

Conversation with Chip Mellor on December 12, 2013

Participants

- Chip Mellor — President and General Counsel, Institute for Justice
- Howie Lempel — Research Analyst, GiveWell

Note: This set of notes was compiled by GiveWell and gives an overview of the major points made by Chip Mellor in the conversation.

Summary

Chip Mellor is the President and General Counsel of the Institute for Justice (IJ), which he co-founded in 1991.

GiveWell spoke to Mr. Mellor as part of its investigation into opposing policies that enable rent seeking as a charitable cause. Conversation topics included types of rent seeking, IJ's work opposing rent seeking, and IJ's major successes in curbing rent seeking.

Rent seeking

Rent seeking occurs when a group manipulates legislative and regulatory procedures for its own benefit, to the detriment of the wider public.

Arbitrary occupational licensing laws that restrict participation in professions are an important type of rent seeking. IJ conducted a study of 100 occupations that provide moderate incomes and do not require extensive training to perform well, and found that many of them are subject to occupational licensing, including cosmetology, taxi driving, street vending, and home computer repair.

Occupational licensing laws close opportunities to entrepreneurs, leading to unemployment, higher prices and worse service, and lack of flexibility in the economy. Occupational licensing laws should only exist when the government can clearly show that they are necessary to protect public health and safety. “However, existing license holders oftentimes team up with policymakers to put such laws in place and then support the laws in order to prevent competition.”

Another important form of rent seeking is the use of eminent domain to transfer property from one private party to another without any constitutionally appropriate reason to do so. Eminent domain is typically justified by claiming that the new owner will generate more tax revenue or employment than the former owner. In the past ten years, IJ has made significant progress on curbing use of eminent domain.

Abuse of civil forfeiture is another form of rent seeking. Civil forfeiture occurs when law enforcement seizes private property because it is allegedly connected to a crime. Property seized by law enforcement agencies is often sold to fund the agencies, creating an incentive for the agencies to seize excessive amounts of property. It is very difficult for property owners to recover their seized property; they must navigate a complex bureaucracy and wait up to a year for a court hearing. IJ is working to change laws so that law enforcement does not have an incentive to use civil forfeiture. IJ is also working to make it easier for property owners to recover their property and is working to establish a due process right to a

prompt hearing immediately after forfeiture.

Manipulating zoning laws is also a form of rent seeking.

Rent seeking is common in many areas of the political process.

The Institute for Justice

IJ conducts litigation, communications, strategic research, and activism across the country to protect civil liberties. When selecting cases to litigate, IJ has a dual mission to help its clients and to lay the groundwork for broader change by setting legal precedents and educating the public. Litigating cases with sympathetic clients, particularly manipulative opponents, and newsworthy facts helps IJ to educate the public and accomplish its goals. IJ litigates cases all over the country and is able to elevate the cases it works on to national prominence.

IJ works in four areas: economic liberty, property rights, free speech, and school choice. IJ's work on rent seeking is included in the areas of economic liberty and property which, combined, receive about 50% of IJ's funds. Almost all of IJ's work in the area of economic liberty, which receives about 25% of its total budget, is to oppose occupational licensing.

IJ's budget is about \$15 million per year. IJ has offices in seven states and 74 employees (of whom 37 are lawyers). About 84% of IJ's funding is used for program expenses (mostly litigation), 7% is used for fundraising, and the rest is used for administrative costs.

About 80% of IJ's funding comes from individual donors or small family foundations, with the other 20% coming from large foundations. The Casey Foundation and the Olin Foundation funded IJ's entrepreneurship clinic at the University of Chicago law school, which was established to teach entrepreneurs about how to navigate bureaucratic red tape. However, the Casey Foundation no longer funds IJ's work, and the Olin Foundation no longer exists. The Searle Foundation and the Bradley Foundation may provide funding for IJ in the future.

IJ recently met an \$8 million challenge grant for economic liberty work and received \$4 million in matching funds for meeting the challenge.

IJ's work to reduce rent seeking

The Privileges or Immunities Clause of the 14th Amendment was designed to bar states from interfering with the economic liberty of their citizens. However, problematic case law (particularly the 1873 Slaughterhouse cases) illegitimately narrowed the Privileges or Immunities Clause and eventually established a "rational basis test" that enables states to restrict economic liberty. This test requires courts to uphold a law restricting economic liberty as long as the court finds a rational relationship between the challenged law and some legitimate government interest even if that relationship was not the reason that the law was enacted. Many laws that enable rent seeking have been upheld by appealing to the rational basis test.

IJ's long-term goal for its work on economic liberty is to challenge the rational basis test and to establish new case law that would require the government to demonstrate a clear connection between legitimate goals and the legal provisions used to achieve those goals. In the long term, IJ would like to

overturn the Slaughterhouse Cases and restore the Privileges or Immunities Clause to its proper meaning. Strengthening the Privileges or Immunities Clause would not collapse all economic regulation, but it would make it easier to challenge many unjustifiable regulations. Economic liberty also ought to be protected by state constitutions.

In the shorter term, IJ is taking court cases, attempting to change public opinion, and attempting legislative change to oppose laws that promote rent seeking. This latter work is done consistent with IJ's 501(c)(3) status. Recently, IJ challenged a law that prohibited compensation for bone marrow donation on the basis of the Equal Protection Clause. The US Department of Health and Human Services is attempting to reinstate the ban, which IJ will challenge. At the state level, IJ has found that once a legislator takes the lead on anti-rent seeking legislation, legislative change is possible.

The Supreme Court has recognized that occupational licensing laws can be challenged once they become outdated. If IJ had more funding for its economic liberty work, it would challenge outdated occupational licensing laws.

Allies and opponents of work to reduce rent seeking

Allies and other organizations working to reduce rent seeking:

- Local-level allies are often groups that are negatively affected by particular forms of rent seeking rather than groups that are opposed to rent seeking in general. Past allies include the National Federation of Independent Business and associations of African hair braiders (which opposed occupational licensing laws). Additionally, some local chapters of the NAACP and the Southern Christian Leadership Conference oppose rent seeking that affects their communities.
- The Cato Institute, the American Enterprise Institute, the State Policy Network, and sometimes the Brookings Institution work on anti-rent seeking legislation at the national level.

If rent seeking is defined broadly as legislative and regulatory manipulation for private gain, many other national think tanks and trade groups could be considered to be working in the area, and in IJ's estimation, its work would account for less than 10% of total activity. More narrowly, IJ estimates that its work opposing occupational licensing represents about half of the activity in that area.

Opponents of reducing rent seeking:

- The beneficiaries of occupational licensing (those who are already licensed and can use licensing to exclude others from the profession in order to suppress competition) tend to support occupational licensing laws. These beneficiaries include, for example, the American Society of Interior Designers, taxi and transportation companies, and dentists and dental hygienists who are interested in maintaining control over teeth whitening.
- Labor unions sometimes benefit from occupational licensing laws and support them, especially in the transportation sector. Construction unions tend to support eminent domain because they benefit from redevelopment projects.

The inertia of the status quo helps to keep laws that enable rent seeking in place. The defenders of such laws also frequently have constituents in place who can threaten strikes or other actions if the laws are threatened, as well as lobbyists who work to keep the laws in place.

IJ's major successes in reducing rent seeking

- IJ won a court case that led to the legislative deregulation of the African hair braiding market in Washington, D.C. for the first time since World War II. The plaintiff in the case went on to found a national African hair care association that has helped to deregulate African hair braiding in many states.
- IJ won a case to deregulate African hair braiding in Mississippi, leading to an increase from one or two hair braiders to over 300 in the state. IJ also has struck down or reformed hairbraiding laws in Utah, Arizona, Washington state, Ohio, California, and Minnesota.
- IJ opened up the Denver taxi market to entrepreneurs for the first time since World War II. They've also helped open up taxi markets in Minneapolis, Milwaukee, Indianapolis, and Cincinnati.
- IJ helped to liberalize laws governing food trucks in New Orleans, El Paso, and Washington, D.C., and is involved in liberalizing food truck laws across the country.
- IJ helped deregulate the practice of interior design in Connecticut, Florida, Texas, New Mexico, and Oklahoma.
- IJ won a case striking down an IRS licensing scheme on independent tax preparers that would have put tens of thousands of mom-and-pop tax preparers out of work. The regulation also would have increased costs for millions of taxpayers.
- IJ has saved more than 16,000 homes and businesses from eminent domain abuse since 2005.”
Or: “IJ saved homes and businesses from eminent domain abuse in NY, NJ, OH, PA, MS, TN, FL, AZ, and CA.
- IJ's sparked a nationwide property rights movement in the wake of its U.S. Supreme Court loss in *Kelo v. New London* that resulted in 47 states strengthening property rights protections against eminent domain abuse through legislative change and state Supreme Court rulings.
- IJ defeated the Louisiana funeral board in its attempts to make the brothers of St. Joseph Abbey become licensed funeral directors in order to sell their handmade caskets. This 5th Circuit Court of Appeals ruling joins IJ's victory in a similar case in the 6th Circuit as one of only a handful of federal appellate decisions since the New Deal that protect economic liberty.
- IJ's won its case in Minnesota challenging a state law that forced funeral home entrepreneurs to waste tens of thousands of dollars building embalming rooms they do not need and will never use. The law benefitted big, full-amenity funeral home businesses by driving up prices for consumers and operating costs for their competitors.
- IJ defeated civil forfeiture in MA, GA, MI, UT, and CA.

People for GiveWell to talk to

- Dana Berliner, Litigation Director, Institute for Justice, author of the report *Opening the Floodgates: Eminent Domain Abuse in the Post-Kelo World*
- Dick Carpenter, Director of Strategic Research, Institute for Justice, author of the report *Designing Cartels: How Industry Insiders Cut Out Competition* and *License to Work: A National Study of Burdens from Occupational Licensing*
- Morris Kleiner, Professor and AFL-CIO Chair, Humphrey School of Public Affairs, University of Minnesota

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