

Michigan Law Review

Volume 39 | Issue 1

1940

EMINENT DOMAIN - POWER OF THE FEDERAL GOVERNMENT TO CONDEMN LAND IN PUBLIC USE FOR AN INCONSISTENT FEDERAL USE

Robert P. Kneeland
University of Michigan Law School

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Property Law and Real Estate Commons](#)

Recommended Citation

Robert P. Kneeland, *EMINENT DOMAIN - POWER OF THE FEDERAL GOVERNMENT TO CONDEMN LAND IN PUBLIC USE FOR AN INCONSISTENT FEDERAL USE*, 39 MICH. L. REV. 163 (1940).

Available at: <https://repository.law.umich.edu/mlr/vol39/iss1/20>

This Regular Feature is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

EMINENT DOMAIN — POWER OF THE FEDERAL GOVERNMENT TO CONDEMN LAND IN PUBLIC USE FOR AN INCONSISTENT FEDERAL USE — Defendants, landowners and next of kin of persons buried in a cemetery which was being subjected to condemnation, moved to dismiss the federal government's petition for condemnation of such lands on the grounds that the federal statutes did not authorize the United States to take land already dedicated to a public use for an inconsistent use; and that public cemeteries were not subject to the United States' power of eminent domain. The land was being condemned to effectuate a federal project under the National Industrial Recovery Act¹ and the Federal Emergency Relief Appropriations Act of 1935,² and was for public purposes in furtherance of congressional powers.³ The federal district court denied the motion to dismiss, holding that the United States had stated a cause of action for condemnation of the cemetery. *United States v. Sixty Acres of Land in Williamson County*, (D. C. Ill. 1939) 28 F. Supp. 368.

The right of eminent domain is a sovereign one, inherent in the federal government. This right may be exercised without the consent of a state, in pursuance of the constitutionally delegated powers of Congress.⁴ That a state cannot condemn land already devoted to a federal use within its borders is now a settled rule.⁵ But the fact that land within a state is already devoted to a public use does not place a similar limitation on the federal government's power to condemn.⁶ The extent of the national government's right of eminent domain where the prospective federal use is inconsistent with the public purpose to which

not as a specific item of recovery but as affecting the market value of the leasehold. 4 SUTHERLAND, DAMAGES, 4th ed., § 1069, p. 4012 (1916), states: "If the tenant's estate is limited to a particular use and the appliances used by him in conducting business are rendered useless by an entry thereon, and it becomes necessary to reconstruct them, and thereby the expense of doing business is increased and the profits are diminished by waste, all these matters may be proven as descriptive of the injury sustained and as affecting the market value of the lease, but not as specific items of damage." See ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN, § 156 (1936), for discussion of other instances where income might be an acceptable measure of market value.

¹ 48 Stat. L. 200 et seq. (1933), 40 U. S. C. (1934), § 401 et seq.

² 49 Stat. L. 115 (1935), 15 U. S. C. (Supp. 1939), §§ 721-728, note.

³ *United States v. Eighty Acres of Land in Williamson County*, (D. C. Ill. 1939) 26 F. Supp. 315.

⁴ *Kohl v. United States*, 91 U. S. 367 (1875); *Chappell v. United States*, 160 U. S. 499, 16 S. Ct. 397 (1896).

⁵ A close question arises where federal land is not held for any public purpose. Cf. *Fort Leavenworth R. R. v. Lowe*, 114 U. S. 525, 5 S. Ct. 995 (1885). NICHOLS, EMINENT DOMAIN 23-30 (1909), 1 id., 2d ed., § 36 (1917).

⁶ *United States v. Gettysburg Electric Ry.*, 160 U. S. 668, 16 S. Ct. 427 (1896).

the land has been put within the state is in some doubt. If the property is being used by the state in the discharge of its necessary governmental functions, it is possible that the courts might limit the federal government's power to condemn, especially if the land is being sought by the federal government for reasons of convenience and not necessity.⁷ Allowing the courts to go into questions involving the necessity of the federal purpose, however, seems rather dubious. Probably the only question should be whether the taking of the land is necessary in carrying out the federal purpose;⁸ and the answer to this question largely depends upon the expressed intention of Congress. As the principal case points out, the rule that the statute authorizing condemnation must apply, expressly or by necessary implication, to the specific property to be taken where it is already devoted to a public use, generally involves only those cases in which the right of eminent domain has been given to public service or municipal corporations.⁹ Agents of the United States, however, may condemn lands which are needed to carry out the more generally stated constitutional projects of Congress.¹⁰ Land being used for a cemetery is not necessary to the functioning of a state; and a state, in the exercise of its police powers, or Congress, in the exercise of its delegated powers, may authorize its removal.¹¹ To hold cemeteries sacred from interference by governmental agencies, as well as private persons, might well lead to absurd results, especially in densely populated areas.¹² Therefore,

In any case, the exercise of the federal government's power to condemn is subject to the limitation that just compensation for the land must be made. *St. Louis v. Western Union Telegraph Co.*, 148 U. S. 92 at 100-101, 13 S. Ct. 485 (1893).

⁷ "As the United States cannot interfere with the exercise by the states of their proper functions, it would not be permissible for the United States to take land actually used and required by a state or one of its subdivisions for public purposes, merely as a matter of convenience; but as, in case of conflict, the federal powers are supreme, land necessary for the performance of its proper functions could be taken by the United States, however it was used by a state." 10 R. C. L. 24 (1915). Cf. also, NICHOLS, *EMINENT DOMAIN* 23-30 (1909).

⁸ In *Missouri ex rel. Camden County v. Union Electric Light & Power Co.*, (D. C. Mo. 1930) 42 F. (2d) 692, the defendant, a federal agency, given power by the federal government to condemn land to erect a dam on a navigable stream, was held entitled to condemn land then used for a school district, a court house, and a county jail. *United States v. Jotham Bixby Co.*, (D. C. Cal. 1932) 55 F. (2d) 317; *C. M. Patten Co. v. United States*, (C. C. A. 9th, 1932) 61 F. (2d) 970 at 972.

⁹ *United States v. Southern Power Co.*, (C. C. A. 4th, 1929) 31 F. (2d) 852; *Masonic Cemetery Assn. v. Gamage*, (C. C. A. 9th, 1930) 38 F. (2d) 950, 71 A. L. R. 1027 at 1040; *City of Norton v. Lowden*, (C. C. A. 10th, 1936) 84 F. (2d) 663. The rule was also applied to a county in *Board of Commissioners for Clarendon County v. Holliday*, 182 S. C. 510, 189 S. E. 885 (1937).

¹⁰ Cf. *United States v. Southern Power Co.*, (C. C. A. 4th, 1929) 31 F. (2d) 852. The circuit court there held that the act of Congress authorizing condemnation of land for forestry purposes did not reveal the intention of Congress to appropriate land used for power transmission lines. There was no real showing, however, that the uses were inconsistent and that the land was needed to carry out the federal purpose.

¹¹ Annotation, 71 A. L. R. 1040 (1931).

¹² *Campbell v. City of Kansas*, 102 Mo. 326, 13 S. W. 897 (1890).

granting that Congress may authorize condemnation of property being used within a state as a cemetery, if it be necessary to carry out a congressional power, it is submitted that the intention of Congress to appropriate the cemetery involved in the instant case was properly expressed. Furthermore, sound policy would seem to favor this result in view of the extent and purpose of the National Industrial Recovery Act.

Robert P. Kneeland