

# Policy Dialogue

No. 42 • Feb. 2001

## The Power To Take

### A Primer on Eminent Domain

*Despite constitutional restrictions, state and federal governments' authority to take private property through eminent domain often disadvantages property owners. Its use around the country for the construction of sports stadiums and quasi-private redevelopment projects has been contentious. In view of the number of current or planned projects around Massachusetts that are premised on governmental land-taking—the Big Dig, the Boston convention center, a possible new Fenway Park, among others—Pioneer Institute recently issued a [White Paper](#) examining its use in the Commonwealth. In conjunction with the Federalist Society, Pioneer held a Forum featuring the paper's author, Michael Malamut of the New England Legal Foundation. Also speaking were Gideon Kanner, professor of law emeritus at Loyola University and a national authority on eminent domain; Jason Barshak, who as an Assistant Attorney General has defended the Commonwealth in civil litigation stemming from eminent domain takings; and James Masterman, an attorney in private practice specializing in eminent domain cases. The following excerpts each's remarks.*



#### Federal Eminent Domain Case Law

**Gideon Kanner:** The law of eminent domain is essentially contained in the last phrase of the Fifth Amendment, “Nor shall private property be taken for public use without just compensation.” It is that deceptive grand simplicity so often found in constitutional phrases that is the source of our problems. As a constitutional phrase it is interpreted and applied by judges, as has been the case since *Marbury v. Madison* held that the judicial branch should construe and apply the Constitution. The law in this field is almost entirely made by judges.

At the time the republic was founded, it was supposed in some circles that the federal government did not even have the power of eminent domain and that the states would condemn property for the federal government. Eventually in the case called *United States v. Kohl*, the U.S. Supreme Court said, “No, the power of eminent domain is an inherent attribute of sovereignty.”

*A host of incidental losses go uncompensated. The most egregious example is business losses.*

*—Gideon Kanner*

[www.pioneerinstitute.org](http://www.pioneerinstitute.org)

85 Devonshire St., 8<sup>th</sup> floor  
Boston, MA 02109  
617-723-2277 | Tel  
617-723-1880 | Fax

Federal eminent domain law cases include:

- *United States v. Kohl*, 91 U.S. 367 (1875)
- *Clark v. Nash*, 198 U.S. 361 (1905)
- *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527 (1906)
- *Hairston v. Danville & Western Railway Co.*, 208 U.S. 598 (1908)
- *City of Cincinnati v. Vester*, 281 U.S. 439 (1930)
- *United States ex rel. Tennessee Valley Authority v. Welch*, 327 U.S. 546 (1946)
- *Berman v. Parker*, 348 U.S. 26 (1954)
- *Agins v. City of Tiburon*, 447 U.S. 255 (1980)
- *City of Monterey v. Del Monte Dunes, Ltd.*, 526 U.S. 687 (1998)

Hear more of Gideon Kanner's remarks on Pioneer's new audiotape "Pioneer for the Ear" a compilation of excerpts of speakers' remarks at Pioneer events, available on our website, [www.pioneerinstitute.org](http://www.pioneerinstitute.org).

The right to take was not created by the Constitution, but rather the Constitution imposed limits on it, and these are two-fold. It must be for public use, and just compensation has to be paid. As it turns out, neither of these limitations retains much force. In the early cases, the Court took the position that the phrase "public use" meant, as expressed by *Kohl*, "for forts, armories and arsenals, for navy yards and lighthouses, for customs houses, post offices, and courthouses, and for other public uses."

The measure of just compensation, in almost all cases, is fair market value, which is globally defined as the price that would be paid by a willing but unpressured buyer to a willing but unpressured seller, both being fully aware of the property's good and bad features after a reasonable period of time on the market. That means that you get paid for the dirt and the sticks and the bricks. A host of incidental losses go uncompensated. The most egregious example is, of course, business losses. If you have an established business on the property being taken, you receive nothing for the value of the business. This has been a massive tragedy in urban redevelopment cases particularly, because a lot of these cases involve small, single-location businesses that are destroyed without compensation and replaced with shopping malls, which are then populated by chain stores. So this is, among other things, bad public policy that encourages oligopolistic trends, which the Court in other contexts doesn't like.

Finally, we have the transactional costs, which translate into litigation expenses. In most jurisdictions, neither litigation expenses nor business expenses are compensable. Under the Uniform Relocation Assistance Act you can get up to \$20,000 for a displaced business, but as anybody who has ever been in business will tell you, these days that doesn't pay for the flooring and painting, much less the business. Florida is the only state in the Union that pays litigation expenses, attorney's fees, and appraiser fees. It hasn't inhibited them at all; they have more public projects and more land acquisition than anybody else.

What are we to do about this situation? Edmund Burke said it all when he said that "for evil to prevail, it is only necessary that good people do nothing." Good people have been doing nothing. This has been somebody else's problem. Some of the archaic rules need to be criticized. Some commentators have called eminent domain a dark corner of the law that is completely out of sync with modern realities. There should be efforts made in legislatures to change this. Legislators don't interpret the Constitution, but they can certainly provide for compensation that is above the Constitutional minimum.

## The Use of Eminent Domain in Massachusetts

**Michael Malamut:** The Pioneer study "The Power to Take: The Use of Eminent Domain in Massachusetts" is an historical review of data on eminent domain practice, comparing Massachusetts with the most advanced practices in the rest of the country. Massachusetts eminent domain practice compares favorably in effecting most takings through the quick-take process, which gives the condemnee a relatively large damage award up front, preventing months and years of litigation before a condemnee can receive anything.

We collected data on takings in nine municipalities in Middlesex County and in the City of Boston over a 13-year period. Out of all the data that we collected, 53 percent of

all takings were for road repair and road building. This has been the leading category since colonial times. Almost all the remaining takings were for traditional government purposes: municipal services, conservation, public transportation, public utilities. Although 11 percent of takings were for urban renewal, almost all of those were takings from government bodies. Because the Boston Redevelopment Authority is also

the planning authority for the City of Boston, often it effects takings from other government agencies to speed up the process. Only 1 percent of all takings from private property owners were for purposes of urban renewal.



Forum speakers (left to right) Gideon Kanner, James Masterman, Michael Malamud (discussing the recommendations of his study), and Jason Barshak.

## Trends

I'd like to highlight some of the statistical correlations we observed:

- Municipal population, municipal area, total municipal assessed value, and total municipal revenue were all positively correlated with both

number and total area of takings by municipalities. It is possible that the need to serve a larger population raises the total number of takings. Another theory is that since population is highly correlated with municipal revenue, it is available municipal revenue that drives takings. That is, the more money the town has, the more takings it will engage in.

***The most striking conclusion is that more property was taken in good economic times; less in poorer times.***

***—Michael Malamud***

rent control and the total number and area of takings. Places like Boston and Cambridge, which have stronger anti-property sentiments than other places, tend to do more takings and over time have more of their municipal area involved in government-related projects. Cambridge and Boston already have smaller tax bases than other towns because of large public projects and private universities and hospitals located there. It's a trend to be concerned with because takings are gradually eroding the tax base.

***If government has more money, it will do more takings—but will pay more for the same property than it would during a slower economic time.***

***—Michael Malamud***

- More rural towns tended to take more land, possibly because the land is less costly in those areas. Parcels taken tend to be larger in rural areas than in more developed areas.

- Voting on two property-related issues (ending nuclear power generation and rent control) were examined relative to municipal takings. The data revealed a strong correlation between voting to end nuclear power and voting to continue

rent control and the total number and area of takings. Places like Boston and Cambridge, which have stronger anti-property sentiments than other places, tend to do more takings and over time have more of their municipal area involved in government-related projects. Cambridge and Boston already have smaller tax bases than other towns because of large public projects and private universities and hospitals located there. It's a trend to be concerned with because takings are gradually eroding the tax base.

- The most striking conclusion is the strong correlation between takings and the economic climate of the state. More property was taken in good economic times; less property was taken in poor economic conditions. This strongly correlates with government revenues, and it supports the theory that if government has more money, it will do more takings. This also means it is paying more for the same piece of property than it would during a slower economic time.

The *White Paper* “The Power To Take: The Use of Eminent Domain in Massachusetts” can be downloaded at Pioneer’s website, [www.pioneerinstitute.org/research/whitepapers/wp15cover.cfm](http://www.pioneerinstitute.org/research/whitepapers/wp15cover.cfm).

## Recommendations

Among the many recommendations, the study suggests reviving the Massachusetts Constitution’s provision linking takings to “public exigencies,” which has been deprived of any real meaning by Massachusetts courts. If government analyzed whether every taking was really necessary, it might act as a brake upon the increase in takings during strong economic times.

Another important recommendation is that we compensate for business losses, relocation costs, and attorneys fees. In addition, we urge that agencies provide explanatory materials in plain English and other languages, and make pre-taking appraisals known to condemnees. There is more to the analysis and to the recommendations, but for that I would refer you to the full study.

## Statutory Changes Regarding Legal Challenges

**Jason Barshak:** I suggest two reforms within the existing statutory framework. Most of the lawsuits filed deal with just compensation. Under Massachusetts case law, fair compensation is based on the highest and best use of the property. The problem is that you often end up with hypothetical values—not values based in reality. A condemnee is entitled to introduce evidence of a different use for his property—even if it is not a legal use at the time of the recording of the taking. The property owner’s attorney may try to argue that the owner could have built a McDonald’s, and this changed use would have a higher value. Juries, who often do not have that much background in real estate, not only have to determine fair market value of what was taken, but also hypothesize about what the local town or city *could* do.

I suggest having a preliminary hearing board address the initial questions in eminent domain cases where the taking authority and property owners differ on the highest and best use of the property. Each board member would have at least some background in local administration concerning land use. This would allow juries to focus on determining which side is more credible.

*I suggest two reforms within the existing statutory framework dealing with just compensation lawsuits.*

—Jason Barshak

The second reform is simpler, but just as necessary. The statute of limitations for landowners to seek additional compensation should be changed from three years to two. With the courts throughout the state overloaded, four to five years can go by before a judge or jury tries to value the property. Property values can change considerably in that time. It is very difficult for a juror to ignore the present reality and judge value based on conditions five years earlier, creating the distinct possibility that the taking authority is going to pay more than it should.

## The Landowners’ Perspective

**Jim Masterman:** There is already a system available to safeguard against a landowner’s flight of fancy. If trial lawyers can convince the judge that the evidence to be presented by the other side is not a realistic hypothetical based on market conditions as of the date of the taking, the evidence will never appear before the jury.

Most of our clients are individual small businesses. Most of them have been operating their businesses for many, many years in the path of a public project. Projects like the Big Dig, Fenway Park, and the Telecom City Project in Malden,

Medford, and Everett take a long time to plan. There is a blighting influence as a result that has a diminishing effect on the values of the land and the ability of the landowners to conduct their business. Do I improve my property? Do I invest? Do I, by private enterprise alone, try to achieve the redevelopment objectives of a neighborhood? Or do I wait for the big steamroller to come along and wipe it out for the big project?

Take, for example, a landowner who owns a small building with six or seven units. For years there have been threats of a taking; the tenants can leave, the building can fall into disrepair, the building can go into tax foreclosure, and if there is no taking, there is no redress. And if there is a taking, the government bases its appraisal on the building being empty.

### **The Use of Eminent Domain for Sports Stadiums**

Let me address stadiums. In a recent case involving a proposed minor league baseball stadium in Springfield, Judge Constance Sweeney knocked out the project as one predominantly favoring private interests. Let me read from the decision:

From the evidence, particularly through the Mayor's testimony and the documentary exhibits, it appears the disappointment over the City's inability to attract a minor league affiliated baseball franchise set into motion a series of events and decisions on the part of certain officials, organizations, and individuals to bring some type of professional baseball team to Springfield through whatever means possible. Baseball became the all-consuming goal and the propriety of public funding to obtain that goal became, at best, secondary.

In other words, the judge found that the public officials were so consumed with having a baseball stadium in downtown Springfield—because it would have an economic spin-out—that they did everything that they possibly could do. They made side deals that were perceived as public and made agreements to lease with private entities all under the general rhetoric that this was a good public purpose. One can debate whether stadiums are a public purpose or not. The way the financing vehicle came through determined that this one was not.

*The question has to be asked: can we justify the acquisition of private land to build a baseball stadium that will line the pockets of the baseball team's ownership?*

—James Masterman

I understand that the government can use eminent domain to facilitate economic development and that improvements of infrastructure satisfy public purpose concerns; those are legitimate public purposes. But the question that has to be asked is whether these stadiums, which are for the benefit of these private companies, justify the taking of a small business from its owner, who has been a taxpayer and will suffer a disproportionate burden.

Now in the case of Fenway Park, we don't know whether it's going to be a Boston Redevelopment Project, a special stadium commission like the Convention Center Authority, or whether it's going to be a City of Boston stadium. The fact is the Red Sox are a private corporation just like Raytheon, Gillette, or the many small businesses in Massachusetts. And, again, the question has to be asked, whether we can justify the acquisition of private land, the taking of small businesses, to build a baseball stadium that will truly line the pockets of the baseball team's ownership?