Fully Compensating Eminent Domain Sellers When Economic Development Is the Public Use

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Eminent domain is one of the more controversial functions of government. The functioning of good government that accomplishes together what people cannot accomplish individually is at the heart of eminent domain. Unfortunately, its exercise often conflicts with individual freedom and property rights. Judicial rulings have given legislative bodies wide latitude on which to base the "public use" requirement of the 5th Amendment. Many steps have been suggested to protect property rights where the definition is too broad, but none seems to be workable. Here I suggest two methods of more properly compensating property owners when economic considerations are applied.

INTRODUCTION

Eminent Domain is the most uncomfortable realities of the United States legal system. On one hand, in *Boom Company v. Patterson*, 98 US 403, 406 (1879), Supreme Court Justice Stephen Johnson Field wrote in the majority opinion that eminent domain need not even be enumerated in a constitution. He said all independent governments possess this right as part of their sovereignty. (*Boom Company v. Patterson*, 1879) On the other hand, President Barack Obama stated in his book, *The Audacity of Hope*, that the US Constitution places property rights, "...at the very heart of our system of liberty." (Obama, 2006, 149). It is this complicated mixture that will forever make eminent domain a controversial, but necessary, part of our ongoing discussion of government sovereignty and citizen's property rights.

While the reality and legality of eminent domain is well established, the nuisances of how this governmental right is limited and applied is far from settled, thus it is the topic of this paper. Immediately after the decision in *Kelo v. City of New London*, 545 U.S. 469 (2005), in which economic developments were included in the definition of "public use" as required by the U.S. Constitution; citizens, writers and legislators began asking why governments and, by extension, private third parties could forcibly take the property of another citizen for development that would increase the value of the property and only pay the victim the present value at best. While many have attempted to develop safety measures for individuals, no one answer seems to address the issue. I will propose answers to two scenarios that arise. First, I will consider instances in which the victim's property is taken and given to someone who makes a significant profit at least partially from the advantage of having the government's police power in helping them acquire the property. Second, I will consider instances similar to number one, but in which the taking was not properly planned or is even politically motivated and the victim is left without the property they had previously owned. In these instances,

the development fails and there is no one to hold the government accountable for a misuse of its power of eminent domain.

HISTORY OF EMINENT DOMAIN

Based on the controversy following the *Kelo* case at the beginning of this century, one would think that eminent domain would have a contested history. That, however, is not the case. Eminent domain has a long history dating back to Roman law. (Bouvier, 1839) The concept of *dominium eminent* recognized the need of society to the property of the individual for public use. (Bouvier, 1839) The concept found its way to the United States via England. As colonies of England, the colonies adopted English law. This gave the foundations of eminent domain a different look than it would take when codified on the federal level by the Fifth Amendment.

Under English law, eminent domain was seen as a power of the sovereign that did not necessarily include public use or compensation. (Treanor, 1985) These takings were justified historically on the authority of the crown and later parliament as parliament was seen as the power of the people. (*Vanhorne's Lessee v. Dorrance*, 1795) Under the republican form of government passed from Britain to the colonies, individual rights had some level of importance, but they would take a backseat to the common good. (Treanor, 1985) As discussed in the *Vanhorne's Lessee* case, the Parliament had absolute authority. (Treanor, 1985) In quoting Sir Edward Coke, *Vanhorne's Lessee* said, "The power and jurisdiction of Parliament..., is so transcendent and absolute that it cannot be confined, either for causes or persons, within any bounds. It has sovereign and uncontrollable authority in making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations, ecclesiastical or temporal, civil, military, maritime, or criminal." (*Vanhorne's Lessee v. Dorrance*, 1795, p. 307) Ownership of property came from the state and could therefore be apportioned by the state. Coke's statement and Justice Patterson's approval in *Vanhorne's Lessee* were merely reflections of the first agreement on this soil in the Magna Carta. (Treanor, 1985) The Magna Carta provided that the consent of the owner was not necessary if the legislature approved it. (Treanor, 1985)

It is consequential that "property" was replaced in Locke's famous quote, "life, liberty and property" when it was restated in the Declaration of Independence. (Treanor, 1985) Jefferson makes a significant statement of the philosophy of the time by replacing "property" with "pursuit of happiness." One is left to understand that Jefferson did not believe that property rights were inalienable. As Lockean-liberalism began to take shape in the rebelling colonies and fledgling nation, priorities began to shift from the common good to the good of the individual. The belief was that each citizen following personal interest would lead to common good. (Epstein, 1985) Jefferson's omission and Madison's inclusion can serve to help us understand how far the philosophy of the fledgling country had come between the Declaration of Independence and the Bill of Rights.

Through the first two centuries of U.S. History, eminent domain was largely uncontroversial on a national level. Prior to and following the *Boom Company* decision, the right and how it was carried out was largely unchallenged on a philosophical basis. Most challenges seemed to be on a case-by-case basis and they focused more on valuation and less on the theory of eminent domain itself or the use of the property. That has changed over the last decade and a half. Beginning with the Holmes era of the "living Constitution," the court began to mold the Fifth Amendment into a public benefit model through *Berman, Hawaii Housing Authority,* and *Kelo*. (Burnett, 2015)

A Lockean approach would only allow the government to take from the individual that which is necessary to operate. (Epstein, 1985) As Richard Epstein wrote, "In the Lockean world…the sovereign is to be fully constrained, so that the lives, liberties, and estates of the citizens may be preserved." (Epstein, 1985, 163) Instead of following their Lockean roots, the United States seems to be shifting back towards their republican pre-Revolution roots giving more latitude to the sovereign when imposing on personal property rights.

THE DANGERS OF EMINENT DOMAIN

Viewed even from the individual's perspective, eminent domain can serve its necessary evil. As populations grow and shift, it becomes necessary for the use of eminent domain for such public necessities as schools and roads. Like most things in the legal system, though, it is not these uses that have come into question. Rather, what has come into question are the gray areas. These areas are where we have seen a shift from "public use" as in the Constitution to "public purpose" as used by the Supreme Court in *Berman v. Parker* (1954). It is in this area that abuses and mistakes seem to be occurring. Here we will examine three types of abuses that have been addressed by some state legislatures and electorates, but have not been addressed in most states. Some states have, perhaps, gone too far in effectively eliminating economic development takings, and others have done nothing to protect their citizens.

First, we will examine economic failures. There are many instances in which eminent domain has been exercised to redevelop areas for the benefit of society overall; but due to poor planning or poor execution, victims have lost their property and society has received no benefit. Second, we will consider a more sinister danger to a free society. Under the banner of public purpose, property can be seized when the real reason includes discrimination or political retribution. Just as the founders created checks and balances to protect against the human condition, the legislatures across the United States should create checks and balances to protect against potential mistakes and misgivings.

Economic Failures

The twentieth century and the first part of the twenty-first are littered with economic development cases that failed. The Census Bureau's Business Dynamic Statistics released the five-year failure rate for businesses from various sectors that began in 2005. Within the construction industry the failure rate was 36.4 percent. (Scott, 2018) With over one-third of companies failing within five years, the number of developments failing has to be higher than the government should be risking when treading on the property rights of an individual. One also should consider that these companies have to know how to analyze the viability of their projects because their livelihood depends on it. In many instances, the government is ill prepared to make this analysis.

In June of 2006, the Castle Coalition released a report titled, "Redevelopment Wrecks: 20 Failed Project Involving Eminent Domain Abuse". Of those covered in the report, only one is prior to 1973. (Castle Coalition, 2006) It includes stories of government abusing private property rights of small businesses in favor of large corporations and government incompetency causing development failures. As the authors state, "Simply put, governments do not make very good real estate speculators." (Castle Coalition, 2006, p. 2)

One such example from Cincinnati began in 1998. (Castle Coalition, 2006) A large retail company, Nordstrom, was looking to open a new store in the downtown area of Cincinnati. (Castle Coalition, 2006) In bowing to the corporate giant, the local government participated in getting the Walgreens that what at the location to agree to move to a location occupied by a CVS store. (Castle Coalition, 2006) CVS agreed to move, and drop a case they had filed against Cincinnati, if the city would condemn property owned by smaller businesses for them to locate their new store. (Castle Coalition, 2006) On top of that, the city was to lend $12 million to the developer that was to build the Nordstrom store. (Castle Coalition, 2006)

Unfortunately, for this project, Nordstrom began to recognize the coming downward market conditions and pulled the project. (Castle Coalition, 2006) Preferring not to leave the hole that was left from this debacle, the city at least paved the vacant lot as parking lot. (Castle Coalition, 2006) In the end though, many of the small businesses that were destroyed did not return at any location. (Castle Coalition, 2006) Too many times, developers and large corporations are able to persuade local governments into bad investments because the developer believes they can make it work by getting tax breaks, loans from the government, or cheap land to complete the project. Here, the city had also guaranteed that the property where the Walgreens was to locate to would be left vacant. (Castle Coalition, 2006) This was done as an additional concession to the developer to allow them to attract another high-end tenant. (Castle Coalition, 2006) Somehow, it got lost in the process that the government was promising this parcel to one group and

promising another that it would remain vacant. (Castle Coalition, 2006) It does not appear that the government was being dishonest. It appears the government parties involved were over their head in this type of commercial development. Unfortunately, this appears to be the case too often.

At least in the Cincinnati case, the government was caught in a situation that had developers and possible tenants. The city of Phoenix, Arizona in 1998 decided to pursue land speculation in its purest form, but with the power to force owners to sell. This did not make the outcome any more successful than poor land speculation by a company who could not force people to sell to them. At least when private companies do it, they are gambling with their own money and only buy out other people in arm's length transactions.

In this case, Phoenix seized small businesses at the corner of two streets claiming the area's crime rate was too high and that new development would improve the safety of the area. (Castle Coalition, 2006) This seems to be a somewhat novel approach to crime fighting with all the resources at the disposal of the local government for fighting crime in a particular area. (Castle Coalition, 2006) This is an instance in which the government punished the local innocent citizens by seizing their property and closing their grocery store in an attempt to "fight" crime. (Castle Coalition, 2006) A recent check of google maps shows that the lot is still vacant because the government could not find a developer to speculate with them. (Google Maps, 2019)

Lastly, we will consider the most famous debacle of economic development, Susette Kelo's house in New London, Connecticut. In an attempt to placate the demand of a large pharmaceutical company, Pfizer. (Benedict, 2009) Much like individual citizens, when cities are struggling, they make poor decisions. We have already seen that governments are not the best at projecting future growth or demand; they find themselves in an even worse situation when their economy is crashing around them. Because New London was suffering economically, the local officials bought all in to the demands of Pfizer to produce Viagra there creating high paying jobs that would be held by people who paid high taxes. (Benedict, 2009) Much like the Cincinnati case, though, the government was not agile enough to move at the speed of business. After displacing many residents, including Ms. Kelo, and going all the way to the U.S. Supreme Court to verify their authority to do so, the government lost the deal as Pfizer located elsewhere. (Benedict, 2009) Of course, this case led to the infamous *Kelo* ruling that finally got the attention of the American public and the state legislators.

Discrimination

One might not immediately think of eminent domain as a potential tool of discrimination, but anywhere there is power discrimination can follow. As Dr. Martin Luther King, Jr. wrote, "Injustice anywhere is a threat to justice everywhere." (King, 1963) The potential use of eminent domain to perpetrate injustice when economic development can so easily be used as a "public use" requires that we as a society take a closer look at it and protect those to whom injustice would be measured against. This is true whether it is relocate people or people groups that the power find less desirable or under compensating those who cannot pursue justice themselves. In this section, we will examine instances in which authors see discrimination in the use of eminent domain in an attempt to begin a flow of thought and action to stamp out discriminatory use of power, particularly in the area of eminent domain. One should keep in mind that eminent domain is a tool; it is people who choose to misuse it.

In many instances when the community chooses to use the tool of eminent domain for discriminatory purposes, courts can feel powerless to stop them. In *City of Creve Coeur v. Weinstein* (1959), the victims, Mr. and Mrs. Venable, had two lots condemned, one of which they had already begun to build a residence. They claimed that the decision was made, at least partly, based on their race. We will never know if this was a legitimate claim, because the legislation was silent as to whether motivation of the local body was a factor. Additionally, the Missouri Supreme Court had written that without an exception, the court could not consider the motivation of the legislative body. (*City of Creve Coeur v. Weinstein*, 1959) In reaction to the omission, the court said the following:

> We are aware of the seriousness of the charges contained in the counterclaim and cross-claim filed by the Venables and because of the gravity of the allegations we have conducted an exhaustive research to determine if an exception to the rule…was authorized. We found no authority authorizing an exception, and none has been cited to us by respondent. The motive which actuates and induces the legislative body to enact legislation is wholly the responsibility of that body and courts have no jurisdiction to intervene in that area. (*City of Creve Coeur v. Weinstein*, 1959)

With courts feeling unable to consider the motivations of the legislative body having or giving the power to commence a taking, that opens the system to many types of abuses including discrimination. (*City of Creve Coeur v. Weinstein*, 1959)

In a more modern dispute, Philip Lee writes about the potential of discriminatory policy being at the heart of President Donald Trump's desire to build a wall along the southern border of the United States in his article, "A Wall of Hate: Eminent Domain and Interest-Convergence." Dr. Lee argues that the divergent interests of various minority and majority groups demands a higher level of scrutiny for federal takings. (Lee, 2019) While the purpose of the present article is not to determine whether race is a factor in the President's desire to build a wall, it is important to note that the perception of race being a guiding factor is out there and the issue is important enough to consider when discrimination is a potential factor.

Finally, a case that draws together the idea of discrimination, shifting ownership from one individual to another, and economic development as public use is *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984). The *Kelo* case, which solidified economic development and the taking of property from one citizen to give it to another, relied heavily on the *Hawaii Housing Authority* case. Here, the state legislature of Hawaii recognized that the oligopoly that had defined the real property ownership system of the state going back to the high chiefs of the islands had stifled growth, so the legislature created a system whereby lessee's could petition to have property removed from the lessor and then have it titled in their own names ultimately. (*Hawaii Housing Authority*, 1984) The legislature passed this law in hopes that it would reduce the concentration of land ownership in the hands of a specific elite group. (*Hawaii Housing Authority*, 1984)

The court ultimately faced a legislatively passed act of discrimination against one group of society and defined it as public use for the purposes of eminent domain. In response to the questioning of whether that can be the case, the court quoted *Berman v. Parker*, 348 U.S. 26, 31 (1954) in saying,

> Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases, the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia…or the States legislating concerning local affairs….This principle admits of no exception merely because the power of eminent domain is involved….

This deference between *Berman* in 1954 and *Hawaii Housing Authority* in 1984 covered a time in which many legislature motives and decision-making were questioned on this very basis shows a definite restraint by the court to get involved in even cases that discriminate on behalf of one citizen versus another.

Discrimination is not the only possible legislative vice that could be used to weaponized eminent domain. Here, it is used to show that despite society having identified the motivation as not acceptable, legislative bodies are still willing to use it under the banners of economic development, common defense, and the righting of historical wrongs. Given the hands off approach chosen by the judiciary shown in these cases, it is imperative that a check be put into place for would be victims.

Political Retribution

If, as established, the courts are going to defer to the wisdom of the legislature when economic development is going to be used for "public use." Then the legislature defers to the authority they have granted eminent domain power to, not only is discrimination of groups possible; but political retribution against individuals is also possible. In fact, following the *Kelo* decision, two Supreme Court justices saw attempts to seize their own property arise with economic development as the "public use."

In the immediate days following the *Kelo* decision, Logan Darrow Clement began to move to have Justice David Souter's property located in Weare, New Hampshire seized and transferred to him to build a hotel for the same type of economic development Justice Souter approved in the *Kelo* case. (Morrison, 2015) Ultimately, Clement had a referendum placed on a ballot as to whether Justice Souter should be evicted from his property. (Morrison, 2015) The vote failed, but in a town in which 93 percent of the people opposed the *Kelo* decision, getting a public vote at all is a success in gaining attention to his cause. (Morrison, 2015) If a private citizen can be this successful in attempting to carry out retribution in such a high-profile case, against a powerful person, in a town solidly against these types of seizures; how much more successful could political retribution be against the powerless without media attention?

CHECKS AGAINST EMINENT DOMAIN DANGERS

Even before the *Kelo* case, economist and other academics have been hard at work attempting to find a way to fairly compensate victims of eminent domain. Because of the nature of takings based on a desire for improved economic development, the fair market value of the properties are very difficult to determine and are generally considered to be inadequate.[1] When one's property is seized for the construction of a school or highway, the property value at the time it is seized is the most applicable value it will have. This property is leaving the tax roll and is not being developed for the increase in value. When the property is seized for economic development, the property is being seized to go up in value. If it fails to go up in value, something has not gone according to plan. Why should the victim not share in this increase in value since it was their property that was the foundation of the rise in value?

Many scholars have made suggestions as to how the valuation inadequacy should be alleviated. Justice Anthony Kennedy, who voted with the majority in *Kelo*, even commented during oral arguments that perhaps there should be an additional way to compensate the victims when taking property from private person to give to another private person. (Somin, 2015, 2016) This seems to be the most common suggestion, but there is considerable disagreement as to how to accomplish this and how to make sure it is accurate when assigning a future value is just as speculative as the taking in the first place. It has been argued that the procedure itself could be changed to give the victim more notice of the opportunity to be compensated correctly. (Somin, 2015, 2016) Others have suggested additional protections for home owners, increased scrutiny levels, or getting the community more involved in the process. (Somin, 2015, 2016) Here, I will argue first that shifting the timing of the valuation would give the victim much more control in the amount they receive for involuntarily participating in economic developments. Second, I will argue that using tort law will give the taking party more incentive to carefully evaluate the project before proceeding which will cause both governments and developers to be more careful before using the eminent domain hammer.

Valuation Timing

Many of the suggested methods of more fairly compensating victims for eminent domain when economic development is the public use struggle with the impossibility of determining the future value of the property and its contribution to the overall development. Even with projects that are completed, the anticipated value is often not achieved. For example, Triangle Square, a mall development in Costa Mesa, California was built in 1992. At the time, the projected tax revenue was going to be $1 million per year. By 2005, the annual tax revenue had only reached $200,000.00 per year. (Lowery, 2005) Had the victims been given a heightened compensation as advocated by many authors, they would have received more than what the fair market value was to be. The solution is less in the process and more in the timing.

The Internal Revenue Service (IRS) allows the executor of an estate to choose the time for valuing the estate of a deceased. (26 U.S. Code §2032(a)) Essentially, the executor of the estate may elected to value the estate on the date of the deceased death OR they may value the estate 6 months following the date of the deceased death. This is in recognition of the fact that the value of some estates is very dependent on the life of the deceased. Consider a small business that is very valuable, but is dependent on the expertise or license of the owner. When the owner becomes deceased the customers, patients, or clients will likely go somewhere else. Without the patrons of the business, it loses a tremendous amount of value. It has been determined the 6 months is adequate time to assess the extent to which the business will lose value.

There is a parallel here in that it can be hard to value the estate on the date of death, just as it can be difficult, or impossible, to value a person's property when it is first seized. As such, the victim of the taking should be allowed to choose their valuation date for the property. An alternative valuation date would need to be elected at the outset of the process, and would need to have a cap on how far out one could apply it. When applied to property, a 6 month election would be too close to the taking itself. To give adequate time to develop the land, the alternative valuation date would need to be at least 1 year out. Upon the taking, the victim could review the research that would suggest the project would be a success or failure. They would also have time to receive counsel from third party professionals to determine whether they agree with the government's justification. If the victim believes in the project, they can elect to push the valuation closer to the time of completion. If they do not believe in the projections of the governmental body or need the money quicker, they can elect to receive the fair market value of the property when it is seized.

Tort Law as a Protection

Allowing for a later valuation of the property alleviates the problem of property owners being under-compensated when economic improvement is the justification under public use. In particular, it protects the victim when the economic development succeeds. This does not address the problem of poor planning by government officials, discriminatory activity or political retribution. These takings can be addressed through tort law. In particular, poor planning by government officials when spending money collected through taxes would be protected.

Consider the redevelopment of Daytona Beach Boardwalk in Florida. Over the years, it had been recognized that the Daytona Beach Boardwalk area had become less than people in the area thought it could be. One newspaper article described it as "kitschy." (Lelis, 2003) In the early 2000's, city officials launched a plan to redevelop the area to be more attractive to families and conventions. (Lelis, 2003) The city asked for proposals for the redevelopment and only one developer came forward with a plan. (Lelis, 2003) Bill Geary proposed a $115 million plan to create new hotels, and space for shopping and restaurants while maintaining the carnival type atmosphere. (Lelis, 2003) Ignoring the market indicator that only one potential developer came forward, the city began to move forward in talks with Mr. Geary. (Lelis, 2003)

Dino Paspalakis, who owned property in the proposed redevelopment area, began to investigate Geary's background. (Lelis, 2003) Apparently, the city failed to investigate Mr. Geary as he pointed out that Mr. Paspalakis was the one raising his past experience as an issue. (Lelis, 2003) Mr. Paspalakis found that Mr. Geary had failed in a redevelopment project in the area about twenty years prior in which he filed Chapter 11 bankruptcy protection. (Lelis, 2003) He ultimately testified against a business partner ten years prior while admitting that he was part of at least one of the incidents for which the partner went to prison. (Lelis, 2003) Lastly, he was embroiled in a lawsuit in Los Angeles in the amount of $101 million based on his activities in transferring properties from a company he was director to his personal companies for as little as $10 each. (Lelis, 2003) Mr. Geary's past should have raised red flags due to his failure in the geographic area, potential involvement in criminal activity, and transferring other people's property to himself for a de minimis amount. This does not mean that Mr. Geary should have necessarily been barred from these type deals, but the governing authority should have taken time to investigate these actions.

Despite these warning signs, the mayor, city council and even the county attorney gave Mr. Geary a ringing endorsement. The mayor, when confronted with the evidence of Mr. Geary's past dealings, was quoted as saying, "I'm not concerned about it." (Lelis, 2003) The attorney for the city gave an even more direct endorsement by saying, "There shouldn't be any risk to the city." (Lelis, 2003)

On the other hand, Mr. Paspalakis took an approach that would seem a little more reasonable. He said, "It should be standard procedure to carefully review a developer that they're going to give tax money [to], that they're going to use eminent domain [on behalf of]." He continued by saying, city officials are "either stupid or they're desperate." (Lelis, 2003)

Almost twenty years later, the Boardwalk and boardwalk area remains mainly unchanged except the people who lost their property because of eminent domain. (Zaffiro-Kean, 2016) The project envisioned by the city and Mr. Geary was never built. (Zaffiro-Kean, 2016) Mr. Geary pled guilty over money laundering and mail fraud in the amount of $900,000 and went to prison. Mr. Paspalakis was still in a dispute with the company trying to develop the land as late as the end of 2016. (Zaffiro-Kean, 2016).

The Daytona Beach Boardwalk redevelopment is a perfect example of a case in which the previous land owners should be afforded the opportunity for recovery for their property lost by using tort law. The elements of negligence in Florida are duty, breach of duty, cause, proximate cause, and damages. (Oldham & Smith, 2017) In this case, the city clearly owes a duty of care to its citizens. Based on the red flags that were raised in the process of exercising eminent domain, there appears to be a breach of that duty. If there are damages, it is clear that the lack of due diligence by the city led to them. The only question then becomes whether there is damage. One could argue that because the victims who lost their property compensated financially, there would be no damage. On the contrary, this does not take into account the uniqueness of real property. Even if this property did not have such close proximity to the ocean and foot traffic, one can still make a very strong argument that all real property is unique. For the real property owner that does not want to sell their property, they are damaged by being forced to sell.

In order to bring such a suit, the governing body must not be immune to a suit of this type. In at least one instance, courts have been willing to view the state as having waived their immunity when a negligent act was committed in what amounted to what was effectively a taking. (*Dep't. of Highways v. Corey*, 1952) Given the ruling in *Kelo*, it is well within the power of the legislature in granting the power of eminent domain to a particular entity to also require that they waive any immunity they have. On the federal level, Alexandra McLain does a great job in her article, "Choose Your Path To Recovery Against the United States V. Takings" in laying out a path for suits under federal tort law when federal government activities have damaged surrounding properties such that it rises to the level of a taking. (McLain, 2018) This same approach could be applied to direct takings where negligence was the committed in the process.

CONCLUSION

Eminent domain is universally recognized as a necessary evil of an effective government. Property rights, though, are dear to the American people and should be protected as a central tenant of the success of the United States. In considering both of these statements, legislatures should consider instances where it is not clear that the taking is necessary for their governance and provide additional safe guards for the protection of the citizenry. Although many solutions have been proposed, inappropriate takings continue to be proposed and carried out. Whether the taking is the result of poor economic decision making by the government body or taking arises out of discrimination or political retribution, the legislatures of the United States need to heighten the standard of what is expected of those to whom they grant the power of eminent domain.

First, victims should be given the same right of alternative valuation given to estates being valued after a person becomes deceased. This would give victims of eminent domain the opportunity to be compensated as other investors in an economic development even though they are being forced into the contribution. It also gives the victim who does not want to take part in the risk of the development the

opportunity to cash out at a more predictable rate. Otherwise, they will continue to be a victim of someone else's economic plan for their property.

Second, allowing victims of eminent domain to sue in torts when public use is based on economic considerations requires the government to pause and consider the true viability of the project and the private party in which they are placing their trust. By opening up the possibility of punitive damages, the government will have to perform due diligence required by private investors risking their own resources and not those of the taxpayers. This higher level of scrutiny would also give the government pause before attempting to use eminent domain in discriminatory ways or for political retribution. Ultimately, the process would be reduced to its actual value to society of supplying services to the community as a whole or making the taxpayer's life better.

ENDNOTE

1. In *The Grasping Hand: Kelo v. City of New London & the Limits of Eminent Domain*, author Ilya Somin presents a good list of resources arguing the inadequacy of compensation for the victims of these cases in footnote 4 of Chapter Eight on page 331.

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