G.R. No. 248061 – MORE ELECTRIC AND POWER CORPORATION, *Petitioner v.* **PANAY ELECTRIC COMPANY, INC.,** *Respondent*; and

G.R. No. 249406 – REPUBLIC OF THE PHILIPPINES, *Petitioner-Oppositor*, **MORE ELECTRIC AND POWER CORPORATION,** *Petitioner v.* **PANAY ELECTRIC COMPANY, INC.,** *Respondent.*

Promulgated:

September 15, 2020

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SEPARATE OPINION

PERLAS-BERNABE, *J.*:

I concur in the result.

At the onset, it must be highlighted that this case stemmed from a Petition for Declaratory Relief[1] assailing the constitutionality of Sections 10 and 17 of Republic Act No. (RA) 11212;[2] this is not an appeal from a ruling made by the trial court in the expropriation proceedings proper, wherein the propriety of the taking's public use will still be put at issue. In *National Power Corporation v. Posada*[3] (*National Power Corp.*), the Court described the two phases of expropriation proceedings as follows:

> Expropriation, the procedure by which the government takes possession of private property, is outlined primarily in Rule 67 of the Rules of Court. It undergoes two phases. The first phase determines the propriety of the action. The second phase determines the compensation to be paid to the landowner. x x x
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> > [In the first phase, the trial court] is concerned with **the determination of the authority of the plaintiff to exercise the power of eminent domain and the propriety of its exercise in the context of the facts involved in the suit.** It ends with an order, if not of dismissal of the action, "of condemnation declaring that the plaintiff has a lawful right to take the property sought to be condemned, **for the public use or purpose described in the complaint** x x x."
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> > x x x x[4] (Emphases supplied)

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1 See *ponencia*, pp. 3-4.

2 Entitled "AN ACT GRANTING MORE ELECTRIC AND POWER CORPORATION A FRANCHISE TO ESTABLISH, OPERATE, AND MAINTAIN, FOR COMMERCIAL PURPOSES AND IN THE PUBLIC INTEREST, A DISTRIBUTION SYSTEM FOR THE CONVEYANCE OF ELECTRIC POWER TO THE END USERS IN THE CITY OF ILOILO, PROVINCE OF ILOILO, AND ENSURING THE CONTINUOUS AND UNINTERRUPTED SUPPLY OF ELECTRICITY IN THE FRANCHISE AREA," approved on February 14, 2019.

3 755 Phil. 613 (2015).

4 Id. at 624.

Thus, it is not merely the amount of just compensation, **but the propriety of the taking itself**, which is up for judicial determination by the courts. Accordingly, the evaluation of the propriety of the taking is, in theory, a **judicial function**. As held in *National Power Corp.*:

> The power of eminent domain is an inherent competence of the state. It is essential to a sovereign. Thus, the Constitution does not explicitly define this power but subjects it to a limitation: that it be exercised only for public use and with payment of just compensation. **Whether the use is public or whether the compensation is constitutionally just will be determined finally by the courts**.[5] (Emphasis and underscoring supplied)

Generally, the propriety of an eminent domain taking is hinged on its "public use." This is implicit from Section 9, Article III of the 1987 Constitution which states that "**[p]rivate property shall not be taken for public use** without just compensation." The Court, however, reckoned that the exercise of the power of eminent domain is **also circumscribed by the due process clause of the Constitution**, *viz.*:

> In general, eminent domain is defined as "the power of the nation or a sovereign state to take, or to authorize the taking of, private property for a public use without the owner's consent, conditioned upon payment of just compensation." It is acknowledged as "an inherent political right, founded on a common necessity and interest of appropriating the property of individual members of the community to the great necessities of the whole community."
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> **The exercise of the power of eminent domain is constrained by two constitutional provisions: (1) that private property shall not be taken for public use without just compensation under Article III (Bill of Rights), Section 9 and (2) that no person shall be deprived of his/her life, liberty, or property without due process of law under Art. III, Sec. 1.**[6] (Emphasis supplied)

The term "public use" is undefined in the eminent domain clause of our Constitution. In this regard, the Court recognized that "there is no precise meaning of 'public use' and the term is susceptible of myriad meanings depending on diverse situations."[7]

Historically, there are two (2) views on this matter. The first is the narrow definition of public use – that is "**[t]he limited meaning attached to 'public use' is 'use by the public' or 'public employment,'** that 'a duty must devolve on the person or corporation holding property appropriated by right of eminent domain to furnish the public with the use intended, and that there must be a right on the part of the public, or some portion of it, or some public or quasi-public agency on behalf of the public, to use the property after it is

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5 Id. at 623.

6 *Barangay Sindalan, San Fernando Pampanga, rep. by Brgy. Capt. Gutierrez v. Court of Appeals*, 547 Phil. 542, 551 (2007), citing 26 Am Jur 2d 638.

7 Id.

condemned."[8] However, this narrow definition of "public use" being equivalent to the "use of the public" has been later superseded by a more expansive definition of the term **equating "public use" to "public purpose."**

In the United States, where we have patterned our own Constitution, the Supreme Court (SCOTUS), in *Kelo v. New London*[9] (*Kelo*), explained the evolution of the term "public use" as applied in eminent domain cases:

> [T]his "Court long ago rejected any literal requirement that condemned property be put into use for the general public." **Indeed, while many state courts in the mid-19th century endorsed "use by the public" as the proper definition of public use, that narrow view steadily eroded over time. Not only was the "use by the public" test difficult to administer (*e.g.*, what proportion of the public need have access to the property? at what price?), but it proved to be impractical given the diverse and always evolving needs of society. Accordingly, when this Court began applying the Fifth Amendment to the States at the close of the 19th century, it embraced the broader and more natural interpretation of public use as "public purpose."** Thus, in a case upholding a mining company's use of an aerial bucket line to transport ore over property it did not own, Justice Holmes' opinion for the Court stressed "the inadequacy of use by the general public as a universal test." *Strickley v. Highland Boy Gold Mining Co.*, 200 U. S. 527, 531 (1906). We have repeatedly and consistently rejected that narrow test ever since.[10] (Emphasis supplied)

As stated in *Kelo*, the SCOTUS has embraced the broad interpretation of public use as "public purpose," reasoning that not only was the "use by the public" test difficult to administer, but it was also impractical "given the diverse and always evolving needs of society." Thus, the SCOTUS has "repeatedly and consistently rejected that narrow test ever since."

In our jurisdiction, this Court has acceded to "[t]he more generally accepted view [which] sees **'public use' as 'public advantage, convenience, or benefit**, and that anything which tends to enlarge the resources, increase the industrial energies, and promote the productive power of any considerable number of the inhabitants of a section of the state, or which leads to the growth of towns and the creation of new resources for the employment of capital and labor, [which] contributes to the general welfare and the prosperity of the whole community.'"[11] In *Manapat v. Court of Appeals*,[12] this Court stated that "the 'public use' requisite for the valid exercise of the power of eminent domain is a flexible and evolving concept influenced by changing conditions. At present, it may not be amiss to state that **whatever is beneficially employed for the general welfare satisfies the requirement of public use.**"[13]

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8 Id. at 551-552.
9 545 U.S. 469 (2005).
10 See id.
11 *Barangay Sindalan, San Fernando Pampanga, rep. by Brgy. Capt. Gutierrez v. Court of Appeals*, supra note 6 at 552.
12 562 Phil. 31 (2007).
13 Id. at 53, citing *Estate of Jimenez v. PEZA*, 402 Phil. 271, 291 (2001).

However, it is well to point out that, at least in the United States, adherence to the expansive definition of "public use" as the standard for eminent domain takings has not gone without any strident dissent.

In the same case of *Kelo*, Justice Clarence Thomas (Justice Thomas) lamented that "[t]he Framers embodied that principle in the Constitution, **allowing the government to take property not for 'public necessity,' but instead for 'public use.'** Defying this understanding, the [SCOTUS] [has] replace[d] the Public Use Clause with a 'Public Purpose' Clause, (or perhaps the 'Diverse and Always Evolving Needs of Society' Clause) x x x."[14]

In addition to defying the "most natural reading of the clause," Justice Thomas also forewarned of the danger of the government taking one's private property and giving it to another private individual, whereby the taking may be legitimized because of "**the incidental benefits that might accrue to the public from the private use**," *viz.*:

> **The most natural reading of the Clause is that it allows the government to take property only if the government owns, or the public has a legal right to use, the property, as opposed to taking it for any public purpose or necessity whatsoever.** At the time of the founding, dictionaries primarily defined the noun "use" as "[t]he act of employing any thing to any purpose." 2 S. Johnson, A Dictionary of the English Language 2194 (4th ed. 1773) (hereinafter Johnson). The term "use," moreover, "is from the Latin *utor*, which means 'to use, make use of, avail one's self of, employ, apply, enjoy, etc." J. Lewis, Law of Eminent Domain §165, p. 224, n. 4 (1888) (hereinafter Lewis). **When the government takes property and gives it to a private individual, and the public has no right to use the property, it strains language to say that the public is "employing" the property, regardless of the incidental benefits that might accrue to the public from the private use.** The term "public use," then, means that either the government or its citizens as a whole must actually "employ" the taken property. See *id.*, at 223 (reviewing founding-era dictionaries).[15] (Emphases supplied)

Parenthetically, Justice Thomas reasoned that by defying the natural import of the term "public use," "we are afloat without any certain principle to guide us" since there is "no coherent principle limits what could constitute a valid public use x x x." In contrast, "**[i]t is far easier to analyze whether the government owns or the public has a legal right to use the taken property than to ask whether the taking has a 'purely private purpose** x x x.' Otherwise, "the Court [would] eliminate public use scrutiny of takings entirely."[16]

In the same vein, Justice Sandra Day O'Connor (Justice O'Connor), in *Kelo*, argued that by expanding the definition of "public use," the qualifying standard would lose any practical relevance since "**nearly any lawful use of**

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14 See Dissenting Opinion of Justice Thomas in *Kelo v. New London*, supra note 9.
15 See id.
16 See id.

real private property can be said to generate some incidental benefit to the public."[17] Accordingly, there would be no more "constraint on the eminent domain power," *viz.*:

> In moving away from our decisions sanctioning the condemnation of harmful property use, the Court today significantly expands the meaning of public use. **It holds that the sovereign may take private property currently put to ordinary private use, and give it over for new, ordinary private use, so long as the new use is predicted to generate some secondary benefit for the public—such as increased tax revenue, more jobs, maybe even aesthetic pleasure**. But nearly any lawful use of real private property can be said to generate some incidental benefit to the public. Thus, if predicted (or even guaranteed) positive side-effects are enough to render transfer from one private party to another constitutional, then the words "for public use" do not realistically exclude any takings, and thus do not exert *any* constraint on the eminent domain power.[18] (Emphasis supplied)

In this relation, Justice O'Connor cautioned that this broad interpretation of "public use" allows one's property to be taken in favor of those "with disproportionate influence and power in the political process, including large corporations and development firms."[19] In the end, "**the government now has license to transfer property from those with fewer resources to those with more.**"[20] This, to her, runs counter to the concept of a just government "which *impartially* secures to every man, whatever is his *own*," *viz.*:

> Any property may now be taken for the benefit of another private party, but the fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more. The Founders cannot have intended this perverse result. "[T]hat alone is a *just* government," wrote James Madison, "which *impartially* secures to every man, whatever is his *own*." For the National Gazette, Property, (Mar. 29, 1792), reprinted in 14 Papers of James Madison 266 (R. Rutland et al. eds. 1983).[21]

While SCOTUS rulings, much less, opinions of dissenting US Justices, are not binding in our jurisdiction, they are nonetheless persuasive in shaping our own doctrinal bearings. As previously mentioned, this Court has subscribed to the doctrine equating "public use" to mere public interest, public purpose, or public advantage. Thus, as long as the taking of private property subserves some form of general welfare, the public use requisite of the eminent domain clause in our Constitution is met, leaving the amount of just compensation as the only remaining issue.

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17 See Dissenting Opinion of Justice O'Connor in *Kelo v. New London*, supra note 9.
18 See id.
19 See id.
20 See id.
21 See id.

Notably, while this Court has held that "[t]he number of people is not determinative of whether or not it constitutes public use, **provided [that] the use is exercisable in common and is not limited to particular individuals,**"[22] still, **the *discernible divide* between a taking that subserves some public interest but at the same time, accommodates a clear private benefit, and which between the two in a particular case is a mere incidence, remain blurry subjects in our current body of jurisprudence**.

In *Vda. De Ouano v. Republic*,[23] cited in the 2015 case of *National Power Corp.*, the Court expressed that "the direct use by the state of its power to oblige landowners to renounce their productive possession to another citizen, who will use it predominantly for that citizen's own private gain, is offensive to our laws,"[24] *viz.*:

> *In esse*, expropriation is forced private property taking, the landowner being really without a ghost of a chance to defeat the case of the expropriating agency. In other words, in expropriation, the private owner is deprived of property against his will. Withal, the mandatory requirement of due process ought to be strictly followed, such that the state must show, at the minimum, a genuine need, an exacting public purpose to take private property, the purpose to be specifically alleged or least reasonably deducible from the complaint.
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> Public use, as an eminent domain concept, has now acquired an expansive meaning to include any use that is of "usefulness, utility, or advantage, or what is productive of general benefit [of the public]." If the genuine public necessity—the very reason or condition as it were—allowing, at the first instance, the expropriation of a private land ceases or disappears, then there is no more cogent point for the government's retention of the expropriated land. **The same legal situation should hold if the government devotes the property to another public use very much different from the original or deviates from the declared purpose to benefit another private person. It has been said that the direct use by the state of its power to oblige landowners to renounce their productive possession to another citizen, who will use it predominantly for that citizen's own private gain, is offensive to our laws.**
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> A condemnor should commit to use the property pursuant to the purpose stated in the petition for expropriation, failing which it should file another petition for the new purpose. If not, then it behooves the condemnor to return the said property to its private owner, if the latter so desires. The government cannot plausibly keep the property it expropriated in any manner it pleases and, in the process, dishonor the judgment of expropriation. This is not in keeping with the idea of fair play.[25] (Emphasis supplied)

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22 *Barangay Sindalan, San Fernando Pampanga, rep. by Brgy. Capt. Gutierrez v. Court of Appeals*, supra note 6 at 552.

23 657 Phil. 391 (2011).

24 Id. at 419, citing *Heirs of Moreno v. Mactan-Cebu International Airport Authority*, 503 Phil. 898, 912 (2005).

25 Id. at 418-419; citations omitted.

This notwithstanding, there is no clear and settled guidance in our cases so as to determine what is "predominant" use for another's own private gain. Rather, what is more compellingly abound in our jurisprudence is the doctrine that the public use requirement is satisfied by the taking being premised on some public advantage, convenience, or benefit.

However, it must be discerned that the grant of the authority to expropriate is different from the propriety of the expropriation itself. As initially mentioned, this case only concerns the issue of the constitutionality of Sections 10 and 17 of RA 11212, which provisions must be examined against the prevailing jurisprudential standard that public use is equal to "whatever is beneficially employed for the general welfare." In this regard, the propriety of the public use anent petitioner MORE Electric and Power Corporation's (MORE) taking of respondent Panay Electric Company, Inc.'s (PECO) specific properties is not yet at issue here. The assailed statutory provisions only accord eminent domain power in favor of MORE, but the actual exercise of such power is still subject to judicial scrutiny in the expropriation proceedings. Hence, perhaps in the proper case where the Court is called to examine the expansive/narrow scope of the public use concept in relation to a specific taking, the Court will be able to amply resolve this quandary. That case may well be the appeal to this Court from the expropriation proceedings involving PECO's properties.

Nonetheless, I already deem it proper to draw attention to the above divergence of opinions anent the interpretation of "public use" in order to magnify two points relevant to this case:

First, the broad definition of "public use" seems to create a practical conundrum as to whether or not the propriety of an exercise of eminent domain power, ***when delegated by the State to a franchisee***, is still properly a judicial function, or just a matter of the judiciary confirming the determination already made by legislature.

To explain, implicit in the franchise grant is the advancement of public interest. Conceptually, franchisees are given statutory privileges to conduct the covered activities in their franchise for the benefit of the public. Thus, when a franchisee is concomitantly conferred with an eminent domain power to acquire private properties, any taking made under the legal cover of the grantee's franchise will theoretically satisfy the requirement of public use.

At this juncture, it may not be amiss to point out that while the statutory delegation of eminent domain power to franchisees does not dispense with the need of filing expropriation proceedings before the court, the practical effect, however, is that trial courts are put in an awkward position to defer to Congress' will, else it be accused of frustrating the pursuits of the franchisee who enjoys the imprimatur of the lawmaking body. In fact, it may also be

argued that the franchisee's taking under the cover of its franchise will always carry some semblance of public benefit, ***regardless of the private benefit it will gain***.

To note, this scenario wherein private entities have been delegated eminent domain powers in their respective franchises is not only attendant to MORE, but also to other public utilities. To illustrate, Section 10 of MORE's franchise reads:

> SECTION 10. *Right of Eminent Domain.* – **Subject to the limitations and procedures prescribed by law, the grantee is authorized to exercise the right of eminent domain insofar as it may be reasonably necessary for the efficient maintenance and operation of services**. The grantee is authorized to install and maintain its poles, wires, and other facilities over and across public property, including streets, highways, forest reserves, and other similar property of the Government of the Philippines, its branches, or any of its instrumentalities. **The grantee may acquire such private property as is actually necessary for the realization of the purposes for which this franchise is granted** x x x: *Provided*, That proper condemnation proceedings shall have been instituted and just compensation paid[.]
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> x x x x (Emphases supplied)

To name a few, the above provision is akin to the following eminent domain provisions in favor of electric distribution utilities embedded in their respective franchises:

Law	Franchisee	Franchise purpose	Eminent domain delegation
RA 11322 (April 17, 2019)	Cotabato Electric Cooperative, Inc.-PPALMA	SECTION 1. *Nature and Scope of Franchise.* – x x x to construct, install, establish, operate and maintain for public interest, a distribution system for the conveyance of electric power to the end users in the municipalities of Pikit, Pigcawayan, Aleosan, Libungan, Midsayap and Alamada, Province of Cotabato, and its neighboring suburbs.	SECTION 10. *Right of Eminent Domain.* – **Subject to the limitations and procedures prescribed by law, the grantee is authorized to exercise the right of eminent domain insofar as it may be reasonably necessary for the efficient maintenance and operation of services**. The grantee is authorized to install and maintain its poles, wires, and other facilities over and across public property, including streets, highways, forest reserves, and other similar property of the Government of the Philippines, its branches, or any of its instrumentalities. **The grantee may acquire such private property as is actually necessary for the realization of the purposes for which this franchise is granted**: *Provided,*

			That proper condemnation proceedings shall have been instituted and just compensation paid. (Emphases supplied)
RA 10637 (June 16, 2014)	Cotabato Light and Power Company	SECTION 1. *Nature and Scope of Franchise*. – x x x to construct, install, establish, operate and maintain for commercial purposes and in the public interest, a distribution system for the conveyance of electric power to the end-users in the City of Cotabato and portions of the municipalities of Datu Odin Sinsuat and Sultan Kudarat, both in the Province of Maguindanao.	SECTION 9. *Right of Eminent Domain.* – **Subject to the limitations and procedures prescribed by law, the grantee is authorized to exercise the right of eminent domain insofar as it may be reasonably necessary for the efficient maintenance and operation of services**. The grantee is authorized to install and maintain its poles, wires and other facilities over and across public property, including streets, highways, forest reserves and other similar property of the Government of the Philippines, its branches or any of its instrumentalities. **The grantee may acquire such private property as is actually necessary for the realization of the purposes for which this franchise is granted**: *Provided*, That proper condemnation proceedings shall have been instituted and just compensation paid. (Emphases supplied)
RA 10891 (July 21, 2016)	First Bay Power Corp.	SECTION 1. *Nature and Scope of Franchise*. – x x x to construct, install, establish, operate and maintain for commercial purposes and in the public interest, a distribution system for the conveyance of electric power to the end users in the Municipality of Bauan, Province of Batangas.	SECTION 9. *Right of Eminent Domain.* – **Subject to the limitations and procedures prescribed by law, the grantee is authorized to exercise the right of eminent domain insofar as it may be reasonably necessary for the efficient maintenance and operation of services**. The grantee is authorized to install and maintain its poles, wires and other facilities over and across public property, including streets, highways, forest reserves and other similar property of the Government of the Philippines, its branches or any of its instrumentalities. **The grantee may acquire such private property as is actually necessary for the realization of the purposes for which this franchise is granted**: *Provided*, That proper condemnation

			proceedings shall have been instituted and just compensation paid. (Emphases supplied)
RA 9381 (March 9, 2007)	Angeles Electric Corporation	SECTION 1. *Nature and Scope of Franchise.* – x x x to construct, operate and maintain in the public interest and for commercial purposes, a distribution system for the conveyance of electric power to the end-users in the City of Angeles, Province of Pampanga.	SEC. 10. *Right of Eminent Domain.* – **Subject to the limitations and procedures prescribed by law, the grantee is authorized to exercise the right of eminent domain insofar as it may be reasonably necessary for the efficient maintenance and operation of services.** The grantee is authorized to install and maintain its poles, wires and other facilities over and across public property, including streets, highways, forest reserves and other similar property of the Government of the Philippines, its branches or any of its instrumentalities. **The grantee may acquire such private property as is actually necessary for the realization of the purposes for which this franchise is granted**: Provided, *That* proper condemnation proceedings shall have been instituted and just compensation paid. (Emphases supplied)
RA 10373 (March 1, 2013)	Olongapo Electricity Distribution Company, Inc.	SECTION 1. *Nature and Scope of Franchise.* – x x x to construct, install, establish, operate and maintain for commercial purposes and in the public interest, a distribution system for the conveyance of electric power to the end-users in the City of Olongapo and its suburbs.	SECTION 9. *Right of Eminent Domain.* – **Subject to the limitations and procedures prescribed by law, the grantee is authorized to exercise the right of eminent domain insofar as it may be reasonably necessary for the efficient maintenance and operation of services.** The grantee is authorized to install and maintain its poles, wires and other facilities over and across public property, including streets, highways, forest reserves and other similar property of the Government of the Philippines, its branches or any of its instrumentalities. **The grantee may acquire such private property as is actually necessary for the realization of the purposes for which this franchise is granted**: Provided, *That* proper condemnation proceedings shall have been

			instituted and just compensation paid. (Emphases supplied)

To my mind, when the exercise of eminent domain is necessary to carry out the franchise, the taking is intermixed with the Congress' will. *As such, the judicial function of the courts in determining the propriety of expropriation is somewhat constrained by an attitude of legislative deference.* In *Kelo*, Justice Thomas especially criticized the "almost insurmountable deference to legislative conclusions that a use serves a 'public use,'" *viz.*:

> A second line of this Court's cases also deviated from the Public Use Clause's original meaning by allowing legislatures to define the scope of valid "public uses." *United States* v. *Gettysburg Electric R. Co.*, 160 U. S. 668 (1896), involved the question whether Congress' decision to condemn certain private land for the purpose of building battlefield memorials at Gettysburg, Pennsylvania, was for a public use. *Id.*, at 679–680. Since the Federal Government was to use the lands in question, *id.*, at 682, there is no doubt that it was a public use under any reasonable standard. Nonetheless, the Court, speaking through Justice Peckham, declared that "**when the legislature has declared the use or purpose to be a public one, its judgment will be respected by the courts, unless the use be palpably without reasonable foundation**." *Id.*, at 680. As it had with the "public purpose" dictum in *Bradley*, *supra*, the Court quickly incorporated this dictum into its Public Use Clause cases with little discussion. See, *e.g.*, *United States ex rel. TVA* v. *Welch*, 327 U. S. 546, 552 (1946); *Old Dominion Land Co.* v. *United States*, 269 U. S. 55, 66 (1925).
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> **There is no justification, however, for affording almost insurmountable deference to legislative conclusions that a use serves a "public use."** To begin with, a court owes no deference to a legislature's judgment concerning the quintessentially legal question of whether the government owns, or the public has a legal right to use, the taken property. Even under the "public purpose" interpretation, moreover, it is most implausible that the Framers intended to defer to legislatures as to what satisfies the Public Use Clause, uniquely among all the express provisions of the Bill of Rights. We would not defer to a legislature's determination of the various circumstances that establish, for example, when a search of a home would be reasonable, see, *e.g.*, *Payton* v. *New York*, 445 U. S. 573, 589–590 (1980), or when a convicted double-murderer may be shackled during a sentencing proceeding without on-the-record findings, see *Deck* v. *Missouri*, 544 U. S. ___ (2005), or when state law creates a property interest protected by the Due Process Clause, see, *e.g.*, *Castle Rock* v. *Gonzales*, *post*, at __; *Board of Regents of State Colleges* v. *Roth*, 408 U. S. 564, 576 (1972); *Goldberg* v. *Kelly*, 397 U. S. 254, 262–263 (1970).
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> Still worse, it is backwards to adopt a searching standard of constitutional review for nontraditional property interests, such as welfare benefits, see, *e.g.*, *Goldberg*, *supra*, while deferring to the legislature's determination as to what constitutes a public use when it exercises the power of eminent domain, and thereby invades individuals' traditional rights in real property. The Court has elsewhere recognized "the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic," *Payton*, *supra*, at 601, when the issue is only whether the government may search a home. Yet today the Court tells

> us that we are not to "second-guess the City's considered judgments," *ante*, at 18, when the issue is, instead, whether the government may take the infinitely more intrusive step of tearing down petitioners' homes. Something has gone seriously awry with this Court's interpretation of the Constitution. Though citizens are safe from the government in their homes, the homes themselves are not. **Once one accepts, as the Court at least nominally does, *ante*, at 6, that the Public Use Clause is a limit on the eminent domain power of the Federal Government and the States, there is no justification for the almost complete deference it grants to legislatures as to what satisfies it.**[26] (Emphases and underscoring supplied)

As Justice Thomas pointed out, with the prevailing legal regime, "when the legislature has declared the use or purpose to be a public one, **its judgment will be respected by the courts, unless the use be palpably without reasonable foundation.**"[27] However, with our expansive definition of public use, where – in Justice O'Connor's words – "**nearly any lawful use of real property can be said to generate some incidental benefit to the public,**"[28] it would be quite difficult to tag any taking done under the cover of a franchise as "unreasonable." Most probably, it would only be in **extreme cases where the taking is completely and wantonly without any public purpose** that our courts can validly rule against the propriety of a franchisee's taking of another's private property. In so doing, for as long as this wanton and complete unreasonableness does not exist, a taking may be done to advance private benefit.

This brings me to my second and final point: the expansive definition of public use as mere taking for some public interest, purpose or benefit appears to legitimize the regime of allowing franchisees to take private properties, irrespective of the franchisee's private gain. As I have discussed, this Court has yet to draw any clear delineation between the commingling of private interests with public purposes when it comes to eminent domain takings. Neither has our Court prohibited the delegation of eminent domain powers to franchise holders albeit being private entities. In fact, the Court recognizes that the power of eminent domain may be delegated "even to private enterprises performing public services."[29]

In this case, Associate Justices Marvic M.V.F. Leonen and Amy C. Lazaro-Javier strikingly present the background facts which show that MORE was intentionally benefited by Congress to the prejudice of PECO. PECO, despite being the longstanding franchise holder of electric distribution in Iloilo City for 96 years, has now been ousted from its statutory privilege to so operate. *As to whether or not PECO deserves to continue its franchise or whether MORE is qualified as a new franchisee is clearly beyond the province of the Court as it is a pure political question left to the wisdom of Congress.* However, more than the stripping of PECO's franchise, PECO – it is claimed

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26 See Dissenting Opinion of Justice Thomas in *Kelo v. New London*, supra note 9.
27 See id.
28 See Dissenting Opinion of Justice O'Connor in *Kelo v. New London*, supra note 9.
29 *Manapat v. Court of Appeals*, supra note 12, at 47.

– stands to lose its entire operation system, goodwill, and even employees through an explicit statutory enactment which not only recognizes a new franchisee but also enables the latter to practically take over PECO's business at the cost of paying the fair market value of its assets. To this point, it may be posited that while PECO may be able to realize "just" compensation, it is effectively left as a shell corporation. Further, despite receiving the "fair market value" of its properties, PECO would get paid much less than if it openly deals with a buyer in the market. Unlike in judicial proceedings, business and trade acumen may be utilized when one sells assets in the open market. Also, it is pertinent to note that the "fair market value" of a former franchisee's assets may be diluted in value since some of them may prove to be un-utilizable by the owner considering that it had already been stripped of the franchise, and thus, diminishing their future utility. Hence, in the hands of the previous franchisee, the assets may be valued less at the time of the taking.

Nevertheless, in theory, PECO's precarious situation is actually legitimized by our prevailing framework on eminent domain. Hypothetically speaking, there is nothing legally prohibiting the government to delegate the eminent domain power to a private entity embedded in its franchise, and in so doing, allow the takeover of the properties of the previous franchisee upon the reason that the taking is – in the language of our numerous franchise laws – "actually necessary for the realization of the purposes for which this franchise is granted."

In fine, up until our current paradigm on "public use" *completely* or *partially* shifts, Section 10 – and its corollary provision,[30] Section 17[31] of RA

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[30] While Section 17 of RA 11212 is equally assailed in this petition, this provision merely provides for a transitory period for PECO to continue its operations so as to ensure the uninterrupted supply of electricity pending the takeover of MORE, as the new franchisee. To a certain extent, Section 17 is also an offshoot of Section 10 in that it expressly qualifies that the transitory period granted in favor of PECO "shall not prevent [MORE] from exercising the right of eminent domain over the distribution assets existing at the franchise area as provided in Section 10 of this Act."

[31] Section 17. *Transition of Operations.* – In the public interest and to ensure uninterrupted supply of electricity, the current operator, Panay Electric Company, Inc. (PECO), shall in the interim be authorized to operate the existing distribution system within the franchise area, as well as implement its existing power supply agreements with generation companies that had been provisionally or finally approved by the ERC until the establishment or acquisition by the grantee of its own distribution system and its complete transition towards full operations as determined by the ERC, which period shall in no case exceed two (2) years from the grant of this legislative franchise.

Upon compliance with its rules, the ERC shall grant PECO the necessary provisional certificate of public convenience and necessity (CPCN) covering such interim period. The applicable generation rate shall be the provisional or final rate approved by the ERC.

This provisional authority to operate during the transition period shall not be construed as extending the franchise of PECO after its expiration on January 18, 2019, and it shall not prevent the grantee from exercising the right of eminent domain over the distribution assets existing at the franchise area as provided in Section 10 of this Act. During such interim period, the ERC shall require PECO to settle the full amount which the ERC has directed to refund to its customers in connection with all the cases filed against it.

To reduce the length of the transition period, the ERC and all agencies issuing the requisite licenses shall prioritize all applications relevant to the establishment and operation of the distribution system under its franchise.

The grantee shall, as far as practicable and subject to required qualifications, accord preference to hiring former employees of PECO upon commencement of business operations.

11212 – are in accord with subsisting doctrine, and hence, constitutional. This pronouncement, however, is without prejudice to the outcome of the expropriation proceedings where the propriety of MORE's actual taking of PECO's properties, in relation to the jurisprudential parameters of public use (which may or may not be revisited), may be raised.

ESTELA M. PERLAS-BERNABE
Senior Associate Justice

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EDGAR O. ARICHETA
Clerk of Court En Banc
Supreme Court

An information dissemination campaign regarding public services and operations of the grantee shall be made to all end-users in the franchise area.

The grantee and PECO shall jointly ensure that employees not hired by the grantee shall receive all separation and/or retirement benefits they are entitled to in accordance with applicable laws.

The DOE shall, during the transition, ensure that there will be uninterrupted supply of electricity in the existing franchise area.