

FINAL REPORT

**AN ANALYSIS OF HIGHWAY
CONDEMNATION CASES UNDER THE
PROVISIONS OF SENATE BILL 724:**

**COMPARISONS OF JURY
AND COMMISSION AWARDS**



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1. Report No. FHWA/VTRC 97-R14	2. Government Accession No.	3. Recipient's Catalog No.	
4. Title and Subtitle An Analysis of Highway Condemnation Cases Under the Provisions of Senate Bill 724: Comparisons of Jury and Commission Cases		5. Report Date March 1997	
		6. Performing Organization Code	
7. Author(s) Amy A. O'Leary, Ph.D. Michael A. Perfater		8. Performing Organization Report No. VTRC 97- R14	
9. Performing Organization Name and Address Virginia Transportation Research Council 530 Edgemont Road Charlottesville, VA 22903-0817		10. Work Unit No. (TRAIS)	
		11. Contract or Grant No. 0582-030-940	
12. Sponsoring Agency Name and Address Va. Department of Transportation Federal Highway Administration 1401 E. Broad Street 1504 Santa Rosa Road Richmond, VA 23219 Richmond, VA 23239		13. Type of Report and Period Covered Final - 3/93 - 12/96	
		14. Sponsoring Agency Code	
15. Supplementary Notes In cooperation with the U.S. Department of Transportation, Federal Highway Administration			
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17. Key Words Eminent domain, condemnation costs		18. Distribution Statement No restrictions. This document is available to the public through NTIS, Springfield, VA 22161.	
19. Security Classif. (of this report) Unclassified	20. Security Classif. (of this page) Unclassified	21. No. Of Pages 12	22. Price

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(The opinions, findings, and conclusions expressed in this
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those of the sponsoring agencies)

Virginia Transportation Research Council
(A Cooperative Organization Sponsored Jointly by the
Virginia Department of Transportation
and the University of Virginia)

In Cooperation with the U.S. Department of Transportation
Federal Highway Administration

Charlottesville, Virginia

March 1997
VTRC 97-R14

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ABSTRACT

The Virginia Department of Transportation (VDOT) may legally condemn land for road improvements if all purchase negotiations with the landowner fail. If all further negotiations fail, just compensation for the landowner is decided in court by a five-member panel, called a commission. Until 1991, litigants nominated the individuals selected for the panel. Awards unfavorable to the Commonwealth have often occurred when panels had a majority of landowner-nominated commissioners. In 1991, the Virginia General Assembly enacted legislation that required the use of ordinary jurors as panel members in selected areas of the state.

Average (award / certificate of take) values were compared for samples of jury and commission cases held since 1988. The state's total payout (as a percentage of certificate values) for all commission cases was also compared to its total payout for all jury cases completed in a geographic area.

There were no statistically significant differences in the average (award / certificate) values of jury and commission cases heard in VDOT's Northern Virginia District since 1988. The state's total payout for 64 commission cases heard there was 162% of the certificate values, compared to a total payout of 113% for 28 jury cases.

Statistical tests revealed that the average (award / certificate) value for 60 commission cases heard in Chesterfield and Henrico counties was significantly higher than the average for 19 jury cases. The state's total payout for all 60 commission cases was 150% of the corresponding certificate values, while the total payout for all 19 jury cases was 118% of the certificate values.

The authors conclude that the payout comparisons for jury and commission cases, in particular, suggest that the state's costs have been substantially lower when juries have been used. The number of jury cases completed to date is small, however. For that reason, the authors recommend a three-year extension of the legislation, so that the outcomes of the two different panel selection procedures might be more validly compared.

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INTRODUCTION

By law, the Virginia Department of Transportation (VDOT) is vested with the power of eminent domain. This enables it to condemn land needed for road improvements if all reasonable attempts to purchase property by negotiation with the property owner fail. The condemnation process is initiated with VDOT's filing of a legal petition (the certificate of take) to the court in the jurisdiction in which the property is located. Negotiations with the property owner can continue after the filing of the certificate, and if these negotiations are successful, an Agreement After Certificate (AAC) is reached. If all negotiations fail, however, the *Code of Virginia* provides that the issue of just compensation to the property owner is to be decided by a litigant-selected five-member panel, called a commission.

Before December 1, 1991, all condemnation commissions in Virginia were generally selected from a group of 9 individuals nominated by either the property owner or the Commonwealth (henceforth referred to as "the commissioner system" or "the current system"). Under the law, each side has two peremptory challenges it may use to reduce the 9 prospective commissioners to the panel of five who will actually hear the case (*Code of Virginia*, §25-46.20). Ultimately, the issue of just compensation to the property owner is determined by a simple majority of the panel members (i.e., at least three commissioners out of five). Other states use a variety of approaches to select the members of such panels (Perfater, 1989).

Without question, right of way costs are escalating in Virginia. In some urbanized areas, right of way acquisition costs often exceed project construction costs. Multiple factors often underlie high property acquisition costs: rapid development in certain areas, extension of water and sewer service, zoning and Comprehensive Plan changes, high court awards to landowners, and the length of time required to complete all preliminary engineering activities for projects. High right of way costs may also be caused by increases in property values in anticipation of road improvements (the so-called "unearned increment").

The current system often produces a panel consisting of three landowner-nominated commissioners and two commissioners nominated by the Commonwealth. VDOT staff, fee appraisers, and fee attorneys say that awards highly unfavorable to the Commonwealth tend

to occur more often in this situation, especially in the state's more rural areas (Perfater, 1989).

In 1991, the Virginia General Assembly enacted Senate Bill 724 (Acts 1991, c. 520), which initiated an "experiment" in which jurors rather than litigant-nominated commissioners were to be used in condemnation cases in certain jurisdictions. Originally, the law required the use of jurors only in the Northern Virginia counties of Arlington, Fairfax, Loudoun, and Prince William and in the cities adjacent or contiguous to them. The jury requirement was subsequently extended to Chesterfield County in the 1993 Session (Acts 1993, c. 506), and to Henrico County in the 1994 Session (Acts 1994, c. 681). In the jurisdictions included under the legislation, potential panel members are selected by Clerks of Court from jury pools of ordinary citizens. Any individual serving as a juror in a condemnation case is required to own property in the jurisdiction where the case is being heard (this requirement also applies to commissioners selected under the current system). Originally, the jury "experiment" was to have ended on July 1, 1994; in subsequent Sessions, however, the legislation was extended until July 1, 1997.

Senate Bill 724 also required the Virginia Department of Transportation to "track, review, and analyze assessment awards under the provisions of the 1991 Act, and report biannually to the House and Senate Committees for Courts of Justice whether or not all available empirical data indicate that Virginia's currently existing system of condemnation is resulting in higher condemnation costs to the Commonwealth compared to such costs under the provisions of the 1991 Act." The Virginia Transportation Research Council (VTRC) has been performing this analysis since the use of juries began.

This report summarizes comparisons of commission awards and jury awards for condemnation cases heard from 1988 through mid-1996. These comparisons have also been summarized in the VTRC's biannual reports to the House and Senate Committees for Courts of Justice. In the sections that follow, we describe the study's methods of analysis, findings, conclusions, and recommendations.

METHODS OF ANALYSIS

VDOT's Right of Way Division provided information on certificate of take amounts court awards, and AAC amounts from their computerized Right of Way Management System (RWMS) database. Condemnation case data from January, 1988 through August, 1996 are included in the analysis. The RWMS information was supplemented as needed by VDOT Right of Way staff in the Northern Virginia and Richmond District offices (see acknowledgments). Cases for which certificate amounts or award amounts were unavailable necessarily had to be excluded from the analysis. Pre-1988 cases are characterized by much missing data in the RWMS system and therefore were not used. For purposes of comparison, commission awards from a more rural area (VDOT's Bristol District) were also analyzed.

We primarily used two types of descriptive statistics for our comparisons of jury and commission awards. For each *individual* case, the ratio of the award to the certificate amount was calculated (**award / certificate amount**). In percentage terms, this statistic

reveals whether an award was 125% of the certificate amount, 200%, etc. This statistic does not take the magnitude of the award into account, however. For example, a \$1,000 award and a \$1 million award could both be 125% of their corresponding certificate amounts. For this reason, in each *group* of cases (Northern Virginia commission, Chesterfield jury, etc.) the sum of all of the awards was compared to the sum of all of the certificates (**awards for all cases in group / certificate amounts for all cases in group**). In our judgment, this is the more valid measure for assessing the effects of juries versus commissions, because it is based on multiple cases and better reflects how much the Commonwealth ultimately spends on awards.

The averages that are reported for each group of cases (e.g., average certificate amount) are medians rather than arithmetic means. The median is the cut point that separates the bottom 50% of a set of numbers from the top 50%. Hence, median values are not skewed by extremely low or extremely high values in the data, as mean values can be.

Independent *t* tests were used to determine whether any statistically significant differences between commission awards and jury awards could be detected with the current (case) sample sizes for Northern Virginia and Chesterfield / Henrico. Throughout the course of the study, the small number of completed jury cases has hindered the statistical analysis. The *t* statistic compares the mean values of the (award / certificate amount) ratio for jury cases and for commission cases, using information about the sample sizes and sample variances.

Trends in the numbers of AACs by year were also examined. VDOT fee attorneys and right of way staff told the authors that the use of juries has added a measure of uncertainty (for both sides) to the outcome of taking a case to court. This uncertainty, they said, might lead the property owner, the Commonwealth, or both to go to greater lengths than they otherwise would to settle out of court.

FINDINGS

Northern Virginia Condemnation Cases, 1988-1996

Although the original SB 724 legislation specified that juries were to be used in Northern Virginia highway condemnation cases beginning December 1, 1991, the change did not occur overnight. Judges in Northern Virginia took the position that cases would be heard by an appointed commission if one had already been selected before the effective date of SB 724, and in a number of instances, this had occurred.

Sixty-four commission-heard cases and 28 jury-heard cases from the Northern Virginia District were available for the analysis. One additional jury case with an award that was 18 times the certificate amount (\$500 certificate, \$9000 award) was excluded from the analysis to avoid skewing the statistics.

For the 64 Northern Virginia commission cases:

- Average amount of the certificate of take was \$17,913
- Average award amount (land and damages) was \$28,973
- Damages were included in 30% of the awards
- The average (award / certificate amount) value for individual cases was **115%**
- Awards for all 64 cases totaled **162%** of the certificate amounts.

For the 28 Northern Virginia jury cases:

- Average amount of the certificate of take was \$33,284
- Average award was \$72,877
- Damages were included in 50% of the awards
- The average (award / certificate amount) value for individual cases was **137%**
- Awards for all 28 cases totaled **113%** of the certificate amounts.

Most of the jury cases were heard after 1992. For that reason, one would expect both the average certificate amounts and the average total awards to be higher than for the commission cases, due to both inflation and recovery from the early 1990's recession. Although comparisons of the average (award / certificate amount) values for individual cases might seem to suggest that the commissioner system produced lower awards, these averages do not take the size of the award into account. Also, an average based on only 28 cases may not be a reliable indicator of what happens in a "typical" case. The Commonwealth's total payout for all of the jury cases (113% of the certificate amounts) is notably lower than the total payout for the commission cases (162% of the certificate amounts).

The *t*-test analysis for Northern Virginia (summarized in Table 1) did not detect a significant difference between the mean (award / certificate amount) values for jury and for commission cases. Table 1 shows that based on the available cases, the mean (award / certificate) ratio for commission cases is lower than for jury cases. The standard deviations also indicate more variation in the Northern Virginia jury cases completed to date than in the commission cases. Information about the size of the awards is not incorporated in the *t*-test; it is based on the sample means.

Table 1. *T*-test Comparisons of Northern Virginia Commission and Jury Cases

Cases	Mean (Award / certificate)	Std. Dev	<i>t</i>	<i>df</i>	Sig. (2-tailed)
Commission	1.44	0.63	-1.96	31.83	.06
Jury	1.97	1.37			

Table 2 below shows trends in the numbers of AACs and court trials as a percentage of all condemnation cases resolved in a given year in the Northern Virginia District (1996 is not included in the table because data for the entire year were not available when this report was written). The data indicate that a decreasing percentage of cases have gone to trial since

1991, when the jury law was enacted. (The number of cases going to trial in a given year is never very large, however). Nonetheless, the trend in Table 1 is interesting, in light of comments by VDOT staff, fee appraisers and fee attorneys that the use of juries adds an element of uncertainty to the outcome of going to court. Property owners, the Department, or both may be going to greater lengths to negotiate an AAC. If so, this represents additional cost savings for the Commonwealth, since AACs on the whole cost the Commonwealth less than court awards. The Commonwealth's total payout for a sample of Northern Virginia AACs was **118%** of the total certificate amounts (compared to **162%** when cases went to court and were heard by commissions).

Table 2. Condemnation Cases Resolved by AAC or Trial in Northern Virginia, 1990-1995

Year	AACs	Trials	Trials as % of Total
1990	102	17	14%
1991	90	19	17
1992	74	13	15
1993	72	11	13
1994	124	8	6
1995	92	8	8

Chesterfield and Henrico County Condemnation Cases, 1988-1996

Sixty commission-heard and 19 jury-heard condemnation cases from Chesterfield and Henrico counties were available for the analysis. All but 5 of the commissioner-heard cases and all but four of the jury-heard cases occurred in Chesterfield County. No cases needed to be excluded from the analysis because of extremely high awards relative to the certificate amounts.

For the 60 Chesterfield and Henrico commission cases:

- Average amount of the certificate of take was \$10,375
- Average total award was \$24,427
- Damages were included in 65% of the awards
- The average (award / certificate amount) value for individual cases was **162%**
- Awards for all 60 cases totaled **150%** of the certificate amounts.

Thus, the Commonwealth's total payouts for the Northern Virginia and Chesterfield / Henrico commission cases are similar (162% and 150% of the total certificate amounts, respectively). In Chesterfield / Henrico, however, commissions were more than twice as likely to make damage awards as in Northern Virginia. The average Chesterfield / Henrico commission's award for individual cases tended to be notably larger than the certificate amount (162%) while in Northern Virginia, the average individual commission award was

115% of the certificate amount. Since the averages reported are medians, half of the awards made in individual cases by Chesterfield / Henrico commissions exceeded 162% of the certificate amount. VDOT's Northern Virginia attorneys have told the authors that excessive awards by old-style commissions were not a common occurrence in their region; these numbers tend to support that observation.

For the 19 Chesterfield and Henrico jury cases:

- Average amount of the certificate of take was \$14,960
- Average total award was \$25,520
- Damages were included in 42% of the awards
- The average (award / certificate amount) value for individual cases was **100%** (meaning the average individual award equaled the certificate amount)
- Awards for all 19 cases totaled **118%** of the certificate values.

Chesterfield / Henrico juries were apparently less inclined to make damage awards than commissions have been. The differences between the total payout percentages (118% of certificate values for jury cases versus 150% for commission cases) suggest that overall, awards have been notably closer to certificate values when juries have been used in Chesterfield and Henrico counties.

Table 3 shows the *t*-test results for Chesterfield / Henrico cases. The mean (award / certificate) value for Chesterfield / Henrico jury cases is significantly lower ($p < .01$) than for commission cases. Interestingly, the standard deviations show much less variation in the jury cases than the commission cases. The *t*-test results for Chesterfield / Henrico are the opposite of those for Northern Virginia.

Table 3. *T*-test Comparisons of Chesterfield / Henrico Commission and Jury Cases

Cases	Mean (Award / certificate)	Std. Dev	<i>t</i>	<i>df</i>	Sig. (2-tailed)
Commission	2.34	1.80	3.31	73.21	.00
Jury	1.40	0.69			

Table 4 shows trends in the numbers of AACs and court cases for Chesterfield and Henrico counties since 1990 (recall that the jury law was extended to Chesterfield in 1993 and Henrico in 1994). Although the percentage of all cases going to court appears to have decreased since 1993, the decrease resembles variation in the percentages prior to 1993. Additional years of data may shed some light on the question of whether juries have changed the environment for negotiations. If one or both parties are going to greater lengths to settle out of court, this would represent additional savings for the Commonwealth. The Commonwealth's total payouts for a sample of Chesterfield and Henrico AACs were **134%** of the certificate values (compared to payouts equaling **150%** of the certificate values in commission-heard court cases).

Table 4. Condemnation Cases Resolved by AAC or Trial in Chesterfield and Henrico Counties, 1990-1995

Year	AACs	Trials	Trials as % of Total
1990	72	16	18
1991	95	7	7
1992	79	16	17
1993	73	22	23
1994	52	11	17
1995	63	5	7

Bristol District Condemnation Cases, 1988-1995

Our report to the 1996 Session included a brief analysis of condemnation case data from VDOT’s Bristol District, where litigant-nominated commissions are used exclusively. VDOT right of way staff have made observations that very high commission awards (relative to certificate amounts) are a more frequent occurrence in rural areas than in urban areas. The analysis included 120 cases heard between January, 1988 and June, 1995.

For the 120 Bristol District commission cases:

- Average certificate amount was \$6,685
- Average total award was \$19,492
- Damages were included in 59% of the awards
- The average (award / certificate amount) value for individual cases was **235%**
- Awards for all 120 cases totaled **264%** of the certificate values.

These statistics suggest that very high awards relative to certificate amounts are more characteristic of this rural district than of either of the two more urban districts where the jury “experiment” has occurred. Data from VDOT’s remaining six districts have not been examined, so it is not known whether very high commission awards are a frequent occurrence in those districts or not. If Bristol is typical of more rural parts of the Commonwealth, however, the current system of allowing each side to nominate prospective commissioners could be producing awards equaling 200% or more of the corresponding certificate values much of the time. Since the averages reported are medians, half of the awards in the Bristol District exceeded 235% of their corresponding certificate amounts.

DISCUSSION AND RECOMMENDATIONS

Our statistical comparisons of the Commonwealth’s total payouts in jury cases and in commission cases continue to suggest that in both Northern Virginia and Chesterfield and Henrico, the current system has cost the Commonwealth notably more than the jury system has. Use of the commissioner system has cost the Commonwealth the most in the more rural area included in our analysis (Bristol). Unfortunately, since the jury legislation has never

been extended to a more rural area, the potential cost savings of using juries in more rural areas is unknown. Commission awards have also tended to be closer to certificate amounts in the most urbanized area included in our analysis (the Northern Virginia District).

Selection of individuals from a jury pool is likely to yield a rather different type of panel member than the current commissioner system does. Commissioners selected under the current system typically have occupations in real estate, lending, or related fields, and are nearly always men. Most jurors, on the other hand, would tend not to have any specialized knowledge of real estate or lending; they would often be ordinary homeowners, many of whom are women. Unlike commissioners, jurors are also unlikely to be acquaintances of either the landowner or the Commonwealth's representatives in a condemnation case.

Jury cases continue to accrue very slowly, probably more slowly than was anticipated in 1991 when the jury "experiment" began. Unfortunately, multiple one-year extensions of the legislation have not remedied the sample size problem thus far. For that reason, the authors recommend that the Courts of Justice committees extend the legislation for up to three years (until 7/1/2000), so the systems can be more validly compared. If that occurs, additional statistical and interview data could also shed light on the question of whether juries have changed the environment for negotiations, contributing to an increasing percentage of AAC settlements. If so, it represents another source of lower condemnation costs for the Commonwealth.

ACKNOWLEDGMENTS

A number of individuals have provided valuable assistance to us in the course of this research and deserve our thanks. Stuart Waymack, VDOT's State Right of Way Engineer, has helped in a number of ways since 1991. Vicki Campbell in VDOT's Central Office Right of Way Division has always responded quickly to our requests for data. In VDOT's Richmond District Right of Way Section, John Branch, Eunice Fisher, Charles Fielding, and Joyce Ashley (now retired) have been very responsive to our requests for information about cases and upcoming trials, as have Dave Holsinger, Andy Williams, Miles Pillars, and Richard Baker (now retired) of VDOT's Northern Virginia District Right of Way Section. At the Research Council, Jan Kennedy, Steve Blackwell, and Melanie Wiedmann provided fast, accurate assistance with data file creation. Rob Hanson and Cherie Kyte of the VTRC provided useful reviews of the report and Gary Mawyer edited the report.

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