encourage cities to favor those with influence and power in the political process, such as large corporations and land developers. Those harmed would be the poorer residents of the cities, forced to make new housing arrangements.

After *Kelo*, several states reacted to the perceived threat of government overreaching in banning by statute any eminent domain for private development. A *Christian Science Monitor* poll at the time the decision was issued showed that 93% disagreed with the Court's ruling. President Bush issued an executive order forbidding federal agencies from condemning land for the purpose of advancing the economic interests of private parties. In the 2006 elections, however, California rejected an anti-*Kelo* ballot measure, probably because of its added provisions.

In Connecticut, the issue of "just compensation" was resolved for the affected homeowners with the payment of agreed-upon sums, the city had reportedly set aside $1.6 million to buy all 15 homes. Soon after the decision, city officials announced plans to charge the residents of the homes for back rent for the five years since condemnation procedures began. The city contended that the residents had been on city property for those five years and owed tens of thousands of dollars of rent. The controversy was eventually settled when the city paid substantial additional compensation to the homeowners. In addition, the parties reached an agreement to allow certain homes to stay in Fort Trumbull and to move Kelo's house to another location. Connecticut has yet to pass any legislation to overturn *Kelo*, but the governor has proposed that any use of public property in private development be approved at a town referendum by a two-thirds vote. A modest attempt at a *Kelo* reform was passed in the 2007 General Assembly. A definition of 'deteriorated' was added requiring that 20% of the buildings in an area be defective.

2. ***1Connecticut Department of Public Safety v. Doe***

538 U.S. 1 (2003)

In *Connecticut Department of Public Safety v. Doe,* a civil rights action was brought to challenge Connecticut's Sex Offender Registration Act, also known as "Megan's Law," requiring persons convicted of sexual offenses to register with the Department of Public Safety. John Doe, a convicted sex offender in Connecticut was required to register information about himself on the Internet pursuant to "Megan's Law." This registration is posted on an Internet site and contains the offender's name, address, photograph, and description. A registration process in one form or another is found in every state and many have come under court challenge. Connecticut makes most sex offenders' registration data accessible to the public through the Internet without any assessment of the individual's risk of re-offending. Doe sued the state in federal district court seeking to enjoin the statute under the Due Process Clause.

A class action was brought by offender Doe contending that he was denied due process of law. According to Doe, the registry implies that each person listed is more likely than the average person to be "currently dangerous." In addition, the registration duties imposed by the act are extensive and onerous. Thus, Doe argued that that sex offenders should be entitled to a hearing to assess their current dangerousness before being included in a publicly disseminated registry. Doe claimed that he was not afforded a hearing before the Internet posting to allow him to show that he was no longer "currently dangerous."

The State of Connecticut argued that the two choices of either electing not to disseminate truthful information about convicted sex offenders, or creating a tiered system, which would be cumbersome, expensive, and less accurate than a system in which there is no subjective information relayed both result in sex offenders with the constitutional right of being able to keep secret otherwise public and accurate information, generally subject to freedom of information laws. The State further argued that the registry disclosed only truthful objective information about offenders which, in light of the disclaimer, could not be reasonably viewed as falsely stigmatizing any offender. The State further argued that the registration requirements did not have a sufficient nexus to the stigma factor because persons who do not comply are still listed in the registry and the data pertaining to them is still accessible to the public.

Both the Connecticut Federal District Court and the Second Circuit Court of Appeals agreed with Doe, and enjoined--prohibited--the state law's public disclosure provisions. The District Court held that Doe had a protected liberty interest, which triggered the Due Process Clause and the right to a hearing to show that he is not dangerous. The Second Circuit Court of Appeals held that although the CT registry posts a disclaimer and does not say or imply that all registrants are currently dangerous, it clearly "conveys

the message that some of the persons listed on the registry are currently dangerous." The state's failure to differentiate between registrants "implies that some of the registrants are dangerous and that each individual registrant is more likely than the average person to be currently dangerous, and thus stigmatizes every person listed on the registry." The Court also determined that the CT registration requirements were onerous and burdensome and had the result of "altering the registrants' legal rights and duties."

The Supreme Court ruled (with some concurring opinions but no dissents) that the Connecticut statute was constitutional and reversed the Second Circuit. The Court held that the statute merely lists the names of those *convicted* of a sexual offense, and need not be drafted to take into account the convicted person's current status. The state may enact legislation, even if it causes some harm to one's reputation. A hearing is not required where the results of the hearing would not change the outcome--here only that the offense occurred. No other fact, such as one's current rehabilitated state, is relevant.

The Supreme Court was not asked to rule on whether the Connecticut legislature could legitimately establish this type of disclosure scheme. The only issue in the case was whether a hearing was required before a name was posted to the online registry list. Justice Souter in concurrence noted that there were exceptions in the law for some offenders that a court concluded were not dangerous to others. For example, a court may exempt registration for a person convicted of sexual intercourse with a minor aged between 13 and 16 while the offender was more than two years older than the minor, provided the offender was under age 19 at the time of the offense. This left the possibility of a further challenge to the statute on an equal protection basis, that the exceptions were not rationally devised.

A recent editorial in the Connecticut Law Tribune (1/29/07) points out that subsequent federal law (The Adam Walsh Child Protection and Safety Act of 2006) requires the States to assign risks in the offender population--low, medium and high. Connecticut has established a Risk Assessment Board to classify state offenses into these categories. The editorial urges the Risk Assessment Board to recommend that some conduct is of such low-risk that little or no information should be posted online. Thus, the Connecticut sexual offender list that survived a court challenge in *Connecticut Department of Public Safety* will now be affected by the passage of a federal statute and the appointment of a state review board.

3. *1Connecticut v. Doehr*

501 U.S. 1 (1991)

On March 15, 1988, Brian Doehr and his wife were in a local park in Meriden, Connecticut where Mrs. Doehr was flying a kite. John DiGiovanni, a retired gentleman, was practicing his golf game near the kite-flying activity. Mrs. Doehr told DiGiovanni that park rules prohibited golf practice as someone could be struck by a golf ball. Mr. Doehr and DiGiovanni got into an argument over the golf game and allegedly Doehr knocked DiGiovanni to the ground. DiGiovanni hurt his wrist and received a black eye.

DiGiovanni brought a civil suit against the Doehrs in Meriden Superior Court. Along with filing his suit, he also presented a request for an attachment--the legal process of seizing another's property for the purpose of satisfying a court's monetary judgment--of the Doehrs' house in Meriden in the amount of $75,000. The purpose of a real estate attachment was to require Doehr, if he ever attempted to sell his house, to pay DiGiovanni any damages then due from his lawsuit. In other words, the attachment had the effect of not allowing Doehr to sell his house unless he paid off DiGiovanni.

At the time that DiGiovanni sued Doehr, a Connecticut statute allowed a judge to sign a real estate attachment without holding a hearing or giving notice to Doehr before signing the attachment. Under the statute, DiGiovanni had to give immediate notice to Doehr after the attachment was signed, and then Doehr could ask for a hearing to set aside the attachment after the fact.

A Superior Court judge read over the papers submitted by DiGiovanni's attorney. These merely stated that Doehr had assaulted and injured DiGiovanni and was filing a lawsuit. Based upon this information, the judge approved the attachment for $75, 000.

Once Doehr was served with the lawsuit and the attachment, his attorney brought suit in the U.S. District Court for the District of Connecticut to have the statute allowing the attachment declared unconstitutional and the attachment removed. The attorney's claim was that recently the Supreme Court had held that attachments without prior notice were a violation of the due process clause.

The District Court ruled in favor of the defendant DiGiovanni for the following reasons: While a Supreme Court case held that the seizure of a bank account or goods without prior notice to the debtor was unconstitutional, *Fuentes v. Shevin* (1972), subsequent cases had made it clear that notice before attachment

was not always needed. These cases set up an alternative to prior notice--a judge must review a plaintiff's affidavit, find probable cause and hold an immediate hearing after the attachment is placed on the land records.

In addition, the District Court observed that the possibility of harm from an attachment on the land records was less severe than the harm to a person who had his bank account attached. In contrasting real estate with personal property and bank accounts, the District Court was following precedent formulated by the famous Justice Oliver Wendell Holmes.

Doehr took an appeal from the District Court in Connecticut to the Federal Second Circuit Court of Appeals. The name of the case at that point was listed on court books as *Pinsky v. Duncan*, because the District Court had considered several cases together and had chosen another party as the main plaintiff.

Just as the case was about to be argued in the Second Circuit, the judges realized that the State of Connecticut had not been formally notified that the constitutionality of a state statute was being questioned on appeal. It so happened that an assistant attorney general was in the courtroom and the judges asked him to bring a copy of the parties' briefs back to Hartford to obtain the Connecticut Attorney General's views. The argument in the case was postponed to give the Attorney General a chance to file a brief. After the State had submitted its brief, the Second Circuit ruled 2-1 that the statute was unconstitutional because no notice and hearing were given to the homeowner before the placement of the attachment on the land records. The court did rule, on a related point, against Doehr by a 2-1 tally that the statute was not unconstitutional for failure to require the attaching plaintiff to file a bond along with the attachment.

The state Judicial Branch and other state agencies requested that the Attorney General take an appeal from the Second Circuit Court's opinion to the United States Supreme Court. The Supreme Court allowed the appeal, because there was a Connecticut Supreme Court opinion upholding the statute in conflict with the Second Circuit Court's opinion. While DiGiovanni was a party to the appeal, the state was then the main appellant and the name of the case became *Connecticut v. Doehr.*

On June 6, 1991, the Supreme Court affirmed the Second Circuit. The Court held that the Due Process Clause of the Fourteenth Amendment to the United States Constitution required notice and a hearing before someone's property was taken. This included real property--even if the harm was not as great as seizing wages, a piece of furniture or a bank account. A homeowner was still affected because with the attachment he or she could not sell the house or obtain a mortgage. The only exception to the prior notice rule would occur if there were emergency circumstances--such as someone was concealing his property or moving out of state. Even in the exceptional situation, a judge must review and approve a request for attachment, and set up a quick post-attachment hearing. The majority of the court on the main issue of due process voted for Doehr, but it did not have enough votes to impose a further requirement (sought by Doehr) that an attaching plaintiff post a bond--a written obligation to pay, or repay, a debt--to insure no financial damage through the attachment.

The result of the case was that the attachment on Doehr's house was ruled unconstitutional. It was removed by DiGiovanni immediately after the Court's decision. The parties had a trial on the assault and battery case pending in the state court and the jury awarded DiGiovanni approximately $3,000. The State paid Doehr the legal expenses that he incurred in the Second Circuit and the Supreme Court. The Connecticut statute was changed so that, except in very narrow circumstances, there must be a hearing before attachments occur. The case has been used many times by courts in discussing the scope of procedural due process under the Fourteenth Amendment.

For further information, see Kevin Clermont, editor, *Civil Procedure Stories*, article by Robert Bone, Foundation Press, 2004.