

The Economic Case Against Eminent Domain

by William L. Anderson

In 1979 one of the most divisive things ever to affect the Tennessee Valley, my former home, came to a head. The Tennessee Valley Authority (TVA) had nearly completed a dam at the mouth of the Little Tennessee River—the Tellico Dam—but could not close the gates because the U.S. Supreme Court had agreed with environmentalists that an allegedly endangered fish called the snail darter should not have its habitat disturbed by the proposed reservoir.

Of course, this case was labeled an excess of environmentalism. Congress responded by passing a law that exempted the snail darter from the Endangered Species Act. President Jimmy Carter signed the bill. Soon the gates of the dam were shut, and Tellico Lake was born. It seemed like the triumph of common sense over extremism, which supposedly became even more apparent after biologists discovered snail darters living in other creeks in the Tennessee Valley.

Yet long before environmentalists brought the Endangered Species Act into the fray, the Tellico project had already created high levels of anger among many people who owned land near the Little Tennessee River. These landowners, mostly farmers working some of the best growing land in east Tennessee, were forced by the TVA to sell their property

to the U.S. government, which invoked its powers of eminent domain.

I remember three families who held out the longest, all whom were finally removed from their homes by federal marshals. There were no gun battles and no physical resistance, simply the resigned attitudes of people who had been beaten down by government. To make matters even more bitter for landowners, most of the land taken for the project was not to be inundated by Tellico Lake, but rather went well beyond the proposed shoreline.

The TVA, as it turned out, seized the extra land in order to sell it to developers of a proposed “public-private” planned community to be called Timberlake. (The project never went through.) In fact, the only way the project could satisfy the cost-benefit test was that TVA projected a large profit in the sale of the land taken from private property owners.

(In the 23 years since the closure of the Tellico Dam, few of the project’s touted benefits have actually come to fruition. That sad fact, however, is grist for another article.)

As with most debates over things like dams and property seizures, argument raged over the efficacy of the Tellico Project. Did it serve a “greater good,” and could it be justified because of the benefits it was supposed to provide? Conversely, could one determine after the fact that the whole thing had been a mistake and that it ultimately was not in the “public interest” to have dammed the

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river and seized lakefront property? In other words, was and is there a way to *measure* whether or not government should undertake such activities?

The larger issue, which I want to discuss here, is the efficacy of giving governments at all levels the power of eminent domain, which allow legal property seizures in the service of a “public interest.” The U.S. Constitution granted the power to the central government, although it was not to use it without “due process.” State laws on eminent domain are similarly modeled. As is often the case, however, “due process” simply is nothing more than a blank check to the authorities to participate in land grabs with accompanying abuse of property owners.

The examples of how eminent domain has been abused are endless and would fill these pages in perpetuity. Moreover, I doubt that all the reforms in the world could end or even curtail the myriad wrongs that government inflicts on those who happen to be in the way of “progress.” My purpose, then, is not to propose *reforms* of eminent domain. Instead, I wish to show why these government powers must be *abolished* not only in the name of liberty, but also in the name of good economics.

Eminent Domain and the “Common Good”

Whenever one openly questions eminent domain, the argument invariably turns to whether such property seizures can serve a larger “public purpose” by enabling public works and, increasingly, private facilities to be built that otherwise might have been blocked by recalcitrant property owners. The premise is that if the benefits accruing to the “public” are greater than the losses suffered by property owners, then a “common good” argument can be made in favor of such activity.

When property was taken to build a Jeep factory in Ohio, an editorial in the *Toledo Blade* on March 12, 2002, crudely—but forcefully—made a “common good” case:

First it was Ralph Nader. Now it’s the libertarians at the Institute for Justice in Washington raising a ruckus about the eminent domain land takings that made the new Jeep plant possible. Lost in the discussion is any concept of the common good. . . . Ralph Nader, in earlier visits to Toledo, waxed pious about how shabbily those whose property was seized were treated. This was in some cases true until they hired lawyers to negotiate for them. But they received fair prices and kept the city honest. . . . In a society we have roles as individuals and roles as social creatures. The libertarian stance is that personal rights always supersede public welfare. Sorry, we didn’t buy that during the eminent domain proceedings and we don’t buy it now. . . . [T]here are times when the good of the civic body requires individual sacrifice. That is why members of our military are dying in Afghanistan, and that is why some people sacrificed their homes and small businesses for the Jeep plant. It wasn’t about moving assets from one party to another but investing in the community’s future.

Undoubtedly many people in Toledo benefited from the expansion of the Jeep plant, but the argument presented by the *Blade’s* editorial writer is woefully shortsighted. First, it attempts to create an imaginary standard of the “common good,” something that may have some rhetorical appeal, but cannot be measured. Second, it endorses a process that invariably abuses individuals who ultimately must bear the burden for the good fortune of others.

For all of the talk of “public interest,” we seem to forget that society is always made up of individuals, who may choose to work with each other to enjoy gains through trade. The seizure of property to serve a “common purpose” generally means that some individuals gain—perhaps even a large number—and others are made worse off.

Economic analysis must always begin with the individual, but in so doing, it runs into a serious problem: *interpersonal utility comparisons* are impossible. In laymen’s terms,

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one cannot compare satisfaction and dissatisfaction among individuals because there is no way to measure those things. Assume that I trade my watch for a friend's rare book. Observers might be tempted to claim that I valued that book more than my friend valued it, and he valued my watch more than I did. But such claims are impossible to make. All we can know is that I valued my friend's book more than I valued my watch and he valued my watch more than he valued his book.

The problem with the "common good" argument is that it is based on the assumptions that interpersonal utility can be compared and that a measurable "public interest" exists. All we can know in the Toledo case is that the seizure of property to enable Jeep to expand its factory provided benefits to large numbers of individuals in the Toledo area. Perhaps one can even say that more people benefited from the new plant than were harmed through the loss of homes and businesses.

To say, however, that plant expansion via property seizures was justified because more people benefited than were harmed is nothing more than an appeal to brute force. It is not good economics. If a mob were to overwhelm my family, ransack our house, and steal our possessions, no one would say this was good because the majority of people in our house decided they wanted our goods more than we did. Yet there is no logical difference between the two examples.

Forced Sales

Like the small farmers who had their ancestral lands taken away from them for the creation of Tellico Lake, the property owners in Toledo "sold" their land under

duress. Since the transactions were not voluntary, there is no way to declare (as the editorial writer did) that the owners received a fair price for their property. Furthermore, because lawyers are not likely to work pro bono in takings cases, individuals who challenged the state's price were able to do so only at a high cost to themselves.

Those who advocate eminent domain generally appeal not only to the common good, but also to efficiency. The argument is this: Things that are good for the community should also be done at the lowest possible cost within the bounds of the law, which generally requires "due process" and "just compensation." Furthermore, if eminent domain were not applied to worthy projects such as roads and plant expansions, holdouts demanding exorbitant compensation would make such things too expensive.

Although on the surface this sounds like a good argument, it falls apart on examination. First, let us assume that a firm, in order to complete a project, needs to purchase ten parcels of land from individual owners and does not appeal to the local government for eminent-domain assistance. Furthermore, assume that each owner is offered \$100,000 for his land, and all agree to sell, except one who demands \$500,000.

At first glance, one might accuse the holdout of "greed" or "selfishness," but that is irrelevant from an economic point of view. All we can say is that the holdout values his property more than any amount below \$500,000. Because value is ultimately subjective, the holdout's demands are no less legitimate, economically speaking, than those of the landowners who accepted \$100,000. Even though the others most likely would have preferred more—just as we accept pay raises—they were willing to part with their property for less.

One needs to view the buyer's offer as a cost not only to the buyer, but to the landowner as well. Whatever amount he turns down is the cost of keeping his land. This is no less a cost in economic terms than whatever the company would have paid for the property.

What if the local government invokes its power of eminent domain and seizes the property for the company, with each property owner paid \$100,000 in the forced sale?

It seems the "community" (which includes the company) has saved \$400,000 by forcing the recalcitrant landowner to sell at \$100,000 instead of letting him hold out for \$500,000. However, the \$400,000 represents a real loss to an individual (also a member of the community), who is forced to bear a cost he preferred not to bear. This is what the *Blade* had in mind when it declared that "there are times when the good of the civic body requires individual sacrifice." Actually, what it means is not that an individual has "sacrificed" (more appropriately, *has been* sacrificed), but that the costs that would have been borne by the company are now forced on a person against his will.

State Abuse

Besides the economic criticism of eminent domain, we also see that the granting of such awesome powers also guarantees that the state will abuse them. Once upon a time, eminent domain meant the construction of dams and roads; today it means whole neighborhoods, churches, and businesses condemned so other businesses can use the space. It is ominous that large corporations can appeal to government to take others' property instead of having to rely on voluntary exchange.

A recent occurrence in my town serves as a frightening and depressing example. I live in Cumberland, Maryland, which is located

in the Allegheny Mountains in the western part of the state. While it is a relatively poor area, one charming aspect of the city is that it has a number of wonderful examples of nineteenth-century architecture. In my neighborhood, for example, many of the houses (including my own) were constructed over a century ago, when large-scale ownership of automobiles was not anticipated and houses were constructed near the street and close to one another.

One would think the local government would want us to take pride in the architectural integrity of our city. However, officials attempted (in secret, of course) to force a law through the city council that would have retroactively applied new housing regulations, including one governing the proximity of a dwelling to the street. In other words, the city officials were trying to make most of Cumberland's lovely houses illegal.

Why would they do this? The answer is simple and sinister. They wanted to be able to condemn large blocks of neighborhoods if the opportunity for a large-scale business or government project arose. It is always easier to invoke eminent domain on homes that don't meet current codes.

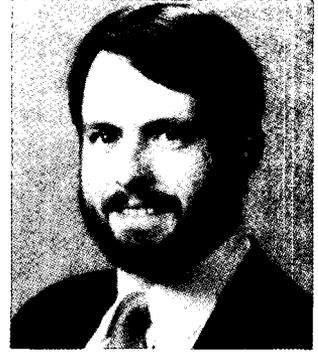
Fortunately for us, a couple of sharp-eyed female citizens found out about the government's plans and blew the whistle. The city officials ran for cover and had to postpone—for the time being—their attempt to turn our neighborhoods into one vast violation of building regulations.

One can only call this an abuse of power. However, because eminent domain is on the books and is seen by some as a natural "right" of ambitious politicians and bureaucrats, individuals who happen to be in the way will continue to suffer.

Milton Friedman once compared attempts to "reform" government agencies to trying to teach cats how to bark. He might as well have been describing the power of eminent domain. □

IDEAS ON LIBERTY

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Patriotic Tax Avoiders

Little upsets politicians more than people attempting to escape their control. So it is with U.S. companies that have fled overseas, now attacked as being unpatriotic and worse by Washington pols.

Over the last decade, at least 25 major firms have reincorporated in Bermuda or the Cayman Islands. Eleven have emigrated since 2000.

The reason is simple: taxes. As Jonathan Weisman of the *Washington Post* put it: "The United States, with its 35 percent corporate income tax and its Byzantine rules for taxing worldwide profits, is not a particularly friendly tax environment, especially when compared with Bermuda, where there is no corporate income tax."

But the economic incentive isn't enough. Unlike European rules, U.S. law allows companies to shift to another country without shifting their headquarters.

Naturally, the legislators who enacted both the tax rates and the tax loophole are furious. Charles Grassley of the Senate Finance Committee says such inversions are "immoral and unethical." Representative Jim Maloney calls firms that migrate "unpatriotic and immoral in a time of war."

Even some nominal conservatives have joined in the hunt. Former Reagan administration defense aide Ken Adelman wants to go after companies that aren't paying their "proper share of taxes to the U.S. Treasury."

Moving offshore to reduce Washington's take is "shady" and "just awful."

A half dozen laws have been drafted in response. The companies responded with their usual weapon of choice, lobbyists. Said Todd Malan, executive director of the Organization for International Investment: "They've hired everybody in town."

Corporate inversion is one of those issues that invite demagoguery. Yet moving to lower one's taxes is common in America. States without an income tax attract retirees; many people compare the level of taxation before deciding between adjoining states. Many people even avoid cities, such as New York, which hit up their residents coming and going.

Moving across national borders is more difficult, but makes equal sense. It's not just small Caribbean nations that have lower corporate tax rates. So do Hong Kong and Taiwan, Norway and Sweden, Chile and Ecuador, Hungary, and Switzerland.

Playing by the tax rules enacted by Congress in order to lower one's taxes hardly seems immoral, unethical, and unpatriotic. Rather than complaining, legislators could, perish the thought, lower tax rates and rationalize the regulations to make America more competitive.

Indeed, when it comes to blame, Congress is the obvious culprit. First, consider the mess Congress has made of international taxation. Senator Orrin Hatch admits that the foreign tax credit doesn't fully offset foreign levies, resulting in double taxation. Thus, he says, "the effective tax rate of

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