

## **Public Affairs and the U.S. Supreme Court**

In 2005, I successfully argued *Kelo v. New London*, 545 U.S. 469 (2005), to the U.S. Supreme Court on behalf of the defendants. The issue was the meaning of “public use” in the Fifth Amendment eminent domain clause in relation to the private redevelopment of an economically depressed city in Connecticut. The decision has created a huge fuss from Maine to Alaska and I have been tarred and feathered wherever I go for my outrageous attack on sacred property rights.

My expertise in the U.S. Supreme Court had previously been limited to the many ways petitions for certiorari (review) are denied. In fact in over 35 years of doing appellate litigation I have developed quite extensive expertise on that subject. Consequently, when I finally failed to get a petition denied in September 2004, I suddenly entered the world of public affairs at the national level.

First, let me comment on aspects of the process before the preparation for oral argument that were somewhat of a surprise to me. My opponents were represented by the Institute for Justice, and what an effective publicity machine they have! Well-placed editorials or op ed pieces by conservative or libertarian commentators or newspapers just happened to appear a few days before two vital events in the case: the decision of the Supreme Court to grant certiorari in September 2004 and the decision of the U.S. Solicitor General to remain neutral in January 2005 (which lowered our chances of affirmance from 55% to 30%). The Institute’s publicity machine since *Kelo* was decided on June 23, 2005 is also surely to some extent responsible for insuring that I would not succeed if I ran for public office (for which I thank them). Our firm had previously retained a publicity person for our general law firm doings, but we certainly had to play

catch-up fast when the Institute was on the opposite side. In the future publicity will be a major strategy issue to discuss the day a potential U.S. Supreme Court case comes in the door.

Another point on which the Institute was very effective was in claiming in their petition for certiorari that there was a conflict among the state Supreme Courts. I pooh-pooed that argument in my opposition brief, but I rather think it helped them over the certiorari hurdle, especially in an area that is usually litigated in the state rather than the lower federal courts. That state courts were dealing with an issue of great public interest in radically different ways mattered to the U.S. Supreme Court.

An area in which I had had some experience is dealing with amici curiae. But I've never had a dozen separate amici briefs on my side to contend with. There are amici and there are amici. Some get in the way; some are major players in public affairs and the court wants to know what they think. It took me no more than a few days after certiorari was granted to realize that I needed an amici coordinator, and one independent of my office and clients. This decision turned out to be great, because it meant I was to have only minimal contact with all the amici lawyers and yet I could parcel out issues to elaborate on with the confidence that we were not tripping over each other or saying the same thing twelve times. A coordinator also provided some level of security as I reviewed amici drafts and some of the amici reviewed my drafts.

Lawyers go to law schools for training. But they really should go to fact schools. Public affairs are mostly about facts, not theories. Indeed, facts are what decide most cases and what probably got me the fifth vote in *Kelo*. So I emphasized facts, notably that New London was economically depressed, that the private developer was not going

to own the land, that the city was not trying to benefit some particular private party (the developer had not even been chosen when the plan was adopted), that there was an open democratic process, and that the plan was comprehensive and long-range. We also made a point of preparing a large and expensive appendix with sizeable excerpts from the plan.

On to oral argument. Our brief as appellees was filed in mid-January but I knew in late December that the case would be scheduled for oral argument in late February. I did not know until mid-January whether I would have the full 30 minutes or would share 10 minutes with the solicitor general's office.

I was in Washington the week of January 11, 2005 to hear several oral arguments in other cases. It is important to be up-to-date on the mood and style of justices before whom you will shortly argue. For example, Justice Breyer, as expected, asked some hypothetical questions. At one point the lawyer paused thoughtfully before responding. That was mistake because it gave the more senior Justice Scalia a chance to chime in with a question on a wholly different subject. From January 11 until the *Kelo* argument six weeks later, I basically closed down my law practice except for this case. Our 8-lawyer firm is almost exclusively appellate and I normally assemble four or five of them for one moot session a week or so before oral argument. For *Kelo* I had four moots, two internally, a third with several law professors at University of Connecticut School of Law, and a fourth at Georgetown.

Finding time for four moots gave me the chance to test different tactics. In the UConn moot I decided to be reasonable. "Q: Can you take a Motel 6 to make a Ritz Carlton? A: No." It went fine there but in the Georgetown moot it was a disaster because I got bogged down with lots of follow-up hypotheticals, such as "How about two

Motel 6's?" "Four? So I tried "A: Yes." That turned out to be the right legal decision since it cut off follow-up questions and allowed me to return more easily to what I wanted to talk about: the facts of the case. My tactical decision, however correct legally, turned out to be a public relations disaster after the decision came out. First of all, Justice O'Connor's dissenting opinion referred to the Motel 6 hypothetical. More important, her question and my "yes" answer provided a perfect one liner for the Institute for Justice's publicity machine. If public opinion was ever influenced by a one-liner, this was it.

But my job was to count to five. What 300,000,000 thought did not matter to New London if I could not get to 5. I figured I likely had the four liberals – Stevens, Souter, Ginsberg and Breyer – and did not have the three conservatives – Rehnquist, Scalia and Thomas – so my strategy was to convince either O'Connor or Kennedy, for both of whom the mantra is: facts, facts, facts. With this in mind I decided to do what I have done only once before in my career: use a prop in oral argument. The merits clerk at the U.S. Supreme Court told me there was nothing improper about using a blow-up of an exhibit showing the comprehensive plan of development at oral argument as long as I sent copies of the blow-up to the court ahead of time. Which I did.

On February 22<sup>nd</sup>, the date of the oral argument, our local counsel, my partner Dan Krisch and I arrived at the Supreme Court and were escorted into the anteroom, where the clerk, Mr. Suter, informed us that Chief Justice Rehnquist was ill (we knew that) and that the senior justice, Justice Stevens, had missed his flight from Florida. For the first time in the Supreme Court's history, a woman would be presiding. I had prepared for Stevens's somewhat less strict presiding manner than Rehnquist's, but of course no one knew what O'Connor's would be like. As it turned out, she was more

Stevens than Rehnquist, although less strict is still strict. Nevertheless, my rather informal style of presentation (hands here and there, etc.) did not seem to annoy.

Opposing counsel, Scott Bullock, of course went first. He wanted to make a broad argument about condemnation for blight is OK, but no further. He was immediately pressed by Justice Ginsberg and other liberals about the compelling facts of our case, whereupon Justice Scalia tried to bring the argument back to Bullock's broad principles. When it was my turn I waited for Justice O'Connor to ask a question about the facts of the case and then I reached under the table for my prop. I cannot improve on reporter Dahlia Lithwick's comment of what happened next:

I've witnessed some weird moments at oral arguments over the years, but I'm thinking absolutely nothing could compare with the sight I beheld today: In the midst of argument in *Kelo v. New London* – a critically important case about the government's right to condemn private land and give it to private developers – the lawyer for the city of New London, Conn., pulls out an actual prop. In response to a query from Sandra Day O'Connor as to whether there's a concrete development plan for what would replace the handful of homes being condemned, Wesley W. Horton hauls out a big poster board with the whole proposed community laid out. Condos here, marina here, yank out this crappy little Victorian house and the health club will go there, he enthuses.

My heart begins to pound. I want in on this deal. And O'Connor looks like she does, too.

With the exception of a yellow pad, I have never seen a visual aid of any sort used at oral argument. Advocates really should use them more.

So my theme was facts, facts, facts. The questions came thick and fast: I answered them quickly as well as I could and then tried to redirect them back to my theme. As it turned out, Kennedy, not O'Connor, was the crucial fifth vote, and his concurring opinion emphasized the facts of our case.

Most speakers warm up their audiences with a story. I will end with one. In the U.S. Supreme Court, when the red light comes on precisely 30 minutes after you have

started oral argument, you must stop mid-sentence. I am not used to that. I am used to the Connecticut chief justice looking benignly down and saying: “Mr. Horton, would you please wrap up.” I knew the red light was about to appear. The transcript says it all:

And so it seems to me the four words I think that this Court should consider – and I’m not going to tell you the four words since my red light is on. Thank you, Your Honor.

JUSTICE O’CONNOR: Mr. Bullock, you have three and a half minutes.

JUSTICE KENNEDY: Mr. Bullock, do you know those four words?

Wesley W. Horton

September 15, 2008