Order Code RS22884
May 20, 2008

CRS Report for Congress

Delegation of the Federal Power of Eminent Domain to Nonfederal Entities

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Summary

Congress has on several occasions delegated its power of eminent domain to entities outside the federal government — public and private corporations, interstate compact agencies, state and local governments, and even individuals. The constitutionality of such delegation, and of the exercise of such power by even private delegatees, is today beyond dispute. However, among delegatees with both federal and private characteristics, there is some subjectivity to deciding which to list in a report limited to "nonfederal entities." For delegatees of federal eminent domain power listed here, delegations since 1920 have primarily been to Amtrak, hydroelectric facilities (for dams and reservoirs), and entities engaged in the movement of electricity, gas, and petroleum (the last one expired), and for interstate bridges.

Introduction

As a sovereign government, the United States has the power of eminent domain — the right to take private property for a public use, upon payment of just compensation.[1] The judicial procedure for formally invoking this power is known as "condemnation." Congress routinely delegates eminent domain power to executive branch agencies, for their use in carrying out federal programs that require the acquisition of property interests. Among executive branch agencies engaged in condemnation most frequently in recent times are the Department of Homeland Security, in connection with construction of the U.S.-Mexico border fence, and the U.S. Army Corps of Engineers and General Services Administration.

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[1] As in England whence the concept derives, the power of eminent domain has always been regarded by U.S. courts as inherent in the nature of sovereignty. *Boom Co. v. Patterson*, 98 U.S. 403, 406 (1878). As such, it requires no constitutional recognition. Thus, the federal eminent domain power may be thought of as existing in absolute and unlimited form, were it not for the two constraints imposed by the Fifth Amendment Takings Clause: "[N]or shall private property be taken for *public use*, without *just compensation*." (Emphasis added.) *United States v. Carmack*, 329 U.S. 230, 241-42 (1946).

Less frequently, Congress delegates the federal eminent domain power to entities *outside* the federal government — our topic here. The ability of Congress to do so is today beyond dispute. Moreover, Congress has a free hand in choosing the delegatee, and may confer the power on public and private corporations, agencies created by interstate compact, state or local governments, and even individuals.[2] Notwithstanding that the Fifth Amendment Takings Clause requires that condemnations be for a *public* use, condemnation by a private party meets this demand by being part of a congressional scheme having a public purpose[3] — which is to say, any congressional scheme within Congress's constitutionally granted powers.[4] The fact that a private benefit (to the delegatee-condemnor) is mixed in with the public benefit is not constitutionally fatal. Even should the conservative bloc on the Supreme Court be enlarged by the appointment of new justices, it is unlikely that the constitutionality of eminent domain delegations to private parties will soon be called into question, merely on that ground.[5]

Unsurprisingly, private delegatees of federal eminent domain power are subject to the same constitutional constraints as public delegatees. Grants of condemnation power also may be subject to any conditions Congress deems necessary.[6]

If acting within its statutory mandate, the delegatee of federal eminent domain power (whether federal or nonfederal) stands in the same position as Congress in that the delegatee may determine all questions that are legislative rather than judicial in nature — that is, whether, when, and the extent to which eminent domain may be used. In the event of statutory ambiguity, however, the private delegatee is at a disadvantage. First, grants

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[2] *See, e.g., United States v. 243.22 Acres of Land in Village of Farmingdale*, 43 F. Supp. 561, 565 (E.D.N.Y.) ("The Congress may properly delegate to individuals or to corporations power to condemn ... to carry out its legislative intent."), *aff'd*, 129 F.2d 678 (2d Cir. 1942). *See generally* Julius L. Sackman, NICHOLS ON EMINENT DOMAIN (third ed.) § 3.03[d].

[3] *See, e.g., Hawaii v. Midkiff*, 467 U.S. 229, 244 (1984) ("it is only the taking's purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause").

[4] Id. at 240, *quoting Berman v. Parker*, 348 U.S. 26, 33 (1954).

[5] The text sentence is an implicit reference to the Supreme Court's high-profile decision in *Kelo v. City of New London*, 545 U.S. 469 (2005). At issue there was the Fifth Amendment Takings Clause's requirement that eminent domain be exercised only for a "public use." The Court held 5-4 that this public-use requirement was not violated by a local redevelopment agency's attempting to condemn private land for transfer to a private developer, solely for purposes of economic development (pursuant to a properly adopted areawide plan). Promoting economic development is a public purpose, the Court made clear, and under prior precedent public purpose may be equated with public use.

At least that is how the five-justice majority saw it. The four remaining justices, generally regarded as "conservative," took a narrower view of "public use" — one that excluded compelled private-to-private transfers solely for economic development. The addition of a new, conservative justice to the Court could transform this dissent into a majority view. Nonetheless, most of the *Kelo* dissenters, as suggested by the principal dissent by Justice O'Connor, seem amenable to private-to-private condemnation when essential for important national purposes. Then, too, the *Kelo* decision is only three years old, and the Court has often (but not always) been averse to overturning recently established precedent.

[6] *See, e.g., United States v. Eight Tracts of Land in Town of Brookhaven*, 270 F. Supp. 160, 163 (E.D.N.Y. 1967).

of eminent domain power are strictly construed against private grantees of the power; they do not receive the deference accorded governmental condemnors.[7] Second, where the proposed use of land by a non-governmental grantee would interfere with an existing public use, a court may deny the power of condemnation unless the legislature has authorized it either expressly or by necessary implication. Nor do we find any instances where Congress has authorized purely private delegatees to use the "quick take" mechanism available to federal condemnors, by which the condemnor may obtain title and possession of land expeditiously, without awaiting the conclusion of the condemnation trial.[8]

The restriction in the report title to "Nonfederal Entities" calls for some definition. Entities that have been granted federal eminent domain power run the gamut from purely federal (executive branch agencies and the Architect of the Capitol) to purely private (e.g., natural gas pipeline companies and hydroelectric companies). Close to the purely federal end of this spectrum, hence excluded from the "Nonfederal Entities" list that follows, is the National Capital Planning Commission, which includes some members appointed by the District of Columbia mayor.[9] Also close to purely federal and excluded from the list is the District of Columbia government[10] and its agencies and instrumentalities, such as the District of Columbia Redevelopment Land Agency[11] and the National Capital Revitalization Corporation.[12] The District of Columbia is so intimately connected with the federal government as to effectively be an agency thereof. The Washington Metropolitan Area Transit Authority is listed here because its delegated federal power of eminent domain applies not only in the District, but also in Maryland and Virginia.

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[7] *National R.R. Passenger Corp. v. Two Parcels of Land*, 822 F.2d 1261, 1264-65 (2d Cir. 1987); *United States v. 121 Acres of Land*, 263 F. Supp. 737, 740 (N.D. Cal. 1967).

[8] The "quick take" procedure is set out in 40 U.S.C. § 3114. Note that a federal court has approved possession by a private condemnor prior to conclusion of trial even in the absence of formal quick-take authority, through a preliminary injunction granting possession. *East Tennessee Natural Gas Co. v. Sage*, 361 F.3d 808 (4th Cir. 2004) (condemnation under Natural Gas Act by interstate pipeline company).

[9] Federal condemnation power exercised through D.C. Code § 2-1009.

[10] Federal condemnation power exercised through D.C. Code § 16-1311.

[11] Federal condemnation power exercised through D.C. Code § 6-301.04(a).

[12] Federal condemnation power exercised through D.C. Code § 2-1219.19. An argument could be made that in contrast with the District of Columbia Redevelopment Land Agency, the Corporation is sufficiently nonfederal to be listed here. *See, e,g.*, D.C. Code § 2-1219.02: "The National Capital Revitalization Corporation is established as a body corporate and an independent instrumentality of the District ... *with a legal existence separate from that of the District government.*" (Emphasis added.) Owing to Congress's pervasive authority over the District, however, we have opted not to list it. Parenthetically, the Corporation's power of eminent domain is actually a *re*delegation of the federal power — from the United States, to the District of Columbia, to the Corporation.

Congressionally created corporations possessing both federal and private characteristics also blur the federal-nonfederal boundary. We have included Amtrak in the list that follows as being more nonfederal than federal.[13] On the other hand, the list excludes congressionally chartered corporations that, notwithstanding their corporate form, are deemed agencies or instrumentalities of the United States — e.g., the Synthetic Fuels Corporation (terminated 1986)[14] and Pennsylvania Avenue Development Corporation.[15]

Also not included is a statute under which the federal government avoids delegation of the condemnation power to a private party by itself condemning the real property interest, then selling or leasing the interest to the private party.[16] The end result, of course, is the same as if the condemnation power had been delegated to the private party.

With the above understandings as to coverage, following are nonfederal recipients of the federal power of eminent domain.

Railroads

Several delegations of the federal condemnation power were made to the land grant railroads during the 1860s. For example:

- Act of July 2, 1864, 13 Stat. 369. To the Northern Pacific Railroad Co.
- Act of July 2, 1864, 13 Stat. 357. To the Union Pacific Railroad Co. and other railroads involved in a transcontinental line.
- Act of July 27, 1866, 14 Stat. 296. To the Atlantic and Pacific Railroad Co.

The delegation to the Atlantic and Pacific Railroad Co. is representative in its statement of the purposes for which the granted power could be exercised:

> [the railroad] is ... empowered to enter upon, purchase, take, and hold any lands or premises that may be necessary and proper for the construction and working of said road, not exceeding in width one hundred feet on each side of the line of its railroad, unless a greater width be required for the purpose of excavation or embankment; and also any lands or premises that may be necessary and proper for turnouts, standing places for cars, depots, station-houses, or any other structures required in the construction and working of said road.

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[13] 49 U.S.C. § 24301(a) ("Amtrak ... is not a department, agency, or instrumentality of the United States Government ...").

[14] Federal condemnation power granted by 42 U.S.C. § 8771(c) (omitted from U.S. Code due to the Corporation's termination).

[15] Federal condemnation power granted by 40 U.S.C. § 875(6).

[16] Public Utilities Regulatory Policies Act of 1978, § 602; 16 U.S.C. § 824a-4.

In recent decades, eminent domain delegations have been to Amtrak:

- P.L. 103-272 (Act to revise, codify, and enact without substantive change certain ... laws related to transportation), 49 U.S.C. § 24311. To Amtrak, as necessary for intercity rail passenger transportation or when requested by the Secretary of Transportation to build an intermodal transportation terminal at Union Station, Washington, D.C. Includes "quick take" authority (see "Introduction"). Repeals original 1970 provision giving eminent domain power to Amtrak (P.L. 91-518, formerly codified at 45 U.S.C. § 545(d)(1)).

- P.L. 103-272 (Act to revise, codify, and enact without substantive change certain ... laws related to transportation), as amended by P.L. 103-429 (technical amendments), 49 U.S.C. § 24904(a)(2). To Amtrak, to acquire real property interests necessary to carry out Northeast Corridor Improvement Program.

Energy Companies

Since the building of the land grant railroads, delegations of federal eminent domain power to nonfederal entities have usually been to promote the generation/movement of energy or energy-related materials — electricity, oil, and gas.

- Act of June 10, 1920 (Federal Power Act), 16 U.S.C. § 814. To companies that have received from the Federal Energy Regulatory Commission a license to construct hydroelectric facilities under the Federal Power Act, to acquire land for dam, reservoir, and diversion structures, and related facilities.

- Act of July 30, 1941 (Cole Act), 15 U.S.C. note preceding sec. 715. To pipeline companies, for building interstate petroleum pipelines determined by the President to be necessary for the national defense. Authority expired June 30, 1946.

- Act of July 25, 1947 (amendment to Natural Gas Act), 15 U.S.C. § 717f(h). To companies engaged in the interstate transportation of natural gas that have received from the Federal Energy Regulatory Commission a certificate of public convenience and necessity under the Natural Gas Act.

- P.L. 109-58 (Energy Policy Act of 2005) § 1221(a), amending the Federal Power Act to add a new section 216, 16 U.S.C. § 824p. To a company proposing to build or modify an interstate electric transmission facility in a "national interest electric transmission corridor" designated by the Secretary of Energy, when such company has been unable to acquire the necessary approvals from state authorities and, for that reason, is granted a permit by the Federal Energy Regulatory Commission.

Other Entities

- Act of August 2, 1946, Title V (General Bridge Act), 33 U.S.C. § 532. To any individual, corporation, state or political subdivision, or municipality, authorized under the General Bridge Act to build a bridge between two or more states, over navigable waters of the United States. Condemnation power extends to building, operating, and maintaining such bridge and its approaches.

- P.L. 89-774, enacting the interstate compact creating the Washington Metropolitan Area Transit Authority as it affects the District of Columbia, and giving congressional consent to the compact as it affects Maryland and Virginia. Section 82(a) of the compact (reprinted in the public law) gives the Authority power to condemn property in all three jurisdictions necessary or useful for the authorized mass transit system.