# CONDEMNATION: WHO SHOULD SIT IN JUDGMENT?

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(A Cooperative Organization Sponsored Jointly by the Virginia Department of Highways & Transportation and the University of Virginia)

Charlottesville, Virginia

September 1975
VHTRC 75-R16

"Experience in the trial and conduct of condemnation proceedings, as well as familiarity with awards for property taken, casts doubt on the assumption, suggested by a reading of the cases, that the award in any particular case represents the price at which the property could have been sold at the time of the taking. There are a number of reasons for this doubt. In the first place, the fact that owners are usually not only willing but anxious to have their property condemned testified to the widespread belief that awards in condemnation proceedings are liberal, and this in turn suggests that they are often not merely in excess of the price at which the property might have been sold, but even in excess of the value to the owner.

"...the vagueness of the market value standard gives the condemnation tribunal a broad field within which it may make its decision. This vagueness is desirable in hard cases, for it gives a certain amount of play to the legal rules, but often it leads to unsatisfactory results.

Still another reason for the apparent excess of condemnation awards over the strict market value is that the sympathy of the court is likely to be on the side of the dispossessed property owner. And this sympathy is usually warranted and justified by the facts.

"...Without abandoning the accepted verbal doctrines, the courts can give effect to the principle of indemnity by liberally interpreting the meaning of market value. The can do so, too, by inflating awards for consequential damages in partial-taking cases so as to cover incidental losses not otherwise compensable...And yet the situation is not sound in which the courts do by indirection what they refuse to do directly.

"...We cannot quarrel with these devices but we must deplore the tendency of the courts to keep them covert and veiled; and there is ground for criticism, too, in the failure of the courts frankly to recognize that their verbal formulations are often at variance with their practices. Although this discrepancy between judicial utterance and judicial action enables the courts to come close to awarding an amount sufficient for indemnity, the likelihood is great that it may sometimes lead to allowances not merely more than the market value, but even much more than is required for indemnity. For the vagueness of the judicial standards removes the only check on the unwarranted generosity of the award-fixing tribunals. This vagueness of the legal standard combined with other weaknesses of condemnation procedure has given rise to certain abuses to which we must now turn our attention."

— Excerpts from ORGEL ON VALUATION UNDER EMINENT DOMAIN

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## PART I: BACKGROUND AND ANALYSIS

### I. INTRODUCTION

> Experience has demonstrated over a period of many years that the issue of just compensation, which is usually the principal and always the ultimate issue in a condemnation action, is equally baffling to a court, a jury or a commission. The radically conflicting opinions of real estate appraisers, who are the principal and frequently the only witnesses in condemnation trials, present a strange pattern from which to find market value (just compensation) with accuracy.[1]
>
> — Harry Dolan

Condemnation has long frustrated attorneys, judges and legislators. A wide variety of juries and commissions, courts, referees, masters and special boards have been used, yet all of these have been the subject of bitter complaint, and none of them has provided permanent assurance that landowners will consistently receive neither more nor less than fair compensation for their property.

Condemnation has inherent difficulties which make it likely that the controversy will continue regardless of what tribunal is used. Unlike the ordinary criminal or civil case, which requires the judge or jury to choose between two versions of a previous event, the condemnation tribunal must determine "fair market value" assisted only by the "radically conflicting opinions of real estate appraisers." An even more difficult issue is always present in condemnation: should the landowner receive a bare fair market value for his land as the law requires, or should the jury (or commission or judge) exercise its discretion to award a more liberal amount so as to give the owner what it believes to be a "just compensation?"

Because of these ambiguities there is no easy solution to the condemnation problem, and there may very well be no "ideal" tribunal. The best solution for a particular state will depend on practical considerations such as condemnation habits and traditions,

the geography of the state, the kinds of condemning agencies which are active in the state, the amount of condemnation, the workload on the state courts, the quality and independence of the judiciary, and others.

This report is written primarily for a legislator or staff researcher who has been assigned to investigate alternative condemnation procedures. Research in this area in the past has been time-consuming and frustrating because the necessary materials are widely scattered and the subject is poorly indexed. In recognition of the limited amount of time which most legislative researchers have to spend on such a project, an attempt is made here to draw together into one convenient volume enough information to allow the reader to appreciate the variety of problems which can arise.

Bringing together information on several different aspects of condemnation is not merely a matter of convenience, however. To understand the issues in selecting a tribunal, one must know something about real estate appraisers, the substantive law of compensability, and how a condemnation trial takes place. Few articles in the past have attempted to analyze the problem in this broader context; most have been written by attorneys or judges about their personal experiences with a particular condemnation law. Very little of the literature has been based on actual research data, and few writers have described the condemnation process across the country generally. This report is an effort to supply some of the important contextual information and comparative analysis which has been lacking in the past.

## II. A DESCRIPTION OF CONDEMNATION TRIBUNALS

### A. The Basic Kinds of Tribunals

There is a great variety of condemnation tribunals in the United States. Since state legislatures have frequently passed separate condemnation acts for each public agency or public utility granted the power of eminent domain (see Section IV for a fuller discussion of this practice), there may be 15 or more different condemnation procedures in a single state. According to one study made in 1931, 325 separate condemnation procedures were in effect in this country at that time.[2] While that number has been reduced somewhat through reform and consolidation, a very large number remain and seemingly every kind of arrangement can be found in use somewhere. Even with this variation, however, all tribunals may be classified as a jury, a commission, a permanent board, a judge, a referee, or a master.

#### 1. Juries

Several states do not provide a special tribunal for condemnation, and eminent domain cases are tried before a jury as any ordinary civil case would be. Jurors are drawn as usual from the jury rolls and do not have any special qualifications. The regular rules of evidence and court proceedings are followed. Jury trials are usually considered the most tightly controlled and most formal proceedings.

In a very few states, a "special" jury is provided; "special" in this context usually means that only jurors who are property owners may be selected to hear condemnation cases.

#### 2. Commissions

Other than the jury, the most common tribunal is a commission. (In some states such a tribunal may be called a Board of Viewers, Board of Assessors, or Board of Appraisers.) The term "commission," however, covers so many different arrangements that it requires further explanation.

Ordinarily in the law, a commission is composed of men who are chosen for their special competence in a given area. This special ability presumably results from training, experience and professional practice. In condemnation, however, the term is used to describe not only highly reputable and experienced attorneys who in effect act as special judges, but also ordinary landowners and citizens who have no special knowledge of real estate and who actually act as jurors.

Probably the most qualified and professional commissioners are appointed in the federal condemnation system. Three commissioners may be appointed by the federal district judge to sit for an extended period of time. A commission may sit for several months, for example, to hear all of the cases involved in a particular construction project (a road, a dam, an airport, etc.). After an initial briefing by the district judge, the commission is thereafter free to conduct its own proceedings; the judge will not be present unless a troublesome problem arises. Usually at least one member of the commission will be an attorney who will be made the chairman; he will conduct the hearing and make the necessary rulings on admissibility of evidence. Other members of the commission may also be attorneys or professional real estate appraisers. In short, a federal condemnation commission may be in effect a temporary special court. A federal commission will not necessarily, of course, fit this description; the character of a commission will depend on the quality of appointments made by the judge and the degree of independence which he grants to it.

In general, state condemnation commissioners are less professional than federal commissioners, although there is great variation from state to state and some states do require commissioners to be attorneys or real estate appraisers. Typically, however, local persons such as bankers, successful businessmen, insurance men, real estate brokers, farmers, storekeepers, livestock dealers, auto dealers, builders, ordinary landowners and retired persons are appointed commissioners. These persons are not highly professional in real estate matters, but are assumed to be generally more knowledgeable than ordinary jurors would be.

There are important differences between states in the degree of formality of the proceeding. In some states a very formal proceeding is conducted in the courtroom with the commission in the jury box and the judge presiding and tightly controlling the admissibility of evidence. Other procedures are less formal and are held in an attorney's office with no judge presiding. Still others are completely informal and no testimony is taken at all; the commissioners (they may be called appraisers) simply informally inspect the property and submit their opinion to the court.

In most states, commissioners are by statute selected and appointed solely by the judge. The actual practice varies greatly from state to state and judge to judge, however, since many judges will solicit suggestions from the parties, or at least drop a proposed commissioner if a litigant strenuously objects to him. In a small number of states the parties are by statute given a role in the selection of commissioners. West Virginia is an example of this; the judge proposes "thirteen disinterested freeholders," the condemning agency and the landowner each strike four, and the remaining five freeholders constitute the commission.

3. Permanent Boards

In two states condemnation cases are decided by a full time professional board. Such a board is usually called a "commission," but is differentiated here from other kinds of commissions because of its distinctively different character. Members of a board are appointed by the governor for three or four year terms, and the appointments are staggered so that the entire board is not replaced at one time. A condemnation board will travel extensively and hold hearings in the various counties where property is being taken. A permanent board is in many respects like a special court.

5. Referees and Masters

Referees and masters are sometimes used to hear condemnation cases. This ordinarily means simply that the judge appoints an attorney to act as a special judge for this purpose. The attorney conducts a hearing, listens to the evidence and submits a report to the judge in which he recommends an award. Unless there are irregularities or special problems, the judge will usually adopt the master's recommendation.

Connecticut has a unique system using "referees." Only retired judges, however, may be appointed referees.

## B. A Summary of State Procedures

One very common arrangement needs to be explained before the following summary figures can be properly understood. Many states provide for an initial hearing or trial before a commission, but grant both the condemnor and the landowner an automatic right to reject the commission's award and demand a jury trial on the compensation issue. The jury trial in such a procedure is de novo, that is, the trial is a completely new proceeding; testimony given before the commission and the commission's award are not admissible in the jury trial.

Although almost half of the states have procedures fitting this general description, the actual situations vary considerably. In some states the commissioner's hearing is quite formal and most cases are resolved with their award, while in other states the commissioners' hearing is treated by everybody concerned as merely preliminary and most cases are appealed for a jury trial.

The following summary shows the condemnation tribunals used for highway condemnation in the several states. Only tribunals for highway takings are shown because the information is readily

available and the statistics on all condemnation procedures are not. Highway takings do represent a very substantial part of all condemnation, however, and these summary figures are probably representative.[3]

It is useful to note that a total of forty-five states grant a right to jury trial, although of course in many states a preliminary hearing before commissioners is required. In thirteen states, the right to jury trial is a state constitutional requirement.

1. ALABAMA: A double procedure. First heard by three commissioners appointed by the Court. Either party may appeal to Circuit Court for de novo jury trial.

2. ALASKA: A double procedure. Judge may appoint a master, unless all parties object, in which case a jury trial is held. Jury may be waived by all parties. A master's award may be appealed for jury trial.

3. ARIZONA: Constitutionally required jury trial unless waived by all parties.

4. ARKANSAS: Apparently, a jury trial is always used.

5. CALIFORNIA: Any party may demand a jury, otherwise heard by the court. Judge may appoint a referee.

6. COLORADO: Landowner may demand a jury, otherwise a commission of three is appointed. Court may hear case if all parties agree.

7. CONNECTICUT: A unique system under which references are appointed in every case, and their award is final unless gross misconduct, etc., can be shown. Referees must be retired judges.

8. DELAWARE: Commissioners. Court proposes eleven, each party strikes four, leaving three.

9. FLORIDA: Constitutionally required jury trial in every case.

10. GEORGIA: A double procedure. Either party may appeal "assessors" report for jury trial.

11. HAWAII: Jury trial as a matter of course.

12. IDAHO: Condemnation cases are heard by judges, juries and referees.

13. ILLINOIS: Either party may demand jury trial; otherwise heard by the Court.

14. INDIANA: A double procedure. Commissioners first hear the case. Either party may appeal for a jury trial, or by agreement, by the court.

15. IOWA: A double procedure. Heard first by six commissioners; either party may appeal for jury trial.

16. KANSAS: A double procedure. Heard first by "three disinterested householders"; right of appeal for jury trial.

17. KENTUCKY: A double procedure. First heard by "three impartial housekeepers", with right of appeal for jury trial.

18 LOUISIANA: Heard by Court without a jury.

19. MAINE: An unusual double procedure. Heard first by a permanent Land Damage Board composed of five members: two appraisers, two attorneys in the county of the take. Any party may appeal for jury trial. By agreement court may hear alone, or may appoint a referee.

20. MARYLAND: A double procedure. Heard first by the Board of Property Review. Right to appeal for jury trial, or trial by court if all parties agree.

21. MASSACHUSETTS: Either party may demand a jury. Otherwise heard by Court.

22. MICHIGAN: Either party may demand a jury; otherwise heard by Court.

23. MINNESOTA: A double procedure. Heard first by three court-appointed commissioners. Either party may appeal to a jury, de novo.

24. MISSISSIPPI: An unusual double procedure. Heard first by a Special Court of Eminent Domain. Any party may appeal its award for jury trial de novo.

25. MISSOURI: Double procedure. Three court appointed commissioners with a right of appeal to jury.

26. MONTANA: A double procedure. First heard by three commissioners; each side nominates one, the third is selected by the first two. Either party may appeal its award to a jury, de novo.

27. NEBRASKA: A double procedure. Award of three court appointed commissioners appealable for de novo jury trial.

28. NEVADA: Has no special tribunal. Under ordinary civil rules, the Court, a jury, a commission or a master may hear the case.

29. NEW HAMPSHIRE: An unusual double procedure. Heard first by a three man permanent board called the N. H. Commission on Eminent Domain. Either party may appeal its decision for jury trial de novo.

30. NEW JERSEY: A double procedure. Award of the three court appointed commissioners may be appealed for jury trial de novo.

31. NEW MEXICO: Either party may demand a jury; otherwise heard by the Court.

32. NEW YORK: All condemnation cases involving highway takings are heard by a Judge of Court of Claims without a jury.

33. NORTH CAROLINA: A double procedure. Commissioners are appointed if requested by either party; there is a right of appeal for jury trial de novo.

34. NORTH DAKOTA: Either party may demand a jury trial; otherwise heard by the court alone, or by a court appointed referee.

35. OHIO: The Ohio Constitution requires condemnation cases to be determined by a jury.

36. OKLAHOMA: A double procedure. The award of the three court appointed commissioners ("free-holders") is appealable for a jury trial de novo.

37. OREGON: All cases are tried by jury.

38. PENNSYLVANIA: An unusual double procedure. Either party may request a Board of Viewers. This three member Board must include an attorney to act as chairman. Each county maintains a Board; appointments run from three to six years and one third must be attorneys. Either party may appeal to the Court of Common Pleas for jury trial. This award may also be appealed, to the Supreme or superior court, for another jury trial.

39. RHODE ISLAND: All cases are determined by a jury, unless the landowner fails to file a claim within one year, in which case the condemnor may request the court to determine compensation without a jury.

40. SOUTH CAROLINA: An unusual double procedure. A statewide list of commissioners is maintained by the Governor. Members of the State Highway Commission are included on the list. As needed in a condemnation case, three or more commissioners are appointed from the list by the State Highway Department. Either party may appeal the Board's award to the Court of Common Please for a jury trial de novo.

41. SOUTH DAKOTA: Jury trial, unless waived, in which case the award is made by the Court alone.

42. TENNESSEE: The landowner may request a jury trial; otherwise heard before the judge.

43. TEXAS: A double procedure. The award by the three court appointed commissioners may be appealed for a jury trial de novo.

44. UTAH: Courts, juries and referees are all used.

45. VERMONT: A double procedure. If the landowner rejects the state's offer, a member of the State Highway Board holds a bearing and fixes compensation. The landowner may appeal to the County Court for trial by jury.

46. VIRGINIA: Commissioners only. The parties may agree to five commissioners. If no agreement is reached, each party nominates six names. The Court summons nine of the twelve. Each party has two strikes, leaving five commissioners. Jury trials are not used.

47. WASHINGTON: Either party may demand a jury trial; otherwise heard by the Court alone.

48. WEST VIRGINIA: A double procedure. Unless both parties agree to waive the commissioner's leasing and take the case directly to a jury, the five member commission first hears the case. Commissioners are selected as follows: the Judge nominates thirteen disinterested freeholders, each side strikes four, leaving five. Either side may appeal the commissioners award for a de novo jury trial.

49. WISCONSIN: The landowner may choose to have three commissioners appointed from a list maintained by the Court, or to have a regular jury trial. May be heard by court without a jury by agreement. Either party may appeal from the commissioner's award for jury trial de novo.

50. WYOMING: A double procedure. Heard first by three court appointed commissioners ("Appraisers"). Either party may appeal to the District Court for a jury trial de novo. On such an appeal, trial must be before a jury: the parties cannot waive it.

C. A Brief Description of Condemnation Under Federal Rule 71A(h)

The federal procedure is different from any procedure used in the states. Rule 71A(h) provides that

> any party may have a trial by jury... unless the court in its discretion orders that, because of the character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice, the issue of compensation shall be determined by a commission of three persons appointed by it.

See Section IV below for a more extensive discussion of the federal procedure.

# III. THE CONDEMNATION CONTEXT

## A. The Condemnation Trial

In order to appreciate the situation which confronts the juror, commissioner or judge in a condemnation proceeding (which may be a hearing as well as a formal trial), it is important to be aware of some legal rules and the characteristics of the participants. While the limitations of this paper do not permit an in-depth discussion of these matters, they will be sketched here briefly.

### 1. The Heart of Condemnation: Determining Compensation to the Landowner

Many legal issues conceivably can be, and sometimes are, raised in condemnation litigation. There may be, for example, a dispute as to whether the project for which the land is being taken is a "public use," or whether there has been compliance with statutory requirements. For practical purposes in the great majority of cases, however, there is only one issue: the amount of compensation to be paid to the landowner. This fact, which is taken for granted by persons familiar with condemnation practice, has been noted by numerous commentators.[4]

### 2. Witnesses, Expert and Not So Expert

There are two fundamentally different types of persons involved in appraising real estate: professional appraisers on the one hand and influential businessmen familiar with the local real estate market on the other. Confrontations between the out-of-town professional and the local businessmen occur frequently in condemnation litigation and there is a continuing controversy as to which is the more reliable appraiser.

The appraising profession believes that through vigorous training it is possible to estimate value with a great deal of precision. Professionals (graduates of appraisal schools and accredited members of professional societies) are required to make a thorough investigation of the real estate market in a new area by reviewing court records of recent sales. On the basis of this review a "brochure" is created which serves as the basis for appraisals. Appraisals are based on recent sales of similarly located and constructed property. Individual appraisals must be heavily documented and broken down in great detail. Professional appraisals are frequently voluminous and resemble mail-order house catalogs.

The appraising profession has been attacked, however, for what opponents believe to be pretensions to an impossible degree of certainty. It is claimed that appraisal of property is largely a matter of experience and judgment in the local market, and that a mere "paper analysis" may be misleading and inaccurate. According to this view, a person who has lived in the community for a number of years and has dealt in property may have a better idea of value than an "expert" who is in the locality for only a brief time. The court has little control over such witnesses, however; nonprofessional appraisers frequently have little if any written analyses to submit to the commissioners or jurors, and their testimony sometimes amounts to the simple assertion that "In my opinion, the land is worth $XXX."

a) Court Admission of "Expert" Testimony — Most American jurisdictions are very liberal in accepting the testimony of real estate "experts"; nearly any landowner with general business experience in the jurisdiction will be permitted to testify. The courts have generally held that a witness's qualifications, or lack thereof, go to the weight of his testimony, not to its admissibility. The condemnee-landowner himself is always permitted to testify on the value of his property, regardless of his qualifications. In sum, there is no effective bar to the admission of uninformed testimony.

b) Condemnor Appraiser Witnesses — The government and other institutional condemnors may use either their own staff appraisers or professional, accredited appraisers hired on contract. Because of comparatively low pay scales, government appraisers tend to be young and less experienced than the consultant appraisers. The professional consultant frequently specializes in working for condemnors. Because the government uses professional and staff appraisers, it frequently finds itself in the position of relying on witnesses who are strangers to the community where the property is being condemned.

c) Landowner Appraiser Witnesses — The condemnee is much more likely to use a local appraiser, since such a person will have more influence with a local jury. This is especially true in very small rural communities, where an influential businessman may personally know many of the jurors or commissioners. A landowner may of course also use a professional appraiser, and will frequently present both a local and a non-local professional witness.

d) On Differences of Professional Opinion — Whatever one's conclusion on the question regarding appraiser abilities and the admissibility of "expert" witnesses may be, one thing is clear: most condemnation factfinders are presented with a

very diverse menu of value opinions by the witnesses testifying before them. Ella Graubart, writing in 1954, expressed the situation well:

> As long ago as 1889, the market value of three acres of land was said by one witness to be $2,500 and by another $12,000. In a recent condemnation of land by the U. S. Government, expert opinions varied from $475,000 to $950,000.
>
> In our local court early this year, a well-known expert estimated damages of $132,000. Opposing him, another equally well-known witness testifying for the defendant assessed damages at $6,740.
>
> The times call for better rules of evidence to end the abuses which have grown up under the old rules.
>
> The introduction of sales prices of neighboring properties would do much to steady the testimony of experts and the verdicts of juries...
>
> In a recent case tried in Allegheny County, an expert for the plaintiff testified to a market value of $200,000 for the condemned property. The expert for the defendant testified to damages of $50,000. Such a discrepancy between experts on opposing sides is by no means unusual in the trial of a condemnation case.
>
> If two real estate experts appeared before a Board of Directors of a bank and one seriously contended that a property was worth $200,000 while the other gave an appraisal of $50,000, there would be considerable suspicion about the good faith of one or both of the experts.
>
> An yet, in courtrooms all over the country, in state and federal proceedings, such divergent opinions are being seriously offered to judges and juries unfamiliar with the condemned property as the basis for reaching a fair valuation.[5]

A more recent comment illustrating this fact was made by Mr. McLeod, the Attorney General of South Carolina, in a paper presented to the Highway Research Board in 1970:

> ...The state of North Carolina in North Carolina State Highway Commission v. Gamble had before it a factual situation which exists regularly in my state and which, it is fair to assume, is common in every other state and territory. Three witnesses in that case appeared for the landowner and three for the highway department. The high range of testimony by the landowner's witnesses was a valuation of $92,000 before and a valuation of $10,000 after. The landowner's witnesses also testified that the highest and best use for the property before the taking was for residential and subdivision purposes; and after, its highest and best use was for growing trees. On the part of the highway department its witnesses testified to a value before of $27,000 and a value after the taking of $20,000, and that the highest and best use before and after the taking was for the purpose of farming and timber growing. With this range of testimony before it, a North Carolina jury returned a verdict for $73,000.
>
> There is nothing unusual about this particular case except that it represents common factual situations which occur daily throughout the land, but with each jurisdiction, to a greater or lesser extent, considering such circumstances in the light of its own highway condemnation laws.
>
> ...I feel confident that the problem of excessive highway condemnation jury verdicts exists in a large number of states. Concern in this regard has been expressed at meetings of the National Association of Attorneys General at least as far back as 1958 when the thrust of massive federal contribution began to be felt. The causes of high verdicts are as many and varied as there are lawyers, judges, juries and parcels of land.[6]

The situation is familiar to persons who are regularly involved in condemnation. Since value testimony is so widely divergent, it would seem to be important to have a competent and knowledgeable group of persons to sift through the evidence and separate the credible from the incredible. As Mr. Harry Dolan has written,

> ...The radically conflicting opinions of real estate appraisers,... present a strange pattern from which to find a market value (just compensation) with accuracy.[7]

3. The Attorneys

The government and landowner attorneys present a contrast, as do the respective appraisers. The government attorney may be a staff attorney or an independent lawyer hired by the state. If a staff attorney, he will probably be compensated on a straight salary; if an independent lawyer, by a straight fee for time spent. Politics may be involved in the selection of a firm by the state.

The landowner's attorney, on the other hand, will almost certainly be compensated on a contingent fee basis. While there are several variations, one common arrangement is for the attorney to receive 25%-33% of the excess (that is, the difference between the government's offer and the court's final award). In another variation, the lawyer receives 10% of the government's offer plus 50% of any increase in the award given by the court.

Landowner attorneys frequently specialize in condemnation work. It not infrequently happens that an attorney who develops a reputation for condemnation work in a rural county will try all, or nearly all, of the landowner's cases on a project (e.g., a highway) in the county. Such a situation can be quite lucrative.

4. Appellate Review of Awards

Rules governing appeals in condemnation cases are generally the same as those in other civil litigation. It is important to note here, however, that appellate courts will rarely review a condemnation award merely on the basis that it is excessive or inadequate. This is particularly true of commission awards, since commissioners are theoretically experts whose opinion is held to be more accurate than the opinion of a reviewing judge. (Another manifestation of the authority given to commissioners is the common rule that commissioners are not bound by the testimony;

they may award less than the lowest government testimony or more than the landowner's highest testimony — and sometimes do.) Because of these rules severely restricting reviewability, commission or jury awards may be considered final in the ordinary case.

## B. The Substantive Law of Compensability

The habits and traditions which have been developed by our commissions, juries and courts in making condemnation awards may be explained in part by the law of compensability which they are required to apply. While the limitations of this report do not permit a thorough treatment of the law of compensability, a brief sketch is very helpful in understanding the situation confronting these tribunals. For a somewhat more complete exposition of the subject, the reader is referred to "Contemporary Studies Project: New Perspectives on Iowa Eminent Domain," 54 Iowa L. Rev. 737 at 853 (1969). This excellent note is relied on heavily for the brief discussion here.

### 1. The Historical Limitation to the Market Value Standard

The Fifth Amendment to the United States Constitution states that

> ...Private property (shall not) be taken for public use, without just compensation.

All of the states have similar provisions with the exception of North Carolina. The history of these provisions both on the national and state levels, however, has been one of severe judicial restriction of the concept of "just compensation."

In general, the courts have considered only fair market value of the actual physical property taken to fall under the constitutional requirements for "just compensation." The standard falls far short of complete compensation for the condemnee. A Congressional Committee Report constructed the following list of expenses which are non-compensable under the strict market value standard:[8]

> Moving Expenses, including costs for disconnecting and reinstalling.
>
> Expenses incurred in moving a family.
>
> Expenses incurred in searching for replacement property.

Expenses incurred in obtaining substitute property including appraisal, survey, financing charges, and the title examining costs.

Losses on forced sale of property rendered unusable.

Expenses incidental to transfer of title.

Increased cost to rent for new dwelling on property.

Increased cost to acquire a substitute home, farm, or business.

Loss of homeownership because of inability to refinance within financial means.

Loss of rental due to anticipated taking.

Business interruption.

Loss of going concern value, goodwill, livelihood, and loss of patronage after relocation.

Inability to continue in business because of inability to refinance, elderly cannot withstand pressure of relocation, increased costs, risks, competition.

Loss of employment due to discontinuance or relocation of business.

The market value standard was judicially developed during the eighteenth century, and was an appropriate and reasonable one for the conditions then prevailing. The United States was predominantly rural and large amounts of undeveloped land were available for expansion. Much of the land needed for public projects already belonged to the government. Where private land was required, the wide availability of land made it relatively easy to relocate. Furthermore, the plentiful supply of land meant that it was cheap; most condemnation involved negligible or very low economic losses to the condemnee. In short, condemnation of land on the early American wide open spaces simply did not involve major sacrifices by most landowners.

Because of this situation, there was in some states (especially the Southern states) originally no duty at all to compensate a landowner for the taking of undeveloped land. With time, however, the laws were "liberalized" to require that market value be paid. As described above, the market value standard is itself very limited. Under the judicial development of the standard, any expenses or inconveniences other than the value of the property itself are classified as "consequential damages" and are not compensable.

Noise is a classic example of a "consequential" damage and provides a useful illustration of the irrationalities which have developed in the law of compensation. Under the law of most states, where part of a landowner's property is physically taken, damage to remainder property caused by noise generated from the project (e.g., the new highway) may be considered in making an award to a landowner; if, however, the landowner has not been subjected to a physical condemnation, then he is not entitled to any compensation for damage caused by noise -- regardless how substantial the damage may be.[9] Thus, exactly the same damage which is compensable in the one case is not compensable in the other.

A summary of the rationales traditionally used by courts to defend the prevailing fair market value rule reveals their weaknesses. One theory for denying incidental damages which had a long history was that business holdings were not "property interests" but "merely personal interests," and therefore not compensable. Another theory was that business losses and other incidental damages are not compensable because they aren't "taken" and are therefore of no benefit to the condemnor. Both theories have falled into disuse and carry little weight today.

A third argument for restricting compensation is that the cost of public projects would otherwise be prohibitively high. This argument ignores the fact that every public project involves damage to landowners, and that the only real question is therefore whether the damages should be suffered by those persons unfortunate enough to be in the way, or should be reallocated to all members of the society generally. It seems clear that the trend in modern society favors spreading the cost of public projects and avoiding substantial losses to individuals. The "too costly" argument contains the assumption, however, that incidental damages aren't really very serious, and that it is not valid or wise to quantify "personal" and "psychic" injuries. Neither of these objections would appear to be valid, however, since presumably under a liberalized standard, compensation would be made only for demonstrable and quantifiable losses.

A fourth rationale frequently enunciated by the courts is one that deserves more serious consideration. It is argued that any attempt to compensate incidental (consequential) damages will result in unfounded and speculative jury awards. The premise of this argument is that such "incidental" losses are too difficult, too remote and too uncertain to measure accurately. This may be true of such "incidental" injury as the sense of loss and disorientation which a person may suffer when forced to move off the family homestead, but other "incidental" injuries such as noise damage from a highway may be quite accurately measured by the drop in the market value of the property. A more important

rebuttal to the "speculative award" argument is that jury and commission awards are already unfounded and speculative. This is a result of the fact that while juries are by law not permitted to hear testimony on incidental damages, they regularly attempt to compensate for them anyway in the conviction that mere "fair market value" is unjustifiable inadequate.

Conditions in the 1970's are very different from those prevailing when the "fair market value" doctrine was established. In our urban, commercial society with an increasing concentration of population, land has become a very valuable commodity. "Incidental" or "consequential" damages are a serious problem as a result of the natural frictions between persons living close together. A landowner can no longer simply move over a few feet on the prairie; it is a major effort for a homeowner to relocate in an urban area and an even greater effort and expense for a complex business to do so. Many commentators have articulately argued that the market value standard is obsolete and completely inadequate under an enlightened view of modern social policy; few defend it as sufficient.

2. Fundamental Compensation Reform Under the Uniform Relocation Act of 1970

As it has become increasingly obvious over the last few years that mere fair market value is not really a fair or adequate compensation in many condemnation situations, there has been a movement in the states as well as in the federal government to liberalize compensation. Some states have by statute required payments to be made for moving expenses, appraisers' fees, refinancing costs, rental losses, increased interest rates, and other such items.[10] The Florida courts have required moving expenses to be compensated under a direct state constitutional interpretation of "just compensation."[11] The doctrine of non-compensability for indirect damages (such as noise where there is no property physically taken) is under constitutional attack in a few state courts.[12]

The truly revolutionary reform in compensation law, however, came in the form of federal legislation, first in the 1968 Federal-Aid Highway Act,[13] and then in the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970[14] (hereafter referred to as the Uniform Act), which replaced and expanded the 1968 Act. The Uniform Act is applicable to all condemnation by federal agencies and all condemnation by state and local governments which involve federal funds.

The major compensation features of the Uniform Act of 1970 are summarized below:

TITLE II.

Sec. 202, Moving and Related Expenses

a) 1) actual reasonable expenses to move property, business or family are compensable.

2) actual direct losses of tangible personal property due to the move as to discontinuing a business are compensable.

3) actual reasonable expenses in searching for a replacement business or farm are compensable.

b) a homeowner may elect to receive, in lieu of the expenses allowed above, an automatic moving expense allowance of up to $300, and a dislocation allowance of up to $200.

c) if a person is displaced from his business, and it is determined that it cannot be relocated without a substantial loss of existing patronage, then he may elect to receive, in lieu of moving expenses, a fixed payment of an amount equal to his average annual net earnings (but not less than $2,500, nor more than $10,000).

Sec. 203, Replacement Housing for Homeowners

a) a displaced homeowner may receive the following payments, but total payments cannot exceed $15,000:

a) the amount which is necessary, in addition to the condemnation award for the old dwelling, to enable the homeowner to acquire a comparable replacement dwelling which is decent, safe, sanitary, and reasonably accessible to public services and places of employment.

b) the cost of higher interest rates which the homeowner is required to pay on his new dwelling.

c) reasonable expenses for title and recording fees and other closing costs on the new dwelling.

Sec. 204, Replacement Housing and Tenants

1) a displaced tenant may receive payments which are necessary in addition to his previous rent to enable him to obtain comparable, decent, safe and sanitary rental housing for four years (not to exceed $4,000).

2) a displaced tenant may, if he elects to purchase a dwelling, receive a payment sufficient to enable him to make a down payment to obtain comparable decent, safe and sanitary dwelling (not to exceed $4,000, and if payment exceeds $2,000, tenant must match the payment).

The reader will notice that this new compensation scheme covers many of the items which previously were not compensable under the market value standard (see the list of non-compensable on page 16 above). In fact in some respects the Uniform Act goes beyond "just compensation" and represents a social welfare program; this is clearly the case in the requirement that indigent persons who are displaced from their homes must receive more than the value of their previous home — they must be placed in new housing which is decent, safe and sanitary. Furthermore, under the Uniform Act no person may be displaced from his home until the condemning agency certifies that suitable replacement housing is available in the community; if such housing is not available, the agency may as a last resort use funds authorized for the construction project to build the necessary housing. Another feature of the Uniform Act is that it is truly uniform; all persons displaced by a project involving federal funds are treated alike. There previously had been many inequities as a result of the fact that different agencies were governed by different rules of compensation.

While the 1968 Federal-Aid Highway Act and the Uniform Act of 1970 represent a fundamental reform of compensation law, it should be remembered that they were only recently enacted and that for many years only the fair market value of property physically taken was compensable. (The fair market value standard still remains the constitutional test of "just compensation.")

Perhaps more importantly, it should be noticed here that this discussion pertains only to the letter of the law; how much landowners have historically actually received from juries, commissions and courts is a separate question which is considered in Section V below.

### 3. The Full Compensability Standard in England

It is interesting to note in passing that England, which never had vast tracts of undeveloped land, has traditionally compensated all provable losses.[15] The following expenses are all compensable in England: solicitor's and appraiser's fees, moving, disconnection, adoption, and installation of personal property costs, temporary loss of profits, miscellaneous expenses incurred in moving, costs of increased rent and business overhead expenses under certain conditions, costs of seeking and obtaining new quarters, and business goodwill, measured by its value to the owner. Furthermore, an owner of land which is not taken may claim injury from the construction of the project.[16]

## C. Condemnation and Public Opinion

Condemnation litigation, like most daily government business, does not ordinarily command public attention. Few people other than those actually displaced are informed about condemnation, either in theory or in practice. Still, the forced displacement of a person from his property does touch upon a sensitive issue of individual rights and some condemnation situations receive considerable press attention. This section is an attempt to offer a very brief glimpse into condemnation as viewed in the public media.

### 1. Condemnation in the Popular Press

There have been articles on condemnation from time to time in the popular press, but not a great number of them. They generally express sympathy and advice to the landowner in his condemnation plight. The following samples are illustrative: "If the Highway Builders Want Your Home," Popular Science, 1958:[17], "When They Take Your Home for the New Highway," Good Housekeeping, 1968:[18], "They Can Throw You Out Any Time," Saturday Evening Post, 1952:[19], "Buildozers at Your Door," Reader's Digest, 1963:[20] "Will Americans Surrender Their Private Property?", Vital Speeches, 1959:[21], "Connecticut, Spare My Land!!!", Forum, 1938:[22], "Incident on Interstate 91 — Man Shoots, Burns Self," Saturday Evening Post, 1968:[23], "Road Program Hits a Landowner," Nation's Business, 1967:[24], "Yes, They Can Condemn Your Property," Changing Times,

1957:[25], "Proceed At Your Own Risk," Fortune, 1956:[26], "Highwaymen Come to Morristown: The Interstate Highway System," Saturday Evening Post, 1966:[27], and "The Great Land-Grab Scandal," Reader's Digest, 1968.[28]

2. An Example of Condemnation as a Political Issue

A situation which occurred in Virginia in 1962 is very useful in illustrating how condemnation can be politicized. William Schultz in his Reader's Digest article "The Great Land-Grab Scandal"[29] summarized the situation:

> Agents for the Virginia Highway Department moved into Shenandoah in 1962 to acquire land for Interstate 81. When John G. Miller, editor of the Shenandoah Valley learned of the prices offered local landowners, he was outraged. "This is criminal," he thundered, and then week after week in his newspaper encouraged residents to reject inadequate offers and fight for just compensation in court.
>
> Three out of every five landowners did just that. They often had to wait long, agonizing periods before getting their hearing from a court-appointed commission (in fact, some 20 Shenandoah County landowners, whose property was taken in 1963 and 1964, have not yet received commission hearings). But the commission has found that in 68 of 70 cases the highway agents attempted to underpay property owners. Total commission awards were 71 percent higher than the Highway Department's offers.

The author has analyzed in detail the offers and awards on this project and has compared the results with Interstate 81 awards in two other jurisdictions.[30] This study shows that Shenandoah commission awards were 68% higher than the Highway Department offers in that county; in Roanoke County the awards were 16% higher than the offers.

While it is possible that some of the Virginia Department of Highways Shenandoah County appraisals were low, it is very unlikely that its appraisers in one county would be so consistently low as to account for these statistics, which show that Shenandoah awards, compared to the offers, were substantially and strikingly higher than the others. Quite plainly, the vehement and repeated attacks on the Highway Department by the local newspaper over an extended period of weeks had the effect of increasing awards. Shenandoah County is a rural county containing only a few thousand residents and it is unlikely that commissioners selected to hear the cases that followed were unaffected by the brouhaha caused by the newspaper.

Mr. Schultz is of course sympathetic to the landowners and accepts the commissioner's awards as true fair market value; whether this is likely to be the case is discussed in Section V below. Mr. Schultz asserts that "in 68 of 70 cases the highway agents attempted to underpay property owners," but failed to point out that it is almost universally the case in this country that juries and commissions will award somewhat more than the condemning agency offers. He also failed to point out that Mr. Miller, the crusading editor, was also one of the landowners whose property was being condemned for Interstate 81, and was therefore personally interested in the condemnation awards.

In cases like this one where condemnation becomes a public issue, the controversy is likely to be most detrimental to the condemning agency. Unlike parties in other kinds of cases, a condemnor appears repeatedly over an extended period of time in the court of a particular jurisdiction. It is therefore vulnerable to attacks on its reputation and veracity which may substantially affect future litigation.

Whether such attacks are justified or not is a separate issue, of course; this discussion is by no means intended to defend the agency's offers, which may indeed have been low by a common sense standard of "just compensation." It is intended, however, to illustrate how awards can be influenced in ways that are inconsistent with the theory that fair market value is arrived at by a technical analysis of comparable sales.

## IV. A BRIEF HISTORY OF CONDEMNATION PROCEDURE

### A. A Variety of Tribunals From the Beginning: English Precedents

There has never been a "standard" condemnation tribunal. A review of over four centuries of British history shows that juries, commissioners, courts and special panels have all been used to determine property values at one time or another.[31] While a rich, detailed account of the practical problems encountered with the various procedures is not available, a sketch of Parliament's actions over the years makes it clear that no tribunal was free from criticism and dissatisfaction.

#### 1. 1541: Commissioners Appointed By the Parties

The first provision for determining a condemnation value appears in 1541 in "The Bill for the Conduyttes at Gloucester"[32] by which the city of Gloucester was authorized to dig for new springs on Marston's Hill and construct a conduit through which the water would flow down to the city. Under the Bill, the Mayor was to pay the owner

> ...as much money for the same digging and breaking as shalbe adjuged and taxed by the determynacon and jugement of iij or iiij indefferent men inhiting wtin the pishe where the place so broken buylded or trenched is or shalbe...And the same iij or iiij men alwaies hereafter shalbe chosen and named aswell by the owner or possessor of the grounds so broken for the time as also by the saide Maire or Deane for the tyme beying...

#### 2. 1605: Commissioners Appointed by the Chancellor

Another provision for the appointment of commissioners (this time appointment is made by the Chancellor) appears in a 1605 act for the increase of the water supply of London by diverting the New River into an artificial channel:[33]

> ...at the request and charges of the Maior Cominalty and Citizens of London, Commission or Commissions under the Greate Seale of England shalbe graunted to such psons as the Lords Chauncellor or Lorde Keeper of the

> Great Seale of England for the tyme being shall nominate and appointe, (four from each of the three counties of Middlesex, Essex and Hartford and four from London):... which Sixteene or any Nyne of them, whereof Two to be of the City of London, shall have power to order and set downe what Rate or Rates Some or Somes of Money shall be paid by the Maior Comminalty and Citizens of London to the Lordes Owners and Occupiers of the Groundes and Soyle and Milles for which composicon is to be made by the intent of this Acte, if the parties cannot of themselves agree, and in what manner the same shall be paide; And that for the recoverie of suche Money as shall be soe ordered and set downe by the saide Commissioners or any Nyne of them...

3. 1696: Jury

The first use of a jury to determine compensation was made in 1696 in "AN ACT for enlarging Common High-ways," under which local justices of the peace, after being authorized to widen highways, were directed to

> impannel a Jury before them and to administer an Oath to the said Jury that they will assesse such Damages to be given and Recompence to be made to the Owners and others interested in the said Ground Rent or Charge respectively for their respective Interests as they shall think reasonable not exceeding Five & Twenty Yeares Purchase...[34]

4. 1707: Justice of the Peace

Apparently the use of the jury was not universally favored, because Parliament, in a road-improvement statute[35] eleven years later, in 1707, used neither a jury nor commissioners. The statute provided for the compulsory acquisition of roadbuilding materials and specified that damages would be

> assessed and adjudged by the said Justices of the Peace at the Quarter Sessions of the Peace to be holden for the said Counties in case of difference concerning the same...

5. 1766: Justice of the Peace with a Right to Appeal for Jury Trial

The jury was used again in 1766 in

> AN ACT to explain, amend, and reduce into One Act of Parliament, the several Statutes now in being for the Amendment and Preservation of the Public Highways of this Kingdom; and for other purposes therein mentioned.[36]

Under this statute Parliament repealed the old jury provision, the Act of 1696, but enacted a new provision under which the justices of the peace were to attempt to agree with the landowner on the compensation, but, failing agreement, were to impanel a jury of twelve to make the determination. Three later statutes also provided for assessment by juries.[37]

6. 1845: Land Clauses Consolidation Act

In 1845 Parliament passed the Land Clauses Consolidation Act,[38] which was apparently a uniform act replacing several condemnation acts. The jury procedure received frequent criticism in the debates on the Consolidation Act,[39] but was finally included under the following scheme. (1) Value was to be determined by a justice of the peace where it was under $50, (2) It was to be determined by arbitration if demanded by the land owner. (3) Otherwise, it was to be determined by a sheriff's jury. (4) If the owner could not be found or failed to answer a summons to appear before a jury, value was to be determined by a surveyor who was to be appointed by two justices of the peace.

It is clear from this history that the basic types of tribunals early made their appearance in English law, and have all been used intermittently to the present day. There never has been a "standard" condemnation procedure.

## B. Condemnation in the States

### 1. The Early Proliferation of Condemnation Procedures

Under early American law, both municipal and private corporations were created and regulated entirely by special acts of the legislatures.[40] Each special act of incorporation enumerated the powers granted to the new corporation. The power and procedure of eminent domain was among these individually legislated matters, and the legislature adopted condemnation schemes which seemed appropriate for the condemnor involved.

The result of this state of affairs was a rather extreme proliferation of procedures. One reputable and oft-quoted study found that as of 1931 there were 325 separate condemnation procedures in use in the United States.[41] Few generalizations could be made about these schemes; each was a peculiar combination of condemnation requirements. All of the basic types of tribunals were used, and all manner of variations of each could be found in one procedure or another.

The Ohio situation is typical. A study conducted by the Ohio Legislative Service Commission in 1956[42] found that Ohio had fourteen "separate, distinct, and complete methods[43] of condemnation. The study also found that the power of eminent domain in Ohio was granted to a very large number of condemnors, which fell into the following categories:[44] (1) state officers and boards, (2) municipal corporations, (3) private corporations, (4) counties, (5) township trustees, (6) boards of education, (7) regional water and sewer districts, (8) sanitary districts, (9) conservancy districts, (10) bridge commissions, (11) the turnpike commission, (12) port authorities, (13) park districts, (14) metropolitan housing authorities, and (15) county agricultural associations.

The result was widespread obfuscation and uncertainty. As noted by the author of the Ohio study, the many condemnation laws scattered throughout the state code were enough to confuse "even the most experienced lawyer.'[45] Furthermore,

> ...with so many methods available for the exercise of eminent domain, the governmental agency frequently can neither be sure that the proper method has been selected nor that all the requirements of the method chosen have been observed in a given case.[46]

Many other writers have commented on the "motley quilt work of laws"[47] on the subject of condemnation.

## 2. Reform: Attempts to Pass Uniform Condemnation Acts

As early as 1909 an argument for reform of condemnation law was made. In that year there appeared in The Albany Law Journal an article by Willis Bruce Dowd on the New York condemnation Law.[48] His conclusion was as follows:

> There is no reform within the whole realm of this state which is so imperative and so colossal as the reform of condemnation

> proceedings...The waste which has been going on has resulted naturally from piece-meal legislation. Perhaps it is fair to say it has been unavoidable from the rapid and extensive growth of our cities and the state. But now we have come to the time when the rubbish of hasty legislation is being wiped out. We know from the enactment of the Public Service Law that many defects can be cured in one general act. There is another ripe field for the law-making scythe and if the incoming Legislature will pass a law abolishing all old forms of condemnation and creating a special court with definite procedure to cover this subject, it will deserve well the people of the state.[49]

Several years passed, however, before any general reform movement in the states developed. The lack of attention to the subject could probably be attributed to the fact that comparatively little condemnation was occurring. Over the years the government became much more active, however, and increasing amounts of property were taken. The original Federal Highway Act was passed in 1916; the New Deal social programs in the 1930's again escalated government activity and condemnation. The trend toward governmental activism (and condemnation) culminated during the 1950's and 1960's with the passage and implementation of the interstate highway and urban renewal programs.

As government and utility takings expanded dramatically over the years, the perplexing state of the condemnation statutes became increasingly obvious. The result was a general reform movement during the 1950's and 1960's, when a number of articles arguing for consolidation and simplification of the condemnation laws appeared.[50] As of 1974, several states have modified their laws, although the goal of a uniform condemnation procedure in each state has been achieved with varying degrees of success. (In some states the attempted reform failed completely.) The "motley quilt work" remains substantially intact.

There is, of course, a legitimate question as to whether the procedure should be the same for all condemnation situations. It has been argued, for example, that the necessity for rapid action, under emergency conditions (such as a civil defense emergency), justifies fewer procedural safeguards for the condemnee than might otherwise be required.[51] It is generally recognized by commentators, however, that there are few such specially required procedures, and that the great majority of condemnation powers should be governed by a uniform act within each state.

3. Constitutional Right to Jury Trial in the States

An obvious fact to be reckoned with in any consideration of condemnation tribunals is the constitutionally granted right to jury trial which exists in thirteen states.[52] This number may be declining; a count by a reputable author in 1931 put the number of right to jury trial provisions at twenty.[53] These constitutional guarantees are specific provisions relating to eminent domain; as will be seen below, the judiciary has generally refused to extend general right to jury trial provisions to condemnation.

a) Judicial Construction of General Constitutional Provisions for Jury Trial — Every state constitution contains a guarantee of the right to jury trial. In all but a few of the states the language is quite general, leaving significant questions regarding extent and applicability of the guarantee to judicial interpretation. Apparently, only a few of the states (perhaps none) have construed these provisions to guarantee a jury trial on condemnation cases.

Blair[54] has analyzed state opinions for the purpose of ascertaining why the right was not extended to condemnation. Since the theories used by the courts provide an interesting perspective on the nature of condemnation litigation, Blair's findings will be summarized here.

One theory used by the courts is that since proceedings to secure compensation are suits against the sovereign, the legislature has the right to condition and qualify the right to bring the suit, at least to the extent of providing that they be conducted without a jury.[55] Other courts have simply proceeded on the basis that suits under the power of eminent domain are "special proceedings" and are therefore not "actions at law" at all.[56]

Indiana proceeded on the theory that eminent domain proceedings were not a "civil case," therefore not falling within that state's constitutional provision.[57] A later decision in that state, following similar lines, declared that the provision was confined to civil cases at common law, such as debt, covenant, assumpsit, trover, replevin, case, etc., and did not cover proceedings not classifiable under one of these heads.[58]

In New Hampshire, condemnation was excluded because it fell into an "otherwise used and practiced" exception to the jury trial guarantee.[59] A later case added that jury trials in such cases would be productive of "inconvenience and expense."[60]

In New York, a slightly different tack was used: it was declared there that condemnation proceedings lacked a judicial character altogether. They were declared the court, a manifestation of legislative, not judicial, power.[61]

Another theory which appeared in several variations was that condemnation proceedings do not concern disputed questions of fact. Gold v. Vermont Central R. R., 19 Vt. 478 (1847), perhaps expressed this best:

> It has not been hitherto supposed, that it (a proceeding to ascertain compensation) was a subject coming within the scope of the appropriate duties of a traverse jury. The issue to be tried, if it can, with any propriety, be called such, is altogether unlike that presented by the counter allegations between party and party, in which the truth of the facts in controversy is to be ascertained. The duty imposed is rather one of appraisement merely. As such, it appropriately belongs to one man, or a board of competent men, qualified properly to discharge it.

Blair has summarized the direction of the cases in a more general way:[62]

> It is, nevertheless, possible to conclude from the cited cases that the inapplicability of trial by jury guarantees to condemnation proceedings is a consequence of the fact that such proceedings — having as their end the enforcement of a right now not moral merely but legal — are not a "trial" in the sense in which that word is used in the typical constitution; and no mode of trial can be deemed mandatory in a proceeding incapable of coming under the head of trial at all. A trial in the constitutional sense presupposes a situation where one party asserts a thing and the other denies it, thereby creating an issue for the determination of the jury. On the other hand, in condemnation cases there is no assertion matched by denial, but merely a question to which both parties are equally eager for an answer — what is the value of the property?

It is undeniably true that many of these rationales are marked by superficiality and shallowness, and are, perhaps, examples of Roscoe Pounds "jurisprudence of conceptions." Yet the only conclusion which can be drawn from these repeated attempts to

distinguish condemnation proceedings is that the judiciary does in fact consider them to be in some way "special" and not subject to the considerations of ordinary civil litigation.

b) Constitutional Guarantees to Right to Jury Trial Specific to Eminent Domain -- These provisions have several variations. In no state is the jury trial requirement absolute, but there is a split on the question of whether the jury may be waived solely by the condemnee, or must be waived jointly by the condemnee and the condemnor.

Furthermore, the guarantee is not always a right to a trial before an ordinary civil jury. For example, the West Virginia constitution guarantees a trial before twelve freeholders.[63] This has been classified as a "right to a jury trial" for the purposes of this report.

These constitutional provisions were enacted during a period beginning early in the nineteenth century. The historical forces which brought about this movement have been described by Roscoe Pound[64] and other observers.[65] As Wasserman expressed it:

> (there developed) a general distrust of legislative and administrative officers... in the early nineteenth century. People became remarkably dependent upon the judiciary to protect them from the incompetence and corruption of other branches of government. Because a method which permits administrative officials to choose when to condemn and what to pay appears particularly despotic and susceptible of abuse, it was only natural for those already greatly reliant on the courts to demand condemnation by judicial decree.[66]

## C. Federal Condemnation

### 1. A Timid Beginning[67]

The position of the federal government in the years following its formation has been well stated by Nichols:

> For many years after the constitution was adopted and while the fear of a too centralized government was still prevalent

> and the extent of the powers of the United States under the constitution was yet but dimly understood, whenever the acquisition of land within the limits of a state for the use of the federal government became necessary, it was the practice for the taking to be made in a state court and by authority of a state statute.[68]

In sum, the government was faced with a very tender situation when it became necessary to acquire private property under the jurisdiction of the states for federal purposes. It purchased land by negotiation whenever possible and relied on the cooperation of the state government if condemnation was unavoidable.[69]

The federal government did, however, directly condemn property under its own jurisdiction. Much like the state legislatures, Congress passed individual condemnation acts for each government agency, and yet another one for the District of Columbia. It is therefore not surprising that these statutes displayed a wide variety of procedures and tribunals, as did the state provisions. Blair has succinctly summarized these laws:

> An immediately noticeable feature of these early acts is that they manifest as great a diversity in methods of assessment as do the acts of Parliament already referred to. Thus we find, in close succession, provisions for assessment by a jury of twenty-three, by twelve freeholders, by not less than twelve jurymen out of a panel of twenty-four, and by not less than seven out of twelve, while we likewise find, all within the same decade, provisions in no less than four different statutes for reference of the assessment to three commissioners of a majority of them. In 1831, occurred an act providing for assessment by a jury of twenty, followed in 1958 by one imposing such duties upon any twelve or more out of a panel of eighteen. The votes of four jurymen out of a panel of seven were deemed sufficient in a later statute, which went on to provide for a review of their findings, at the instance of the court itself or the land owners, by a jury of twelve, or a majority of them. In 1864 Congress for the first time provided,

> under the stimulus of the emergency created by the Civil War, for the condemnation of lands situated not in the District of Columbia but in one of the states, and in three different statutes left the matter of assessment of damages with three commissioners or a majority of them.[70]

Congress continued to add to the variety of condemnation authority and procedures by prescribing a separate and unique condemnation law for each new agency granted the power of eminent domain. By 1940 there were seventy such federal condemnation acts. This fact alone created great confusion and uncertainty in this area of the law. The problem was even more hopelessly compounded, however, by the passage of the Conformity Act.

2. Procedure Under the Conformity Act: An Exercise in Confusion

During the nineteenth century, many of the states abolished the old common law pleading and adopted new statutory codes of procedure. The federal courts however, remained for many years subject to the common law rules. As a result, attorneys were required to be familiar with two separate and very different procedural systems — one for their local state courts and another for the federal courts in which they practiced. The situation produced considerable hardship and confusion.

Congress acted to ameliorate the problem in 1872 by passing the General Conformity Act,[71] the purpose of which was to provide a single uniform procedure for each state. This was done by requiring each federal district court to adopt the procedural rules of the local state court system. In the language of the Conformity Act itself,

> the practice in civil causes, other than equity and admiralty causes, in the district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such district courts are held, any rule of court to the contrary notwithstanding.

Later statutes extended the Conformity Act so as to be specifically applicable to condemnation under federal authority.

The Conformity Act was a resounding failure. The Department of Justice's "Manual on Eminent Domain" perhaps best summarized the reasons for the failure:

> The usefulness of the act in developing a uniform system within a state and relieving the members of the local bar from the necessity of following two distinct procedures was short-lived. The phrase "as near as may be," elusive as it is uncertain, created a field of exceptions wider in scope than the rule itself. A discretion was left in the court which served to cloud the whole subject in confusion and uncertainty. Besides the license found in the act itself, other reasons were developed for departures from conformity. As a practical matter, exact conformity was impossible. The personal conduct and administration of the judge in the discharge of his functions and the rule making power of the courts enlarged the field of exceptions. Necessarily, any specific federal enactments on points of procedure also superseded the requirement of conformity.[72]

In sum, while the Conformity Act was a failure generally, it represented a particular disaster with respect to condemnation. Congress had enacted seventy diverse federal condemnation statutes. Where none of those were applicable, the Conformity Act required the proper state law to be applied; as we have seen, there were approximately 325 such laws in force in 1931, creating great confusion. Then, to compound the matter further, the uncertainties and confusion resulting from the failure of the Conformity Act to create a uniform procedure in each state were added to the mix.

To help cope with this intricate system of condemnation law, the Department of Justice published the "Manual of Federal Eminent Domain" referred to above. The 1940 edition of the manual consisted of 948 pages and an appendix of an additional 73 pages. The Advisory Committee Report further describes this publication.[73]

> The manual, from pages 309-332, then proceeds to describe the infinite number of complications that arise in condemnation cases under the present so-called conformity system and cites scores of judicial decisions on the subject, many of which are conflicting.

> From page 332 to page 626 there are few pages on which no mention is made of confusion or difficulty arising because of the attempt to conform to state practice, and many references to problems arising because the present federal rules do not apply to condemnation cases. Appendix D tabulates the varying state rules on the method and conduct of trial in condemnation cases.
>
> It is not surprising that more than once Attorneys General have asked the Advisory Committee to prepare a federal rule and rescue the government from this morass.

The rescue came in the form of the Federal Rules of Civil Procedure in 1938, and especially in the enactment of Rule 71A(h) in 1951. See Section 4 below.

3. A Seventh Amendment Right to Jury Trial?

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.
>
> — Seventh Amendment, U. S. Constitution

There has never been serious question about the inapplicability of the Seventh Amendment to eminent domain proceedings. While the cases on the point were not as productive of imaginative theories distinguishing condemnation from other kinds of litigation as were the corresponding state cases,[74] a brief summary of them will be presented here for the light they shed on the issue.[75]

Two early cases indirectly gave some credence to the argument that the Seventh Amendment applied to condemnation. Both cases, Kohl v. United States[76] (1875) and Boom C. v. Patterson[77] (1878), declared in dicta that condemnation proceedings are suits of a civil nature at law. As such, they would appear to be "suits at common law" under the Seventh Amendment. The language containing this point was, however, irrelevant to the decisions at hand in both cases.

In 1878 the Supreme Court commented directly on the Seventh Amendment issue in United States v. Jones.[78] While it declared specifically that the Seventh Amendment was inapplicable to condemnation, this too was dicta. It was, however, the first interpretation of the issue by the court, and it is one that has lasted:

> The proceeding for the ascertainment of the value of the property and consequent compensation to be made, is merely an inquisition to establish a particular fact as a preliminary to the actual taking: and it may be prosecuted before commissioners or special boards or the courts, with or without the intervention of a jury, as the legislative power may designate. All that is required is that it shall be conducted in some fair and just manner, with opportunity to the owners of the property to present evidence as to its value, and to be heard thereon. Whether the tribunal shall be created directly by an act of Congress, or one already established by the States shall be adopted for the occasion, is a mere matter of legislative discretion.

In the years that followed the Court implicitly followed this interpretation.[79] In 1897, the Court in Bauman v. Ross,[80] while still not in a situation in which it could render a square decision on the point, clearly restated its position:

> By the Constitution of the United States, the estimate of the just compensation for property taken for the public use, under the right of eminant domain, is not required to be made by a jury; but may be entrusted by Congress to commissioners appointed by a court or by the executive or to an inquest consisting of more or fewer than an ordinary jury.

No further pronouncement on the issue was made by the Court. The problem was thrust into national attention in 1927, however, when a bill was introduced in Congress to consolidate railroads; this would have involved the condemnation of the interests (shares of stock) of dissenting shareholders. Would such litigation be required to be heard by a jury? Such a prospect was frightening. A railroad extended from coast to coast; juries in different sections of the country might award widely varying amounts for exactly the same stock.

It was this situation which prompted two excellent articles on the issue of jury trials, Blair, Federal Condemnation Proceedings and the Seventh Amendment, 41 Harv. Law Rev. 29 (1927), and Hines, Does the Seventh Amendment to the Constitution of the United States Require Jury Trials in all Condemnation Proceedings?, 11 Va. L. Rev. 505 (1925). Blair's article, which has been used extensively in this report, is a particularly useful and scholarly piece of work. After tracing the variety of tribunals used both in England and in the United States, and fleshing out both state and federal constitutional interpretations, Blair persuasively contends that there is not a Seventh Amendment right to jury trial. Hines' analysis concurs in all significant respects. Both articles have been cited repeatedly since their publication, and their conclusion has been uncontested since that time.

4. The Adoption of FRCP 71A(h): The Culmination of Lengthy and Heated Debate.

When the Advisory Committee first met and began formulating its recommendations which subsequently became the Federal Rules of 1938, it resolved not to recommend a new condemnation procedure, since it detected no desire for a change.[81] Before all was said and done, however, the question of a new condemnation procedure rule was to become the most difficult and hotly contested issue the Advisory Committee had to contend with. The heart of the controversy concerned the nature of the tribunal to hear condemnation cases; should the parties always be able to demand a jury trial, or was a court appointed commission the appropriate body to determine fair market value? The battle concluded with the adoption of Rule 71A(h), a compromise, in August 1951.

a) The First Attempts to Formulate a Rule — As described above, the Advisory Committee originally thought no change in the condemnation law was required, since there was "no general demand for a uniform rule," and because it was thought that "it would be extremely difficult to draft a uniform rule satisfactory to the various agencies and departments of government and to private parties."[82] Shortly before the preparation of the April 1937 Draft of the Rules, however, the Committee received an "urgent request" from the Department of Justice to propose a rule on this subject. The Committee did so and the result appeared as Rule 74 in the April 1937 draft. After publication and distribution of the draft, however, controversy ensued around proposed Rule 74. Many federal agencies opposed the uniform rule; each having become used to its peculiar condemnation procedure, the were very reluctant to support the adoption of a new, unfamiliar procedure. Furthermore, the Department of Justice, for

reasons that are unclear, changed its position; it, too, decided that leaving the matter under the Conformity Act was preferable to the proposed uniform rule. As a result of these developments, Proposed Rule 74 was deleted in the Final Report to the Court of November 1937.

In 1944, the Advisory Committee was again at work. With more than six years experience under the Federal Rules of 1938, it was obvious that certain amendments were desirable and the Advisory Committee was assigned the task of formulating them. By this time, a different atmosphere had enveloped the condemnation issue. The volume of federal condemnation had increased very greatly to meet the demands of the war, and many more attorneys than ever before had become involved in condemnation. As a result, there developed within the profession a much keener awareness of the frustrating, chaotic condemnation laws, and a general agreement on the necessity for a simplified and uniform federal rule.

In response to the demand for a new rule, the Advisory Committee proposed a Rule 71A in its Preliminary Draft of May 1944. Upon its publication and distribution to the profession at large, however, it became apparent that the Preliminary Draft had touched off a renewed donnybrook on the issue of whether a jury or a commission should hear condemnation cases. When the extent and intensity of the controversy became clear, it was obvious that the Advisory Committee did not have sufficient time to resolve the matter to the reasonable satisfaction of all the parties concerned. Since the Committee was fearful that the condemnation issue would unduly delay the other proposed amendments, it simply omitted the draft of Rule 71A in the Final Report of Proposed Amendments of 1946, and the amendments which were adopted by the Supreme Court in December 1946 did not deal with the condemnation problem.

b) The TVA's Arguments for Its Commission System — One of the strongest protagonists in the debate was the Tennessee Valley Authority.[83] The TVA's condemnation authority had been governed by a unique scheme specified in the TVA Act.[84] The initial determination of value was made by a three-man commission appointed by the District Court. If either party was dissatisfied with the commission's award, it could appeal and have the trial de novo before three district judges (the parties could stipulate a hearing before a single judge, however). The three judge court was permitted but not required to receive additional evidence and inspect the property. From the award of the District Court, an appeal was available to the Circuit Court of Appeals, which was required to dispose of the case upon the record "without regard to the awards or findings theretofore made by the commissioners or the district judges."[85]

The TVA had been extremely satisfied with this procedure.[86] The key to its success, declared the agency, was the competence of the commissioners (attorneys were appointed as chairmen; others were generally nonlocal real estate men), and the remarkable uniformity in awards which resulted from one commission deciding all the cases in a given neighborhood. The TVA felt strongly that this procedure resulted in awards considered by both sides to be fair; the proof of this, it asserted, was the extremely low level of litigation in its land acquisition program. Charles J. McCarthy, the agency's Assistant General Counsel, summed it up:[87]

> ...resort to condemnation as the rule rather than the exception would be highly detrimental to TVA's permanent program as a regional agency. TVA has succeeded in making condemnation the rare exception. The owners of only about 3 per cent of the tracts acquired by TVA have refused to convey voluntarily and thus compelled TVA to resort to condemnation. The TVA policies of fair appraisals, no price-trading, and like treatment of landowners insofar as possible, have been largely responsible for this extraordinary record, but these factors alone would not have made it possible had the TVA Act provided that the issue of just compensation be tried by jury or that condemnation proceedings under the TVA Act be governed by the Conformity Act, which would have meant that this issue would be tried by a jury in all states in which TVA carries on any operations except Virginia.

This excellent relationship with local landowners was considered by the TVA to be absolutely critical to the success of its program. Unlike most other agencies, the TVA held an ongoing responsibility in the Tennessee Valley; it would later be dependent on the cooperation and good will of the very same farmers whose land was being condemned for the success of the many regional development programs to be launched under TVA auspices.

In this sensitive situation, the TVA was extremely wary of any uniform federal rule which would change its procedure; in particular, it was vehemently opposed to a jury trial.

While uniformity of awards was the crux of the TVA's case, it did assert other advantages to the commission procedure. Thus, it was asserted that it reduced administrative costs to a minimum; that it was more efficient to schedule commission hearings at the convenience of the attorneys, rather than attempting to fit them into overloaded court dockets; that the procedure did much to conserve the time of the courts; and that it was expeditious.[88]

c) The Department of Justice's Support for the Jury Trial — The Department was the TVA's principal opponent. The basis for its support of the jury trial is not as clear as one would hope. Since no articles on the issue by the Department of Justice spokesmen appeared in professional journals, the researcher is dependent on Judge Clark's summary of the Department's position during the controversy:[89]

> The chief arguments advanced by the Department were the unusual expense of commission trials, increased by the dilatory nature of the proceedings and the long delays before the commissioners. It was said that, while occasionally an award by a jury might be rather more substantial than expected, yet at least the matter was settled with promptness and with finality, even to the point of giving the property owner this advantage, and was not subject to expensive delay.

It appears, therefore, that the Department of Justice objected to the commissioner system solely on the basis of commissioner efficiency; it apparently conceded, in fact, the issue of unpredictability of jury awards. It is regrettable that there is apparently no information revealing the basis for the Department's conclusion,[90] or showing why the Department gave greater weight to efficiency than uniformity of awards.

d) The Proposed Condemnation Rule of 1948 — Early in 1947 the Advisory Committee, having successfully secured Supreme Court adoption of the other amendments, returned to work on the thorny condemnation problem. In June of 1947 the Advisory Committee published a proposed draft of Rule 71A with an invitation to the profession to submit comments and suggested changes. On the basis of the 1947 draft and some minor changes which resulted from suggestions from the profession, the Advisory Committee submitted to the Supreme Court in May of 1948 a "Proposed Rule to Govern Condemnation Cases in the District Courts of the United States.[91] It contained Rule 71A(h) which dealt with the key issue:

> (h) TRIAL. IF the action involves the exercise of power of eminent domain under the law of the United States, any tribunal specially constituted by an Act of Congress governing the case for the trial of the issue of just compensation shall be the tribunal for the determination of that issue; but if there

> is no such specially constituted tribunal any party may have a trial by jury of the issue of just compensation by filing a demand therefor within the time allowed for answer or within such further time as the court may fix. Trial of all issues shall otherwise be by the court.

In short, the general rule was to be that either party could demand a jury trial; the only exceptions were the TVA and the District of Columbia, since only they had been provided with tribunals "specially constituted by an Act of Congress."

The Advisory Committee's notes explain its decision.[92] It was persuaded that the TVA and the District of Columbia should not be required to change their procedures, since their experience had been satisfactory. In the case of the TVA, the Committee had not relied solely on the TVA's assertions; it had written to every judge who had sat on a TVA condemnation case. Of the twenty-one responses received, seventeen approved the commission system and "opposed the use of juries in any condemnation case."[93] As for the general rule of a right to jury trial, however, the Committee simply accepted the Department of Justice's position:[94]

> Experience with the commission on a nationwide basis, and in particular with the utilization of a commission followed by an appeal to a jury, has been that the commission is time consuming and expensive... Since in the bulk of states a landowner is entitled eventually to a jury trial, since the jury is a traditional tribunal for the determination of questions of value, and since experience with juries has proved satisfactory to both government and landowner, the right to jury trial is adopted as the general rule. Condemnations involving the TVA and the District of Columbia are the two exceptions.

The 1948 Proposed Rule received biting criticism from a prominent figure, Mr. Walter P. Armstrong, a former President of the American Bar Association.[95] He criticized the Committee for failing to propose a uniform rule, and accused it of simply arbitrating between the TVA and the Department of Justice, rather than exercising its own independent judgment.

Mr. Armstrong was particularly critical of the TVA, which he accused of "obstructive tactics" and of holding an attitude that the TVA was an "imperium in imperio" to be excepted from the

usual rules. He further disagreed with the TVA's "self laudatory evaluation" of its commissioner procedure, and with the TVA's assertion that judges and attorneys preferred the commissioner system.[96]

The 1948 Proposed Rule was, of course, taken under consideration by the Supreme Court following its submission by the Advisory Committee in May of that year. On December 2, 1948 the Court held an informal conference on the proposed rule; three members of the Advisory Committee were present by invitation. The occasion for the conference appears to have been the interest of the Chief Justice in the views of Judge John Paul, Judge of the United States District Court for the Western District of Virginia. Judge Paul was one of the judges who had corresponded with the Advisory Committee on the TVA commissioner system and had delivered a particularly persuasive defense of the commissioner system in large projects such as the TVA.

At the conference the question was raised whether there was not an inconsistency in the Committee's proposed amendment; if the commissioner system was eminently desirable in the TVA situation, as it appeared from the arguments of Judge Paul and others, why was it not equally desirable in other large projects? Under the proposed rule, all large projects other than the TVA would be governed by the right to jury trial.

The members of the Committee present at the conference were unable to justify the inconsistency, and it was suggested that the rule be modified to permit the trial judge the discretion to appoint commissioners in appropriate situations (this idea had been briefly considered by the Committee previously). "Appropriate" situations were those where a large number of acquisitions were required in a specific area, similar to the TVA situation.

The suggestion received the approval of the Court and the three members of the Committee who were present. Since the proposed change had not been submitted to and received the approval of the remainder of the Committee, the draft was returned to the Committee for further consideration.

e) The Final Draft and Adoption of Rule 71A(h) — In March of 1951, the Advisory Committee submitted an amended version of 71A(h) which generally followed the idea agreed on in the conference held in 1948. While the proposed amendment contained other changes, 71A(h) was the key provision as it had been throughout the thirteen-year controversy. The final version of Rule 71A(h) reads as follows (additions to the 1948 version are underlined):

> (h) TRIAL. If the action involves the exercise of the power of eminent domain under the law of the United States, any tribunal specially constituted by an Act of Congress governing the case for the trial of the issue of just compensation shall be the tribunal for the determination of that issue; but if there is no such specially constituted tribunal any party may have a trial by jury of the issue of just compensation by filing a demand therefor within the time allowed for answer or within such further time as the court may fix, unless the court in its discretion orders that, because of the character, location, or quantity, of the property to be condemned, or the other reasons in the interest of justice, the issue of compensation shall be determined by a commission of three persons appointed by it. If a commission is appointed it shall have the powers of a master provided in subdivision (c) of Rule 53 and proceedings before it shall be governed by the provisions of paragraphs (1) and (2) of subdivision (d) of Rule 53. Its action and report shall be determined by a majority and its findings and report shall have the effect, and be dealt with by the court in accordance with the practice, prescribed in paragraph (2) of subdivision (e) of Rule 53. Trial of all issues shall otherwise be by the court.

The Committee's notes stated that it had been almost evenly divided between the jury and the commission versions and "that made it easy for us to agree on the present draft."[97] The conclusion of the Committee was that "there are some types of cases in which the use of a commission is preferable and others in which a jury may be appropriately used, and that it would be a mistake to provide that the same kind of tribunal should be used in all cases.[98]

The Committee's notes acknowledged that the Department of Justice continued in opposition to the draft, and was in fact opposed to the use of commissioners in any condemnation case, on the basis that it was too expensive. The Committee questioned this proposition, declaring first that it could find no evidence of it, and second that even if it were true, the problem could be solved by simply limiting commissioner compensation (although the latter was beyond the power of the federal rules).

The Final Draft of the Advisory Committee's Amendments to Federal Rules of Civil Procedure Governing Condemnation Cases was adopted by the Supreme Court and submitted to Congress on May 1, 1951. The burden now shifted to Congress; under the unusual provisions of the Rules Act of 1934, §28 U.S.C. §2072, the amendments would become effective law on August 31, 1951, unless Congress actively intervened to disapprove or modify them.

5. Congressional Attempts to Overrule 71A(h)

The Proposed Rule on Condemnation which had been adopted and sent over by the Supreme Court was not ignored in Congress. Senate Joint Resolution 82[99] "to amend Title 28 to add a chapter on condemnation procedure" was introduced shortly after the amendments were submitted by the Court. The basic purpose of the legislation was to abrogate Rule 71A(h) and provide a jury trial in all cases. Excerpts from a statement in the Congressional Record by Senator O'Conor in support of the Resolution are representative of the opinions of the sponsors:[100]

> It is my view that we are confronted with a most vital decision when we deal with the question of trial by jury. This is particularly true when it has to do with the taking of the property of our citizens under a condemnation proceeding. Probably the greatest safeguard that any citizen of this country has is his inalienable right to trial by jury.
>
> ...there are a great majority of the States which provide for jury trials in condemnation proceedings. To abrogate by the rule proposed by the supreme court the legislative will of these States is indeed a drastic and far-reaching undertaking. I firmly believe that it is our bounden duty to respect the will of those legislatures as well as to guard against any possible encroachment on the sacred right of a trial by jury when a demand is made by any citizen of these United States for such a trial.
>
> ...The case loads of the United States District Courts are such that these courts are generally overburdened by work at the present, and under section (h) it would only be human and natural for the district courts to farm out to commissioners the question of compensation in condemnation proceedings if allowed so to do.

Senate Joint Resolution 82 had considerable support. It was passed by the Senate,[101] and amended and passed by the House.[102] No further action was taken, however, and the measure apparently died in conference committee.

Since Congress ended up taking no action on the amendments, they became effective on August 1, 1951. Thus, the much-delayed decision was finally made.

6. The Experience Under 71A(h); Questions of Discretion

The language of Rule 71A(h) appears to grant very broad discretion to the courts:

> ...any party may have a trial by jury...unless the court in its discretion orders that, because of the character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice, the issue of compensation shall be determined by a commission of three persons...

It is clear from the history of the Rule, however, that the exceptional cases were thought to be limited to "TVA-like" situations. The Supplementary Report of the Advisory Committee itself contains a detailed account of the circumstances in which the discretionary provision was added, and leaves a direct implication that it was to be applied narrowly. And yet there was language indicating that commissioners might be used in circumstances not yet foreseen:[103]

> In large projects like the TVA the court may decide to use a commission. In a great number of cases involving only sites for buildings or other small areas, where use of a jury is appropriate, a jury may be chosen. The District Court's discretion may also be influenced by local preference of habit, and the preference of the Department of Justice and the reasons for its preference will doubtless be given weight. The Committee are convinced that there are some types of cases in which use of a commission is preferable and others in which a jury may be appropriately used, and that it would be a mistake to provide that the same kind of tribunal should be used in all cases. We think the available evidence clearly leads to that conclusion.

> ...It would be difficult to state in a rule the various conditions to control the District Court in its choice and we have merely stated generally the matters which should be considered by the District Court.

At least one early commentator believed that District Courts' discretion was very limited.[104]

> It seems obvious that the present congressional distrust of the provision has little basis. Proper construction of the discretionary clause will leave little if any limitation on the right of jury trial...If the intent of the drafters is followed, the courts' discretion to grant commission trial will only be exercised in aid of a condemnation problem of the magnitude of TVA. The Rule was intended to grant the discretion to cover such a problem and nothing more.

In 1952 the first decision was rendered on the point. In United States V. Theimer,[105] the United States was condemning an eighty-acre tract of land on the outskirts of Oklahoma City. The government requested a jury trial, but the district judge denied the request and appointed commissioners. On appeal to the Tenth Circuit, the trial judge was reversed and the suit was remanded for jury trial; the court declared that this was required since the record revealed no "extraordinary facts or circumstances" warranting the use of commissioners. A narrow construction of 71A(h) seemed firmly established.

Two cases which rapidly followed Theimer in the Tenth Circuit, however, substantially diluted the holding of the case. In United States v. Wallace,[106] the fact that the land was 60 miles from the nearest court, and was suited for hunting and fishing, was deemed sufficiently "unusual" to merit commissioners. In United States v. Waymire,[107] a distance of 150 miles and the character of varied ranch lands were considered "extraordinary" enough to warrant commissioners. Both the Wallace and Waymire decisions were rendered by divided courts, with the minority delivering strong dissents. The two cases did indeed represent a sharp change of direction for a court which had only recently handed down Theimer. They prompted one observer to note that "If these circumstances are exceptional, there appear to be few cases in which a district court could not find reason to justify appointing commissioners."[108]

The denial of the jury trial itself was not the only basis of criticism. Opponents also argued that a policy of liberally granting commission hearings frustrated the fundamental purpose of the new rule:[109]

> ...in an attempt to compromise between a commission and a jury in condemnation proceedings, the drafters of 71A(h) have possibly left the Rule open to the same criticisms leveled against the Conformity statutes, i.e., that it results in confusion and lack of uniformity.

United States v. Chamberlin Wholesale Grocery Co.,[110] decided in 1955, took an even more liberal view than previous cases. The issue was thoroughly briefed and argued in the case, and the arguments of both sides were summarized in detail in the Court's opinion. After taking this long look, the Court came to the following conclusion:[111]

> There can be no doubt that when the committee "earnestly" recommended "the rule as now drafted for promulgation by the Court, in the public interests," it intended a broad discretion to be vested in the District Court to choose between the use of juries and of commissioners in the condemnation cases brought before them. We think the rule as it stands does vest such discretion in the District Court and in the present case we find no abuse of discretion...

Professional comment in the years following Chamberlin generally supported the liberal interpretation. Two leading authorities on federal procedure, Moore's Federal Practice[112] and Barron and Holtzoff's, Federal Practice and Procedure,[113] were among the supporters. Barron and Holtzoff did so because of the

> evident supericrity of the commission method in most cases argues against limiting use of commissioners by so vague a rubric as "extraordinary circumstances."

Judge John Paul, whose views had so impressed the Supreme Court that the discretionary clause was added to 71A(h),[114] wrote a law review article in 1958 strongly favoring the use of commissioners. After discussing the cases (and confessing a bias in favor of commissions), he expressed his reading of the opinions:[115]

> Fortunately, the trend of decisions appears to favor granting the trial courts the right to appoint commissioners whenever in their opinion this procedure will result in fairer and more accurate awards.

While a liberal interpretation has been favored by the courts and the commentators, the trial court's discretion is far from absolute. United States v. Hall,[116] decided in 1960 by the Ninth Circuit, declared that a congested docket, by itself, was not enough to justify appointment of commissioners.

The list of circumstances in which the District Courts have been held justified in appointing commissioners is impressive, however, and shows that they do have substantial flexibility. One observer, writing in 1963, was able to compile the following list of factors which have been held sufficient to warrant the use of commissioners.[117]

(a) Complexity of the issues involved.

(b) Nature of the interest to be taken.

(c) The convenience of the parties or the court.

(d) Where trial expense is prohibitive to landowners due to the small value of the parcels to be taken.

(e) In circumstances where a jury trial would take 5 to 10 years and would be expensive.

(f) Where land to be condemned is situated a long distance from a Federal Court town, involving inconvenience of travel for local witnesses.

(g) If it is impractical to have a jury view the realty.

(h) The existence of severance damages arising from the taking.

(i) Numerous and diverse ownerships with scattered locations.

(j) Uniformity in awards.

(k) Where it would be difficult for a jury to evaluate technical testimony.

In summary, the federal district courts, when presented with a choice between commissioners and a jury under Rule 71A(h), have showed an increasing tendency to appoint commissioners. While it is true that it is tempting to a judge to ease his workload by sending condemnation cases out to a commission, it appears

that many judges believe that commissioners are more efficient and render uniform, fair and accurate awards.

# V. A SUMMING-UP OF CONDEMNATION EXPERIENCE

## A. Problems With Condemnation Tribunals as Reflected in Law Review Articles and Research Papers

Part II of this report contains excerpts from various legal articles and papers discussing condemnation tribunals. This section of the paper is intended to succinctly summarize some of the major problems which emerge from this review of the literature. It is important to remember that law review articles tend naturally to be written about troublesome situations; a review of articles may therefore be unduly pessimistic and not representative of condemnation across the county generally, since the happy situations may go unnoted in the legal journals. While this is true, however, there is plenty of evidence to indicate that condemnation is a difficult and troublesome problem in most jurisdictions.

### 1. Commentaries on Juries (See Part II, pp. 93 - 114)

a) Criticisms of Juries — There are many comments to the effect that juries are not qualified to make awards in condemnation cases. Most of these articles argue that valuation issues are simply too complex and technical, and the opinions of the experts are too divergent, for the jury to make a rational award. The following comments express this opinion: "...amateur brain surgery" (see page 103 ); "they would just make a wild shot in the dark" (page 103 ); "..it's like a puppet show...the jury takes the amount of the plaintiff's expert and that of the dependent's expert and divides by two..." (page 102); "these determinations require expertise and... jurors simply cannot properly perform them..." (page 100); "It is well recognized that upon the voir dire, all persons having any semblance of expertise on the subject are excused from jury service..." (page 107); "... the jury is without experience and therefore entirely dependent upon the conflicting views of experts; in short, (it is) easily confused..." (page 107); "the use of different factors gleaned from different appraisals...by a jury...can result in awards which do not remotely reflect the true value of a piece of property..." (page 106); "...a commissioner system would...eliminate the vagaries and imbecilities of a common jury..." (page 108 ).

Another and related point which appears often in the literature is that juries are very unpredictable and awards under a jury system are very inconsistent. Representative comments: "...you can never tell what a jury is going to do..." (page 103 ); "...the cry of 'right to trial by jury' has, unfortunately made an appeal to those having little experience with condemnation cases and

who believe...that there is something inherent in a jury trial which assures a result fair to everyone concerned; ...where each owner is entitled to a ... separate jury (the result may be) ... the widest sort of inconsistency in the awards"... (page 101); "...commission awards are generally consistent, thus eliminating the wide disparity often found in jury verdicts."...(page 101).

b) Arguments Favoring Juries — There are many fewer comments in the literature supporting the use of juries in condemnation. It is interesting that such comments often appear in situations where a commissioner system has worked poorly and the argument is made that while the jury system has problems, "it's at least better than commissioners."

There are few articles that positively argue that juries are a good way to decide condemnation cases. One of these is a report written by the American Bar Association's "Special Committee on the Amendment of Rule 71-A of the Federal Rules of Civil Procedures." The report argued (see page 93 ) that a formal jury trial was desirable because "...if the wrong type of evidence is admitted and is the basis of consideration, the compensation paid may be illegal or wrong." The report furthermore argued that the client often wants a jury trial because "...the jurors are his peers and often his neighbors and he feels that he will be fairly treated."

In the author's interviews with persons experienced with both commissions and juries under Federal Rule 71A, there were several comments to the effect that a jury trial is preferable to a commissioner hearing; frequently juries were favorably contrasted with troublesome commissioner systems. One very experienced judge said that he was not concerned at all about juries rendering bad awards and pointed out that juries are used in many other kinds of extremely complicated cases; he believes that jurors are generally pretty sophisticated and "can recognize ridiculously low as well as ridiculously high testimony." (page 120). A district attorney with much experience is "not persuaded that juries cannot render just awards;" he points out that while there are many issues which juries don't understand, this is also true of commissioners. He believes that if juries were given the opportunity to hear several cases, they would rapidly develop the ability to make sound awards (page 96 ).

Another attorney with long experience in condemnation as the government counsel expressed the belief that generally the government "comes out better with a jury than with a commission" (page 97 ). He notes that there are usually some "good business people on the jury" who "know something about real estate values."

Several of the highway counsel in various states also expressed a preference for the jury. Representative comments follow: "Despite its weaknesses, there's nothing better than a jury" (page 99 ), "the jury is the best guarantee of fairness both to the landowner and the state" (page 99 ).

c) Juries: Generous or Tight? — While juries are unpredictable, as it appears from the discussion above, it is indicated in several articles that juries tend generally to award considerably more than the condemnor offers. Perhaps the most significant evidence of this is found in the results of a study conducted in Iowa (page 109). The study is one of the most thorough empirical research projects available on the issue. The report concludes the following (page 109); "The results of this study indicate that most jurors seem to believe that their job is to assure the property owner an adequate award. They are less concerned about assuring the condemnor a fair price for the property. This one-sided concern is the main reason many jurors favor an award larger than the offer." The Iowa study showed that jury awards exceeded condemnor's offers by the following percentages on all parcels studied in the project; Primary highway projects, 102.83%, Interstate highways, 36.11%, 161 KV utility lines, 263.06%, and 345 KV utility line, 59.73%.

Other commentators have noted a similar pattern. In a comment on a Massachusetts situation, it is said that "...a common law jury is usually the most liberal assessor...for example, the total of awards in eight Massachusetts cases tried by juries was 63% higher than the combined valuations of the same parcels as determined by a board of five disinterested real estate men." (page 110). A commentator in Pennsylvania comments that "in these trials, juries usually return large verdicts, often twice as much as the property is worth" (page 109). According to Mr. McCarthy, the objective in setting up the unique TVA condemnation system was to protect the Government against "so many bitter experiences of unreasonable jury awards" (page 110).

It is interesting that although the United States Department of Justice was the major proponent of jury trials in the debate over Federal Rule 71A, it apparently conceded that juries were sometimes over-generous: "It was said that, while occasionally an award by a jury might be rather more substantial than expected, yet at least the matter was settled with promptness and with finality, even to the point of giving the property owner this advantage..." (page 41 ).

Not all comments agree that juries are liberal, however. Mr. Armstrong, former ABA President who was involved in the Rule 71A controversy, asserted that "The Government in a civil case is a favored litigant before a jury" (page 112). He described his condemnation experiences in the Federal Courts in Tennessee, in which he found that juries always returned a lower award than the court appointed commissioners where both bodies made awards on the same property. Mr. Ghingher of Maryland also believes that juries tend to be conservative; he believes that a juror is "tax conscious" and "jealously protective of his tax dollar." (page 113). One other comment was found indicating that juries are conservative; the Massachusetts Special Commission on Eminent Domain made the following comment without further elaboration (page 112): "...experience has shown that a jury trial usually does not materially increase the amount available to the property owner..."

2. Commentaries on Commissioners (See Part II, pp.115-130)

a) Criticisms of State Commissioners — Almost all of the articles on state procedures using commissioners indicate that those persons are generally poorly qualified for the task of determining property value. This is true even though there are several variations in the way commissioners are appointed. The Iowa study illustrates a typical situation (see page 121). Although the tribunal there is called a "sheriff's jury," the procedure is intended to be a commissioner arrangement. A list of condemnation "jurors" is drawn up by the local clerks of court, but unlike ordinary juries, the list is not drawn up from the population at large, but is composed of men who are willing to serve. Clerks often include any person who requests to be put on the list. The following occupations are representative: farmers, businessmen, bankers, retired men, auto salesmen, service station operators, electrical contractors, turkey growers, and chiropractors. Little inquiry is made into the juror's qualifications with regard to property valuation, and in some areas politics is involved in the appointment of "jurors". In sum, it appears from the Iowa study that this "cross-breed" system lacks the advantage of either a jury system or a commissioner system; there is neither an impartial jury nor a qualified commission.

The New York commission system, which presented a similar situation, has been noted in three articles. One comment (page 123) notes that "...the commission is composed of laymen attempting to apply legal valuation formulae, with no evidentiary standards," that the commissioner's reports are often unclear as to how awards were arrived at, and that the system is "plagued with deficiencies."

A second comment on the New York commissioners (page 124) points out that the three commissioners are frequently no better qualified than jurors and asks (rhetorically) "if they will be any less confused than a jury because there are only three?" The article further points out that New York City dispensed with this commissioner arrangement after finding that it was "replete with waste, incompetence and extravagance." A third article on New York (page 125), asserts that some commissioners are "at a complete loss to know what the procedures are", and are "amateur judges learning courtroom procedures and the rules of evidence at the taxpayers' expense."

A comment on Pennsylvania "viewers" (page 124) expresses a similar degree of dissatisfaction: "...the Viewers pay no attention to anything...except the final question...'What, in your opinion, is the fair market value...?'" at which point each viewer"...writes down the magic figure...which acquires an importance far beyond its accuracy..."

In the author's Virginia study (which consisted of fifty-four interviews with judges handling condemnation cases) the procedure for selecting commissions, procedure, and therefore the problems, are somewhat different (see Page 103). In Virginia, each party nominates six persons as commissioners. Of the twelve names submitted to him, the judge selects nine. Each party then exercises two peremptory strikes, leaving five commissioners. Since the judges usually select four persons from one list and five from the other, the resulting commissions almost always have three from one side's list and two from the other's.

This system is cordially disliked by almost half the judges interviewed because it tempts the parties to present the names of persons not necessarily knowledgeable about real estate, but who are for one reason or another favorably inclined to render either a very liberal or very conservative award. One judge expressed the problem: "It's just like trying a man for murder and letting him select half the jury." Another judge thought it was simply wrong to have a situation where there are "our" commissioners and "your" commissioners; in his opinion this simply amounted to just "choosing up sides." In the opinion of many of the Virginia judges, condemnation awards under this procedure have been too liberal (see page 112 below).

State commissioners were also criticized in the author's interviews with the six state highway department chief counsels. Some representative comments: "it's the commissions, not the juries, that can't be controlled," (page 99 ), "Judges often appoint political friends as commissioners" (page 99 ). "...a weak commission is reluctant to rule on evidentiary arguments" (page 99 ), and "...everything tends to get thrown in" (to evidence) (page 99 ).

b) Comments Favoring State Commissioners — The author has found no articles written to praise state commissioners. This may be partially accounted for by the fact that a procedure which is working well is not likely to produce law review articles. Nevertheless, it does seem significant that not even one such article could be found.

There were some favorable comments on commissioners in the Virginia study, however. Several judges expressed the opinion that they were getting impartial and qualified commissioners in whom both sides had confidence; some commissioners were characterized as men of "unimpeachable integrity" who are open to the evidence but also "bring their expertise to bear" in making an award.

c) Criticisms of Federal Commissioners — Criticisms of federal commissioners are similar to those of state commissioners — lack of qualified commissioners, political appointment of commissioners, high commission awards, and a lack of formality and order at hearings. Another criticism is that cases which are sent to commissioners are delayed for long periods. As one judge explained it, such cases "stretch out to infinity" because the commissioners often take a long time to write up and submit their report. The judge must review the transcript and familiarize himself with the details of the case so as to be able to make proper rulings on objections. Furthermore, in making these rulings the judge has not personally heard the evidence and must proceed on a "cold record."

Other comments also reflect the problem of delay; "there is no more effective way of putting a case to sleep for an indefinite period than to permit it to go to reference with a busy lawyer as referee..." (page 118), "...reference to a commission tends unduly to prolong the proceedings..." (page 118).

d) Favorable Comments on Federal Commissioners — In view of the extensive literature criticizing all kinds of condemnation tribunals in general, and commissions in particular, the history of the TVA commissioner system is quite significant. It is one of the few tribunals which has been praised heartily by the people who worked with it. (See in addition to this discussion the portion of Section IV above, "A Brief History of Condemnation Procedure," relating to the TVA.)

The TVA was faced with a particularly sensitive problem. It was a large, dominating agency in the Tennessee Valley with long-term operations in the area. The success of many of its programs depended on the continuing goodwill and cooperation of

Valley residents. It must have been with some trepidation that the TVA faced the necessity of acquiring large amounts of property in a small area; it would appear that no condemnation situation would lend itself more readily to jealous dissatisfaction than this one, where each landowner would compare his award with that of his neighbors on all sides. In this difficult situation, the TVA commission system worked, somewhat remarkably, to the satisfaction of both landowners and the TVA.

Charles McCarthy, Assistant General Counsel to the TVA, praised the procedure (see page 116) for producing a high degree of uniformity of awards; he noted that although some awards were higher than the TVA offered, "...it rarely happens that an award is extremely high." He attributed this to the fact that commissioners had a "knowledge of land values far superior to that of ...jurors" and the fact that the same commissioners hear all the cases in a district, thus permitting them to compare a proposed award with awards previously made to surrounding neighbors. McCarthy argued strongly that the excellent record of the TVA in settling these cases without a court proceeding was a result of the fact that "...the opportunity to gamble on the award of a jury..." was not available under this procedure.

Other commentators have argued for commissioners. Judge Paul is one who favors "disinterested persons specially selected by the court because of their intelligence, integrity and sound judgment." (page 115). Similarly Judge Miller noted that most judges find the commission method to be "...more expeditious and less expensive...and that commission awards are generally consistent." (page 115).

e) Commission Award Patterns — It is clear that commissions almost always award landowners more than the condemnor's offer. The margin between the offers and awards varies considerably, however. It is very common for awards to be 10 or 15% above the offer, but are often much more than that and there are a number of references in the literature to "shocking" awards from commissioners as well as from juries. This is not surprising, since every land acquisition office in the country has its favorite "outrageous award" story.

As early as 1909 the complaint was made that "It is well known that the ultimate cost of land to the City of New York in condemnation proceedings is from twenty to one hundred percent above the value of the property taken." (see page 129). A more recent example of a complaint of high awards is the article by Mr. Vallone regarding condemnation for urban renewal in New York (see page 125). He noted that awards were generally 50%

higher than offers and cited the following cases: offer $57,000, award $269,000 (363% higher); offer $115,000, award $225,000 (95% higher); offer $42,000, award $102,000 (140% higher); offer $35,000, award $95,830 (178% higher). Mr. Vallone concluded that in view of these "staggering" awards "it might serve the cause of fairness if the justices who appoint the commissions and who must review their awards took a little sterner look at what their agents are doing."

The author's Virginia study also indicates that commissioners in that state are at least considerably more generous than the law would technically allow. In that study, twenty-five judges were asked explicitly whether in their opinion commission awards were generally too low, fair or too high. (see page 112). Of the twenty-five, fourteen thought awards were generally fair, eleven thought they were too high, and none thought they were too low. Some of the judges who thought awards were too high were very emphatic; "(The awards are) getting out of hand, it almost shocks the conscience," "of all the cases I've tried, there has been only one time where the man didn't get more than he should have."

Another study conducted in Virginia by the author provides useful insight into commission awards. All offers and awards in three Virginia jurisdictions heavily affected by the interstate highway program were analyzed and compared.[118] The results indicate that awards vary greatly from county to county, and that commissions are much more liberal in making awards for damages to remaining land than for the land actually taken. The statistics show that commissioners awarded 16% more than the Highway Department offered for total take and damages on the Interstate 581 project in the City of Roanoke. The corresponding figure for the County of Roanoke (Interstate 81) is 18%, and for Shenandoah County, 68%. It should be noted that the Shenandoah project was the one which involved the crusading editor and the Reader's Digest article described in Section III C 2 above. The very high Shenandoah awards shown here suggest that the editor may have had a substantial effect on awards.

When the offers and awards for damages alone are broken out of the above totals and analyzed separately, it becomes clear that damage awards account for a large part of the increase; in the City of Roanoke commissioners awarded 134% (over than twice as much) more for damages than offered by the Department. The corresponding figure in the County of Roanoke is 32%, and in Shenandoah County, 129%. Of course, the total number of dollars involved in damages is much less than for actual takings, so that the overall statistics given above are much lower than the damage increase.

3. Other Tribunals

There is very little information available on masters, referees and permanent special boards which are used in some states.

For comments on permanent boards, see Merrill, p.109.[119] Also see the recommendation of the Massachusetts Special Committee on Eminent Domain.[120]

On the issue of court determination of condemnation issues, the commentary is mixed. It is pointed out by some that judges would be more competent than juries,[121] but by others that "judges are no real estate experts either."[122] The Virginia judges are unanimously opposed to deciding condemnation cases. They appear to believe that deciding such speculative issues is not a desirable judicial function.[123]

## B. The Present System: A Practical Way to Give What the Substantive Law Has Refused?

### 1. Theory and Reality in Condemnation

The basic standard of compensation, supported by virtually all legal authorities until the 1968 and 1970 Federal aid acts, has historically been fair market value for property taken. This doctrine may be found in all the pertinent treatises, articles, court opinions, legal encyclopedias and jury instructions. Volumes have been written on the many technical and detailed questions as to what items are compensable under the fair market value concept.

Clearly, the objective of the fair market value standard was to provide a clear line between the compensability of actual physical losses and the noncompensability of those unmeasurable and unquantifiable injuries which are inevitable in condemnation, such as inconvenience of moving, the emotional effects of losing an old family homestead and one's position in the neighborhood. The courts have been doggedly determined to prevent "opening the floodgates" by allowing the court, the jury, or a commission to consider such unponderable psychological injuries in making condemnation awards. One famous comment in a court opinion expressed this determination to keep the "floodgates" closed even at the expense of a landowner clearly injured; "Equitable principles, no matter how well founded, are rendered inoperative in a condemnation proceeding."[124]

In contrast to the doctrine as expressed by the legal authorities, however, a review of the condemnation experience in

the United States leads the objective observer to the conclusion that courts, commissions and juries have historically considered many factors which are legally inadmissible into evidence, and that awards have generally been more generous than a strictly applied fair market value would allow. The regularity with which this has occurred leads one to the conclusion that to a great extent the participants in the condemnation process — attorneys, appraisers, and judges — have tacitly agreed that by any common sense standard, "fair market value" is simply not fair to the landowner. This seems entirely reasonable in view of the niggardly character of the fair market value standard (see the list of items not compensable under this doctrine on page 16 above). The inadequacy of fair market value, which has been criticized in the scholarly journals for years, was finally remedied in the Uniform Relocation and Real Estate Acquisition Policies Act of 1970. This revolutionary legislation has in effect abolished the fair market value standard and has greatly liberalized the compensation for monetary losses involved in condemnation, especially for persons with low incomes.

As we have seen, actual compensation has been in excess of legally allowable compensation. But how much more? Have landowners generally still received less than a common sense "just compensation"? Have they received a fair compensation, in general? Or have they too often received so much as to represent an unjust enrichment to the landowner and an unfairly high price to the acquiring agency?

Obviously examples of each of these can be found, but the question here is a more difficult one — what has <u>generally</u> been the experience? No definitive answer can be given to such a question which depends so heavily on a value judgment. Still it seems significant that the thorough review of the literature made by the writer for this report turned up many complaints by government representatives about the outrageously high awards they were required to pay (complete with the offending facts and figures) and while there are many articles decrying the inadequacy of the market value law, the writer found no article by a landowner's attorney complaining about inadequate awards in specific cases. (There was a substantial amount of testimony, however, before congressional committees considering the Federal Aid acts by persons who had been put to hardship by condemnation; much of this testimony related to the special relocation problems of low income families.) Mr. Lewis Orgel, one of the nation's most authoritative valuation writers, wrote that too frequently landowners seemed "too anxious to be condemned" (page 141).

One issue which deserves attention is the inequity which results between the knowledgeable wealthy wandowner and the unsophisticated landowner because of the difference between condemnation law and condemnation practice. Government appraisers base their offers, of course, on the letter of the law. A landowner who has the money to afford an experienced condemnation attorney will frequently take his case to court and receive substantially more than the agency's offer (with the attorney being compensated on a percentage-of-the-excess basis). A more ordinary citizen is more likely to accept the agency's offer without even consulting an attorney.

2. Who Sets the Standard of "Just Compensation"?

The realities of condemnation practice raise an interesting question as to the extent of the legislature's control of compensation. Despite the detailed rules which the legislature or the court may issue regarding compensation, neither is effectively controlling the level of awards if the commission or jury simply awards what it believes to be a fair compensation in each individual case. As a practical matter, of course, the tribunal will inevitably exercise its discretion since the market value question is unique to each case and its fuzzy nature enables and encourages the tribunal to make a generous award which will beyond doubt recompense the landowner. The legislature cannot, of course, control each award; it can merely establish a sound tribunal system.

3. What Effect Will the Uniform Relocation Act Have on Compensation?

In view of the history of jury and commission awards, the passage of the Uniform Relocation Act raises the question whether juries and commissions should be informed about the Relocation payments. The Relocation Act payments, which cover all of the incidental expenses which have become for the first time legally compensable, are determined administratively and are paid directly by the condemning agency to the landowner. These payments do not enter into the condemnation trial, since the purpose of the trial remains only to determine fair market value of property taken. Under this theory, evidence regarding Relocation Act payments is irrelevant and therefore inadmissible at trial. It seems clear that most jurors, and perhaps many commissioners, will therefore not be aware that the condemned landowner is receiving supplementary payments in addition to the award rendered in the trial. This raises the question whether the legislature should specifically provide that evidence of supplementary payments should be admissible in order to discourage jurors and commissioners from awarding the landowner double compensation for such expenses. This would appear to be reasonable, especially since the jury or commission will still inevitably use its discretion in making its final award.

## C. Who Should Sit in Judgment?

The purpose of this report has not been to provide the ultimate answer to the question of "who should sit in judgment." As noted in the Introduction, there is no "ideal" condemnation tribunal, and the appropriate solutions for different states may be different, depending on many factors. It has been an objective of the report, however, to provide a variety of materials which will enable a researcher to rapidly and conveniently gain an understanding of the practical complexities of this problem.

If this report has made a contribution, it is not to provide the right answer, but to help the researcher ask the right question. Since juries and commissions must inevitably use their discretion in making awards, the key question appears to be "Who should most appropriately make the discretionary decisions as to fair market value and just compensation to the landowner?" From an ideal point of view, it would seem that the most satisfactory tribunal would be one composed of the most knowledgeable and impartial men available, and one which would hear all neighboring cases so that awards would be equitable across the jurisdiction. If commissioner appointments are made politically, or if the power of a commission becomes excessively concentrated and abused, however, then the regular jury is the best guarantee of impartiality even if some consistency and rationality must be sacrificed. The jury has a great psychological and political advantage, since it is the best guarantee of impartiality yet devised.

Where to draw the line in this question is for each state to decide. It is hoped that this report has helped in illuminating these issues.

# PART II: A COLLECTION OF COMMENTARIES ON CONDEMNATION TRIBUNAL PROBLEMS

## INTRODUCTORY NOTE TO PART TWO

As pointed out in Part I, the problems of condemnation are very practical, and their solution must be based more on a shrewd evaluation of actual experience than on rational analysis. Unfortunately, there has been little attempt to draw together into one volume materials on condemnation from several jurisdictions. Such materials as are available tend to be very parochial in the sense that they are oriented to a specific local situation. Furthermore, they have been rather poorly indexed, are scattered throughout a wide variety of legal publications, and spread over a long period of time, making the task of researching the topic a somewhat tedious one.

In an effort to fill the need for a publication with a broader perspective on this problem, the author made a thorough review of the literature and collected all of the available articles on the subject. While certainly every such article is not represented here, it is believed that most of the significant ones are included.

These articles represent a great variation in depth, quality and objectivity. Some are based on thorough objective research or many years of actual experience, while others amount to no more than an offhand comment about a specific incident. Nevertheless, all have been included for the particular insight or perspective they convey; each will of course have to be weighed in context and compared to contrary opinions.

In presenting these commentaries, it was necessary to edit extensively in order to exclude material which was irrelevant to the issue and therefore merely confusing. Every effort has been made to represent each source fairly and fully and all doubts related to relevance have been resolved by including the material.

All omissions are indicated by three ellipses (...); this is to indicate a missing word, phrase, sentence or paragraph. The only other stylistic liberty taken by the editor, taken in the interest of increasing readability, was to capitalize the first word of each quotation.

## I. COMMENTARIES ON APPRAISAL THEORY AND APPRAISER PROBLEMS

Graubart, Theory Versus Practice in the Trial of Condemnation Cases, 26 PENN. B.A.Q. 36, (1954):

AS long ago as 1889, the market value of three acres of land was said by one witness to be $2,500 and by another $12,000. In a recent condemnation of land by the U. S. Government, expert opinions varied from $475,000 to $950,000.

In our local court early this year, a well-known expert estimated damages of $132,000. Opposing him, another equally well-known witness, testifying for the defendant, assessed damages at $6,750.

The times call for better rules of evidence to end the abuses which have grown up under the old rules.

The introduction of sales prices of neighboring properties would do much to steady the testimony of experts and the verdicts of juries...

...

In a recent case tried in Allegheny County, an expert for the plaintiff testified to a market value of $200,000 for the condemned property. The expert for the defendant testified to damages of $50,000. Such a discrepancy between experts on opposing sides is by no means unusual in the trial of a condemnation case.

If two real estate experts appeared before a Board of Directors of a bank and one seriously contended that a property was worth $200,000 while the other gave an appraisal of $50,000, there would be considerable suspicion about the good faith of one or both of the experts.

And yet, in courtrooms all over the country, in state and federal proceedings, such divergent opinions are being seriously offered to judges and juries unfamiliar with the condemned property as the basis for reaching a fair valuation.

Note, Eminent Domain Valuation in an Age of Redevelopment: Incidental Losses, 67 YALE L.J. 61, 73 n. 54 and 55 (1957) reprinted by permission of the Yale Law Journal and Fred B. Rothman and Company:

THE results of the (New York) study show that expert appraisals made for the condemnor and for the condemnee generally varied by about one hundred percent. A more recent study was conducted in Massachusetts in which the appraisals of two or more expert appraisers employed by the condemnor were compared. This study is significant in that it eliminates the conflict of interest which may be presumed to exist between appraisers working for competing parties, and yet confirms the results obtained in the New York City study. In analyzing one hundred and fourteen separate parcels of land, the study disclosed that the average difference between appraisal values was fifty-six percent with a maximum variance of five hundred seventy-one percent.

Ratcliff, Condemnation Awards and Appraisal Theory, Highway Research Record No. 78, page 1 (1965):

AS a confirmed optimist, it is contrary to my nature to view with alarm. Yet it has come as a shock to realize how pervasive is appraisal error in valuations which are relied on in condemnation awards. The nature and implications of these errors in appraisal theory and practice will command our attention later; for the moment, accepting the hypothesis of widespread appraisal error, consider the vicious circle of circumstance which enthrones and perpetuates these errors. To present a somewhat oversimplified sequence of events, an appraisal practitioner develops a plausible method of analysis which presents the appearance of scientific accuracy and which he employs in a condemnation case. His lawyer, finding that this method convincingly supports the client's case, gladly accepts it as sound. In court, because of his long experience in real estate, the appraiser is qualified as an expert. The judge, who is no appraisal expert himself, is not competent to assess the soundness of the method and is inclined to accept it as presented by a qualified expert. The opposing lawyer, also unlearned in appraisal methodology, is in poor position to challenge the process. It sounds impressive to the farmers and housewives on the jury, who rely on its findings in their award. Other appraisers, observing that this method seems to be accepted and effective, employ it in other cases. Other lawyers, finding it unchallenged and accepted by the judges, accept it themselves and dare not question it in court when employed by the other side. It appears as accepted doctrine in judicial pronouncements. It is written into appraisal literature and taught as gospel. Finally, public officials in condemning agencies demand that their appraisers employ this tried and true method and prepare appraisal forms which call for its use and which all appraisers hired by the agency must complete. Now comes a small voice from somewhere which questions the validity of the method, points to faulty theory on which it is based, and demonstrates its error. Who is there to listen? Who is there to break the vicious circle? The appraiser for the public agency is required to use the method if he wants to be hired. The lawyer for the condemnor and the lawyer for the condemnee will insist that his appraiser use this tested and accepted method, assuming it contributes to the client's case, or he will find another expert witness. If neither side challenges the method, the judge may never become aware of its dubious logic; or if the question is raised, there is the comfortable precedent of past acceptance on which to fall back.

It is a demonstrable fact that not one such error, but many, have become built into appraisal theory and practice, accepted by most appraisers, lawyers, judges and public agencies. All parties to the condemnation process have contributed in one way or another —

"Condemnation Awards and Appraisal Theory," cont'd.

the appraiser, the lawyer, the public agency, the judge and the legislature. Because of the growing importance and frequency of compulsory acquisition of land and the large number of court cases, the appraisal theory and practice which has gained acceptance in this area of activity has acquired a status which makes it controlling in other fields of appraisal.

It is difficult to assess the social importance of appraisal error but as a generalization it is safe to say that any method which results in a condemnation award which fails to reflect the intent of the law represents a social cost and is not to be condoned.

The most shocking violation of appraisal logic is the widespread misuse of the cost less depreciation calculus. Ignoring a number of respected appraisal authorities who have long pointed out the error in the cost approach, appraisers persist in its use and many courts continue to accept it as a valid basis for adducing evidence of value. Much of its popularity, no doubt, derives from a specious appearance of reasonableness, from the widely understood parallel approach in accounting procedure, albeit for entirely different purposes, and from the fact that juries will readily believe that a property is worth what it would cost new less accrued depreciation. As a horrible example of the misuse of the cost approach, take the case of an actual appraisal made recently by a staff member in the organization of an outstanding and nationally known appraiser...

This discussion began by viewing with alarm the self-perpetuating circle which has frozen certain serious and pervasive appraisal errors into the condemnation process. The existing situation was highlighted by a number of examples of error, and it is to be hoped that a more or less convincing logic has served to support my position, dominant appraisal beliefs and practices not to the contrary. It is not quite true that everyone is out of step but me. A few of the errors discussed have been recognized by the courts in a number of states. Among thoughtful appraisers, there is growing evidence of an acceptance of certain of the viewpoints outlined here. In fact, the misuse of the cost approach was pointed out some thirty years ago and since 1934, the Federal Housing Administration has avoided using it in its millions of appraisals for the very reasons stated in this paper. But the fact remains that most of the protest against traditional but

"Condemnation Awards and Appraisal Theory," cont'd.

unsound appraisal methods is tacit and not expressed in changed techniques. The major reason for the laggard pace of rationalization in appraisal practice may perhaps be found in the fact that so many courts and public agencies accept unquestioningly or even insist upon wrong practices. In such a precedent-minded environment, what gain is there for the appraiser in fighting upstream against the strong current of tradition and accepted theory.

But it is also true that the great majority of practicing appraisers are not conscious of error. They are following the theory and methods which have long been taught by the trade associations and professional societies and which are supported by most of the books and periodical literature which is recognized as authoritative. Perhaps the lagging state of the appraisal art can be illuminated by viewing it in the perspective of its slow evolution toward professional status.

The history of any professional group will reveal that at the beginning, the development of a theoretical foundation and the refinement of techniques depended almost entirely upon the more able and thoughtful practitioners. Apprentices were trained by those experienced in the art, and accumulated wisdom was passed on to each new generation through observation and personal instruction. Until very recently in the field of appraisal, most of the textbooks were written by practitioners, the articles in the professional magazines were submitted by practicing appraisers, and the organized societies passed on the accumulated knowledge through educational programs prepared and taught by practitioners. Very little was contributed by university professors and scholars. Whatever the reasons, there have been very few significant advances in appraisal theory and practice in more than forty years. But as it became more difficult for the appraiser to retreat behind experience alone to defend his findings, he did develop theoretical gimmicks, such as the three approaches, to serve as rationalizations for his methods. He devised impressive arithmetical treatments for processing appraisal data which gave the specious appearance of scientific analysis and exactitude.

If the experience of other professional fields can be accepted as relevant the maturing of appraising into a profession will continue to lag until there has been a substantial increase in the complementary facilities for appraisal education and research in our institutions of higher learning. Without the contributions of a much more extensive academic collaboration than now exists, there will be little progress in raising the standards of this deductive art. On this front, the University

"Condemnation Awards and Appraisal Theory," cont'd.

of Wisconsin has made a modest addition in the form of a new graduate program of professional education leading to the degree of Master of Science in appraisal. Public agencies could speed the process by insisting on adequate training for staff and fee appraisers and by refusing to accept appraisal findings based on erroneous theory and faulty practice. They could provide retraining facilities for their present staffs. And the judges are in a most strategic position to speed the rationalization of appraisal practice for if, with sufficient frequency, the judges refuse to consider appraisal findings which are unsoundly based, the appraisers will quickly mend their ways. And who is to educate the judges? The lawyers.

"Divergencies in Right-of-Way Valuations," National Cooperative Highway Research Program Report Number 126, Highway Research Board, 1971:

FOREWORD

WIDE variations have been reported in the valuation of real estate that is required in the acquisition of right-of-way for highways. These divergencies have plagued highway administrators, trial attorneys, appraisers and the court discusses the nature of and reasons for wide divergencies and makes recommendations to properly meet and cope with this problem of unwarranted divergencies. Right-of-way engineers and agents, appraisers, attorneys, and other personnel engaged in the acquisition of property for highway purposes should find this report of special interest.

The objectives of this research were to review, analyze and evaluate actual cases in which wide divergencies existed. Based on this evaluation, reasons for such divergencies were to be identified and corrective measures suggested to diminish the wide variations in value.

Because the American Institute of Real Estate Appraisers (AIREA) is the only known source that has been collecting specific data on divergencies in valuation in litigated condemnation cases throughout the United States over the past several years, AIREA was chosen to conduct the research project. The study was under the direction of the AIREA Committee for Special Research. Because the appraisal review files of the organization are confidentia and cannot be made public, all data given and case studies cited are not identified by individuals involved or geographic location. More than 4,000 cases that have been recorded since 1961 were reviewed during the conduct of the study. Selected cases are included in the report to show typical facts and findings.

The report discusses the nature of the problem as it relates to the appraisal process. The various reasons for wide divergencies are presented, including the relation of divergency to the appraisal testimony. The report also discusses the relationship of appraiser and attorney in condemnation cases. Recommendations to reduce the incidence of wide divergencies are made.

Highway personnel engaged in the acquisition of real property for right-of-way and other public purposes should find this report of practical use. Understanding the problem of wide divergencies in valuation and implementing recommendations that are suggested in this report should result in more equitable valuations and awards.

"Divergencies in Right-of-Way Valuations," cont'd.

CONTENTS

"Divergencies in Right-of-Way Valuations," cont'd.



There are practical actions that can be taken now to lessen the incidence of unwarranted divergency among appraisers in condemnation proceedings, but no one group can successfully instigate

remedies for a problem that arises from the action of the several participants involved in a condemnation action.

Although the Appraisal Review Committee (ARC) of the American Institute of Real Estate Appraisers (AIREA) has made a substantial contribution to the lessening of wide divergencies among its Members and Candidates, as indicated by the decreasing number of files to be reviewed, it obviously does not have a direct influence on wide divergencies among nonmembers.

The function of the ARC has acted as a major deterrent to advocacy among its Members and Candidates, as indicated by the findings of the ARC. This encouraging trend has resulted in the refusal of appraisal assignments from clients with preconceived ideas of market value and damages which, to some extent, has impressed on the legal profession that the professional services of a Member or Candidate are not for hire as an advocate.

The researchers believe that corrective measures should emanate from the system that breeds divergencies. With that point in mind, the following recommendations are made, which are confined to the problem of unwarranted divergency between appraisers and specifically not between appraisal testimony and condemnation awards.

PERTAINING TO THE INDEPENDENT APPRAISER

1. The independent appraiser should not appear in court without first having prepared a written appraisal report, or adequate memorandum, in support of his opinion of value, damages, and benefits. The effect of this requirement would be to reduce impromptu or hastily conceived opinions, and hopefully have a moderating effect on the writer.

2. It is essential for the independent appraiser to have special training, or associate with an experienced condemnation appraiser.

3. Independent appraisers should attend and participate in special education courses and seminars, such as:

a. Condemnation courses.

b. Regional conferences and chapter seminars of recognized appraisal organizations where condemnation matters are scheduled.

"Divergencies in Right-of-Way Valuations," cont'd.

c. Educational courses of other organizations and educational institutions.

4. The independent appraiser should join professional appraisal organizations that enforce observance of high professional standards.

5. The independent appraiser should subscribe to the principles and objectives of appraisal review.

6. The independent appraiser should insist that instructions by the attorney to him on points of law and interpretation of legal matters be in writing. The purpose of this requirement is to avoid the situation wherein the appraiser is placed in an untenable position because of an unsound or improper interpretation by the attorney Instructions in writing would not necessarily validate the legal assumption but would give the attorney pause for thought before expressing his opinion of the law.

PERTAINING TO THE ACQUIRING AGENCY

1. The acquiring agency should observe the principle of "just compensation," recognizing the obligation of fair play to the property owner as well as to the acquiring agency that will pay for the property.

2. Where such practice prevails, the acquiring agency should abandon any policy that condones offering the lowest appraisal, but offer the best appraisal, based on competent review.

The employment of unprincipled appraisers by some attorneys and some property owners looking for high appraisals should not mislead the acquiring agency into seeking low appraisal testimony in the hope of a split verdict.

3. The acquiring agency should support education on condemnation matters for the reviewing and staff appraisers such as:

a. Encourage attendance at condemnation courses.

b. Encourage attendance at regional, state, and chapter seminars where speakers on condemnation problems are scheduled.

4. The acquiring agency should

a. Sponsor on-the-job training in condemnation matters on an objective basis.

"Divergencies in Right-of-Way Valuations," cont'd.

b. Support and encourage the work of appraisal review committees.

c. Require that independent appraisers retained by acquiring agencies have special training, experience, and education.

d. Make certain that instructions by the agency attorneys on points of law and interpretation of legal matters be given to the appraisers in writing.

e. Provide appraisers with sufficiently complete drawings showing cross sections, profiles, cuts and fills, drainage systems, etc., so that engineering data are understood by appraisers for owners and agency.

f. Revise and modify requirements for condemning agency's appraisal reports to eliminate minutiae that contribute little or nothing to supporting a professional opinion of value.

PERTAINING TO ATTORNEYS FOR THE PROPERTY OWNER

The canons of the American Bar Association should be enforced so that the attorneys do not knowingly present a distorted appraisal testimony.

In many major cities there are groups of self-styled "appraisers" who make their living by giving "made-to-order" appraisal testimony. They are primarily professional witnesses and should be distinguished from professional appraisers. These witnesses are supported by some legal firms who handle condemnation cases in the same manner as personal injury litigation in which distorted claims for damages commonly occur.

Such situations are the probable cause of many major divergencies in court testimony between appraisers. They are and will remain the most difficult to cure.

PERTAINING TO THE COURTS

The courts should apply strict standards in qualifying appraisers as expert witnesses. Some courts contribute to "legalizing" divergency by permitting the uninformed political appointee and the known "actor" to function as an expert witness when a more strict enforcement of qualifying standards would do much to discourage erroneous valuations and unjust awards.

"Divergencies in Right-of-Way Valuations," cont'd.

Under present circumstances virtually anyone can qualify as an expert witness. The resultant testimony is often afforded as much credence by the judge, jury, or commission as is the testimony of a competent and qualified appraiser. For this reason, the court frequently does not have the choice between the testimony of two competent appraisers. Rather, this choice lies between the testimony of one appraiser and one "actor".

Regardless of what reforms may be instituted in other areas relating to condemnation, extreme divergencies in court testimony will continue until more rigid requirements are established and enforced pertaining to witnesses who can properly qualify as expert real estate appraisers.

In jurisdictions where discovery proceedings do not require exchange of appraisal reports, the court should require each appraiser to submit a written appraisal report in camera (for the court's personal review only). (See comments in Chapter Five.)

The researchers believe that unfettered valuation testimony is a major contribution to divergency and that the lack of a written appraisal report permits too much flexibility. This situation could be immeasurably improved through positive action by the courts to:

1. Establish minimum standards of qualification for an expert witness in order to testify on real estate valuation.

2. Require each expert witness to formalize his opinion with a written appraisal report or adequate memorandum that can be examined by the court for its adequacy and conformity to professional standards.

Chapter Two — The Nature of the Problem

. . .

Three appraisals of the market value of a residence by three different appraisers who estimate the value of the property at $18,000, $20,000, and $21,000 are acceptable because they are within a range that could easily extend from $18,000 to $22,000. On the other hand, a range of value for a "special-purpose" property which sells infrequently in the market place, could be justifiably greater. It is obvious, therefore, that divergencies must necessarily exist about which there can be no complaint. The very nature of value makes it impossible not to have divergencies.

"Divergencies in Right-of-Way Valuations," cont'd.

Add to this basic reason for divergencies the varying judgments of appraisers who honestly are either conservative or liberal in their interpretations and one has divergencies that may be spread over a wider-than-acceptable range.

Still another basic reason for divergencies is the human desire to please one's employer. Most professional men do not want to disappoint their clients, and many appraisers who know they are going to do so will decline the assignment. This situation is apparent when a condemnee or his legal counsel asks an appraiser to appraise the market value, after telling him the offer made by the condemnor. In large communities the attorney may know a reputable appraiser whose outlook is liberal or optimistic and therefore will have no trouble in pleasing his client. The result is wider divergencies without materially violating the appraisal process.

Real estate valuation is an art that calls for the exercise of experienced judgment based on a logical and justifiable approach; it is an observational process — by no means an exact science.

It is inevitable that there will be differences of opinion because individuals with varying degrees of knowledge and skill are allowed to testify. The very nature of the profession, which is that of rendering an opinion, is bound to result in different answers in varying degrees. This is true of all professions, including those more advanced and/or less susceptible to caprice or personality. It is not unusual for medical and legal opinions to be diametric opposites, or engineering opinions (presumably more exact) to be at wide variance.

This area of opinion difference will always exist — it is part of the appraisal business; but, as professional standards are accorded more recognition, the reasons for wide divergencies will diminish.

IMPACT ON SOCIETY

Wide divergencies in opinions of real estate values in judicial proceedings are a source of inequities to society and a discredit to the appraisal profession. Owners suffer when appraisers testify to low-range values. When value estimates are excessive, condemnors spend more taxpayers' money than they should. As a result, owners and taxpayers are frequently put to extra expense, and important public improvement programs are subjected to possible delays.

"Divergencies in Right-of-Way Valuations," cont'd.

It is a fact that courts and juries frequently determine awards by averaging the divergent valuations. If the appraiser for one party testifies to value at or near market value, and the appraiser for the other party supports a value substantailly higher or lower, one of the parties often suffers an unfair loss, or benefits from undeserved enrichment. It is apparent that justice in condemnation cases cannot be achieved unless the valuations of all expert witnesses fall within a relatively narrow range. The roadblocks to the attainment of this ideal — and suggestions for alleviation — constitute the reason for this study and report.

Actual experience indicates that most condemnees receive what is believed to be "just compensation" — and frequently considerably more. Most condemning authorities scrupulously follow the policy of resolving doubt in favor of the property owner. If the owner receives less than the amount to which he is entitled under the law, it is the result of error by the appraisers, lawyers, condemning authorities, courts, or a combination of them. It certainly is not planned that way by condemnors and the very high percentage of amicable settlements (in excess of 95 percent for many projects) confirms adherence to this policy.

As between appraisers for condemnors and condemnees, the former seldom find themselves under pressure to be unobjective in their value estimates because they are less frequently subjected to the influences of former appraisals, advocacy of attorneys, or high hopes of owners. Appraisers for owners, on the other hand, at times find themselves exposed to such pressures and must choose between declining the assignment and finding questionable justification for the hoped-for value.

Of course, the term "divergency" is a matter of degree. Because of the subjective nature of the concept of value and for the other reasons stated in this report, there will always be some differences in value estimates by and between even the most competent and conscientious appraisers. It is when the spread between such opinions becomes unreasonably wide that the objective of "just compensation" and the public image of the appraisal profession are placed in jeopardy.

Allard, Is Market Value Just Compensation? APPRAISAL JOURNAL 355 (July 1967):

ACCORDING to Appraisal Terminology and Handbook, fair market value or market value is defined as "the price at which a willing seller would sell and a willing buyer would buy, neither being under abnormal pressure." Another definition is "the amount at which a property would exchange in the current real estate market, between a willing buyer and a willing seller, with equity to both."

These definitions are within the fair market value or market value concept which has been ruled by the courts as the proper basis for value in determining just compensation in eminent domain proceedings. Furthermore, the courts also have ruled that "the owner is entitled to the full money equivalent of the property taken, and thereby to be put in as good a position pecuniarily as he would have occupied if his property had not been taken."

For an appraiser to meet the fair market value concept in some condemnation appraisals, and yet make the fee owner whole, becomes a most difficult, if not impossible, task. Three hypothetical condemnation situations follow.

. . . (Editor's note: the discussion of the three hypotheticals is omitted.)

REPORTS DIFFERENCES BETWEEN VERDICTS, VALUE ESTIMATES

Many other cases could be cited, both from this writer's experience and the experience and the experience of other appraisers. Although the circumstances may vary from case to case, the results would be most similar — a wide difference between the verdicts rendered by juries, and the value estimate of the taking and severance damages to the remainder, using the fair market value concept as the measure of just compensation. The verdicts are usually higher than the value of the taking as estimated on the basis of fair market value.

A negative response to the above discrepancy is that the estimate of value as testified by an expert witness did not reflect fair market value, and the verdict by the jury more closely did. On many occasions I have heard a well-qualified appraiser testify in court as an expert witness on valuation, and support his testimony with good and accurate market data. The jury, however, rendered a verdict that was substantially higher than his testimony, and in some cases, twice and three times the figure.

"Is Market Value Just Compensation?" cont'd.

If the verdicts which have been rendered by juries in land condemnation cases are an accurate measure of just compensation, then another method to properly measure just compensation aside from the fair market value concept must be found.

## "COMPENSATION VALUE" SUGGESTED AS MEASURE

For one to be critical without advancing an alternative is unfair. I offer the following comments for those who might want to preserve the confidence of competent appraisers in the face of ever-increasing jury verdicts which are in excess of the fair market value of the property taken.

It has become obvious that jurors are more conscious of the various elements of damage being inflicted upon a property than the different comparable sales used to develop unit values. Also, although they are instructed by the courts that fair market value is the measure of just compensation, jurors apparently consider replacement value as a more accurate measure.

The jurors' thoughts associated with the three illustrations mentioned above appear to be that a condemnee is not made whole unless he is given "in terms of money" the amount which he will need to purchase a 150-acre farm as in the first example, an eight-room dwelling as in the second illustration, and an adequate water supply (including its operational costs and maintenance) as in the last case.

If this interpretation of jurors' feelings is correct, is not the term "compensation value" a more accurate and appropriate measure of just compensation? I suggest further that the definition of such value could be: "The sum, in terms of money, of the taking plus the severance damages to the remainder: this latter amount being the difference between the value of the taking, and the amount necessary to make the fee owner whole.

Opponents to a change in condemnation appraisal procedures may claim that no matter what amount an expert witness may testify to, the jury will bring in a much higher verdict; and that this will be true, no matter what approach an appraiser might process, whether he uses fair market value or other measures of just compensation. Others may claim a jury speculates that the condemner's appraiser is usually low, the condemnee's appraiser is usually high, and that somewhere between the two estimates lies

"Is Market Value Just Compensation?" cont'd.

the just compensation to the fee owner. Still other opponents may claim that no matter what the experts' testimonies are, the jury will add the two estimates and divide by two, the result being just compensation to the fee owner.

The above comments reflect a defeatist attitude. The appraisal profession must take the initiative in this matter. Appraisers should make a thorough study of their approach to condemnation appraisal and their testimony in courts. It is possible that the methods and techniques of appraisal are over emphasized and that not enough time is taken to clearly explain the different elements of damage being inflicted upon the remaining property.

On the other hand, the response to the situation may be that incompetent appraisers are allowed to testify in court without making a complete appraisal of the property, nor having a clear understanding of the appraisal problem. Perhaps the courts should require a written examination by the expert witness on valuation before being allowed to testify in condemnation cases, such an examination to deal specifically with condemnation appraisal methods and techniques. To go one step further, perhaps the property owner should not be allowed to testify on the value of his own property; it is impossible for him to be impartial.

The reaction to these thoughts may be that there is nothing wrong with the present approach to condemnation appraisals; but that the error rests with the judiciary for allowing lay people to judge real estate value. The feeling may be that all eminent domain cases should be tried before a panel of real estate experts, appointed by the American Institute of Real Estate Appraisers and other leading appraisal societies, in order that each case be tried under the same basic rules in every state.

While it is true that the fair market value concept is applicable in some eminent domain cases, its application is most difficult in many others. Whether proponents or opponents to the thoughts which have been mentioned in these pages, appraisers should give consideration to the matter. Such concern may lead to suggestions which will lessen the growing controversy of eminent domain proceedings.

Heaney, A Comparison of Statutory and Court-Made Rules of Eminent Domain Valuation With Actual Practices, Highway Research Board Bulletin No. 232, p. 105 (Jan. 1959):

THE purpose of this paper is to make some observations on the relationship between the law of eminent domain valuation as it exists on the books and the activities of highway administrators working under that law. It is a study of the realism of highway law. The method of presentation here will be to present a few selected propositions of law, testing them by comparing the rule to the current practice.

. . .

## THE APPRAISER AS A LAWMAKER

The Attorney General of the State of Wisconsin informs all District Offices of the State Highway Commission as to the compensability or non-compensability of various types of damage which a landowner might suffer as a result of eminent domain proceedings. It is elementary, of course, that all conceivable damages suffered by the owner of condemned land may not be recovered. Right-of-way negotiators may not like to put it just that way to property owners but it is one of the hard facts of life. The State Highway Commission of Wisconsin has assigned to the Attorney General the task of examining Wisconsin law to provide the Commission with a working knowledge of the cases and statutes needed to assure compliance with the law in valuing property. The various District Offices then pass this summary of compensable and non-compensable items of damage to the appraisers assigned to a specific acquisition.

The Attorney General, relying on Wisconsin case law, has concluded that the following damages, among others, are not compensable in a condemnation action and therefore should not be considered by appraisers: damages due to a change of grade, costs in moving to a new location, and damages due to the diversion of surface water. This does not mean that the landowner is without a remedy in these cases. However, it does mean that in the absence of a specific statute to the contrary he may not recover for them in a condemnation action.

Research has indicated that a significant number of appraisers in making appraisals for eminent domain purposes have taken into account the above items of damage and included in the final damage figure an amount for such damages where they exist.

"A Comparison of Rules of Valuation with Actual Practices," cont'd.

This sort of administrative lawmaking is, of course, most prominent in appraisals prepared for use by a landowner preparatory to a condemnation action. This reshaping of the damage concept by landowner's appraisers, familiar to every right-of-way agent can be explained on two grounds. First, it is, of course, one of the penalties of the advocate system of resolving controversies. The system of law is based on this premise of justice through conflicting forces and certainly it is not being questioned here. Second, sheer ignorance might be pleaded. A landowner does not necessarily choose an appraiser experienced in condemnation work nor does he have a large staff of attorneys to spell out the intricacies of valuation law. The result is that often the condemnee's appraisal is prepared by a local real estate salesman without any consultation with an attorney or perhaps after a hasty conference with a busy practitioner relatively unfamiliar with condemnation problems.

However, this discrepancy between what the law provides and what appraisers do applies also in the case of state-employed appraisers. The majority of state-employed appraisers follow scrupulously the instructions provided them. However, a significant minority do not. As a result of a surprisingly candid series of discussions with some of these appraisers three distinct reasons can be isolated.

The first is that the nature of the art or science of appraisal does not permit a perfectly clear breakdown of the total value of a piece of property into the sum of its parts. It is not the easiest part of an appraiser's job to say X number of dollars in damages is due to damage item A and Y number of dollars is due to damage item B. Some appraisers will say it cannot be done with even reasonable accuracy. Others will say it cannot be done except with extreme difficulty.

The second reason is that some of the provisions of the law seem unfair to the appraisers. Therefore, they substitute their own sense of justice for that of the official lawmakers. The result is that there is concealed somewhere in the appraisal an amount for a damage which, under the existing law, should not be considered by the appraiser.

The third reason for the disparity between what the appraiser is directed to do by law and what he does do in fact is that, in spite of the procedure set up to inform him of the law, he is not sufficiently aware of the provisions of the law to apply it intelligently. This is particularly true in the more remote

areas of the state where competent appraisers are hard to locate and where so little land acquisition is done that it is difficult for the local appraisers to build up a backlog of experience.

The importance of the real estate appraiser in highway land acquisition cannot be overemphasized. Just compensation which is just to the condemnor as well as the condemnee is only a term unless he performs faultlessly. It is his report which is the basis for the original offer. Under the Wisconsin system it is his report which is the basis for an award if the offer is rejected. At the trial before a jury his evidence has long been recognized as setting the limits of value within which the jury must find. Therefore, his performance, in large measure, determines how realistic the law of valuation really is. The implications of his expanding the concept of what is recoverable are clear. The state is paying more per mile for necessary right-of-way than would otherwise be the case.

## THE COST OF POLITICAL RESPONSIBILITY

In Wisconsin the first appeal which a landowner may take from an award of the Highway Commission is to the county judge of the county in which the condemned property is located. Oftentimes, although not always, the state will be represented before the county judge by the district attorney of the appropriate county.

Many people intimately involved in highway land acquisition on the side of the state feel that in this set of circumstances the state is at a distinct disadvantage. County judges, who decide the controversy over value, are officials elected by the local citizens. The district attorneys who must represent the state are also locally elected. The condemnor, on the other hand, is a powerful, essentially outside intruder — the State. The critics of this system contend that there is a tendency on the part of some county judges to entertain a bias on the side of the property owner. Whether this bias is a desire to protect his own people or is a manifestation of his awareness of who keeps him in office, or both, is not clear. There is also the definite possibility that a particular judge may feel that the Highway Commission makes awards which are uniformly too low. Certainly it should be pointed out that this suggested bias is not a widespread, usual condition. An attorney who has participated on behalf of the state in hearings before the county judge indicates that in his experience he has encountered some county judges who virtually always raise the Highway Commission's award, some who almost always go along with the award, and some who sometimes accept the Highway Commission's award as about right and sometimes do not.

"A Comparison of Rules of Valuation with Actual Practices," cont'd.

Definite conclusions on the degree to which county judges are affected by their feeling of responsibility to the condemnee are difficult to draw. It can be said that as a group they are extremely competent, uniformly conscientious men of unquestioned integrity. It is, of course, equally a fact that they are elected officials with local ties. What should certainly be noted by highway administrators and evaluated for what it is worth is that some judges as a matter of course regard Highway Commission awards as too low.

In a few areas of the state selected for special study, right-of-way people at the grass roots level have indicated a strong feeling that a few district attorneys have not exerted a sufficient amount of effort on behalf of the condemnor when representing the state. The reason offered was that the particular district attorneys are hesitant to be too hard on local voters. One right-of-way appraiser acting as a witness on behalf of the state reported to the author his frustration at the refusal of a local district attorney to elicit from him on direct examination certain testimony which the appraiser regarded as critical to the fair determination of the trial. Needless to say the state saw its award raised by a significant figure in that case.

A related complaint was that district attorneys were too busy to give a case proper attention, particularly in those counties where the position of district attorney is the civic duty of one of the two or three lawyers in the county and is a sideline to the private practice of law.

Sometimes the Highway Commission is represented by an assistant attorney general or a special counsel appointed from the local bar. This study has indicated a high level of representation where this has been the case.

The degree of landowner bias on the part of either the finder of fact or the acting attorney for the state cannot be measured accurately. However, to the degree that it is present, it represents a departure from the law as it is written and almost certainly raises acquisition costs both by raising awards and by encouraging litigation.

## FORGOTTEN RULES OF EVIDENCE

The rules of evidence in a judicial hearing are designed, among other things, to assure compliance with the written substantive law. If it is the law that one may not collect damages because

the state trunk designation has been removed from the highway going past his place of business and has been placed on another highway and therefore, fewer potential customers now reach his place of business, then it seems reasonable that one should not be permitted to introduce evidence of the loss of such business. Such testimony has no function to serve except to confuse the fact finder and lead him to conclusions at variance with the law.

As indicated previously, the initial appeal from an award of the Highway Commission in Wisconsin is to the county judge. Under the governing statute no particular procedure need be followed in making the determination. The appeal is regarded as one to the county judge not to the county court. A hearing may or may not be held. Most county judges do hold a hearing on the pattern of the familiar court trial. Some judges will even hold the parties strictly within the rules of evidence in presenting testimony. Others will exert some control over what evidence will be accepted but avoid particularly confining technicalities. A minority dispense entirely with the rules of evidence and this procedure presents a definite possibility of a departure from the law of compensability. The following actual case is illustrative:

Witness Jones took the stand and presented testimony of the damages to the property as found by appraisers Smith and Brown. He did not testify to a "before" value or an "after" value. He did not state whether the appraisal was based on a comparable sales, an income or a reconstruction cost basis. He did not indicate whether noncompensable items such as circuity of travel or diversion of traffic were considered. He could not even testify of his own certain knowledge that the appraisers had looked at the property except to the extent that they were instructed to do so. Yet his testimony was accepted by the judge and presumably taken into consideration.

This is admittedly an extraordinary example, the most obvious possible disregard of the law before a county judge which the study has turned up. Yet it illustrates how easy it is to depart from the law of eminent domain valuation where there is a determination not subject to check by the rules of evidence. Whether this flexibility afforded the county judge is ultimately a good thing or a bad thing in the administration of justice is another matter, but it certainly makes the control of law less significant and the decisions of men more significant. Right-of-way men in the district offices visited seemed to feel that such a flexibility usually works adversely to the interests of the state and attribute some of the, to them, seemingly inordinately high awards of the county judges to this lack of firm control on what testimony may be considered.

## BARGAINING THE LAW AWAY

The State Highway Commission of Wisconsin like many other commissions in the country does not engage in "horse trading". That is to say the right-of-way negotiator comes in with a firm offer based on two or three appraisals. Unless error can be shown, the negotiator is not prepared to alter that price. This appears to be the policy of a majority of state highway commissions.

However, a minority still bargain with landowners in order to avoid litigation. This sort of flexibility, undoubtedly sometimes useful in making a settlement, puts a limitation on the accuracy of the law as it appears on the statute books. If compensation is to be based on the difference between the value of the property before and after the taking and such a determination has been made then a departure from such a figure is a departure from the apparent law. It is a departure created by administrative action. If this practice makes acquisition of land easier and in the long run cheaper to the state, while providing just compensation to the affected landowners, it may be a good thing. In any event it emphasizes the lawmaking power of right-of-way people and even gives the potential condemnee an opportunity to make a little law of his own.

Bonner, A Uniform Expert Valuation Testimony Act, Highway Research Board Bulletin No. 294, page 13, (1961):

DURING a recent condemnation case, expert valuation witnesses differed in their estimates by an incredible 800 percent. If this were an unusual event it could be noted with little more than a raised eyebrow. Wide deviations of this magnitude, however, are being observed throughout the nation. The seriousness of such appraisal variations is spotlighted by the fact that an increase of only 10 percent in the cost of right-of-way for the Federal Interstate Highway Program will result in the additional expenditure of approximately two billion dollars.

How can the wide variations in the testimony of expert real estate valuation witnesses be reduced? There are two possible answers. One solution would be to eliminate the jury system of awarding damages in condemnation cases. A recent study has indicated that condemnation jurors have a pronounced tendency to arrive at a quotient verdict — that is, a verdict approximately midway between the amounts to which the expert valuation witnesses for each litigant have testified. Thus, the higher the testimony of the real estate appraisers representing the condemnee, the higher the probable verdict. Conversely, the lower the testimony of the witness for the condemnor, the lower the ultimate verdict. Obviously such a system leads to extreme bias or worse.

Unfortunately, the states which have adopted the tribunal system in lieu of the jury system have not eliminated the wide variations in appraisal testimony. The jury system for awarding damages may prompt bias or intellectual dishonesty but the elimination of the jury panel does not cure these moral diseases.

A second solution would be the establishment of uniform expert testimony acts. The term "uniform expert testimony act" now has a specific connotation in those states which have adopted such a statute. The act is an attempt to remove the paid partisan status of the expert witness. Its antecedents may be found on the European Continent where the expert witness is an officer of the court and not called by the parties.[1] In the states which utilize the expert testimony act, the expert is appointed by the court although he is not, technically, an officer of the court. The act does not pre-empt either or both parties from calling as many other expert witnesses as they may desire. As one authority explains the act:

> The uniform expert testimony act provides, in brief, that when issues arise in a case where the court deems that expert evidence

"A Uniform Expert Valuation Testimony Act," cont'd.

> is desirable, the judge may appoint one or more experts of his own choosing who should make an examination of the....subject matter in controversy and report to the court their conclusions.[2]

While such a uniform expert testimony act may eliminate bias on the part of witnesses, it should be strengthened to eliminate incompetence as well. A comprehensive analysis of 794 pages of transcripts from condemnation cases indicated that witnesses for the same litigant were also subject to wide variations in their opinions of value.[3] Bias or intellectual dishonesty could not account for these variations. Only the inexact nature of real estate appraisal or the incompetence of some of the witnesses could be blamed for wide variations of opinions between experts representing the same party in a condemnation case. Let us first examine the question of incompetence and see how a uniform expert testimony act could reduce the number of incompetent appraisers who testify as expert valuation witnesses.

As a bare minimum, no witness should testify to real estate values who is not, or has not been, a licensed real estate broker. All but two of the states have real estate license laws but only a few states forbid an unlicensed person from rendering appraisals of real estate. Exceptions could be made to permit court testimony by officers of financial institutions or responsible employees of government agencies whose principal activity entails the appraisal of real property.

Above a certain minimum property value, such as the $25,000 minimum set by the Bureau of Public Roads for two or more appraisals, all condemnation appraisals should be made only by members of accredited, professional appraisal societies. Members of the American Institute of Real Estate Appraisers and the International Society of Residential Appraisers have been qualified by age, experience, investigation, and examination to appraise certain types of real property. They should be used within their fields of experience.

If sole reliance upon existing appraisal societies would seem to deny appraisal practice to qualified non-members, courts could establish a series of comprehensive examinations for those who wished to testify in condemnation cases. Separate examinations could be provided, if desired, for residential, commercial, industrial, or agricultural appraisals.

"A Uniform Expert Valuation Testimony Act," cont'd.

Another valuable contribution to a uniform expert testimony act would be the requirement that all appraisal reports would be made available to the opposing attorneys and to the bench before trial, as well as to members of the jury during the course of the litigation. It is true that a requirement of this type would strengthen the position of the cross-examining attorney at the expense of the expert valuation witness. It is also probably true, however, that the submission of appraisal reports would result in the reduction of incompetent appraisers, the decline of biased testimony, and the thinning out of court dockets as more cases were settled.

With the myriad of condemnation statutes in use throughout the various states it is perhaps hopeless to expect a really uniform expert valuation testimony act to be enacted by all fifty states. Each state, however, should consider the enactment of laws which will provide for a greater degree of competence and a lesser opportunity for bias among expert valuation witnesses.

The Federal Bureau of Roads should take the initiative by demanding that all appraisers who testify in court actions involving the interstate highway system should meet minimum standards of competence and be removed, as fast as possible, from situations leading to bias, prejudice, or intellectual dishonesty.

The appraisal of real estate interests should not be expected to become an exact science. Real estate valuation has developed as a specialized practice only within the past three decades. Remember that with all of the strides made by medicine over the centuries, top rated physicians may hold diametrically opposed opinions when testifying as medical experts.

Too many real estate appraisers, however, are using the inexactitudes of valuation as a crutch to support variations in estimates which could only result from incompetence or dishonesty. A uniform expert testimony act should eliminate much of this abuse.

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[1]Orgel, Lewis, "Orgel on Valuation Under Eminent Domain." Second Edition, Charlottesville, The Michie Co., p. 249 (1953).

[2]Tracy, John Everts, "Handbook of the Law of Evidence." Prentice-Hall, Inc., New York, p. 217 (1952).

[3]Bonner, John T., Jr., "A Study of the Persuasion of Juries by Expert Witnesses in Condemnation Cases," Unpublished PH.D. Dissertation, The Ohio State University, 174 pp. (1954).

## II. COMMENTARIES ON JURIES

### A. COMMENTARIES GENERALLY FAVORING JURIES

Report of the American Bar Association's Special Committee on the Amendment of Rule 71-A of the Federal Rules of Civil Procedure; 81 AMER. BAR ASSN. REPORT 463 at 465 (1956):

IT is interesting to note, and no doubt significant, that practically all of our states have enacted specific and affirmative legislation to assure the right to trial by jury in eminent domain proceedings. Historically speaking, this apparently became necessary because the right to trial by jury was not protected by the Constitution of the United States inasmuch as it did not exist at common law...At the time of the adoption of our Constitution, eminent domain proceedings were not a matter of importance and thus the right to trial by jury was not in the minds of our founding fathers, other than as it applied at common law...With its (condemnation) increasing use either by the United States or a sovereign state, the basic right to trial by jury as to the issue of just compensation became more and more a matter of real concern to landowners whose homes and property were taken away in the process; hence the enactment of laws protecting that right in practically every state.

Thus, it now seems inconsistent with the trend of history in the United States for the Supreme Court, under the guide of its rule-making authority to abrogate the right to trial by jury in federal courts and to give to federal judges, who have already a vast amount of power far greater than exists in the average state court, the discretion as to whether they will overrule a demand for trial by jury. This is just another step in taking away from attorneys and their clients a certain amount of control over proceedings in federal courts. Naturally, the American Bar Association has been concerned about the matter. It is felt that control over a problem as vital as the right to trial by jury should be maintained in the parties litigant.

. . .

The trial of a condemnation of land case is considered by the bar as a very important matter. Client's very homes are often involved and in recent years the federal government has taken so much land for public purposes that these cases quite often involve millions of dollars. The Constitution provides that just compensation must be paid and the determination of just compensation is

not only an important matter but is sometimes a difficult legal matter. In the field of evidence a vast body of law separate unto itself has been established as to what evidence is admissible to show the true value of the land. It is somewhat amazing that this field of law has become as voluminous as it has, but once legal study is made of it the necessity is seen, because if the wrong type of evidence is admitted and is the basis of consideration, the compensation paid may be illegal or wrong. Also the questions of proper use of the sovereign power of eminent domain as well as the question of when, where and how its use was authorized by Congress to apply to a particular case are important and technical questions. Thus the attorney must give considerable legal study to prepare himself adequately to try an eminent domain case. The Government usually proceeds in these cases with attorneys who have specialized in them and in many instances have tried them exclusively for years. Accordingly, it is not uncommon for an attorney, realizing the importance of his case and its value to his client and after properly preparing himself, to desire that a petit jury be empaneled to hear this case. The client often feels this way also because the jurors are his peers and often his neighbors and he feels that he will be fairly treated. There are several reasons motivating this feeling among attorneys; one is that they prefer to have the judge present every moment in the trial of the case so that when important and technical points, particularly relating to the admissibility of evidence, arise, the judge will be there and will hear the background and can rule immediately on them so as not to prejudice the jury or he may delay the trial until legal determination thereof can be made and perhaps memoranda of authorities filed. Thus the case proceeds in an orderly manner.

Summary of an Interview with LEIGH B. HANES, U. S. District Attorney for the Western District of Virginia, Roanoke. Mr. Hanes has had much experience in trying and supervising condemnation cases in Southwestern Virginia.

MR. Hanes expressed the belief that in most cases, all parties are benefitted by a jury trial, he would make an exception only in very unusual situations, such as the one the TVA faced. He noted that for years the Justice Department's traditional (although not official) practice was to demand a jury; this was encouraged by a standard phrase in the recommended pleadings. He feels that in spite of Rule 71A, the Justice Department regarded jury trial as a right. About 1965, the Justice Department stopped demanding jury trial as a matter of course. As described above, Mr. Hanes agrees that jury trial should be the rule, commissioners the exception.

He is unhappy with the commission system as it has often worked out in practice. The parties naturally attempt to secure the appointment of commissioners favorable to them; and courts have felt that they should appoint local people. In practice, local people are under pressure to be favorable to the landowner, since "they must answer to friends and acquaintances on the street." In general, he believes that the probability of securing a fair result is increased by using juries.

Mr. Hanes has found that commission hearings at which no judge is present are frequently unsatisfactory. Since the chairman is often not sure of the law, all kinds of inadmissible evidence is permitted to be introduced. He cited cases where inexpert opinion was admitted which used "comparable sales" which were in actuality extraordinary and unusual sales. He tells of testimony to the effect that "millionaires were straining at the leash" to buy the property and this impressed the commissioners, but such testimony would clearly have been ruled inadmissible by a judge.

Mr. Hanes noted that commissioners feel pressured to admit possibly objectionable testimony, because they feel that the judge can't rule on the evidence without seeing it, and that it must therefore be included in the record.

As a practical matter, Mr. Hanes contends, most judges are very busy and simply do not have the time to read through a transcript "three inches thick." The result of this situation is that the judge will rule only when the objections are presented verbally and in person by the attorneys.

"Interview with Mr. Hanes," cont'd.

In sum, Mr. Hanes feels that the commission system causes many problems, and that attorneys on both sides become provoked at the situation.

He is not persuaded that juries cannot render just awards. He pointed out that while there are things in any case that a jury doesn't understand, this is also true of commissioners, who "aren't appraisers either." Mr. Hanes suggests that just as commissioners learn from experience, so could jurors if they were drawn to hear four of five cases. He believes that condemnation is no different from any other complicated case with respect to the jury. It is his belief that jury awards would be lower than the commission awards which are presently unfair to the taxpayer.

Mr. Hanes is attracted to Judge Widener's idea of using commissioners with the judge presiding, however, "That might be the answer." Similarly, he believes that it might be feasible to use U. S. Magistrates to preside over commissioner hearings.

Summary of an Interview with W. HARRIS GRIMSLEY, U. S. Magistrate, Alexandria, Virginia. Formerly an Attorney with the Lands Division, U. S. Department of Justice.

MR. Grimsley has had very extensive experience in condemnation during his approximately twenty-five years with the Lands Division. He approves of the Rule 71A approach, but stresses his belief that the jury trial should be used in all ordinary cases, and that the appointment of a commission is more appropriate "only in the most complex circumstances."

He noted that in terms of the harshness of the effect of government action on the citizen, condemnation is matched only by a criminal prosecution. In view of this, he believes that the government should take all reasonable steps to assure the landowner that the condemnation proceeding is conducted fairly and impartially, and that the landowner should have a right to jury trial.

Mr. Grimsley is not convinced by the argument that juries aren't competent to decide ordinary condemnation cases; he pointed out that there are ordinarily some "good business people on a jury." He said that in the situation where only one parcel is being taken (for the local post office, for example), the government is usually able to get a jury that knows something about land values. For the reasons described above, he prefers the "common sense of the common people" and believes it is proper for the jury to give the landowner the benefit of the doubt. This, he says, is preferable to the "Big Brother concept of Big Government" implicit in judge-appointed commissioner schemes.

He noted that the Justice Department's attitude has traditionally favored jury trials. The official reason for this is that a judge is present, thus allowing immediate and definitive rulings on objections. The government therefore had a good record on which it could take a prompt appeal. This is especially important, says Mr. Grimsley, in situations where an appeals court decision would have an important effect nationally. The Justice Department held this opinion, he says, even though it recognized that "a jury may occasionally sock it to the government." Mr. Grimsley feels that he generally came out better (i.e., got a lower award) with a jury than with a commission.

Mr. Grimsley noted several problems with the commission procedure. He pointed out that commissioners are frequently not especially qualified; "You've got to pick exceptionally good commissioners to be any good." Too frequently, he thinks, the chairman of the commission is unsure of the proper legal rulings and resolves objections to evidence by saying "Well, we'll accept the evidence for what it's worth, note your objection, and send it up to the court."

"Interview with Mr. Grimsley," cont'd.

Thus, weeks or months later, the Judge has to rule on objections which, by the time they reach him, are strictly "cold potatoes." Another difficulty with commissions: "Sometimes it'll take the commission weeks to write the report." In summary, a weak commission usually means "lots of problems and appeals to the judge." And if the judge uses commission appointments to pay off "political cronies," you often end up with a weak commission.

Nevertheless, Mr. Grimsley noted that in cases where strong, "top-notch" commissioners were appointed, the procedure worked excellently. The key to the commissioner arrangement is the quality of the appointments, he repeatedly stressed. In Federal condemnation cases in the U. S. District Courts of Eastern and Western Virginia, the commissions were most effective.

He described special circumstances which he feels are better handled by commissioners. He cited cases involving the capitalization-of-income method, takings involving valuation of subterranean minerals, and situations involving very large tracts of land (TVA, Dulles Airport, etc.). Some of the latter projects, he pointed out, could clog up a court's calendar for years.

He responded very favorable to Judge Widener's practice of appointing commissioners but presiding himself; "That may be the answer."

A Summary of Interviews With State Highway Attorneys:

(Editor's note: The editor conducted interviews with six government attorneys who are responsible for their state's highway litigation. As such these men have accumulated considerable experience with condemnation. For various reasons, several of them declined to have their comments published. The results of these interviews are significant, however, and the editor has summarized them briefly here.)

THE general consensus of these attorneys is that while there are problems with the jury, commissioners are even more troublesome. The main criticisms of commissions are that they are susceptible to political influence and that they are poorly qualified to make evidentiary rulings. The following comments are representative:

> "Its the commissioners, not the juries, that can't be controlled. Judges often appoint political friends as commissioners."
>
> "A weak commission will be reluctant to rule on evidentiary issues and will shirt from one foot to another, but will inevitably hear the evidence; with a jury, on the other hand, the attorneys can argue evidentiary points out of the jury's hearing."
>
> "In rural commissioners' hearings, the evidence is not carefully controlled and everything tends to get thrown in."
>
> "Despite its weaknesses, there's nothing better than a jury."
>
> "I'm inclined to think that the jury is the softest way to handle it because a board or commission can get all powerful."
>
> "The jury is the best guarantee of fairness to both the landowner and the state."

Thus, while there were reservations expressed about the jury system, these six highway attorneys as a group seemed clearly to prefer the jury to the commission as the fairest tribunal.

## B. COMMENTARIES GENERALLY NOT FAVORING JURIES

Report on the Proposed Rule to Govern Condemnation Cases in District Courts of the United States, 11 F.R.D. 213, 237 (May, 1948):

WE obtained from counsel for TVA the results of their experience, which afforded convincing proof that the commission system is preferable under the conditions affecting the TVA and that the jury system would not work satisfactorily. We then...wrote every Federal judge who had sat in a TVA condemnation case, asking his views as to whether a jury system should be preferred. Of the 21 responses from the judges, 17 approved the commission system and opposed the substitution of a jury system for the TVA. Many of the judges went further and opposed the use of juries in any condemnation case.

...The reasons which convinced the Advisory Committee that the use of commissioners instead of juries is desirable in TVA cases were these: 1...Uniformity of awards is essential. The commission system tends to prevent discrimination and provide for uniformity in compensation. The jury system tends to lack uniformity.

Note, Contemporary Studies Project: New Perspectives on Iowa Eminent Domain, 54 IOWA L. REV. 737 (1969):

A CONDEMNATION proceeding in the district court is nothing more than a determination of highly technical questions by non-expert jurors. The jurors used in district courts condemnation cases have no special ability to decide the technical questions presented. In addition to this, the courts insist that these jurors make their determination in terms of the market value of the property and insist that all evidence of value be stated in terms of the market value of the property. These determinations require expertise and district court jurors simply cannot properly perform them. The jurors are forced to rely completely upon expert testimony.

Paul, Condemnation Procedure Under Rule 71A, 43 IOWA L. REV. 231, 235 (1958):

IT would seem obvious that that method of ascertaining this value is most satisfactory which is most expeditious and least costly and which would obtain the most accurate and just results. The use of a jury to fix values, in most instances, tends against these desirable ends.

A proceeding for the condemnation of property is not a common law proceeding and it has been long established that the constitutional guarantee of jury trial has no applicability to it. The cry of the "right to trial by jury" has, unfortunately, made an appeal to those having little experience with condemnation cases and who believe some of them sincerely, that there is something inherent in a jury trial which assures a result fair to everyone concerned...

One argument against trying valuations by jury which has not been sufficiently emphasized is one which was stressed by the representatives of the TVA in their insistence on retaining the use of commissioners. It relates to the frequently occurring situation where a number of tracts are taken within a large area and where some of the landowners may contest the valuations. In such cases each owner is entitled to a separate trial and by a separate jury. This may result in the widest sort of inconsistency in the awards. For example, one jury may fix a valuation on tract X in an amount decidedly larger than another jury may value tract Y; whereas it is common knowledge in the community that tract Y is the more valuable. Such inconsistencies lead to dissatisfaction among landowners and distrust and criticism of the processes of the courts. There is always danger that such disparities will exist when valuations depend upon the temperament of juries.

Miller, Federal and State Condemnation Proceedings — Procedures and Statutory Background, 14 VAND. L. REV. 1085, 1084 (1961) (reprinted by permission of Vanderbilt Law Review, copyright owner):

THE consensus of the judges who have appointed commissioners under Rule 71A(h) is that...the commission awards are generally consistent, thus eliminating the wide disparity often found in jury verdicts.

Graubart, Theory Versus Practice in The Trial of Condemnation Cases, 26 PENN. B.A.Q. 36 (1954):

AT present, the trial of eminent domain cases in Pennsylvania as well as in other states is like a puppet show. The lawyers, the expert witnesses and the judge know that all the testimony is unimportant except the answers of the experts to the question "What, in your opinion, was the fair market value of the property at the time of condemnation?" Usually, the jury takes the amount of the plaintiff's expert and that of defendant's expert and divides by two. This is what encourages plaintiff's experts to stretch so high and defendant's experts to crouch so low.

Recently, the Real Estate Board of one of our cities held a moot eminent domain trial. In the jury box sat the President Judge of the local Common Pleas Court, the president of the local Bar Association, the presidents of several real estate groups. They listened to expert testimony. When asked how they arrived at their verdict, they confessed they used the usual formula of "add and divide."

Frankly, that is the only formula that can be used by a jury unfamiliar with the property, who has listened to experts whose appraisals cannot be attacked, undermined, or exposed.

McCarthy, Land Acquisition Policies and Proceedings in TVA — A Study of the Role of Land Acquisition in a Regional Agency, 10 OHIO St. L. J. 46, 59 (1949):

WHERE the issue of just compensation is determined by a jury, the award in one case is no indication of what the award of a different jury will be in the next case, and no matter how fair a price the landowner has been offered there is always the possibility that a jury will award him a great deal more. A jury trial procedure is, therefore, an invitation to litigate.

Merrill, Condemnation Procedure Alternatives for Virginia 17, published by the Virginia Highway Research Council, P. O. Box 3817, University Station, Charlottesville, Virginia 22903 (1972):

(Editor's Note: Since Virginia uses a commissioner system, the Virginia judges interviewed in this study are not speaking from actual experience with juries in condemnation trials. To some extent, therefore, their comments are speculative. Most of the judges have had extensive experience with condemnation, however, and all are obviously experienced with juries in other kinds of cases.)

IT seems fair to say that the overwhelming majority of the judges are strongly against the jury system. Forty-four judges oppose its implementation, while only seven support it as an alternative...

The thrust of most of the comments opposing the jury is that the average juror would be unprepared and unqualified to understand and evaluate appraisers' testimony. The following sampling of the comments illustrates this point:

> "It would be amateur brain surgery."
>
> "They wouldn't have any knowledge and would just be making a wild shot in the dark."
>
> "The concepts would be foreign to them. They'd just be groping for an answer."
>
> "You'd get people on there who don't know anything about property. You might as well not ask them."
>
> "Some of our jurors can't even read or write. Very often jurors don't know what's going on."
>
> "Chaos would take place."
>
> "Absolutely worst system."
>
> "It ought to be on a more expert basis."

One judge thinks that the very terms used in condemnation, "utility easement," "damage to the residue," "front footage, etc.," would be "above their heads." Another states that it would be "throwing it up too much for grabs."

A second point mentioned by several judges is the unpredictability and lack of uniformity in jury verdicts. It seems to be the general consensus that "you can never tell what a jury is going to do." Even the judges supporting the jury appear to accept this conclusion.

The time factor is also frequently mentioned. One thinks trials would be "infinitely more time consuming," another that "trials would be fifty percent longer."

Several judges believe the awards would be higher under a jury system:

> "I find that the jury would be very much swayed by sympathy for the landowner."
>
> "Very, very sympathetic to the landowner."
>
> "It would be tragic as far as the Highway Department is concerned. I just think every award would be tremendous."
>
> "I'm inclined to think it would bankrupt the state in no time flat."

Ghingher, A Contemporary Appraisal of Condemnation in Maryland, 30 MD.L.REV. 301, 312, 313, 323 (1970):

(Editor's Note: These comments were made in the context of an article which argues that the landowner should be given his choice between a jury and a commission.)

THE extent to which a jury's verdict in a condemnation case may deviate from the expert testimony as to the property's value was examined in Bergeman v. State Roads Commission. In that case the landowner brought an appeal alleging that the jury below had based its verdict on its own speculation as to the proper valuation instead of on the expert testimony presented in the case because the jury had rendered a verdict $3,000 lower than the lowest appraisal presented by the condemnor's experts. The landowner concluded from this that the jurors had based their verdict on their own impressions of the property which had been formed when the jury viewed the property. While the court agreed that a verdict based entirely on the jury's view could not be sustained, it rejected the landowner's claim that the view could have been the only foundation for the verdict.

After analyzing the evidentiary factors which could have motivated the jury in rendering its verdict, the court concluded that the jury could have founded its award on the appraisers' testimony as to valuation by the income method, but had interchanged the figures on which that testimony was based. The court speculated that the jury could have accepted the net rent figure of one of the condemnor's experts, but, concluding that the capitalization rate used by that expert was too low, had then arrived at a rate representing a compromise between that rate and the rate employed by the condemnor's other appraiser. Because the net rent figure of the first expert was considerably lower than that estimated by the second appraiser, the application of the higher capitalization rate to this lower rent figure resulted in an award lower than the appraisal of either expert. Citing the hackneyed rule that the weight of expert testimony is a matter for consideration by the jury, the court held that this "out-of-context" application of the evidence by the jury was proper. Because the value of such expert opinion depends on its underlying facts, the court concluded that there could be no objection to permitting the jury to "draw their own conclusions from such basic facts as they may choose to find..."

The danger of such a practice is obvious. Each of the expert appraisals offered as evidence in a condemnation case is a consistent whole, resting on a given set of carefully conceived

"Contemporary Appraisal of Condemnation in Maryland," cont'd.

assumptions. The assumptions underlying each appraisal are different and depend upon the viewpoint of the individual appraiser. If a jury can pick and choose among the facts and figures of the different experts, the final award will lack this element of consistency. The use of different factors gleaned from different appraisals, each based on differing assumptions, by a jury with little, if any, independent knowledge of property valuation, can result in awards which do not remotely reflect the true value of a piece of property. Such uncontrolled latitude in the jury's consideration of the expert testimony seems inconsistent with the constitutional mandate that no property may be taken without just compensation.

Comment, Condemnation Procedure — An Argument for Reform, 29 FORD. L. REV. 757, 763 and 767 (1961) (Reprinted by permission of copyright holder from Fordham Law Review, Volume 29, pp. 757-768. Business Office: Fordham Law Review, Lincoln Center 140 West 62nd Street, New York, New York 10023. (c) 1961 by Fordham University Press):

BASICALLY, the jury is without experience and therefore entirely dependent upon the conflicting views of experts: in short, easily confused. The present system (commissioners) is, in effect, a jury of three. Because they are but three, will they be any less confused?

...Surely an award resulting from the deliberation of experienced appraisers is entitled to more weight than that of a jury.

Report of the New Jersey Eminent Domain Revision Commission (1965):

(Editor's Note: The following comment is part of the Revision Commissions' summary of the arguments against juries. The commission recommended a right to jury trial in its final report.)

IT having been adjudicated...that there exists no constitutional right of trial by jury in condemnation cases, the abolition of such trials has been urged. In support of this argument, it is said that the complexities of valuation are far too great for the comprehension of a group of persons, totally uninformed and ill-equipped to adjudicate such issue. It is well recognized that upon the voir dire, all persons having any semblance of expertise on the subject are excused from jury service. When it is recalled that our appellate courts frequently vacate adjudications of value made by state agencies, highly knowledgeable in the field, how can we expect adequate findings by a jury whose excursion into the area is an isolated experience?

Hines, Does the Seventh Amendment to the Constitution of the United States Require Jury Trials in all Condemnation Proceedings? 11 VA. L. REV. 505, 514-15 (1925):

SUPPOSE Congress, in connection with railroad consolidations, should wish to provide for the condemnation of shares of stock in a railroad company. It is manifest that a jury would not be well-equipped to handle a question of this complex character.

Bernard, A Proposal to Improve Condemnation Procedure, THE AMERICAN CITY 43:150, October 1930:

THE advantages of such a (commissioner) system over...(present) practice...are apparent. It would eventually eliminate the vagaries and imbecilities of a common jury.

## C. COMMENTARIES ARGUING THAT JURIES ARE LIBERAL

Note, Contemporary Studies Project: New Perspectives on Iowa Eminent Domain 54 IOWA L. REV. 737 (1969):

THE results of this study indicate that most jurors seem to believe that their job is to assure the property owner an adequate award. They are less concerned about assuring the condemnor a fair price for the property. This one-sided concern is the main reason many jurors favor an award larger than the offer. Some jurors believe that all offers made by a body which possesses the power of eminent domain will be conservative...

The jury is very sympathetic with the landowner's forced loss of ownership interest in his property. They are also concerned with extra burdens such as inconvenience or unsightliness which the taking may place on the property owner.

Graubart, Theory Versus Practice in the Trial of Condemnation Cases, 26 PENN. B.A.Q. 36 (1945):

IN these trials, juries usually return large verdicts often twice as much as the property is worth.

In most condemnations settlements are made with most of the owners, but much can be gained by plaintiffs and their lawyers if they appeal and take their cases to juries. Lawyers for plaintiffs usually charge 10% of the viewer's award plus 50% of any increase over the award. Thus the plaintiff and his lawyer are fairly certain of some increase as well as detention money. The municipalities, authorities, redevelopers and the state usually 40% more for condemned land than it is worth. This performance which is daily going on throughout the country breeds disrespect for law, cynicism toward the courts,and discouragement for necessary public improvements.

McCarthy, Land Acquisition Policies and Proceedings in TVA — A Study of the Role of Land Acquisition in a Regional Agency, 10 OHIO ST. L.J. 46, 59 (1959):

THE condemnation sections of the TVA Act were drafted by Honorable Seth M. Richardson, then Assistant Attorney General in charge of the Lands Division of the Department of Justice, at the request of Chairman McSwain of the House Military Affairs Committee. The objective was to provide a procedure which would protect the Government against unreasonable jury awards.* The procedure has not only accomplished Chairman McSwain's stated objective; it has proved to be tailor-made to fit the problems of a regional agency.

*"We have had so many bitter experiences of the Government being imposed upon in their attempt to acquire land that I asked the Department of Justice to send their expert down here for a conference. Assistant Attorney General Richardson had two conferences with me, and based on his experience, growing out of hundreds and hundreds of cases all over the Nation, this provision has been drawn by him. It is his language, adopted by us after we considered it. He told us this. For instance, they found it necessary to acquire a little lot of land somewhere on the New England coast. The preliminary Commissioners estimated it to be worth about $1,100. They proceeded to condemn the land, it went to a jury, and the jury brought in a valuation verdict of $44,000." Muscle Shoals, Hearings before the House Committee on Military Affairs, 73d Cong., 1st sess. 43 (1933).

Wasserman, Procedure in Eminent Domain, 11 MERCER L. REV. 245, 246 (1959-1960):

...A COMMON law jury is usually the most liberal assessor...for example, the total of awards in eight Massachusetts cases tried by juries was 63% higher than the combined valuations of the same parcels as determined by a board of five disinterested real estate men. Comment, Eminent Domain in an Age of Redevelopment: Incidental Losses, 67 YALE L.J. 61, 89-90. In only one of these eight cases did the board's determination exceed that made by the jury. Id. at 90 n. 125.

McLeod, An Attorney General Looks at the Highway Condemnation Law, a speech to the Highway Research Board, July 28, 1970:

...THE STATE of North Carolina in North Carolina State Highway Commission v. Gamble had before it a factual situation which exists regularly in my state and which, it is fair to assume, is common in every other state and territory. Three witnesses in that case appeared for the landowner and three for the highway department. The high range of testimony by the landowner's witnesses was a valuation of $92,000 before and a valuation of $10,000 after. The landowner's witnesses also testified that the highest and best use for the property before the taking was for residential and subdivision purposes; and after, its highest and best use was for growing trees. On the part of the highway department its witnesses testified to a value before of $27,000 and a value after the taking of $20,000, and that the highest and best use before and after the taking was for the purpose of farming and timber growing. With this range of testimony before it, a North Carolina jury returned a verdict for $73,000.

There is nothing unusual about this particular case except that it represents common factual situations which occur daily throughout the land, but with each jurisdiction, to a greater or lesser extent, considering such circumstances in the light of its own highway condemnation laws.

...I feel confident that the problem of excessive highway condemnation jury verdicts exists in a large number of states. Concern in this regard has been expressed at meetings of the National Association of Attorneys General at least as far back as 1958 when the thrust of massive federal contribution began to be felt. The causes of high verdicts are as many and varied as there are lawyers, judges, juries and parcels of land.

Merrill, Condemnation Procedure Alternatives for Virginia, page 13, published by the Virginia Highway and Transportation Research Council, P. O. Box 3817, University Station, Charlottesville, Virginia 22903 (1972):

Of the twenty-five judges responding to this question, fourteen indicate that they think the awards are generally fair and eleven indicate that awards are high, or at least in excess of fair market value. None of the twenty-five judges indicate that the awards are too low.

The following comments are representative of the judges who think the awards are about right:

> "Awards have not gone haywire."
>
> "Considered in the correct range by the bar."
>
> "I have never seen an instance where the commissioners made an unfair award."
>
> "I don't see too much wrong with the awards."
>
> "No real runaway awards, no ridiculous awards."
>
> "Somewhat liberal, but not extravagant."

The judges who believe the awards are too high make the following comments:

> "Getting out of hand, it almosts shocks the conscience."
>
> "Extremely high."
>
> "Of all the cases I've tried, there has been only one time where the man didn't get more than he should have."
>
> "I don't know of any case where the landowner didn't get in excess of the fair market value."
>
> "On the interstate in one of my counties, every one was excessive."
>
> "The landowner makes a pretty good recovery in the usual case."

It is significant that none of the judges interviewed think the awards are too low.

## D. COMMENTARIES ARGUING THAT JURIES ARE CONSERVATIVE

Armstrong, Proposed Condemnation Rule, 7 F.R.D. 383 (1947):

THE Government in a civil case is a favored litigant before a jury. In the Federal Courts in Tennessee under the Conformity Act in condemnation cases there is first a hearing before a "jury of view" of five members appointed by the court and usually consisting of men conversant with real estate values. From the finding of the "jury of view," there is an appeal to the court, and a trial by regular jury. In recent years in one Tennessee district I have tried a number of these cases and informed myself of the result in many more: in each instance the jury of twelve has reached a verdict for a less amount than that awarded by the "jury of view."

Report of the (Massachusetts) Special Commission Relative to Certain Matters Pertaining to...Eminent Domain, 42 MASS.L.Q. Vol. XLII 13, 19 (1957):

...EXPERIENCE has shown that a jury trial usually does not materially increase the amount available to the property owner had he accepted a settlement. In many instances, the actual increase over the offer is so small as to make the jury cost almost unconscionable.

Ghinger, A Contemporary Appraisal of Condemnation in Maryland, 30 MD. L. REV. 301, 323 (1970):

IT was undoubtedly contemplated by the framers of article III, section 40 that the best method for protecting the property owner was to entrust the final decision as to the value of the condemned property to twelve good men and true. That this conviction is apparently still held by the courts is suggested by Master Royalties Corp. v. Mayor and City Council, in which the Court of Appeals concluded that no prejudice resulted to the property owners "by having a jury trial thrust upon them."

The realities of condemnation cases have eroded the credibility of this assumption. In these days of steadily increasing tax consciousness, the average juror, already jealously protective of his tax dollar, is either already aware or is made aware by his fellow jurors that any award which he will vote to confer upon a property owner will be paid, theoretically at least, out of that tax dollar. His awareness of this fact exists even though comment by condemnor's counsel referring to the jury's status as taxpayers is prohibited. While the jurors' tax consciousness may not affect the size of their award in any given case, it would certainly be consistent with the spirit of constitutional protection of the rights of property owners to permit the owner to elect whether to run the risk that it may. This risk is compounded by the permissiveness which the courts have shown toward those juries which substantially ignore the expert testimony in the case in favor of far less reliable evidence of value or which arrive at their verdicts through piecemeal selection of inconsistent elements of that testimony. Certainly a court trying a condemnation case without a jury would be more apt to weigh the evidence of value in a more judicious and predictable manner.

## III. COMMENTARIES ON COMMISSIONERS IN THE FEDERAL SYSTEM

### A. COMMENTARIES GENERALLY FAVORING COMMISSIONERS

Paul, Condemnation Procedure Under Rule 71A, 43 IOWA L. REV. 231, 238 (1958):

IN contrast to fixing valuations by jury the use of commissioners contemplates that the value of properties condemned shall be determined by a small group of disinterested persons specially selected by the court because of their intelligence, integrity and sound judgment: that these persons shall visit the property and examine it and, basing their judgment on their own knowledge of property values along with any testimony which they may choose to hear, they shall report to the court the amount to be awarded as fair compensation. Where there are a number of tracts to be valued which are situated adjacent to or in close proximity to each other and which are of the same general nature and present no unusual elements of value, as is frequently the case, commissioners can, in the short period of a day or two, determine and report upon the value of a score of different properties. The saving in expense and in the time of the court is evident.

Miller, Federal and State Condemnation Proceedings — Procedures and Statutory Background, 14 VAND. L. REV. 1085, 1096 (1961) (reprinted with permission of Vanderbilt Law Review, copyright owner):

The consensus of the judges who have appointed commissioners under rule 71A(h) is that (1) the commission method is more expeditious and less expensive to all parties than jury trials, and (2) that commission awards are generally consistent, thus eliminating the wide disparity often found in jury verdicts.

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McCarthy, Land Acquisition Policies and Proceedings in TVA — A Study of the Role of Land Acquisition in a Regional Agency, 10 OHIO ST. L. J. 46, 61 (1959):

UNDER the commission procedure prescribed by the TVA Act, the opportunity to gamble on the award of a jury is eliminated. Although the commission hearings frequently result in awards higher than the amount offered by TVA for the property, the awards have a degree of uniformity and it rarely happens that an award is extremely high. The uniformity in commission awards is brought about by a number of factors. The members of the commission usually have a knowledge of land values far superior to that of the ordinary juror to begin with and they soon develop a high degree of competency, both in knowledge of land values and ability to weigh the testimony of the witnesses. They hear all of the cases within a district and thus are in a position to test the value of the land in condemnation by comparing it with other lands being acquired for the same project. When hearings are scheduled in a new district, it has frequently happened that the awards in the first two or three cases are excessive, but after the commission has acquired more experience, the awards are rarely very far out of line. The realization by the landowners that there is little probability that they will obtain through litigation a substantial increase over the amount offered has contributed greatly to TVA's success in acquiring the land needed for its projects by voluntary purchases and sale.

Summary of an Interview with the Honorable Ted Dalton, Federal District Judge, Roanoke, Virginia:

JUDGE Dalton has had considerable condemnation experience. Before his appointment he was a landowner's attorney who practiced frequently before Judge Paul, who played an important role in the Supreme Court's decision to provide for commissioners in Rule 71A.

The judge appoints 3 commissioners in every case. He believes that commissioners are more expeditious and less expensive than a jury. He indicated that the attorneys exceptions to the commissioner's report had caused no serious problems; he has found that such objections can generally be handled with dispatch.

The judge said that he usually tries to include two commissioners from the county in which the land is being taken and the third from an area nearby.

Judge Dalton sees no problem with a procedure in which the judge proposes names and each of the parties makes strikes, but the practice in the U. S. District Court for the Western District of Virginia is for the judge to appoint three qualified commissioners of his own choosing. In this, Judge Dalton states that he frequently makes the tentative selections and then submits the names to counsel for both sides to obtain their comments and suggestions. No difficulty has been experienced in this method and in a period of 14 years no criticism of commissioners selected has occurred. Frequently, Judge Dalton appears before the commissioners on the date of their first meeting and gives them instructions.

## B. COMMENTARIES GENERALLY NOT FAVORING COMMISSIONERS

Nealy, Some Historical and Legal Aspects of Rule 71A in Federal Condemnation Proceedings, 23 FED. B. J. 45, 57 (1963)

(Editor's Note: Mr. Nealy has collected some criticism of federal commissioners from court opinions:)

(1) "THIS court has recently had occasion to express its general views on the propriety of using a commission to decide compensation issues in condemnation actions...it is worthwhile to again note that the experience with commissioners appears to have been less than satisfactory." (United States v. Fairfield Gardens, 21 F.R.D. 370); (2) "There is one special cause of delay in getting cases on for trial that must be singled out for particular condemnation, the all-too-prevalent habit of sending matters to a reference. There is no more effective way of putting a case to sleep for an indefinite period than to permit it to go to a reference with a busy lawyer as referee..." (La Buy v. Howes Leather Co., 352 U. S. 249 (1957); (3) And, the Appellate Court for the 3rd Circuit, in United States v. Delaware, Lackawanna & Western Railroad Company, 264 F. 2d 112 (1959), after refraining from saying that the trial court erred in ordering the case to a commission, nevertheless observed: "However, we do not lose sight of the fact that among other things a reference to a commission tends unduly to prolong the proceedings, thereby causing vexation to all concerned and additional expense..." See also United States v. Bobinski, 244 F.2d 299.

## C. A COMMENTARY ON USING COMMISSIONERS AS A JURY

Summary of an Interview with the Honorable H. Emory Widener, Jr., U. S. Court of Appeals, 4th Circuit. Formerly U. S. District Judge for the Western District of Virginia:

JUDGE Widener has had considerable experience with condemnation in Southwestern Virginia, and has strong views on the subject. As a District Judge, he was particularly dissatisfied with the practice of referring the entire condemnation case to a commission by a "general reference". Under this procedure the commission not only determines the amount of compensation, but conducts its hearing independent of the judge and makes all legal rulings which are required — particularly regarding the admissibility of evidence. It is a not unusual practice for Federal judges to make a "general reference." Judge Widener found that cases sent to commissioners under this arrangement "drag on for a very long time." The commissioners must first hold the hearing. They are then required to write a report explaining their award; this report is often months in filing. Frequently objections are filed by one or both parties, which means the judge must review a lengthy transcript, and must spend a considerable amount of time familiarizing himself with the details of the case so as to be able to make the required rulings. Furthermore, the judge is at a disadvantage since he has not personally heard the testimony; he must go on a "cold record." In sum, the Judge feels that this procedure frequently involves two hearings instead of one; and that the cases "stretch out to infinity."

Judge Widener solved this problem by referring only the question of compensation to the commissioners. (This is known as a "limited reference.") Under this arrangement, the three commissioners were brought into Judge Widener's court where a formal trial was held. The Judge presided and made all legal rulings. After a view of the premises the commission sat in the jury box, listened to the evidence and made an award (they were not required to write a report giving the reasons.) Judge Widener feels that this system worked extremely well; the award and the necessary legal rulings were made quickly and authoritatively, yet the advantages of using commissioners (knowledgeable and sophisticated men appointed to hear several parcels in one neighborhood) were retained. The United States objected to this limited reference but did not appeal.

Judge Widener, however, does not agree with the suggestion that juries are not competent to handle the ordinary condemnation case. He said that while he could see that point of view, he was "not concerned about that at all." He pointed out that juries are used in many other types of cases which are extremely complicated; he cited patent law, medical and legal malpractice, civil rights, and ejectment cases. He does not believe that juries generally take an average of the high and low testimony, but are generally more sophisticated than that. He also pointed out the commissioners sometimes come back with awards two or three times higher than the government's testimony and that jurors can also recognize ridiculously low as well as ridiculously high testimony.

Judge Widener noted that his commissioners had been appointed "more or less" with the agreement of the parties. He suggested that it might be well to explicitly provide that the judge propose several names (perhaps twenty-five) and allow the parties to agree on three from that list. If the parties were unable to agree, of course, the judge would simply have to appoint them.

## IV. COMMENTARIES ON COMMISSIONERS IN THE STATES

Note, Contemporary Studies Project: New Perspectives on Iowa Eminent Domain, 54 IOWA L. REV. 737, 814, 815 (1969):

(Editor's Note: Although the article refers to "Sheriffs jurors," the Iowa system is in fact a commissioner system.)

SECURING knowledgeable jurors is also hampered by techniques used to assemble the jury. The chief justice picks jurors from lists compiled by local clerks of court. However, the clerks are merely asked to compile a list of men who would be willing to serve on such juries. They are not asked to examine their qualifications beyond the legal requirements of residence and property ownership. Clerks will often include any person who asks to be named. Consequently, the chief justice often receives a list which was compiled without a consideration of qualifications of juror candidates. Similarly, jurors are chosen for other condemnations after only a cursory consideration of expertise. County sheriffs usually make only a brief study of whether the prospective juror might know anything about land value.

A study of sheriff's jurors reveals other interesting facts about the selection process. While the professional real estate appraisers would probably be the most qualified to serve on the sheriff's jury, only 3.4 percent of the jurors were appraisers. Furthermore, only 34.7 percent of the jurors were professional real estate agents. Most other jurors were farmers, bankers, businessmen, or retired men. Many of the occupations represented, including auto salesmen, service station operator, electrical contractor, carpenter, turkey grower, and chiropractor, seemed to have little relation to land value expertise. Thus, at the present time jurors apparently are not consistently selected from the professions which should provide the greatest expertise in land valuation.

Some sheriffs seem to be motivated by the political affiliation of prospective jurors. A few sheriffs always make sure that members of their party have a majority. Others attempt to balance the number of jurors chosen from each political party. Sheriffs who consider political affiliation are in the minority, however, most sheriffs emphasize that the political affiliation of prospective jurors is not a factor in selection. Nevertheless,

the word "political" could describe other criteria which most sheriffs do use in selecting jurors. Some of these other criteria are personal friendship with the sheriff, ability of the sheriff to control the size of the jury's award, and pressures exerted by attorneys for both parties to keep certain individuals off the jury. Thus, informal and personal considerations do influence the selection of jurors.

Many elderly jurors are chosen. A large percentage of the jurors answering questionnaires were above the age of sixty and a significant number were above age seventy. This may result from the fact that jurors appointed can decline to serve. Since retired people may have the time and willingness to serve while active businessmen do not, retired people are easier to obtain.

Note, The Growing Crisis in New York Condemnation Law: Deficiencies of the Present System and Recent Proposals for Its Modification and Reform, 21 SYRACUSE L. REV. 1193 (1970):

...LOCAL laymen are frequently appointed as commissioners. Often, without the benefit of previous experience in this area, these laymen must first attempt to educate themselves as to the commissioners' duties and the procedures which must be followed in determining their award. Commissioners, who may subpoena witnesses, view the premises and analyze appraisals, must eventually decide which rule of damages applies to their particular case. In computing the award, they must keep in mind a multitude of economic and legal factors which can alter the valuation of the condemned property. Commissioners, therefore, should have a working knowledge of all factors within the condemnation law. It would seem naive,however, to expect local laymen to educate themselves before passing judgment with respect to another individual's property. The condemnation procedure and commission system, as they presently exist, are products of an agrarian society which authorized the determination of compensation by local residents or peers of the condemnee. In light of the increasing complexity of the law in this area, this principle no longer has utility.

. . .

New York condemnation law and the commission system, as they now exist, are plagued with deficiencies. The commission is composed of laymen attempting to apply legal valuation formulae, with no evidentiary standards. They are allowed to submit reports, which contain a minimal amount of detail, for the court's confirmation. These reports are often unclear with respect to the methods and computations which were employed in arriving at the compensation award. The confirming court cannot alter or modify the award, but must resubmit it for further detail and explanation. Furthermore, the courts are reluctant to take such action. The process of appeal is extremely time consuming, expensive, and yields inconsistent results for contesting parties. The commission process is, therefore, lengthy, inefficient and extremely costly. These deficiencies would be intolerable in criminal procedure; they should not be acceptable in adjudicating individuals' property rights.

Comment, Condemnation Procedure — An Argument for Reform, 29 FORD. L. REV. 757, 763, 766 (1961) (Reprinted by permission of copyright holder from Fordham Law Review, Volume 29, pp. 757-768. Business Office: Fordham Law Review, Lincoln Center, 140 West 62nd Street, New York, N. Y. 10023. (c) 1961 by Fordham University Press):

...THE procedure relating to the appointment of commissioners is not desirable. It is specified that they be competent. "Competent" has been construed as meaning honest, unbiased and impartial. These qualifications are not sufficient. The practicability of having a jury constituted as the tribunal to determine compensation has been much criticized. Basically, the jury is without experience and therefore entirely dependent upon the conflicting views of the expert witnesses, in short, easily confused. The present system is, in effect, a jury of three. Because they are but three, will they be any less confused?

New York City dispensed with commissioners of appraisal after finding this system replete with waste, incompetence and extravagance. That the court, without jury, is any more efficient is doubtful. "Perhaps in no other field of law is the trial judge so completely helpless to learn the truth."... Because appraisal is largely a matter of opinion, it is felt that an interchange of views should be made possible. Indeed, disenchantment with the commission system seems to lie in the fact that the commissioners were unqualified. A panel of experts would not be easily misled by the insinuations of counsel and the expert witness.

Graubart, Theory Versus Practice in the Trial of Condemnation Cases, 26 PENN. B.A.Q. 36, 37 (1945):

...IN hearings before Boards of View, the Viewers listen only halfheartedly to the testimony; they pay no attention to anything except the final question addressed to the expert: "What, in your opinion, was the fair market value of the property at the time of condemnation?" At this question, each member rouses himself, grasps his pencil, and writes down the magic figure. This figure, which judges say is "fixed in the mind of the witness" is supposed to represent "general" market value.

The moment it is announced, it acquires an importance far beyond its accuracy. Efforts to attack it will prove futile because of the restrictive character of our rules of evidence.

Vallone, The Urban Renewal Condemnation System Scandal and other Related Practical Problems of Local Government, 33 ALB. L. REV. 519, 524, 526, 528 (1969):

IF one attends a commission hearing, he will soon discover that some commissioners are sitting in on their first case and often they are at a complete loss to know what the procedures are, let alone the objectives. In other words, they are "amateur" judges learning courtroom procedures and the rules of evidence at the taxpayers' expense. This is indeed no laughing matter because the commissioners are constantly faced, during the hearings, with making decisions and rulings as to points of law on which attorneys for both sides disagree. If a ruling made by these commissioners is incorrect, it can present many serious ramifications and, of course, result in many cases being appealed, thereby compounding the time and money spent to try the case.

The fee paid to commission members should be increased to $50-$100 per day so as to be more consistent with that paid to trial attorneys and expert witnesses. The commissioners who are acting as judges receive the ridiculous figure of $25 per day while the trial attorneys and expert witnesses receive up to $200 per day or more under special fee arrangements. Even the court stenographer makes $35-50 per day or more for the transcript work! If the commissioners were paid a realistic fee for their services they might be more conscientious and this could contribute to more efficient and expeditious proceedings.

...FINALLY, the judge reviews and approves the commissioners' report and final award, and once again, the local agency is shocked by the excessive award being made. Many of these awards should be appealed on excessive grounds alone; however, the judges will not even listen to such a plea by agency attorneys. Therefore, the only practical grounds for appeal are technicalities or points of law. Unless there are such grounds for an appeal, the agency and the taxpayers are stuck with another staggering award and are completely helpless to do anything about it.

It is encouraging that the evils of the commission system have been recognized by practically every newspaper across the state. Many newspapers have editorially voiced a serious concern for the scandalous awards being made and the inadequacies of the commission system.

An editorial in Syracuse[20] was prompted last July by the revelation that the cost of 456 parcels in an urban renewal area had skyrocketed from the original estimates of less than 19 million

dollars. This was evidently due to the fact that the owners of thirteen of the parcels had contested the condemnation proceeding. Two sets of commissioners were paid for a total of 874 man-days at twenty-five dollars a day. Three of the property owners had been represented by the chairman of the county legislature and the county judge was quoted as having ruled that commissioners "have wide discretion" and "are not bound by the testimony of experts." The editorial concluded:

> It is only fair for property owners to be well compensated for being uprooted by condemnation, but when such proceedings are not subject to any court review and when awards seem beyond reason, the situation approaches a public scandal which taxpayers and voters should not forget.

Last October a Binghamton editorial[21] noted that prices for over two hundred downtown properties acquired for that city's urban renewal problem had generally been 50 percent higher than the city had offered even though the city was "retaining the best appraisal advice that can be had." Attention was called to the disparity, not only between the awards and the assessed valuations, but also between the awards and the prices that the properties would bring on the open market. Noting that the commissioners, who were almost always lawyers of one political party, had been paid from $4,800 to $13,275 for their work, the paper called for the abolition of the commission system and concluded:

> While waiting for reform of the procedure as a whole it might serve the cause of fairness if the justices who appoint the commissions and who must review their awards took a little sterner look at what their agents are doing.

In March the Watertown Daily Times[22] noted its awareness of the excessive awards being made in local condemnation proceedings, the latest being two urban renewal cases where the awards were "82 and 69 percent higher than federally-fixed prices arrived at in independent appraisals." However, the paper saw a brighter side to the big awards. Noting that the awards were always much larger than the low assessed valuations of the properties, it suggested that "the courts could be credited with opening a whole new avenue for increased assessments in Watertown's commercial districts."

"The Urban Renewal Condemnation System Scandal," cont'd.

This past fall the Associated Press released a series of three articles for publication in its member newspapers throughout New York State on October 21, 22 and 23.[23] The articles outline in excellent detail the seriousness of the situation and the abuses of the urban renewal condemnation system prevalent in every New York State city undertaking an urban renewal project.

The first of the three articles dealt with the excessive awards presently being made. The Associated Press stated, "Urban renewal, government's 19-year-old grand design for transforming city slums into decent living places, has become a financial night-mare in many communities in the state." The article gave the following illustrations of exorbitant awards: in Buffalo the local agency's offer for one parcel was $57,000, the commission's award was $264,000, 363 percent over the offer in a Binghamton case the agency's offer was $115,000, the award was $225,000, 95 percent above the offer; in another Binghamton case the offer was $42,000, the award was $102,000, 140 percent more than the offer; and in Utica the offer was $35,000, the award was $95,830, 178.3 percent above the offer. Other Utica awards were found to have exceeded the agency's offer by from 5.2 percent to 143.5 percent.

The article also contained a warning that excessive awards could jeopardize the entire urban renewal program.

> [One federal official] expressed belief that the 90th Congress had slashed the Urban Renewal funding request of $1,400,000,000 virtually in half largely because of anger over the big awards made by condemnation courts.
>
> [Another official stated:]
>
> "The one thing Congress has trouble understanding is why the urban renewal agency, in many cases says it needs $2,000,000 for a given project only to get a tab for $4,000,000 after condemnation proceedings."
>
> New York State is bound to stand out in any congressional review of urban renewal funding.

"The Urban Renewal Condemnation System Scandal," cont'd.

The second article placed the blame for the excessive awards on the commission system. It stated:

> Court-appointed commissioners, lawyers, appraisers and other specialists have emerged repeatedly as the big financial gainers in the costly efforts by urban renewal agencies to acquire land under New York State's condemnation laws.
>
> The fees paid to legal, real estate and appraisal experts, as well as to commissioners and stenographers, help swell the ultimate price of property for urban renewal substantially.

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[20] Condemnation Scandal? Syracuse Post-Standard, July 18, 1968, at 6, col. 1.

[21] What Price Equity, The Binghamton Sunday Press, October 13, 1968, at 8-A, Cols. 1 & 2.

[22] Time to Call a Halt, Watertown Daily Times, March 12, 1969, at 4, Cols. 1 & 2.

[23] The quotations from this series which follow in the text are from the articles as published by the Binghamton Evening Press.

Merrill, Condemnation Procedure Alternatives for Virginia, page 11, published by the Virginia Highway and Transportation Research Council, P. O. Box 3817, University Station, Charlottesville, Virginia 22903 (1972):

The judges are split roughly in half on the question of the merits of the present system. Twenty-eight judges seem to be generally satisfied with it, while twenty-five indicate substantial unhappiness with it. This classification is somewhat arbitrary, however, since most of the judges comment extensively, pointing out both the merits and the demerits of the procedure....

(Summary of Comments Favoring Virginia's Procedure:)

The judges who are happy with the present procedure indicate that they are getting impartial and qualified commissioners in whom both sides have confidence. The judges say that the commissioners are men of "unimpeachable integrity" who listen to the evidence but then "bring their expertise to bear" in making the award. Some of the judges say they have never suspected any wrongdoing or impropriety in condemnation cases.

Another point frequently made by the judges is that whatever problems might come up are taken care of by the safeguards, that is, the strikes by the judge, the voir dire, and the peremptory strikes by the parties. As one judge puts it, it's "almost impossible to get biased or unqualified people on the commission after voir dire."

Others like the system because "it takes care of both sides of it," "both sides get a shot at it," and "you get both ideas."

Several of the judges, particularly in rural areas, indicate that they personally know most of those who sit as commissioners; "I'd know if somebody brought in a loaded list to me. I know these people."

. . .

(Summary of Comments Unfavorable to Virginia's Procedure:)

Several of the judges who oppose the system are clearly more emphatic and voluble in their denunciation than the advocates are in their support. The following descriptions are used by the judges in opposing the present system:

"Abominable."

"Horrible."

"Bad in every way."

"Anything would be an improvement."

"Deplorable."

"There have been rank abuses."

"Repugnant to our entire concept of our legal system."

"Wrong, wrong, wrong from the beginning."

"Very, very unsatisfactory."

The major thrust of the complaints is that it is impossible to have five impartial commissioners when the court must accept the suggestions of the parties. Many judges indicate that the Highway Department brings in very conservative men (presumably because the state doesn't have "friends," at least in the way a landowner has personal friends), while the landowner brings in liberals and persons he knows are favorable to him. As one judge expresses it, "It's like trying a man for murder and letting him select half of the jury. It's no different."

Other judges make the same point in another way. One says, "The case is won or lost at the selection of the commissioners, at no other place. It's who that man knows on the commission that counts." Other judges indicate that selecting the commissioners is a critical aspect of the case. The comment is also made that it is simply wrong to have a situation where there are "our" commissioners and "your" commissioners, and this amounts to just "choosing up sides."

Report of the New Jersey Eminent Domain Commission 20 (1965):

FREQUENTLY, the hearings before the Commissioners have taken the form of a "dress rehearsal" or a "trial-run" of the case to be tried on appeal. This result may have been reached because the counsel were dissatisfied with the personnel of the Commission, or its lack of adequate authority or experience to pass upon involved questions of law and fact. Furthermore, counsel feel that they should not disclose the merits of their case before the Commissioners when an appeal is in the offing. This practice should be eliminated. ...The Committee on Eminent Domain of the New Jersey State Bar Association has also strongly recommended the abolition of hearings before Commissioners...

Dowd, Condemnation Proceedings, 70 ALB. L. J. 291 (1909):

NOW the need of such a change in the laws on this subject is emphasized by the great expense and waste which attach to the existing laws in their enforcement. It is well known that the ultimate cost of land to the City of New York in condemnation proceedings is from twenty to one hundred percent above the value of the property taken. The present Comptroller of this City prepared a convincing statement of figures showing this fact.

## V. A COMMENTARY ON ARBITRATION

Latin, The Arbitration of Eminent Domain Cases, 14 RIGHT OF WAY No. 5, p. 57 (1967) (citations omitted):

I PROPOSE in these few paragraphs to sketch in broadest outline the possible applicability of arbitrating Eminent Domain Cases.

It seems that right of way is polarized; that we work at either one of two ends of a spectrum. Either we negotiate and agree with property owners (and this is the vast majority of cases); or, we enter the legal arena, subject to all its hazards for both parties, and do "battle" over the amount of money to be paid for the right of way document and the rights conveyed therein.

How often have we experienced a sense of frustration over inability to agree and said to ourselves, "Isn't there an alternative to the courtroom?"

It is my thesis that an alternative to the courtroom does exist. This alternative is the arbitration process.

The arbitration process is not something new or mysterious. Its origins are probably lost in the mists of antiquity; possibly when two opponents decided that mutually submitting their dispute to a decision of an impartial 3rd party was preferable to continued bloody battle. In our days arbitration — the voluntary submission of a dispute to an impartial and knowledgeable 3rd party for binding decision — finds many applications. It is suggested that another application may be in Eminent Domain as an added alternative in judicial process. Presently in some right of way documents, post-construction crop damages could be arbitrated. However, I believe that arbitration deserves a role in the acquisition phase.

That arbitration has certain inherent advantages as compared to the judicial process, is readily apparent. These will be briefly noted;

(A) TIME: This is probably the greatest advantage. The time factor, especially for those agencies who do not have the right of immediate entry, is crucial, as the astute attorney tactically maneuvers to delay the trial of this type of lawsuit, and the construction crews, originally off in the horizon, are now crowding the right of way acquisition. The correlation

between time and money becomes evident — less time more money; or put another way, "Lead time keeps costs in line." I estimate that with arbitrations, the matter should be finished and construction crews allowed entry, within 30 days.

(B) COSTS: It seems to me that arbitration should be less costly than the judicial process — but not by much. Certainly legal counsel will have to prepare his case as thoroughly as if he were entering a courtroom. Perhaps even more so; because instead of trying to educate 12 jurors, counsel has 3 highly knowledgeable arbitrators whose inquiry can be corrosive on a poorly prepared case. Counsel for both sides have a vital place in arbitration, and they must be paid.

Also, arbitration demands, just as in a courtroom expert witnesses on the issues of engineering and valuation. The appraisal and engineering evidence will have to be as thorough as if in a courtroom. This means we should be prepared to present, and pay for, the various expert witnesses.

Well, what lesser costs are there? Other than avoidance of local counsel probably none. In place of court costs, there are administrative expenses of arbitration which I estimate to be in the $600 per case average; theoretically to be split between the artitrating parties. The merit of arbitration, to my mind, rests not upon illusory savings of costs, but upon speedy and fair resolution of conflict.

(C) LIMITATION OF RIGHTS: In most states resort to the judicial process limits the condemning agency to those rights necessary to accomplish the present purposes. It does not provide for the future enlargement of rights (additional tower lines, pipelines, tracks, conduits of various kinds). However, I see nothing to prevent the parties agreeing to arbitrate the rights contained in whatever document they agree on — even those containing future or expandable rights.

(D) AVOIDANCE OF LOCAL PREJUDICE: It is almost axiomatic in right of way that there is an inherent bias in favor of the local property owner. This is nothing to be shocked about. To a lot of people, in spite of our strenuous efforts to allay the image, big utilities are seen as money — bloated avaricious "faceless" corporations. Besides, today's juror may be tomorrow's defendant — I'll "take care" of my neighbor today and tomorrow he may "take care" of me.

I expect the arbitration process would eliminate, or certainly reduce, this effect. The prime requisites of arbitration — knowledgeability and impartiality — are provided for in the mechanics of arbitration.

"The Arbitration of Eminent Domain Cases," cont'd.

(E) PRIVACY OF ARBITRATION: The public, by law, must be admitted to the courtroom. This is not so in arbitration. In fact, the public is usually excluded. Many of us often wish to minimize the effect of publicity. In fact, we often are at pains to avoid a reputation for suing. The stigmata of often being in court is not to be envied. The privacy of arbitration may be effective in this concern. Certainly the parties are in a position to control the information on the vital question of "How much was paid for what rights taken?"

It is essential that the arbitrators be knowledgeable and impartial. As to knowledgeability, I believe that on any arbitration panel (usually 3) at least one should be an appraiser (for his knowledge of economic value — the ultimate question); and one should be an attorney (for his ability to sift the facts and limit clearly what rights are taken and what is reserved to the property owner); and the third arbitrator depending on the issue to be arbitrated, may often be an engineer if the issue calls for his particular expertise. Care in selection of arbitrators is material. They should not be conciliators or "split the difference persons," but rather they are "quasi-judges," to hear the evidence and render decision. As in the courtroom there should be no disclosure of "last offer." Although rules of evidence are relaxed, they are not abandoned. Good arbitrators help keep the case in line.

Impartiality cannot be over emphasized. The mechanics of the arbitration process have "built in" a tendency to fairness — by the successive striking from a submitted list of arbitrators. Perhaps, if the arbitrators are from outside the local area or the service area, it may go part way to assuring essential fairness.

What shall be arbitrated — the issues — could be a perplexing problem. I believe arbitration should be limited to one question — the economic issue. More crassly put, "How much is to be paid?" Due to the finality of decision, (except for fraud or gross error), and the possibility of adverse decision on engineering issues (Why this route? Why my property?) these issues should not be subject to arbitration. The utility company should take the protection of the weight of judicial opinion that the engineering issues (route selection, "specs" of construction) are a matter for itself to determine. The only issue of arbitration is "How much" not "If."

(F) PUBLIC RELATIONS: Implicit in the preceding paragraph was a statement essential to all in right of way — our public relations in the area we are operating in. Big utilities and big government don't like, and often try to minimize, the fact that they are forced to condemn property owners who may be both rate-payers and taxpayers. Implicit in arbitration is the "voluntary principle" — i.e. — two parties agreeing to submit a dispute for resolution by a 3rd party, as compared to the "bludgeon" principle implicit in the judicial process.

Suffice the above as a short summary of the probable advantages of arbitration over the judicial process. However, it all depends on a key act — a voluntary agreement to submit to arbitration. Is there any reasonable probability that the property owner will agree to arbitrate? I think "YES."

I assume (and experience supports this assumption) that most property owners desire amicable resolution of conflict. In this the right of way agent's role is vital. He must "sell" the property owner on the feasibility of arbitration. He must communicate to the property owner that reasonable men can honestly differ (unreasonable men will certainly differ); and arbitration may be a quick, perhaps less expensive, and quiet way to resolve conflict. Speed of award and certainty of conflict resolution are preferable to expensive long drawn out courtroom battles. On this one point — obtaining the property owner's agreement to arbitrate — hinges the whole process. It seems formidable, but I surmise that in practice it may not be too difficult, given the ability of the right of way agent to "sell" this means of conflict resolution over courtroom battle.

Suppose the property owner does agree to arbitrate, then two questions are relevant: (1) Who shall the arbitrators be? and, (2) What shall be arbitrated?

Another question is, "Granted the applicability of arbitration by public utilities, what about government agencies whose methods and expenditures of funds are much more circumscribed by law? Is arbitration a practical proposition for them?" Frankly, I don't know, and hesitate to prognosticate. Often a state constitution or statute says a "...a jury shall decide..." It may take legislation or judicial opinion, or perhaps an Attorney General's opinion to clarify the issue by vesting authority in a State Agency to arbitrate if it so desires.

"The Arbitration of Eminent Domain Cases," cont'd.

In conclusion — What can we hope to gain by arbitration? The answer lies in asking what are the goals of right of way? We can all agree that fast, fair acquisition of right of way, consistent with good public relations, are legitimate goals.

Any process that works towards these goals by resolving conflict must redound to the overall benefit of a utility company or government agency. I suggest that arbitration properly executed with the help of the American Arbitration Association could aid in achieving our goals.

This idea — The Arbitration Process — certainly deserves greater consideration and a greater role in right of way acquisition than it has heretofore enjoyed.

## VI. A COMMENTARY ON AN UNUSUAL CONDEMNATION SITUATION

Summary of an Interview with the Honorable Roszel C. Thomsen, Federal District Judge, Baltimore, Maryland:

JUDGE Thomsen has heard condemnation cases over a period of twenty years. During the years 1968-1973 he handled the Assateague Island National Seashore takings. These cases involved over 2,500 tracts, owned by over 1,000 persons. After deciding many preliminary questions, following several hearings and two elaborate opinions, the parties agreed to submit the valuation of about 100 tracts to the judge without a jury. Those tracts included almost every type of tract involved in the case. Judge Thomsen set values for the various categories. See Assateague Island Condemnation Cases, Opinion #3, 324 F. Supp. 1170 (D. Md. 1971). No appeal was taken, and thereafter most of the other tracts were settled.

In the spring of 1972, Judge Thomsen stated that the valuation of the remaining tracts would be made in two trials — the first dealing with all remaining tracts as to which a jury trial had been waived and the second dealing with all the tracts as to which a jury trial had been requested. Various dates of taking were involved.

After Judge Thomsen filed his opinion in the non-jury trial, 354 F. Supp. 1233 (1971), from which no appeal was taken, all tracts in which the owners were represented by counsel were settled. The jury trial started with some 16 owners. A few settled during the trial. The jury valued the poorer lots at about the same figure the Judge had valued similar lots, but valued the better lots at a lower figure. Four owners appealed, but the judgment was affirmed in a short per curiam opinion. In addition to the two opinions cited above, see 356 F. Supp. 357 (1973); 311 F. Supp. 1039 (1970); 306 F. Supp. 138 (1969).

While recognizing that both the owner and the taker have a right to a jury trial, Judge Thomsen believes that many condemnation cases should be tried before a judge without a jury. Much time can be saved, and he stated that he has found that the verdicts brought in by juries before him usually do not vary greatly from his valuation. In jury trials he gives a fairly elaborate charge, trying to be sure that the jury understands the issues and the evidence, particularly the assumptions articulated or unarticulated, upon which the several witnesses have based their valuations.

# VII. JURY TRIAL UNDER THE UNIFORM EMINENT DOMAIN CODE

Uniform Eminent Domain Code, National Conference of Commissioners on Uniform State Laws (1974) (reprinted by permission of the National Conference on Uniform State Laws):

Section 902. [Trial by Jury; Waiver.]

[Alternative A]

[(a) The amount of compensation [and any additional issue for which the right to trial by jury is secured by the Constitution] shall be determined by a jury only if a party entitled to participate in the trial of the issue (expressly) demands trial by jury. The court shall determine all other issues without a jury.]

[Alternative B]

[(a) The amount of compensation [and any additional issue for which the right to trial by jury is secured by the Constitution] shall be determined by a jury unless, and to the extent that, the parties entitled to participate in the trial of the issue (expressly) waive the right to trial by jury. The court shall determine all other issues without a jury.]

[(b) The number of jurors, method used for impanelling and selecting jurors, number and method for exercising challenges, form of oath to be administered, number of jurors required to return a verdict, and all other procedures relating to trial by jury, to the extent practicable, shall conform to the requirements applicable in civil actions under the [Code] [Rules] of Civil Procedure.]

Comment

Alternative A of Section 902(a) requires the court without a jury to determine the amount of compensation, unless a jury trial is properly demanded. Alternative B is an alternative version of this section, designed for use in those states in which a jury is routinely convened unless waived.

Upon enactment, the wording of this section should be adapted both to local practice and state constitutional requirements. While it is clear that there is no federal constitutional requirement for a jury trial in eminent domain actions, some extend a right to a jury trial on issues other than the amount of compensation. See "Eminent Domain," 27 Am. Jur. 2d § 407 (1966). The bracketed phrase in lines 2-3 of Subsection (a) suggests a means for conforming to such constitutional guarantees. The bracketed term "expressly" is also suggested for optional use where, under existing state practice, it would be appropriate.

The term "compensation," as used in Subsection (a), is defined by Section 103(7) to include only the amount of just compensation required to be paid for condemned property. Disputed questions on other matters, such as the scope of compensable elements, additional financial increments (e.g., costs) that may be included in the award, or the allocation of the award as between conflicting claimants, are deemed to be "additional issues" within the meaning of Subsection (a).

## VIII. COMMENTARIES REFLECTING ON COURT AND COMMISSIONER REACTION TO THE CONDEMNATION PROBLEM

Orgel on Valuation under Eminent Domain 261-265 (2d ed., 1953):

EXPERIENCE in the trial and conduct of condemnation proceedings, as well as familiarity with awards for property taken, casts doubt on the assumption, suggested by a reading of the cases, that the award in any particular case represents the price at which the property could have been sold at the time of the taking. There are a number of reasons for this doubt. In the first place, the fact that owners are usually not only willing but anxious to have their property condemned testifies to the widespread belief that awards in condemnation proceedings are liberal, and this in turn suggests that they are often not merely in excess of the price at which the property might have been sold, but even in excess of the value to the owner.

In the second place, as we have already noted, the vagueness of the market value standard gives the condemnation tribunal a broad field within which it may make its decision. This vagueness is desirable in hard cases, for it gives a certain amount of play to the legal rules, but often it has caused many tribunals to lean too heavily on expert testimony. This testimony has some serious shortcomings which the courts have recognized from time to time and which they have sometimes condemned in harsh terms but which, one suspects, they have insufficiently discounted. The partisan character of expert or opinion testimony is, of course, obvious and this is emphasized by the fact that an expert witness may usually escape the consequences of an excessive zeal for the interests of his employer by pointing out that he is testifying to his "opinion," and not to "facts." Nevertheless, it is not too much to say that expert testimony counts for more in the final result than almost any other type of evidence.

The mere fact that the courts rely so completely on expert testimony need not be in itself a ground for criticism, but what makes it deplorable is that the courts often accept these estimates blindly because of their own inexperience with real estate valuations. And for the very reason that they are unfamiliar with appraisal technique, courts and juries are likely to find a study of the detailed data irksome and to snatch at the figures presented by the witnesses without searching out the grounds for these opinions and without testing the validity of the reasons on which they are based. The tribunal's task is not made easier by the fact that perhaps the most important qualification of an expert witness from the point of view of the party employing him is his ability to evade questions and to conceal or gloss over facts that are disadvantageous to his employer's side of the case.

A tribunal may, of course, conclude that the entire truth lies with one party and may accordingly accept the figures presented by that party. But, being bewildered by the conflicting estimates and the plausible reasons advanced by both sides, a jury or court is more likely to make some arbitrary compromise, usually by splitting the difference between the respective estimates. This practice encourages fantastic claims by property owners' witnesses, and estimates, deliberately undercut, by condemners' appraisers. It puts a premium on perjury. It is unfair to conservative appraisers who have a strong sense of their professional standing, and it places at a disadvantage those owners who set their claims at what they consider the actual market value, rather than at a figure that takes into account the possibility that the tribunal will split the difference between the respective estimates. Often it leads to inconsistent awards, which make unwarranted discriminations between similar properties.

Nor is the situation entirely remedied on appeal. Condemnation records are tedious and appellate courts are apt to let condemnation decisions stand if only the awards fall somewhere between the respective estimates of the real estate witnesses. This attitude has led to the prevalent impression that the appellate courts will not reverse on questions of quantum. The latter impression is correct insofar as it implies that, within wide limits, the appellate courts will permit the findings of the trial courts or commissioners to stand.

Another factor that tends in the same general direction of an excess of award over probable sale price is the assumption that the condemnor is not only a willing but a generous, purchaser. At the root of this assumed munificence is the condemnor's supposed ability to pay. The taker's resources are usually far in excess of the condemnee's, and while the courts refuse to accept the value to the taker as a measure of compensation they apparently feel that it will usually occasion less hardship if they err on the side of over-indemnity rather than on the side of under-indemnity.

Still another reason for the apparent excess of condemnation awards over the strict market value is that the sympathy of the court is likely to be on the side of the dispossessed property owner. And this sympathy is usually warranted and justified by the facts. Not only is the owner deprived of his property by compulsory process, but defects in condemnation procedure often impose very severe hardships upon him. Under the system of

condemnation by administrative order, title to the condemned property vests in the condemnor at the very outset of the proceeding. Here the principal hardship is the delay in the determination of compensation and in the postponement of payment. Although the owner is entitled to interest for the delay, this is often insufficient to repay him for his loss, for the uncertainty of the date of payment and of the amount of compensation makes it difficult, and in some cases, impossible for him to secure the financing necessary to reinstate him in his business or in a new home. Under the system of condemnation by judicial order, title to the property sought to be acquired does not vest in the condemnor until the payment of compensation. Although here the owner remains technically in control of his property, the effects of the expropriation are often more severe under this method than under the alternative procedure. For it usually happens that the very institution of the condemnation proceeding puts the property under a blight. If the land is vacant, the owner if foreclosed from erecting structures on it or otherwise improving it. On the other hand, if the property is improved, it would be foolhardy for the owner to make alterations or additional improvements, and even substantial expenditures for maintenance are unwarranted in view of the impending condemnation. Yet, if the owner allows the property to run down, its condition at the time of trial may greatly reduce the award that he might otherwise have received. Moreover, the income that the owner derives from the property may be materially reduced by the imminence of the condemnation. For, the uncertainty of their tenure often causes tenants to move from buildings marked for expropriation. The resulting reduction in revenue may seriously embarrass the owner in keeping up his carrying charges. Indeed, his interest in the property may be foreclosed and the property sold before his right to receive compensation from the condemnor ultimately accrues.

These hardships imposed on owners by condemnation proceedings are recognized not merely expressly in statutory enactments that provide for allowances to the owner in addition to the market value of the property taken but often tacitly in the awards. Without abandoning the accepted verbal doctrines, the courts can give effect to the principle of indemnity by liberally interpreting the meaning of market value. They can do so, too, by inflating awards for consequential damages in partial-taking cases so as to cover incidental losses not otherwise compensable. And in the case of a tenant who sustains losses of a serious

nature that could not be recovered under the formal doctrines, they may allow more than the strict market value of the tenant's interest by a generous allowance for fixtures or by giving the tenant the benefit of the doubt when it is uncertain whether articles claimed to be fixtures are so annexed as to be considered part of the realty.

Ane yet the situation is not sound in which the courts do by indirection what they refuse to do directly. In England and Scotland, it was for many years the practice of the courts in the absence of statute expressly to allow an additional percentage of the award as "smart money." In other countries, and in some of the British colonies, such an allowance is provided for by law. In this country, the same result is reached by many statutes which direct that the owner shall receive an allowance for counsel fees and expenses of the trial.

In these various ways, the courts tend to bridge the gap between a hard-boiled concept of market value in the sense of the probable sale price and the indemnity that is measured by the value to the owner. We cannot quarrel with these devices but we must deplore the tendency of the courts to keep them covert and veiled; and there is ground for criticism, too, in the failure of the courts frankly to recognize that their verbal formulations are often at variance with their practices. Although this discrepancy between judicial utterance and judicial action enables the courts to come close to awarding an amount sufficient for indemnity, the likelihood is great that it may sometimes lead to allowances not merely more than the market value, but even much more than is required for indemnity. For the vagueness of the judicial standards removes the only check on the unwarranted generosity of the award-fixing tribunals. This vagueness of the legal standard combined with other weaknesses of condemnation procedure has given rise to certain abuses to which we must now turn our attention.

Note, Contemporary Studies Project: New Perspectives on Iowa Eminent Domain, 54 IOWA L. REV. 737, 829, 831, 832, 833, 866 (1969):

THE reason most frequently given for giving an award larger than the offer is the belief that an offer does not include compensation for many items of damage which the property owner actually does suffer. Most important on this list of unconsidered items are the intangible elements of damage, such as inconvenience, forced sale of land and loss of complete control of land. The jury is very sympathetic with the landowner's forced loss of an ownership interest in his property. They are also concerned with extra burdens such as inconvenience or unsightliness which the taking may place on the property owner.

Jurors employ this concern for fairness when they determine their award. The award is divided by the jurors into two distinct portions. One portion of the award represents the value of the property interest taken. The second portion of the award represents the value of damages which are inflicted upon the remaining property or the property owner by the condemnation. If the condemnation is for a fee simple, the value of the fee plus resulting damages compose the award. If a condemnation is for an easement, the award is composed of the value of the easement and the value of resulting damages. This approach of the sheriff's jurors is inconsistent with the legally required before and after market value test of evaluating damages.

...In assessing irreplaceable damages the jurors rely heavily on their past experience with similar problems and upon the parties' valuations, although they recognize that these valuations might be biased. Thus, even though jurors attempt to arrive at an accurate damage figure, the award is often based on a guess. As a result, jurors usually vary greatly in their individual valuations of any particular damage item.

Jurors have greater disagreements concerning the elements of damage to be included in the award. For example, each juror in an electric transmission line easement condemnation has his own opinion on including compensation for the inconvenience caused by electric poles or towers, their unsightly appearance, the difficulty of selling the altered property, the restrictions on the placement of buildings, the utilities' right to enter on the property at any time, the fear of damage or harm, the greater cost of spraying around power lines, and the loss of television reception. Juror disagreement is heightened by a lack of control of what can be presented to the jury. The parties can and do

present evidence of any element of damage they wish even though it has been ruled non-compensable in court condemnation proceedings, and the jurors rely on the information received. For example, the court has ruled that business profits lost because of the condemnation cannot be compensated. Yet a large percentage of jurors indicate that they will award business profits which a firm will lose while closed for moving, and a smaller number of jurors indicate they will award a business the profits it loses as a result of having to relocate.

Thus, juror disagreement on which elements of damage to include, heightened by a lack of control of what arguments the parties may present, gives the jury the freedom to base their awards on considerations unrelated to losses from the taking.

One of these considerations is sympathy for the landowner. Although many jurors insist that arguments of personal hardship do not influence the size of an award, jurors who have heard such a plea may be more willing to compromise for a higher award. Individual idiosyncrasies also bear on the decisions of some jurors. A small number of jurors fear the possibility of a successful appeal to the district court. Thinking the court will increase the award by a predictable percentage they give a smaller condemnation award to keep the final award low. A larger number will increase the sheriff's jury award in order to discourage the landowner from appealing to the court. Some jurors automatically set an award approximately half way between the proposals of each side in order to keep both condemnor and condemnee happy. Many jurors endeavor to keep their awards consistent with a standard set by similar condemnations. A few jurors even support a higher award if other property of the condemnee has been condemned in the past. Thus, the juries in the present condemnation system stretch the valuation of damages to the point of arbitrary generosity. Too often the damages award has little recognizable relationship to the actual harm suffered.

The foregoing sections suggest that the present sheriff's jury system, although basically sound in theory, needs to be improved. Too often juror concern for the welfare of the property owner results in an award based on nothing more than individuals ideas of equity. However, juror rejection of present compensation laws may result more from the unworkability of those laws than from inadequate functioning of sheriff's jurors. These laws are established in post-sheriff's juror proceedings. Thus, before any meaningful changes can be suggested for the sheriff's jury system, post-condemnation procedures must be reviewed.

"New Perspectives on Iowa Eminent Domain," cont'd.

Results obtained by this study clearly indicate that condemnation juries in Iowa disregard the restrictive market value standard in determining just compensation in favor of more equitable principles which fully compensate the condemnee for his loss.

Merrill, Condemnation Procedure Alternatives for Virginia, 9,10, published by the Virginia Highway Research Council, P. O. Box 3817, University Station, Charlottesville, Virginia 22903 (1972):

THE judges were asked if they think the commissioners adhere to the law and consider only the fair market value as of the date of the take, or consider, in addition, the expense and inconvenience to the landowner such as legal fees, expert witness fees, sentimental value in the property, etc. The clear majority of the judges, thirty-one out of forty-two, state that the commissioners do take into account the extra factors. Eleven indicate that they think the commissioners stay very close to the fair market value.

Many of the judges who say their commissioners consider the extras do not think this is improper. As one judge expresses it, "it's part of the humanity of the system". Another says he thinks it is good because "there are so many variations (in situations) to allow for." Another believes that "it wouldn't be realistic if the commissioners didn't consider those things". One judge remarks that it is his experience that commissioners are more liberal in setting a value on residences than on commercial property, which leads him to believe the commissioners are allowing for the intangible factors. Another reason given for high awards is that the commissioners take into account the fact that the landowner is forced to the needless expense of litigation because the Highway Department's offer is so low.

The eleven judges on the minority side of this issue generally state that their commissioners are "not swayed by sympathy or bias" and that they try to be fair. Some of these judges, however, state that the commissioners might take the extras into account to some degree, at least in extreme circumstances where, for example, the landowner is a "widow with ten children and no place to go."

In summary, it is clear that despite the law and clear instructions given them to the contrary, the commissioners exercise considerable discretion in making the award to the landowner. As one judge puts it, most of the commissioners "know how the system operates." This would seem to be especially true of commissioners who serve on condemnation cases repeatedly. One implication of this situation is that there may be lower awards in those cases where the commissioners strictly adhere to the law and the instructions, and where the commissioners don't "know how the system operates."

FOOTNOTES

1. Dolan, New Federal Procedure in Condemnation Actions, 39 VA. L. REV. 1071, 1081 (1953).

2. See the REPORT ON THE PROPOSED RULE TO GOVERN CONDEMNATION CASES IN DISTRICT COURTS OF THE UNITED STATES (May, 1948), 11 F.R.D. 213, 237, citing the First Report of the Michigan Judicial Council 56-57 (1931).

3. See GUY, STATE HIGHWAY CONDEMNATION PROCEDURES, Institute for Continuing Legal Education, 1971.

4. See Terrell, Eminent Domain Procedure in Texas, 42 TEX. L. REV. 522, 529 (1964); Note, Contemporary Studies Project; New Perspectives on Iowa Eminent Domain, 54 IOWA L. REV. 737 (1969); Phay, The Eminent Domain Procedure of North Carolina: The Need for Legislative Action, 45 N.C.L. REV. 587, 606; Dolan, supra note 1 at 1081 (1953).

5. Graubart, Theory Versus Practice in the Trial of Condemnation Cases, 26 PENN. B.A.Q. 36 (1954).

6. McLeod, An Attorney General Looks at Highway Condemnation Law, a presentation to a Highway Research Board workshop, July 1970.

7. Dolan, supra note 1 at 1081.

8. SELECT SUBCOMM. REPORT, n. 754, cited in Contemporary Studies Project..., supra note 4 at 856.

9. Spies and McCoid, Recovery of Consequential Damages in Eminent Domain, 48 VA. L. REV. 437 (1962); Merrill, Compensation for Noise Damaged Property, Virginia Highway Research Council, 1974.

10. Contemporary Studies Project..., supra note 4 at 863.

11. Jacksonville Expressway Authority v. Henry G. DuPree Company, 108 So. 2d 289 (Fla. 1958), cited in Contemporary Studies Project..., supra note 4 at 861.

12. See Merrill, Compensation for Noise Damaged Property, supra note 9, and City of Yakima v. Dahlin, 5 Wn. App. 129, 485 P. 2d 628 (1971).

13. See Chapter Five of the 1968 Federal-Aid Highway Act.

14. The Uniform Relocation Assistance and Land Acquisition Policies Act of 1970, Public Law 91-646, 84 STAT. 1894, 1971.

15. Contemporary Studies Project...,supra note 4 at 859.

16. Id. at 860.

17. POPULAR SCIENCE 173:79, July 1958.

18. GOOD HOUSEKEEPING 146:116, January 1968.

19. SATURDAY EVENING POST 224:44, May 1952

20. READER'S DIGEST 83:83, September 1963.

21. VITAL SPEECHES 26:41, November 1963.

22. FORUM 991:333, June 1938.

23. SATURDAY EVENING POST 241:64, December 1968

24. NATION'S BUSINESS 45:62, August 1967.

25. CHANGING TIMES 11:43, October 1957.

26. FORTUNE 54:77, September 1956.

27. SATURDAY EVENING POST 239:68, August 1966.

28. READER'S DIGEST 93:100, December 1968.

29. Id.

30. Merrill and Walton, INTERSTATE CONDEMNATION: A STUDY OF COMMISSION AWARD PATTERNS AND ULTIMATE REMAINDER VALUE TO OWNERS (1971) (unpublished report of the Virginia Highway Research Council).

31. The author is heavily indebted to Paxton Blair's excellent article for this early history. See Blair, Federal Condemnation Proceedings and the Seventh Amendment, 41 HARV. L. REV. 29 (1927), hereinafter referred to as Blair.

32. 33 Hen. VIII, c. 35.

33. 3 Jac. I, c. 18.

34. 8 & 9 Wm. III, c. 16.

35. "AN ACT for repairing the Highways from Old Stratford in the County of Northampton to Dunchurch in the County of Warwick," 6 Anne c. 77.

36. 7 Geo. III, c. 42, §12.

37. 13 Geo. III, c. 78 (1773); 3 Geo. IV, c. 126 (1822); 1 & 2 Wm. IV, c. 50 (1831).

38. 8 Vict., c. 18.

39. 78 Hansard 889, 1115 (1845); 79 ibid. 1105; 80 ibid. 279.

40. See Wasserman, Procedure in Eminent Domain, 11 MERCER L. REV. 245, 247, citing 1 McQUILLAN, MUNICIPAL CORPORATIONS §1.83 (3rd ed. 1949); C.J.S. Municipal Corporations §14 (1949); BALLANTINE, CORPORATIONS §8a (1946); STEVENS, CORPORATIONS §20 (1949).

41. See REPORT ON THE PROPOSED RULE TO GOVERN CONDEMNATION..., supra note 2 at 237, citing the First Report of the Michigan Judicial Council 56-57 (1931).

42. OHIO LEGISLATIVE SERVICE COMMISSION, EMINENT DOMAIN IN OHIO, November 1956.

43. Id. at 4.

44. Id. at 4.

45. Id. at 3.

46. Id. at 3.

47. This phrase is borrowed from Note, The Growing Crisis in New York Condemnation Law: Deficiencies of the Present System and Recent Proposals for its Modification and Reform, 21 SYRACUSE L. REV. 1193 (1970).

48. Dowd, Condemnation Proceedings, 70 ALB. L.J. 291 (1909).

49. Id. at 292.

50. The following references are concerned primarily with "streamlining" individual state condemnation procedures: KENTUCKY LEGISLATIVE RESEARCH COMMISSION (SCHWAB), EMINENT DOMAIN PROCEDURE (1965); OHIO LEGISLATIVE RESEARCH COMMISSION, EMINENT DOMAIN IN OHIO (Research Report No. 14, Nov. 1956); PENNSYLVANIA JOINT STATE GOVERNMENT COMMISSION, 1964 REPORT — EMINENT DOMAIN CODE; TENNESSEE LEGISLATIVE COUNCIL COMMITTEE, STUDY ON EMINENT DOMAIN LAWS (1966); Stevens, Eminent Domain: The Administrative and Judicial Methods of Procedure, 6 KAN. JUD. COUNCIL BULL. 152 (1932); Beatty, The Eminent Domain Procedure Act, 32 J.B.A. KANSAS 125 (1964); Note, The Virginia General

Condemnation Act, 49 VA. L. REV. 1235 (1963); Baker and Altfeld, Maryland's New Condemnation Code, 23 MD. L. REV. 309 (1963); Comment, Modernizing Illinois Eminent Domain Procedures, 48 Nw. U. L. REV. 484 (1953); Comment, Modernizing Illinois Eminent Domain Procedure, 41 ILL. L. REV. 52 (1946); Note, Montana's Condemnation Procedure — The Inadequacy of the "Commission System" of Determining Compensation, 25 MONT. L. REV. 105 (1963): and Title Procedure Under the New Eminent Domain Act of 1951, 35 NEB. L. REV. 259 (1955).

The following articles, while not concerned primarily with the "streamlining" aspect of condemnation law, contain some discussion of it; Note, The Growing Crisis..., supra note 48; Comment, Condemnation Procedure — An Argument for Reform, 29 FORD. L. REV. 757 (1961); REPORT OF THE NEW JERSEY EMINENT DOMAIN COMMISSION (1965); Phay, supra note 4; Wasserman, supra note 40; Heaney, The Eminent Domain Law and the Wisconsin Practitioner, 1960 WIS. L. REV. 430 (1960); WIS. L. REV. 430 (1960); Note, Contemporary Studies Project..., supra note 4.

51. Phay, supra note 4 at 590.

52. According to one count in 1971, thirteen states had such provisions. GUY, STATE HIGHWAY CONDEMNATION PROCEDURES (published by the Institute for Continuing Legal Education, 1971). See his appendix, which contains a collection of relevant statutes and constitutional provisions beginning on p. 175.

53. Wasserman, supra note 40, citing RAY, CONDEMNATION PROCEDURE 78 (1931).

54. The author is indebted to Blair, supra note 31 at 38, for much of this discussion of early state constructions of the guarantee of jury trial.

55. Ligat v. Commonwealth, 19 Pa. 456, 460 (1852); Penna. R. R. v. First German Lutheran Congregation, 53 Pa. 445, 449 (1866); Rich v. City of Chicago, 59 Ill., 286, 291 (1871); McElrath v. United States, 102 U. S. 426, 440 (1880).

56. Koppikus v. State Capitol Commissioners, 16 Cal. 248, 254 (1860).

57. Lake Erie, Wabash, etc., Co. v. Heath, 9 Ind. 558, 559 (1857).

58. Allen v. Anderson: 57 Ind. 388, 389 (1877).

59. Backus v. Lebanon, 11 N.H. 19, 26 (1840).

60. Dalton v. North Hampton, 19 N.H. 362, 364 (1849).

61. People v. Smith, 21 N.Y. 595, 598-99 (1860).

62. Blair, supra note 31 at 42.

63. W. VA. CONST. art. III, §9.

64. POUND, JUSTICE ACCORDING TO LAW, 29, 30.

65. Wasserman, supra note 40 at 261.

66. Wasserman, supra note 40 at 261, citing NICHOLS §24.113(2).

67. The author is indebted to Blair, supra note 31 for this early history of federal condemnation.

68. NICHOLS, EMINENT DOMAIN §34 (2d ed. 1917).

69. Blair, supra note 31 at 36.

70. Id. at 37.

71. The General Conformity Act was later reenacted, 25 STAT. 375 (1888), as amended, 36 STAT. 1167 (1911), 40 U.S.C. §258 (1946).

72. See ADVISORY COMMITTEE REPORT, supra note 2 at 225, quoting from the "Manual of Eminent Domain."

73. ADVISORY COMMITTEE REPORT, supra note 2 at 226.

74. See section II b 3 above.

75. This account relies heavily on Blair, supra note 31 at 43 forward.

76. 91 U.S. 367 (1875).

77. 98 U.S. 403 (1878).

78. 109 U.S. 513 (1833).

79. See Shoemaker v. United States, 147 U.S. 282 (1893), and Chappell v. United States, 160 U. S. 499 (1896).

80. 167 U.S. 548 (1897).

81. See ADVISORY COMMITTEE REPORT, supra note 2 at 235. This history of Federal Rule 71A(h) relies heavily on the Report.

82. Id. at 236.

83. See Clark, The Proposed Condemnation Rule, 10 OHIO ST. L.J. 1 (1949). This article is a concise and neutral account of the controversy by the Advisory Committee's Reporter, Judge Charles E. Clark of the U. S. Court of Appeals, 2d Circuit. Judge Clark, a prominent scholar and former Dean of the Yale Law School, had been the Reporter since the Committee's creation in 1935.

84. 46 STA. 1422, c. 307, §§ 1 to 5:40 U.S.C. §258.

85. McCarthy, Land Acquisition Policies and Proceedings in TVA — A Study of the Role of Land Acquisition in a Regional Agency, 10 OHIO ST. L. J. 46, 59 (1949). Mr. McCarthy was Assistant General Counsel for the TVA, and and this article is by far the best statement of the TVA's position. The following summary is based generally on Mr. McCarthy's article.

86. McCarthy, supra note 85 at 61.

87. Id. at 60.

88. Id. at 61.

89. See Clark, supra note 83 at 10.

90. The writer has discovered commentary to the effect that commissioners are inefficient. These will be discussed in a later section.

91. ADVISORY COMMITTEE REPORT, supra note 2 at 229.

92. Id. at 238.

93. Id. at 222.

94. Id. at 238.

95. 7 F.R.D. 383.

96. Id. at 384.

97. ADVISORY COMMITTEE REPORT, supra note 2 at 224.

98. Id. at 224.

99. 97 CONG. REC. 7938 (Part XIII), July 11, 1951.

100. Id. at 7939.

101. Id. at 7938.

102. 97 CONG. REC. 9003, 9141.

103 ADVISORY COMMITTEE REPORT, supra note 2 at 224.

104. Comment, Condemnation Procedure — A New Federal Rule, 4 STAN. L. REV. 266, 277 (1952).

105. 199 F. 2d 501 (1952).

106. 201 F. 2d 550 (1953).

107. 202 F. 2d 550 (1953).

108. Comment, Eminent Domain — Proceedings — Jury Trial May be Denied Under Federal Rule 71A(h) Only in "Extraordinary Circumstances," 66 HARV. L. REV. 1314, 1315 (1952).

109. Comment,Federal Procedure — Condemnation Proceedings — In Condemnation Proceedings Under Fed. R. Civ. P. 71A(h) District Court Held Justified in Appointing Commission to Determine Compensation, 39 VA. L. REV. 694, 695 (1953).

110. 226 F. 2d 492.

111. Id. at 498.

112. 7 MOORE, FEDERAL PRACTICE (2d ed. 1954).

113. 3 BARRON AND HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE §1525 (1958).

114. See section IV C 4.e. above.

115. Paul, Condemnation Procedure Under Rule 71A, 43 IOWA L. REV. 231, 235 (1958).

116. 274 F. 2d 856 (9th cir. 1960), cert. den., 362 U.S. 990, 8 S. Ct. 1077 (1960).

117. Nealy, Some Historical and Legal Aspects of Rule 71A in Federal Condemnation Proceedings, 23 FED. B. J. 45, 57 (1963).

118. Merrill and Walton, supra note 30.

119. Merrill, CONDEMNATION PROCEDURE ALTERNATIVES FOR VIRGINIA 129, published by the Virginia Highway Research Council, P. O. Box 3817, University Station, Charlottesville, Virginia 22903. (1972).

120. REPORT OF THE (MASSACHUSETTS) SPECIAL COMMISSION RELATIVE TO CERTAIN MATTERS PERTAINING TO...EMINENT DOMAIN, 42 MASS. L.Q. Vol XLII 13, 19 (1957).

121. Vallone, The Urban Renewal Condemnation System Scandal and Other Related Practical Problems of Local Government, 33 ALB. L. REV. 519, 526 (1969); Dowd, supra note 48 at 292.

122. Merrill, supra note 119 at 26.

123. Id. at 26.

124. United States v. 257.654 Acres of Land, 72 F. Supp. 903, 914 (D. Hawaii 1947).