South Dakota's Eminent Domain Experiment to Curb Private Condemnation by Railroads

*By Donald J. Kochan**

Introduction

The government's eminent domain power is an extreme one, grounded in the nature of sovereignty but constrained in our Constitution to protect individuals from excessive and unnecessary takings of private property. Justifying eminent domain power becomes more difficult the farther it strays from the control of the sovereign, such as when it is delegated from the government to private entities such as railroads or natural gas operators. In such instances of delegation, the government allows one private entity to formally condemn the property of another private entity. The potential for abuse in such delegations is great, and designing rules to limit such delegated powers should be a priority.

South Dakota recently enacted novel legislation to try to check the awesome power held by railroads to condemn property within its state, but that legislation has recently come under fire in court. To simplify, the legislation essentially requires that railroads clear additional hurdles in order to prove that their acts of condemnation are truly necessary for the public benefit. Because the South Dakota legislation increases the costs of condemning property, it represents a wise means for constraining condemnation for private benefit.

"Public Use" and the South Dakota Legislation

Protections of property can be found throughout the United States Constitution, as well as the constitutions of the States. The most important of these is in the Takings Clause of the Fifth Amendment: "[N]or shall private property be taken for public use without just compensation."[1] As part of this protection, condemnations for purely private uses are, theoretically, prohibited. But over time, the "public use" component of the Takings Clause has been eroded in the courts, leaving little protection to private property owners subject to condemnation actions that benefit private interests. A relaxed public use standard often benefits powerful special interests, like railroads, capable of convincing the state to use or cede its power to allow the displacement of residents from their homes and businesses for private benefit.

Delegating eminent domain power to railroads and other common carriers has been justified as a means to overcome holdout problems that might preclude the development of common carrier systems that benefit the public. Without eminent domain power, it is theorized, common carriers like railroads would face high costs in obtaining property necessary to develop their network that would ultimately preclude investment in creating a network of rails that can connect the public for its own benefit. While these arguments have some merit, they do not defeat the position that the delegates of eminent domain power should be required to prove that their condemnations truly are necessary to that end of public benefit.

Such a requirement of proof of public benefit and necessity is precisely the aim of the South Dakota legislation. In 1999, South Dakota enacted a change in its eminent domain law. Prior to 1999, South Dakota law stated that: "A railroad may exercise the right of eminent domain in acquiring right-of-way as provided by statute."[2] The 1999 reform added several procedural steps and approvals that are designed to increase oversight such that railroads would be required to prove that their exercise of the State's eminent domain power was truly necessary for public benefit. Rather than give railroads carte blanche to define what condemnations were in the public interest, the legislation requires that the railroad's decisions to exercise eminent domain be filtered through political institutions within the State.

The 1999 reform required, among other things, that a railroad obtain authorization from the Governor or a state railroad commission "that the railroad's exercise of the right of eminent domain would be for a public use consistent with public necessity," including a submission of proof to establish the same by a preponderance of the evidence.[3] Thus, a railroad's exercise of delegated eminent domain power is not automatically triggered under the South Dakota reform, but instead must be filtered through an approval process from the sovereign state that delegated that power.

The South Dakota legislation went on to define what constitutes "public use consistent with public necessity,"[4] many of which undoubtedly were designed to serve the interests of the State of South Dakota, perhaps at the expense of the interests of the citizens of the United States at large. For that reason, the United States District Court for the District of South Dakota, on July 19, 2002, found most of the 1999 South Dakota provisions in violation of either the Commerce Clause or Supremacy Clause of the U.S. Constitution.[5] The court determined that South Dakota's requirements conflicted with the federal government's encouragement and approval of railroad activities, arguing that additional state requirements largely conflicted with these federal mandates and approvals in favor of railroad construction and unduly burdened interstate commerce. Based on conflict preemption under the Supremacy Clause and interference with interstate commerce, much of the South Dakota reform was invalidated.

One can dispute the court's findings on these issues. For example, unlike situations where the federal government has delegated to common carriers its own *federal* eminent domain power – such as under the Natural Gas Act[6] — Congress left railroads dependent upon state powers of eminent domain and the conditions antecedent thereto. Thus, it might be argued that railroads should be subject to any conditions placed upon the delegation of a state's sovereign powers that such a state may choose. After all, a state has a profound interest not only in the disposition of property within its territory but also in the use of its sovereign power of condemnation as delegated to private entities. Congress could have superseded state sovereignty by giving railroads federal eminent domain power, but it did not.

But, for purposes of this article, issues of Federalism, the Supremacy Clause, conflict preemption, and the Commerce Clause will be set aside. Instead, this article focuses on the wisdom and utility of the South Dakota reforms in protecting private property and limiting condemnations for private benefit.

The filter adopted in South Dakota serves several important purposes. It increases costs of private condemnations under the imprimatur of the state and increases the transparency and accountability of condemnations for private benefit by requiring that such condemnations be vetted with the state's elected representatives.

The Benefits of the South Dakota Legislation: Controlling Private Condemnations

Condemnation is an extremely powerful tool for private interests. By gaining it by delegation from the government, a private entity can escape market pressures which would otherwise require the negotiation and purchase of property rights. The private entity has the power to expel property owners without their consent, albeit requiring just compensation. In a normal transaction between private parties, a property owner can refuse to sell – he has the protection of a "property rule" which includes the right to exclude would be possessors. Once the prospective acquirer has eminent domain power, he has the right to oust a property owner so long as he pays compensation – the transaction is governed by a "liability rule" where one empowered with a delegation of sovereign eminent domain power can oust a property owner without that owner's consent so long as they pay "just compensation."

One way to check private interest exercise of eminent domain, including that by delegates of the sovereign power, is to require a procedural approval process by which layers, or filters, exist to make the exercise more difficult and concomitantly more costly. If a system is created where municipalities, agencies, and quasi-public delegates (like railroads) of the eminent domain power could be stripped of their ability to condemn unilaterally, adding a legislative or executive consent process would decrease the incidence of condemnations. Condemnations would require the consent of a number of additional parties. Many interest groups will find the investment in obtaining a condemnation too expensive under such a regime, thereby forcing them back into the competitive market for land acquisitions – railroads are forced to negotiate in the market rather than, at a whim, conscripting property by eminent domain.

By diversifying the governmental actors required to approve a condemnation decision, as the South Dakota legislation does by requiring Governor or commission approval, interest groups like railroads must either (i) spend more to obtain favor, often making the legislation no longer profitable (that is, the legislation no longer creates a rent), or (ii) disperse the resources it was willing to spend under the old regime, which will decrease the incentives for all of the affected governmental actors to zealously push the interest group's agenda.

South Dakota's legislation is very similar to the filtering rule that I have proposed elsewhere:[7] All formal exercises of the eminent domain power by any entity must be approved, through the normal legislative process, by the initial sovereign holding the power of eminent domain. Delegates of the eminent domain power shall not have the unilateral power in any particular condemnation to institute eminent domain proceedings without the formal consent of the delegating party holding that power. Municipalities, agencies, and quasi-public actors are not independent sovereigns.

Railroads and other delegates of eminent domain authority derive their power from the state or federal government; thus, they do not hold, as a right of sovereigns, the power to exercise eminent domain.[8] It is merely delegated to them by some entity, either the state or federal government, that holds that sovereign power. Thus, conditioning the exercise of that power is perfectly consistent with the nature of the power.[9] Alternatively stated, the greater power to delegate eminent domain includes the lesser power to condition that delegation.[10]

Delegation itself fosters rent-seeking. Both the entity obtaining the condemnation power and the interest groups likely to have access to that entity's condemnation powers will make payments to obtain the delegation. A filtering rule essentially decreases the degree to which the legislature can delegate the eminent domain power. Thus, the benefits interest groups obtain through delegation are diminished. Once an interest group must obtain the assent of both the delegate of eminent domain power as well as the various political institutions constituting the delegating party—such as two houses of the legislature and the executive—the price of condemnation increases not only because more governmental actors must receive payments but also because the number of distinct competing interests vying for each politician's services will also increase.[11]

The South Dakota filtering rule is similar to other proposals to solve purported constitutional problems. For example, McGinnis argued that spending bills should be subject to a supermajority rule.[12] At least part of his purpose in making such a proposal is to overcome the failures of the enumerated powers doctrine—a scope-restrictive rule like public use—at controlling the growth of governmental power.[13] A supermajority rule increases the price of legislation by requiring interest groups to "pay" a larger number of legislators in order to close a deal, thereby decreasing the supply and demand.

Conclusion

In its operation, the proposed filtering rule, exemplified by the South Dakota legislation, for condemnations would increase the costs of rent-seeking because it also increases the price of condemnations by making such actions more difficult to attain.[14] Increasing the difficulty of effecting a condemnation is particularly important if one believes that the power is especially susceptible to abusive application when held and exercised by private interests.

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Footnotes

[1]U.S. Const. amend. V.
[2] S.D.C.L. 49-16A-75 (1998).
[3] S.D.C.L. 49-16A-75 & .75.1 (2002).
[4] S.D.C.L. 49-16A-75.3 (2002).
[5] *Dakota, Minnesota, & Eastern R.R. Corp. v, State of South Dakota*, CIV No. 02-4083 (filed, July 19, 2002).
[6] 15 U.S.C. 717f(h).
[7] Donald J. Kochan, *"Public Use" and the Independent Judiciary: Condemnation in an Interest Group Perspective*, 3 TEX. R. L. & POL. 49 (1998).
[8] Consider congressional grants of eminent domain power to quasi- public actors. "Quasi-public actors" includes a number of private enterprises, usually due to their status as a common carrier, that have been delegated the power of eminent domain. *See, e.g.,* Natural Gas Act § 7(h), 15 U.S.C. § 717f(h) (granting natural gas companies the power of eminent domain). *See also* Dupree v. Texas E. Corp., 639 F.Supp. 463 (M.D.La. 1986) (recognizing that gas companies operating pursuant to section 7(h) legitimately hold eminent domain power).
[9] *See, e.g., Lim v. Michigan Dep't of Transp.*, 423 N.W.2d 343 (Mich. Ct. App. 1988) (no public or private agency may condemn without authorization in law); *Montana Talc Co. v. Cyprus Mines Corp.*, 748 P.2d 444 (Mont. 1987) (delegated eminent domain power must be derived from, and is limited by, legislative grant); Appeal of Swidzinski, 579 A.2d 1352 (Pa. Commw. Ct. 1990) (body to which eminent domain power is delegated has no authority beyond that legislatively granted).
[10] For example, the Oklahoma constitution limits the scope of delegation of eminent domain powers to an individual or entity. *See Malnar v. Whitfield*, 774 P.2d 1075 (Okla. Ct. App. 1989) (interpreting Okla. Const. art. II, § 23).
[11] Discussing the differences between the two houses of Congress, McGinnis described the importance of struggle between political institutions beholden to distinct interests at decreasing rent-seeking: "[D]ifferences in function also mean that branches will themselves acquire different institutional interests even when controlled by similar majorities, thus ensuring a perpetual struggle in a kind of state of nature at the heart of Leviathan—a struggle that inhibits the development of permanent or tyrannical majoritarian control." John O. McGinnis, *The Original Constitution and Its Decline: A Public Choice Perspective*, 21 HARV. J.L. & PUB. POL'Y 195, 199.
[12] *See* John O. McGinnis, *The Constitutionality of Legislative Supermajority Requirements: A Defense*, 105 Yale L.J. 483 (1995).
[13] *Id.*
[14] *See id.* at 508-11.