36 1/20/69

Memorandum 69-30

Subject: Study 36 - Condemnation Law and Procedure (Procedural Aspects--Cost Allocation)

You will recall that the Commission retained Professor Douglas Ayer of the Stanford Law School to prepare a background research study on the procedural aspects of condemnation. The first portion of his study has been prepared and is attached. This portion deals with allocating the costs of determining just compensation.

Background

A common complaint of persons who have gone to trial in eminent domain proceedings (and of their attorneys) is that the property owner is never made whole because he must pay his attorneys' fees and fees for expert witnesses if he goes to trial. Hence, a significant amount must be paid out of the award (which represents only the fair market value of the property) leaving the property owner with an amount that is not sufficient to replace the property taken. Many attorneys representing property owners further advise that in many cases they must advise a property owner to accept an offer of inadequate compensation because the amount involved in the particular case (such as an offer of $29,000 for a $30,000 house) would not justify the attorneys' fees and expert witness fees that would have to be expended to contest the action. A solution commonly suggested by attorneys representing condemnees is that the condemnor should pay reasonable attorneys' fees and expert witness fees in all eminent domain cases. Condemnors respond to this suggestion by pointing out that only a small percentage of cases are not settled (only about 3 percent of the state highway takings go to judgment) and

that payment of attorneys' fees and expert witness fees would substantially increase the number of cases that would be tried. See Exhibit I (attached) for a discussion from Nichols on Eminent Domain.

The attached study by Professor Ayer presents background information and suggestions concerning the solution to this troublesome problem. We will assume that you have read the study prior to the meeting and merely summarize the suggestions in this memorandum as a guide to discussion at the meeting.

Allocation of costs among parties

Ordinarily, in the context of litigation, "costs" refers to those items generally taxable to the losing party, such as filing fees, ordinary witness fees and mileage allowances, jury fees, disbursements for printing, and certain deposition expenses. California law requires that the condemnors bear these costs in the trial of a condemnation action.

Except when a condemnor abandons the proceeding after commencing the condemnation action, California condemnors are not required to bear condemnees' traditionally nontaxable trial costs. These costs include such substantial items as attorneys' fees and fees paid to experts for investigating and marshaling evidence and for testifying at trial (which greatly exceeds the statutory allowance for ordinary witnesses).

Some states have provided that the condemnor must pay the condemnee's reasonable attorneys' fees and expert witness fees whenever the final award exceeds by a certain percentage a "jurisdictional offer" required to be made by the condemnor prior to the trial. For example, where the award exceeds the condemnor's offer by 10 percent, the condemnor would be required under such a statutory scheme to pay the condemnee's reasonable

attorney's fee and expert witness costs. The consultant does not recommend that such provision be made in California law. The staff also believes that such a solution would be a poor one since many condemnors ordinarily consider it a victory if the ultimate award is within 10 percent of the condemnor's appraisal. See Arnebergh, Trial Tactics from the Standpoint of the Condemnor, Eighth Institute on Eminent Domain 1, 19 (Southwest Legal Foundation, 1968). Hence, this solution would encourage litigation as the condemnee would recover his attorneys' fees and expert witness fees in most cases.

The consultant suggests that as a basic proposition the condemnee's presently nontaxable trial costs in a condemnation action (i.e., attorneys' fees and expert witness fees) should be divided between the condemnee and the condemnor in proportion to the extent of each party's responsibility for proceeding to trial. By taking the figure arrived at by the ultimate decision maker in the condemnation process as the goal, the extent of each party's responsibility for proceeding to trial can be assessed by comparing their respective bargaining positions prior to trial to the compensation awarded at trial.

Specifically, the consultant suggests the following cost allocation scheme:

1. The condemnor should continue to pay the costs generally taxable to the losing party. This is existing law.

2. The condemnee should never be required to pay any costs of the condemnor except to the extent provided by existing law. (In some cases, under existing law, the condemnee who appeals may be held for taxable costs.)

3. The condemnee should be entitled to recover from the condemnor for "trial costs" (i.e., reasonable attorneys' fees and expert witness expenses) to the following extent. Each party would be required to make a "best offer" in writing to the other party. By "best offer" is meant the highest offer made by the condemnor and the lowest offer made by the condemnee at any time prior to trial which is not revoked before trial. (To prevent the cost allocation scheme from influencing the jury's deliberations about compensation, no offer made by either party should be admissible at trial.) If the ultimate award does not exceed the condemnor's best offer or if the condemnee fails to make an offer, the parties should bear their own trial costs, that is, those incurred by them. If the ultimate award is no less than the condemnee's best offer or if the condemnor fails to make an offer, all of the condemnee's trial costs should be reallocated to the condemnor. If the award falls between the parties' best offers, the difference between the condemnee's best offer and the condemnor's best offer should be treated as the denominator and the difference between the award and the condemnor's best offer should be treated as the numerator. If the resulting fraction is one-half or less, no reallocation of trial costs should occur. If the resulting fraction is more than one-half, the condemnor should be assigned that percentage of the condemnee's trial costs equal to twice the percentage by which the resulting fraction exceeds one-half. Suppose, for example, that the best offers were $100,000 and $200,000 respectively and the award was $155,000. The resulting fraction exceeds one-half by 5 percent, so the condemnor should bear 10 percent of the condemnee's trial costs. (Were the excess over one-half not multiplied by two, the condemnee could never recover more than

one-half of his trial costs, no matter how close his demand was to the ultimate award, unless his demand was equal to or less than the award.)

The suggested allocation scheme does not unreasonably penalize the condemnor as would a scheme that imposed all the condemnee's attorney and witness expenses on the condemnor whenever the award exceeds the condemnor's offer by 10 percent. Instead, the scheme takes into account the reasonableness of the parties' positions prior to trial. If the award in a case discussed above were $150,000 or less, the condemnor would not bear any of the condemnee's trial costs. Thus, the condemnor pays nothing unless the condemnee is ultimately awarded more than one-half the difference between the condemnor's best offer and the condemnee's best offer and even then the condemnee is entirely reimbursed only if the ultimate award is at least equal to the amount of his "best offer" prior to trial. The scheme might encourage condemnees to make a reasonable best offer prior to trial and, thus, permit the condemnor to avoid the need to try the case. At the same time, the scheme would encourage those condemnors who do not now offer a reasonable amount to do so.

Often the type of case that goes to trial is one where there is a real disagreement between the parties as to the highest and best use of the property or the severance damages or benefits. In such a case, since the property owner is an unwilling party to the action, it is not inappropriate that he recover not only the fair market value of his property but his expenses in obtaining an objective determination of that value to the extent that he has taken a reasonable position before trial. Can it be said that the property owner is given "just

compensation" where it is ultimately determined that his position prior to trial was substantially correct and he nevertheless must incur the cost of defending the action to take his property?

A careful reading of the background study will give you information needed to understand more fully the consultant's proposal and the competing policies that must be weighed in determining whether it should be adopted.

Appraiser's certification

The consultant notes that various studies have indicated that condemnors sometimes acquire property at less than their lowest appraisal. Although many, if not most, California condemnors offer the condemnee at least the amount of the lowest appraisal, it is not unlikely that some California condemnors follow the same practice of acquiring property at the lowest possible price, even at a price below what their lowest appraisal shows the value of the property to be. The consultant suggests that the condemnor should not offer less than the value set out in an appraisal report prepared for the condemnor. He suggests that this objective can be achieved by requiring that the appraiser on whose report the condemnor wishes to rely in making its initial offer certify to the amount at which he valued the taking and that the vesting of title in the condemnor should then be conditioned on its obtaining a receipt signed by the condemnee stating that such a certification has been given to him. This would, of course, require that an appraisal be made before the condemnor makes an offer to buy the property and might present a problem where the value of the property is a nominal amount (such as $50).

Arbitration

Within the past year, the American Arbitration Association has adopted a set of eminent domain arbitration rules, thus seeking to provide an independent tribunal which is cheaper and more expeditious than the courts. The consultant points out the problems that would exist in submitting an eminent domain controversy to arbitration. Nevertheless, the staff believes that the comprehensive statute on eminent domain should include a section permitting the parties to submit a controversy as to the value of property sought to be taken by eminent domain to arbitration. Otherwise, it will not be clear that this means of resolving valuation problems is available in condemnation cases. In some cases, one expert appraiser could be appointed as the arbitrator by agreement of the parties and could examine the property and give it a value that would be binding on both parties. One change made in the California Arbitration Act by the Law Revision Commission was to provide that an appraisal can be a matter submitted to arbitration. There could be considerable savings since neither party would need to prepare and present appraisal evidence.

Selecting an independent appraiser

A difficulty that frequently faces a property owner whose land is to be taken for a public project is that he (or his attorney) must determine whether the condemnor's offer is reasonable. Ordinarily, this requires that the property owner retain an appraiser to advise him as to the reasonableness of the offer. Thus, even in cases where the property owner decides ultimately to accept the condemnor's offer, he often must incur the expense of obtaining an appraisal of his property.

The consultant suggests that the condemnee have a right to have an independent, nonpartisan appraisal of the property made at the condemnor's expense. The independent appraiser would be selected by agreement of the parties or by a nonpartisan institution, such as the American Arbitration Association.

The consultant suggests the details of the scheme in the research study at pages 35-38.

Independent appraisal report as public record

So that the independent appraisal devise may serve its purpose of supplying competent and impartial valuation information, the consultant recommends that a copy of each independent appraisal report (no matter which method of selection is employed) to be filed as a public record. (He further recommends that government licensing should be required if this proposed minimal step turns out to be insufficient.) Making these reports generally accessible would invite the attention, hopefully systematic, of interested private groups, especially the AAA, professional appraisal organizations, and the condemnation bar. In this way, appraisers who show bias or incompetence could be identified and denied appointment.

Legal instructions

The consultant discusses the problem of giving the appraiser legal instructions. See the research study at pages 39-40.

The staff doubts that the problems involved in the parties' giving the appraiser legal instructions justify the complexity that would be required to deal statutorily with these problems. The appraisal is only as good as the appraiser. His ability to understand and apply

legal principles of valuation would seem to be a matter that goes to the worth of the report, just as would the extent to which he has uncovered and properly used market data in determining the value of the property.

Alteration of cost allocation system if independent appraisal obtained

The consultant suggests that the condemnee should be deterred from proceeding unnecessarily to trial when an independent appraisal has been provided. Hence, where an independent appraisal has been made and the condemnee rejects an offer by the condemnor to settle on that basis, the consultant recommends that none of the condemnee's trial costs should be charged to the condemnor unless the ultimate award exceeds the amount set by the independent appraiser by more than 10 percent. (The consultant indicates that 10 percent either way is the range within which competent and unbiased appraisers can be expected to differ.) The consultant also discusses how the problem of uncertainty in the law should be dealt with. See the background study at pages 39-42.

The staff believes that, if an independent appraisal is provided the property owner at the expense of the condemnor and the condemnor offers the property owner the amount of the appraised value, the condemnee should under no circumstances be permitted to recover presently unreimbursed trial costs. We would make no special provision in the statutory scheme for an error or controversy as to the law applicable since this would merely unnecessarily complicate the statute. This recommendation would encourage the condemnor to offer the appraised value and would encourage the condemnee to accept the offer.

Independent appraiser as impartial expert witness

The parties would be further discouraged from going on with the trial if the independent appraiser were permitted to testify at the trial as an impartial expert witness and the jury were informed that he was an impartial expert witness. See the discussion in the research study at pages 42-45.

Respectfully submitted,

John H. DeMoully
Executive Secretary

EXHIBIT I

Extract -- 7 Nichols on Eminent Domain (3d Ed. 1968) § 15.03

§ 15.03 Reform Proposals Relating to Attorney's Fees

A number of reformers have suggested that condemnees be reimbursed for both counsel fees, as well as all the incidental costs incurred by them. Their principal argument is that the condemnee is brought into court through no fault of his own, that legal representation is essential if the property owner expects to obtain just compensation, and he will not have received that compensation if he is given the value of his property but must then pay over part of the award to his lawyers. Most proposals would limit the situations in which litigation expenses would be allowed the condemnee. One suggestion would condition the allowance of fees and costs upon

(1) the condemnee having submitted a counter-offer to the condemnor's initial offer; and
(2) the final award exceeding, by at least 25 percent, the condemnor's offer.[15]

Another proposal would allow litigation expenses in the following circumstances:

(1) where the court determines that a condemnation was unauthorized;
(2) where the condemnation is abandoned; or
(3) where a property owner brings an action in the nature of inverse condemnation and obtains an award of compensation.[16]

The New Jersey Commission suggested that the condemnee be allowed attorney and expert fees if the award exceeds, by at least 25 percent, the amount of the offer made during negotiations; however this allowance could not exceed 10 percent of the award.[17]

Those who oppose the allowance of litigation expenses to the condemnee point out that litigation results from condemnee's unreasonable demands as well as from condemnors' niggardly offers. To discourage these excessive demands by owners, some members of the New Jersey Commission suggested that the condemnor's litigation costs be imposed on the condemnee, if the award was less, by at least 25 percent, than the amount demanded.[18] Florida is the only state which allows *all* litigation expenses incurred by the condemnee irrespective of the outcome of the suit; and experience there indicates the need for some restriction on the payment of these expenses. The results of a 1950 decision[19] holding that the condemnee must be paid for appraisers', engineers', and photographers' fees (as well as attorneys' fees) were: (1) to reduce the percentage of properties acquired by purchase from ninety before 1950 to twenty by 1957, and (2) to substantially increase the cost of acquisition—with a large part of the increase attributable to the litigation expenses of condemnor and condemnee.[20]

[15] Report of the New Jersey Supreme Court's Committee on Eminent Domain, in Hearings Before the New Jersey Senate Eminent Domain Revision Commission at 91 (Nov. 1963).

[16] Select Sub-Committee on Real Property Acquisition, House Committee on Public Works, 88th Cong., 2d Sess., Study of Compensation and Assistance for Persons Affected by Real Property Acquisition in Federal and Federally Assisted Programs at 129 (1965).

[17] Report of the New Jersey Legislative Eminent Domain Revision Commission at 7, 16-17 (1965).

[18] *Ibid.*

[19] Dade Co. v. Brigham, 47 So. 2d 602 (Fla. 1950).

[20] Britton, "Effect in Florida of Requiring Condemnor to pay Condemnee's Entire Litigation Expenses, in Hearings Before New Jersey Senate Eminent Domain Revision Commission at 161-162 (Nov. 1963).

36 1/15/69

CONDEMNATION LAW AND PROCEDURE

ALLOCATING THE COSTS OF DETERMINING "JUST COMPENSATION"*

*This study was prepared for the California Law Revision Commission by Professor Douglas Ayer. No part of this study may be published without prior written consent of the Commission and the Stanford Law Review.

The Commission assumes no responsibility for any statement made in this study, and no statement in this study is to be attributed to the Commission. The Commission's action will be reflected in its own recommendation which will be separate and distinct from this study. The Commission should not be considered as having made a recommendation on a particular subject until the final recommendation of the Commission on that subject has been submitted to the Legislature.

Copies of this study are furnished to interested persons solely for the purpose of giving the Commission the benefit of the views of such persons, and the study should not be used for any other purpose at this time.

This study will be published in the Stanford Law Review.

ALLOCATING THE COSTS OF DETERMINING "JUST COMPENSATION"

I. THE IMPLICATIONS OF THE PURPOSE OF THE EMINENT DOMAIN POWER

Eminent domain law allows condemnors to substitute a judicial proceeding for a market transaction as a means of acquiring property. One function performed by the procedural rules which govern the conduct of the participants in the condemnation process is that of allocating among the participants the costs occasioned by the exercise of the eminent domain power. A useful starting point for an inquiry as to whether the correct allocation of these costs is being made is to ask in what respects the effects of the market are considered deficient. From an examination of the purpose of the eminent domain power, we will proceed to considerations of how the costs attending its exercise should be allocated.

The willing-seller-willing-buyer price

The sole issue in most condemnation actions is the amount the condemnee should be paid for his property. That amount is supposed to represent the price that a property owner who was willing to sell but did not have to could get from a buyer who did not have to have the property but would like to have it.[1] There are several reasons why the condemnee would be unwilling to sell his property to the condemnor at that price were it not for the legal compulsion of the eminent domain power. For one thing, the condemnee might have a sentimental attachment to the property and be unwilling to part with it. But the condemnee's disinclination to sell at that price need not be rooted in sentimentality. Selling his property may require his incurring replacement and relocation costs which exceed the price that eminent domain law requires condemnors to pay for the land. Moreover, the condemnor may be unable to

make the public improvement elsewhere, in which case the condemnee is in a position to exact a "monopoly toll" for his property.[2]

Since the land needed for public improvements would not always be forthcoming at willing-seller-willing-buyer prices, some public improvements now made would be abandoned or altered if condemnors had to operate through the actual real estate market. The result of this would be that the condemnor's services would be quantitatively or qualitatively diminished. Fewer parks or schools, for example, might mean either less recreation or education or a poorer quality because more intensive use had to be made of fewer facilities. Or, if highways or railroad tracks had to be built with more curves, that might mean an increase in delay and accidents. The result of diminished services is not necessarily undesirable, for the land that would otherwise have been used for a public improvement might be left to a use that would augment the gross social product more. Suppose that a monetary value could be imputed to the greater or superior service that making the public improvements would enable the condemnor to render.[3] Suppose, further, that in order to keep the land the condemnee would be willing to pay the condemnor more than the difference between the imputed value and the willing-seller-willing-buyer price (which the condemnor would not have to pay if it abandoned the taking). Assuming we count the monetarily expressed preferences of each person equally, the land in our hypothetical should remain with the condemnee. The exercise of the eminent domain power in such cases must be explained in terms of the practical difficulty of confidently imputing monetary value to the kind of services that condemnors render or as a rejection

of the equal counting assumption once the willing-seller-willing-buyer price is exceeded. The current reexamination of whether compensation should reflect replacement and relocation costs is evidence that the latter explanation is subject to question.[4] Since it is not the purpose of this Article to contribute to that inquiry, I shall assume that the elements of compensation have been properly defined and that, insofar as that definition implies a rejection of the equal counting assumption, the rejection was intended.[5] Suffice it to note that the more a condemnee is made whole for a taking, the less likely that land will in fact be put to a public use which is less productive of social welfare (as determined if each person's monetarily expressed preferences are counted equally) than would be leaving the land to its private use. Also, the more this is done, the more the justification for the eminent domain power must be in terms of avoiding monopoly tolls.

Not all condemnees who refuse to sell at the willing-seller-willing-buyer price would be willing to pay the difference between the imputed value and the willing-seller-willing-buyer price, and continued use of the land by them would not augment the gross social product as much as would its use by the condemnor.[6] The relevance of the net social benefit of the prospective public improvement in their situations is that it sets a limit on the monopoly tolls they can exact from the condemnor. If they demand more than the difference between imputed value and the willing-seller-willing-buyer price, it will be cheaper for the condemnor to abandon or alter the taking, in which case the windfall-seeking condemnees will have priced themselves out of the windfall. Society has no occasion to regret their loss, but it may well regret the fact that the land of these condemnees is being used in a less socially productive

fashion (again, each person's monetarily expressed preferences are being counted equally) than it would have been had the condemnees received their windfalls and had the condemnor obtained their property. This unhappy occurrence could come about because too many condemnees demand monopoly tolls which, individually or in the aggregate, exceed the difference between imputed values and willing-seller-willing-buyer prices.[7] If there were no transaction costs, no legal impediments to bargaining and the windfall-seeking condemnees were all rational, they could work out among themselves a contractual arrangement which would assure that their demands did not exceed the monopoly tolls which the condemnor could pay and still benefit from the public improvement that it would then be able to make.[8] A legislature could remove any legal impediments to such an arrangement, but there would still be transaction costs (such as identifying the windfall-seeking condemnees, getting them together, negotiating each contracting party's share in the monopoly tolls that the condemnor could pay, etc.) and perhaps irrational condemnees as well who could not perceive the advantage of entering into such an arrangement. To meet these problems, some form of governmental coercion seems to be required, and the eminent domain power can be seen as serving this purpose.[9]

But this purpose does not require that the condemnees be denied the monopoly tolls they seek. So long as miscalculations do not result in abandonment or alteration of the public improvement, monopoly tolls need not impose any cost on society but would simply transfer wealth (the difference between imputed values and willing-seller-willing-buyer prices) from the condemnor to the condemnees.[10] Payment of monopoly tolls would give rise to social costs, however, if condemnors' revenues could not

be increased without engendering costs which might take the form of campaigns for and against higher taxes (if the condemnor is a government agency or is funded out of the public treasury) or rate hearings before a regulatory agency (if the condemnor is a public utility). But aside from this, the objection to monopoly tolls is not economic but either practical (the difficulty of confidently imputing monetary value to the kind of services condemnors render) or ethical (equating fairness with the willing-seller-willing-buyer price). The equation of fairness with the willing-seller-willing-buyer price may reflect the principle which is quite common to political philosophy that inequalities are unjust which are not won in return for a contribution to the common advantage.[10a] If paying condemnees more than the willing-seller-willing-buyer price in connection with the exercise of the eminent domain power in no way increases general welfare (and, given what we have said up to this point, it does not[10b]), the payment of a greater amount would make condemnees better off while those who constitute the revenue bases of condemnors (taxpayers if the condemnor is a government agency or is financed by the government, consumers if the condemnor is private--e.g., a public utility) would be made worse off without any contribution to the common advantage to justify it. Thus questioning whether the equation of fairness with the willing-seller-willing-buyer price is proper would entail an investigation of the revenue bases of condemnors, the tax structure applicable to condemnees and the preexisting distribution of wealth as between these two groups, since the issue comes down to whether condemnees should be enriched at the expense of taxpayers (if the condemnor is a government agency) or consumers (if the condemnor is private, e.g., a

public utility).[10c] Again, since it is not the purpose of this Article to explore that question, I shall assume that eminent domain law correctly disfavors windfalls to condemnees.

Determination costs

One reason why society is generally willing to tolerate refusals to sell and monopoly tolls as aspects of the actual real estate market is that their avoidance is not without social costs of its own. One such cost is that of determining the willing-seller-willing-buyer price which eminent domain law prescribes, but which, in the context of a nonmarket transaction, can only be estimated. These "determination costs" engendered by the land acquisition operations of an agency possessing the eminent domain power might, over a given period of time, exceed the costs of operating entirely through the actual market which would have been incurred had that agency not possessed the eminent domain power during that time period.[11] To obtain a figure for the market cost aspect of this comparison, we would have to start by imputing a monetary value to the greater and superior services that the condemnor would be unable to render if it were unable to acquire the land needed to make the necessary public improvements or to make them in the most efficient manner. From this, we would have to subtract the value of the alternative use to which the land would continue to be put. Since we assumed a rejection of equal counting of monetarily expressed preferences beyond the willing-seller-willing-buyer price, the value ascribed to the alternative use cannot exceed that price. The costs of operating through the actual market are hard to compute with any confidence, but without resolving that problem, an indication could be given that the costs of market

operations are thought to exceed determination costs if the system for allocating determination costs were such that agencies possessing the eminent domain power were required to assume all determination costs occasioned by their land acquisition operations.

At present, California condemnors--and those in most other jurisdictions[12] --do not bear all determination costs incident to their exercise of the eminent domain power. When American lawyers speak of "costs" in the context of litigation, they are referring to those items generally taxable to the losing party, such as fees paid to various court officials, ordinary witness fees and mileage allowances, disbursements for printing, and some deposition expenses. California law does require that condemnors always bear these costs in the trial of condemnation cases.[13] But except when a condemnor decides not to take after the condemnation action has been commenced, California condemnors are not required to bear condemnees' traditionally nontaxable trial costs.[14] These include such substantial items as attorneys' fees and fees paid to experts for investigating and marshaling evidence and for testifying at trial (which greatly exceed the statutory allowance for ordinary witnesses).[15]

Litigation avoidance payments

An argument against requiring condemnors to buy a lawsuit each time they take a parcel of land is that such a requirement would increase litigation. The implicit assumption underlying this argument is that litigation is a sort of a necessary evil to be minimized as much as possible. Of this, we will have more to say later. Preliminary to that, however, it should be pointed out that the result of requiring condemnors to assume condemnees' trial costs in every case might not be an increase

in litigation but an increase in "bribes" which condemnors would pay condemnees (in the form of higher purchase prices) to avoid litigation. Unlike litigation, which employs resources--lawyers, appraisers, secretaries, etc.--that could be put to some other productive use, litigation avoidance payments simply transfer wealth from condemnors to condemnees and are not likely to make any greater demand on society's resources. Thus, from society's point of view (but not, of course, from the condemnor's), litigation avoidance payments are probably costless and will be assumed to be so throughout this Article.[16] That does not mean they are unobjectionable, especially if, as has been assumed, a purpose of eminent domain law is to equate fairness with the willing-seller-willing-buyer price and to avoid windfalls to condemnees. Litigation avoidance payments in the form of compensation beyond that price are simply another variety of windfall. This variety may be smaller and easier to distribute more evenly among condemnees than was the case with the monopoly toll variety discussed earlier. While these features may make litigation avoidance payments less objectionable than monopoly tolls, the size of a transfer of wealth and the facility with which it can be evenly distributed among the potential transferees are not reasons in themselves for requiring the transfer. What would constitute a good reason for requiring the transfer would be if condemnation litigation decreased as a result. This might occur if the prospect of always bearing condemnees' trial costs induced condemnors to offer purchase prices that were high enough to encourage a greater number of condemnees to accept and refrain from going to trial. Should this happen, we would then have to choose between insisting on a no-windfall policy at a cost to society or allowing condemnees to enrich themselves at condemnors' expense but at no cost to society.

It may be possible to avoid such a choice by devising a cost allocation system that would allow us to insist on a no-windfall policy but without an increase in litigation. But we may not be able to recognize when we have such a system. The difficulties of measuring the level of litigation that any cost allocation system produces are not insuperable, but the extent of objectionable litigation avoidance payments is virtually impossible to measure because of the large subjective element involved in identifying them. If we use the term to designate the difference between the purchase price of a taking and the amount of compensation that a party reasonably anticipates would have been awarded at trial, the problem is discerning what the party honestly estimates that the trial award would have been. Yet we must mean something like that when we speak of objectionable litigation avoidance payments in the context of a cost allocation scheme that would impose all trial costs on the condemnor. What is objectionable is that litigation avoidance payments are paid on top of the willing-seller-willing-buyer prices, thereby giving windfalls to condemnees. But the willing-seller-willing-buyer price must be estimated when the buyer possesses the eminent domain power.[17] Determination of that price by a compromise between the parties which results from their mutual uncertainty as to the outcome of a trial is not objectionable. Thus, the term "litigation avoidance payment" will be used in this Article to refer to the "bribe" a condemnor will add to (or a condemnee will subtract from) its offer not because of significant doubt that an amount close to the offer would be awarded at trial but because the "bribe" is less than the trial costs which the party paying it expects to bear if litigation ensues.

Litigation avoidance payments can be expected to occur most frequently if either party is required to bear the full costs of any trial which occurs. Should such a requirement be placed on condemnors, a condemnee would have nothing to lose from resorting to trial whenever the condemnor offered only so much as the condemnee could reasonably anticipate recovering at trial. But litigation avoidance payments can occur under California's present cost allocation system as well. For example, if the condemnor believed that a jury would find the taking to be worth $18,000 and the condemnee thought the jury would award $22,000, they might settle for $20,000. The settlement could be the result of each party's lack of confidence in its prediction of the jury's behavior, in which case there would be no litigation avoidance payments, as we have defined the term. But if the reason for settling at $20,000 was that each party would have to bear trial costs in excess of $2,000 no matter what the outcome of the trial, each party made a litigation avoidance payment of $2,000. Litigation avoidance payments under the present cost allocation system need not be symmetrical, as in the above example, for one party may be in a better position to bluff. For example, while a condemnor would have to incur trial costs to defend an offer which it may anticipate is below the amount of compensation a trial would award, the present cost allocation system would also impose substantial trial costs on the condemnee even though the condemnee demanded no more than what was recovered at trial. The condemnor may be able to obtain a litigation avoidance payment (in the form of acceptance of its low offer) by making clear its willingness to incur its trial costs so as to inflict trial costs on the condemnee. The converse situation is also imaginable.

Our definition of litigation avoidance payments enables us to devise a cost allocation system which, if it produced no increase in litigation, would obviate the choice between insisting on a no-windfall policy at a cost and allowing windfalls to condemnees. Since litigation avoidance payments have been defined in terms of avoiding those trial costs that a party would have to assume whatever the result at trial and not in terms of avoiding the uncertainty as to what the result will be, litigation avoidance payments would be impossible if each party were assigned that share of the trial costs which corresponded with that party's responsibility for making the trial necessary. To the extent that each party "caused" the trial, each party should pay for it.

A quantitative measure of causation

An administratively convenient technique for attributing causation is made possible in "direct" condemnation proceedings (those in which the condemnor acknowledges that it is exercising the power of eminent domain)[18] by the fact that a single question of "how much" is usually all that divides the parties. The touchstone of the compensation question, as noted before, is the willing-seller-willing-buyer price. While this price is hypothetical when the buyer is a condemnor and can only be estimated, the result of the condemnation process in trying to determine this hypothetical price is known with exactitude after the fact. By taking the figure arrived at by the ultimate decision maker in the condemnation process as the goal, the extent of each party's responsibility for proceeding to trial can be assessed by comparing their respective bargaining positions prior to trial to the compensation awarded at trial. The trial costs could then be divided between the parties in proportion to the extent of their responsibility, as thus defined.

A suggested cost allocation system

A cost allocation system which reflected this quantitative measure of causation might work as follows: Each party would be required to make a "best offer" in writing to the other party. A best offer should mean the highest offer made by the condemnor and the lowest offer made by the condemnee at any time prior to trial which is not revoked before trial. To prevent the cost allocation scheme from influencing the jury's deliberations about compensation, no offer made by either party should be admissible at trial. If the ultimate award does not exceed the condemnor's best offer or if the condemnee fails to make an offer, the condemnee should be charged with all trial costs. If the award is no less than the condemnee's best offer or if the condemnor fails to make an offer, the condemnor should bear all trial costs. If the award falls between the parties' best offers, the difference between the parties' best offers should be treated as the denominator, and the variation between each party's best offer and the award should be treated as that party's numerator. Each party should be allocated that fraction of the total trial costs. For example, if the final award were $150,000 and the condemnor had offered $100,000 while the condemnee had demanded $200,000, each party should bear half of the total trial costs. But, assuming best offers of $100,000 and $200,000, if the award had been $125,000 (or $175,000), the condemnor (or the condemnee) should be assessed only one-fourth of the trial costs with the balance assigned to the condemnee (or condemnor).

Litigation avoidance payments are eliminated under this cost allocation system, for a party can anticipate being reimbursed for its trial costs if it is sure that its offer is close to the amount that

will be awarded at trial. The effect of this will be to increase the inclination of a party to go to trial when it feels certain about its offer. Let us return to the example given earlier of the parties that settled for $20,000 when the condemnor believed that the jury would award no more than $18,000 while the condemnee thought that at least $22,000 would be awarded. If this settlement occurred because each party would have to bear more than $2,000 in trial costs no matter what the outcome, a lawsuit would ensue under the suggested cost allocation system since each party would anticipate recovery of its trial costs from the other. But if the parties lacked confidence in their predictions, they would be more inclined toward settlement under the proposed cost allocation system for the risks of going to trial would then include being assigned the other party's trial costs. Thus, in situations in which the parties feel uncertainty, the suggested cost allocation system, more than any other, would discourage litigation. In addition, by making the consequences of a party's mistaken estimate more serious, the suggested cost allocation may cause parties to question their feelings of certainty in situations where, under other cost allocation systems, they would confidently push on to trial. On balance, it seems unlikely that the suggested cost allocation system would result in more litigation than systems in which litigation avoidance payments are possible. If anything, we might expect it to produce less litigation.

II. THE LEGITIMATION FUNCTION OF JUDICIAL DECISIONS

The assumption which underlies the cost allocation system based on the quantitative measure of causation is that judicial decisions are something of an evil made necessary by the failure of one or the other or both of the parties to acknowledge the correct amount of compensation due for the taking. Given this assumption, the costs of the necessary evil should be allocated on the basis of each party's degree of responsibility in making the evil necessary, and the quantitative measure of causation is a device well enough suited to that purpose. But this assumption would be true only if there were no value in having the claim of an interested party legitimated by an authoritative and disinterested tribunal. We have yet to inquire whether judicial decisions in condemnation cases perform a legitimation function which would justify a modification in the suggested cost allocation system. If, for example, a jury awards what the condemnor offered before trial, is the jury's determination of compensation worth no more than that of the condemnor, so that the condemnee should be required to assume all of the condemnor's trial costs as well as the condemnee's own?

Demoralization costs

A recent article by Professor Frank I. Michelman[19] is helpful in answering this question. Professor Michelman is concerned with distinguishing those instances in which compensation should be paid for the injurious results of governmental activity from those in which it should not, or, as the more traditional phrasing would have it, what constitutes a "taking" as distinguished from an exercise of the "police power." Michelman observes that some governmental activity is undertaken

solely because it is thought to bring about an augmentation of the gross social product not otherwise obtainable.[20] He calls this justification "efficiency"[21] and distinguishes it from other justifications for governmental activity such as "equality"[22] or "commutative justice."[23] Any economic harm resulting from governmental activity undertaken out of efficiency considerations will appear as a capricious redistribution of wealth from those harmed to those benefited by the activity, unless those harmed are compensated for their economic losses.[24] Disutilities, the impairment of incentives to engage in socially productive pursuits and social unrest will result when those harmed, their sympathizers and other observers disturbed by the thought that they themselves may be subjected to similar treatment on some other occasion perceive uncompensated losses inflicted by efficiency-motivated governmental activity.[25] These are labelled "demoralization costs" by Michelman.[26] To avoid demoralization costs by compensating for the losses, it is necessary to incur "settlement costs" which include not only the cost of determining the amount of compensation to be paid (what we have been calling determination costs) but also the cost of identifying compensable claims.[27] The compensation payment itself should not be regarded as a settlement cost. Whether compensation is actually paid or not, the potentially compensable economic losses caused by the governmental activity will be sustained by society and will offset the gross social benefits which the activity brings about. Unless there are net social benefits (in other words, unless the benefits of the activity exceed its losses), the activity should be abandoned, even if compensation is not actually paid.[28] But it is not enough if the benefits exceed only the potentially compensable losses (which, given

our assumptions, should be valued at willing-seller-willing-buyer prices). Michelman's point is that further social costs are generated by efficiency-motivated governmental activity--either demoralization costs (if compensation is not paid) or settlement costs (if compensation is paid).[29] The utilitarian solution to the problem of which one should be incurred[30] --and, as Michelman shows, the "fair" solution as well[31] --is to pay compensation, thereby incurring settlement costs, when demoralization costs exceed settlement costs, and not otherwise.

Since direct condemnation actions are those in which the condemnor acknowledges that compensation is due, the question of whether or not to compensate has been settled. Perhaps we can surmise that the kinds of activities which result in direct condemnation actions (often involving what, but for the action, would be a physical invasion of property) would occasion the kinds of losses which, if uncompensated, would give rise to demoralization costs that would exceed the settlement costs involved in compensating.[32] Michelman offers a utilitarian defense of our surmise by pointing to the following behavioral assumption:

> Physical possession doubtless is the most cherished prerogative, and the most dramatic index, of ownership of tangible things. Sophisticated rationalizations and assurances of overall evenness which stand up as long as one's possessions are unmolested may wilt before the stark spectacle of an alien, uninvited presence in one's territory. The psychological shock, the emotional protest, the symbolic threat to all property and security, may be expected to reach their highest pitch when government is the unabashed invader.[33]

Since demoralization costs will run high when governmental activity involves physical invasion of property (as, but for the condemnation action, the construction of a public improvement on someone's land most clearly would), it is wise to identify physical invasion as a clearly compensable

occasion, thereby eliminating the identification aspect of settlement costs for at least some compensable claims.[34]

Legitimation

For such clearly compensable occasions as an acknowledged exercise of the eminent domain power, there remains that aspect of settlement costs which we have previously called determination costs. But also remaining are likely to be some demoralization costs, the dimension of which would depend on how compensation is determined. It seems implausible that the mere payment of compensation, by whomever determined, would be enough to avoid all demoralization costs, or perhaps even any. If the purpose of current compensation practices is explained as that of allaying the fears engendered by the spectre of strategic exploitation,[35] this purpose is surely not well served if compensation is determined by the condemnor--the potential exploiter. This should most especially be true in direct condemnation cases where such fears are apt to be most intense. From these observations we can conclude that the determination of compensation by the judicial system--an authoritative institution independent of the condemnor--is worth more than the condemnor's determination of compensation even if the judicial decision awards no more than the condemnor offered. By confirming the condemnor's determination, an element of legitimacy has been added, and the presence of this factor in the condemnation process is worth whatever additional demoralization costs (beyond those already avoided by the actual payment of compensation, without regard to who determines it) are thereby avoided.

Possible modification in cost allocation

Whether the cost allocation scheme should be modified depends on the magnitude of demoralization costs avoided by the legitimation function of judicial decisions and the increase in determination costs occasioned by the modification. If we assume that a shift to the condemnor of any trial costs which the suggested cost allocation scheme would assign to the condemnee will result in increased litigation, we can then make a comparison between the cost of the increased litigation and the demoralization costs avoided by the legitimation effected by the additional judicial decisions. No shift of trial costs from the condemnee to the condemnor will be justified if the resulting increase in determination costs is more than the decrease in demoralization costs. It may be that no increment of demoralization costs could be avoided by shifting condemnee-caused trial costs to the condemnor without increasing determination costs by an even larger increment. Were this the case, no modification in the cost allocation system based on the quantitative measure of causation would be warranted--at least not in the direction of making the cost allocation scheme more favorable to condemnees.

If, however, demoralization costs could be avoided which exceed in magnitude the increase in determination costs that would result were some condemnee-caused costs assigned to condemnors, such a modification would be called for. The shift of each group of condemnee-caused costs to condemnors should be tested by whether the resulting diminution in demoralization costs exceeds the resulting increase in determination costs. Thus, if the demoralization costs avoided by making trials cost-free to condemnees are thought to exceed the costs of extra trials,

condemnors should be assigned all trial costs in every condemnation action. But it may seem more probable that the demoralization costs which can be avoided by judicial legitimation are not of that large a dimension. Should this be the case, some encouragement for condemnees to go to trial in some cases should be given by shifting some condemnee-caused costs to condemnors. Again, it is a question of how much legitimation is worth. If it is worth very little, we might place the traditionally taxable costs (jury fees, ordinary witness fees, etc.) on condemnors whenever a condemnation case is tried but apply the suggested cost allocation scheme to the more significant trial costs (e.g., attorneys' and expert witnesses' fees). Should we conclude that the value of legitimation is somewhat greater, we might make the cost allocation scheme a one-way operation so that the condemnor would always bear its own trial costs (even in situations where a two-way operation would assign part or all of them to the condemnee) plus some portion of the condemnee's trial costs whenever the condemnee's best offer was closer to the ultimate award than was that of the condemnor. Other configurations can, of course, be imagined.

The system for allocating costs will probably affect the kinds of cases that go to trial as well as the total number. For example, cases in which one or the other party feels certain that its settlement offer is close to what would be awarded at trial will be more inclined to go to trial under the suggested cost allocation system (which provides for reimbursement of trial costs if the party's belief is substantiated) than would be the case under California's present cost allocation system (which leaves substantial trial costs with the party incurring them whatever the outcome). The reverse would be true when both parties were

uncertain about the result at trial (since the suggested cost allocation system makes a mistake in outcome prediction more costly to the party making it).

The avoidance of demoralization costs may be related to the kind of situation giving rise to litigation as well as the extent of litigation. We might expect that demoralization costs would be greatest in cases where condemnees feel certain that their settlement offers are not out of line with what would be awarded at trial but, because the cost allocation system is not keyed to the outcome of the trial, they choose to make a litigation avoidance payment by settling for a lower amount. If so, encouragement of litigation in that sort of case may be warranted by substituting a cost allocation system that provides for reimbursement of condemnee's trial costs when the condemnee's pretrial offer coincides with the ultimate award. The suggested cost allocation system does that, but it discourages litigation in another kind of case--where the parties are uncertain about the outcome of a potential trial. It seems quite possible that no demoralization costs result from a settlement that is the product of both parties' lack of confidence in their predictions of what the trial award would be. If this is correct, the suggested cost allocation system would not warrant modification on that score. But the degree of uncertainty that one party feels may be greater than that of the other, and a settlement under the suggested cost allocation scheme may seem to the condemnee the result of what he perceives as the condemnor's overconfidence. Demoralization costs may well arise in such a situation and they may well be great enough to justify whatever increased litigation resulted from a modification designed to avoid such situations (for example, making the operation of the suggested cost allocation system one-way).

The possibility exists, as has been suggested before, that the total amount of litigation will not vary significantly with the way in which trial costs are allocated between condemnors and condemnees. Shifting costs to condemnors may not produce increased litigation but only increased litigation avoidance payments. Simply making judicial decisions more cheaply available to condemnees may avoid some demoralization costs even though no greater numbers of condemnees actually go to trial, preferring instead to trade the opportunity to litigate at less cost to themselves for a litigation avoidance payment from the condemnor. Since higher litigation avoidance payments are costless to society (being only a transfer of wealth), any demoralization costs (which are social costs) that could be avoided by a shift of trial costs from condemnees to condemnors would be a net social benefit, assuming no increase in litigation. Consequently, if the total amount of litigation is unaffected by the cost allocation system, trial costs should be shifted from condemnors to condemnees in those situations where imposition of trial costs on condemnees would be expected to give rise to demoralization costs.

In order to choose one cost allocation system over any other, we must at least narrow the range within which the value of legitimation falls. Empirical data on the diminution of demoralization costs resulting from the availability of judicial decisions may never be obtainable.[36] Assumptions can be derived, however, from an examination of present cost allocation patterns in condemnation actions.

Present cost allocation patterns

Cost allocation patterns throughout the United States are diverse but almost all share one characteristic. No departure from a jurisdiction's general system of trial cost allocation is ever made in the direction of imposing trial costs upon condemnees which would not be assigned to losing parties generally.[37] The behavioral assumption underlying this practice must be as follows: In a sense, the condemnee can be said to be in court simply because the condemnor is able to make better use of the condemnee's land. In another sense, of course, the condemnee who is in court can be said to have brought trouble upon himself to the extent that his pretrial demand for compensation exceeds the award by more than the condemnor's best offer falls short of the award. It is causation in this sense that is gauged by the quantitative measure upon which the suggested cost allocation system is based. But the reason the condemnee is required to make a demand for compensation is that the gross social product is augmented by having a public improvement built upon his land and not because of some wrong committed by the condemnee[38] (or, in Michelman's terms, because of "efficiency" rather than "commutative justice").[39] It is not hard to imagine that reallocation to the condemnee of the generally nontaxable trial costs incurred by the condemnor will be viewed as punishment, and the introduction of this element of punishment against a condemnee whose demand is not as close to the ultimate award as is the condemnor's offer adds insult to injury, increasing the feeling that the condemnee has been put upon in the course of a process that begins by involving any particular condemnee only as a matter of public convenience.

Allocation patterns with respect to trial costs incurred by condemnees and generally taxable costs incurred by condemnors vary widely from state

to state and even from condemnor to condemnor within some states.[40] In some jurisdictions, all such costs are left with the party incurring them.[41] In other jurisdictions, some or all of the condemnee's various cost items--traditionally taxable costs,[42] attorneys' fees,[43] expert witnesses' fees[44] --are routinely assigned to the condemnor. In still other jurisdictions, some or all of the condemnee's trial costs are reallocated to the condemnor if the award exceeds the condemnor's offer[45] or if the court, in the exercise of its discretion, so decides.[46] Traditionally taxable costs incurred by the condemnor are sometimes assigned to the condemnee when he fails to better the condemnor's offer[47] or when he unsuccessfully appeals or gets a new trial which results in an award that is no higher than that of the first trial.[48] This diversity (in contrast to the near uniformity that prevails with respect to allocation of condemnor's generally nontaxable costs) indicates that assignment to condemnees of trial costs incurred by condemnees and traditionally taxable costs incurred by condemnors is, on a nationwide basis, regarded only ambivalently as punishment. Because the jurisdiction's general tradition of cost allocation in litigation may well affect expectations of condemnees and potential condemnees, bearing one's own trial costs or even those traditionally taxable costs of one's opponent may not seem punitive, whereas being assigned the generally nontaxable costs of one's opponent most certainly would.

The present cost allocation patterns and the behavioral assumptions which probably underlie them give some evidence that the element of legitimacy supplied by judicial determinations of compensation warrants a shift to condemnors of at least that part of generally nontaxable trial

costs incurred by condemnors which the cost allocation system based on the quantitative measure of causation would reallocate to condemnees. Thus, because of the near uniformity of the practice, it will be assumed that condemnors should bear all generally nontaxable trial costs incurred by them. As to condemnee-incurred costs and traditionally taxable costs incurred by the condemnor, however, no strong tendency exists in present cost allocation patterns to indicate that the suggested cost allocation system should not apply.

Nonetheless, in California[49] and elsewhere,[50] a constitutional impediment exists to assigning traditionally taxable costs, by whomever incurred, to condemnees until a trial has resulted in an award from which the condemnor does not wish to appeal.[51] Reallocation of traditionally taxable costs incurred by the condemnor on an appeal taken by the condemnee or at a new trial granted at the condemnee's behest is keyed to the condemnee's lack of success at these subsequent stages in the condemnation process[52] and not, as with the suggested cost allocation system, to comparative proximity of the best offers made by the parties before trial to the ultimate award. Thus, a reason of expediency exists for confining the operation of the suggested cost allocation system to traditionally nontaxable costs, leaving traditionally taxable costs (which are typically an insubstantial part of litigation expense anyway)[53] to be allocated within the framework of present law. Consequently, "trial costs" as used henceforth in this Article will refer only to traditionally nontaxable costs (such as attorneys' fees and expert witnesses' fees).

A recommended cost allocation system

Based on the above considerations, I recommend that the following system be adopted for allocating trial costs in condemnation cases: Each party should be required to make a best offer, as explained in connection with the cost allocation scheme suggested earlier. If the ultimate award does not exceed the condemnor's best offer or if the condemnee fails to make an offer, the parties should bear their own trial costs, that is, those incurred by them. If the ultimate award is no less than the condemnee's best offer or if the condemnor fails to make an offer, all of the condemnee's trial costs should be reallocated to the condemnor. If the award falls between the parties' best offers, the difference between the condemnee's best offer and the condemnor's should be treated as the denominator and the difference between the award and the condemnor's best offer should be treated as the numerator. If the resulting fraction is one-half or less, no reallocation of trial costs should occur. If the resulting fraction is more than one-half, the condemnor should be assigned that percentage of the condemnee's trial costs equal to twice the percentage by which the resulting fraction exceeds one-half. Suppose, for example, that the best offers were $100,000 and $200,000 respectively and the award was $155,000. The resulting fraction exceeds one-half by 5%, so the condemnor should bear 10% of the condemnee's trial costs. Were the excess over one-half not multiplied by two, the condemnee could never recover more than one-half of his trial costs, no matter how close his demand was to the ultimate award, unless his demand was equal to or less than the award.

54

III. LEGITIMACY AND NONJUDICIAL DETERMINATIONS OF COMPENSATIONS

Condemnors acquire most of the property needed for public improvements without resort to trial.[55] Land purchased from a condemnee whose negotiating ability, knowledge of value and bargaining weapons are evenly balanced with those of the condemnor should not be expected to give rise to demoralization costs. But indications are that no such balance exists. Condemnors are typically represented in negotiations by a staff member--often with the title of "negotiator"--who is particularly qualified to perform the task.[56] Condemnees, on the other hand, often negotiate on their own behalf, without the benefit of an attorney.[57] While most condemnors have each parcel appraised before entering negotiations for it,[58] a condemnee will usually conclude negotiations without ever having an appraisal made of his property or that part which is being taken.[59] We can take no comfort in the possible surmise that condemnees who fail to have their property appraised know its value.[59a] All available, objective information indicates that, where the condemnor's practice is to begin negotiations by offering less than the condemnor-approved appraisal, a number of purchases will be made at less than the condemnor-approved appraisal.[60] For example, a Congressional investigation of real property acquisitions in federal and federally assisted programs revealed that nearly a quarter of the purchases made by the U.S. Army Engineers (the largest federal land acquisition agency) were made below that agency's appraisals.[61] And a most significant study of the condemnation practices of Nassau County, New York found that the price paid for approximately five out of every six parcels which Nassau County acquired by negotiation was less than the value set by the lower appraisal report prepared for the County.[62]

The condemnee who does not know his property's value and accepts the condemnor's below-appraisal offer in the belief that the condemnor is dealing fairly with him will not experience demoralization costs, at least not at that time. Whether he or anyone else (both other condemnees and potential condemnees) will ever experience demoralization costs depends on how successful the condemnor is at concealing the practice of initially offering less than appraised value. It seems a fair assumption that in a free society such a practice is unlikely to remain a secret for long, and when it does become generally known, such a practice will surely strike those who were or might be subjected to it as petty exploitation.[63] In short, such a practice engenders precisely the effect that it is the purpose of compensation payments to avoid. Moreover, once the news is out, it creates an attitude that "you can't beat city hall" which cannot be erased by simply stopping the practice. The condemnation process must be arranged in such a way as to put condemnees on a relatively equal footing with condemnors and to call attention to such an arrangement.

Appraiser certification

The proposed solutions have ranged from declarations by the legislature[64] or the condemning agency[65] of a policy to offer no less than the value set by a condemnor-approved appraisal (without providing a mechanism for enforcement of the policy) to the institution of an ombudsman or an amparo process[66] (which would provide condemnees with an effective means of complaining if they suspected that the condemnor was not complying with the policy). It would seem, however, that if the objective is merely that of assuring condemnees of the value set in an appraisal report prepared for the condemnor, the most effective and least costly technique

would be a requirement that the appraiser on whose report the condemnor wishes to rely in making its initial offer certify to the amount at which he valued the taking. The vesting of title in the condemnor should then be conditioned on its obtaining a receipt signed by the condemnee and stating that such a certification had been given to him.

Condemnees' bargaining weapons

Such a requirement would be a helpful step and should be taken, for it would give a greater measure of protection to those condemnees who are the least knowledgeable about value. But it would be of little assistance to those condemnees--only slightly more sophisticated--whose knowledge of value consists solely of an uneasy feeling that the condemnor's offer is low, even though it is the value set by an appraiser selected by and working for the condemnor. Many of these condemnees may feel forced to accept an offer which they regard as insufficient because they perceive an imbalance in bargaining weapons and conclude that they lack effective means of resisting.

Their perception is not without merit. A condemnee's chief weapons are delay and resort to trial. The former is most effective where condemnation law does not provide for possession by the condemnor prior to final judgment (which is commonly referred to as the "right to immediate possession" or "quick taking") and against a condemnor that has not allowed sufficient "lead-time"--the time interval between the initial decision to build the public improvement at a particular location and the beginning of construction. But even in the most propitious circumstances the condemnee must be sufficiently well off so that he can be unconcerned with the deleterious effect that the mere commencement of condemnation proceedings

may have on his property and with the problem of financing the replacement of his property before the condemnation process has run its course.[67] Undoubtedly many small condemnees are not well situated to withstand these economic pressures. Further, whatever their financial conditions, condemnees who are individuals or small businesses may find the condemnation process psychologically unsettling to such an extent that they have no stomach for playing a waiting game.[68] The condemnee's other principal weapon--resort to trial--cannot be employed without delay. Consequently, where delay is economically or psychologically infeasible for the condemnee, resort to trial loses its value as his weapon and probably becomes a weapon in the hands of the condemnor.

The economic pressure which delay imposes on condemnees, and which is felt most keenly by small ones, can be relieved to some degree if approximate compensation is forthcoming at the outset of the condemnation process. Thus, it is not surprising that an advantage to condemnees is seen in provision for immediate possession (which significantly curtails delay as an effective weapon for condemnees) if immediate possession is conditioned on the payment of "probable just compensation" at the time the taking occurs.[69] Condemnees who believe that is not enough can then turn to their other weapon (resort to trial) in an attempt to get more. The economic pressure that would have precluded resort to trial had there been no quick taking would be largely abated by the early payment.

The prospect of going to trial creates its own economic pressures which are different from the kind engendered by delay. The condemnee must decide whether the gain that is likely to accrue to him from trial is worth the attorneys' fees, appraisers' fees and other costs that trial would entail. If the recommended cost allocation system were in

effect, the demoralization costs likely to arise from settlements forced by these pressures seem slight, for the condemnee would stand a chance of recovering part or all of his trial costs and, in any event, would not risk being charged for the trial costs incurred by the condemnor. To benefit from the cost allocation system, however, the condemnee must have a notion of value which is precise enough for him to make a best offer, since the proportion of his trial costs that will be reallocated to the condemnor depends on the extent to which the condemnee's best offer is closer to the ultimate award than is that of the condemnor. For relatively unsophisticated condemnees this means obtaining an appraisal, which tends to be the last thing condemnees (or even their attorneys, if an attorney has been retained) are inclined to do.[70]

An alternative cost allocation system

One possibility would be the utilization of a different kind of cost allocation system. Instead of basing the reallocation of trial costs on the relative proximity of the best offers of both parties to the ultimate award, reallocation could be keyed to the relationship of the condemnor's best offer to the award. For example, the condemnor could be charged with the condemnee's trial costs if the ultimate award exceeded the condemnor's best offer by more than the margin by which competent and unbiased appraisers can be expected to differ. While appraisers are not in unanimous agreement that a general margin (applicable in valuing all kinds of takings) is meaningful, the range most often given is 10% either way.[71] Viewed without any regard for the realities of condemnation trials, such a cost allocation system seems to obviate the need for condemnees to estimate the value of their property or that part which is

being taken. But under any cost allocation system, the condemnee will have to get his own appraisal if he is going to trial, so making reallocation of condemnees' trial costs turn on the condemnor's offer rather than on the offers of both parties is really of no help. On the contrary, a cost allocation system which requires that the condemnee who resorts to trial better the condemnor's best offer by more than 10% in order to recover his trial costs may be susceptible to abuse by the condemnor. If the condemnee's property is worth about $20,000, for example, the condemnor could discount the actual worth by 10% and, by offering $18,000 or so, avoid paying any of the condemnee's trial costs should trial ensue. Since it would not be unusual for the condemnee's trial costs to exceed $2,000,[72] the condemnor could rely on the expectation that the condemnee would have to bear its own trial costs to pressure the condemnee into making a litigation avoidance payment by settling at $18,000. If the cost allocation system were based on the relative proximity of both parties' best offers to the ultimate award and if the condemnee in the example given above reasonably insisted on $20,000, the strong probability that the condemnor could escape being charged with some or all of the condemnee's trial costs would disappear.

Another way of preventing condemnors from exacting litigation avoidance payments from condemnees would be to assign the condemnee's trial costs to the condemnor whenever the ultimate award exceeds the condemnor's highest offer, however slightly.[73] The trouble with any cost allocation system not keyed to the demand of the condemnee as well as the offer of the condemnor is that it can be expected to encourage obstinance on the part of the condemnee during bargaining since the ridiculousness of the condemnee's demand would have no impact on the reallocation of

his trial costs. The result may be to increase litigation above the level that would be produced by the recommended cost allocation system. But the result might be to increase litigation avoidance payments from the condemnor, and this might reduce demoralization costs by reducing the number of instances in which condemnees felt the condemnor's offer was low. Adopting a cost allocation system keyed only to the condemnor's offer is, however, a rather imprecise way of solving the problem presented by the unsophisticated condemnee who combines reluctance to get an appraisal (possibly out of ignorance about the appraising business, possibly out of an attitude that "you can't beat city hall") with a belief that the condemnor's offer is unduly low. Such a cost allocation system would be a boon to those condemnees whose demands prove to be quite excessive. A condemnee would be reimbursed for his trial costs simply because the condemnor's offer was low, even though it may have been a good deal closer to the ultimate award than was the condemnee's demand. The principal beneficiaries may turn out to be condemnees who are quite sophisticated and who will delight in such a cost allocation system as the source of greater windfalls. Thus, an arrangement would be preferable if it met the problem of the unsophisticated condemnee without making condemnors more susceptible to demands for litigation avoidance payments and without materially increasing the cost of determining compensation.

Arbitration

The legitimation function is performed by judicial decisions only in part because the judiciary is the most authoritative institution provided by our society for the resolution of particular disputes between particular parties. The element of legitimacy that a judicial decision lends to the determination of compensation is also due to the tribunal's

independence from the parties. While the authoritativeness cannot readily be duplicated by nonjudicial institutions, the independence can be. An institution which has become a popular surrogate for judicial decisions in commercial and industrial situations is arbitration.[74] Within the past year, the American Arbitration Association adopted a set of eminent domain arbitration rules,[75] thus seeking to provide an independent tribunal which is cheaper and more expeditious than the courts.

While an arbitration proceeding will almost certainly be quicker than a judicial proceeding, it will not necessarily be less costly. It is true that options are included in the arbitration rules which, if used, would effect cost savings. For example, a party has a right to present the evidence of a witness in an affidavit.[76] And if the parties choose, they may waive oral hearings altogether.[77] But oral hearings must be held if one party wants them, and there is no limitation on the amount of evidence a party may present.[78] In short, unless the parties limit their presentation, an arbitration proceeding could be as costly as a trial. Indeed, it could be more expensive for the parties, since in the case of arbitration, they must bear the costs of providing for the tribunal--costs which are borne by the public in the case of courts. These include arbitrators' fees which can run as high as $200 per day for each member of the arbitration tribunal.[79] There will typically be three members, for unless the parties provide otherwise in their submission agreement, an arbitration tribunal in a condemnation case will consist of a lawyer, a real estate appraiser and an expert in a field to be determined by the American Arbitration Association.[80] In addition to the arbitrators' fees and other expenses of the tribunal, an administrative

fee is charged by the AAA to compensate it for the cost of providing administrative services.[81]

Even if the entire cost of an arbitration proceeding is less than the parties' total trial costs, the cost allocation system provided by the eminent domain arbitration rules might make trial preferable for the condemnee. The rules contemplate that costs such as attorneys' fees and the expenses and fees of witnesses will be borne by the parties incurring them.[82] And what might be called arbitration service costs (arbitrators' fees, the cost of producing evidence requested by the arbitrators, the administrative fee, etc.) are assigned to the parties equally unless the parties agree otherwise or unless the arbitration award provides otherwise.[83] Some of these costs or their equivalent (e.g., the various court fees which are a part of traditionally taxable costs) are charged to the condemnor under present California law.[84] Were the recommended cost allocation scheme in effect, the traditionally nontaxable costs incurred by the condemnee would be potentially reallocable to the condemnor.[85] Consequently, if arbitration is to be made attractive to condemnees, the cost allocation system applicable in arbitration should be brought into line with that which applies to trials, or else the costs of arbitration must be low enough that a condemnee prefers sure payment of his part of these costs to the risk of being stuck with his own trial costs. This situation would most likely arise when the condemnee was uncertain enough about the outcome to be inclined to settle. In such cases, the condemnor may not want to bear its portion of the arbitration costs, for then arbitration would not be a less expensive substitute for a trial so much as a more expensive substitute for a settlement.

Selecting an independent appraiser

What is needed is a means which, like arbitration, affords an independent determination of compensation but which costs little more than a settlement. Arbitration achieves its independent status by the nonpartisan manner in which the tribunal is selected.[86] Since condemnors typically have an appraisal made as a basis for negotiation,[87] an "independent appraisal" could be cheaply obtained by substituting an appraiser selected by agreement of the parties or by a nonpartisan institution for an appraiser selected exclusively by the condemnor.[88] The fee for a substituted independent appraisal need not be an additional expense if assigned to the condemning agency, which in many instances would be incurring an appraiser's fee at this point in the condemnation process anyway.[89] The only cost increase that an independent appraisal would necessarily occasion would be the selection costs.

Perhaps the cheapest way of selecting the independent appraiser would be to allow the American Arbitration Association to choose him from among those professional appraisers included on the panel it maintains of potential arbitrators for condemnation cases.[90] When the condemnor first notifies the condemnee of the intention to take the latter's property, the condemnor should be required to inform the condemnee of the possibility of AAA selection of an appraiser. The condemnor should explain that the fee of the AAA-selected appraiser will be paid entirely by the condemnor and that the only expense to the condemnee would be half of the AAA's administrative fee. If the condemnee agrees to AAA selection, the condemnor should not be allowed a veto but the valuation of the AAA-selected appraiser should not be binding on either party unless both agree. The purpose of the independent

appraisal would not be a final determination of compensation but the provision of nonpartisan information about value. The parties would then have the same information base, and the condemnee could bargain more knowledgeably than is often the case at present. To assure that the independent appraisal is truly independent of the condemnor, the AAA should select the independent appraiser without submitting prospective names to the parties. Condemnees--and especially those who opt for AAA selection--are likely to be completely uninformed about appraisers whereas condemnors, who will always be involved in selecting independent appraisers, can be expected to develop a network of information about the available appraisers in each community. Given this informational disparity, the independent appraisal device could become condemnor dominated if the parties were given a chance to influence the selection process by expressing their preferences and objections.

The problem of condemnor domination in the selection of the independent appraiser would not arise if a countervailing information network developed among condemnee attorneys and if this information were brought to bear on the selection by the condemnee's retention of an attorney. Participation of a condemnee through his attorney in the selection of an independent appraiser may add to the sense of legitimacy surrounding the condemnation process, so an alternative to AAA selection should be permitted and this other method should involve more direct participation by the parties. If the condemnee chooses this alternative method of selection, the parties should have a short period of time in which to agree on an appraiser. If no agreement has been reached by the end of this period, either party could move for court appointment of the independent appraiser. Court appointment should be a special proceeding

without oral argument. It should be based exclusively on papers that list the names suggested by the parties in attempting to reach agreement and state the reasons for preferring or objecting to the suggested appraisers. The court should be permitted to request additional names and should not be restricted to those suggested by the parties. The parties should bear their own attorneys' fees, but the condemnor should assume the fee of the independent appraiser selected in this manner just as it should for the AAA-selected appraiser.

Professional real estate appraisers

The appraisers on the AAA's panel are persons "whose principal source of income is derived from appraisal of real estate." The availability of professional real estate appraisers is a relatively recent phenomenon, for it was only 40 years ago that real estate appraising began to be regarded as a discipline that was worthy of studious attention. The depression of the '30's spurred demands for improvement in techniques by revealing previous misestimations, and it was at that time that the two professional organizations devoted exclusively to real estate appraising (The American Institute of Real Estate Appraisers and the Society of Real Estate Appraisers which began as the Society of Residential Appraisers) were formed. After World War II, with the advent of extensive federal highway programs and urban renewal, real estate appraising became a full-time occupation. The number of appraisers possessing the top professional designations of either of these organizations presently stands at over 7,500.[91] Both organizations have codes of ethics and mechanisms for reviewing the expert testimony of their members. Approximately 2,200 real estate appraisers are members of the American Society of Appraisers--an

organization that includes among its members appraisers of building construction, machinery and equipment, jewelry and items of fine arts (such as antiques and paintings).[92] The American Society of Appraisers likewise has a code of ethics and a system for investigating complaints of unethical conduct. All three organizations publish periodicals containing articles that deal with appraisal techniques and other subjects of interest to appraisers. Not all professional appraisers would be available for service as independent appraisers, however, for a sizeable percentage of them are employees of banks, governmental agencies and other institutions and appraise exclusively for their employers.[93]

Appraising by real estate brokers

The parties need not be limited to these appraisers if they decide to select the independent appraiser themselves rather than let the AAA do it. In addition to these professional appraisers (as well as persons accumulating the experience and skill necessary for admission to a professional organization) are real estate brokers, some of whom perform appraising services other than in connection with real estate transactions.[94] Broker appraisers generally have less skill in documenting their opinions and testifying at trial, although some brokers do make appealing witnesses. The broker's valuation of an entire piece of property of the type and in the location which the broker frequently handles will probably be as accurate as that of a professional appraiser. But the latter is better able to appraise any kind of taking, especially if it is partial and questions of severance damages and special benefits must be considered.

Independent appraisal report as public record

One problem with broker appraisals is that no policing agency presently exists to review their competence and objectivity. While this is probably an insufficient reason for restricting the parties' selections of independent appraisers to appraisers with professional designations, some pressure for professionalization of the appraising service is warranted if the independent appraisal device is to serve its purpose of supplying competent and impartial valuation information. The minimal step in this direction would be requiring a copy of each independent appraisal report (no matter which method of selection is employed) to be filed as a public record. (Further steps in the direction of government licensing should be taken if this proposed minimal step turns out to be insufficient.) Making these reports generally accessible would invite the attention, hopefully systematic, of interested private groups, especially the AAA, professional appraisal organizations and the condemnation bar. In this way, appraisers who showed bias or incompetence could be identified and denied appointment.

Legal instructions

A professional appraiser is likely to be familiar enough with the law governing the measure and elements of compensation to dispense with legal instructions, and AAA-selected appraisers should proceed to make their valuations without them. That obviates the need for the condemnee to retain an attorney, at least until after the report is finished. But if selection is not by the AAA, both parties may already have attorneys who wish to instruct the independent appraiser on compensation law or on the nature of the property rights involved. Either attorney should be free to do so, but communications from either party to the independent appraiser

on this or any other matter should be subject to the requirement that they be in writing and that a copy be sent to the adversary. If the instructions are conflicting, the independent appraiser should make alternative valuations, using first one legal premise and then the other. Whether preliminary instructions are given or not, the independent appraiser may make a mistake of law in his report. If either attorney believes this to have happened, he should prepare an instruction including what he thinks is the correct statement of the law and the independent appraiser should make an alternative valuation on that basis. Each party should bear its own costs of preparing instructions, and the party objecting to a legal premise in the appraiser's report should bear the appraiser's fee for preparing the alternative valuation based on the legal premise which that party regards as correct. This opportunity to correct legal errors in the independent appraiser's report should be available however the independent appraiser is selected. Consequently, at this point the condemnee may well have to retain an attorney. He will have to do so if he wants assurance that the independent appraisal is not premised on erroneous legal notions that are unfavorable to him or if the condemnor contends that the report contains a mistaken view of the law which makes the valuation unduly high. If there are no significant mistakes or if the condemnor is right, the legal fee for reviewing the independent appraiser's report will surely not be onerous.[95] If either of these contingencies turns out not to be the case, a lawyer should be retained to assist in the further bargaining and subsequent litigation if no settlement is reached.

Alteration of cost allocation system

If the independent appraisal occasioned no increase in determination costs beyond that of selecting and instructing the independent appraiser, the proposal would not seem unduly expensive. Selection costs will rarely exceed a few hundred dollars and can be as low a total as $50.[96] Instruction costs may run somewhat higher in complicated cases[97] but they can be expected to be wholly lacking in relatively simple cases, and these may comprise the bulk of cases in which an independent appraiser is employed. But independent appraisals may increase determination costs in the way that condemnors fear they would be increased if the appraisal report prepared for the condemnor were given to the condemnee.[98] A condemnee who becomes more knowledgeable about the basis for setting the worth of the taking at a particular price may be more inclined to haggle for a better price and possibly even to resort to trial in an attempt to get what he demands. If this stiffening of condemnees' bargaining positions results in higher compensation payments,[99] the concomitant increase in determination costs is probably sufficiently offset by a diminution of demoralization costs, since settlements achieved because of condemnees' ignorance about matters of valuation are likely to be regarded as exploitive. But the increase in determination costs would be worthless if what is strengthened is a condemnee's misguided notion of the taking's value which a subsequent trial shows to have been inflated. Some sort of deterrent against condemnees' pressing on to trial may be warranted.

One way of deterring condemnees from proceeding unnecessarily to trial is by an alteration in the cost allocation system. When an independent appraisal has been made and the condemnee rejects an offer by the condemnor

to settle on that basis, none of the condemnee's trial costs should be charged to the condemnor unless the ultimate award exceeds the amount set by the independent appraiser by more than 10%. As was mentioned earlier, 10% either way is the range within which competent and unbiased appraisers can be expected to differ.[100] If the trial award does exceed the independent appraiser's valuation by more than 10%, the recommended allocation scheme should apply. This suggested alteration in the recommended cost allocation system requires that only one value be set by the independent appraiser, but a conflict in legal premises might result in alternative valuations. When this happens, the estimate based on the view of the law that is ultimately judged to be correct should be treated as the sole valuation for cost allocation purposes. If it turns out that none of the legal premises were correct, the recommended cost allocation system should apply as it would had no independent appraisal been made.

Independent appraiser as impartial expert witness

A way of encouraging both parties to eschew trial and accept the independent appraisal as the basis for settlement is to permit the independent appraiser to testify at trial as an impartial expert witness. Impartial expert testimony has often been proposed and has even been tried with respect to medical testimony in personal injury cases.[101] The mischief its proponents seek to remedy is the disparity among expert opinions that seems explainable only in terms of partisanship. The problem of seemingly partisan experts is not unknown in condemnation cases where the tendency of appraisers to become advocates has been observed.[102] But some lawyers and judges contend that juries give undue weight to the

testimony of witnesses called by the court. They argue that while such a witness is cloaked with impartiality, his opinion may reflect only one school of thought that is not unanimously shared by reputable appraisers. This sort of argument has been made against plans for impartial medical testimony[103] which provide for selection of the court's expert at the pre-trial conference stage by rotation from a panel of doctors' names supplied by local medical societies.[104] This method of selection is not much different from AAA-selection, but where the independent appraiser is chosen by the parties or by the court when they cannot agree, the danger of getting a partisan of a school of thought is mitigated to some extent. Counsel for the party who would be disadvantaged by an appraiser of decided views could refuse to agree to his appointment and then urge his partisanship to a particular view as a reason against court appointment in the event that the parties are unable to agree upon someone else. Nonetheless, appraising is not an exact science and honest differences of opinion, though perhaps lacking the visibility of a "school" of thought, will occur among competent appraisers. When this is the case or when the independent appraiser is selected by the AAA, the independent appraisal proposal may still have an advantage over the impartial medical testimony projects. Since the independent appraisal occurs early in the condemnation process and serves a function besides providing impartial expert testimony at trial, the judge should not worry, as some have in connection with impartial medical testimony, that telling the jury that the court's expert is to be judged like all other witnesses "suggest self-stultification."[105] The judge can explain to the jury that he is calling the independent appraiser to give them the benefit of hearing about an appraisal made for both parties at the outset of the condemnation process, that the appraisal

served an informative function and was not binding on either party and that the jury is no more obliged to give credence to this witness' opinion than to that of any other. Such an instruction should open the way to full examination and cross-examination of the independent appraiser which may elicit an acknowledgement that competent appraisers could honestly hold differing views about the value of the taking at issue.

This is not to say that the independent appraiser does not have an advantage over other appraiser witnesses. The nonpartisan manner in which he was selected and his duty of impartiality in making his report and testifying will undoubtedly be given a great deal of weight. But his opinion is entitled to a great deal of weight on this account. Certainly impartial experts have no monopoly on the truth but partisanship is always a strong argument against the validity of an intellectual product and it is unclear why it should count for less in the evaluation of expert testimony. Thus, triers of fact, whether judge or jury, are not behaving irrationally if, in a vast majority of cases, they accept the opinion of an impartial expert. It ill behooves champions of trial by jury to bemoan the tendency of juries to credit that evidence which is apt to be most reliable.

The court should be obliged to call the independent appraiser as an impartial expert witness at the request of either party. A judge should also be empowered to call the independent appraiser sua sponte. In a jury trial, the jury should be informed of the manner in which the independent appraiser was selected and of his duty to act impartially in making his report and in testifying. To assure that the independent appraiser does not become the witness of the party requesting that he be called, the ban against communication by either party with the independent

appraiser, unless the communication is in writing and a copy is sent the opposing party, should be continued up to and throughout the trial. If oral communication is imperative, it should be in the presence of the attorney for the other side.

Witness fee of independent appraiser

When the independent appraisal report is favorable enough to one party so that the party requests that the independent appraiser be called, the witness fee of the independent appraiser should be assigned to that party. When the court calls the independent appraiser on its own motion, however, the fee for testifying should be divided equally between the condemnor and condemnee. If the basis for compensating the independent appraiser for testifying were revealed to the jury, a party who would like to have the independent appraiser called might hope that the court would call him and refrain from requesting his appearance for fear of creating the impression that he was that party's witness rather than the court's. But if this were not revealed to the jury, as it should not be, a party's decision on whether to request that the independent appraiser be called is not likely to be affected by cost considerations unless the independent appraiser's testimony would be only marginally favorable to that party or marginally damaging to the other party. When the partisan advantage that would flow from an independent appraiser's testimony is so slight that a party makes this sort of calculation and decides against a request, it can be assumed that the testimony will not be overly favorable to either side.

Summary

Concern for the relatively small and unsophisticated condemnee who cannot afford to go to trial is not new. Lawyers, appraisers, legislators

and administrators have sought ways to lessen the economic burden on the condemnee which trial portends. Some proposals have attacked the problem by altering in one way or another the system for allocating trial costs. Other suggestions have implicitly acknowledged that, for reasons that are psychological as well as economic, many condemnees who are not sophisticated will never reach the trial stage whatever the cost allocation system. These suggestions have focused, therefore, on solutions which would assure a more legitimate, though nonjudicial, determination of compensation. The ombudsman or the amparo process have been proposed to deter condemnors from offering less than their appraisals indicate to be justified. Another answer to this problem is offered by the new eminent domain rules of the American Arbitration Association which provide for an adjudicative proceeding that can be less expensive and more expeditious than a trial.

I recommend that attention be given to two additional institutional arrangements. Appraiser certification (to guarantee that a condemnee gets no less than the figure at which some appraiser, albeit one employed by the condemnor, values the taking) and the independent appraisal (to provide a more equal bargaining basis in terms of knowledge of value) are relatively inexpensive techniques which can function in lieu of or in addition to other potential and realized reforms in the process of determining just compensation.

FOOTNOTES

*This Article was prepared by the author for the California Law Revision Commission and is published here with the Commission's consent. The Article was prepared to provide the commission with background information to assist the commission in its study of condemnation law and procedure. However, the opinions, conclusions, and recommendations contained in this Article are entirely those of the author and do not necessarily represent or reflect the opinions, conclusions, or recommendations of the California Law Revision Commission.

I wish to thank the Title Insurance and Trust Company Foundation for a grant that made it possible to obtain the research assistance of several Stanford Law School students. Gile Downes and Richard Wirtz served as general research assistants. Inquiries on specific points were answered by Bruce Kennedy, Sam Sperry and Malcolm Wheeler.

Professor Jack Friedenthal, Professor Richard Posner and Assistant Dean Thomas H. Headrick of the Stanford Law School, Professor Gerald Meier of the Stanford Graduate School of Business and Dexter D. MacBride of the California Highways Division read earlier drafts of this Article, and any worth it has owes much to their helpful suggestions. Needless to say, whatever problems remain with the Article are my responsibility, not theirs. In addition, the Article was substantially enriched by conversations with many of my colleagues, especially Professors William F. Baxter, John Henry Merryman, Charles J. Meyers, Michael Wald and Howard R. Williams.

The various professional appraisers' organizations were most cooperative. I particularly wish to thank William Y. Armstrong, Henry A. Babcock, Elmer M. Berliner and George Edward Carey who gave generously of their time to inform me about the appraising profession.

An earlier draft of the Article was sent to persons on the eminent domain mailing list of the California Law Revision Commission and numerous instructive comments were received.

1. See, e.g., 4 Nichols on Eminent Domain § 12.2(1) (3rd ed. 1962); Kaltenbach, Just Compensation Revised § 1-1-6 (1964). In California, this amount must be the "highest price estimated in terms of money which the land would bring if exposed for sale in the open market, with reasonable time allowed in which to find a purchaser, buying with knowledge of all the uses and purposes to which it was adapted and for which it was capable." Sacramento So. R.R. v. Heilbron, 156 Cal. 408, 409, 104 Pac. 979, 980 (1909).

2. Economists would call this "monopoly rent".

3. See generally Prest and Turvey, "Cost-Benefit Analysis: A Survey," 75 Econ. J. 683 (1965).

4. For the latest contribution to this inquiry, see Note, "The Interest in Rootedness: Family Relocation and an Approach to Full Indemnity," 21 Stan. L. Rev. (1969).

5. This need not imply an elitist perspective, since what may be substituted for equal counting of monetarily-expressed preferences is equal counting of ballot-box-expressed preferences. See generally E.J. Mishan, "Pareto Optimality and the Law," 19 Oxford Econ. Papers (N.S.) 255 (1967).

6. This assumes that the maximum amount a condemnee would pay to keep his property is the same as the minimum amount he would accept to forgo it. Contra, Mishan supra note 5 at 272 n.2.

If the former is less than the latter but the latter exceeds the net benefit to society (the difference between imputed value and the willing-seller-willing-buyer price) some condemnees that would be classified as windfall seekers under the analysis in the text should perhaps be classified as condemnees whose continued use of the land contributes more to social welfare (counting monetarily-expressed preferences equally) than does use of their land by the condemnor. Compare id. at 256, 264-67, 272 n. 2. Since we have assumed that monetarily-expressed preferences will not be counted equally once the willing-seller-willing-buyer price is exceeded, this problem of "welfare effects" is immaterial to the analysis.

7. The situation is akin to that which game theorists call "Prisoner's Dilemma." See, e.g., Rapoport, Two-Person Game Theory: The Essential Ideas 123-31 (1966).

8. Compare Calabresi, "Transaction Costs, Resource Allocation and Liability Rules--A Comment," 11 J. Law & Econ. 67 (1968).

9. Compare id. at 69-70, 73; Coase, "The Problem of Social Cost," 3 J. Law & Econ. 1, 15-19 (1960).

10. The distinction made here--and often throughout this Article--is between a "private cost" (which may be a "transfer payment" affecting the distribution of wealth but not the allocation of resources) and a "social cost" (which does affect resource allocation). Different wealth distributions may result in different demands which could affect the output mix, but this can be cured by a compensating wealth change. See Demsetz,

"Toward a Theory of Property Rights," 57 Am. Econ. Ass'n Pap. & Proc. 347, 349 (1967). In the case of condemnees who collect monopoly tolls, a stiff capital gains tax might be a socially costless way of effecting the compensating wealth change, if one is needed. A compensating wealth change might be needed if the eminent domain power did not exist and a few condemnees who were best able to hold out became substantially wealthier. But the more likely result if there were no eminent domain power would not be this but miscalculations, as discussed in the text. The need to recapture monopoly tolls distributed in connection with the exercise of the eminent domain power can probably not be justified in resource allocation terms since the presence of governmental coercion can be expected to assure an even distribution among condemnees and the output mix is unlikely to be significantly affected if condemnees generally are made somewhat wealthier.

10a. See, e.g., Rawls, "Justice as Fairness," in Justice and Social Policy 80, 82n. 3 (F. Olofson, ed., 1961).

10b. In the case of some condemnees, this follows from the rejection of equal counting of monetarily-expressed preferences beyond the willing-seller-willing-buyer price. In the case of windfall-seeking condemnees, this follows from regarding monopoly tolls as "transfer payments" which do not affect resource allocation. Arrangements which allow condemnees to collect windfalls but which might contribute to the common advantage by diminishing social costs will be discussed at various points in this Article.

10c. See Freeman, "Income Distribution and Planning for Public Investment," 57 Am. Econ. Rev. 495 (1967).

11. Or, had the agency possessed the eminent domain power but behaved very much as though it had not--by abaddoning or altering its public improvement plans when the needed property was not forthcoming at willing-seller-willing-buyer prices or paying monopoly tolls to get it.

12. Florida comes closest to being an exception. See notes 43 and 44 infra.

13. City and County of San Francisco v. Collins, 98 Cal. 259, 33 Pac. 56 (1893).

14. Pacific Gas & Elec. Co. v. Chubb, 24 Cal. App. 265, 141 Pac. 36 (1914); City of Los Angeles v. Vickers, 81 Cal. App. 737, 254 Pac. 939 (1927). When condemnors abandon condemnation proceedings, reimbursement of condemnees' trial costs is governed by Cal. Code Civ. Proc. § 1255a. See Recommendation Relating to Recovery of Condemnee's Expenses on Abandonment of an Eminent Domain Proceeding, 8 Cal. L. Revision Comm'n Reports 1361 (1967); Report of Assembly Committee on Judiciary on Assembly Bill No. 41, 9 Cal. L. Revision Comm'n Reports 46 (1969).

15. The exercise of the eminent domain power does produce additional business for the judicial system which, given the condition of most courts' dockets, will occasion delay in the consideration of other litigants' cases. (Condemnation cases are given a priority over other civil actions. Calif. Code Civ. Proc. § 1264.) Additional judges may be needed. Thus, another

category of determination costs which condemnors do not bear are those additional (marginal) ones involved in operating a judicial system which are occasioned by the condemnation process.

16. Condemnors' demands for increased revenue for the purpose of making litigation avoidance payments are less likely to reach the dimension that would give rise to the kind of social costs which might be engendered if condemnors paid monopoly tolls (campaigns for and against higher taxes, for example). Litigation avoidance payments will be more easily held in check by the more discernible limit of the cost of litigating.

17. It makes no difference whether the condemnor acquired the property by agreement or by court order. When dealing with a buyer possessing the eminent domain power, a seller could be "willing" only if the buyer agreed not to litigate if negotiations failed to result in a sale and if the agreement not to litigate were binding. Otherwise, the landowner must sell--sooner or later--and recognition of this will affect the transaction. These observations are reflected in Cal. Evidence Code § 822(a) which provides: "the following matter is inadmissible as evidence and is not a proper basis for an opinion as to the value of property: (a) The price or other terms and circumstances of an acquisition of property or a property interest if the acquisition was for a public use for which the property could have been taken by eminent domain."

18. The contrast is with "inverse" condemnation proceedings which a property owner institutes when he believes his property has

been taken or damaged for public use and that just compensation is due. Van Alstyne, "Statutory Modification of Inverse Condemnation: The Scope of Legislative Power," 19 Stan. L. Rev. 727, 730 (1967). Professor Van Alstyne is presently engaged, under the auspices of the California Law Revision Commission, in a study of inverse condemnation. See ibid.; Van Alstyne, "Inverse Condemnation: A Legislative Prospectus," 8 Santa Clara Lawyer 1 (1967); Van Alstyne, "Statutory Modification of Inverse Condemnation: Deliberately Inflicted Injury or Destruction," 20 Stan. L. Rev. 617 (1968). The thoughts presented in this Article about cost allocation in the condemnation process have been developed without reference to the inverse condemnation situation and may not be entirely apposite to it.

19. Michelman, "Property, Utility, and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law," 80 Harv. L. Rev. 1165 (1967) (hereinafter MICHELMAN).

20. Id. at 1172-76.

21. Id. at 1173.

22. Id. at 1182-83.

23. Id. at 1235-39.

24. Id. at 1178-82.

25. Id. at 1208-18.

26. " 'Demoralization costs' are defined as the total of (1) the dollar value necessary to offset disutilities which accrue to losers and their sympathizers specifically from the realization that no compensation is offered, and (2) the present capitalized

dollar value of lost future production (reflecting either impaired incentives or social unrest)caused by demoralization of uncompensated losers, their sympathizers, and other observers disturbed by the thought that they themselves may be subjected to similar treatment on some other occasion." Id. at 1214.

27. Ibid.

28. See id. at 1172-75. A summary and extensive citation of the economic literature on the importance and shortcomings of being able to compensate but not actually compensating can be found in Comment, "The General Welfare, Welfare Economics, and Zoning Variances," 38 S. Cal. L. Rev. 548, 554-60 (1965). For an exposition of the essence of the compensation principle which is both short and lucid, see Baxter, "The SST: From Watts to Harlem in Two Hours," 21 Stan. L. Rev. 1, 39-40 (1968).

29. MICHELMAN 1215.

30. Ibid.

31. Id. at 1215-23. Michelman's "fairness" approach is based upon the concept of fairness developed by John Rawls. Id. at 1219 n. 104. The questions one asks under either the fairness approach or the utilitarian approach turn out to be much the same. Id. at 1222-23. But differences in application may result from "the behavioral assumptions that are plugged into the utilitarian equation." Id. at 1223. For example, if men are not "patient, far-seeing and reasonable" (as the fairness approach assumes), the utilitarian approach may require payment of compensation in situations where the fairness approach would not. Id. at 1224.

32. Our surmise is by no means free from question, especially where the taking or "invasion" is relatively insignificant and bearable. Id. at 1228. It is with respect to such situations that a fairness approach would be less likely to lead to compensation than would a utilitarian approach. See note 33 infra and accompanying text.

33. MICHELMAN 1228.

34. This saving of settlement costs is not very significant since the physical invasion test can only identify clearly compensable occasions. The lack of physical invasion does not indicate a clearly noncompensable occasion. Id. at 1227-28.

35. Id. at 1216-17.

36. The difficulty of empirically ascertaining the dimension of demoralization costs is pointed out in MICHELMAN at 1215. Because guessing about the extent of demoralization costs is necessary, whatever precision may be suggested by the analysis is operationally illusory. The virtue of the analysis, if any, is in alerting us to the factors which we should take into account and guess about in deciding how to allocate the costs of determining compensation.

37. In most jurisdictions, of course, this means that condemnors must always bear their own attorneys' fees and expert witnesses' fees since these are typically nontaxable. But this may not be so in all American jurisdictions. Alaska, for example, has a system for awarding attorneys' fees to the prevailing party in civil suits generally. Alaska Civ. Rule 82. With respect to condemnation

actions, Alaska Civ. Rule 72(k) provides "(c)osts and attorney's fees shall only be assessed when the interests of justice so require." It would not be a departure from Alaska's general tradition of cost allocation in litigation to assess a condemnee for the condemnor's attorney's fee should the interests of justice so require. But the purport of Rule 72(k)--which seems something of a retreat from that state's general system--may preclude Alaskan judges from ever finding that the interests of justice require such an imposition on condemnees. Thus far, there are no reported cases.

38. Cf., 4 Nichols on Eminent Domain § 14.249 at 690 (4th ed. 1962).

39. MICHELMAN 1235-39.

40. In North Carolina, for example, exercise of the eminent domain power under the Urban Redevelopment Law to condemn a blighted area entitles the condemnees to reasonable counsel fees, Gen. Stat. N.C. § 160-456(2), whereas North Carolina condemnees generally have no right to reimbursement for attorneys' fees, see Carolina Power & Light Co. v. Creasman, 262 N.C. 390, 403 , 137 S.E.2d 497, 506 (1964).

41. This is the general rule when the United States is a condemnor. See 7 Moore's Federal Practice ¶ 71A.130. Since 1966, 28 U.S.C. § 2412 has provided for the reimbursement of traditionally taxable costs incurred by "the prevailing party" in suits brought by or against the United States. This provision has not been used in condemnation actions. Introductory remark of Senator Joseph D. Tydings at Hearings before the Subcomm. on Improvements in

Judicial Machinery of the Judiciary Comm., U.S. Senate, 90th Cong., 2d Sess. on S.1351 at 1 (Ap. 5, 1968). A reason may be the inappropriateness of the "prevailing party" concept to condemnation actions. See Moore, supra, at 2808; 4 Nichols, op. cit. supra note 27, at 690-91; letter from Warren Christopher, Deputy Attorney General, to Senator James O. Eastland, Chairman, Judiciary Comm., U.S. Senate (Ap. 5, 1968), reprinted in Hearings on S. 1351, supra, at 49.

42. For example, California condemnors must always bear condemnees' traditionally taxable costs until a trial award is obtained from which the condemnor does not wish to appeal. See City and County of San Francisco v. Collins, 98 C. 259, 33 P. 56 (1893); Oakland v. Pacific Lumber and Mill Co., 172 C. 332, 156 P. 468 (1916).

43. Florida Stat. Anno. § 73.16 assigns all costs of condemnation proceedings at the trial level to condemnors and explicitly states that these shall include "a reasonable attorney's fee". § 73.11 requires the jury verdict to state, inter alia, what a reasonable attorney's fee for condemnee's attorney should be. In 1965, the Florida legislature added § 73.131 which makes a similar provision regarding the costs of appellate proceedings unless the appeal is taken by the condemnee and the judgment of the trial court is affirmed. The amount of the fee is to be assessed by the court, as is the case under § 73.16 when the court sits without a jury.

44. E.g., Dade County v. Renedo, 147 So.2d 313 (Fla. 1963); Dade County v. Brigham, 47 So.2d 602, 604, 18 ALR.2d 1221, 1224 (Fla. 1950).

45. E.g., Ore. Revised Stat. § 35.110 (attorneys' fees if award exceeds amount tendered by condemnor); Revised Code Wash. Anno. § 8.25(2) (attorneys' fees and expert witnesses' fees if award exceeds condemnor's highest written offer by 10% or more where condemnee consents to immediate possession). In two-trial states, where an initial award is made by a commission with an "appeal" to a de novo trial, the commission award is sometimes used as a basis for allocating some or all traditionally non-taxable costs. See, e.g., Iowa Code Anno. § 472.33 (attorneys' fees if trial award exceeds commission award).

46. E.g., N.D. Code § 32-15-32; United Development Corp. v. State Highway Dept., 133 NW2d 439, 443 (N.D. 1965). (The amount recoverable for expert witnesses' fees may not exceed $50 a day plus actual expenses.) In Nebraska, a two-trial state, the court has discretion to order reimbursement of the condemnee for his attorneys' fees and for fees of not more than two expert witnesses, if the condemnee appeals and the trial award exceeds the commission award by 15% or more, or if the condemnor appeals and the trial award is not less than 85% of the commission award, or if both parties appeal and the trial award exceeds the commission award by any amount. Revised Stat. Nebr. § 76-720.

47. E.g., Ore. Revised Stat. § 35.110. In Nebraska, a two-trial state, the traditionally taxable costs of the trial (which is an appeal from the commission's award) are assigned to the condemnee if he appeals and fails to better the commission's award at trial. Revised Stat. Nebr. § 76-720.

48. This is the case in California. Calif. Code of Civ. Proc. § 1254(k).

49. See note 42 supra.

50. See, e.g., Keller v. Miller, 63 Colo. 304, 165 Pac. 774 (1917) and cases cited therein.

51. This position show the influence of Lewis on Eminent Domain, a much-cited treatise that first appeared in 1888. (A second edition appeared in 1900 and a third in 1909.) Lewis's reasoning on this point is found in § 559 of the second edition and § 812 of the third.

52. See Oakland v. Pacific Lumber and Mill Co., 172 Cal. 332, 156 Pac. 468 (1916); Cal. Code Civ. Proc. § 1254(k). The trial award which should be used as the measure in the recommended cost allocation scheme should be the one finally arrived at, and the expenses of appeals and new trials, as well as those incurred in connection with the first trial, should be included as trial costs.

53. This does not mean that reform of some aspects of present law governing traditionally taxable costs is not desirable. A case in point is City of Downey v. Gonzales, 262 Adv. Cal. App. 611, 69 Cal. Rptr. 34 (1968). Several takings were there consolidated into one action, and one appraiser testified on behalf of all the condemnees. Each condemnee claimed the statutory witness fee and mileage allowance as a cost taxable to the condemnor. The Court of Appeal, Second District, reversed a trial court ruling that only one such amount could be taxed as costs. After adjustments are made for single parcels owned by more than one

condemnee and for condemnees who own more than one parcel (which, in this case, resulted in 13 takings), a statutory fee and mileage allowance must be taxed as costs for each taking. This decision is defensible, if at all, only as judicial technique for modifying a cost allocation system that seems inadequate. With the adoption of a comprehensive system for allocating determination costs occasioned by the condemnation process, the decision becomes defenseless and should be reversed. Multiple recovery of a single cost incurred by the condemnees would then be unwarranted.

54. Of course, the condemnee's trial costs must have been reasonably incurred, and courts should pass on this reasonableness question as they now do with respect to presently taxable costs. See City and County of San Francisco v. Collins, 98 Cal. 259, 263, 33 Pac. 56, 57 (1893). For suggestions as to how much reasonable attorneys' fees and reasonable appraisers' fees might be, see note 72 infra.

55. Select Subcomm. on Real Prop. Acquisition, House Comm. on Public Works, 89th Cong., 2d Sess., Study of Compensation and Assistance for Persons Affected by Real Property Acquisition in Federal and Federally Assisted Programs 44-45 (1964) (hereinafter DAVIS REPORT); Berger and Rohan, "The Nassau County Study: An Empirical Look into the Practices of Condemnation," 67 Colum. L. Rev. 430, 440 (1967) (hereinafter NASSAU COUNTY STUDY). The results of both the DAVIS REPORT and the NASSAU COUNTY STUDY are included in 7 Nichols on Eminent Domain Chp. 6 (Revised 3rd ed. 1968).

56. DAVIS REPORT 368-73; NASSAU COUNTY STUDY 452; Statement of Rudolph Hess, then Chief Right-of-Way Agent, California Division of Highways, at Hearings on Real Property Acquisition Practices and Adequacy of Compensation in Federal and Federally Assisted Programs, before the Select Subcomm. on Real Property Acquisition of the House Comm. on Public Works, 88th Cong., 1st Sess. 43 (October 4, 1963) (hereinafter HESS STATEMENT).

57. DAVIS REPORT 407-08; NASSAU COUNTY STUDY 452.

58. DAVIS REPORT 306-07; NASSAU COUNTY STUDY 437; HESS STATEMENT 33. Contra, Post Office practice, DAVIS REPORT 48 n. 7.

59. DAVIS REPORT 408-09; NASSAU COUNTY STUDY 445, 455; HESS STATEMENT 48.

59a. Contra, Cal. Evidence Code § 813(a)(2), which permits the owner of the property interest being taken to testify as to its value. Perhaps it is significant that § 813 seems to make a distinction between property owners and witnesses qualified to express opinions about value. Compare § 813(a)(2) with § 813(a)(1).

60. DAVIS REPORT 47, 294; NASSAU COUNTY STUDY 442-43. The stated policy of the California Division of Highways is to offer the condemnee the compensation figure arrived at by the Division's staff appraisal system and not to deviate from that figure unless the property owner manages to identify some factor overlooked in the appraisal. HESS STATEMENT generally and especially at 13, 17. There is no reliable information about the extent to which other California condemnors offer less than the value set by appraisals prepared for them.

61. DAVIS REPORT 117.

62. NASSAU COUNTY STUDY 442.

63. See, e.g., Schulz, 'The Great Land-Grab Scandal," Readers' Digest 100 (Dec. 1968).

64. DAVIS REPORT 122-23.

65. NASSAU COUNTY STUDY 458 N. 59; HESS STATEMENT 13, 17; U.S. News & World Report 99 (Mar. 25, 1968) (acknowledging that it has not always been done, the United States Department of Housing and Urban Development directed local housing agencies thenceforth to "offer each owner the full fair price for his property immediately without negotiation").

66. MacBride, "The Value of Land," The Real Estate Appraiser 31, 37-39 (Mr. 1968). An ombudsman is an official, selected by the legislature, to receive and investigate complaints from citizens about administrative behavior. Such an official could look into the contentions of condemnees that a condemnor was not offering them a fair price for their property. An amparo process is similar except that a court would conduct the inquiry rather than an official employed by the legislature. In either case, were the investigation to concern more than whether the condemnor was offering less than the value set by an appraisal report prepared for the condemnor, the proposal would probably be rather costly.

67. See NASSAU COUNTY STUDY 446-47; cf., A. Altshuler, The City Planning Process 49-50 (1965).

68. See NASSAU COUNTY STUDY 446.

69. Taylor, "Possession Prior to Final Judgment in California Condemnation Procedure," 7 Santa Clara Lawyer 37, 48-50 (1966). The California Law Revision Commission has recommended that such a provision be made generally available. Tentative Recommendation and a Study relating to Condemnation Law and Procedure, Number 1--Possession Prior to Final Judgment and Related Problems (Sept. 1967). At present, immediate possession and early payment are possible in California only where the acquisition is for "any right of way" or "lands to be used for reservoir purposes". Cal. Const., Art. I, § 14; Cal. Code Civ. Proc. §§ 1243.4-.7.

70. See note 59 supra.

71. See DAVIS REPORT 387-89. Inquiry was made of 90 professional appraisers as to the percentage that would best represent the margin by which competent and unbiased appraisers, not subject to conflicting legal instructions, can be expected to differ on the average. See letter and postcard in Appendix. The appraisers selected as the sample were the members of the national Appraisal Review Committee of the American Institute of Real Estate Appraisers, of the national Professional Practice Committee of the Society of Real Estate Appraisers, and of the Appraisal Review Committee of the Northern California chapter of the American Institute of Real Estate Appraisers, together with the officers of the Southern California and San Diego chapters of the Institute and the officers of various California

chapters of the Society of Real Estate Appraisers. These appraisers were selected because their roles in their professional organizations bring them into frequent contact with the problem of discrepancies in appraisals. 57 responses were received, with the following distribution:

Margin	Number of appraisers
Under 10%	6
10%	22
10-15%	5
15%	10
20%	7
Over 20%	5
Would not answer	2
Total	57

These data indicate that as many professional appraisers are likely to regard a 10% margin as too narrow as are likely to regard it as proper or too wide. Comments in letters and on some of the returned cards, emphasizing that the margin would vary with the kind of property being appraised, confirm the likelihood that 10% as a general average may be too narrow. Thus, requiring the trial award to exceed a condemnor's offer by 10% before a condemnee's trial costs are reallocated to the condemnor is, if anything, favorably biased toward condemnees in terms of the reliability that can be placed on appraisers' valuations.

72. A reasonable attorney's fee would be around $500 to $1000 for a relatively simple condemnation case and up to $5000 for an average case. A reasonable attorney's fee for a complex case could easily exceed $10,000. A reasonable appraiser's fee would be $100 to $150 a day for preparing the report and $150 to $200 a day for testifying in court.

73. This cost allocation scheme was proposed for the United States when it is a condemnor. See Hearings before the Subcomm. on Improvements in Judicial Machinery of the Judiciary Comm., U.S. Senate, 90th Cong., 2d Sess. on S. 1351 at 23-24, 42 (Ap. 5 and 7, 1968).

74. The use of arbitration in condemnation cases has been urged by Latin, "The Arbitration of Eminent Domain Cases," 14 Right of Way, Oct. 1967, at 57.

75. The Eminent Domain Arbitration Rules of the American Arbitration Association (hereinafter ARBITRATION RULES) became effective June 1, 1968.

76. ARBITRATION RULES § 26.

77. ARBITRATION RULES § 30.

78. See ARBITRATION RULES §§ 23, 25, 28, 29.

79. $200 is the maximum if an arbitrator resides more than 75 miles from the place of arbitration. Otherwise, the maximum is $150 per day. ARBITRATION RULES § 49.

80. ARBITRATION RULES § 80.

81. ARBITRATION RULES 46, 47, 52.

82. See ARBITRATION RULES §§ 17, 48.

83. ARBITRATION RULES § 48.

84. See note 42 supra.

85. See text accompanying note 54 supra.

86. The AAA maintains a panel of arbitrators which includes attorneys and appraisers recommended by their professional organizations as especially qualified to perform the judge-like task of arbitrating. When a dispute is submitted to arbitration, the AAA submits to each party an identical list of names drawn from the panel. The parties have seven days to cross off objectionable names and number the remaining names to indicate order of preference. The AAA then invites the persons on the returned lists to serve as arbitrators, asking those with the lowest numerical score first. If this does not produce a tribunal, the AAA makes the appointment from other names on the panel without submitting any additional lists of names to the parties. See ARBITRATION RULES §§ 6, 12; Aksen, "Arbitrating Right of Way Disputes," 14 Right of Way, Dec., 1967, at 47, 50.

87. See note 58 supra.

88. This substitution could not be made immediately by condemnors that rely on staff appraisers to make the appraisal for negotiation purposes. The California Division of Highways is the foremost example. HESS STATEMENT 11-13. But there should be no time-lag in effecting the substitution, once the proposal is adopted, by condemnors that presently rely on fee appraisers and maintain no substantial staff of their own. To assure that the independent appraiser can be substituted, the condemnee's right to insist on an independent appraisal should be limited to a short

period after being notified by the condemnor. The condemnor should be under no obligation to make an offer before the condemnee decides whether to opt for an independent appraisal.

89. DAVIS REPORT 330, 340; NASSAU COUNTY STUDY 438.

90. See note 86 supra.

91. 3,000 are "M.A.I.'s" (Member of the Appraisal Institute). The other 4,500 belong to the Society as "SREA's" (Senior Real Estate Appraiser) or "SRA's" (Senior Residential Appraiser). These designations require at least 5 years of full-time appraisal work, the submission of narrative reports which demonstrate capacity for handling the techniques of the profession and the passing of written examinations.

92. Membership in this society is conditioned on requirements which resemble those of the Institute and the Society. The qualifications, regulations and statements of ethical principles of the American Institute of Real Estate Appraisers and the American Society of Appraisers can be found in 7 Nichols on Eminent Domain Appendix B-3 (3rd revised ed. 1968).

93. Of the 400 or so M.A.I.'s in California, nearly half are unlikely to be available for fee assignments of this kind. The number of the 600 SREA's and SRA's in the state who could be expected to serve as independent appraisers would probably not exceed 250. And only about 200 of the approximately 300 real estate appraisers who are members of the California chapters of the American Society of Appraisers would be available for such assignments. Moreover, some of these appraisers are members of both the

American Institute of Real Estate Appraisers and the Society of Real Estate Appraisers or of both the Society of Real Estate Appraisers and the American Society of Appraisers. When allowance is made for this overlap, an estimate of the total number of appraisers in California who have attained the professional competence which membership in one of these organizations indicates and who would presently be available for service as independent appraisers can be put at around 500.

94. Slightly over half of the roughly 70 and 60 entries under "real estate appraisers" in the yellow pages of the San Francisco and San Jose telephone directories were also listed as real estate brokers. Almost a third of slightly over 110 real estate appraisers listed in the yellow pages of the Los Angeles telephone book were also listed as brokers while in San Diego there were 14 joint listings out of the 35 real estate appraisers listed. Some real estate brokers may be included among the nonappraisers on the AAA's panel of potential arbitrators. See Aksen, "Arbitrating Right of Way Disputes," 14 Right of Way, Dec. 1967 at 47, 50.

95. A reasonable attorney's fee for reviewing the independent appraiser's report for legal errors would be about $150.

96. The AAA's administrative fee schedule which presently applies in condemnation cases where all oral hearings are waived is essentially as follows:

Amount of award	Fee
Up to $10,000	3% (minimum of $50)
$10,000 to $25,000	$300 plus 2% of excess over $10,000
$25,000 to $100,000	$600 plus 1% of excess over $25,000
$100,000 to $200,000	$1350 plus 1/2% of excess over $100,000

See ARBITRATION RULES §§ 47, 52. This fee schedule was established on the assumption that three arbitrators would generally be appointed. Since the proposal would require that the AAA supply only one and, as to that one, would dispense with the preparation of lists of names for submission to the parties, a lower administrative fee schedule might be appropriate when the AAA selected the independent appraiser. If the alternative method of selection is used, a reasonable attorney's fee for representing a party in the selection process should be around $50 to $100, if no court proceeding is involved, and from $200 to $300, if a court proceeding is necessary. Thus, the total expense involved in non-AAA selection should rarely exceed $600 and would often be a good deal lower.

97. In cases where instructions do have to be prepared, the social cost of doing so may be nominal since these cases may require the employment of attorneys in any event and the preparation of the instructions may be incidental to the general preparation for bargaining or trial which would be necessary in any event.

98. DAVIS REPORT 400-05.

99. This increase might include litigation avoidance payments, but this seems likely only in the case of unsophisticated condemnees whose understanding of value had been tutored by the independent appraisal report. The bargaining position of a condemnee who was knowledgeable about value without the benefit of an independent appraisal is unlikely to harden around a price higher than that set in the independent appraisal report, if, indeed, such a condemnee even requests an independent appraisal in the first place. The main use that sophisticated condemnees can be expected to make of the independent appraisal device is to resolve uncertainties about value, thereby facilitating settlements and perhaps at less cost than the additional bargaining necessary to reach agreement without an independent appraisal.

100. See note 71 supra. The 10% margin would appear more reliable in California than nationwide, for if the responses from appraisers who are not Californians are eliminated, the following distribution occurs:

Margin	Number of Appraisers
Under 10%	5
10%	16
10-15%	3
15%	1
20%	1
Over 20%	3
Would not answer	2
Total	31

That California appraisers report a narrower margin of difference might be explainable if a greater number of real estate transactions occur in this state, thereby supplying California real estate appraisers with more ample data.

101. See, e.g., The Ass'n of the Bar of the City of New York, Impartial Medical Testimony (1956); Zeisel, "The New York Expert Testimony Project: Some Reflections on Legal Experiments," 8 Stan. L. Rev. 730 (1956); Note, "The Doctor in Court: Impartial Medical Testimony," 40 So. Cal. L. Rev. 728 (1967).

102. See, e.g., Smith, "Next Witness in Eminent Domain," 28 Tex. B.J. 267, 306 (1965).

103. See, e.g., Levy, "Impartial Medical Testimony," 30 Pa. B. Ass'n Q. 348 (1959).

104. See The Ass'n of the Bar of the City of New York, op. cit. supra note 101, at 13-19 (1956).

105. Levy, op. cit. supra note 103, at 357 (Quoting Justice Irving H. Saypol).

APPENDIX

The following letter and post card were mailed on August 23, 1968 to the persons described in Note 71. For the results of the inquiry, see notes 71 and 100.

Body of Letter

I have been retained by the California Law Revision Commission to prepare a study on the procedural aspects of eminent domain law. I am working on a proposal which would entail a nonpartisan appraisal and reallocation of litigation costs (including attorneys' and expert witnesses' fees) after trial. I have enclosed a copy of pages 20-26 of a preliminary draft which contain a brief outline of this proposal.

My purpose in writing you is to get your opinion as to what percentage would best represent the margin by which competent and unbiased appraisers, not subject to conflicting legal instruction, can be expected to differ in their valuations of a taking--that is, value of land taken plus severance damages with any special benefits to the remainder subtracted from severance damages but not from the value of the land taken. As you can see from pages 25 and 26, I am presently using 10%.

I know that any figure used will be arbitrary in some cases and I would expect that the answer you would like to give to my inquiry is "it depends". But to make the proposal work, some percentage figure is necessary. Consequently, I would greatly appreciate your marking the enclosed, self-addressed post card and returning it to me. Thank you for your help.

Yours sincerely,

Post Card

The percentage that would best represent the margin by which competent and unbiased appraisers, not subject to conflicting legal instructions, can be expected to differ is _____%.

Name_____

Address_____

_____