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EMINENT DOMAIN RESEARCH NOTES 1958-1962

Eminent Domain Under a Treaty:

A Hypothetical Supreme Court Opinion

by Eberhard P. Deutsch • *of the Louisiana Bar (New Orleans)*

Pending disputes as to the advisability of limiting the internal legislative effect of treaties have recently been stimulated by a pamphlet entitled "Peace Through Disarmament and Charter Revision", published in February of this year by Mr. Grenville Clark, of the New York Bar, and Professor Louis B. Sohn of the Harvard Law School, and widely circulated throughout the world. They suggest wholesale revision of the United Nations Charter to "put teeth" into a detailed plan for enforced disarmament. One of their proposals is for establishment of a United Nations Atomic Energy Authority with power to acquire all nuclear materials in every country throughout the world by condemnation proceedings in the courts of the member nations. In this hypothetical opinion, Mr. Deutsch considers the validity, under our present constitutional system, of such a treaty clause providing for expropriation of land containing fissionable materials through proceedings in the national courts of the locus rei sitae.

This controversy arises from certain provisions of the Atomic Energy Convention, a multi-partite treaty among various member nations of the United Nations. The Convention was signed in behalf of this country on January 12, 1960, was ratified by the Senate on June 18 of the same year, and was proclaimed by the President on June 27, 1960.

This treaty is the outcome of continued efforts, following on the heels of the first atomic explosion in 1945, to obtain some effective supra-national control over the use of atomic energy, particularly for destructive and warlike purposes.[1]

A feature of all of these efforts has been the idea that the supra-national control body must have absolute authority over all sources of uranium and other materials peculiarly used in the production of atomic energy.

The Convention at issue creates a fifteen-member Atomic Energy Authority as an integral body of the United Nations. Details of the organization of the Authority are by and large irrelevant to the questions presented in this case.

It may simply be noted that this country, in common with each other permanent member of the Security Council of the United Nations is permanently represented by one member of the Authority; that no nation may be represented by more than one member; and that the Authority is not responsible to this or any other individual nation, but only to the United Nations itself.

We need not stop to describe the complex of powers and functions inherent in the Authority. The exercise of but one of its functions is here concerned.

Conformably to the concepts of those who have led the movement of which the Convention is the culmination, it is stated as one of the underlying principles of the Convention that the Authority shall ultimately control all sources of uranium and other materials peculiarly adapted for use in the production of atomic energy.

Such control is to be achieved through acquisition, by the Authority in its discretion, of actual ownership of land constituting such sources, as they are defined technically in the Convention. The Convention provides, broadly, that ownership is to be obtained through a process in the nature of condemnation or eminent domain proceed-

1. For partial documentation of these efforts, see *Agreed Declaration of November 15, 1945*, issued by the President of the United States and the Prime Ministers of the United Kingdom and of Canada; joint recommendation of the United States, the United Kingdom and the Soviet Union, at the Moscow Conference, on December 27, 1945; Baruch, *International Control of Atomic Energy; Growth of a Policy*, Department of State Publication 2702, October, 1946, and *Speech by Bernard Baruch*, Department of State Publication 2681, October 8, 1946; Report of the Joint Committee on Atomic Energy, *Hydrogen Bomb and International Controls: Technique and Background Information*, 81st Cong., 2d Sess., July, 1950; Clark and Sohn, PEACE THROUGH DISARMAMENT AND CHARTER REVISION (1956); and address by President Eisenhower before the General Assembly of the United Nations Organization, Department of State Publication 5314, General Foreign Policy Series 85.

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CALIFORNIA LAW REVISION COMMISSION
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T E N T A T I V E

RECOMMENDATION AND PROPOSED LEGISLATION

relating to

Pretrial Conferences and Discovery in Eminent Domain Proceedings

NOTE: This is a tentative recommendation and proposed statute prepared by the California Law Revision Commission. It is not a final recommendation and the Commission should not be considered as having made a recommendation on a particular subject until the final recommendation of the Commission on that subject has been submitted to the Legislature. This material is being distributed at this time for the purpose of obtaining suggestions and comments from the recipients and is not to be used for any other purpose.

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PROPOSED SOUTH DAKOTA CONSTITUTIONAL AMENDMENTS: 1962

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Since the adoption of the South Dakota Constitution in 1889, there has been a total of 128 amendments offered to the electorate at all but three of the thirty-seven general elections since statehood. This year in November voters of South Dakota will again be asked to express their views on three separate proposals for changes in the wording of their basic law.

If the past is any guide, the three proposals offered in 1962 stand a slightly better than even chance of adoption. Of the 128 amendments submitted since statehood, 61 were rejected and 67 approved. Recently the odds for approval have improved. In 1960 three of the four proposed amendments were approved, as follows: (1) removed the prohibition against certain county officials being eligible for election to more than two successive two-year terms; (2) reconstituted the Board of Pardons as a Board of Pardons and Paroles, shifted the responsibility for paroling of prisoners to the new board, and required the Governor to secure favorable recommendation from the new Board precedent to reprieves, commutations, and pardons; and (3) authorized the Legislature to provide for continuity of state and local governments during periods of emergency resulting from disasters caused by enemy attack. Rejected in 1960 was a proposal to limit to two the number of state senators which may be elected from any one senatorial district.

The constitutional amendment process in South Dakota is, compared with that of many states, a relatively simple and straight-forward one. Proposals are placed on the general election ballot through adoption of a joint resolution by a majority of the members of each house of the Legislature; joint resolutions are not subject to gubernatorial veto. They are ratified by a favorable vote of a majority of the electors voting on each proposal in the election, and become effective immediately upon ratification (unless the amendment provides for a later effective date). The only other way the Constitution may be changed is through the holding of a constitutional convention—a method which, though often proposed, has never been used.

Three proposed amendments, outlined below, were endorsed through joint resolutions adopted by the Thirty-seventh Legislature, and will appear on the ballot on November 6, 1962. The sequence in which they will appear was determined by lot in a drawing supervised by the Secretary of State.

AMENDMENT A

Eminent Domain

The first constitutional question which will appear on the November ballot relates to the taking or damaging of private property for public use. Under the present South Dakota Constitution private property may not be damaged or taken under condemnation procedures until just payment determined by a jury for the property has been given. The amendment would allow the state, under its power of eminent domain, to proceed with the taking of property for public use, or damaging it, for which the private property owner is guaranteed compensation according to legal procedures determined by the Legislature. The issues on which the electorate will vote, reduced to their essentials, are these: Should property to be taken or damaged for public use be paid for and the title transferred before a public improvement on it begins, or, may the public use begin when deemed necessary by the appropriate public officials, and compensation be determined afterwards? And, shall the Legislature be authorized to establish procedures—possibly through some method other than jury trial— for determining the value of the property taken or damaged?

The proposed amendment on this subject, submitted under Senate Joint Resolution No. 8, 1961, has never been before the electorate before, although similar proposals have been previously introduced in the Legislature. If approved, it will amend Section 13 of Article VI by striking two restraints on the state's power of eminent domain: first, that in every case of taking and damaging of property, just compensation shall be determined by a jury; and second, that the compensation determined shall be paid "as soon as it can be ascertained and before possession is taken." The first of these, under the proposal, would be changed to allow alternate methods for determination of just compensation (retaining, however, the ultimate right of appeal for jury trial—although whether the wording of the proposal guarantees such retention has been questioned by some legal authorities) and the second would be eliminated. If adopted, the amendment would become effective immediately.

Background

The basis for concern for the "right of entry" amendment (as it has been commonly called) is the need for efficient methods by which public improvements can be begun. Although historically the right of the sovereign to take private property was without limitation, this right has been tempered by limitations—such as the section of the South Dakota Constitution in question—and the concern of the 1961 Legislature was to present to the people a proposal which will allow them to decide whether there is a proper balance between public necessity and limitations.

The Case of *Berman* v. *Parker:*

Public Housing and Urban Redevelopment

by Jacob M. Lashly • *of the Missouri Bar (St. Louis)*

■ **Berman v. Parker, decided by the Supreme Court last November, dealt with the constitutionality of a District of Columbia statute permitting the taking of private property for slum clearance. The property in question, however, was not a slum; it was being condemned so that the entire area could be rebuilt in accordance with the land-use plan of the National Capital Planning Commission. The Supreme Court upheld the validity of the statute. Mr. Lashly points out the great political implications of the decision.**

■ In *Berman* v. *Parker,* 348 U.S. 26, 75 S. Ct. 98, 99 L. ed. (Adv. p. 63), decided November 22, 1954, the judgment of a three-judge District Court for the District of Columbia was modified and, as modified, affirmed.

The decision and opinion passed over quietly, like the Fourth of July in a foreign country. Yet, it informed the country that we have come to the end of something, to the end of much that we have been accustomed to regard as precious and to suppose that we would never relinquish. The case involved an appeal from the District Court of the District of Columbia upon a challenge to the constitutionality of the Redevelopment Act of 1951, and the validity of the taking of certain property by the Redevelopment Land Agency of the District. The National Capital Planning Commission laid out a redevelopment district, a land use plan and certain project areas. Portions of the project area involved were "insanitary". Other portions were not. The project under consideration contained a department store, a retail hardware store, and other first-rate business improvements and residences whose owners objected to having their property demolished and turned over to others as apartment sites or for other construction which would accord with area programs of the District planners. The procedures involved the exercise of police power, enforced by condemnation, after the fashion of states.

The Fifth Amendment explicitly provides that private property shall not be taken without due process of law, and not for public use without just compensation.

The original concept of the sanctity of private property as an important incident to the blessings of liberty has been subjected to gradual fundamental changes brought to a climax in this case. Two world wars and one profound economic depression have accelerated the process. The broad sweep of the decision banishes all doubts and shores up the foundations for those reluctant to take the final step at any point. The taking of private property for war purposes often became necessary as a security measure; the extension of the police power and of the functions of eminent domain beyond anything previously conceived has been tolerated, slightly less cheerfully, as a relief measure. The *Berman* case marks the point of no turning back and leaves little doubt that the people have surrendered to the state something of great value, in an emotional sense, which has been cherished heretofore. In the universal concentration upon one emergency after another, the changes in concepts of the rights of property have come about almost unperceived. Like flakes of snow falling in the night, they drift noiselessly down in confused disorder, but in the morning there is the blanket of white.

Public *use* is changed to public *purpose,* or benefit. Obviously, private property taken for a public use would revert to its owner, or his heirs should the specific public use be terminated or abandoned. To avoid these consequences, the practice has been enlarged to permit the taking of the property in fee simple by condemnation. Thus there is no reverter. In the language of Mr. Justice Douglas speaking for the Court:

> The District Court indicated grave doubts concerning the Agency's right to take full title to the land as distinguished from the objectionable