# Use of a Commissioner System to Determine Just Compensation in Condemnation Actions

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● CONSTITUTIONAL and statutory amendments have been proposed which would require the use of a five member lay commission to initially determine the issue of just compensation in a contested condemnation action. The five commissioners would be landowners resident in the county, selected from lists of 13 drawn up by Superior Court Judge in the county. Theoretically, these commissioners meet on the subject property with the landowner (or his representative), the condemnor's right-of-way agent, and an engineer, and "informally" reach a conclusion regarding just compensation. The determination of a majority of the commissioners is then reported to the court with each side having 10 days to file exceptions and request a de novo jury trial. If no exceptions are forthcoming a final order is executed by the court.

The following analysis is restricted to an appraisal of the particular system advocated. Only indirectly is the general question: "Is a jury trial better than a commissioner's hearing to determine fair market value?" touched upon. The evaluation and determination of that controversial problem was not undertaken due to the lack of available material on which to base an objective and supportable conclusion. The principal bar to comparability of fact finding systems, is the diversity of procedural techniques now in use by various jurisdictions. Approximately five states use only commissioners, 23 states use commissioners with an available trial de novo before a jury, and in 18 states a jury alone is used.[1] This breakdown itself is only approximate since the same state may have several diverse procedural processes, depending on the type of condemnation or type of condemning agency. One rather exhaustive study in 1931 estimated that there were 269 different methods of judicial condemnation in different classes of cases, and 56 methods of nonjudicial or administrative procedure.[2]

Present also are the further variables of the quality and policy of each jurisdiction's right-of-way department, the attitude of the local populace toward condemnation in general or toward a particular public works project, and the amount and type of property being acquired. These existing variables reduce, if not eliminate, the usefulness of such statements as "90 percent of all condemnation cases can be settled by a commissioner's hearing."[3] It is difficult if not impossible to conclude from such claims that a similar system would produce comparable results in California. These questions must be answered first:

1. What type of construction required the use of condemnation procedures?
2. What type of pre-trial negotiation was carried on?
3. What type of personnel conducted these negotiations?
4. Was the appraisal used fair to both parties and prepared by competent personnel?

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[1]Advisory Committee Report on Rules for Civil Procedure, U.S. Code Cong. and Ad. Serv. (1951), p. 2618.
[2]First Rep. Mich. Jud. Council, sec. 46, pp. 55, 56 (1931).
[3]U.S. Code Cong. and Ad. Serv. (1947), p. 2506.

5. In what percent of the parcels appraised was resort to a commissioner's hearing necessary?[4]

Because these questions are seldom answered or answerable, one is left in a position where apparently contradictory statistics can exist.[5] In attempting to avoid such confusion this comment is limited to the comparison of suggested procedure and its advantages and/or disadvantages as compared to methods now used in California to determine just compensation in contested cases (that is, a jury or single judge trial).

## ADVANTAGES CLAIMED FOR ADVOCATED PROCEDURE

The alleged merit in a commission system, stated simply, is that it would be cheaper, quicker, and more effective. However, an analysis of the reasons why such desirable results should ensue indicates that in some instances the results are not likely to occur and in other cases the sacrifices made to achieve the desired end are not worthwhile.

### The Commission System is Less Expensive

The following reasons are advanced to show that financial savings will result:

1. No expert witnesses or appraisers need be used by the condemning agency, therefore their fees will be eliminated. As noted, the suggested procedure envisions a meeting of the property owner (or his representative), a right-of-way agent, an engineer and the commissioners on the property. It is apparently felt that the right-of-way agent alone can adequately present the condemning agency's opinion as to fair-market value. It should be understood that a right-of-way agent alone could be used to testify under the present jury system. The policy which justifies use of an independent appraiser is just as valid or invalid whether a judge, jury, or commission is used. Under any system the testimony of an expert who is not a condemnor's employee may potentially carry more weight, while serving to buttress the right-of-way agent's opinion. Consequently, attorneys practicing before commissions have advocated the use of an outside appraiser in an attempt to avoid the stigma of party bias.[6]

A more practical problem exists in this "simple meeting" suggestion. If a property owner is required to appear and represent himself an injustice may be done. The match

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[4]"Condemnation in Maryland," Research Report No. 31, Research Division of Maryland Legislative Council, August 1958, p. 26.

> The right of way department prepares the appraisals and the commission admits that they are considerably lower than is subsequently awarded. Since the prospective condemnees know this, title is rarely acquired before submission to the Property Board. (emphasis added)

[5]Other sources indicate very poor settlement figures:

a. "Condemnation in Maryland," Research Report No. 31, Research Division of Maryland Legislative Council, August 1958, p. 26. "During the first 22 months of operation 46 percent of the awards granted by the Property Review Boards were appealed. This suggests that "the boards" created to relieve state courts of the heavy load of highway condemnation have failed to do more than a portion of their appointed tasks." (emphasis added)

b. Armstrong, "The Proposed Condemnation Rule," 7 F.R.D. 383, 387, "Judge Elmer D. D. Davies, of the Middle District of Tennessee, wrote:...I would say that a majority of the awards made by the commissioners are required to be heard by a three-judge court." (emphasis added)

[6]Ferrell, "The Preparation and Trial of Condemnation Cases for Virginia Public Service Company," 43 Va. L. Rev. 747, 753.

> In many cases competent local, independent real estate experts should be employed...This does not reflect in any way upon the knowledge or ability of the company's real estate department. On the other hand, that department should recognize the necessity for having outside assistance. The expert who can materially help in the trial of a condemnation case is independent in every respect.

of an experienced right-of-way agent, trained to search out facts substantiating an opinion, and an uninitiated property owner cannot be considered equal, nor can the inherent sympathy for the landowner be relied on to off-set such an advantage.

The balance changes if, as suggested, the property owner can bring a representative who, for example, is an M.A.I. appraiser of long standing in the community with a wide variety of experience and extensive training in appraisal practice. Again the same problem exists under the present jury system. Is it wise or necessary to match the defendant's expert with a similarly qualified plaintiff's expert? Such a decision does not depend on the system in use, but rests solely in the subjective evaluation of the effectiveness of such witnesses on the trier of facts. Therefore, it would seem that the savings in appraisal or witness fees are not inherent in the commissioner system but would arise as the result of a policy decision regarding the tactical value of such methods.

2. No attorneys need be employed by either party, thus saving legal fees. If it is proposed that the parties be prohibited from the use of counsel, a serious constitutional issue is raised, even though an ultimate appeal to trial de novo is available.[7] Though the proposal is ambiguous on this point, it appears that the defendant's representative could be an attorney since the defendant's legal representatives are referred to in regard to selection of the five commissioners.[8]

Should the defendant appear with an attorney at the hearing, it seems doubtful that the condemning agency would not wish to answer in kind. Again this is a decision not dependent on the type of system used to determine fair market value. It is possible that a condemning agency could appear without an attorney in a jury trial. If a reason exists in the courtroom for an attorney's presence, that purpose should not vanish merely because the "hearing" is transferred to the situs of the property in question.

Informality is advocated; however, it would be conceded that by the time a condemnation action proceeds to "trial" the "battle lines" are drawn and an absolute difference of opinion usually exists. Informality used in a sense synonymous with cooperation comes primarily in early pre-trial negotiation, if at all, and can be used by the experienced negotiator at that stage to reach a settlement. Just because of the open air hearing the defendant cannot be expected to proclaim "I really don't think a bowling alley would be practical here." The defendant will want to win and in a majority of cases will have an attorney present to see that his interests are protected as is true in the existing system. If the defendant is represented by counsel, the right of way agent could not be expected to handle the hearing without aid of counsel, representing the condemning agency.

It appears then that the savings of attorney's fees would not automatically result from a change of "trial" methods.

3. No costly exhibits, maps, or photographs will be needed. Because the commissioners will view the property, it is claimed that no money need be expended to produce demonstrative evidence. At most, this would only apply to cases that are not ultimately taken before a jury, or where there are no complicated construction or geological problems. Furthermore, it assumes that the lay commissioners can view rough terrain or residential areas and imagine three or four level interchanges and the resulting shift in traffic patterns and access availability. It is apparent that exhibits would be used in the same situations where they are presently used.[9] An example is a recently completed condemnation case involving quarry property in Rocklin, California.[10]

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[7]Prudential Ins. Co. v. Small Claims Court, 76 C.A. 2d 379, 382, 167 A.L.R. 820, "There can be little doubt but that in both civil and criminal cases the right to a hearing includes the right to appear by counsel, and that the arbitrary refusal of such a right constitutes a deprivation of due process..."

[8]Page 2 of proposed procedural changes.

[9]Dolan, "New Federal Procedure in Condemnation Actions," 39 Va. L. Rev. 1071, 1081, "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."

[10]People v. Aitken, Placer County Superior Court No. 21203 (as to Parcels Nos. 2A and 2B).

Expensive geological tests were made and exhibits prepared which graphically demonstrated the invalidity of the defendant's assertion that valuable granite deposits existed beneath the proposed right-of-way. Surely these same tests would be made whether a jury, commissioners, or a judge alone heard the case. The purpose of demonstrative evidence is to make a given proposition more understandable to the fact finder. Therefore, if a particular exhibit serves to clarify and explain an argument this purpose will be served whether the fact finder carries the title, judge, juror, or commissioner. Further, changing the system of arriving at just compensation will not correct the overzealous or unnecessary use of demonstrative evidence.

4. No jury fees will be necessary in cases settled by the commissioners. The savings alleged to exist here are hard to estimate since there is no accurate way of tabulating how many cases would be settled by the commissioners that normally would have required a jury trial.[11]

The proposed compensation of the commissioners is $250 a day and it is assumed a certain figure for mileage will be included. The jury fee ranges from three to seven dollars a day, averaging five dollars a day. Therefore, a twelve-man jury would cost approximately $60 a day, or about one-fourth the cost of a commissioner hearing. A jury trial lasting two weeks would cost less than a three-day commissioner's hearing compared on the basis of fees.

Subtracted from any "saving" of jury fees would be the expenses in those cases which required a de novo jury trial, and the expenses in those commissioner's hearings where, "either or both parties request a lengthy hearing."[12] Logically, it would seem that the parcels which require long jury trials would also require lengthy commissioner's hearings. Surely neither the condemning agency nor the defendant will prepare less or hasten their presentation because five people instead of twelve or one are listening.

5. No court reporter's fee will be necessary. The general statutory fee for court reporters in contested cases is twenty-five dollars a day (Government Code Sec. 69949) with certain counties having special statutes (Government Code Sec. 69947). This seems a small price to pay for an accurate memory refresher, especially in those cases where an appeal may be necessary. Perhaps the lack of a reporter adds to informality but it also allows exaggerated testimony to go unchallenged. Also, the recordation of testimony would free the commissioners from extensive note taking and allow concentration on the testimony itself.

It must be reiterated that if a certain procedure serves a beneficial purpose in a jury trial or a case heard by a judge alone, that same purpose would be served in a commissioner hearing, and if any particular feature is of no benefit, then it should be eliminated, not the whole system.

Summary re Savings under Commissioner System

The item-by-item analysis reveals that the substantial savings alleged are not readily apparent, or would not be occasioned by a switch to the commissioner's system, in fact the contrary may be true.

The United States Justice Department has consistently opposed use of commission hearings in federal condemnation on the grounds that the commission system is too

[11]At least one jurisdiction's experience indicates that almost all parcels require a commissioner hearing. See note 4 supra.

[12]This subtraction will be large if as in some jurisdictions 50 percent of the commission awards are appealed. See note 5 supra. In U. S. v. 44 acres of Land, 234 Fed. 2d 410, the three commissioners were allowed $10,000 apiece compensation. Three days had been spent viewing the property, 38 days in hearing and 25 days preparing a report. Incidentally, despite these lengthy deliberations it was necessary for the trial judge to reduce the land owner's award approximately 50 percent because an erroneous method of arriving at fair-market value had been used.

expensive, costwise and verdictwise.[13] This view is shared by other authorities familiar with the commission system.[14]

The Advisory Committee on Rules for Civil Procedure, studying a possible revision of federal condemnation procedure, concluded as follows:

> ...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. Furthermore, it is largely a futile procedure where it is preparatory to jury trial. 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.[15]

## Most Cases Can Be Set For Hearing Within 30 Days After Filing of Suit

There appears to be no problem under present California procedure regarding lengthy waits for trial dates.[16] Code of Civil Procedure Section 1264 provides for a preference in setting condemnation actions for trial. If the parcel is urgently needed to allow initiation of construction work an order of immediate possession can be obtained under Art. I, Sec. 14 of the California Constitution. In neither case does the defendant landowner suffer undue hardship. Where immediate possession is not taken he still has the use of the land; where possession is taken, 75 percent of the condemning agency's deposit may be withdrawn.[17]

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[13]Supplementary Report of Proposed Rule to Govern Condemnation Cases in the United States District Courts (1951).

[14]Armstrong, "The Proposed Condemnation Rule," 7 F.R.D. 383.

a. At page 385, "... 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. The disadvantage of the commission plan is the delay caused by two trials and the expense (sometimes onerous, where a comparatively small amount is involved)..."

b. At page 386, Judge Marion of the Western District of Tennessee, "This procedure (appeal de novo) is costly and the necessary delay incident to a three judge hearing often is a denial of justice. I believe a good old fashioned jury trial in the first instance is the answer." (emphasis added)

Searles and Raphael, "Current Trends in the Law of Condemnation," Appraisal Journal, October 1959, p. 511, 516: "The Commissioners' system under which commissioners were judges of 'fair' compensation was critized as being wasteful, particularly in New York State."

Dolan, "Federal Condemnation Practice, General Aspects," Appraisal Journal, January 1959, p. 15, 17: "It has been my experience that the commission method of fixing just compensation in a condemnation action is a costly and tedious mode of trials."

[15]U.S. Code Cong. and Ad. Serv. (1951), p. 2632.

[16]The waiting period in condemnation actions in most counties varies from one to three months and should not be confused with the several year wait possible in personal injury litigation.

Also, a quick trial or hearing date cannot be equated with the speedy determination of contested issues usually fair-market value. United States v. Bobinski, 244 Fed. 299, (Commissioners appointed Dec. 1953, final report Dec. 1955, findings set aside March 1956); United States v. Vater, 259 Fed.2d 667, (Court discharged commissioners after three years without final report); United States v. 44 Acres of Land, 234 Fed.2d 410, (Commissioners appointed July 1953, final report Feb. 1955, award reduced 50 percent subsequently).

[17]Code of Civil Procedure Section 1254.7.

The period between filing a complaint and setting a case for trial, in a great number of cases, is not delayed by a crowded court calendar but by a desire to get independent appraisals and conduct further negotiation, which efforts often result in settlement.

Furthermore, the delay occasioned by a trial de novo duplicating the efforts of a commissioner's hearing, more than offsets any advantage of quick setting. The cumbersome, dilatory and expensive appeal to a jury trial de novo is often pointed to as the serious and fatal weakness of a commission system.[18]

Long Jury Trials May be Eliminated by One-To Three-Day Hearings

Savings resulting from this elimination of "long drawn out jury trials" are doubtful for several reasons.

1. Those complicated cases requiring extensive testimony will not be shortened by the form of trial.
2. Many cases will be appealed requiring a dulicatory trial where all the issues will be reargued again at length.
3. The relaxation of rules of evidence will tend to lengthen the commission hearings themselves.[19]

Only Five to Ten Percent Will be Tried by Juries

The 5 to ten percent figure noted previously is not subject to substantiation and carries little weight. Other jurisdictions using the commission system indicate the cases are rarely settled prior to a hearing.[20] Therefore, instead of having the value of a small percentage of parcels requiring determination by independent tribunal, almost all parcels will need such a determination.[21] Further, it has been found that approximately 50 percent of the commissioners' awards are appealed.[22]

The Commissioners Will View the Land

The "advantage" of the commissioner's viewing the land is not inherent solely in the commission system since a jury view can be had under present condemnation methods at the discretion of the trial judge.[23] If it is felt that a view is necessary in all cases the Legislature could eliminate the discretionary element now present, without resort to a widescale procedural change.

Court Dockets Will be Relieved

This argument is currently popular whenever a commission system is advocated. However, were it to be accepted in all cases, the courts would soon be empty and the chant would be "let's relieve the burden on the commissions." Studies are now under way to determine the merit of a commissioner system in determination of personal

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[18]See Notes 14 and 15. United States v. Bobinski, supra at Note 16. "Unwarranted use of commissioners like similar use of masters is an effective way of putting a case to sleep for an indefinite period. (citing cases) Certainly the misadventures of this case and of United States v. 44.00 Acres of Land, 2 Cir, 234 F2d 410 certiorari denied, Odenbach v. United States 352 U.S. 916.77 S. Ct. 215 1 L. Ed. 2d 123 do not speak well for a course substantially repudiated in the state as well as federal procedure."

[19]Thies, "The Law of Eminent Domain, Its Origin and Development," Right of Way, June 1957, pp. 17, 20: "It is my opinion that most courts employ care in the selection of commissioners to appraise and assess damages, add hence the extended hearings are beneficial in that they give the condemnee an opportunity of expressing grievance without the restraining hand of rules of evidence. Since so many suffer from frustration today, this works for a healthy society; it also makes for healthy M.A.I. and lawyers' fees." (Emphasis added)

[20]See Note 4

[21]Present firgures for the 1957-1958 period indicate that only 4.4 percent of total parcels required by the Division of Highways for right of purposes in California are contested in condemnation proceedings. "Tweltfth Annual Report," p. 199.

[22]See Note 5.

[23]Code of Civil Procedure Sec. 610.

injury litigation.[24] Since personal injury cases allegedly compose 80 percent of the trial docket in some counties,[25] this is the place to seek relief, although many authorities feel the crowded docket argument itself is fallacious or overemphasized.[26] Also, there is no assurance that less cases will eventually end up with a jury trial than are presently begun there.

Disadvantages Present in Commission System

In discussing the alleged advantages of a "commission" system, certain definite disadvantages were commented upon. There are still other disadvantages which are apparent.

There is no mention of the grounds for appeal to a jury trial de novo. If either party is able to enter an automatic exception, the hearing becomes a mere practice grounds. Allowance of groundless appeals could work great hardship on the landowner less able to bear the costs of a duplicatory trial. Conversely, the perverse landowner who can afford the added costs could put the condemning agency through two expensive "trials."

Since a majority of three commissioners can determine the amount of an award, local prejudice is more likely to influence verdicts under the commission system. At least under the jury system, nine people would have to be so prejudiced.

Furthermore, the chance to play on local sympathy would be greater at an informal hearing not governed by the rules of evidence. Irrelevant testimony concerning the loss of business, circuity of travel, difficulties in finding a new equivalent property, or other personal discomforts occasioned by the new construction would be given unchallenged.[27]

It is doubtful also that lay commissioners can separate the acceptable testimony from the bad and reach a proper conclusion on fair-market value.[28]

## CONCLUSION

A review of the proposed changes raises serious doubts regarding the efficacy of a constitutional amendment of Art. I, Sec. 14, to provide for a mandatory commissioner hearing to determine just compensation. The alleged financial savings cannot be shown to be present. A majority of the remaining "advantages" as discussed are not inherent solely in a commission system and could be adapted to present procedure if desired. Many of the "evils" pointed to, such as long trials and expensive preparation, are not attributable to the jury system but can be laid mainly to the complicated issues sometimes present, and to the determination of litigants to get a full hearing. Complicated issues of title, severance damage, and appraisal theory cannot always be quickly settled.[29]

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[24]Regan, "Cases, Courts and Commissions," 34 S. Bar J., 180.

[25]Ibid, at 181.

[26]Ibid, at 181; Wines, "Congestion and Privation," 34 S. Bar J., 409.

[27]Thies, supra, note 19 at 20, "As a practical matter, no formal record being made or kept by the commissioners, they have the virtual right to ignore the evidence presented before them and can rely on their own judgment primarily."

Ferrell, supra, note at 752, "It may be argued that stating objections to 'improper' evidence is a vain thing unless it is thought that such objection might have some psychological effect on the commissioners."

[28]Thies, supra, note 19 at 20, "One appellate court has said: 'That even though commissioners do not know law, they must apply it'; and other students of the problem have said that, 'it is a scandalous proceeding to have as an only qualifying requirement that a commissioner be the owner of a vacant lot.' "

United States v. 44 Acres of Land, supra, at note 12.

[29]Regan, supra, Note 25 at 182, "If a commission is to accomplish anything, it must handle cases in a different way. That is, it must handle them faster. And here we must be careful that in our eagerness for speed we do not sacrifice the whole purpose for which the machinery exists justice."

California eminent domain procedures are noted for being comprehensive and uniform. Great confusion can result if a varying procedure is adapted for each type of condemnation.[30] Consequently, such changes should not be lightly made.

A Federal judge aptly concluded as follows:

> Considering the merits and demerits of a jury in determinating land values where the Government is a party, I know of no better way to arrive at such values, particularly with the idea that the jury will be supervised by the judge, the judge will have a right to pass upon the verdict and there will be a right of appeal.[31]

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[30]"Modernizing Illinois Eminent Domain Procedure," 48 N.W.U.L. Rev. 484, 491: "One pre-requisite for eliminating the procedural difficulties encountered in Illinois eminent domain sections is a clear and comprehensive condemnation statute. At least one state, California, has such a statute which has streamlined the eminent domain procedures of that state."

[31]Judge Leslie R. Darr, of the Eastern District of Tennessee 7 F.R.D., 387-8.