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ASURENA:5-23-74:kkc

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5 OF EMINENT DOMAIN PAPER

Case:

2,953.15 acres of land, more or less, situate on Russell County,  
State of Alabama, and Richard H. Bucherstaff, et al appellants  
V. U.S.A.

USCA 5th Circuit - June 30, 1965  
350 F. 2d 356 (1965)

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The exercise of the power of eminent domain is vested in the legislative branch of the government. The power may be exercised directly or may be delegated to be exercised in any manner the Congress sees fit so long as constitutional restraints are not violated. The necessity and expediency of exercising the power, the amount of property and the estates to be taken are all matters to be decided by the grantee of the power and are not subject to judicial review with the possible exception of fraud, bad faith, or abuse of discretion ... These are well settled principles of the law of eminent domain.

[See also 29A CJS, Eminent Domain §§ 87-92, pp 350-379; 18 Am Jur, Eminent Domain §§ 105-111]

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EMINENT DOMAIN

Last December at the close of Marianas III you gave us a position paper in which you described your current thinking on the question of federal eminent domain power in the Commonwealth of the Northern Marianas. We have encountered difficulties with your proposals and I would like to explain why the U.S. feels it must possess the fundamental power to exercise eminent domain in the Commonwealth. In the process, I will discuss the safeguards inherent in the exercise of eminent domain by the United States Government. We believe that the maintenance of the eminent domain authority by the U.S. Government would not only be to the benefit of all of the U.S., including the Northern Marianas, but also, should its exercise ever become necessary, it would be implemented with full consideration given to your interests and preferences.

A brief explanation of what we mean by eminent domain may be appropriate here.

Eminent domain, as it is exercised in the U.S., is generally defined as the power of the nation or a sovereign state to take, or to authorize the taking of private property for a public use without the owner's consent, conditioned, of course, upon the payment of just compensation ... It is the inherent political right, founded on a common necessity and interest, to appropriate the property of individual members of the community to fulfill the greater necessities of the whole community.

The power to appropriate private property for public use is a necessary attribute of sovereignty and is essential to the very existence of government. No major government in the world is without it or

16-401011

its equivalent.

It has even been argued by jurists that the power of eminent domain is inalienable and no legislature can bind itself or its successors not to exercise this power when public necessity and convenience require it.

Furthermore, since the power of eminent domain exists inherently in a sovereign state, it does not depend for its existence on a specific grant in the U.S. Constitution. On the contrary, the U.S. Constitution presupposes the existence of that power and merely contains certain provisions which serve as the limitations on its use by the U.S. Government. Those provisions by which the power is chiefly limited are: (1) That property shall not be taken for public use without just compensation, and (2) that no person shall be deprived of his life, liberty, or property without due process of law.

Since last December we have reviewed the matter in the Executive Branch and have consulted with members of the U.S. Congress concerning your proposal which would limit the ability of the federal government to exercise eminent domain in the Commonwealth. Those members have advised us that given the nature of the relationship we have in principle agreed upon for the Commonwealth, it would be essential that the U.S. Government have the same authority to exercise eminent domain in the Commonwealth as it does in the rest of the United States. The U.S. Government will have sovereignty in the Commonwealth, and consistent with the brief description of the source of the power of eminent domain I have just given, we have been advised that the U.S. Government must also have its full power of eminent domain

in the Commonwealth. This is consistent with the obligations of the Commonwealth as part of the United States.

This is why I have offered these brief remarks; to describe the theory, the philosophy of the power of eminent domain as it is employed in the U.S. I am hopeful that with this background information you will be able to appreciate why we have been advised not to pursue terms by which the federal government would undertake as a future obligation either (1) not to use eminent domain, or (2) to use it only in some restricted fashion which does not have its roots in the U.S. Constitution.

Your difficulty, I believe is

not so much with the theory as with your experience of its abuse before the present Trusteeship. Let's see, as I will outline later, what the U.S. system provides as safeguards. I wish to clarify at this point that while we have been clearly advised by members of Congress that the U.S. Government must have the ability, where necessary, to acquire title to and possess in a timely fashion land in the Commonwealth, we do possess flexibility with regard to developing procedural safeguards for condemnation of land in the Commonwealth. We believe that the federal statutes provide adequate protection for private interests, and we can agree, as we have suggested repeatedly in the past, to observe these safeguards scrupulously; nonetheless, in the event you wish to propose additional procedural safeguards, we will be pleased to consider them.

The comments I have expressed in these introductory remarks reflect the basic policy position which we have been advised to follow as a result of our Congressional consultations.

401013

Your proposal posed six underlying principles.

Principle 1

Under principle 1, the federal government could never by exercise of eminent domain obtain title to land in the Commonwealth. It could never obtain an interest in land greater than a long term lease subject to a "conditional limitation".

As I have just stated, this would constitute a present and future limitation on the exercise of eminent domain and, as such, would undercut the exercise of sovereignty by the U.S. in the Commonwealth. We have been advised that the U.S. Congress will not concur in such terms.

Principles 2, 3, 4 and 5

Principles 2, 3, 4 and 5 propose a system whereby the United States would have to deal directly with the Commonwealth Government for the acquisition either by negotiation or condemnation of land privately owned. Thus this proposal deals only partly with the question of eminent domain and in general with the issue of U.S. acquisition of land owned by private parties in the Commonwealth. I believe I have already explained our position with regard to eminent domain.

In our consultations we have been advised that the Congress would not view favorably a procedure whereby the Commonwealth Government would prohibit private parties from directly negotiating the sale of, or selling, their land to the U.S. Government; and where instead, the Commonwealth Government would intervene and deal directly with the U.S. Government. We would strongly suggest that you consider some other mechanism which would permit the private party to negotiate his own transactions, but would subject such transactions

to certain specific land alienation laws of the Commonwealth.

You proposed in principle 5 that in a condemnation proceeding the courts be authorized to review whether the U.S. has a legitimate need for the land to be taken and whether the amount of land to be taken and the estate to be taken are the minimum required. While we at one time considered a proposal which would have permitted a judicial review of need and estate, we have, in our consultations with Congress, been advised against pursuing these terms given the fact that such a proposal diverges rather dramatically from the normal rules applicable in adjudication of questions of eminent domain. Briefly these normal rules provide that:

"... The necessity and expediency of exercising the power [of eminent domain], the amount of property and the estates to be taken are all matters to be decided by the ... [Legislative branch of the Government or those it has delegated]... and are not subject to judicial review with the possible exception of fraud, bad faith, or abuse of discretion ... These are well settled principles of the law of eminent domain."

[2,953.15 acres of land, more or less, situate in Russell County State of Alabama, and Richard H. Bucherstaff, et al, v. United States, 350 F 2d 356 (CA5 June 30, 1965)]

#### Principle 6

This principle proposes a limitation on acquisition of land for military purposes which is even more severe than the limitations proposed in the prior principles. I don't believe that I have to repeat what I said earlier or explain in detail the difficulties this poses. But permit me to add that if the U.S. cannot freely exercise eminent domain to acquire necessary land for military purposes--that is for the defense of the nation--then a reasonable inference arises that you are not prepared to undertake the same obligations as the States and territories of the U.S. for the defense of the nation.

**401015**

Let me now turn to some of the safeguards inherent in the U.S. practice for implementation of the power of eminent domain.

When the Executive Branch, consistent with specific or general Congressional authorization, acts to take land, it must follow the procedures and safeguards set forth in federal statutes.

Briefly, they provide:

- (1) That notice of the proposed acquisition be given locally;
- (2) That the judicial proceedings for condemnation be held in the district court where the land is located; and,
- (3) That the federal rules of procedure must be followed in the judicial process:
  - (a) Among these is a requirement that the Government file a Declaration of Taking which shall contain:
    - (i) A statement of the authority under which and the public use for which such lands are taken;
    - (ii) A description of the lands taken sufficient for their identification;
    - (iii) A statement of the estate or interest in such lands taken for the stated public purpose;
    - (iv) A plan showing the lands taken; and
    - (v) A statement of the sum of money estimated by the acquiring authority to be just compensation for the land taken.

(b) With regard to the last point, the federal statutes and the U.S. Constitution require that just compensation be paid for all interests acquired. And under the Federal Rules of Civil Procedure, any party may have a jury trial of the compensation issue unless the court in its discretion orders that because of the character, location, or quantity of the property to be condemned, or for other reasons in the interests of justice, the issue of compensation shall be determined by a commission of three persons appointed by it. But note, that to justify denial of a demand for jury trial, it is essential that the exercise of the court's discretion be based upon some exceptional reasons in the interests of justice.

(c) Further, before the Government can take possession of the land it must also deposit with the court the amount it has estimated as fair compensation for the land. At that point the estate or interest in land sought by the Government shall vest in the United States and the right to just compensation shall vest in the persons entitled to it. Upon application of such persons, the court may order that the money deposited by the Government be paid forthwith. Of course, if it is later judicially determined that the amount deposited was not sufficient, the Government will have to make such additional payment, including interest.



It is our proposal, gentlemen, that the U.S. eminent domain authority, together with the safeguards applicable to its implementation would, on the one hand, protect your interests by providing for equitable adjudication of fair compensation for any land condemned; while, on the other hand, it would permit the national government to acquire land where such acquisition was determined to be necessary, and I repeat necessary, for the welfare of the American family. The latter involves an obligation, a potential sacrifice, which the States and territories of the U.S. all share.