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The federal government, pursuant to authorizing statutes,[1] sought to condemn defendant's land, alleging that it was needed as a source of fill for a section of the National System of Interstate and Defense Highways. Defendant offered proof demonstrating that commercial fill could easily be purchased within the immediate area,[2] that it was therefore not necessary for the government to condemn any land in order to complete the construction of the highway, and that his land was zoned "light industrial" and was thus ideally suited for future development. Employing the usual stringent proof requirements, the court granted the government's motion for summary judgment, on the ground that purely economic considerations will justify the exercise of the federal eminent domain power.[3]

When the federal courts review a taking of property under the eminent domain power,[4] they are confronted with two questions: whether the taking was for a public use,[5] and whether it was neces-

* 233 F. Supp. 544 (W.D. Mich. 1964).

1. 46 Stat. 1421-22 (1931), 23 U.S.C. § 107, 40 U.S.C. §§ 258(a)-258(e) (1964); 25 Stat. 357 (1888), 40 U.S.C. § 257 (1964). Under § 107, the Secretary of Commerce is authorized "for . . . purposes in connection with the prosecution of any project for the construction . . . of any section of the Interstate System . . . to acquire . . . interests in lands by . . . condemnation." Section 257 permits the designated officer to acquire the land "whenever in his opinion it is necessary or advantageous to the Government to do so." This section has been interpreted as enabling legislation which can be utilized only when other congressional authorization has been proclaimed. Barnidge v. United States, 101 F.2d 295 (8th Cir. 1939); United States v. Threlkeld, 72 F.2d 464 (10th Cir.), *cert. denied*, 293 U.S. 620 (1934).

2. In order to reach defendant's land, which was located approximately one mile from the construction site, the government was required to condemn an easement over the land situated between the highway and defendant's property. A commercial sand and gravel pit was situated about 700 feet past defendant's land. Interview with defense counsel in Lansing, Michigan, February 12, 1965. If the land were contiguous to the highway, then it is undisputed that the government would be able to enter it in order to condemn materials required for highway construction. See 2 NICHOLS, EMINENT DOMAIN § 7.5121 (3d ed. 1950); *cf.* Annot., 54 A.L.R.2d 1322 (1957).

3. United States v. Certain Parcels of Land, 233 F. Supp. 544 (W.D. Mich. 1964) (hereinafter cited as principal case).

4. The power of eminent domain is generally considered to be inherent in the sovereign, rather than a right created by the fifth amendment or an implied power of the government. United States v. Gettysburg Elec. Ry., 160 U.S. 668 (1896); Kohl v. United States, 91 U.S. 367 (1875). Although the power is inherent, it may not be exercised until Congress has passed appropriate legislation. Chappell v. United States, 160 U.S. 499 (1896). It has been contended that the fifth amendment precludes an exercise of the power unless there is physical use of the property by the public. LEWIS, EMINENT DOMAIN §§ 257-58 (3d ed. 1909). This so-called "narrow view" has been rejected by modern courts. See 2 NICHOLS, *op. cit. supra* note 2, §§ 7.2-7.224.

5. The scope of the public-use requirement has been substantially broadened in the past ten years. In Berman v. Parker, 348 U.S. 26 (1954), Mr. Justice Douglas, speaking for a unanimous Court, in effect equated "public use" with "public purpose." Having found that the District of Columbia Redevelopment Act was a constitutional exercise

sary in order to effectuate that public use.[6] Once the courts are satisfied that the public-use requirement has been met, they invariably approve the proposed condemnation, reasoning that the administrative determination of necessity is conclusive upon them absent an arbitrary, capricious, or bad faith exercise of administrative judgment.[7] A few federal courts appear to treat the administrative determination of necessity as controlling under any circumstances,[8] but even these courts often impliedly recognize the limitations expressly enunciated in the majority holdings.[9] In any event, there exists a marked reluctance on the part of the federal judiciary to overturn an administrative finding of necessity.[10] This

of the police power because it was for a valid public purpose, he concluded that the power of eminent domain was a legitimate means of effectuating the ends of the police power. *Id.* at 33. Even before *Berman*, however, the Court had accorded Congress substantial latitude within the bounds of the public use requirement. In Old Dominion Land Co. v. United States, 269 U.S. 55, 66 (1925), Mr. Justice Holmes stated that the congressional declaration was "entitled to deference until it [was] shown to involve an impossibility." In addition, the public benefit need be only remotely important; private individuals may be the primary beneficiaries of the taking. Clark v. Nash, 198 U.S. 361 (1905).

6. See, *e.g.*, Puget Sound Power & Light Co. v. Public Util. Dist. No. 1, 123 F.2d 286 (9th Cir. 1941).

7. See, *e.g.*, United States v. Threlkeld, 72 F.2d 464 (10th Cir.), *cert. denied*, 293 U.S. 620 (1934). If Congress directly exercises the eminent domain power, then the determination is conclusive because the courts would be unable to inquire into congressional motives under the doctrine of separation of powers. Lavine, *Extent of Judicial Inquiry Into Power of Eminent Domain*, 28 So. CAL. L. REV. 369, 378 (1955). References to political considerations of comity are also present in cases involving administrative decisions. United States v. 40.75 Acres of Land, 76 F. Supp. 239 (N.D. Ill. 1948). In this excellent opinion, after an extensive review of the federal condemnation cases involving the question of arbitrary and capricious conduct on the part of administrative officials, the court concluded that it was difficult to ascertain what burden of proof stare decisis placed upon the landowner. Therefore, by analogy to the law of torts, the court suggested that an actual malevolent purpose would have to be demonstrated by the landowner in order to set aside the taking.

8. See generally Marquis, *Constitutional and Statutory Authority To Condemn*, 43 IOWA L. REV. 170 (1958).

9. See, *e.g.*, United States v. 1096.84 Acres, 99 F. Supp. 544 (W.D. Ark. 1951). Without such a limitation, it would seem that "the power . . . in the hands of thoughtless and over-avaricious officials could be used for improper and coercive methods." United States v. 6576.27 Acres of Land, 77 F. Supp. 244 (D.N.D. 1948). However, once the courts find that there is a necessity for a taking, then the amount and the estate to be taken are solely within the discretion of the administrative agency. Shoemaker v. United States, 147 U.S. 282, 298 (1893); Simmonds v. United States, 199 F.2d 305, 306-07 (9th Cir. 1952).

10. Because of the judicial deference accorded administrative decisions, there is apparently not one instance in which the federal courts have not ultimately decreed that the taking by the government was necessary in effectuating the public use. See United States *ex rel.* T.V.A. v. Welch, 327 U.S. 546, 557 (1946) (Frankfurter, J., concurring); 1964 DUKE L.J. 123, 131. Instances where the lower courts have found the taking to be arbitrary and capricious have been uniformly reversed by the appellate courts. See, *e.g.*, United States v. 209.25 Acres of Land, 108 F. Supp. 454 (W.D. Ark. 1952), *rev'd sub nom.* United States v. Willis, 211 F.2d 1 (8th Cir.), *cert. denied*, 347 U.S. 1015 (1954); United States v. Certain Land, 55 F. Supp. 555 (D. Mo. 1944), *aff'd sub nom.* United States v. Carmack, 151 F.2d 881 (8th Cir. 1945), *rev'd*, 329 U.S. 230 (1946). Many

reluctance is apparently attributable to the courts' recognition that two related factors are predominant in the typical condemnation proceeding. First, *someone's* land must be condemned so that the proposed project may be undertaken. For example, when the federal government contemplates the construction of a dam, it may consider several locations in order to ascertain which site would best satisfy its goal of flood control or electric power supply. Once the decision as to location is made, however, the particular lands upon which the dam will be constructed and over which the backflow will pass must necessarily be acquired before other steps may be taken. Second, the government generally exercises its power of eminent domain in projects of immense scope and complexity, such as urban renewal or highway construction, in which administrative expertise plays a dominant role in site selection, and over which the judiciary is generally poorly prepared to pass judgment.[11]

This appreciation of the difficulties inherent in their review of condemnation proceedings has led the federal courts to impose a heavy burden of proof upon the landowner in order to demonstrate that the taking was not necessary: the landowner is required to prove the subjective malfeasance of the responsible government official.[12] Furthermore, since the relevant statute generally requires that the administrative edict be handed down by the head of the administrative agency involved,[13] the official whose malfeasance must be

of the modern condemnation cases were brought by the Secretary of War during the Second World War. At that time the courts were understandably hesitant to impede the war effort, and therefore avoided second-guessing the intricate military decisions which required expeditious condemnation. See, *e.g.*, United States v. 243.22 Acres of Land, 129 F.2d 678, 683 (2d Cir. 1942) (Frank, J.): "The decision of the Secretary of War is not open to judicial inquiry. That is fortunate, for if it were open, the ensuing delay would delight our country's enemies."

11. "In passing upon the authority of the T.V.A. we would do violence to fact were we to break one inseparable transaction into separate units. We view the entire transaction as a single integrated effort on the part of T.V.A. to carry on its congressionally authorized functions." United States *ex rel.* T.V.A. v. Welch, 327 U.S. 546, 552-53 (1946) (land cut off by inundation of highway condemned by T.V.A. and given to National Park Service in lieu of more expensive construction of new highway to isolated land); United States v. 40.75 Acres of Land, 76 F. Supp. 239 (N.D. Ill. 1948) (choice of site is an engineering decision rather than a judicial one); *cf.* United States v. Commodore Park, Inc., 324 U.S. 386, 392 (1945). See Lavine, *supra* note 7, at 376.

12. See United States v. Meyer, 113 F.2d 387 (7th Cir. 1940). A mere assertion that the official acted arbitrarily, capriciously, or in bad faith is not sufficient to transmute what was a legislative question into a judicial one. United States v. Mischke, 285 F.2d 628 (8th Cir. 1961). The presumption that the government official acted validly is given great weight by the courts. United States v. 1096.84 Acres, 99 F. Supp. 544 (W.D. Ark. 1951). Because the question is one of bad faith, not bad judgment, the landowner must charge facts which suggest actual malevolence by the officer to the complaining party. United States v. Southerly Portion of Bodie Island, 114 F. Supp. 427, 430 (E.D.N.C. 1953); *cf.* Mississippi Power & Light Co. v. Blake, 236 Miss. 207, 221, 109 So. 2d 657, 662 (1959). See note 7 *supra*.

13. For example, under the National System of Interstate and Defense Highways Act, which was involved in the principal case, the Secretary of Commerce is the only official who can exercise the condemnation power. 46 Stat. 1421-22 (1931), 23 U.S.C. § 107 (1964).

proved is almost invariably of high rank and will probably have had little, if any, contact with the actual decision-making process.

The court in the principal case does not appear to have realized that the two predominant factors which have caused the federal courts to refrain from an extensive review of the administrative determination of necessity in the typical condemnation case—necessity and administrative expertise—were not present in the proceedings before it.[14] As the defendant contended, it was not essential for the government to condemn any land at all in order to procure the fill dirt needed for the construction of the highway, since it could easily have purchased fill dirt from a nearby commercial sand and gravel contractor.[15] Moreover, because the government's decision to condemn defendant's land was based upon an elementary decision to conserve money, the factor of administrative expertise was similarly lacking.[16]

Since these same factors form the basis for the rigorous burden of proof usually placed on the landowner, their absence in the principal case suggests that the utilization of a more relaxed standard, perhaps a balancing-of-interests test, would have been more appropriate.[17] Under such a standard the landowner would be required to demonstrate both that the government's taking was exclusively for economic reasons[18] and that his interest in retaining the property sufficiently

14. Since the construction of highways has long been a classic example of an essential governmental activity, there seems no doubt that the court was correct in its determination that the public-use requirement was met. See Helstad, *Recent Trends in Highway Condemnation Law*, 1964 WASH. U.L.Q. 58. The construction of limited access highways has created similar problems, for in some instances a landowner's property will be "landlocked" when the highway slices his land in two. In such cases, the courts have generally found that the right of way for an access road is a by-product of the highway construction, which is admittedly for a public purpose. Luke v. Massachusetts Turnpike Authority, 337 Mass. 304, 149 N.E.2d 225 (1958). *Contra*, Libbe v. Imhoff, 11 Ill. App. 2d 344, 137 N.E.2d 85 (1956).

15. In the principal case the court relied heavily upon Harwell v. United States, 316 F.2d 791 (10th Cir. 1963), in which a tract of land was condemned for a source of stone in the construction of a dam and reservoir. Although the court in the principal case admitted that the precise question of whether a purely economic motive would suffice to sustain a taking was not directly confronted by the *Harwell* court, it felt that such economic considerations underlay the decision and led to the "inescapable result . . . that the [government's] motion for summary judgment must be granted." Principal case at 546. It seems that the court may have overlooked what could be a crucial distinction between the fact situations presented in *Harwell* and in the principal case: that the stone required for the construction in *Harwell* may not have been available in the open market and that the government may have been forced, as a result, to condemn a tract of land in order to secure the necessary materials.

16. In other instances involving relatively uncomplicated administrative decisions, such as the determination by an administrative agency that certain matter is unmailable because it is fraudulent or obscene, the courts have been willing to review the administrative action. See Jeffries v. Olesen, 121 F. Supp. 463 (S.D. Cal. 1954). See Lavine, *supra* note 7, at 378.

17. See Note, *Public Use as a Limitation on Eminent Domain in Urban Renewal*, 68 HARV. L. REV. 1422 (1955); 40 IOWA L. REV. 659 (1955).

18. If the government's decision to condemn were based upon other factors, such as

outweighed the amount which the government would save by condemning his land.[19]

It has been contended that the interest of the property holder is sufficiently protected under the stricter standard employed in the principal case because the fifth amendment requires that just compensation be paid.[20] However, in certain instances the compensation offered by the government is at least partially inadequate because for practical reasons of valuation certain intangible interests emanating from the ownership of property are necessarily excluded from the award of damages.[21] The federal courts have generally subordinated these considerations in the typical condemnation proceeding in order to facilitate the effectuation of massive public programs.[22] State courts, however, have been somewhat more responsive to such considerations,[23] perhaps in part because of the reduced complexity of the programs which state and local governments attempt to implement. When reviewing a taking by a municipality or a local school board, for example, state courts have apparently equated their expertise with that of the agency, and have consequently scrutinized the necessity of the taking more carefully.[24] When con-

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distances which would have to be traveled in order to secure the fill commercially or the reliability of the commercial operators in the surrounding area, it could be plausibly argued that the degree of administrative expertise involved in such decisions was sufficient to preclude extensive judicial inquiry.

The government in the principal case relied exclusively on cost justifications. Fill obtained by condemning the defendant's land would cost three or four cents per yard, while the current market price was at least twenty cents per yard. Because the government needed approximately 1,200,000 yards of borrow, the saving would probably have been several hundred thousand dollars. Interview with defense counsel in Lansing, Michigan, February 12, 1965.

19. It should be noted that this standard is similar to the substantive due process test enunciated in Nebbia v. New York, 291 U.S. 502, 525 (1934).

20. See, *e.g.*, Berman v. Parker, 348 U.S. 26, 36 (1954); Marquis, *supra* note 8, at 185. *But see* 40 IOWA L. REV. 659, 662 (1955). See also Searles & Rapheael, *Current Trends in the Law of Condemnation*, 27 FORDHAM L. REV. 529 (1959).

21. Common examples of the types of interests which the courts have held to be non-compensable are the value of a business over and above the value of the land being taken—future profits, cost of preventing loss of trade, and moving costs. See Cromwell, *Some Elements of Damage in Condemnation*, 43 IOWA L. REV. 191 (1958); Crouch, *Valuation Problems Under Eminent Domain*, 1959 WIS. L. REV. 608. These costs are sometimes extensive, particularly when a business has been well established in a location for a number of years. See generally 1 ORGEL, VALUATION UNDER EMINENT DOMAIN §§ 72-76 (2d ed. 1953). In the principal case, any plans which the defendant may have had for future industrial development of his land would be non-compensable since such damages would be considered too remote.

22. See, *e.g.*, Arp v. United States, 244 F.2d 571 (10th Cir. 1957); United States v. 40.75 Acres of Land, 76 F. Supp. 239, 246 (N.D. Ill. 1948). *But see* District of Columbia Redev. Land Agency v. 70 Parcels of Land, 153 F. Supp. 840 (D.D.C. 1954) (discussion of other devices employed to protect property owner's interest).

23. See United States v. 3.65 Acres of Land, 53 F. Supp. 319, 323 (E.D. Mo. 1944). *But see* Weiss, *Is the Power of Eminent Domain Dangerous Under the Urban Renewal Act?*, 57 DICK. L. REV. 326 (1953).

24. Winger v. Aires, 371 Pa. 242, 89 A.2d 521 (1952) (condemnation by school board

demnation is not actually necessary in order to satisfy the government's needs, it would seem that the presence of these non-compensable losses should assume even greater importance.

If the government can condemn land for solely economic reasons, the use of the eminent domain power can be vastly expanded as long as the public-use requirement is met and just compensation paid. Logically, under the holding in the principal case the government could condemn a private forest to obtain lumber, or a private pond to obtain water, or a private beach to obtain sand for concrete. Although it is extremely doubtful that the courts would allow such an expansion of the power, its theoretical possibility should warn the judiciary that a taking based solely upon economic necessity is qualitatively different from the taking in the typical condemnation case and that this difference suggests that separate standards should be employed in their review.

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held to constitute an abuse of discretion); Annot., 54 A.L.R.2d 1322 (1957) (cemeteries). In a few states, the legislatures have established quasi-judicial procedures for determining the necessity of particular highway takings. See Helstad, *supra* note 14, at 61. In a minority of jurisdictions, the courts will hold a de novo hearing if the taking by an urban renewal agency is merely alleged to be arbitrary and capricious. See Offen v. City of Topeka, 186 Kan. 389, 350 P.2d 33 (1960); Bristol Redev. & Housing Authority v. Denton, 198 Va. 171, 93 S.E.2d 288 (1956). On the other hand, most courts will allow review only if the decision appears baseless and irrational. Kaskel v. Impelliterri, 306 N.Y. 73, 115 N.E.2d 659 (1953), *cert. denied*, 347 U.S. 934 (1954). Apparently only one court has ruled that the determination of the agency is conclusively controlling, Allen v. City Council, 215 Ga. 778, 113 S.E.2d 621 (1960), and that holding has been severely criticized. See Weinstein, *Judicial Review in Urban Renewal*, 21 FED. B.J. 318, 329 (1961); 74 HARV. L. REV. 799 (1961). See generally Note, *State Constitutional Limitations on the Power of Eminent Domain*, 77 HARV. L. REV. 717 (1964).

There also seems to be a tendency for the courts to scrutinize more closely the takings of private corporations. It has been suggested that this distinction is based upon the aura of official dignity which surrounds takings by governmental agencies. Lavine, *supra* note 7, at 380.