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CONSTITUTIONAL LAW — EMINENT DOMAIN — POWER OF FEDERAL GOVERNMENT TO CONDEMN LAND FOR SLUM CLEARANCE PROJECT — In proceedings by the United States government to condemn certain lands in the city of Louisville for the purpose of a slum clearance and low cost housing project, several property owners demurred to the condemnation petitions as being beyond the constitutional powers of the federal government. Although the United States contended that the property was being taken for a public use, in the sense of general public advantage, and that the project was a valid expenditure of public funds for the general welfare, it was *held* that this condemnation was not within the power of the federal government. *United States v. Certain Lands in City of Louisville, Jefferson County, Ky.*, (D. C. W. D. Ky. 1935) 9 F. Supp. 137.

The power of the United States government to use eminent domain proceedings in carrying out any of its ordinary governmental functions seems clearly settled¹ although the right is conferred in the Constitution only by implication from the provision "nor shall private property be taken for public use, without just compensation."² Apparently the limitations affecting the exercise of the power on the part of the federal government, apart from the compensation provision and procedural requirements under the Fifth Amendment, are contained

¹ *United States v. Certain Lands in City of Louisville, Jefferson County, Kentucky*, (D. C. W. D. Ky. 1935), 9 F. Supp. 137 at 138.

² United States Constitution, Fifth Amendment.

in the scope of what may be called a "public use"³ and the extent of the federal power to tax and spend tax money.⁴ The power to tax and appropriate money is derived chiefly from Article I, section 8, of the Constitution which confers the power to "lay and collect Taxes . . . to pay the Debts and provide for the common Defence and general Welfare of the United States." Although some earlier writers express the view that the "general welfare" clause adds nothing to the tax power beyond raising money for functions expressly provided for elsewhere in the Constitution,⁵ a more realistic view would seem to be that a wide discretion is thereby given to Congress with respect to purposes for which taxes may be raised and spent.⁶ It seems impossible to view the expenditures which have been made of tax money for the geological and geodetic surveys, for the relief of unfortunate sufferers in other countries, and the extensive advisory and research functions of the Department of Agriculture⁷ and the Department of Labor, without concluding that the tax power has long been used to provide for the general welfare in a broad sense; sufficiently broad to include expenditures for the relief of the miserable, unhealthy housing conditions in the nation's slum areas.⁸ However, unless the extreme position is taken that Article I, section 8 gives a general power to legislate for the general welfare, rather than merely to tax for that purpose,⁹ authority to use eminent domain for this particular purpose

³ *United States v. Certain Lands in City of Louisville, Jefferson County, Kentucky*, (D. C. W. D. Ky. 1935) 9 F. Supp. 137 at 138; 1 NICHOLS, *EMINENT DOMAIN*, 2nd ed., 126 ff. (1917).

⁴ CORWIN, *THE TWILIGHT OF THE SUPREME COURT* 149 ff. (1934); GOODNOW, *SOCIAL REFORM AND THE CONSTITUTION* 292 and esp. 317 ff. (1919).

⁵ This seems to have been the view of many of the members of the Constitutional Convention; see WARREN, *THE MAKING OF THE CONSTITUTION* 464-479 (1928); Culp, "Creation of Government Corporations by the National Government," 33 *MICH. L. REV.* 473 at 501-502 (1935).

⁶ CORWIN, *THE TWILIGHT OF THE SUPREME COURT* 149-179 (1934). It is possibly significant that the chapter referred to is entitled "The Breakdown of Constitutional Limitations — The Spending Power." See Nicholson, "The Federal Spending Power," 9 *TEMPLE L. Q.* 3 at 10 (1934); Culp, "Creation of Government Corporations by the National Government," 33 *MICH. L. REV.* 473 at 506, 511 (1935).

⁷ See WANLASS, *THE UNITED STATES DEPARTMENT OF AGRICULTURE* (1920). Reference might also be made to expenditures for the census, the Fisheries Bureau, the Bureau of Mines, and those made in aid of education. These are discussed in Nicholson, "The Federal Spending Power," 9 *TEMPLE L. Q.* 3 at 10 ff. (1934); CORWIN, *THE TWILIGHT OF THE SUPREME COURT* 149-179, esp. 169 ff. (1934). See also a book by Charles Warren with the very illuminating title, *CONGRESS AS SANTA CLAUS; OR, NATIONAL DONATIONS AND THE GENERAL WELFARE CLAUSE OF THE CONSTITUTION* (1932).

⁸ This conclusion was strongly urged by GOODNOW, *SOCIAL REFORM AND THE CONSTITUTION* 317-328 (1911), and the subsequent course of federal expenditures would seem an even stronger indication. Cf. Black, "Socialism and the Constitution," 28 *ILL. L. REV.* 313 at 328 (1933): "The general welfare limitation is really no limitation at all. It has been interpreted to mean that whatever Congress deems to be for the general welfare is a legitimate subject of expenditure."

⁹ LAWSON, *THE GENERAL WELFARE CLAUSE* (1926), argues strongly for this view. But see the discussions cited in note 7, *supra*.

must be sought elsewhere. Apart from the funds to pay for the property, the requirement is made that the condemnation be for a "public use."¹⁰ The court in the principal case took the position that this restricted the power to securing land for ordinary governmental functions, as for court houses and barracks, or for a use which would be open to at least a reasonable part of the public, as a matter of right.¹¹ This is the view taken by many state courts;¹² but the decisions of the United States Supreme Court seem to warrant a broader view, upholding as they do condemnation in a number of cases in which the immediate user of the condemned land would be a private party, without a general right of use in the public, upon a showing that a general benefit to the public would result. These cases involved condemnation of land for mills,¹³ mines,¹⁴ irrigation projects,¹⁵ and drainage of land;¹⁶ it is submitted that the public welfare or advantage, in the essential phases of public health, safety and crime prevention, would be as well served by slum clearance projects as by any of these, and that the necessity for the use of eminent domain is as great. If condemning land for a national memorial,¹⁷ or simply to save buildings erected by the government on leased land,¹⁸ can be called condemning for a public use, and the expenditures

¹⁰ *United States v. Certain Lands in City of Louisville, Jefferson County, Kentucky*, (D. C. W. D. Ky. 1935) 9 F. Supp. 137 at 138 (1935); 1 NICHOLS, EMINENT DOMAIN, 2d ed., 114 ff. (1917). The requirement seems to have been implied from the clause of the Fifth Amendment to the federal Constitution, and is found in most state constitutions, that private property should not be taken for public use without just compensation; due process conceptions have also been relied upon to some extent.

¹¹ 9 F. Supp. 137 at 138-142 (1935).

¹² *Arnsperger v. Crawford*, 101 Md. 247, 61 Atl. 413, 70 L. R. A. 497 (1905); *Healy Lumber Co. v. Morris*, 33 Wash. 490, 74 Pac. 681, 63 L. R. A. 820 (1903); *Board of Health v. Van Hoesen*, 87 Mich. 533, 49 N. W. 894, 14 L. R. A. 114 (1891); *Matter of Mayor, etc., of New York*, 135 N. Y. 253, 31 N. E. 1043, 31 Am. St. Rep. 825 (1892). For many more cases see 1 NICHOLS, EMINENT DOMAIN, 2d ed., 128-130 (1917).

¹³ *Head v. Amoskeag Mfg. Co.*, 113 U. S. 9, 5 Sup. Ct. 441 (1885). This decision was placed upon the special grounds that the state might under the police power regulate the use of a stream by joint owners of rights therein. But the result upheld was a right of one riparian owner to flow the land of another without the latter's consent, on payment of just compensation, for mill purposes. *Cf. Otis Co. v. Ludlow Mfg. Co.*, 201 U. S. 140, 26 Sup. Ct. 353 (1906).

¹⁴ *Strickley v. Highland Boy Gold Mining Co.*, 200 U. S. 527, 26 Sup. Ct. 301 (1906).

¹⁵ *Clark v. Nash*, 198 U. S. 361, 25 Sup. Ct. 676 (1905); *Fallbrook Irrigation Dist. v. Bradley*, 164 U. S. 112, 17 Sup. Ct. 56 (1896). See also *Hairston v. Danville & W. Ry.*, 208 U. S. 598, 28 Sup. Ct. 331 (1908), which upheld condemnation of land for a spur railroad track leading to a private plant, but which might also be used for car storage.

¹⁶ *O'Neill v. Leamer*, 239 U. S. 244, 36 Sup. Ct. 54 (1915).

¹⁷ *United States v. Gettysburg Electric Ry.*, 160 U. S. 668, 16 Sup. Ct. 427 (1896).

¹⁸ *Old Dominion Land Co. v. United States*, 269 U. S. 55, 46 Sup. Ct. 39 (1925). But compare with this the strictly geographical interpretation of "general" welfare, as opposed to local, by Albertsworth, in "Constitutional Issues of the Federal Power Program," 29 ILL. L. REV. 833 at 850 (1935).

of tax money therefore called expenditures for the general welfare, it would seem that the federal government should be constitutionally able to condemn land for the clearance of slums.

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