

## ON PRIVATE SECTOR USE OF EMINENT DOMAIN

by Tom Giovanetti

Eminent domain, or the taking of property for a public use, occurs at the intersection of two important values: Property rights and economic growth. Property rights are a foundation of a free society and of a market economy, and, of course, property rights are protected in the U.S. Constitution.

But it's important to remember that no matter how sacred we consider the rights enshrined in the Constitution, rights are not absolute. No matter how many "No Trespassing" signs you put up on your property, the law allows persons to cross your land if necessary to preserve themselves from harm. No matter how much we value free speech, you can't yell "fire" in a crowded theater. There are even legitimate limits on religious freedom. And if a compelling public use requires all or a portion of a plot of land, the Constitution allows it to be taken with just compensation.

### EVERYBODY HATES EMINENT DOMAIN

Eminent domain is a difficult and painful topic precisely because of the importance of property rights and the lack of a willing seller in the face of a public need.

Conservatives generally view eminent domain critically, because of our concern about government's potential to abuse power and the high value we place on property rights. And conservatives rightly were outraged after the Supreme Court's unfortunate *Kelo* decision, which stretched the definition of public use beyond reason to extend to a private office complex for a private company.

But in an overreaction to *Kelo*, many conservatives have become reflexively opposed to any use of eminent domain, and particularly opposed to use of eminent domain by non-government actors, such as private companies that build infrastructure. This overreaction is unwarranted, and actually contrary to the stated policy goals of most conservatives, because opposing private sector eminent domain for public uses is a recipe for even bigger government.

### WHAT IS EMINENT DOMAIN?

In Constitutional parlance, eminent domain is a "taking." Under the Takings Clause of the Fifth Amendment, property may not be taken except for public use, and must include just compensation. Those are the only two conditions, but they are key. Many conservative policy experts have argued over the years for an expansion in the concept of takings to include any action by government that reduces the value of property, which opens up the area of regulatory takings. But a taking is constitutional so long as it is found to be for a public use, and so long as it includes just compensation.

As mentioned earlier, eminent domain is painful because it does not involve a willing seller. If a condemning authority is able to negotiate an acceptable value for the owner, eminent domain doesn't come into play, except to the degree that the property owner sees it as an ultimate threat. But if a legitimate public use is in view and if just compensation is offered, the fact that an unwilling seller is involved becomes irrelevant and is not a legitimate objection.

### WHAT'S A PUBLIC USE?

So what is a legitimate public use? First, public uses can involve national or civil defense, immediate public necessity (such as a fire or riot), and, of course, infrastructure. Most often, eminent domain arises in connection with necessary public infrastructure projects, such as electrical transmission lines, telecom and broadband, airports and runways, ports, highways and roads, railroads, reservoirs and dams, and pipelines for transmission of water, sewage, gas, oil and other commodities. All of these uses have been classified in law and in court decisions as public uses qualifying for eminent domain.

Second, public use does not mean government use. Eminent domain is necessary for building infrastructure, and the Constitution does not reserve a monopoly to government to build infrastructure.

It's legitimate, and even strategic, for governments to empower private sector companies to build infrastructure, and thus to use eminent domain, because the private sector is often willing to build and maintain necessary public infrastructure using its own capital and at its own expense, saving taxpayers significant outlays and ongoing maintenance costs.

This doesn't mean that a private sector company should be allowed to use eminent domain to build, for example, a Burger King on the corner. Burger King may be a necessity to you, but it's not critical infrastructure, so it doesn't meet the public use test.

And this is what was wrong with the Supreme Court's *Kelo* decision. The case involved taking private property in order to build office buildings for a pharmaceutical company. And while pharmaceuticals are important, office buildings are not a public use. As a member of the general public, you could not have gained access to that building under any circumstances without permission, and those office buildings could have been put in other locations. In *Kelo*, the Supreme Court expanded the concept of public use beyond reason, and conservatives have been correct in criticizing that decision. But even a bad *Kelo* decision doesn't invalidate the legitimacy of a proper public use test for eminent domain.

### WHAT IS JUST COMPENSATION?

It's much harder to determine just compensation than to determine public use. People have emotional ties to their land and property, especially in rural areas, where it seems eminent domain most often comes into play. Imagine having the family farm taken in order to flood a reservoir to provide water for people living hundreds of miles away. Imagine saving a piece of land for your children to build their houses on someday, only to have the land taken in order to build a highway or rail line. What is the just compensation for such a taking?

Most often, fair market value is used to determine just compensation, since something like fair market value can usually be determined empirically and through negotiation. It's virtually impossible to quantify the value of an emotional tie to land or property, although in theory attempting to do so would certainly fall within the concept of just compensation.

### SHOULD WE ENCOURAGE OR DISCOURAGE PRIVATE SECTOR USE OF EMINENT DOMAIN?

The Constitution that contains the Fifth Amendment and the Takings Clause was intended to limit government, not the private sector. It's reasonable to assume that the Founders expected private companies, rather than government, would be building ports and other necessary infrastructure, since during the Founding Era government was tiny and limited. That's why we assert that the Constitution does not reserve a monopoly to government to build infrastructure.

Conservatives and other proponents of limited government should view private sector use of eminent domain as a feature, not a bug. Government is, after all, accustomed to using force and is often unconcerned about poor public relations, whereas the private sector is accustomed to pleasing customers and avoiding bad publicity. Therefore, we would expect property owners to have a better experience and probably derive better results from dealing with private sector entities than from dealing with government.

Further, government takings are always subject to the temptations of corruption. It is not unheard of for landowners with political connections to get better deals and even receive windfalls from government takings, or to be able to exercise undue influence over government infrastructure plans. Private sector entities are less subject to the temptations of corruption.

Finally, private sector entities are more efficient and more cost effective than government at building infrastructure. That's why conservatives and free-market proponents have usually supported privatization of all but the most core government services. It's not philosophically consistent for a conservative to argue that only government should be permitted to build infrastructure, or to tilt the playing field toward the benefit of government and to make it more difficult for private entities to build infrastructure.

If only the government can use eminent domain, then only the government can build and own infrastructure. That's a recipe for a much bigger, more intrusive, more expensive government, and it's something that the limited-government community should oppose.

When necessary, private sector use of eminent domain is a feature, not a bug. Through private infrastructure, we can grow the economy without growing government.

And if any extra scrutiny is needed, it should almost certainly be focused on government use of eminent domain rather than on private sector use. At least that's how a proponent of limited government would view things.

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