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The Bill of Rights: Eminent Domain

by Jacob G. Hornberger

One of the bedrocks of a free society is a system of private property. The concept of economic liberty is founded not only on principles of free enterprise but also on the principle that people have the right to accumulate the fruits of their earnings. If government has the power to arbitrarily seize a person's wealth or property, then a person cannot truly be considered free in an economic sense. That is why our ancestors deemed it critically important to protect people's property from governmental assault through their enactment of the Fifth Amendment, which reads in part as follows:

No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Notice that there are two pertinent "takings" clauses in the Fifth Amendment — the due-process clause and the just-compensation clause. The due-process clause empowers government to take a person's property but only after following the principles of due process of law, specifically, notice and hearing. That is, suppose a person is accused of defrauding the federal government. Before the government can punish him through incarceration and fine (i.e., deprive him of liberty and property), it must provide him with notice and hearing, where he is entitled to contest the charges against him.

The just-compensation clause works differently. It empowers the government to take anyone's property, so long as two conditions are met: the taking is for "public use" and "just compensation" is paid to the owner. This clause refers to the age-old government power of "eminent domain."

The original purpose of eminent domain was to enable government officials to acquire property to establish places from which to run the government. The idea was that in order for the government to operate, it would need, for example, courthouses. Thus, eminent domain supplied

government officials with the power to seize a person's property for that purpose but on the condition that government officials paid the owner for it.

While the "public use" and "just compensation" limitations serve as a check on the power of eminent domain, over time the power has increasingly been abused, especially with respect to the concept of "public use." In an era of confiscation and redistribution of wealth through the welfare-state functions of government, public officials have increasingly expanded the meaning of "public use" to the point where they are now using the power of eminent domain to take one person's property in order to give it to another person albeit by paying "just compensation" to the original owner.

Keep in mind that the Fifth Amendment applies only to the federal government, not the state governments. However, by Supreme Court interpretation, the due-process clause of the Fourteenth Amendment incorporates the Bill of Rights and thus applies the restrictions of the Fifth Amendment to the states.

The *Berman* case

In 1954, the U.S. Supreme Court decided one of the major eminent-domain cases, *Berman v. Parker*. The case arose from the D.C. government's condemnation of slum areas in Washington for purposes of "urban renewal." The process involved throwing people out of their homes for the purpose of beautifying blighted neighborhoods in D.C. While the D.C. government was compensating people for the taking, some residents nonetheless objected to being forced to sell their homes, arguing that the power of eminent domain did not extend to such government projects as urban renewal.

A department store was in the affected area. In addition to questioning the use of eminent domain for urban renewal, the store's owners argued that their store didn't even constitute blight.

The U.S. Supreme Court ruled in favor of the government. The Court reasoned, first, that urban renewal was a proper governmental purpose:

Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing the people who live there to the status of cattle. They may indeed make living an almost insufferable burden. They may also be an ugly sore, a blight on the community which robs it of charm, [348 U.S. 26, 33] which makes it a place from which men turn. The misery of housing may despoil a community as an open sewer may ruin a river.

We do not sit to determine whether a particular housing project is or is not desirable. The concept of the public welfare is broad and inclusive.

The Court then proceeded to hold that eminent domain could be employed for urban renewal even if title to the property would ultimately vest in private hands rather than be held by the D.C. government:

Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine. Here one of the means chosen is the use of private enterprise for redevelopment of the area. Appellants argue that this makes the project a taking from one businessman for the benefit of another businessman. But the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established. . . . The public end may be as well or better served through an [348 U.S. 26, 34] agency of private enterprise than through a department of government — or so the Congress might conclude. We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects.

The *Poletown* case

In 1981, the Michigan Supreme Court decided one of the most controversial cases involving eminent domain. In that case, the city of Detroit had seized thousands of homes, businesses, and churches in an area called *Poletown* (named for the large Polish population in that area) so that General Motors could build a plant on the site. The city claimed that the “public use” limitation was met by virtue of the fact that the new plant would “create jobs” and increase the city’s tax base. Opponents contended that this wasn’t truly a “public use” because the property owners’ property was simply being taken from them to be given to General Motors.

The Michigan Supreme Court ruled in favor of the city, and the effects of that decision rippled out nationwide. As an article posted on NationalReviewOnline entitled “This Land Is Your Land,” by Timothy Sandefur, observed,

Eminent domain, once limited to public uses like roads or post offices, was unleashed in the service of any well-heeled private party able to persuade the local government to see things its way. In the years since *Poletown*, eminent-domain abuse has exploded nationwide. As Ramesh Ponnuru has pointed out, powerful corporations frequently send representatives to lobby cities for “free” real estate. The city takes a neighborhood, usually of modest homes, and gives it to a developer or a megastore, and then rakes in the higher taxes. The only losers are the home- and small-business owners, who lack the political influence necessary to persuade local officials to respect their rights. *Poletown* has become the leading symbol of eminent-domain abuse.

In other words, what began as a power to seize property on which to build courthouses and police stations was extended to seizing and redistributing property to alleviate “blight” and

then extended again to seizing and redistributing property to improve the economy and the government's tax base. Of course, a cynic would be forgiven for concluding that the power was being used to take property from those who lacked political influence in order to give it to well-heeled, politically powerful friends of government officials.

A trend toward property rights

In July 2004 the Michigan Supreme Court overturned its infamous decision in the *Poletown* case. In *Wayne County v. Hathcock*, the county had condemned private property for the purpose of giving it to a private developer, arguing that the project would serve the public good through jobs and economic prosperity. The court held that the *Poletown* case had been wrongly decided and that the "public use" power could not encompass the taking of one person's property for the purpose of giving it to another person. The August 4, 2004, issue of the *Detroit News* editorialized,

Michigan's Supreme Court restored the sanctity of private property rights by reversing a quarter-century-old ruling that allowed the city of Detroit to uproot families and businesses in the Poletown neighborhood so General Motors Corp. could build a factory on their land. The original case was a blow to constitutional protections. The new, unanimous ruling restores the concept that government can't just take away private property because it thinks someone else might use the property better. . . . Municipalities and developers can adjust. Wayne County is going ahead with the Pinnacle Park project. The developers will now have to work harder to obtain rights to land from private owners and pay a higher price. But few constitutional rights are as important as private property rights. The court, in bringing Michigan back into compliance with the intent of the Constitution, served Michigan property owners well.

Equally significant, the U.S. Supreme Court has recently decided to revisit the "public use" issue in the case of *Kelo v. City of New London*, which involves the city's seizure of property for private development to boost the city's economic conditions. The homeowners' argument can be summed up in their central contention: They "seek to stop the use of eminent domain to take away their most sacred and important possessions: their homes."

Lost in all this "public use" controversy is a fundamental question: Why should government have the power of eminent domain anyway? If it needs a piece of property, why shouldn't government officials be expected to negotiate for its purchase, just as everyone else does? If someone refuses to sell, then the government can simply go and purchase its property elsewhere.

We should also bear in mind the personal pain and sorrow that accompanies the forcible taking of people's homes and businesses, even when "just compensation" is paid. The best

example was the Interstate Highway System, a socialized project that destroyed the homes and businesses of thousands upon thousands of people. (See “[Highway to Collapse: Spending on Infrastructure](#),” by Jacob G. Hornberger, *Freedom Daily*, April 1993)

Given the power of eminent domain, it should be limited to acquiring property for the legitimate functions of government. For most people, there is no such thing as “just compensation” for their home or business, especially given that value is subjective. Oftentimes, people simply aren’t interested in selling or moving, no matter how high the price.

In the private marketplace, a private buyer cannot force people to sell, no matter what the price that is being offered. As the ancient adage goes, a man’s home is his castle. Where is the morality in permitting a prospective buyer to accomplish an immoral end through the use of the government’s power of eminent domain? By limiting the just-compensation clause of the Fifth Amendment to its original intended purpose, we help to restore the sanctity of private property on which economic liberty is based. Of course, by repealing it we would help restore it even more.

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