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CASE COMMENTS

THE PUBLIC USE LIMITATION IN EMINENT DOMAIN: HANDLEY V. COOK

The right of a citizen to his property is among the most important rights protected by the Constitution. It is the duty of the court to be vigilant and to provide adequate safeguards to protect such an important right. In Handley v. Cook the West Virginia Supreme Court of Appeals further broadened the power of eminent domain delegated to private corporations. As a result the interests of landowners were diminished.

After having failed to reach an agreement with the private landowners concerning rights-of-way over their lands, Appalachian Power Company sought to condemn private property for the purpose of constructing a high voltage power transmission line to serve the East Lynn Monterey Coal Company. The power company filed condemnation proceedings in the Circuit Court of Wayne County. The circuit court entered an order authorizing Appalachian Power Company to survey and lay out the proposed rights-of-way. In addition Appalachian Power Company was authorized to possess, appropriate, and use the private property for the construction and maintenance of an electric power transmission line.

The relators, Gene P. Handley et al., petitioned the West Virginia Supreme Court of Appeals for a writ of prohibition in which they alleged: (1) that the respondent power company had exceeded its lawful powers of eminent domain by entering relators’ lands without their consent and prior to any court order, and further that the circuit court had exceeded its jurisdiction by entering overbroad orders of entry for the purpose of survey; (2) that the relators were effectively denied their day in court on the question of the right of Appalachian Power Company to take their property; (3) that the circuit court lacked jurisdiction to hear the power company’s application to condemn because the power company failed to obtain a certificate of public convenience and necessity;

1 252 S.E.2d 147 (W. Va. 1979).
2 Id. at 150 n.2.
3 W. VA. CODE § 54-2-2a (Cum. Supp. 1979) reads in its entirety:
In addition to the requirements set forth in section two [§54-2-2] of this
(4) that the lands sought to be condemned were not destined for public use; and (5) that the circuit court lacked or otherwise exceeded its jurisdiction because Appalachian Power Company failed to obtain a license from the Federal Energy Regulatory Commission in compliance with the National Historic Preservation Act of 1966.4

When the West Virginia Supreme Court of Appeals agreed to hear the case, it issued a rule to show cause which was limited to two issues: "whether an order granting a right of entry for construction of a power line is appealable, notwithstanding the fact that construction has not begun nor compensation been determined; and, whether supplying electricity to a single mining operation is a public use contemplated by W. Va. Const. art. 3, § 9 and W. Va. Code § 54-1-2(b) [1962]."5

The court, in an opinion by Justice Neely, held that once an order adjudicating the right to take has been entered in a condemnation proceeding, the property owners can seek a writ of error and supersedeas even though the order is interlocutory in some respects. The court further held that condemnation of private property for the purpose of erecting an electric power transmission line

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4 16 U.S.C.A. § 470(f) (West Supp. 1979) reads in its entirety:
The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under sections 4701 to 470n of this title a reasonable opportunity to comment with regard to such undertaking.

Neither the majority opinion nor the dissenting opinion discussed the relevance of this statute to the facts of the case.

5 252 S.E.2d at 147.
to a single commercial consumer serves a public use as contemplated by the West Virginia Constitution and by statute. Thereupon the rule to show cause was discharged and the writ of prohibition denied.

Justice McGraw dissented from the majority opinion citing two mistakes made by the court. The first mistake was the court's "unwise decision" to limit argument to two issues. By limiting the argument Justice McGraw felt the court mistakenly ignored the landowners' contention that the court below lacked jurisdiction to adjudicate the power company's right to take because the power company failed to file its application to condemn lands in compliance with the law, and such failure should have resulted in a dismissal of the petition. This mistake, according to Justice McGraw, delayed justice and denied petitioners their constitutional rights.

The second mistake cited by Justice McGraw was the court's refusal to consider the Amicus Curiae Brief prepared by two Professors of Law of West Virginia University which, in the opinion of Justice McGraw, "could have provided the Court with insight into the origins of eminent domain and modern American law on 'public use.'"

The majority determined the threshold question in this case

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6 W. VA. CONST. art. 3, § 9 reads in its entirety:
Private property shall not be taken or damaged for public use, without just compensation; nor shall the same be taken by any company, incorporated for the purposes of internal improvement, until just compensation shall have been paid, or secured to be paid, to the owner; and when private property shall be taken, or damaged, for public use, or for the use of such corporation, the compensation to the owner shall be ascertained in such manner, as may be prescribed by general law; provided, that when required by either of the parties, such compensation shall be ascertained by an impartial jury of twelve freeholders.

7 W. VA. Code § 54-1-2 (Cum. Supp. 1979) reads in pertinent part:
"The public uses for which private property may be taken or damaged are as follows:

(b) For the construction and maintenance of telegraph, telephone, electric light, heat and power plants, systems, lines, transmission lines, conduits, stations (including branch, spur and service lines), when for public use; . . . ."


9 Id. at 152. The text of the brief, prepared by Professors McGinley and Cady, is included with the dissenting opinion as Appendix A.

10 Id. at 151.
to be whether a writ of prohibition was the proper procedure by which to challenge the orders of the lower court. "It is well established that prohibition does not lie to correct mere errors" and cannot be substituted for a writ of error and appeal unless the latter is an inadequate remedy. The court noted that the lower court had statutory jurisdiction of the condemnation proceedings unless it so exceeded its legitimate powers as to vitiate that jurisdiction. According to the majority opinion, the relators alleged there was a vitiation of jurisdiction by the lower court's ruling that condemnation of private property for construction of an electric transmission line to a single commercial customer is a public use. However, as pointed out by the dissent, relators actually alleged that the failure of Appalachian Power Company to obtain a certificate of public convenience and necessity in accordance with section 24-2-11a of the Code should have resulted in a dismissal of the condemnation petition as required by section 54-2-2a. This failure to dismiss the petition constituted the action by which the relators contended the circuit court exceeded its legitimate powers and acted without jurisdiction. The majority opinion, for no apparent reason, makes no mention of this allegation; while, the dissent cites this as the primary basis for the writ of prohibition.

The statutory requirement of a certificate of public conveni-

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11 Id. at 148 (citing Woodall v. Laurita, 156 W. Va. 707, 195 S.E.2d 717 (1973); Huntington v. Lombardo, 149 W. Va. 671, 143 S.E.2d 535 (1966)).
12 Id.
13 W. Va. Code § 54-2-1 (1966) reads in its entirety:
   In any case in which property may lawfully be taken for a public use, application may be made by petition to the circuit court or the judge thereof in vacation, of the county in which the estate is situated, to appoint commissioners to ascertain a just compensation to the owners of the estate proposed to be taken. If a tract lies partly in one county and partly in another, the application in relation thereto may be made in either county.
14 W. Va. Code § 24-2-11a (1976 Replacement Vol.) reads in pertinent part:
   (a) No public utility, person or corporation shall begin construction of a high voltage transmission line of two hundred thousand volts or over, which line is not an ordinary extension of an existing system in the usual course of business as defined by the public service commission, unless and until it or he shall have obtained from the public service commission a certificate of public convenience and necessity approving the construction and proposed location of such transmission line.
15 See note 3 supra.
16 252 S.E.2d at 150.
ence and necessity applies to construction of a high voltage transmission line of 200,000 volts or more. The transmission line proposed by Appalachian Power Company was characterized as having a potential capacity in excess of 200,000 volts.17 Whether the statute applies to the potential capacity of the transmission line or to the amount of voltage the power company asserts it intends to supply at the present time is not clear since the statute does not refer either to actual or potential voltage. If the statute is construed as applicable to specified rather than to potential voltage, it appears the power company could at some later date step up the voltage to 200,000 volts or more without invoking the statute. Since the line would already have been constructed and would be the extension of an existing system, the statute would not apply. The statute, if not construed to include potential capacity of the transmission line, becomes virtually useless since power companies could assert lesser voltage at the construction stage to avoid complying with statutory requirements.

The relators’ argument that Appalachian Power Company’s failure to comply with statutory requirements should have resulted in dismissal of its petition speaks directly to the question of the lower court’s jurisdiction to hear this case. It would appear that by ignoring this argument the court wanted to avoid the issue of statutory construction as to potential or specified voltage. Obviously, this issue will arise whenever this statute is invoked. Moreover, to ignore this argument is to ignore the primary basis in Handlev18 for seeking a writ of prohibition as opposed to a writ of error. Does the court mean by its holding that once an order adjudicating the right to take by eminent domain has been entered, the only remedy is a writ of error and supersedeas regardless of the actions of the lower court? The answer to this question is unclear. At one point in the opinion the court implied that if the lower court so exceeded its legitimate power as to vitiate its jurisdiction, then prohibition would be a proper remedy.18 However, at a later point in the opinion the court stated that “[e]ven if relators’ allegations were correct, prohibition would be an inappropriate means to challenge an adjudication of a private condemnor’s right to take because such orders are appealable final orders even

17 Id.
18 252 S.E.2d 147 (W. Va. 1979).
18 Id. at 148.
though they retain some characteristics of being interlocutory; . . .”20 Thus, the holding in this case leaves unanswered the question whether a writ of prohibition would ever be an appropriate remedy in condemnation cases.

**THE PUBLIC-USE LIMITATION**

The proposition that private property cannot be taken for private use was not in dispute in *Handley*.21 The issue was whether the use in this particular case, to supply electricity to a single private corporation, was a public use.22 An understanding of this issue requires a consideration of the meaning of the term “public use.” It has been stated that “[a] public use defies absolute definition, for it changes with varying conditions of society, new appliances in the sciences, changing conceptions of the scope and functions of government, and other differing circumstances brought about by an increase in population and new modes of communication and transportation.”23 The meaning of “public use” can only be derived from an analysis of the historical influences which have shaped it and from the social and political contexts of the cases through which the meaning has evolved.

It has been suggested that the American Revolution was dedicated to the proposition that liberty and property are virtually indistinguishable and that the proper function of government is to protect both.24 The importance of private property is recognized in the United States Constitution which provides that no person shall “be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”25 The fourteenth amendment of the Constitution prohibits the states from depriving any person of life, liberty, or property, without due process of law.26

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20 Id. at 149.
22 The Amicus Curiae Brief prepared by Professors of Law McGinley and Cady of West Virginia University discusses whether the proposed taking violates the federal and state constitutions and state statutes by being for an essentially private purpose. See note 9 supra.
23 Barnes v. City of New Haven, 140 Conn. 8, 15, 98 A.2d 523, 527 (1953).
25 U.S. CONST. amend. V.
26 U.S. CONST. amend. XIV.
It is generally agreed that the provision, "nor shall private property be taken for public use, without just compensation? in the Constitution is a limitation on the federal government's power of eminent domain rather than the source of that power. A constitutional government does not have the power to authorize the taking of an individual's property without his consent for the private use of another; the taking of private property by eminent domain must be for a public use. Eminent domain is an inherent sovereign power of the federal government and, likewise, of all state governments. "It is now well-settled in every state in the union that the prohibition against the taking of property for the public use without just compensation impliedly, but none the less definitely forbids a taking of property for private uses."

Unprecedented economic expansion in the early nineteenth century resulted in the delegation of state power of eminent domain to private corporations to facilitate the development of transportation and communication. The courts, not wishing to impede progress, generally upheld the delegation of eminent domain powers and rejected the view of the landowners that the condemnations were for the purpose of furthering the corporate activities and profits. The characterization of public use employed by courts to differentiate such a use from a private use varied from where the interest or even the expediency of the state was concerned to the dominant view of where the project for which land was condemned would benefit the public in some manner. This broad conceptualization of public use obscured the interests of landowners.

In an effort to preserve the rights of landowners and in reaction to the liberal use of eminent domain, a stricter concept of public use evolved in the latter part of the nineteenth century. The stricter concept required a showing that the condemned land would be open to use by the public as a matter of right. While the eastern and midwestern states subscribed to this narrow definition of "public use," the western states, which were experiencing a delayed economic expansion, liberalized the meaning of public use

27 U.S. Const. amend. V.
29 Id.; See also Kohl v. United States, 91 U.S. 367 (1875).
31 Supra note 24.
almost to the point of simple public expediency.\textsuperscript{32}

The narrow "use by the public" criterion carried over into the twentieth century but soon ran headlong into another period of liberalization necessitated this time by urban renewal and slum clearance programs. The view in this period was that when the power of eminent domain is employed in conjunction with the police power—the power of the sovereign to regulate private property for the public welfare—, it is necessarily for a public use. "Public use" appeared to have become synonymous with "public welfare." Although a few state courts define public use narrowly as a matter of state constitutional law, it is generally agreed by most commentators that the public use doctrine no longer imposes a meaningful federal limitation on the exercise of eminent domain.\textsuperscript{33}

The United States Supreme Court has consistently shown great deference to state court decisions regarding public use. In only one case has the Court found that the state exercise of eminent domain power was for a private use and in violation of the due process clause of the fourteenth amendment.\textsuperscript{34} Although the Court has been generally reluctant to adopt a test for public use, it did expressly repudiate the "use by the public test" in \textit{Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co.}\textsuperscript{35} In \textit{Mt. Vernon-Woodberry} a power company sought to condemn land and water rights for its use in the manufacturing and selling of hydroelectric power to the public. In repudiating the "use by the public test" the Court stated:

\begin{quote}
In the organic relations of modern society it may sometimes be hard to draw the line that is supposed to limit the authority of the legislature to exercise or delegate the power of eminent domain. But to gather the streams from waste and to draw from them energy, labor without brains, and so to save mankind from
\end{quote}

\textsuperscript{32} \textit{Id.}\\
\textsuperscript{33} \textit{Id.}\\
\textsuperscript{34} Missouri Pac. Ry. Co. v. Nebraska, 164 U.S. 403 (1896). A state agency decision interpreting a statute as authorizing the agency to require a railroad to grant a private individual the right to build a grain elevator on railroad land was upheld by the state supreme court, but the United States Supreme Court held that such a taking was for a private use and, therefore, unconstitutional. The Court did not state what test it applied in reaching its decision. \textit{See also} Berger, \textit{The Public Use Requirement in Eminent Domain}, 57 Ore. L. Rev. 203 (1978).\\
\textsuperscript{35} 240 U.S. 30 (1916).
toil that it can be spared, is to supply what, next to intellect, is the very foundation of all our achievements and all our welfare. If that purpose is not public we should be at a loss to say what is. The inadequacy of use by the general public as a universal test is established.36

In the landmark case of Berman v. Parker,37 the United States Supreme Court stated: "Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs. . . ."38 Berman extended the fifth amendment's requirement of public use to encompass any taking that would further a legitimate governmental policy and established the legislature's power to determine what policies are in the public interest and what programs constitute a public use.39

Although the legislature, in the first instance, has the power to determine the question of public use, whether the use for which the legislature has authorized the taking of property by eminent domain is really public is ultimately a judicial question.40 There is a presumption that a use is public when the legislature has declared it to be such, but this presumption is not conclusive.41 It is the duty of the court to decide the issue of constitutionality. Although the use declared in the petition may be public and the condemnation proceedings may appear to be regular on their face, courts frequently look to extrinsic facts to determine the actual business a corporation is planning to conduct and the necessity of such business to the public.42

The majority in Handley43 sidestepped the question of the meaning of "public use" and declined to establish a test or stan-

36 Id. at 32.
38 Id. at 32.
39 Supra note 24.
42 Gauley & Summersville R. R. Co. v. Vencill, 73 W. Va. 650, 80 S.E. 1103 (1914). Where it appeared from extrinsic evidence that it was not really the purpose of the petitioning railroad to serve the public but that the railroad was a creature of a logging company, condemnation was denied.
43 252 S.E.2d 147 (W. Va. 1979).
dards by which public use may be determined. Instead the court reasoned that since Appalachian Power Company is a public service corporation, and since the legislature has declared the construction and maintenance of electric power transmission lines to be a public use, then the construction of an electric power transmission line by Appalachian Power Company to serve a customer in this case is a public use. The court noted further that there is no distinction between residential and commercial users, and that it is the nature of the use and not the number of persons served which is of paramount importance.¹⁴

Other jurisdictions have held that service to a single customer comes within the ambit of public use. However, there were other factors in those cases which argued for the public benefit. For example, in Exeter & Hampton Electric Co. v. Harding⁴⁵ the New Hampshire court upheld a condemnation where the lines would fit into a proposed master plan to provide a town with service and to better serve anticipated future demands even though the transmission lines would serve but a single customer. In Montana Power Company v. Bokma⁴⁶ where condemnation for the purpose of providing electric power and service to a single customer was allowed, the Montana court required that before a court may order condemnation, it must find the proposed taking is necessary to the public use in the individual case.

The West Virginia statute on which the court relied for its declaration that the construction of power transmission lines is a public use actually contains the term "public use(s)" in two different places.¹⁴ Is the second use of the term merely redundant or does it add to the interpretation of the provision? The court effectively ignored the second use of the term in its decision, apparently considering it to be redundant. Careful examination of the statutory language, however, supports the conclusion that the phrase "when for public use" is a limitation on the power delegated by the statute. Indeed, the West Virginia court had previously noted in Charleston Natural Gas Co. v. Lowe⁴⁷ that "when for public use"

¹⁴ Id. at 149.
¹⁷ See note 7 supra.
¹⁸ 52 W. Va. 662, 44 S.E. 410 (1901). Chapter 42, section 2 of the W. Va. Code (1899) read in pertinent part:
qualified the right to condemn.

The phrase "when for public use" serves two functions with respect to this statute. First, it serves as a limitation placed by the legislature on the right of eminent domain. It emphasizes the fact that not all "telegraph, telephone, electric light, heat and power plants, systems, lines, transmission lines, conduits, stations" are in and of themselves for public use, and only those which are actually intended for public use will support condemnation. Second, this phrase implies that the decision as to whether a proposed use is private or public is a matter for the courts. When the legislature attaches conditions to the exercise of the right of eminent domain, whether the conditions have been met is a matter for judicial inquiry.48

The Amicus Curiae brief appended to the dissenting opinion calls for rigorous judicial review of a utility company's right to condemn because of the potential for abuse in the exercise of the power of eminent domain by a non-public entity. The brief states that "when the power of eminent domain is delegated to a private entity, particularly one which is profit motivated, there is increased potential for abuse of discretion due to unavoidable conflicts of interest."50 This dichotomy between public and private entities with respect to the power of eminent domain was recognized in West Virginia Board of Regents v. Fairmont, Morgantown & Pittsburgh R. R.,51 where the court observed that the right of the state to condemn is an attribute of sovereignty and is therefore superior to the power of utilities to condemn, which power is granted by the legislature. This dichotomy has long been recognized by the West Virginia court.52 In Varner v. Martin53 the court

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The public uses for which private property may be taken or damaged, are as follows:

Fifth—For companies organized for the purpose of transporting carbon oil or natural gas, or both, by means of pipes or otherwise, when for public use. Sixth—For telegraph and telephone companies, when for public use.

53 21 W. Va. 534 (1883).
described the first class of condemnor as encompassing situations where:

the property condemned is under the direct control and use of the government or public officers of the government, or what is almost the same thing in the direct use and occupation of the public at large, though under the control of private persons or of a corporation; . . ."54

The court described the second class as encompassing situations where there is:

direct use and occupation of private persons or of a corporation, and the general public has only an indirect and qualified use of the property condemned, or perhaps no use properly of any kind of the property condemned, but simply derives from its use by and for a private person or corporation some indirect advantage, as by the promotion of the general prosperity of the community; . . ."55

Speaking of the second class, the Varner court stated:

It is obvious, that this entire class differ greatly from the first class, of which we have spoken, and that unless carefully guarded there is great danger, that the Legislature urged on by a popular sentiment or claim would authorize private persons or private corporations, claiming to come under this second class, to condemn lands nominally for the public use, but really for their own private use in violation of the rights of private property, as designed to be protected by the Constitution. The courts have therefore in such cases thrown around the owners of private property safeguards, which we should be careful not to permit to be broken down."56

The court in Varner enumerated three safeguards. First, the general public must have a definite and fixed use of the property to be condemned. Second, this public use must be a clearly necessary one for the public, that is, one which cannot be given up without obvious general loss and inconvenience. Third, it must be at least very difficult, if not impossible, to secure the same public uses and purposes other than by the condemnation of private property."57

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54 Id. at 552.
55 Id.
56 Id. at 555-56.
57 Id. at 556.
These safeguards have been cited many times as criteria for determining public use. Among cases employing these criteria are cases cited by the court in Handley to support the majority opinion. However, nowhere in the opinion did the court refer to any criteria by which it judged whether a use is public or private. This is unfortunate since the public need for the use and the consideration of alternatives to condemnation are criteria which, in the minds of most, would separate a legitimate exercise of the power of eminent domain from an illegitimate one.

It is time for the courts to rigorously scrutinize allegations of public use in order to protect the property rights of private individuals. The constitution asks no more, but demands no less.

Donna P. Grill

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60 Id. at 152. In Handley, there was an allegation that electric service already existed.