



The Dangers of Eminent Domain

BY DONALD J. BOUDREAUX

In *Kelo v. City of New London* the United States Supreme Court greatly weakened the constitutional protections that property owners have enjoyed against governments wishing to seize private property. This weakening is unfortunate.

Because the facts of the case and the thrust of the ruling are now well known (and spelled out elsewhere in this issue), I'll not belabor them. Nor will I discuss the constitutionality of the ruling. Instead, I shall argue that even if the Constitution did nothing to prevent government from seizing property, such seizures are unwarranted *under any and all circumstances*.

The point seems almost too obvious to mention, but let's be explicit: the more secure people are in their property, the greater will be their efforts to create and improve property. And the greater are these efforts, the wealthier is society.

Not only are the persons who acquire, create, and improve property better off—but so, too, are those with whom they have even indirect commercial relationships. If Andy clears and fertilizes a field to grow more corn, he profits by selling his greater output—and corn consumers (even those who don't buy from Andy!) are made better off by corn's greater availability and lower price.

But if Bob gets the power to take Andy's property against his wishes, then Andy's security in his property is lowered. Andy reasons that further expenditures by him of his money or effort to acquire, create, or improve land for growing corn might be wasted because Bob can confiscate the property and, along with it, whatever sweat and wealth Andy invested in the seized property.

One result is reduced creation and improvement of property. People in their capacities as property owners

suffer, of course, but they also suffer in their capacities as workers and consumers. Fewer and less-elaborate factories and research labs are built, meaning fewer higher-paying jobs are available. And businesses produce less output, and of lower quality.

Few people disagree with the above. "Of course!" they say. "But there are some legitimate projects that require government to exercise the power of eminent domain. Government is not like private men and

women whose only motive for confiscating property is selfish gain. Government, at least when it is properly constituted and constrained, must have the authority to seize property in certain circumstances. Even the framers of the U.S. Constitution understood that government needs this power."

Overwhelmingly, these supposedly special needs justifying the exercise of special powers are infrastructure projects that require the acquisition of large contiguous tracts of land. A road is the chief example. According to this view, if the social welfare is best served by building a road from point A to

point B, then *all* the land along the route must be acquired.

The concern is that without the power of eminent domain, each owner of each parcel of land necessary for the road can scuttle the entire project. Suppose nine of the ten owners of the land necessary to build the road agree to sell their parcels to the government. But one owner holds out (either because he truly values the land at a price higher than the government is willing to pay, or because he supposes that by strategically holding out

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he can oblige the government to pay him an extraordinarily high price).

The result is that the road doesn't get built, or that it is built along an inferior route, or that taxpayers are "held up" for an extortionate sum by a greedy property owner. Because each of these options is inferior to the road being built along the optimal route at a reasonable cost, the power of eminent domain—whose exercise is properly restricted to truly public uses and which must always be accompanied by "just compensation" paid to dispossessed owners—is worthwhile for government to possess.

That's the theory. And it's undeniably possible that some real-world situations might be accurately described by the theory. But it's unwise to base law and public policy on mere possibilities; a sounder basis is plausibility. For at least two reasons, it is implausible to suppose that government needs, or should be entrusted with, property-seizing power that no one in his right mind would entrust to private people.

The first reason is that private developers routinely assemble large contiguous tracts of land without relying on eminent-domain seizures. As I wrote recently (for *Regulation* magazine) in a review of Richard Epstein's brilliant book *Skepticism and Freedom*,

America is planted thick with housing developments on large contiguous plots of land. Private developers manage to assemble those tracts without eminent domain. The Walt Disney Company purchased 30,000 contiguous acres of land in central Florida for its amusement park and resort. That is an area twice the size of Manhattan. With skillful contracting maneuvers—for example, buying each plot of land contingent upon the successful purchase of all other plots of land necessary to build the road or airport—a government intent on serving the public should be able to do its job without powers of eminent domain.

If experience shows that private developers assemble such plots of land without eminent domain, why must the state employ this power? One possible answer is that

government officials are less creative than are private entrepreneurs, if only because such officials have less personal wealth at stake in trying creatively to meet land-acquisition challenges. But surely government officials' weakness on the creativity front is a questionable justification for giving them power to seize property from the private sector.

Political Freedom Imperiled

The second reason is that the power to seize property is both especially dangerous and especially tempting to those who possess this power. It's dangerous not only for the economic reasons reviewed above, but also because it puts political freedoms in jeopardy. A state that can seize people's homes can also seize publishers' presses and broadcasters' studios. And no one should be trusted with such power. Anyone possessing it is too easily tempted to abuse it.

But even if courts diligently prevent government from seizing property to stymie political dissent, the temptation to abuse eminent-domain power for mere money-grubbing reasons remains powerful—as the facts of the *Kelo* case make clear.

New London struck a devil's deal with private developers: the city promised to seize the homes of ordinary citizens and transfer these properties to developers, who in exchange promised to build businesses that generate increased tax revenues for the city government (and nice profits for the private developers).

For anyone who fancies that politicians deserve unique trust with the power to seize property, the *Kelo* facts themselves should be sobering, for the most straightforward reading of them is that politicians will abuse this power shamelessly. I read these facts as evidence that politician Bob is no more to be trusted with seizure powers than is private-citizen Bob. The fact that politician Bob is elected to office and that "Honorable" commonly is prefixed to his name does not render him less likely to abuse power.

Kelo itself is vivid evidence for the case that *no* one and *no* organization is to be trusted with the awesome power to seize private property. 