

Eminent domain

From Wikipedia, the free encyclopedia

Jump to: [navigation](#), [search](#)

"Taker" redirects here. For professional wrestler a.k.a. Taker, see [The Undertaker](#).

Eminent domain ([United States](#)), **compulsory purchase** ([United Kingdom](#), [New Zealand](#), [Ireland](#)), **resumption/compulsory acquisition** ([Australia](#)), or **expropriation** ([South Africa](#) and [Canada](#)) is an action of the [state](#) to seize a [citizen's private property](#), [expropriate property](#), or seize a citizen's rights in property with due monetary compensation, but 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 or civic use or, in some cases, economic development. The most common uses of property taken by eminent domain are for [public utilities](#), [highways](#), and [railroads](#); ^{*[citation needed]*} however, it may also be taken for reasons of public safety, such as in the case of [Centralia, Pennsylvania](#). Some jurisdictions require that the government body offer to purchase the property before resorting to the use of eminent domain.

Meaning

The term "eminent domain" was taken from the legal treatise *De Jure Belli et Pacis*, written by the [Dutch jurist Hugo Grotius](#) in 1625,^[1] which used the term *dominium eminens* ([Latin](#) for *supreme lordship*) and described the power as follows:

"... The property of subjects is under the eminent domain of the state, so that the state or he who acts for it may use and even alienate and destroy such property, not only in the case of extreme necessity, in which even private persons have a right over the property of others, but for ends of public utility, to which ends those who founded civil society must be supposed to have intended that private ends should give way. But it is to be added that when this is done the state is bound to make good the loss to those who lose their property."

Some U.S. states, including [New York](#) and [Louisiana](#), use the term *appropriation* as a synonym for the exercising of eminent domain powers.

[edit] Condemnation

The term "condemnation" is used to describe the formal act of the exercise of the power of eminent domain to transfer title to the property from its private owner to the government. This use of the word should not be confused with its sense of a declaration that property is uninhabitable due to defects. Condemnation via eminent domain indicates the government is taking ownership of the property or some lesser interest in it, such as an [easement](#). After the

condemnation action is filed the amount of just compensation is determined. However, in some cases, the property owner challenges the action because the proposed taking is not for "public use", or the condemnor is not legislatively authorized to take the subject property, or has not followed the proper substantive or procedural steps as required by law.

[edit] Other property

The exercise of eminent domain is not limited to real property. Governments may also condemn personal property. Governments can even condemn intangible property such as contract rights, patents, trade secrets, and copyrights. Even the taking of professional sports team's franchise has been held by the California Supreme Court to satisfy the "public use" constitutional limitation, although eventually, that taking was not permitted because it was deemed to violate the interstate commerce clause of the U.S. Constitution.^[2]

[edit] United States[edit] Constitution

The practice of condemnation was transplanted into the American colonies with the common law. In the early years, unimproved land could be taken without compensation; this practice was accepted because land was so abundant that it could be cheaply replaced. When it came time to draft the United States Constitution, differing views on eminent domain were voiced. Thomas Jefferson favored eliminating all remnants of feudalism, and pushed for allodial ownership.^[3] James Madison, who wrote the Fifth Amendment to the United States Constitution, had a more moderate view, and struck a compromise that sought to at least protect property rights somewhat by explicitly mandating compensation and using the term "public use" rather than "public purpose", "public interest", or "public benefit".^[4]

The Fifth Amendment imposes limitations on the exercise of eminent domain: the taking must be for public use and just compensation must be paid. Some historians have suggested that these limitations on the taking power were inspired by the need to permit the army to secure mounts, fodder and provisions from local ranchers and the perceived need to assure them compensation for such takings. Similarly, soldiers forcibly sought housing in whatever homes were near their military assignments. To address the latter problem, the Third Amendment was enacted in 1791 as part of the US Constitution's Bill of Rights. It provided that the quartering of soldiers on private property could not take place in peacetime without the landowner's consent. It also required that, in wartime, established law had to be followed in housing troops on private property. Presumably, this would mandate "just compensation", a requirement for the exercise of eminent domain in general per the Fifth Amendment.^[5] All US states have legislation specifying eminent domain procedures within their respective territories.^[6]

The power of governments to take private real or personal property has always existed in the United States, being an inherent attribute of sovereignty. This power reposes in the legislative branch of the government and may not be exercised unless the legislature has authorized its use by statutes that specify who may use it and for what purposes. The legislature may delegate the power to private entities like public utilities or railroads, and even to individuals for the purpose of acquiring access to their landlocked land. Its use was limited by the Takings Clause in the Fifth Amendment to the U.S. Constitution in 1791, which reads, "...nor shall private property be

taken for public use, without just compensation". The Fifth Amendment did not create the national government's right to use the eminent domain power, it simply limited it to public use.^[7]

The U.S. Supreme Court has consistently deferred to the right of states to make their own determinations of public use, although the reason why the constitutional term "public use" should not be subject to federal judicial interpretation, the same as other constitutional terms, has not been explained. In 1832 the Supreme Court ruled that eminent domain could be used to allow a mill owner to expand his dam and operations by flooding an upstream neighbor. The court opinion stated that a public use does not have to mean public occupation of the land; it can mean a public benefit.^[8] In *Clark vs. Nash* (1905), the Supreme Court acknowledged that different parts of the country have unique circumstances and the definition of public use thus varied with the facts of the case. It ruled a farmer could expand his irrigation ditch across another farmer's land (with compensation), because that farmer was entitled to "the flow of the waters of the said Fort Canyon Creek... and the uses of the said waters... [is] a public use." Here, in recognizing the arid climate and geography of Utah, the Court indicated the farmer not adjacent to the river had as much right as the farmer who was, to access the waters.^[9] However, until the 14th Amendment was ratified in 1868, the limitations on eminent domain specified in the Fifth Amendment applied only to the federal government and not to the states. That view ended in 1896 when in the *Chicago, Burlington & Quincy Railroad v. Chicago* case the court held that the eminent domain provisions of the Fifth Amendment were incorporated in the Due Process Clause of the Fourteenth Amendment and thus were now binding on the states, or in other words, when the states take private property they are required to devote it to a public purpose and compensate the property owner for his loss.^[10] This was the beginning of what is now known as the "selective incorporation" doctrine.

An expansive interpretation of eminent domain was reaffirmed in *Berman v. Parker* (1954), in which the U.S. Supreme Court reviewed an effort by the District of Columbia to take and raze blighted structures, in order to eliminate slums in the Southwest Washington area. After the taking, held the court, the taken and razed land could be transferred to private redevelopers who would construct condominiums, private office buildings and a shopping center. The Supreme Court ruled against the owners of a non-blighted property within the area on the grounds that the project should be judged on its plans as a whole, not on a parcel by parcel basis. In *Hawaii Housing Authority v. Midkiff* (1984), the Supreme Court approved the use of eminent domain to transfer a land lessor's title to its tenants who owned and occupied homes built on the leased land. The court's justification was to break up a housing oligopoly, and thereby lower or stabilize home prices, although in reality, following the *Midkiff* decision, home prices on Oahu escalated dramatically, more than doubling within a few years.^[citation needed]

The Supreme Court's decision in *Kelo v. City of New London*, 545 U.S. 469 (2005) affirmed the authority of New London, Connecticut, to take non-blighted private property by eminent domain, and then transfer it for a dollar a year to a private developer solely for the purpose of increasing municipal revenues. This 5-4 decision received heavy press coverage and inspired a public outcry that eminent domain powers were too broad. In reaction to *Kelo*, several states enacted or are considering state legislation that would further define and restrict the power of eminent domain. The Supreme Courts of Illinois, Michigan (*County of Wayne v. Hathcock* (2004)), Ohio

(*Norwood, Ohio v. Horney* (2006)), Oklahoma, and South Carolina have recently ruled to disallow such takings under their state constitutions.

The redevelopment in New London, the subject of the *Kelo* decision, proved to be a failure and as of now (2012 - more than a half-dozen years after the court's decision) nothing has been built on the taken land in spite of the expenditure of over \$80 million in public funds. The Pfizer corporation, which would have been the primary beneficiary of the additional development, announced in 2009 that it would close its \$300 million New London research facility, shortly before the expiration of its 10-year tax abatement agreement with the city.^[11] The facility was subsequently purchased in 2010 for just \$55 million by General Dynamics Electric Boat.^[12]

American libertarians argue that eminent domain is unnecessary. Bruce L. Benson notes that utilities, for instance, have a variety of methods at their disposal, such as option contracts and dummy buyers, to obtain the contiguous parcels of land needed to build pipelines, roads, and so forth. These methods are routinely used to acquire land needed for shopping malls and other large developments.^[13] Walter Block argues that the problem of recalcitrant landowners ("holdouts") who refuse reasonable offers for the sale of their land is solved in the long term by the fact that their failure to accumulate wealth through such trades will give them a relative disadvantage in attempting to accumulate more land. Thus, the vast majority of land will tend to fall into the control of those who are willing to make profitable exchanges.^[14]

[edit] Compensation

American courts have held that the preferred measure of "just compensation" is "fair market value", i.e., the price that a willing but unpressured buyer would pay a willing but unpressured seller for the subject property under ordinary circumstances, with both parties fully informed of the property's good and bad features.^[15] Also, this approach takes into account the property's highest and best use (i.e., its most profitable use) which is not necessarily its current use or the use mandated by current zoning if there is a reasonable probability of zone change.

This approach has been severely criticized because it omits from consideration a variety of incidental economic losses that a taking of land inflicts on its owners. The most egregious example of such losses is provided by the American rule that denies any compensation to owners of businesses that are destroyed when land on which they are located is taken, and the business cannot relocate. A small minority of states have provided by statute that at least some business losses are compensable.

Also, attorneys' and appraisers' fees are not recoverable (except in Florida) so the owners of the taken property never recover the full value of the taken land, even if they prevail in the valuation trial, because a part of their recovery must be used to pay those lawyers and appraisers. Some states do provide for limited recovery of such litigation expenses, typically when the owners' recovery substantially exceeds the amount of the condemnor's pretrial offer or the evidence presented by the condemnor at trial by a specified percentage. Also, when a condemnation action is abandoned, the owners are typically entitled (by statute) to be paid reasonable attorneys' and appraisers' fee they had to incur in defending the condemnation action.

When payment of compensation is delayed, the owner of the taken land is entitled to receive interest on the award of compensation, that accrues from the time of taking to the time of payment. The interest must be reasonable, so that when prevailing market rates of interest exceed the statutory rate (as in inflationary times), the former has to be used.

The U.S. Supreme Court takes the position that unlike the determination of what is a "public use," the determination of compensation is a judicial, not legislative, function, but legislatures are free to provide for more liberal awards of compensation than the constitutional minimum determined by courts.

In cases of partial takings of land, the owners are entitled to compensation for the taken part, plus severance damages (the diminution of value of what remains of their property after the taking). If the partial taking creates special benefits (i.e., it causes an increase in the value of the remaining land) their value is offset against compensation, with the majority of states allowing such offsets only against severance damages, so the owner always gets paid for the taken land. When a partial taking impairs access to the remainder land, that gives rise to a contentious issue because courts take the position that diminution in value caused by impaired access is compensable only when the impairment is substantial. Traffic regulations that affect access (one-way streets, median dividers, etc.) are deemed exercises of the police power and are not compensable.

In addition to fee simple titles, all interests in property (easements, leaseholds, etc.) are compensable. The measure of value of a leasehold is the amount by which prevailing comparable rentals in the area exceed the actual contracted-for rent. This amount is known as "bonus value" of a lease. It is calculated over the remaining life of the lease and then reduced to its present value. The measure of compensation for an easement is the difference in the value of the subject land as unencumbered and as encumbered by the easement.

In determining value, zoning and other land-use regulations are considered, but if it appears that there is a reasonable probability of zone change to a higher use, that may be shown and in that case the owner is entitled to an additional increment of value (the extra amount over and above the value under current zoning, that the market would pay for the probability of rezoning).

The appraisal profession recognizes several different methods of calculating value, but courts are largely stuck in the convention of using three valuation approaches: (a) market data analysis or comparable sales value, (b) the capitalization of rentals, and (c) the reproduction-less-depreciation approach under which the cost of reproducing the improvements on the property is estimated and then depreciated to allow for wear and tear and functional or economic obsolescence. The value of the land is then added to the value of the reproduced, depreciated improvements. Some states allow compensation as the cost of reproduction without depreciation, but only in cases where the subject property, though privately owned, performs an important public or charitable function.

The U.S. Supreme Court has indicated (*U.S. v. Cors*) that it is not its intention to make a "fetish" out of market value as the measure of compensation, and that other approaches may be used when conventional methods do not work, or if applied, would create an injustice (*Pewee Coal v. United States*). These situations, however, are extremely rare.

Studies in several parts of the country (California, Georgia, Minnesota, New York and Utah) have demonstrated that condemning agencies frequently undercompensate property owners, and that those owners who reject the pre-litigation offers and go to court tend to recover substantially higher awards, whether by judges or juries.

[edit] Tax implications

When private property is destroyed, stolen, condemned, or disposed of, the owner may receive a payment in property or money in the form of insurance or a condemnation award.^[16] If property is compulsorily or involuntarily converted into money (as in eminent domain) the proceeds can be reinvested without payment of capital gains tax provided it is reinvested in property similar or related in service or use to the property so converted, no capital gain shall be recognized.^[17]

[edit] Bush executive order

On June 23, 2006, the first anniversary of the *Kelo* decision (see above), President George W. Bush issued Executive Order 13406 which stated in Section I that the federal government must limit its use of taking private property for "public use" with "just compensation", which is also stated in the constitution, for the "purpose of benefiting the general public." The order limits this use by stating that it may not be used "for the purpose of advancing the economic interest of private parties to be given ownership or use of the property taken".^[18] However, eminent domain is more often exercised by local and state governments, albeit often with funds obtained from the federal government.

1. ^ John E.Nowak, Ronald D.Rotunda, Constitutional Law, Thomson West, MI 2004, p.263
2. ^ City of Oakland v. Oakland Raiders, 32 Cal. 3d 60 (1982).
3. ^ A Summary View of the Rights of British America
4. ^ http://www.independent.org/pdf/tir/tir_12_03_04_benson.pdf
5. ^ Blog: California Eminent Domain Report.
6. ^ Statutes & Constitution :View Statutes : Online Sunshine
7. ^ "National Eminent Domain Power".
http://caselaw.lp.findlaw.com/data/constitution/amendment05/14.html#182.
8. ^ www.hoover.org policy review
9. ^ U.S. Supreme Court Clark v. Nash. 198 U.S. 361 (1905)
10. ^ Nowak, Rotunda, ibid, p.265
11. ^ Eminent Domain Outrage in Connecticut: Pharmaceutical Giant Pfizer to Leave New London, Site of Major Housing Battle
12. ^ TheDay.com - 2010 Top stories: Pfizer sells NL headquarters to Electric Boat | Southeastern Connecticut News, Sports, Weather and Video | The Day newspaper
13. ^ http://www.independent.org/pdf/tir/tir_10_2_1_benson.pdf
14. ^ Block, Walter. "The Curmudgeon". *Defending the Undefendable*. pp. 143. ISBN 978-1-933550-17-6.
15. ^ Osborne M.Reynolds, Local Governments Law, Second Edition, West Group, Min 2001, ISBN 0-314-23738-0, page 505
16. ^ Legal Information Institute at Cornell Law School. "United States Code: Title 26,1033. Involuntary Conversions". http://www.law.cornell.edu/uscode/26/usc_sec_26_00001033----000-.html. Retrieved 20 July 2010.
17. ^ Hipp, Jonathan W.. "Section 1.1033 of the Department of the Treasury Regulations". Calkain Companies Inc.. http://www.calkain.com/read-more-irs.php?id=72. Retrieved 20 July 2010.
18. ^ "Executive Order 13406: Protecting the Property Rights of the American People". 2006-06-23. http://georgewbush-whitehouse.archives.gov/news/releases/2006/06/20060623-10.html., 71 F.R. 36973
19. ^ See James v.the UK, decision of ECHR dated by 21 February 1986, para 54.

20. [^] ^{##} "Louis Renault and the shame of a nation". London: The Daily Telegraph, Ian Morton. 14 May 2005.
<http://www.telegraph.co.uk/motoring/2735296/Louis-Renault-and-the-shame-of-a-nation.html>.
21. [^] "Foreign News: Was He Murdered?". Time Magazine. Feb 6, 1956.
<http://www.time.com/time/magazine/article/0,9171,893292,00.html>.
22. [^] D.P.R. 327/2001
23. [^] Digs 302/2002
24. [^] See Commonwealth of Australia Constitution Act.
25. [^] Andrews v Howell (1941) 65 CLR 255
26. [^] Smith v ANL Ltd (2000) 204 CLR 493
27. [^] Australian Constitutional Commission, Final Report of the Constitutional Commission vol 1 (Canberra: Australian Government Publishing Service, 1988): 600. ISBN 0-644-06897-3.
28. [^] Mutual Pools and Staff Pty Ltd v Commissioner of Taxation (1992) 173 CLR 450.
29. [^] Lands Acquisition Act 1998 (NT). s 43.
30. [^] Griffiths v Minister for Lands, Planning and Environment [2008] HCA (15 May 2008).
31. [^] Reale, Andreana (2009). "Assisted Theft: Compulsory land acquisition for private benefit in Australia and the US". Alternative Law Journal (Melbourne: Legal Service Bulletin Co-operative Ltd) 34 (3): 147-151. <http://www.altlj.org/index.php?option=Articles&task=viewarticle&artid=69#1>.
32. [^] Samantha J. Hepburn, Principles of Property Law, 2nd ed. (Newport, NSW: Cavendish, 2001):45-46. ISBN 1-876905-08-5.
33. [^] THE STATE OF BIHAR v. MAHARAJADHIRAJA SIR KAMESHWAR SINGHOF DARBHANGA AND OTHERS, AIR 1975 SC 1083
34. [^] 44th Amendment Act. 1978.
35. [^] Tayal, B.B. & Jacob, A. (2005), Indian History, World Developments and Civics, pg. A-33
36. [^] Mahapatra, Dhananjay (28 February 2009). "Should right to property return?". The Times Of India. <http://timesofindia.indiatimes.com/India/Should-right-to-property-return/articleshow/4202212.cms>.
37. [^] Dancaescu, Nick. Note. Land reform in Zimbabwe. 15 Fla. J. Int'l L. 615 (2003).