ADMINISTRATIVE DISCRETION IN ACTION

A NARRATIVE OF EMINENT DOMAIN

AMANDA M. OLEJARSKI

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Administrative Discretion in Action

To Ryan,
for everything

Foreword

Charles T. Goodsell, Virginia Tech

Dr. Amanda M. Olejarski, assistant professor of public administration at Shippensburg University, has studied in concerted fashion the law, process and politics of eminent domain for more than seven years. She has presented many papers, published articles and lectured on the subject and wrote her dissertation at Virginia Tech on this topic. (Among the graduate students she was affectionately known as "SPED," a nickname she explains shortly.)

This is a highly informative volume for academics, specially in the field of public administration where the topic has been largely ignored. More importantly, the book will be a most useful practical guide for elected officials, public administrators, and citizens who get caught up in governmental "takings" of private property. Indeed the author refers to her book as a tool to inform and facilitate dialogue among people active inside and outside government on this sensitive matter. As such, it is written in a clear and direct style, largely in the nature of an informal narrative. Olejarski does not preach dogmatically, advocate one side or another, or pronounce final conclusions. Rather, she reviews the issue's legal history, provides factual information on its considerable complexities, and reminds us of the opposing values and heavy stakes involved.

Aside from wide examination of published legal and academic sources, the book is built on a foundation of field research. This was done in the state of Connecticut, in that it was here that the leading recent U.S. Supreme Court decision on the subject originated, *Kelo et al. v City of New London et al.*, handed down in 2005 (545 U.S. 469). Her suitably mixed-method research strategy includes a survey of local government officials in the state and in-depth interviews in the city of New London, the site of a taking that condemned valued neighborhood property for the purpose of allowing a private-public development corporation to enable the construction of a large plant by Pfizer, Inc. The author's special

attention to this event allows her to go beyond a broad overview of the subject and penetrate it deeply at the human level.

The power to exercise eminent domain in the United States emanates from what seems like an almost throw-away phrase at the very end of the Constitution's lengthy Fifth Amendment, "nor shall private property be taken for public use, without just compensation." Over time, the inherent focus in these words on the adequacy of adequate monetary compensation has been largely supplanted by debate over what "public use" entails. Possibilities are the transfer of private property to ownership by government for its own activities (as in building a highway), serving the public good in general (e.g., removing slums), or making it possible for private developers to build and profit from business enterprises (like waterfront plazas and shopping malls). Because of the *Kelo* decision, determination of which or all of these options are permissible is turned over to the states. At present, forty-three state legislatures have passed statutes on the subject.

However, even these standards are often vague, no doubt because of the political sensitivity of the topic. As a result, individual local governments that encounter the issue have been forced to interpret the power's extent on their own. Hence local elected officials and administrators find themselves in the position of having to wend their way, alone, through the sticky legal and political wicket of how to attract new private investment to their revenue-starved jurisdictions while attempting to ride out the outcries of displaced homeowners and the loss of beloved neighborhood districts.

Olejarski's foremost theme in the book is to explore the normative and practical dimensions of the administrative discretion that local government practitioners must exercise in this volatile tinderbox. She points out that wise implementation involves not only mastering the technical details of negotiations, hearings and contracts, but grappling with politically powerful competing forces and working through distressing moral dilemmas. The very future of communities is at stake. Administrators must deal with the lobbying power of large corporations and their high-priced lawyers, the desperation of city councilpersons facing the need for a boost to their local economy, the personal hurt felt by residents whose private home and personal life are upended, and the political fallout from conservatives that champion private property rights and liberals who dislike using public authority to satisfy private investors.

In her close-up examination of what went on in New London, Olejarski brings her subject to life by describing in detail personal conversations in the kitchens of homeowners affected. Before-and-after photographs are provided of affected properties, including Ms. Kelo's now gone "Pink House" that spawned the litigation in the first place. In this exploration she discovers

that a number of lapses in good judgment occurred in how administrative discretion was exercised.This includes not giving proper notice and failing to engage affected citizens in meaningful dialogue. In addition she learned that administrators who become involved in takings vary considerably in their knowledge of the process and their personal attitudes toward seizing citizen property. As a consequence, she recommends that they should exercise this august power only after talking with all the experienced professionals they can find, keep displaced citizens and the community at large honestly informed, and be proactive in discussing with their own elected officials what seems doable and right.

While the book's topic is a single policy area not commonly encountered in pubic administration as a whole, her study generates broad overall lessons for all conscientious public servants. She urges that while dealing with the particular problems and dilemmas of day-to-day administration, they should ponder the fundamental norms that must infect the running a constitutional democratic republic; leaven rational calculations with common sense; keep in mind the ideals of common fairness, public interest and public good; search continuously for more creative ways of doing things; deal with citizens with total integrity so as not to undermine public trust in government; remain open to hearing the interests and opinions of all parties; and seize the high ground by appropriately interpreting the law in light of their own best instincts and local circumstances.

Preface

My inspiration for this book occurred during the second week of my doctoral studies at the Center for Public Administration and Policy (CPAP) at Virginia Tech. What quickly became some of my most enjoyable memories were the times spent with colleagues outside of the Thomas Connor House in Blacksburg, where we would all gather during class intermissions. It was a break in the middle of John Rohr's institutional class, Normative Foundations of Public Administration (in which many of us learned to drink the CPAP kool-aid). A new friend, Chuck Kirby, asked me if I thought we were going to cover the *Kelo* case this semester, since the class was about ethics, and Rohr's *Ethics for Bureaucrats* centers around property as a regime value of Americans. I was only vaguely familiar with the case, having attended a lecture on "Hurricane *Kelo*" while working on my MPA at Rutgers, Camden. That afternoon, I went home, opened an academic search engine, typed in "eminent domain," and was absolutely stunned that only 161 articles had been written on the subject *ever*.

It was on that day that I decided to write my dissertation on eminent domain. The more investigating I did, the more amazed I became at how little the field of public administration had researched the subject. Certainly, the academic side of the field has made strides since then, but we are nowhere near catching up with the needs of our applied practitioners. I devoted every class paper to learning about takings. I was so proud when I earned the nickname SPED, specialist in eminent domain, from my classmates and professors.

Almost three years later, I found myself in New London, Connecticut, interviewing practitioners of public administration and community members about eminent domain. As an overly-eager graduate student, people were so gracious and willing to share candidly their knowledge and experiences with

me. What I learned during that hot August week has been difficult to capture in words on a page.

So, what *is* eminent domain, and what does it mean when some gets "Kelo'd"? Eminent domain, also known as a *taking*, is the governmental power to take private property for public use, according to the Fifth Amendment of the U.S. Constitution. The landmark U.S. Supreme Court decision on eminent domain is the 2005 *Kelo v. New London* case. In *Kelo*, economic development was determined to meet the requirement for public use. In other words, increased tax revenue and job growth get the constitutional stamp of approval for the government to take private property. Now, this was not a new constitutional question. The Court ruled in the 1950s that economic development was a viable use for eminent domain. But *Kelo* was an outlier, an extreme case that continues to spark political controversy. Part of this controversy comes from the intertwining relationship between the local government and a pharmaceutial giant. Public perception is everything, and much of the public perceived *Kelo* as an abuse of eminent domain because it viewed the government taking property from one private party (homeowners) and giving it to another private party (Pfizer). This controversy was intensified by national media coverage of the taking, highlighting these perceived abuses of administrative power, hence, the narrative of eminent domain.

One of the most important lessons I learned at CPAP is about the importance of dialogue. As long as people keep talking, things *should* get better. And as I continued conducting interviews, I came to realize *that* was the problem with eminent domain: it has become such a controversial issue that practitioners and community members had stopped talking *to* one another and had begun speaking *past one another*.

That is why I wrote this book. This book should be used as a tool for interested practitioners, community members, scholars, and students: to facilitate dialogue during the governance process about using eminent domain responsibly. My understanding of governance surrounds the administration of public affairs in a political context. Especially important for a public administration book is the significance of administrative discretion, or the informal decision-making authority, sometimes called soft power, that practitioners exercise. This book, therefore, is also about critical reflection, analysis, and wielding administrative power, or about changing the way we *do* public administration. This book is about eminent domain in action.

In order to engage broadly those interested in issues surrounding eminent domain and administrative discretion in the academic and applied field of public administration, this is a deliberately short book written in an informal, more casual tone than many academic books. For this book to meet its goal of being used as a tool, I have emphasized praxis, or the dynamic, critical interface of theory and practice. I hope that its substantive practical value is balanced appropriately with theoretical considerations.

Acknowledgments

I would like to share my thanks to the faculty at the Center for Public Administration and Policy (CPAP) at Virginia Tech, Blacksburg, for their unwavering encouragement, guidance, and inspiration. I am especially grateful to Larkin Dudley, John Rohr, Gary Wamsley, Charles Goodsell, and Jesse Richardson for their mentoring of a young scholar. To my fellow CPAPers, for challenging me to succeed, for teasing me about my borderline obsession with eminent domain, and for providing moral support. Most deserving of gratitude is Kathy Webb Farley, my dear friend.

My thanks are also owed to Jim Garnett of Rutgers University, John Morris of Old Dominion University, and Cam Stivers of Cleveland State University, all of whom shared valuable insight to the conceptualization of this book. My new colleagues at Shippensburg University have provided incredible support, especially Alison Dagnes, Cynthia Botteron, and Sara Grove. Shippensburg public administration students Stefanie Pfister, Meagan Thorpe, and Tim Carr provided critical feedback and editorial assistance.

This book could not have been written without the time and contributions of the many practitioners and community members with whom I spoke. I am keeping administrators' names confidential but need to extend my sincere appreciation to them. Community members Amy Visciglia, Kathleen Mitchell, Susette Kelo, Timmy LeBlanc, Avner Gregory, June Evered, and Doug Schwartz-—thank you for opening your homes to me and sharing your stories.

Finally, my husband, Ryan, to whom this book is dedicated—for being more supportive than I sometimes deserve and for keeping our fur babies and me happy.

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Chapter One

Eminent Domain in Action

> *Nor shall private property be taken for public use, without just compensation.*
>
> —Takings Clause, Fifth Amendment, United States Constitution

Most people are probably familiar enough with "the little blue pill," Pfizer's miracle drug that was introduced during the late 1990s. What could that possibly have to do with public administration? The little blue pill was at the center of a national battle over private property rights that began during the summer of 1996 in a small Connecticut community and ended at the United States Supreme Court in June of 2005 with *Kelo v. New London.*

We all know that saying, "This would be funny if. . . ." Well, the fact that the little blue pill made it to the highest court in America would be funny if . . . it weren't true. It would also be funny if it weren't true that a $1,350 bill made it to the Supreme Court . . . and that Congress passed a law condemning a neighborhood that was almost 98 percent black in the middle of the civil rights movement, which made it to the Supreme Court . . . and that a state law allowing renters to have homes condemned so they could purchase them (with a state loan of 90 percent) because the Dole fruit company owned too much property also made it to the Supreme Court.

All of these cases are true, and all of these cases have to do with eminent domain. In what would later become more of a Pyrrhic victory, the Supreme Court settled the immediate controversy of the 2005 *Kelo* eminent domain case, resulting in state legislatures rushing to pass laws at the invitation of the highest court in the land. Enter public administrators in municipalities and states across America. . . .