

CONDEMNATION PROCEDURE ALTERNATIVES FOR VIRGINIA

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## CONDEMNATION PROCEDURE ALTERNATIVES FOR VIRGINIA

### I. INTRODUCTION

During one of the interviews for this project, a trial judge of many years' experience in condemnation cases made the following comment:

It's an unfortunate thing that so many times the people who are changing the laws have never been in one of these cases and don't know straight up about it — and a lot of judges, too, just to be frank, if they haven't handled it. It's a specialty and unless you have been in the practical side of it, why you may agree to anything that sounds good in theory, but it doesn't work out.

Condemnation is indeed a specialty, and it is much more complex than it might at first seem to the uninitiated. As noted by the judge, the condemnation problem is preeminently a practical one. The difficulties lie not in the legal theories of condemnation, which are comparatively easy, but in the day-to-day administration of condemnation trials and particularly in the selection of commissioners. Since these practical difficulties differ greatly from one jurisdiction to another, depending on the size of the circuit, the amount of condemnation and the personalities involved, it is very difficult for any individual to generalize about condemnation problems statewide. Everybody can speak with authority on the situation in their own jurisdictions, but most become much less confident about prescribing solutions for the state as a whole.

It is hoped that this project will help in providing that overall view. It seemed to the author that the best way to approach the problem was to interview the judges who administer the condemnation law daily in their courts, and who have no reason to favor one side or the other. Therefore, the author interviewed fifty-four judges who handle condemnation cases in Virginia. These interviews included at least one judge in each of

the forty judicial circuits. In circuits with more than one judge the author interviewed the judge with the most experience in condemnation whenever possible. In several jurisdictions, two or more judges were interviewed. Most of the judges were sent a list of questions and an explanation of the project considerably in advance of the interview itself, in order that they would have time to consider their answers carefully.

All of the interviews, except one, were conducted by personal visits with the judges, and they generally lasted between forty and sixty minutes. In the case of the judge with whom a personal visit was not possible because of scheduling problems, a complete one-hour interview was conducted by telephone.

All but seven of the interviews were recorded. One of the seven was the telephone interview, which was not possible to record. Another was not practical to record because it was conducted in a restaurant. Thus, only five of the interviews were unrecorded because the judge declined permission. During the unrecorded interviews, the author took extensive notes for use in this report.

The author has made every effort to let the judges speak for themselves. For this reason, the comments of the judges have been included as a series of appendices to this report. The reader is strongly urged to consult these comments freely in reading the report; they contain a wealth of information and insights which cannot be conveyed by a secondhand summary. In fact the narrative portions of this report should be used as a guide to the judges' comments, rather than the reverse. The main body of the report is intended to summarize in a concise and readable form what the judges have to say on a given issue, to present these views in a clear analytical manner, and to provide important contextual information. But with this basis, the reader is well-advised to proceed to the judges' actual comments for the valuable insights and critical judgments which are the payoff of this project.

The judges have not been identified by name in this report for two reasons. First, while the judges were very cooperative and enthusiastically welcomed the opportunity to air their views on the problems of condemnation, many were naturally reluctant to permit anything to be printed in their name without first having the opportunity to review it. As the author got into the interviewing process, it became clear that it would not be possible to transcribe the interviews, write up the portions to be used for quotation, and send them back to the judges for their review within the time limitations of the paper. This was explained to most of the judges, who agreed that the best solution was to use the information without attributing it to specific individuals.

The second reason for not attributing comments to specific judges is that it simply isn't necessary, since the object is not to find out what a specific judge thinks, but to get their collective judgment on the various issues.

An added benefit of anonymity may have been that the judges felt free to discuss the problems frankly and completely. That they did so is obvious from their comments.

The reader will notice that while fifty-four judges were interviewed, the number commenting on any given issue is usually fewer than fifty-four. It should be noted in

particular that on some questions only a few judges made comments. On most of the key questions, however, forty or more judges responded.

No conclusions should be drawn from the fact that all fifty-four judges didn't comment on each question. This variation in the number of responses is simply a result of the practical limitations under which the interviews were conducted. Each of the judges was sent an extensive list of questions well in advance (see Appendix XXIII), but the interview comments did not consist of specific answers to each of the twenty-four questions on the list. The judges were requested to use the list merely as food for thought, and were urged to discuss the issues they considered to be most important. In the far-ranging discussions that resulted, the interviewer attempted to inquire about each of the major issues, but as a practical matter it was not possible to ask each of the twenty-four questions. Frequently, in discussing some aspect of the problem, a judge would in fact answer several questions, since they are in many ways interrelated and overlapping. (The "present system", for example, includes many issues.) In such cases, it seemed redundant and wasteful of valuable time to press the matter further. The author is confident that overall much more information and insight was gained through these free, conversational interviews than would have been gained by formal, specific answers to each of the questions on the list.

Another factor contributing to the variation in the number of responses was that new ideas were picked up from the judges as the interviewing process went along. Each of these ideas was then sounded out in succeeding interviews; but the total number of judges commenting was of course fewer than fifty-four.

In other cases, the reverse process took place. For example, after twenty-five or thirty unanimous, negative, nearly identical responses were obtained on the question of value determination by the court, that issue was assigned a low priority in following interviews. The position of the judges was perfectly clear, and the court-determination procedure was obviously not a realistic alternative. This too contributed to the variation in the number of responses.



## II. BRIEF SUMMARY OF THE REPORT

The purpose of this section is to summarize the significant observations and conclusions of the judges as expressed in the interviews for this report and reproduced in the appendices.

### OBSERVATIONS ON THE PRESENT SITUATION

A substantial number of judges are dissatisfied with the present procedure. Nearly half (25 of 53) of the judges would prefer to see some other procedure implemented. Several judges are very forceful in their denunciation of the present procedure.

A majority of the judges believe that the commissioners base their awards on considerations other than fair market value. Of 42 judges commenting, 31 indicate that legal fees, expert witness fees and other factors are considered. Many of these judges indicate that in their opinion it is in the interest of justice that the commissioners do so.

A number of judges express the opinion that awards are generally high. Of 25 judges responding to the question about awards, 11 think the awards are generally high, 14 think they are fair. No judge expresses the opinion that awards are generally low.

### OBSERVATIONS ON THE ALTERNATIVES

The judges overwhelmingly oppose the use of regular civil juries in condemnation cases. Of 51 judges commenting on the question, 44 oppose the jury. The 7 who support it generally do so out of strong dissatisfaction with the present system. The major reason given for opposing the use of juries is the incompetence of the average juror to decide technical issues of real estate valuation. A second primary reason is that it would delay the proceedings considerably.

While only 13 judges were asked about the matter, most of those commenting do not consider the proposed requirement that jurors be freeholders to be significant in changing the character of the jury. The sample of judges responding on this question is small simply because the interviewer inadvertently neglected to consistently inquire about the issue. Nevertheless, the results based on the 13 seem significant. Of the 13, 9 express the opinion that the status of being a freeholder does not indicate an expertise in real estate. Three judges indicate that it might have "some bearing." Only one believes that it is a substantial qualification.

A majority of judges indicate an interest in and support for the selection of commissioners by a committee and the drawing of commissioners by lot for each case. Of 44 judges commenting, 27 indicate they support the idea. Only 7 oppose it, while 10 are noncommittal. Those who support it generally do so because it would in their opinion retain the advantage of the commissioner system (qualified persons hearing the case), but would eliminate the undesirable aspects of the present system (appointment of commissioners by the parties). The judges stress the importance of selecting

highly qualified commissioners and indicate some reservations of the constitutionality of doing so, since it is possible that the federal courts would require a cross section of the population to be represented on the commissioner rolls, as it must be on jury rolls.

#### SUGGESTIONS BY THE JUDGES

A substantial number of judges would like to have the authority to appoint, at their discretion, a special commissioner in chancery to preside at condemnation trials. Of 44 judges commenting on the issue, 17 indicate their support while 27 indicate opposition. Several of those in favor argue very forcefully for its adoption, however, while the opposition frequently takes the form of "I don't need it" rather than "I oppose it."

Some judges suggest that the summoning of alternate commissioners should be made an integral part of the condemnation law, so that alternates would be summoned as a matter of course in every condemnation case. At present, the law makes no provision for the appointment of alternates. The judges who comment on this indicate it would solve some problems if the summoning of alternates were automatic, as it is with jurors.

### III. THE EXPERIENCE UNDER THE PRESENT LAW

#### A. HOW THE COMMISSIONERS ARE SELECTED

##### 1. AGREEMENT BY THE PARTIES

(See Appendix I)

Section 25-46.20 of the Code of Virginia specifies that the parties to a condemnation proceeding may agree on the commissioners. It further provides that if the parties are unable to agree they must submit a list of not less than six names to the court. The court then selects nine commissioners from the twelve names before it. Of the nine persons summoned to court, four are dismissed at the outset of the case by peremptory challenge. (Each party has the right to arbitrarily strike two commissioners.) Thus, five commissioners remain to hear and decide the case.

The comments by the judges show that while the parties customarily agree on the commissioners in some thirteen jurisdictions, the clearly more common practice is to submit lists to the court (twenty-five jurisdictions). The judges in eight jurisdictions indicate that both methods are commonly used in their circuits. These figures indicate that the selection of commissioners is often a hotly contested aspect of the case. This indication is confirmed by other comments by the judges (see Appendix VII).

Interesting comments by the judges include the following: by a judge in whose jurisdiction the parties do not normally agree, "They're trying to get liberal people on, that's why they don't agree." A judge in whose jurisdiction the parties do usually agree notes that this is evidence that "there couldn't be much dissatisfaction" with the selection procedure. Another thinks that whether they agree or not is "strictly a matter of personalities."

##### 2. SUBMITTING LISTS TO THE COURT

###### a. Frequency of the Same Name on Both Lists

(See Appendix II)

As another way of measuring the contested nature of commission selection, some of the judges were asked if some commissioners were frequently suggested by both landowners and the Highway Department. Four indicate that they are getting some "overlap of names on the lists", while nine say that overlap is infrequent, rare or non-existent. This finding tends to support the conclusion that the selection is a hard fought aspect of the case.

## b. How the Judge Makes His Strikes

(See Appendix III)

The judges use a wide variety of methods for making their choices from the lists submitted to them. Some of them make the selection by drawing the names out of a box, while others investigate (one requires a biographical sketch of each person) and make a judgment of the individuals on the list. Most of the judges divide their strikes, insofar as possible, between the parties; they take five from one list and four from the other (which, of course, is the equivalent of striking two from one list and one from the other). Similarly, most of the judges will rotate the third strike, that is, if they strike two from the Highway Department's list in one case, they will strike only one from the Department's list in the next case.

Some of the judges allow each of the parties to strike one commissioner from the opposition's list of six, then the judge makes his third strike either by lot or by his own judgment. Notice that the effect of this is to give the parties three strikes each, with the judge exercising the remaining one.

While most judges divide their strikes as described above, a few consistently take two strikes against the landowner if they think the awards are too high or two against the Highway Department if they think the awards are too low. It is possible for the judge to exercise all three strikes against one side (which would inevitably leave only one of that party's nominees on the five man commission) but this is rarely, if ever, done.

Many of the judges indicate dissatisfaction with the fact that they are required to favor one side or the other at the beginning of the case. (See Appendix VII.) As mentioned above, some have resolved that situation by drawing the names by lot.

## 3. DESCRIPTION OF THE COMMISSIONERS

(See Appendix IV)

The typical commissioner is a businessman or farmer who is not a professional in real estate, but is generally active in business affairs and has some general knowledge of real estate. Most of the judges commented that the Highway Department generally submits the names of conservative older persons such as bank officers, while the landowners submit the names of younger, more liberal persons such as salesmen or contractors.

Several judges state that they are getting "100% good men" and "substantial, qualified men," while others say that "the Highway Department gets conservatives and the landowners get their friends and next door neighbors."

Many judges in rural jurisdictions indicate that real estate professionals are not used as commissioners, and that they are reluctant to permit them to serve since



they would be "too interested" in the matter. In urban circuits, however, real estate professionals frequently serve as commissioners. This appears to reflect the fact that anonymous and disinterested professionals are available in the cities, but are not available in the intimate rural situation.

One judge states that the parties don't use real estate professionals because "they are afraid they'd be too knowledgeable."

## B. THE COMMISSIONERS IN OPERATION

### 1. WHAT THE COMMISSIONERS CONSIDER

(See Appendix V)

Under the law in Virginia the sole purpose of the condemnation trial is to determine the fair market value of the property taken as of the date of the take and damages to the residue. Compensation to the landowner for relocation and other expenses are governed by other procedures.

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

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

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

In summary, it is clear that despite the law and clear instructions given them to the contrary, the commissioners exercise considerable discretion in making the award to the landowner. As one judge puts it, most of the commissioners "know how

the system operates." This would seem to be especially true of commissioners who serve on condemnation cases repeatedly. One implication of this situation is that there may be lower awards in those cases where the commissioners strictly adhere to the law and the instructions, and where the commissioners don't "know how the system operates."

## 2. THE EFFECT OF USING A LIMITED GROUP OF COMMISSIONERS

(See Appendix VI)

Most of the judges interviewed indicate that they use the same group of men repeatedly as commissioners, though some use a larger group than others. One judge says his commissioners generally come from a group of ten or twelve men, while others have a wider variety of commissioners. Some jurisdictions draw their commissioners from a group of forty or fifty men. Only a very few judges indicate that they usually have a new commission for each case.

Several judges comment that they see more repeaters on the Highway Department's list than on the landowner's list, which is natural since the same attorney handles all of the state's cases in a given circuit and he tends to reappoint commissioners who he believes have returned favorable awards in previous cases. The landowner, and probably the landowner's attorney, are different in each case and therefore have different ideas about commissioners. Several judges note that the landowner brings in his friends, or at least people sympathetic to him, and this naturally differs from case to case. In some counties, however, a single attorney may handle the majority of landowner cases and there is more of a tendency for him to reappoint familiar (and presumably favorable) commissioners.

The judges appear to be in near unanimous agreement that it is very useful to use experienced commissioners (repeaters) in condemnation cases. The reason most frequently given is that the commissioners really don't understand the law or the instructions in the first few cases they hear. According to the judges, the commissioners require three or four cases to become thoroughly familiar with the situation, and with greater experience the commissioners become more knowledgeable about real estate values, the expert witnesses and the evidence presented to them. With this increased confidence and knowledge the commissioners become more aggressive and intelligently critical of the witnesses and the evidence. The judges feel that such experienced commissioners will more readily reject ridiculous or unfounded testimony. The judges also point out that much time is saved by using experienced commissioners since many of the preliminaries can be dispensed with (explaining the law and the instructions) and the proceeding can immediately "get down to the nub of the case," that is, the testimony of the appraisers. Several of the judges also mention that experienced commissions give more uniform awards.

Most of the judges, while supporting the use of experienced commissioners, add the caveat that drawing the commissioners from too small a group can also be undesirable. Most think that the "same old people tend to get in a rut," that we shouldn't use "professional jurors," and that they are afraid "a man might carry over an impression he picked up in one case to the next case."

In short, the judges think it is very desirable to use experienced commissioners, but undesirable to carry it to the extent of using only a few commissioners over and over again.

### C. THE JUDGES' ASSESSMENT OF THE RESULTS

The judges are split roughly in half on the question of the merits of the present system. Twenty-eight judges seem to be generally satisfied with it, while twenty-five indicate substantial unhappiness with it. This classification is somewhat arbitrary, however, since most of the judges comment extensively, pointing out both the merits and the demerits of the procedure. The reader is urged to consult the judges' statements in Appendix VII for a full appreciation of their views.

#### 1. COMMENTS OF THOSE GENERALLY SATISFIED WITH THE PRESENT SYSTEM

(See Appendix VII)

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

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

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

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

A few judges note that having a friend on the commission is a "two-edged sword" since a friend may bend over backwards to insure that he isn't favoring his landowner friend.

One judge points out that he still keeps a list of about forty men which he drew up and used when he was responsible for appointing commissioners, and that it is "almost unheard of" for present commissioners not to come from that list.

## 2. COMMENTS OF THOSE GENERALLY NOT SATISFIED WITH THE PRESENT SYSTEM

(See Appendix VII)

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

"Abominable."

"Horrible."

"Bad in every way."

"Anything would be an improvement."

"Deplorable."

"There have been rank abuses."

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

"Wrong, wrong, wrong from the beginning."

"Very, very unsatisfactory."

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

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

The judges mention several illustrations of the reasons for their complaints. In one case a landowner had driven "his" commissioners to the courthouse in his car and was standing with them in front of the courthouse, presumably discussing the case, before the trial. The judge says that while he thinks that this was inadvertent it nevertheless illustrates how easy and natural it is for improper influence to be used.

Other judges describe cases in which it was discovered after the trial that a commissioner who had been proposed by the landowner had owed the landowner substantial sums of money (\$500,000 in one instance). In another instance, a commission brought back an award of \$30,000 for the landowner. The judge threw out the award and held a new trial. The award granted by the new commission was \$3,000. In the opinion of the judge, this "never would have happened if we hadn't used this system."

One judge in an urban jurisdiction believes he is getting "fast buck types" on the commissions simply because he isn't able to find out enough about them.

According to one judge, there are very few challenges for cause because "I guess the attorneys just assume we're going to have a biased commission. And we do."

Another point made by the judges is that they dislike being required to favor one side or the other by making an uneven number of strikes.

### 3. FAIRNESS OF THE AWARDS

(See Appendix VIII)

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

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

"Awards have not gone haywire."

"Considered in the correct range by the bar."

"I have never seen an instance where the commissioners made an unfair award."

"I don't see too much wrong with the awards."

"No real runaway awards, no ridiculous awards."

"Somewhat liberal, but not extravagant."

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

"Getting out of hand, it almosts shocks the conscience."

"Extremely high."

"Of all the cases I've tried, there has been only one time where the man didn't get more than he should have."

"I don't know of any case where the landowner didn't get in excess of the fair market value."

"On the interstate in one of my counties, every one was excessive."

"The landowner makes a pretty good recovery in the usual case."

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

#### 4. PREDICTABILITY OF THE AWARDS

(See Appendix IX)

The judges are split on this issue. Several say they don't think the commissioners are at all predictable; "No. I can't tell what they're going to do and nobody else can either. Whether they know you or not, they try to give a fair result."

Others think that once the commission is picked, it is weighted; "When you get three to two on there, that's a heck of a way to run a lawsuit." One judge indicates that if the landowner gets a majority, a high award can safely be predicted, but if the Highway Department gets a majority, a moderate or low award cannot be safely predicted because "these people are higher than the Highway Department."

#### IV. THE ALTERNATIVE METHODS

##### A. THE CIVIL JURY

##### 1. THE REGULAR CIVIL JURY

Several states use the ordinary civil jury to hear condemnation cases, either in the first instance or as an appeal from a preliminary procedure. The differences in concept between a jury and a commission are substantial and for that reason will be briefly discussed at this point.

The theory of a commission is that it is composed of men who are chosen for their special competence in a given area. This special ability presumably results from training, experience and professional practice. This assumption about condemnation commissioners is clearly illustrated in Virginia law, which permits them to make their award based solely on their own view of the property. The commissioners are not bound by the evidence presented in court by the appraisers (as jurors would be) and may make an award higher than the highest appraisal presented in court, or lower than the lowest appraisal. In short, the law presumes the commissioners to be experts and gives them unfettered discretion in determining the amount to be paid the landowner. The law plainly reposes considerable confidence and responsibility in the commissioners.

The assumption of commissioner expertise is even more clearly illustrated in the federal condemnation system. Three commissioners are selected by the court to sit for extended periods. The same commission may sit for several months, for example, to hear all of the condemnation cases involved on a construction activity (a road, a dam, airport, etc.). The commissioners are paid a salary and are usually very well qualified. The commissioners are initially instructed by the court and are thereafter free to conduct their own proceedings; the judge is not present unless a troublesome problem arises. The federal condemnation commissions are, in effect, special courts. Usually at least one of the members is an attorney, and of course all of them are highly qualified in real estate dealings.

The theory of a jury is quite different. A juror is in no sense expected to be an expert in any given field. On the contrary, the assumption behind the jury system is that the average citizen is qualified to judge the credibility of witnesses and decide between conflicting versions of a previous event. Jurors (unlike commissioners) are expressly forbidden to go outside the evidence presented to them in court in making their decision, and a verdict which cannot be supported by the evidence as presented will be thrown out. It is true that jurors take a view of the scene of the crime or dispute in certain cases, but this is done merely for the purpose of helping the jurors to better understand the evidence presented in the trial.

In the condemnation context, the commissioner system is usually advanced because it puts highly qualified persons in the decision-making capacity, while the jury system is advocated by those who think it is more important to have impartial persons making the awards.

## 2. JURY WITH A FREEHOLDER REQUIREMENT

Under one version of the jury system which has been advanced, the jurors would be required to be freeholders. This would presumably insure that the jurors at least have a minimum acquaintance with real estate valuation. This system would make it necessary to draw up a separate jury list, that is, a freeholder jury list. This task would be assigned to the jury commission. (The risk of confusion between the various kinds of "commissioners" in the Virginia legal system is great. The "jury commission" referred to here is the committee appointed by the judge for the purpose of drawing up the jury list each year.)

Whether the requirement that condemnation jurors be freeholders would actually make much difference in the quality of the jurors is a question discussed below and in Appendix X.

## 3. THE JUDGES' COMMENTS

(See Appendix X)

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

### a. Comments Generally Favoring Juries

Most of the judges who support the jury do so in the context of rather extreme dissatisfaction with the present system and seem, in effect, to be saying that Virginia is already suffering from the disadvantages of the jury system while not enjoying any of the benefits. As one judge expresses it, "The present commissioners are no 'experts' either." The judges rebut the argument that juries would be very unpredictable and would render disparate awards with comments such as the following:

"If a jury could come out with more unpredictable results than the crowd is doing now, well, I don't know how they could do it."

"We need people as disinterested as possible. You'd still have a great disparity of awards with the jury, but you'll get disparity anytime you have different men serving all the time."

In short, these judges recognize the problems with the jury but still believe it would be preferable to the present system.



## b. Comments Generally Not Favoring Juries

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

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

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

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

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

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

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

At least one judge points out that many women are generally unqualified in real estate matters. He points out that taking the view often involves climbing mountains and tramping through mud, for which "women aren't suited." He further believes that women would tend to think that real estate is a "man's job" and would let the men decide, abdicating their responsibility.

One judge believes that using the jury would increase litigation because, "I think the straight jury would have the same approach to matters of eminent domain that many juries have in personal injuries where insurance is involved. They figure the rich insurance company or the state can pay, so 'let's sock it to them.'"

#### c. Comments on the Freeholder Requirement

While some judges think that the requirement that the juror be a freeholder is a significant one, the majority are plainly of the opinion that it is not. The minority make comments such as the following:

"I certainly think it would make a substantial difference."

"You could avoid some of the problems that way."

"That would have some bearing, they would be more responsible."

"He would know something more about real estate values, I'll say that much."

The clear majority, on the other hand, commented:

"There are lots of ignorant freeholders."

"Doesn't change a thing."

"I wouldn't want that. I think we have to have people who know what they're doing."

"Many freeholders wouldn't have any idea about the value of land."

"It wouldn't make much difference. It takes more expertise than that."

"Wouldn't change it much."

"It might improve the quality of the jurors a little bit, but not significantly."

These results should be tempered by the fact that only thirteen judges responded directly on this question. This sample is small for the simple reason that the interviewer neglected to inquire about the matter. In retrospect, however, even with the small sample, the results seem significant. Of the thirteen, nine express the opinion that the status of being a freeholder does not indicate an expertise in real estate. Three judges indicate generally that it might have "some bearing." Only one believes that it is a substantial qualification.

#### B. COMMISSIONERS SELECTED BY A COMMITTEE

It has been suggested that commissioners should be selected by a committee created for that express purpose. It is thought by some that this would avoid the abuses

of party appointment which are alleged to occur under the present system, and also avoid the abuses of judicial appointment which are alleged to have occurred under the previous procedure. While the details of such a procedure could vary, the main features would be as follows.

A committee (this term is carefully chosen to avoid confusion with jury commissioners, who perform a similar function with respect to juries) of approximately six members would be appointed by the judge. The members of this committee would hopefully be chosen because of their disinterested status and their knowledge of prominent local people who could serve effectively as condemnation commissioners. The committee would be carefully instructed to draw up a list of twenty-five to fifty commissioners selected strictly on the basis of their expertise in real estate valuation, their integrity and their impartiality. This list of commissioners would probably need to be redrawn every three years because of resignations, deaths, commissioners moving from the county, etc.

The number of commissioners to be put on the list would have to be worked out. It seems to be generally agreed that each circuit should be required to have a minimum number (for example, twenty-five or thirty) to prevent the development of "professional" condemnation commissioners. The judges appear also to be of the opinion that too many commissioners would not be desirable since the number of qualified persons is limited and if a completely new commission were brought in every time the system would begin to look more like a jury system. For this reason it would appear wise not to draw more than fifty or seventy-five commissioners. Perhaps a formula could be devised which would base the number of commissioners on the population of the county. The amount of condemnation work in the jurisdiction would also be an important factor in this determination.

One question which comes into consideration under this scheme is whether it is subject to too much control by the judiciary, since that was the major complaint under the old Virginia procedure. It may be argued that under this proposal, the judge would still control the awards by simply appointing conservative persons to the committee and they would appoint conservative commissioners. On the other side, it may be contended that giving the job to the committee broadens the responsibility and takes it out of the direct control of the judge. It may furthermore be argued that as a practical matter most judges would appoint representatives of both the landowner's and the state's point of view to the committee. Also, if the commissioners were chosen by lot for each case, the judge would have much less direct control than he had under the old system when he appointed commissioners for individual cases. The judges' own observations on this question are discussed below.

Under either version of this proposed procedure it seems entirely desirable to retain the peremptory strikes since, as one judge puts it, "There may be a personal thing there."

It should be noted at this point that using one commission for several parcels of land in the same area, which is supported by many judges, could very well be adopted in conjunction with the system of selecting commissioners by a committee. See Appendix XVIII.

### 1. COMMISSIONERS DRAWN BY LOT FOR EACH CASE

Under one possible version of this proposal, the commissioners would be drawn by lot for each case as it arose. No commissioner would serve twice until each had served once. This would presumably be the most impartial method of selecting the commissioners.

### 2. PARTIES SELECT FROM THE LIST

It would be possible under the proposal above for the parties to select commissioners from the list drawn up by the committee. However, this possibility did not receive much support from the judges. As expressed by one judge, "The landowner would look over the list and say to himself, 'Let's see who I know on here.'" It would seem wiser to draw commissioners at random and allow peremptory strikes.

### 3. THE JUDGES' COMMENTS

(See Appendix XI)

The judges are generally very interested in the idea of selecting commissioners by a committee. Of forty-four who comment on it, twenty-seven are favorable, seven are not in favor and ten are noncommittal.

#### a. Comments Generally Favoring Selection by a Committee

Most of the judges favoring this idea do so because it would eliminate the feature of the parties appointing commissioners and yet would not put the selection responsibility directly on the judges. The following comments are made:

"Excellent."

"I'd support this 100%."

"I think that would be superior."

"Seems to have a lot of merit."

"Definite improvement."

"This would be my choice."

It is frequently stressed by these judges, however, that the success of this system would all depend on who was selected as commissioners, and that the key to it is to "select qualified people."

A second caveat is usually added to the initial favorable reaction. Many judges express the reservation that the federal courts would require on a constitutional basis that a cross section of the population be represented on the commission list, just as is now required on jury lists. The judges believe that if this were done, the objective of obtaining highly qualified commissioners would be destroyed, incompetent commissioners would be required to be on the commissioner list and we would have, in effect, a jury. One judge says that, "the ignorant as well as the knowledgeable, the criminal as well as the honest" would be required to be included.

#### b. Comments Generally Not Favoring Selection by a Committee

No single reason stands out among the comments by the judges who do not favor the proposal. A variety of reasons are assigned. One judge advocates selecting the commissioners for the specific case because, "if the case is at one end of the county, you want to pick your commissioners from the other end to be sure they are disinterested." Another believes that the selection "shouldn't be left to chance. It's better to have each party submit a list" so that commissioners of both philosophies will be represented.

Another judge notes that selecting commissioners by lot has the disadvantage that different commissioners are qualified for different kinds of property. That is, a farmer may know very well the value of farm land, but know nothing about twenty unit apartment complexes. For this reason the judge supports picking the commissioners for the individual case.

Still another judge points out that uniformity of awards would be a problem if there were sixty or seventy commissioners on the list.

#### c. Noncommittal Comments

Several judges respond that they "wouldn't object to it" or make other comments of a noncommittal nature. The reader is referred to Appendix XI for these comments.

#### d. Comments on Control by the Judge

While there is a split of opinion on the subject, more judges than not think that under the committee selection the old criticism of excessive judicial control would lose its force. Representative comments follow:

"It broadens the responsibility."

"It would be too far removed from the judge."

"I don't think it would be subject to the criticism that it's too much controlled by the judge."

"This would remove it from the judge and I don't think it would be a valid criticism that the judge controlled it. But it would depend on who the judge appoints."

The opposing opinions express the feeling that "a conservative judge will appoint a conservative committee, which will get conservative commissioners, and a liberal judge will do the same with liberals. So are you any better off?"

### C. COMMISSIONERS APPOINTED BY THE COURT

Two factors should be mentioned with respect to commissioner appointment by the judge. The first is that under any of the variations discussed below the judge could

be required to pick a certain minimum number of commissioners (perhaps twenty-five or thirty). Such a provision would seem to eliminate or reduce the excesses which are alleged to have occurred under the pre-1968 system. As expressed by one judge, "If the judge has to pick a larger number, he couldn't appoint all conservatives."

A second point which it may be well to keep in mind is how the judge would proceed in drawing up his list of commissioners. It is probable that most judges would consult with prominent landowner's attorneys and the state's attorney, and would adopt many of their suggestions.

### 1. APPOINTED CASE BY CASE (PRE-1968 SYSTEM)

Under Virginia law before the revision in 1968, the court was solely responsible for appointing condemnation commissioners. The judges exercised their authority in various ways. It was very common for the judge to ask for suggestions from the attorneys, and these suggestions were frequently adopted unless the judge had a specific reason to reject a nominee. Other judges appointed the same nine commissioners (it was perhaps a slightly larger group) to every condemnation case, in effect adopting them as their "permanent" commissioners. This naturally gave the court very substantial control over the awards, since the judge could appoint nine very conservative or very liberal commissioners to "permanent" commissioner status. The landowners' dissatisfaction with what they considered to be consistently low awards in some jurisdictions resulted in the 1968 revision. The basic idea of the revision was to let all three parties, the condemnor, the condemnee, and the court, share the responsibility for selecting commissioners.

### 2. PARTIES SELECT FROM THE COURT'S LIST

One possible variation of a judge-appointed system would be for the judge to draw up a list of commissioners ("approved commissioners") from which the parties could select commissioners to hear their case.

While this would presumably give the court less control than it had under the pre-1968 procedure, since the judge wouldn't be picking commissioners for an individual case, the court would nevertheless still be selecting all the commissioners. Furthermore, the litigants would naturally shop around on the judge's list to find friends and favorable commissioners and the objective of removing the parties from the selection process would not be met.

### 3. COMMISSIONERS DRAWN BY LOT FROM THE COURT'S LIST

Another version of the judge-appointed system would have the judge select the commissioners for each case by lot. This would remove the parties from the selection

process and would leave the judge with the responsibility. As mentioned above, the judge would be somewhat restrained if he were required to select a comparatively large number of commissioners, and this would seem to eliminate some of the excesses which were alleged under the old system.

#### 4. THE JUDGES' COMMENTS

(See Appendix XII)

Of thirty-seven judges who comment on the judge-appointment alternative, twenty-five are generally favorable, ten are generally unfavorable and two are non-committal. These statistics are somewhat misleading, however, since there is no great desire of the judges to regain this responsibility, and many of those who favor it do so only because they consider it preferable to the present system.

##### a. Generally Favorable Comments

Many of the judges who indicate that they would like to see a return to judge-appointment make their comment by way of making the point that the present system is unsatisfactory: "It would be better than the present system," "It would be an improvement over what we have now." Some of these judges note at the same time that there were abuses of the pre-1968 procedure. The following comments are made by judges who favor judge-appointment:

"Even as a practitioner, I was always in favor of letting the judge select them."

"I think the judge appointed better commissioners than you would get under any other system."

"We had a real blue ribbon commission under the old system."

"The judge is in as good a position to pick a commission as anybody would be."

Many of the judges who are favorable to judge-appointment support the drawing of commissioners by lot, rather than allowing the parties to pick from the list. At least one, however, supports the latter suggestion.

Several of the judges also point out that many judges asked for and accepted suggestions of the attorneys under the old system.

##### b. Generally Unfavorable Comments

The comments against the system of judge-appointment (which are made by judges in the "Generally Favorable" category as well) indicate that the judges under

the old system had too much control. The following comments illustrate the point:

"The judges tend to get a little group of people they have confidence in and they use the same people every time."

"If the judge happens to go one way or the other, you're stuck with it."

"I have always strenuously objected to that because it puts too much power in an agency from which there may be no recourse for either party."

"The judges got in the habit of appointing the same people and that was bad."

"The judges controlled it with an iron hand under the old system."

#### c. Noncommittal Comments

Two judges think that "it wouldn't be very different from the present system."

#### D. PRESENT SYSTEM MODIFIED BY EXPANDING THE LISTS

(See Appendix XIII)

It is suggested by some judges that instead of switching to a completely different procedure to ameliorate the problems under the present law, the discretion of the court could be enlarged by simply increasing the number of names each party submits. For example, each party could submit nine names, giving the judge eighteen from which to select his nine. One judge suggested fifteen from each side, giving the judge thirty names to work with. See Appendix XIII for additional comments.

#### E. A REGIONAL OR STATEWIDE BOARD OF EXPERTS

(See Appendix XIV)

Many of the judges commenting in connection with several different aspects of this problem note that it is of great importance to have qualified commissioners to decide condemnation cases. The logical extension of this idea would be to use a commission of true professional experts in real estate. But because of other factors, this proposal does not meet with the approval of the majority of the judges. Of thirty judges who comment, only five are attracted to the idea. Twenty-five are opposed.



The proposal could take two forms. One would be a single statewide board of perhaps six or eight members appointed by the Governor. Another possibility would be to appoint a board for a region of perhaps four or five judicial circuits.

One factor working against such a proposal is its relative unfamiliarity among Virginians.

## 1. GENERALLY FAVORABLE COMMENTS

Those in favor stress the benefits of having experts decide:

"Any way to make it more professional is good."

"The best way to do it (decide fair market value) is to have experts do it."

"It would probably be better and fairer to get experts who really know what they're doing. I'd like, if I could, to get as far away as possible from the man's next door neighbor appraising his property."

## 2. GENERALLY UNFAVORABLE COMMENTS

Three points are stressed by the many judges who oppose the board of experts. They believe that such a board would inevitably be political, that it couldn't possibly be familiar with land values all over the state (or region), and that it would be too difficult to change the board if it became fixed in its ways. These concerns are reflected in the following typical comments:

"Even though the gentlemen were of sterling character, I'm afraid their actions would be characterized as political."

"Nobody could know land values all over the state. I think local people know more about their land values."

"If you get a board you don't like because it has a certain view of things, you're stuck."

"It could get off in either direction."

"You're taking government farther and farther away from the people."

## F. VALUE DETERMINATION BY THE COURT

(See Appendix XV)

Some states use no commission or jury, but simply let the judge hear the evidence and determine the value of the land. The thirty-two judges who respond to the question about this are unanimously opposed to the suggestion. The comment most frequently made is that "the judge isn't an expert in real estate." Others note that "every man has his slants." Several judges comment that "it would never be possible to satisfy everybody." In sum, the judges obviously think that this simply isn't a proper judicial function.

## G. TWO-LEVEL PROCEDURES

(See Appendix XVI)

Some states use a preliminary proceeding to hear condemnation cases, with an appeal or review by the courts. The purpose of such procedures is to dispose of the cases without requiring court proceedings.

This proposal is opposed by eleven of the twelve judges who comment on it. The consensus of the judges is that:

"Almost every one of those cases would be appealed."

"It would just be double work."

"That's just two proceedings instead of one, and that would be one too many."

## V. A MISCELLANY OF SUGGESTION AND COMMENT

### A. THE USE OF COMMISSIONERS IN CHANCERY IN CONDEMNATION CASES

(See Appendix XVII)

It has been suggested that it is unnecessary for the judge to preside in condemnation trials, and that the judge should have the option to appoint a senior attorney as a special commissioner in chancery to sit in the judge's role at the trial. The use of such special commissioners is already available to Virginia courts in other areas of the law, most notably in divorce proceedings. (The possibility of confusion in the use of the term "commissioner" is great. For the benefit of those without legal training the "special commissioner" being discussed here is to be sharply distinguished from "condemnation commissioners" who hear and make the awards in the present condemnation cases, and "jury commissioners" who draw up the jury list in each county.)

For the purpose of this question in the interviews with the judges, it was assumed that the present condemnation procedure would remain as it is, so that the only question is whether the judge should be able to appoint an attorney (a special commissioner in chancery) to perform the judge's function in the courtroom, thus freeing the judge to attend to other duties. Notice that the condemnation commissioners would still hear and decide the case. The special commissioner would merely preside over the proceeding and make rulings concerning admissibility of evidence and other legal questions. Under this scheme, the judge would retain the ultimate authority, and litigants would be free to appeal the commissioner's rulings to the judge. The assumption of the proponents of this system is, of course, that there would be relatively few such disputed rulings and that most of these cases would be disposed of in the proceedings before the special commissioner so that the judge would not usually have to get involved.

Of forty-four judges commenting on this issue, seventeen are generally favorable and twenty-seven are not favorable. This is partly a result of the fact that most Virginia courts do not have a backlog on their dockets and therefore the judges feel no pressing need to relieve their workload. The judges who do feel the need are quite articulate in their support of the special commissioner option.

#### 1. COMMENTS OF JUDGES GENERALLY IN FAVOR

It is the opinion of many judges, including some not favoring the special commissioner idea, that condemnation cases are ordinarily very simple and straightforward in terms of the legal issues. They are variously described as "cut and dried," "stereotyped," "terribly boring," "very pat . . . as clear as a bell," and "dull to the deadly point." One maintains that "it's not unusual at all to go through an entire condemnation case and never have to make a single ruling, when you have experienced lawyers."

The judges frequently express the belief that in many cases it is simply not necessary for them to be there. The following comments illustrate their opinions:

"A special commissioner could hear them just as easily if not better than I could. You're using too much judicial or legal knowledge in a matter of just sitting and waiting."

"That would have a great deal of merit. I don't agree that the judge should do every mechanical duty that could be done by someone else just as well."

"Why not let somebody else sit there and nod and listen to the evidence and make what few rulings have to be made?"

Another point made by the advocates is that since the procedure would be optional, the judge could use his discretion in hearing the potentially complicated cases himself while farming out the run-of-the-mill, straightforward cases to a commissioner. As expressed by one judge, "I think this idea, if the specifics can be worked out, is the best idea of all to submit to the General Assembly, because it wouldn't change any of the fundamental practice at all. You can leave both of your options open."

## 2. COMMENTS OF JUDGES GENERALLY NOT IN FAVOR

Three reasons are most frequently cited by those who are against the suggestion. The first of these is perhaps best expressed by the following comment: "I think these cases are extremely important. They have an emotional impact on the citizen that perhaps nothing else has. For that reason, I think they deserve the full panoply of the courtroom."

A second major reason given by the judges is that the judge will have to review many of the cases anyway and that under this proposal he would be under the disadvantage of not having observed the witnesses; he would "have to rehash it anyway, from a cold record."

The third point made by many of the judges is that "There are other ways to solve the problem of the court's workload," namely, the assignment of additional judges to the circuit, either temporarily or permanently. One judge noted that the workload problem might be alleviated to some extent by the proposed reorganization of the Virginia judiciary, under which each circuit would have at least two judges.

The added expense of the special commissioner arrangement is also mentioned as a reason for opposing it.

## B. THE USE OF ONE COMMISSION FOR SEVERAL PARCELS

(See Appendix XVIII)

Several judges indicate that it would be very helpful to allow one commission to hear all the parcels in an area. Many, in fact, indicate that they are already doing this insofar as possible by agreement of the parties. This would have the advantage of saving time and lending more uniformity to the awards. As pointed out in the comments in Appendix XVIII, the voir dire, the qualification of the expert witnesses and the instructions would have to be done only once, saving considerable time.

Nine commissioners would be qualified. The two peremptory strikes for each side would of course be retained, so that five of the nine would sit on each case.

The number of cases each commission would hear might create some difficulties. One judge suggests fifteen or twenty. Perhaps a maximum of twenty cases for each commission could be placed into the code, with the judge having the discretion to determine which and how many (less than twenty) parcels are "similar" and are therefore to be heard together.

Since the same (or generally the same) commission would hear all of the parcels of similarly situated landowners under this arrangement, it would seem to have the great advantage of uniform awards.

## C. THE COMPENSABILITY OF LEGAL FEES

(See Appendix XIX)

The general rule in American jurisprudence is that each litigant must stand his own legal and related expenses. The traditional justification has been that a policy of compensating a litigant for his legal expenses would provide an incentive to litigate. It is thought by some that this rule is inappropriate in condemnation litigation, where the condemnee is never a "wrongdoer."

Of the thirty judges who comment on the problem, ten favor compensation by the state to the landowner and twenty oppose it.

### 1. COMMENTS GENERALLY FAVORING COMPENSABILITY

Some of the judges interviewed believe that it is unconstitutional not to compensate the landowner for the costs of the litigation:

The fundamental principle is due compensation, and if the landowner has to pay 25% of the value of his property for him to get the award he is entitled to, he hasn't been paid.

Some of these judges recognize the difficulties which attend compensation, however; namely, that the landowner would always take his case to court.

## 2. COMMENTS GENERALLY NOT FAVORING COMPENSABILITY

The most frequently assigned reason for not compensating the landowner is simply that the question is part of a general rule in American law and right or wrong, the rule in condemnation cases shouldn't be changed independently of the general rule.

Secondly, most of the judges are of the opinion that under the present system of unfettered commissioner discretion, the landowners are in fact being compensated for their expenses. (See also Appendix V and the discussion of "What the Commissioners Consider" above.) Many of these judges believe that if the fees were made compensable, the landowner would be compensated doubly since the awards would probably stay at the same level.

The judges also indicate a reluctance to become involved in setting "reasonable" attorneys' fees in condemnation cases.

## D. SUMMONING ALTERNATES

(See Appendix XX)

Several judges called attention to a difficulty regarding the summoning of alternate commissioners. (See, in addition to the comments in Appendix XX, similar comments in other sections of this report. Still other comments to the same effect were made in conversations with the judges after the interview itself, were not recorded, and thus do not appear in the report.)

Section 25-46.20 of the Code of Virginia, which sets out the procedure for selecting commissioners, does not provide for the summoning of alternate commissioners. Section 33.1-107, which controlled highway condemnation cases until 1972, permitted but did not require alternates to be summoned. Some courts, having gotten in the habit under Section 33.1-107, do provide for alternates. This is often done by requiring the parties to submit more than six names. The court then summons ten or more freeholders to the trial. If all of them are present on the day of the trial and none are challenged for cause, the court at that point exercises, in effect, a peremptory challenge. There are several variations of this basic procedure. Regardless of the form these procedures take, they fulfill the objective of summoning extra commissioners to court to be available if needed.

But many courts do not provide for alternate commissioners and only nine commissioners appear in court on the morning of the trial. Therefore, if a commissioner is absent or is challenged for legal cause, the court as a practical matter is in the awkward position of (1) continuing the case until a later date (and wasting a day, which

a busy trial judge is extremely reluctant to do), (2) inducing one of the parties to treat the absentee as one of its peremptory strikes (which results in the parties having an unequal number of challenges), or (3) inducing the parties to try the case with fewer than five commissioners (condemnation cases are sometimes tried by three or four commissioners by agreement of the parties). Notice that this situation also tends to put pressure on the parties not to challenge a commissioner for cause, particularly in borderline cases. The problem of too few commissioners on trial day is exacerbated by the fact that the absenteeism rate is higher among condemnation commissioners than among regular jurors.

In consideration of these problems, it would seem to be a substantial improvement in the condemnation procedure to provide for the summoning of alternates as a matter of course, as is done with jurors. If a new system of random selection of commissioners is adopted, the implementation would be simple. The last two commissioners to be drawn from the hat would be classified as alternates and would be dismissed at the beginning of the trial if none of the regulars are absent or challenged for cause.

If the present system is retained, the alternates might be provided for as follows. The minimum number of names on the list could be increased to seven. The court would select nine commissioners plus a first and second alternate. It seems probable that most judges would select in such a way that the party which received a minority of "its" commissioners on the list of nine regulars would get the first alternate. Since many judges select the commissioners from the lists by lot, however, (see "How the Judge Makes His Strikes"), perhaps the selection of alternates would also be left to chance.

This suggestion is included only for illustration. There could be several variations of this idea, and in particular the numbers could easily be changed to give the court more discretion for choosing from the lists if that is desirable. The court could also be required to select two alternates independent of the lists submitted to it.

If the present system is retained, the requirement that the court favor one side or the other in selecting commissioners (which is disliked by many judges) might also be retained with respect to alternates as well as regulars. It would seem to be simpler to use a method of random selection for both regulars and alternates.

#### E. OTHER SUGGESTIONS AND COMMENTS

The miscellaneous suggestions and comments made by the judges are brief and straightforward. Since a recapitulation of them here would be redundant, the reader is referred to Appendices XXI and XXII for the actual comments.





## APPENDICES



## A NOTE ON APPENDICES I-XXII

In the appendices that follow, the comments of the judges are collected under the appropriate issue. The author believes that the dangers of segregating the quotes by issue are far outweighed by the advantages. It is much easier to understand a specific problem if all the considerations relating to it are presented as a unit. If the interviews were presented in their entirety, the reader would face the imposing task of leafing through the whole mass of material to find out what the judges think about a given issue. As they are organized here, the reader need only go to the appropriate appendix where he will find all of the judges' views on, for example, "juries."

As a service to the reader who would like to cross-reference a judge's opinions on another topic, each judge has been arbitrarily numbered. Each numbered entry (1, 2, 3, etc.) contains all of a particular judge's comments on a particular point. The judge is identified by his number in parentheses following his last comment. Under this system, if judge number forty is quoted as saying that "The idea of allowing parties to nominate their own commissioners is terrible," and the reader would like to see how the system has actually worked out in judge number forty's jurisdiction, all he has to do is to go to the appropriate appendix and look up number forty's comments.

The author is keenly aware of the possibility of misrepresenting a judge's views by quoting him out of context. Every effort has been made to guard against misrepresentation. To this end, every relevant comment made by a judge has been included in this report. Nothing significant has been omitted, and where a comment might be of questionable significance, it has been included. In those cases where a judge made a statement or took a position which he later qualified or modified as he thought through the considerations on another side of the issue, the qualification has been included with the original comment.

It should be noted that the questions were not put to the judges in precisely the same form that they appear here in the appendices, since the interviews were conducted as informal discussions. (See explanation of this in the introduction.) The interviewer carefully and fully described each of the alternatives being discussed, however, and since each of the judges had already read about them prior to the interview, misunderstandings were kept to a minimum.

For the sake of consistency only, where quotes in the appendices are divided between those "pro" and those "con", the "pro" comments are presented first. Within an appendix, the quotes are not presented arbitrarily. Rather, they are arranged by the author with the most extensive and articulate comments coming first, and those which are most brief and ambivalent last.



## APPENDIX I

## AGREEMENT BY THE PARTIES

QUESTION: "HOW OFTEN DO THE PARTIES TO CONDEMNATION PROCEEDINGS IN YOUR COURT AGREE ON COMMISSIONERS, AND HOW OFTEN DO THEY SUBMIT LISTS TO YOU?"

Summary of Results

Comments Indicating They Usually Agree	13
Comments Indicating They Usually Do Not Agree	25
Comments Indicating Mixed Practices	<u>8</u>
Total Responses	46

Comments Indicating They Usually Agree

1. "In 95% of the cases they agree." (53)
2. "In about 90% of the cases they agree on them. In fact, in every case under the new system they have agreed." (49)
3. "Practically every time. Lists have been submitted only two or three times in the many years I've been on the bench. I'm a little amazed sometimes that people have agreed on them, but they have." (15)
4. "In most all the cases the parties agree." (1)
5. "In 80% or more of the cases they agree. They agree in some counties more than in others." (3)
6. "They agree 90% of the time." (10)
7. "Eighty to ninety percent I'd say, they agree on it." (17)
8. "In 90% of the cases I've handled they have been agreed upon. This varies from one county to another, depending on the highway attorney." (18)
9. "Ninety-five percent agreed. The judge maintains a list of 30 or 40 names which is modified from time to time." (20)
10. "Very often agree. Practically all the time. 75 - 80%." The judge commented that it was pretty much the same as under the old system. (48)

11. In the "great majority of the cases" they agree. (31)
12. The judge noted that there couldn't be too much dissatisfaction, since they agree so often. (33)
13. "They agree in most cases, at least in a majority of the cases." (26)

Comments Indicating They Usually Do Not Agree

1. "Never" agree. They "always submit lists." (37)
2. "Never" agree. The judge hasn't seen the parties agree yet, during his career as a lawyer or as a judge. (35)
3. "Never. Well, that's not quite true, but pretty close to it." (46)
4. "Almost never, in my experience. They may agree on one or two, but not a whole panel." (40)
5. "The parties do not agree. They submit lists, and I pick the nine." (41)
6. "I don't think I've ever had them agree with the possible exception of once or twice, and they agreed then because they had problems in getting the people they recommended, or the two lists that they submitted were so close together they went ahead and agreed on the five. ... very seldom." (45)
7. "Very seldom agree in contested cases." (38)
8. "In contested cases, hardly ever." (29)
9. "Very seldom" agree. Only once in his three years on the bench. (27)
10. "Very, very seldom, in contested cases. A couple of times in fourteen years in contested cases." (24)
11. "They very seldom agree. They submit lists. Only in insignificant cases do they agree. They're trying constantly to get more liberal people on the commission, that's why they don't agree." (22)
12. Parties "very rarely agree" in his experience. (21)
13. "Rarely. Almost always submit lists to the court." Sometimes they agree, but "usually not." (19)
14. "Very seldom" do they agree. Depends on attorneys. New attorneys are reluctant to agree. Experienced attorneys, if happy with previous awards, will agree. (9)

## AGREEMENT BY THE PARTIES

15. "Very rarely." (8)
16. "Almost never" agree in contested cases. (7)
17. "Very seldom do they agree; invariably they submit lists." (6)
18. "Very seldom" in his circuit. (2)
19. It's done both ways, but in the "majority" of the cases, the court selects from the lists. (25)
20. "About 75% of the time they do not agree." (30)
21. "Not very often." Usually the parties submit lists. (51)
22. "Generally, they submit lists." But they "agree on occasion." (14)
23. "Not very often," do they agree. (4)
24. "Usually submit lists." He requires lists of ten. He summons an alternate as well as regulars. (5)
25. "Not too often." But see system used by this judge, explained later in item 1 under "How the Judge Makes His Strikes." (54)

Comments Indicating Mixed Practices

1. "About 50% of the time, the parties agree on the commissioners. The other 50% they hand in lists." (43)
2. "Half the time." (36)
3. "Fifty percent of the time." (32)
4. In one of his counties, it is "very common" for the parties to agree. In another county the parties "very seldom" agree. (28)
5. "Both ways." (12)
6. "They agree pretty often, strictly because of personalities." (23)
7. Parties have agreed "frequently," but from now on he's going to require them to submit lists. (34)
8. In one of his courts, the parties submit lists. In his other courts, they agree from "50 — 90%" of the time. (44)





## APPENDIX II

## FREQUENCY OF SAME NAME ON BOTH LISTS

QUESTION: "ARE SOME COMMISSIONERS NOMINATED FREQUENTLY BY BOTH THE HIGHWAY DEPARTMENT AND THE LANDOWNER?"

Summary of Results

Comments Indicating Yes	4
Comments Indicating No	<u>9</u>
Total Responses	13

Comments Indicating Yes

1. "I'm getting the same names from the landowners and condemnors." (4)
2. "Peculiar thing about it is that some people show up on both lists, which is a pretty good indication that they've been doing a good job." (37)
3. "There is usually some overlapping of names." (22)
4. "Some." (14)

Comments Indicating No

1. "It's not frequent under the present procedure, but used to be under previous system." (6)
2. "Some people, but it's not frequent." (7)
3. "That's not the rule, but it has happened several times." (19)
4. "Very occasionally." (24)
5. "Very seldom. Once in a great while." (27)
6. "A rare occasion" to be appointed by both. (28)
7. "Infrequent." (29)

## APPENDIX II

8. "Very rarely." (35)
9. "Overlap is rare." (40)

## APPENDIX III

## HOW THE JUDGE MAKES HIS STRIKES

QUESTION: "IN THE CASES WHERE THE PARTIES SUBMIT THEIR LISTS TO YOU, HOW DO YOU EXERCISE YOUR STRIKES?"

1. "We sort of have our own system, which has been agreed to by all the parties. The attorneys and the court meet after the suit has been brought, and we select commissioners this way: The attorney for the Highway Department will give me five names. The landowner has a right to object to them, and I also look at them and decide if they're qualified or not. At this stage we all discuss the names and we eliminate anybody that's got some relationship to the parties or anybody who's been affected by condemnation somewhere else — we want to eliminate him. Also, if the condemnation is in the northern end of the county, then we try to get commissioners from the southern end, and vice versa. We try to get the commissioners as far away as possible from the take. Then, of course, the landowner's attorney will submit five names, and we go through the same procedure. In this process we pick five from each side, plus two alternates from each side. So on the day of the trial, 10 commissioners — not 9 — show up. The court then strikes one by drawing out of a hat, leaving 9. Then the parties have two peremptory challenges each, leaving the five. This system just works perfectly. We get good commissioners with no trouble. The reason for bringing the 10 into court instead of 9 is that if someone's sick, or is disqualified, we've got enough people for the parties to have two peremptory challenges." (54)
2. "I do not select them by lot. I look them over and try to pick the best ones. I try to select five from one list, four from the other, then I switch it around on the next case." (2)
3. "I screen the lists carefully and try to take off the ones that are least qualified." (1)
4. "I exercise my judgment and try to eliminate the most extreme ones, and the ones who are social or business friends. I usually divide my my strikes between the two sides." (6)
5. "I use my judgment. I usually select five from the landowner's list and four from the Highway Department's list." (7)
6. "If you don't take at least four from each side, somebody's going to get terribly put out. I take four from one side and five from the other. On the next case I'll switch it around." (8)

7. "I allow each party to strike one each, then I strike a third one." (11)
8. "I just use my judgment in each case. In some of my cases, I require a list of 10 names because some of those people were definitely landowner's witnesses." (16)
9. "I know most of these people. I use my judgment and get rid of the ones I don't think are qualified." (19)
10. "I require the parties to submit ten names each. Then I select ten from the twenty. We bring in ten instead of nine so we'll have enough if there's an absentee on the day of the trial." (22)
11. The judge requires the parties to submit a biographical sketch and the qualifications of the nominees. He feels that this sketch is insufficient for him to learn enough about the nominees, most of whom are strangers. (46)
12. The judge tries to select people who are well qualified in real estate, and tries to strike people who are merely friends of the parties. (50)
13. The judge arbitrarily takes every other name off the two lists, five from one and four from the other. (51)
14. The judge does it two ways. Sometimes he strikes people he believes are not qualified, but other times will make his strikes by lot. (53)
15. The judge "uses his judgment" and tries to "switch the numbers around," five from one and four from the other. (24)
16. The judge "draws by lot, two from one list and one from the other" so as to satisfy both sides. (27)
17. "I usually pick five from the state's list and four from the landowner's, or maybe even more from the state. I use my judgment and try to arrive at a happy medium." (28)
18. "I draw four from each list by lot. Then I put the remaining four names in a hat to draw the ninth commissioner." (30)
19. "I usually try to take five from one side and four from the other, to be fair about the thing. I use my judgment." (35)
20. "I flip a coin for the fifth man." (37)
21. "Selecting names is guesswork. Often, we don't know who they are. We're guessing when we select. I don't know those names on there — many, many of them. Some I do, because they've sat before." The judge often selects the names at random. (38)

## HOW THE JUDGE MAKES HIS STRIKES

22. "I alternate — four from the Highway list this time — five from their list the next time." (41)
23. "I have each side submit a list of twelve names each, from which I pick nine, or I give each of the parties four choices each, then I pick the ninth.  
"I try to put responsible freeholders and high class people on the commissions." (24)
24. "I take four from each list, then flip a coin to determine the ninth man." (40)



## APPENDIX IV

## DESCRIPTION OF COMMISSIONERS

QUESTION: "HOW WOULD YOU DESCRIBE THE COMMISSIONERS THAT SERVE IN YOUR COURT?"

1. "The Highway Department tries to get conservatives on there, and the landowner liberals. I can tell who is who." (44)
2. "We get 100% good men. Of course, the Highway Department tries to get conservative people and the landowners liberal ones." (41)
3. "Substantial citizens. The Highway Department tries to get conservatives and tends to get older people — sixty years old and above, usually. The landowner tries to get people who would escalate property values for one reason or another, usually tied in with some personal experience that they've had or some notoriety that they've gained. And they tend to be younger people, who are more likely to give higher values." (35)
4. "Successful businessmen; bankers, insurance men, real estate men, and so on. The Highway Department puts on conservative farmers, who are designated because of their tightfistedness." (40)
5. "Good, sound businessmen." (33)
6. "We have a lot of successful businessmen, and we use a lot of semi-retired men." (31)
7. "Some of the finest people in the county." (30)
8. "The Highway Department nominates some of the best qualified people in town." (29)
9. "No, I wouldn't say that they are prominent bankers, businessmen and so on. It's a purely adversary thing. The landowner brings in his friends — anybody he thinks will do right by him. The Highway Department brings in people, regardless of their profession, that they think will be on the low side. Neither side is too concerned about fair and just compensation." (27)
10. "No, I wouldn't characterize the selection of the commissioners as a particularly adversarial aspect of the case. It's a very friendly thing."
 

"No, we don't use real estate professionals. That works fine in the cities, but not in a rural area where there are so few real estate people. They would be too biased."

## APPENDIX IV

"Also, once a man has testified as an expert in one of these cases, I will not let him serve as a commissioner, because I think he would try to exert his alleged knowledge on the other commissioners." (54)

11. "The Highway Department puts on some of the most conservative people in the county. The landowner puts on his friends." (24)

12. The landowner will try to get his next door neighbor on: "it's the most natural thing in the world." In general, the judge is satisfied that he's getting honest, fair, and impartial commissioners, but "there's a little larceny in all of it."

The judge does not put real estate men on the commissions, since they are interested in keeping real estate values as high as possible. (49)

13. The Highway Department puts on "penny pinchers and conservatives." The landowners "too often put on fast buck types." (46)
14. "Under the old system we had blue ribbon commissions. Now, we're getting commissioners who aren't quite of the same stature as the previous commissioners." (22)
15. "Inexperienced attorneys appoint people without qualifications, but experienced attorneys appoint people who are well qualified and have knowledge of real estate." (21)
16. "Businessmen, men of some stature." (19)
17. "It's been our experience here that both parties are trying to find reputable men with experience in business, substantial farmers — people who know real estate. We have good commissioners." (14)
18. "Substantial farmers or businessmen, bankers sometimes." (5)
19. "Real estate people in various capacities, businessmen, retired men." (38)
20. "Business people, real estate brokers and ordinary property owners. I think it has worked very well."

"Naturally, you get liberals from the landowners and conservatives from the Department. The Department often appoints older people who don't keep up with rising land values." (37)

21. "Most of the commissioners are real active real estate people. Sometimes I think maybe too active. They get in a rut and won't listen to another expert. They come to their own conclusion. In general, we have good commissioners." (32)



## DESCRIPTION OF COMMISSIONERS

22. "The Highway Department puts on conservatives, and the landowners put on people who are liberal with other people's money. We have lots of real estate agents on the commissions." (29)
23. "Real estate professionals, people from financial institutions that deal with real estate. The commissioners generally know their business, know what they're doing. Generally, the awards are pretty fair." (26)
24. "Real estate dealers, bankers, auto dealers." (25)
25. "Retired businessmen and successful farmers. I don't recall a case where we had a real estate man on the commission." (34)
26. "A cross section of storekeepers, farmers, livestock dealers." For "obvious reasons" the judge shies away from professional real estate dealers. (53)
27. "We don't use professionals. We use informed property owners who are familiar with land values. They are aware of the current market." (17)
28. "Farmers, businessmen, retired businessmen, bankers. We don't use real estate brokers." (15)
29. "We very rarely see real estate brokers on these commissions because the parties would be afraid of them because they would be too knowledgeable. We get liberals from the landowner and bankers and other conservatives from the Department." (9)
30. "Farmers, merchants, builders. Brokers do not make good commissioners." (8)



## APPENDIX V

## WHAT THE COMMISSIONERS CONSIDER

QUESTION: "DO YOU THINK THE COMMISSIONERS CONSIDER ONLY FAIR MARKET VALUE AS OF THE DATE OF THE TAKE, OR DO THEY ALSO CONSIDER THE FACT THAT THE LANDOWNER WILL HAVE TO PAY ATTORNEY FEES, EXPERT WITNESS FEES, ETC.?"

Summary of Results

Comments Indicating They Consider More Than FMV	31
Comments Indicating Only FMV Is Considered	<u>11</u>
Total Responses	42

Comments Indicating They Consider More Than FMV

1. "I think they do. Most of the people who serve know how the system operates." (35)
2. "I'm inclined to think they do, because it always is my experience that commissioners are more liberal in the cases of the taking of a home than they are with business, commercial or industrial property, and I think perhaps justly so. It's part of the humanity of the system. The commissioners have never gone overboard with it, in my experience." (43)
3. "Very definitely. There is no question about it. You tell them they can't consider it, but they still consider it." (9)
4. "Certainly they're aware of that. You're not dealing with persons without intelligence. I'm sure they do and also, I'm sure they should." (7)
5. "I don't have any doubt that they take those things into consideration. But I don't think that should be changed, because you have to allow for many variations in situations." (6)
6. "Part of the reason for high awards is the attitude that 'Well, the landowner has had to go to the expense of getting an attorney needlessly, because the offer was so low, ' so the commissioners socked it to them."
 

"I think they should take these other things into account. That's just human." (15)
7. "I think they take it all in there. You can tell them not to, but they don't pay any attention to the instructions." (42)

# APPENDIX V

8. "I think a good many commissioners do. They are probably trying to see what the man is actually going to get." (28)
9. "I'm sure they do." (24)
10. "Yes, I do. Yes, the commissioners do it, and I don't know what you're going to do about it. They take into account those intangibles the appraisals don't take into account." (45)
11. "I know they do it. I've heard commissioners later say that they considered those things. I don't know how to stop it. Perhaps if we made attorney fees compensable we'd get better awards." (18)
12. "They may do that. While they are men of integrity, they're alert enough to take the equities into account." (17)
13. "I think that's probably considered and I think it's right that they do that. A lot of inequities can result from this. I think the right to fight for your land is a right — you ought not to have to pay for it."  
  
"I'm sure the commissioners do it, and probably discuss it."  
  
"I also think you ought to replace what the owner has, not just give fair market value." (11)
14. "Certainly, they're human. They know the lawyers don't work for nothing. They know the attorney's fees are based on the overage. They're human beings and they're going to keep on doing it." (10)
15. "I have a feeling that all commissioners take into account the fact that the man has got to pay the lawyer, and that the appraiser is not coming in there for nothing." (54)
16. "They probably do, and probably ought to." (3)
17. "I don't see how you can sit in the box and not consider it. But most people hue to the law. They consider it, but it's a subtle thing. I don't think they put a dollar value on it." (4)
18. "There's sympathy for landowners. They take a landowner's attorney's fee into account and allow a little something for it." (5)
19. "Yes. I don't think you can get away from that. My commissioners are very conscientious, though." (12)
20. "They're human. They realize all these things." (19)
21. "I don't see how you're going to keep that away from them. It's the same as in a personal injury case." (20)

## WHAT THE COMMISSIONERS CONSIDER

22. "Yes, they give the landowner a little more than his land is worth. It wouldn't be realistic if they didn't award more than fair market value from a willing seller." (22)
23. The judge feels that there is "no doubt" that the commissioners "throw in extras" for the fees and other expenses. (46)
24. "Yes, they do. But not all that much." (48)
25. The judge feels that there "simply isn't any doubt about it" that they allow for the extra expenses. He thinks 10% may be proper, since replacement costs are considerably more than plain fair market value. (49)
26. "Of course, particularly where the same commissioners sit several times. No doubt they allow for it." (51)
27. "I do think they take it into consideration. They've had dealings in this area before." (29)
28. "Sure. They're practical minded people — in spite of instructions." (31)
29. "No question about that. That to me is human. And you can't get humanity out of it." (32)
30. "I'd say in some instances they do. I wouldn't say universally. It's difficult for me to know what they're thinking." (44)
31. "Yes." (They take extras into account.) (40)

Comments Indicating Only FMV Is Considered

1. "I think there's very little sympathy, and I think they go by the instructions 99% of the time. Maybe in extreme factual situations — a widow with ten children, who has no place to go — the commissioners consider that, but it results in fair awards, not grossly excessive awards."  
 "I don't think they consider attorney's fees hardly at all. In personal injury cases they're beginning to, however." (41)
2. "I don't think they do. The average commissioner is a man of integrity. I don't think he's swayed by sympathy or bias." (34)
3. "I don't think it's true at all that the commissioners consider those other things. I've never seen any indication of it. I think the commissioners try to be absolutely fair about it." (33)
4. "Normally, I would think not. Basically, I don't think they take it into consideration." (38)

5. "I don't think so. I don't think that happens too much. But I really have no way to know." (37)
6. "I doubt if they mention it. Subconsciously they may take it into account but it is not a big factor." (27)
7. "I doubt very seriously if they do take those things into account, although they do have general knowledge about those things. I don't think they attach great significance to it." (53)
8. "That may happen in some cases, but I don't think it happens very much." (16)
9. "I don't think so. If we had an indication that any of the commissioners were in sympathy with the landowner, we wouldn't allow them to serve." (14)
10. "I doubt if most of them even know. The ones that serve time and time again might though." (8)
11. "I don't think they take those things into account." (1)

## APPENDIX VI

## THE EFFECT OF USING A LIMITED GROUP OF COMMISSIONERS

QUESTION: "DO MANY COMMISSIONERS SERVE REPEATEDLY IN YOUR COURT? IF SO, DO YOU THINK THIS IS GOOD?"

1. "In one of my counties there are many repeaters. In two other counties, not so many. My observation is that it is not objectionable to have the same commission to hear all the cases. It takes a commissioner or juror — any man — two or three trials to fully grasp what's involved. The first time a man is called to serve on a jury or a commission, he's somewhat subdued and timid. He's lost. He's hesitant to ask about things that aren't clear to him. After they serve two or three times, however, they will readily ask a witness a question if they're confused. In other words, they understand what they're doing. One trial isn't enough time for them to digest the instructions, and so on."
 

"Experienced commissioners give consistent awards, and you have a much more informed body of commissioners."

"After they've served for a while, you can tell by the questions they ask that they're learning what's involved. They learn fast, but still it takes three or four trials." (17)
2. "We often use the same ones so we have experienced commissioners. We have a list of about 30 commissioners."
 

"These commissioners have got knowledge of what they're doing, and particularly after you use them two or three times, they're better yet. Yes sir, I believe it's a good idea to use experienced commissioners. They learn an awfully lot by serving."

"The only thing I would suggest is that perhaps it might be better to vary the commissioners a little more and not use the same ones quite so much." (54)
3. "I think it is good to use the same commissioners since they get more expert in the thing. Also, you get more uniform awards." (13)
4. "Yes, we have some on there who serve more than others. (Good?) Yes, sir, I certainly do think it's good." (14)
5. "Yes. We have fifteen or twenty people who are generally used. This is a good deal the fault of the Highway Department. They keep using the same people over and over and over."

(Is it good to use experienced commissioners?) "Oh yes, definitely. They understand the rules and they understand when something is ridiculous or preposterous. You don't have to instruct them. I think people gain experience and become better by sitting."

"Some of the fairest awards we've had were by one commission which handled one road. The same commission sat throughout. It had the advantage of uniformity and in this particular case, fairness. To me, the thing that's always of concern is when you get one commission that goes wild and gives some fellow who's needy and deserving a preposterous amount, and then the guy next to him gets practically nothing." (15)

6. "Yes, we've had some people serve often. I like for these fellows to have had some experience in condemnation cases. It makes for a very short case. We don't give the instructions any more because these men have seen the instructions so many times. But I wouldn't use exactly the same commissioners if we had a large number of contested cases. I'd switch it around. It gets to be an imposition on these men." (16)

7. "Yes, there is a tendency toward a body of professional jurors."

(Is this good?) "The worst thing in the world is an inexperienced commissioner. He doesn't know the procedures and is unsure of himself. With inexperienced commissioners, you wouldn't know what you're going to get."

"Yet the old professional loses touch, he gets in a rut. You don't want professionals on there." (18)

8. "Quite a few. They come out of the same group on both the Highway side and the landowner side."

(Is it good?) "It works pretty well. With experience they learn more and do a better job." (19)

9. "We have thirty or forty people on a list. We have experienced commissioners, but we use more than just six or eight. We often use people who aren't on the list, too."

(Good?) "I think it's a decided advantage because after all, it's a special jury. It isn't an ordinary jury. I'm not in favor of having a panel of pros but I do think people who have been on other commissions are very helpful. Also, it saves a lot of time, though we seldom have a complete commission of people who have been on time and again." (20)

10. "The same people are repeatedly appointed and I think it's a good idea, particularly on a series of parcels in the same area."

"Before the law was changed, I used to appoint people over and over again. Some of the parties kicked like steers, but then they learned that was the best way." (21)



## EFFECT OF USING LIMITED GROUP

11. "We have a list of perhaps 75. There are some new ones, but basically they come from this list."

(Good?) "Yes, it is good to have people who have some independent knowledge of real estate values. They get to understand the whole system a lot better after they serve." (22)

12. "You find the Highway Department's attorneys have a group of people in their mind — not always the same six but I could take twenty names and say the six are always in those twenty. This is natural since the Department's attorney handles all of the condemnations. And they are always very good people. A much wider variety of people are nominated by the landowners, of course. All friends." (45)

13. The judge explained that the Highway Department appoints many more repeaters because the same attorney always represents them. There aren't many repeaters from the landowners, though, because the landowners "simply appoint people sympathetic to them", which are different in every case. The judge explained that under the old system the judges reappointed the same people often. The judge thinks this was good because of the strong interest in uniformity, particularly among landowners on the same project. (46)

14. A "substantial number" of repeaters. The judge thinks this is good because the commissioners learn what they're doing. (48)

15. The judge indicated that he sees a lot of repeaters, partly because there are so few qualified people and because the parties select favorable people.

He believes it is good to use experienced commissioners because it takes three or four cases before they really understand the instructions. He believes they learn a lot as they serve and increase their knowledge of land values. But he would not like to see them become "professional jurors," which is beginning to happen now in his jurisdiction. (51)

16. "Yes. After a while, they learn what's going on, and they do a better job." (52)

17. The judge indicated a "definite tendency" toward repeaters since most of the commissioners come out of a pool of ten or twelve men. He noted that the parties must have confidence in the commissioners, since the lawyers had agreed on them time and time again over a long period of time.

He thinks it is good to use experienced commissioners because they understand what they're supposed to do. (53)

18. "Yes, we do see repeaters, especially from the Highway Department. It might be well to use the same commissioners on one project since it would be more uniform, but it wouldn't be good to use the same old people every time." (24)

19. "Yes, there is a high incidence of repeaters. That isn't necessarily bad — these cases are more sophisticated than ordinary cases. It also cuts down trial time because everybody knows what's going on." (25)
20. "The Highway representatives have given a list of thirty-seven names of people acceptable to them to the judge. This list is given to the other side. They both go over the list and get some names. In many cases they agree." (26)
21. "There is an advantage to using the same commissioners — uniformity. And that's important."
- (Good?) "Yes, I agree that experienced commissioners know a lot better what to do, but you don't want it limited to too few people." (27)
22. "The Highway Department appoints pretty much the same people right along." (28)
23. "Now we get a different list every time, but up until two years ago, there were some repeaters."
- (Good?) "No. They get in a rut. They ought to be changed. If you have small projects, maybe that would have merit. But I don't believe in having the same commissioners sit all the way through." (29)
24. "No. We generally get different commissioners every time, though the Highway Department uses repeaters more often than do landowners." (30)
25. "Yes. Same people that served before. We have been using them for five years." (31)
26. "A lot of them are used over and over." (32)
27. "In one county all the cases were by commissioners who came out of a group of about fifteen, and most of them came from a group of about ten. They were just as good natured about it as you've ever seen in your life." (33)
28. "Lists vary considerably. One week it would be a completely different list from the previous week." (34)
29. "Yes they do use the same people."
- (Good?) "I'd be afraid that they'd tend to carry an impression that they picked up in one case to another case. That may be good or bad." (35)
30. "Yes. We frequently use the same commissioners that we used in a previous case."
- (Good?) "I think a list of twenty-five or thirty would be sufficient." (36)

31. "There are a certain number of repeaters that do become somewhat professional. They come back from time to time. It can get to be a hardship on them."

(Good?) "The fact that he has served before ought to make him a better commissioner. People who sit frequently get a better understanding and can do the job faster." (37)

32. "Yes, there are a lot of repeaters."

(Good?) "In a sense, it makes him a better commissioner. This can certainly be confusing for a commissioner, that's for sure. After he's served a few times, he has a better knowledge of it." (38)

33. "We usually end up with the same ones sitting quite frequently, and I don't think that's too good. You don't want the same people sitting on there all year long. It also sort of gets to be an imposition on these commissioners."

"We don't let the same jurors sit in criminal cases, or other civil cases. You ought to spread it around a little bit and get a broad cross section of landowners."

"The state uses people from a very limited group." (41)

34. "No. Some, I suppose, but not as many as there used to be."

(Good?) "I think it works better — if you can get a good group, if you can get good honest ones." (42)

35. (Good?) "I think it's good, if you have good men, because there's nothing worse than a lack of uniformity in a project. If the Highway Department is running down a project taking a little bit of everybody's land, and you get a liberal commission for Mr. Jones, and Mr. Smith gets a conservative commission, the confidence in the system is fearfully undermined. When a project like that starts up, the commission tends to settle on a stable level of values. I think it better that that be slightly too high or too low than that it be very variable. I think that uniformity has an awful lot of merit in a situation like that." (43)

36. "Yes, we have the same people serve on a series of cases." (44)

37. "We do have many repeaters. We do see new faces, but we have a lot of repeaters." (40)

38. "Yes, I certainly do see repeaters. I think the Highway Department has more repeaters — ones who have served before and gave reasonable awards."

(Good?) "There is something to be said on both sides. It's good because experienced commissioners come up with fairly intelligent awards. They are not going to run wild and they are going to reject ridiculous testimony because they know values. With inexperienced people, you couldn't be sure what they were going to do. On the other hand, you don't want a professional jury." (12)

APPENDIX VI

39. "Quite a few repeaters."

(Good?) "I see no objection to commissioners sitting who understand the area and understand the property values because that's the whole crux of it." (11)

40. "We have a list of sixty or seventy names."

(Good?) "Yes, I think they are more competent than if they were brand new in each case, since they are familiar with the instructions." (10)

41. "The Highway Department has many of the same people, but you get different people from the landowners since they're getting their friends to serve." (8)

42. "Some, yes,"

(Good?) "I certainly don't think it's bad. It is probably good. It takes a number of cases to get into it, to learn what to do." (7)

43. "There are probably too many repeaters on the Highway Department's list. There are repeaters on the landowner's list as well. One of the problems here is that we have so few qualified people."

(Good?) "Yes, it saves time." (6)

44. "Usually one-half are experienced and one-half aren't."

(Good?) "Oh yes. They are in a better position to know what they are doing. We often waive the instructions if all have sat before. It's also good to have some of the same people on there from the point of view of uniformity and consistency. It's good to have some change though. I think half and half is very good." (5)

45. "We're getting a substantial number of repeaters."

(Good?) "I think it's all right — everybody likes to have somebody who understands the issues, somebody who's done it before." (4)

46. "There are lots of repeaters on both sides." (3)

47. "We frequently have the same people."

(Good?) "I believe it is good. The commissioners are better informed after several trials, they develop real knowledge." (1)

48. "Yes, we have repeaters. It's almost necessary in rural areas because we don't have enough qualified people."

(Good?) "It is a very good idea to use experienced commissioners." (2)

## EFFECT OF USING LIMITED GROUP

49. "You shouldn't use the same old people every time. They get in a rut. If they start giving Mr. X high awards, they begin to feel that they have to do it in every case, a psychological thing." (23)
50. "Yes, we have the same people serving."
- (Good?) "It is an imposition on the commissioners, and I get complaints from these people. Again, this is all brought about by the present system of selecting commissioners." (9)



## APPENDIX VII

## COMMENTS ON THE PRESENT SYSTEM

QUESTION: "HOW WOULD YOU EVALUATE THE PRESENT SYSTEM? HAVE THERE BEEN ABUSES IN TERMS OF CONFLICTS OF INTEREST OR UNDESIRABLE PRACTICES BY THE PARTIES?"

Summary of Results

Comments of those Generally Satisfied with the Present System	28
Comments of those Generally Dissatisfied with the Present System	<u>25</u>
Total Responses	53

Comments of Those Generally Satisfied with the Present System

1. "The system we've got now can't be beat in selecting commissioners. They are fair, impartial, and you get good qualified men, you get men that everybody has confidence in. They know what they are doing, and particularly after you use them two or three times, they're better yet."
- "Our system has worked perfectly. I wouldn't want to change it for anything in the world."
- "In this county, for example, I don't think I've seen but one case where the commissioners weren't fair."
- "I want to say we've got a good system here. Just leave it alone." (54)
2. "Fortunately, we've gotten qualified, capable men. They haven't been prejudiced either for the landowner or the Highway Department. I think they're men of ability and they've tried to look at the problem objectively, from a neutral standpoint."
- "The integrity of these men is unimpeachable. They are completely impartial."
- "Under the present system, the judge is in a position to see that you get good men."
- "I have never seen any indication that close social friends were getting on the commission. I think the landowners would want to do that, but the attorneys have been above average on that; they have avoided letting the parties suggest people who were too close to them. We just haven't had any trouble at all." (17)

3. "We have unusually good commissioners. I think they'll equal commissioners anywhere. They're topflight men, topflight citizens, people who know what they're doing. These commissioners don't go through the roof very often." (33)
4. "These commissioners are intelligent people. I'd say 99% of them are of above average intelligence. I think our present procedure is highly satisfactory."

"Of all the cases I've tried, I have never suspected anybody on any of my commissions of doing an unethical or improper thing."

"I know almost everybody in the county." (34)
5. "I think we have had excellent results under the present system."

"The commissioners obviously consider what they hear (in court), yet they still bring their expertise to bear."

"One should always be concerned (about conflicts of interest), but I don't think it's any real problem." (39)
6. "I'm very happy with it, the way it works here. I think as long as the court exercises reasonable control over the responsibility of the commissioners, it works fine."

"I don't see too much difference between this and the old system where the judge appointed them."

"I think our system works, and I think if you have a judge that is responsible to his job, he's going to attempt to select a cross section of responsible men and that's what we try to do."

"I like the present system, I have no complaints with it. As long as the system works, why change it?"

"I think the commissioners do a very good job of arriving at a reasonable value between the high and low testimony." (44)
7. The judge is happy with it as it is. He believes the safeguards are sufficient. The judge can knock out a questionable person. It works very well in his jurisdiction. He sees no danger of "pro-highway" or "pro-landowner" commissioners; "the other side would yell if that happened." (53)
8. "System we have now takes care of both sides of it."

"We have a workable system now, better than our sister states. We ought to stay with what we have."



## COMMENTS ON THE PRESENT SYSTEM

The judge mentioned that on several occasions prospective commissioners voluntarily came forward to bring out some connection, social, usually, with the landowner. (10)

9. "I have no complaints against the system we're using now. It's pretty much the same thing, and the same people, as we got before." (14)
10. "I don't see much wrong with the present system. I've found that everybody has confidence in the commissioners, that they are honest, fairminded and conscientious. We just don't have the problems you see in the urban areas." (18)
11. "All in all, our system is very good."
 

"As for social friends, if they are too close we usually find it out and they stand aside. It's unusual to get real close friends involved. Usually they are just acquaintances and there are some you might say are pretty good friends. But that doesn't make much difference. It's not a disqualification. I don't see any particular problems in that respect." (19)
12. "The kind of commissioners we're used to are qualified, good, sound business people — familiar with real estate values. They are very fair to both landowners and the state. That's the answer to it; get qualified people to hear it."
 

(Social friends?) "We've never had an instance like that that was disclosed. If a matter like that was raised, I would consider it and it would all depend. If everyone has confidence in the man, I may let him sit."

"In general, we don't take commissioners from the area of the take. That wouldn't be fair to the commissioner or the parties." (20)
13. "I kind of like the present system myself."
 

"Doesn't that make the system though? You get both ideas. Nobody's going to run wild."

"I did have to throw out one case, though, because the commissioner was too friendly with the landowner and the award was much too high." (32)
14. "We have a list of about 40 names, which has been in existence since the judge selected commissioners. It's almost unheard of for one of the parties to submit a name that is not on the list. Everybody knows who these people are and everybody seems generally satisfied. We're getting the same people as before."
 

"That sort of thing (conflict of interest) is always of concern. Usually, it is not a direct contact between a party and the commissioner. For example, a bank's advisory board, maybe one hundred people, really included all the knowledgeable people about real estate in town. The bank's attorney would put these people on as commissioners."

"The Highway Department uses appraisers who are working for the Department in other areas of the state as commissioners in our case. So you have to be alert to that kind of thing in every case. But these problems can easily be handled on voir dire." (43)

15. The judge feels that it's working pretty well, although he noted a couple of instances that bothered him. In one case, an attorney put his client on as a commissioner. In another the prospective commissioner was on a bank board with the landowner or his attorney. (52)
16. "In short, the system here seems to be working. I don't have the feeling of any overpowering need to change it at all." (47)
17. "I'm satisfied like it is. I wouldn't change it. We haven't had any problem with people putting their friends on, or any such thing. Most of the attorneys are happy with the integrity of the commissioners. Picking the commissioners is just a matter of philosophy. The Highway Department tries to get conservative people like bankers, while the landowners try to get liberals."

"Having a friend on the commission can be a two-edged sword. There might be more danger (from the litigant's point of view) that the friend would lean over backwards not to favor his friend." (26)

18. "I don't see anything wrong with the present system except the judge shouldn't be required to select people from the lists."

"The Highway Department tries to get conservatives and the landowner tries to get liberals, but I don't think the Highway Department goes as far as the landowner in this."

"I don't think the commissioners are of quite the same stature as they were when the judge selected them."

"We just haven't had a problem with getting commissioners who have a relationship to the parties. In the few cases that have come up, it has been simply through inadvertence. A man had been condemned somewhere else, or turns out to be kin to the landowner, or something like that. But this hasn't been a problem. I know most of these people."

"There is no doubt about it. You can tell the 'landowner' commissioners from the 'highway' commissioners, but it's just a matter of general philosophy." (22)

19. "It kind of puts the judge in a real bad spot, the way the law is written now. He has to favor one side or the other. It would be better to knock an equal number off each list."

"I think it's a fair system. I would trust my property to this procedure. I think it balances the interests on both sides."

## COMMENTS ON THE PRESENT SYSTEM

- "There may be some close friends on the commissions. But that man is supposed to advise us of any bias or prejudice. They may be there, but I don't see any manifestation of it. I haven't seen any of it. I don't see anything to worry about."
- "I could pretty well tell if one of my attorneys comes in with a loaded list. I know most of these people. I don't have any trouble." (11)
20. "I'd rather have this system than the old system, for the simple reason that the parties are better satisfied."
- "It does put the court in a right difficult position, but I'd rather have it this way."
- "I think the safeguards are sufficient, since the parties have two peremptory challenges each. I don't think the danger is too great. Most of these people are honest. We don't have many rascals. We have a pretty thorough discussion of all twelve names on the list. We discuss the relationships and things like that."
- "The only things we've had come up were small. In one case a commissioner wrote the insurance for one of the condemnors and he came forward himself with the information. Another time a commissioner was a stockholder in one of the companies running the project out there. But we just haven't had any problem in this area." (29)
21. "One system is about as good as another. It's working all right. We usually get a reasonable solution, the only thing is we usually end up with the same ones sitting quite frequently and I don't think that's too good."
- "I don't think the commissioners we're getting now are that different from the ones we got when the judge appointed them. There's not a whole lot of difference in results."
- "No, I wouldn't recommend going back to the judge system. I think the change ought to be to the jury type system."
- "So far I haven't disqualified anybody for cause."
- "After voir dire by both the judge and the attorneys, it's almost impossible to end up with commissioners that are prejudiced, or not qualified to sit."
- "In the last fifteen years, there has been only one case where a man was later found to have too much interest in the matter." (41)
22. "(The present system) hasn't caused any trouble. It's all right. The system is somewhat contrived, but I don't think it has helped or hurt anything. It just is a little more time consuming than the old system. We're getting pretty much the same people I would have appointed anyway."

APPENDIX VII

"Getting interested commissioners has not been a problem. Sometimes a landowner will nominate his next door neighbor, or you'll get a biased person on there, but the strikes take care of that." (4)

23. "We don't have any serious problems under this system. The judge controls this a great deal. He knows most of the people and won't appoint non-fair-minded people."

"It's not as big a problem as it would appear on the surface. The parties often agree on the commissioners — how can you beat that? So, it's not necessarily a bad system. But it could be improved, and I favor this system of picking them by lot." (12)

24. "Commissioners take their oath seriously and do their best to be fair. They usually get the kind of people who can be fair. They're business acquaintances, often, but that, of course, doesn't disqualify them." (36)

25. "The present system is certainly better than what we had previously. I think it's a very workable system; it's much better than the court picking a particular group. At least under the present system you've got an even shot at it. And often somebody doesn't show up for one reason or another, in which case the first alternate goes in, so it really should even out, overall."

"I think our system, right now, is working in a fine way, and if there are any disadvantages, it's the possibility of coming up short of commissioners because of strikes and so on."

"I don't find anything basically wrong with the commissioner selection. Both parties get a fair shot at it. Who's to complain if the two parties are satisfied? You better leave that part alone. If they start complaining I'd say hear it. But when both sides are getting a fair shot at it, it's pretty hard to better that system."

"There is a tendency toward allowing both sides to bring into the picture commissioners whose appointment might be subject to abuse. At least under this system that opportunity is there more than in a random selection."

"Certain landowners or their attorneys will try to pick somebody who's a friend of theirs, but invariably they'll get chopped off when you examine the commissioners on their qualifications. We don't have much of a problem that way." (37)

26. "I don't see any problem along these lines (conflict of interest)."

"We have had some cases where a man asked to be let off because he was too close to the landowner, or had made an appraisal for the landowner or something like that."

"Friendship doesn't disqualify a man. But a close relationship, visiting back and forth in the homes, I wouldn't allow that." (5)

27. The judge indicated he doesn't have much trouble with conflicts of interest. "I don't think it's as bad as everybody else seems to think it is." (1)

28. "The system is working and working well. You should not change the system because of some minor criticism. I don't see anything wrong with the present system except the selection of commissioners."

"The state doesn't have personal friends the way landowners do. The state has to simply pick good, solid, substantial people. All of them should be that way, not friends."

"But we don't have any problems. Strikes take care of situations that come up." (7)

#### Comments of Those Generally Dissatisfied with the Present System

1. "The present system is horrible. What happens is that the landowner selects his friends. There's nothing in the code that prevents them from selecting their friends. Not one thing. You can't ask a man 'Are you a friend of Mr. Jones.' Suppose he says yes. That doesn't disqualify him. If he's a relative, if he's interested in his business, if the friend has talked to him about being a commissioner, if he is a freeholder, if he's got a quarrel with the Highway Department — you can ask all those questions, but you can't ask 'Are you a friend and acquaintance of the landowner?' He wouldn't be on the list if he wasn't a friend. You're never confident that it all has been brought out. I've tried cases and learned later that two or three of the people went hunting with the landowner the day before. What can you do about it? Absolutely nothing, because you can't call in those people later and say 'Did you talk about the case?' You've asked them that on the voir dire. They've already said no. It's just like being tried for murder and letting the accused select half of the jury, and it's absolutely all wrong. I thought I'd get that off my chest because I've thought that for a long time."

"I'm not saying that I know of any landowner or attorney who has selected people that he has talked to, because you always ask them and I don't think landowners do that. They're too smart for that."

"If a fellow is in on a scheme, he's going to answer the questions to keep himself on the commission."

"I'm not saying they always are in on a scheme, of course. It would usually be foolish for a landowner to mention it to a commissioner, because most people are honorable, and they would resent it. But the fact that they are friends of the man and had the opportunity to talk to the man, they naturally are subconsciously going to lean to the friend. It's just absolutely wrong."

"Not so much in this county, but in some of my other counties, they always come up with their friends. And I don't know of anything you can do about it."

"I don't know that they are their friends. Maybe he is a landowner that lives up in the county and he is a highly respected, a successful man. I can't say 'Are you a friend of Mr. So-and-so?' I could dig and find out how close and then disqualify him, and then the lawyer would say 'The law says you shall take them from the list unless there is legal grounds to disqualify them.' Then where would you be? If I found a close relationship, I would cut him off, and I'm sure the courts would uphold me, but that's not one of the legal disqualifications. You have many cases even under your jury system, where the jurors are drawn by lot, where a fellow will get a good friend on the jury, and he's going to keep him on there if he can. I don't mean he's going to discuss the case with him or use any influence on him, but he's going to try to keep him on there, and there's nothing wrong with it. I can't ask the jurymen, 'Are you a friend of Mr. Brown's?' You ask him if the case has been discussed, whether he knows of any reason why he can't be fair and impartial. Well, if he's a real conscientious, lean-over-backwards guy, he will say 'Judge, I live across the road from Mr. So-and-so, and I hunt with him, (I've had that kind of thing happen many times), and I don't know that I could be fair.' You know, he's a real conscientious fellow and he doesn't want to be under that unconscious pressure from his friend to sit on his case. He wants to go home and still be his friend. He doesn't know what the case is going to be, and if it's a case his friend ought to lose and he loses it, then he's afraid he's going to lose his friend too. But the system puts it on the commissioner's back, and how many people are strong enough to resist that? In the jury system it happens because of a lot-drawing situation and there's nothing you can do about it, but when you add to that in a condemnation case the man who owns the land going out and getting six names and bringing them in here to me, I can't think of a worse system that could possibly have been devised."

"A friend of the landowner sitting on there, who knows about his land, ought never to be on there, but you can't keep him off."

"I have never had a case in which there was any evidence whatsoever that there was any fraud or undue influence, or a landowner trying to dishonestly influence a commissioner or the Highway Department. I'm just saying the system of allowing you to select your friends is wrong, because the friend is put in."

"I've had this happen a dozen times. A commissioner will call me up, who's already been selected. He'll say 'Judge, I ought not to be on this commission. Mr. So-and-so is my real good friend. He's a deacon in the church with me.' (I'm just giving an example.) I'll say, 'When I ask you in your voir dire if there is any reason why you shouldn't sit on this commission, you just give me your reason in the presence of everybody.' That's all I can say to him. Do you know what came back in every case — which is a tribute to the people? 'Well, Judge, I don't want to be put in that position. Mr. Brown is my close friend. If I get up and say I can't be fair to him, he's not going to understand

it, and if I sit and he doesn't get what he wants, he's not going to understand it. I lose my friend either way. Now please let me off.' You see, he's worried about his conscience in advance. You know what I do? I call the attorney in, in the absence of the landowner, and say 'Mr. So-and-so wants to disqualify himself.' I don't tell them why. They know why. So we get another commissioner. But if that's happened twelve times, how many of those men who are friends of that landowner, who are sitting there, didn't call, either feeling on the spot and trying to do the honorable thing, or saying 'Ah, now I'll help my friend'? How many of them? All of that points up the system's wrong. I've had that happen over and over. But I never have had a landowner, in any way, have any evidence that there's been any impropriety, I mean such as talking to him, and so on. But you don't have to talk to him."

"You never have any way of knowing about these things unless the guy's an out-and-out crook, and that's not the case."

(How do you answer those who say the system works fine?)

"It works fine if the judge isn't thinking very much, and it's easy for the judge. They come in here with six names apiece, and they tell me which four each side wants. I don't have to worry about it, then I toss the coin for the ninth. The judge just doesn't have anything to do if he doesn't want to do any thinking or observing after the case is over. Works fine, but who's paying for it? Taxpayers."

"The landowners know through their attorneys that that's what the Highway Department is going to testify to. You can't lose. How are you going to get any less than that, if the state is going to say that's what it's worth? Theoretically, the commissioners can go lower, but they're not going lower. So I'm the attorney, and I take your case for a third of the excess or something like that. Then we go around and get a new appraisal from appraisers who don't work for the Highway Department, all of whom understand the system too. So what does the landowner do? He can't lose. He's got all the cards in his hands, to deal, to negotiate. The state has got no cards in its hands, because its going to put on testimony, certainly, to the amount of that certificate."

"Yet I don't feel as strongly about this as I do the commissioners, because the state really shouldn't be able to offer the landowner less than it's actually worth. And that's the federal government's theory too. And on paper, that's beautiful. But you see how the citizen can take advantage of that? Now I don't mean to say that every offer the state makes is enough. It depends on the appraiser."

"You're going to have problems in any condemnation. But the real key to the thing is to not let the litigants select who's going to try their case. That's what you're doing." (45)

2. "This business of submitting lists is the most abominable way of selecting commissioners that I can think of."

"As long as you're going to try these cases in the way that we are trying them this idea has many drawbacks."

"We all know that the selection of a favorable commissioner is the first key in a condemnation case. What happens now is the Highway Department will select six people that have served on commissions, and who they have an idea are conservative. The landowner will select six, not altogether because of their liberal ideas, but generally because they are friends. Now, that happens all the time. And that shouldn't be."

"The method they're using is just bad."

"I think anything would be an improvement over what we have now."

"The system that we're operating under now is bad in every way." (8)

3. "It's the worst thing in the world. It's all wrong. It's just like picking your own jurors."

"This thing is just as wrong as it can be, it's all wrong. We got along just fine until this thing came along, then we got more and more trouble with the commissioners."

"I think if you talked to them (the public) and told them what was going on, they'd have a suspicion right away. I mean any intelligent person, if you told them this was the system, they'd say it's wrong, I think."

"There have been rank abuses of the appointment procedure in my jurisdiction." The judge explained that he'd had a commissioner sit, only to find out that he owed the landowner \$500,000, and "that sort of thing."

In the opinion of the judge the Highway Department attorney should investigate and he "occasionally turns up some terrible things. I've had to continue many a case because we've had a conflict of interest." The judge has suspected conflicts in other cases where he had no proof to act upon. (21)

4. The judge feels that the system now in use is "repugnant to our entire concept of our judicial system." He believes that it is the "worst part of the entire legal system in Virginia." He believes that, in practical effect, the landowner talks to his friends and neighbors and says "I need some help. I have to appoint some people to sit on the commission. Would you serve for me?" At a minimum, says the judge, phone calls and conversations are made requesting men to serve as commissioners.

In the opinion of the judge, the system invites and presents the opportunity for partiality on the part of the commissioners. He does not believe the safeguards



are sufficient to overcome an atmosphere in which some of the commissioners are "our" commissioners, and others are "your" commissioners. He believes it is ridiculous to have all the commissioners favoring one side or the other, so that we "choose up sides" on the commission. It's "wrong, wrong. It's wrong from the beginning."

The judge says that the attorneys on both sides "couldn't believe their eyes" when this law was passed. When the new law was passed "chaos" reigned during a testing period when landowners' attorneys were testing the courts to "see what they could get away with," with everybody putting his friends on the commissions.

He believes that attorneys on both sides (even landowner attorneys) disapprove of this method of selecting commissioners.

The judge recounted one instance in which the landowner drove the commissioners to court in his car. They were standing in front of the court house discussing the case. He threw out the whole panel. But "never since have I felt that the commissioners were fair and impartial." He believes that these men weren't crooked, but simply ignorant. The judge's point is that the "system invites such abuse." He feels that under these circumstances, "the whole system is suspect."

The judge requires the parties to submit a biographical sketch on each person on the list, but believes it is completely insufficient to adequately inform him of the actual situation. His is an urban jurisdiction, where most of the persons involved are strangers. He believes that too many "fast buck types" are serving on the commissions. The judge noted that "frequently" a landowner will use a man as an expert witness, then a few weeks later he will show up as a commissioner, and "you just know he's favorable to the landowner."

In sum, the judge believes it is "obviously unfair for parties to appoint their own commissioners, their own judges, so to speak." He thinks the solution is to use a "blue ribbon commission." (46)

5. "We see every day the commissioners giving two and three times what the state has offered. In a system like that, there must be something wrong,"

"The parties talk of them as 'my commissioners.' I think we've got to get away from that system."

"As he (another judge) says, it's an abomination. If I have a case, I don't go out and select 'my' judge. It's just not your idea of justice."

"This system is cumbersome and very difficult to use. I just don't like it very much. The judge has to meet with the attorneys to make the selection. You have this business of each side wanting the judge to take five names from its list and four from the other." The judge agreed that under this system picking the commissioners is an important part of the case.

(Have you had situations that have bothered you?)

"Yes, I have had that experience. I've had commissioners who have been very close friends and clients of the landowner's attorney. I've had commissioners who themselves had land that would be condemned. The attorney for the Highway Department didn't make sufficient investigation or wasn't aware of this."

(Can friends be challenged for cause?) "Certainly. If they have an interest in the case." (9)

6. "I don't agree at all to the proposition that litigants select their own courts that try the case. The present system is deplorable. You have a group that's biased since one of the two has a majority. You end up with a commission that's basically bound to be biased. There's no way around it as a matter of practice."

(Do you worry about friends being put on?) "Yes, that happens quite often. That's why I'm against the system. It's natural for a man to select somebody he knows, somebody he thinks will be inclined to give him what he wants. The system invites such things as that. What am I going to do? I can't disqualify a man just because he is a friend of the landowner, or of people affiliated with the Highway Department. That's not grounds for disqualification. I wouldn't know it, really, in most cases. I ask usual questions, but the man doesn't think he should be disqualified." (2)

7. The judge explained that the whole system creates an invitation and a natural tendency to get biased people. He thinks that it simply isn't right for counsel to pick the commission. He says the "whole tenor of the situation is 'I'm his friend. Of course, I'm going to help him.'"

The judge believes there is no out-and-out crookedness, but it's the most natural thing that the man is going to put up somebody who's going to help him. For example, neighbors are frequently used as commissioners. The judge cited other examples, as where a commissioner and a landowner were former business partners, which he thought was "absolutely ridiculous." He cited a case where he threw out an award of \$30,000 and the new commission brought back \$3,000. The judge believes it "never would have happened under the old system." (50)

8. "The landowner tries to get the most liberal, if not the most intelligent, inexperienced people that he can find. I think it's a very, very unsatisfactory arrangement. I oppose it." (31)
9. "The present system is susceptible of outrageously high awards and extremely low awards, and I don't know what the cause is. But I assume any group of people you bring in whether on a jury or what, would be susceptible to the same problem."

"The landowner tries to get people that are just as biased as he possibly can, and the state tries to get them as low as they can. Generally, the state picks people who have less interest in the case, although they are very conservative."

"Sometimes, the landowner gets real close friends and associates", in which case the judge usually takes six from the state's list.

"Naturally, to the parties, whether or not you get your commissioners selected makes all the difference in the world." (28)

10. "I don't like the present system of selecting commissioners in any way. If the judge takes five from one list, the landowner comes in with a chip on his shoulder. The accusation is made that the judge is against them."

"The landowners' attorneys feel the Department will select friends of the Department and conservative people. They feel they have to protect their client. The people they select are friends, not particularly qualified in real estate. It's not a blue ribbon commission."

"Maybe the Highway Department has just completed a condemnation case against a landowner, and the next landowner will use the previous one as a commissioner."

(Social friends? Yes, he worries about it.) "But very seldom is there a challenge for cause. I assume the attorneys just take it for granted that we're going to have a biased commission. And that's what you do have." (24)

11. "This is a very difficult problem, how you keep somebody from saying 'John Doe, you have been appointed a commissioner for my land. John, remember you and I soldiered together in World War II.' People don't regard commissioners as sacrosanct as they do jurors. So for that reason I would favor drawing up a panel of jurors, and getting rid of this awful selection in a last minute situation. They don't dare tamper with jurors, but its not unusual at all to call commissioners. They think the commissioners are somebody they ought to tell their side of the story to."

"Expertise? I just told you, it's who he knows on that commission that counts. The case is won or lost at the appointment of the commissioners, no other place."

"Now, the commissioner's idea of value is controlling, not the evidence. And that's absolutely wrong. The evidence should be the absolute binding polestar. The commissioners should be bound by the evidence." (23)

12. "I know in some areas you get all your friends and cronies and put them on the list so you'll be sure to have two or three old buddies there. In the one or two occasions in which I've had to pick from the list, I ruled that those people were not qualified to be on the list, where they were close friends and this sort of thing. To me it's ridiculous."

(Are the commissioners in your jurisdiction fair and impartial?)

"No. I don't feel that way at all. I think some of them are fair, and some of them are obviously too high. It's rare that you ever see the landowner get a raw deal."

"It's my feeling that many of the commissioners we have used in the past have been obviously unfair, even to the point, sometimes, of giving more than the landowner asked."

## APPENDIX VII

"It's just like a drunk driving case. You win or lose the case when the jury is drawn. You get a bunch of teetotalers on there and you've had it. You get a bunch of drinkers and they'll turn you loose. This is the same thing with commissioners. What goes on in the courtroom is a complete and utter waste of time. But maybe that's being slightly cynical."

"Something has got to be better than what we have now." (15)

13. "I don't believe in the concept. I don't believe our constitution envisioned any system where people would pick their own — so to speak — jurors. It just looks like it's against the whole concept of our system. This concept to me, is not right, that people pick their own jurors."

"We have a very strong voir dire. You can usually find out what the relationships are."

"It is true, subconsciously he's biased, but doesn't realize it. You can't get inside a man's mind. This is why it's against our kind of system." (30)

14. "If I saw the names of commissioners listed one through twenty or whatever, I believe I could go through the list and tell you who nominated them."

"Basically, I have a lot of faith in those who have served in this court."

"I don't like the system of both sides nominating, but don't ask me what's better."

"I prefer the old system to the present system. This is like the Commonwealth going out and selecting people who they know would hang a person accused of a crime, and the criminal being able to select members of the jury he knows would condone everything he'd done. And that would be a poor system. And this system is no different. We haven't had any real problem here with it, but it's just subject to so much abuse." (35)

15. "I don't like for the parties to select. Unfortunately, the lawyers get people partial to them, not impartial people. We had one case where all six people on the landowner's list were landowner employees. Apparently the landowner had outtalked the attorney." (3)

16. "These commissioners aren't paying too much attention to the facts. One time the landowner didn't claim any damages, and the Department claimed only \$100 for an outdoor toilet or something. You know how much damages the commission brought back? \$8,000.00."

"There's always somebody sitting on there — well, I never followed this theory that just because it's the state's money, you're supposed to throw it away, but that's the thinking of a lot of people."

"The way the lawyers are picking them — they are going to pick everybody that's the man's neighbor. Subconsciously, it's like dealing with friends. You're not

## COMMENTS ON THE PRESENT SYSTEM

going to do anything wrong, but subconsciously you're going to help your friend where you wouldn't help someone else." (42)

17. The judge explained that he's "always had the feeling that there's something wrong with the system." He believes that the awards are extremely high. While he has felt uncomfortable with the system, he has not had any conflicts of interest as such.

He explained that in a small rural county, you simply can't avoid getting people on the commissions who know the landowners. It's inevitable that even close friends will be on there, since all the people in the county who know real estate are in the same social circles. (51)

18. "There's the safety valve, of course, a man can be struck, or challenged, at least, on voir dire."

"We've had very qualified expert witnesses here. One of the reasons is that, basically, we've had experts sitting on the commissions. If you get commissioners that aren't experts, they'll present people who aren't experts to testify. With our commissioners, they know they'd be wasting their time and hurting their case by putting on a man who's not an expert. The commissioners are not going to buy that type of opinion. If you had just juries in there, I'm sure that problem would really become a problem."

"We had one instance where the lawyer telephoned one of his people to see if he could serve. But this was inadvertent."

"I guess under the system, lawyers certainly appoint people who are known and friendly to their side, but of course they're challenged on voir dire."

"I think the commissioners are basically fair and impartial. However, I think there is a problem that people can maybe know a party too well and still be able to sit. They may not be aware of it, but subconsciously they would perhaps be leaning to that party. I think that's a possibility under this kind of funny setup where each party lists the people who are to sit."

"I don't know most of the people on the commissions. When the attorneys select people who are their friends and who they know, then the chances are great that there will be a relationship of some nature, just how friendly remains to be seen in each case. This is the responsibility of the attorneys, particularly in cities where people don't know each other." (38)

19. "It seems to me that there's no reason why each side should propose their own commissioners. I see no reason why you should have a commission with an odd number of men, so that it turns out that one side or the other could conceivably have an advantage." (40)

20. "It's just not a very good system, in my opinion, to have each side hand you the names of the jurors, so to speak. I'm not in favor of the system we've got now. The new statute isn't good. The remedy is worse than the illness."

## APPENDIX VII

"We haven't had any actual improper conduct. It's just that naturally the parties will bring in somebody who'll bring in a high award." (27)

21. The judge explained that he does not like the present system, although it's working quite well right now; the parties agree in 90% of the cases and he's convinced that he's getting honest, fair and impartial people on the commissions. He personally knows almost all of the people. Nevertheless, he thinks there is a "little larceny in all of it."

The reason he dislikes the system is that a landowner will walk into his office, saying "Well, I've talked to Joe Smith, and he's willing to serve on my commission." The judge disqualifies him, of course. The judge pointed out that this is the result of ignorance, but he doesn't like a system that causes problems like that.

The judge commented with respect to selecting commissioners "the landowner's attorneys know before dark who was the low man, and he gets struck the next time. The Highway Department attorneys have somewhat of a tendency to do the same thing." (49)

22. "They invariably submit the names of people they have very close relationships with." He believes that the weakness of the present system is that so few people are qualified in a rural area. (6)
23. (Social friends?) "That was happening in one county in which I sat and I had to be very careful about that." (16)
24. "It has really worked out very well in this circuit. We've used pretty much the same commissioners we used before, although some new blood was brought in as a result of the new law."
- "I do see a definite danger in the present system if everybody puts on the most partisan people they can think of, although it hasn't happened here." (13)
25. The judge explained that while it is working pretty satisfactorily right now, the practice of submitting lists to the court isn't good and he thinks we can improve on it.

He noted that landowners often submit the names of friends, and often do not have a suitable list. He said that there were many problems along these lines right after the law was first passed.

In general, he believes the commissioners in his court have better qualifications than the average juror would have. (48)

## APPENDIX VIII

## FAIRNESS OF THE AWARDS

QUESTION: "IN YOUR OPINION, HAVE THE AWARDS IN YOUR JURISDICTION BEEN LOW, FAIR, OR HIGH?"

Summary of Results

Comments Indicating Generally Fair Awards	14
Comments Indicating Generally High Awards	11
Comments Indicating Generally Low Awards	<u>0</u>
Total Responses	25

Comments Indicating Generally Fair Awards

1. "They're usually in line." (33)
2. "None have been so excessive or inadequate that I would set it aside." (34)
3. "The awards are currently considered in the correct range by our bar." (39)
4. "I think the commissions generally come up with reasonable values." (41)
5. "I have felt that some of them are too high, but I had no control over it. Again, that was in a locality where the attorneys selected the commissioners, and I felt that they knew the men, and knew their responsibility. But there have only been one or two cases of that nature." (44)
6. "Awards have not gone haywire, in our area at least. I don't recall a single one in the last reasonable number of years that has been highly excessive, or unfairly low." (47)
7. "I believe they have generally been in line. At least none have really been out of the way. None have been so bad that I had to set it aside." (22)
8. "Awards are generally fair." (20)
9. "The commissions have been somewhat liberal in their awards, but not extravagant or out of line. I'd call them high conservative awards." (17)
10. "Generally speaking, there are no real runaway awards, no ridiculous awards."

## APPENDIX VIII

"I see a difference between counties. The effectiveness of the attorneys is part of it. In one of my counties it's almost always more than is offered. In another county the award is sometimes lower than the certificate." (12)

11. "I've never seen an instance where I thought they made an unfair award." (11)
12. "Lots of people criticize the awards but with rising land values, I'm not so sure but what the commissioners are right." (7)
13. "Landowners don't get raw deals. And the Highway Department doesn't get many either." (1)
14. "I don't see too much wrong with the awards. You do see a difference between counties, some high, some low, some moderate. I really don't know why. The more urban areas are more liberal than the rural farmers. Perhaps they are used to thinking in greater amounts." (18)

### Comments Indicating Generally High Awards

1. "Awards are just getting out of hand. Some of them almost shock the conscience of the court because of their excessiveness. A lot of times it doesn't make much difference who you pick, the awards come back extremely high, in the view of the court."

"In one of my counties, it's not uncommon for a landowner (outside of the courtroom) to say 'Well, they offered me all the money the property was worth, but commissioners will give me more, so I'm just going ahead and have a hearing.'" (28)

2. "Out here I don't know of any case that I've tried in which the landowner didn't get in excess of the fair market value for his property, regardless of what commissioners you have."

"I could appoint five of the most conservative people in this county, and their award would exceed the fair market value." (24)

3. "In all the condemnation cases I've tried, I can't say there was but one time where the man didn't get more than he should have." (42)

4. The judge thinks there is no doubt that the landowners are "getting more than fair market value." He can remember only two instances where the landowner got less than what the judge thought he should.

The judge explained that awards are 50% — 100% higher than the offer, which indicates to the judge that "either the appraisers or the commissioners are wrong, one or the other." He says that in every case an award of 40% more than the offer can be safely predicted. (49)

5. The judge believes the awards are "extremely high." He believes that the commissioners think of the state as they do insurance companies, as a source of never ending cash. They forget, says the judge, that this is their own money, since they are taxpayers. (51)



## FAIRNESS OF THE AWARDS

6. "In one county, every award was excessive on that interstate. In another county, they were all excessive. So many of the awards have been." (15)
7. "In one county it seemed to me some of the awards were just way high, but they were within the evidence and under the law I didn't see anything I could do."  
  
"The commissioners not only gave high awards for land, but tremendous awards for damages — and there were no damages because they were so greatly enhanced. Poor farm land worth \$150 an acre was awarded damages, even though it was worth \$1,000 per acre after the project as residential or campsite property on a large body of water." (16)
8. "The awards in this area, for the past two or three years have been, in my judgment, high." (8)
9. "I have never yet seen a case where the commissioners made a serious mistake against the landowner. But there are many excessive awards. Lots of them." (21)
10. "Frankly, I personally think they've been pretty high. But who's to say? It's the commission's job. There were several that were perhaps excessive." (19)
11. "In general, I think the awards are very fair to all parties."  
  
"But you do see awards that are clearly excessive, though not legally so. The landowner makes a pretty good recovery in the usual case." (14)



## APPENDIX IX

## PREDICTABILITY OF THE AWARDS

QUESTION: "ONCE THE FIVE HAVE BEEN SELECTED AND IT IS KNOWN WHICH SIDE HAS THE MAJORITY, WOULD YOU SAY THE AWARD IS MORE OR LESS PREDICTABLE?"

1. "No. I can't tell what they are going to do and nobody else can. Whether they know you or not, they try to give a fair result. They are fair and honest, and not predictable." (4)
2. "No. I don't get the feeling that the outcome is predictable once the five have been selected." (38)
3. "No, they aren't predictable. That's not the atmosphere about it." (26)
4. "I can't say the commissions are actually predictable." (24)
5. "Well, if it's three to two, then that's what you are up against. But I wouldn't go so far as to say that you can predict what the award will be." (8)
6. "When you get three to two on there, that's a heck of a way to run a law suit. You can't predict the award, but it will naturally tend to be higher if the one side has the majority."
- "This doesn't question the integrity of these commissioners. It's just natural. They're probably friends, or have had some connection with the landowner. If that weren't the case, he wouldn't be on the list, obviously. They're not going to submit names to me of people they're not pretty sure of. That's human nature." (27)
7. The judge believes the commissions are generally predictable once it is known who has got the majority. He believes they are weighted in favor of one side or the other. (46)
8. "Yes. Absolutely. I'd say so if the landowner's commissioners are the majority. But if the Highway Department gets the majority, you can't say that it will generally be a low award. Those people very often disagree with the Highway Department. They are higher than the Highway Department." (45)
9. "If the commissioners are right, you can't tell what they're going to do. But if you let the client pick the commissioners, you'll end up with interested people on there though." (21)

10. "I would say that's a very real factor. If you have three to two, there's a possibility that those three might pull the other two to a higher award than would be the case if it were reversed." (40)

## APPENDIX X

## THE CIVIL JURY

QUESTION: "DO YOU SUPPORT THE USE OF CIVIL JURIES IN CONDEMNATION CASES? DO YOU THINK THAT THE QUALIFICATION THAT THE JURORS BE FREEHOLDERS IS A SUBSTANTIAL ONE?"

Summary of Results

Comments Generally Favoring Juries	7
Comments Not Generally Favoring Juries	<u>44</u>
Total Responses	51

Comments Generally Favoring Juries

1. "I think they ought to have a separate group of people picked by the jury commissioners on the basis of being landowners, and draw their names from a box. I think that's the best system I can think of. Draw up a list of commissioners — how many would depend on the amount of condemnation you're expecting, but maybe fifty names, or something like that. I think this would give you a little more diversification of ideas. In other words, this would be a jury system, except they would be only landowners."
- "I think every landowner has a general idea what land is worth, and I think the days of playing on the sympathy of the juries is gone. I think jurors are generally better educated than they used to be. I think the change ought to be to the jury type system." (41)
2. "I think that would be the best way, because when you let them submit those names, well, I think the Highway attorneys are generally fairer along those lines than the other attorneys."
- "If a jury could come out with more unpredictable results than the crowd is doing now, well, I don't know how they could do it." (42)
3. "You might get people whose views aren't tainted. We need people as disinterested as possible. You'd still have a great disparity of awards with the jury, but you'll get disparity whether it is a commission or a jury if you have different people on there." (28)

4. "I think it would be all right. The present commissioners are no 'experts' either. I think the jury system would be better than the situation we have right here now with the selection of commissioners."
- "As for lack of uniformity, we already have that to a certain extent under the present system. Certainly that would be the same under the jury system. You can't predict what a jury is going to do." (24)
5. "I don't see any particular reason we shouldn't draw them from the same box as we do for other juries. I favor the jury type trial." (8)
6. "I'd go back to a regular jury, and let them be controlled by the evidence. I think the Highway Department would get a better shake." (23)
7. The judge stressed that the important thing is for the commissioners or jurors to be drawn at random so as to get an impartial commission for each case. (50)

#### Comments Not Generally Favoring Juries

1. "I think it ought to be more on an expert basis. Of course it is, to some extent, now. A condemnation case is not like a murder case. I know people say 'Well, juries sit in murder cases,' but they're missing the point, I think. The big point is this: in murder cases, it's credibility — that's the whole issue, basically. Here credibility is not the issue, normally, at all. It's the accuracy of the experts. And it's amateur brain surgery to have someone on there who has no real knowledge of real estate. It's unfair to the landowner and to the state. I think more and more it should be a professional thing. Maybe we should even have certified appraisers on there. Of course, where to get them might be a problem in some areas. But it seems to me, it should be more and more toward professionalism, and further away from the amateur brain surgery approach."
- "It (the jury) would be infinitely more time consuming, not that that should be the controlling factor."
- "We've had very qualified expert witnesses here. One of the reasons is that basically we've had experts sitting on the commissions. If you get commissioners that aren't experts, they'll present people who aren't experts to testify. With our commissioners, they know they would be wasting their time and hurting their case by putting on a man who's not an expert. The commissioners are not going to buy that type of opinion. If you had just juries in there, I'm sure that problem would really become a problem." (38)
2. "If we used jury lists, you'd get a lot of people on there who, if the landowner was his friend, wouldn't even think it was dishonest to say 'Why, he's a good guy. I know him. That land must be worth what he says it is.' Our commissioners now exercise independent judgment."

"Some of our jurors can't even read or write. Very often jurors don't even know what's going on."

"The jury system would not be an improvement in my jurisdiction. I think it's better this way."

(Freeholder requirement?) "You could avoid some of the problems that way." (17)

3. "I think you can do a much better job with commissioners than you could with a jury. I think the jury would be very much swayed by sympathy for the land-owner."

"They would have no knowledge of values and they'd just be making a wild shot in the dark."

"I think that would be tragic as far as the Highway Department is concerned. I think they'd get some outrageous awards. I just think every award would be tremendous, because in the mind of the average layman, who really has no knowledge of land condemnation, you're almost entitled to something because they're taking it from you. And I think through the years we get away from that with the commissioner system, because they acquire enough knowledge serving on these cases and through practical business sense to know that these things are normal functions of government." (14)

4. The judge explained that to use lay jurors in condemnation cases would be the "absolutely worst system since they wouldn't know anything about land values." He believed it is "very important to get qualified people" who know real estate values.

The judge fears that under a straight jury system you might have a situation where a welfare woman with twelve children might be responsible for taking a view of the property, listening to technical testimony and placing a value on the property. This, says the judge, would be ridiculous.

(Freeholder requirement?) The judge thinks that "It would improve the quality of the jury a little bit," but it really wouldn't be a significant improvement. (52)

5. The judge explained that condemnation is a very specialized matter. He believes if we used juries as they are now constituted, they simply wouldn't know what's going on. The very terms used in condemnation would not be understood by jurors; "utility easements," "damage to the residue," "front footage" and the like would be above their heads.

He stressed that we should have persons who have the experience and intelligence to understand and judge the appraisers.

The judge noted that taking the view often involves climbing mountains, going over muddy property, and the like. He thinks the women would tend to think it

## APPENDIX X

was a man's job, and would leave it up to the men to decide. Because of this and because the terms used are too difficult for a housewife to understand, he believes the jury would not be a practical solution. He believes to use a jury would be "cumbersome, awkward, and would jeopardize the condemnation procedure as we now know it."

He furthermore stated that it would "unquestionably delay the proceedings." The present system is "speedy and effective" because the commissioners have been through it so many times the instructions and preliminary matters are quickly dispensed with and the appraisers get right down to the nub of the case. (53)

6. "I'm not in favor of a jury as such. That would be about as sorry a system as you could get, particularly in this day and age when the federal courts are telling us how we have to make up our juries — a cross section all the way across.

"Condemnations should be decided by people with reasonable qualifications. Unless you have a special jury, you won't end up with a blue ribbon commission and the jurors wouldn't know anything about it. The concepts would be foreign to them. They would be groping for an answer.

(Do you think there might be a changed atmosphere in the courtroom?) "There might be a little more histrionics and appeal to sentiment with a regular jury."

(Do you think using a jury would delay the proceedings?) "I don't think there would be a difference there."

(Freeholder requirement?) "That wouldn't change it much." (27)

7. "If we used a straight jury, why, you just don't know what's going to happen. You're getting good commissioners now, but you would get people on there who just don't know anything about property. You might just as well not ask them. You're simply going to be ruined if you put that in there." (33)
8. "A regular civil jury? I'd say absolutely no. Because they would come in here and know absolutely nothing about values and real estate. I find that a jury would be very, very sympathetic to the landowner. I find commissions, on the other hand, who are selected for that purpose, realize they are selected for that purpose, and they feel a greater obligation on them in their dealings with the parties than a jury would be."

(Freeholder requirement?) "I wouldn't want that, I think we have to select people who know what they're doing."

"I would hate to see that change come about, that is, using juries." (54)

9. "I think trials would probably become 50% longer if we switched to the conventional jury system for condemnations, because of the lack of basic knowledge in jurors about land values, zoning and so on. Many things which to us



seem every day, would seem most unusual to jurors. I regret to say that I think a number of lawyers would favor the regular jury system solely on the jackpot theory." (39)

10. "I like the system we have now better than a jury system. I think you ought to get commissioners who have some idea of land values. I just don't like the jury system in the first place. The thing of it is you have a lot of freeholders who really don't know anything about real estate."

"There are many freeholders who wouldn't have any idea about the value of land. Widows, for example, probably weren't told much about business by their husbands."

"One of the dangers of the jury system would be that you'd get much more variance in the awards — much more."

"In condemnation cases, the view is evidence. In regular jury trials, we sometimes have a view, but that is merely to help the jury understand the evidence. It is not evidence itself. I think you need people experienced in real estate on these commissions. Not professionals, however. Professionals in real estate would tend to dominate the commission deliberations and also might tend to have an interest in the case." (16)

11. The judge explained that historically great confidence has been placed in commissioners. In the early years, three neighbors were appointed as commissioners to set the value of a man's land, and the court didn't even supervise their deliberations. It was simply assumed by everybody that the integrity of the commissioners overcame any tendency to favor their neighbor. The judge then explained that:

"You couldn't possibly have that confidence with a random jury selection. In the first place, the housewife who's on there might be a person of great integrity, but the disappointed litigant is going to say 'Well, here I am having my property value ascertained by a housewife. What in the world does she know about property value?' So I think the matter of public confidence still is important, and would be undermined if you had a truly non-expert jury making this determination." (43)

12. "I don't think it's a good idea at all to have a jury. Chaos would take place." The judge explained that we would get women and other persons who don't know anything about land value.

(Freeholder requirement?) "Yes, that would have some bearing. They would be more responsible." (6)

13. "I think, personally, that you can get a better eminent domain result if you have responsible men that are aware of the values in that particular community. If you drew at random from a cross section of the freeholders, you might get all nine liberals, or all nine conservatives. One landowner would get a nice figure,

and the next one, a low one. I like the present system much better, because I balance the conservatives against the liberals. I think I reach a closer norm that way than I would if you just selected commissions by lot." (44)

14. "I don't go for that at all. I don't think people who don't know anything in the world about it should be doing it. Giving it to a jury would be throwing it up too much for grabs. A jury is a very unpredictable thing."

"Condemnation is very different from the usual civil case. Value is a technical thing."

(Freeholder requirement?) "That doesn't make much difference. It takes more expertise than that." (18)

15. "If regular jury commissioners picked them, it would be worse than what we have now. We'd probably get some people who would make terrible commissioners. I would certainly hate to see a jury picked at random." (19)

16. "The average jury wouldn't be qualified. This is a thing that requires some knowledge. A decent commission doesn't pay much attention to the evidence." (21)

17. The judge explained that he is definitely opposed to a straight jury. He believes that condemnation involves "completely different considerations from the usual jury case." In his view we need a "completely professional commission" to decide these cases. This is very different from the jury case where the issue is credibility. (46)

18. "I think a true jury system would not lend itself to uniformity, which is important. You would have extremely liberal people, that are just not knowledgeable in land values, and get a skyrocket award on one parcel, and right next to it, a very small award. Because of the fortuity of timing, perhaps, you could get an ultraconservative jury, and that would undermine the confidence in the system."

"You take a complex business type of litigation, where you've got accounts, tax questions, and so forth — it seems to me that it's much better not to have a jury in that type of case, from the litigant's point of view. I think this falls into that general type of area." (47)

19. The judge explained that jurors just wouldn't know what's going on. He believes that condemnation is a "special problem" that requires "expertise."

The judge thinks that uniformity of awards is very important and that juries would be bad in this respect since they are "unpredictable" and "sporadic." "Uniformity would be completely out the window."

He noted that using juries would "cost the state a lot of money", but expects landowners would be in favor of it. (48)

20. The judge explained that if we used a regular jury there would be no uniformity whatsoever. "You simply can never tell what a jury is going to do." He believes that uniformity of awards is very important.

The judge stated that condemnation is a technical matter and qualified people are needed to decide these cases.

In the opinion of the judge most attorneys would like to see the jury system instituted because "the awards would be higher."

(Freeholder requirement?) "Doesn't change a thing." The judge said that 90% of the people in his area own their homes, but that "just doesn't prove they know much about real estate values." He thought that there are many ignorant freeholders. (49)

21. "I don't particularly like the jury system. I think that it wouldn't function properly because here they're doing a little more specialized sort of thing. I think both sides like to select people who have some knowledge of property values."

"Condemnation cases are different, as evidenced by the fact that commissioners are not bound by the evidence."

"The whole concept would have to be changed. There are so many differences in the system that I just can't picture a normal juror sitting up there on a commission like this." (35)

22. "I do not think it would be desirable because you get such a wide disparity in verdicts with juries, and I think Virginia should go to a more professional type of commissioner, and not involve so many people on a commission."

"I think it would increase litigation because I think a straight jury would have the same approach to matters of eminent domain that many juries have in personal injuries where they are satisfied that insurance is involved. They figure the insurance company can pay or the state can pay, or the federal government, so 'let's sock it to them.' So this is another reason, aside from a lack of uniformity, that a straight jury is undesirable."

(Would it cause delay?) "Yes. That's why I suggest one set of commissioners and one instruction session." The judge indicated that we should use some of the features of the federal condemnation system. (40)

23. "I'm not sure that we don't need a blue ribbon type jury in condemnation cases. I just don't know how it would work to have people who couldn't read or write — as some of our jurors cannot — to come into court, and for the first time hear a condemnation case. I'm inclined to think that they would bankrupt the state in no time flat."

(Freeholder requirement?) "I don't think that would amount to much at all. You've got some pretty ignorant landowners." (12)

24. The judge indicated that the whole thing in condemnation is knowledge of land values. "The average lady, for example, simply isn't familiar enough with values to be put on a commission." He indicated also that ladies wouldn't be suited to "tramping around on the view." (7)

25. The judge stated that a jury system would be "worse than what we have now," and that "the average juror in this area would have no idea about the value of property."

"It's knowledge that counts. It's largely a matter of opinion. He has to form an opinion himself. It's not the usual jury case where one side says it happened one way, the other, another way. The jury listens and decides how it did happen. It happened a certain way. In a condemnation case it's not a question of something happening a certain way, it's a matter of what something is worth."

Also "uniformity of awards is important" and the judge believes this would be better served by using qualified people.

(Freeholder requirement?) "That wouldn't be worth too much. A cross section simply doesn't know. The average man would listen to the experts on both sides and simply compromise between the two." (2)

26. "When we pick jury commissioners, we pick people whom we feel are capable of getting fair representation of all the city. We don't care whether they're experts or not experts. But when we have condemnation commissioners, we want men who are familiar with land values. That's what you've got to have, because you're not dealing in damages, as such. You're dealing in value. You're horse-trading and you've got to have a man who knows whether the horse is sound or not."

"I don't know what you'd gain by juries. You've still got people under oath. They'd do the best they could. They are just not as capable as a commissioner would be." (11)

27. "I think it could work if these cross section requirements weren't enforced on these juries. I think we should keep the qualifications high." (1)

28. "I think the commissioner system is better than the jury, but it wouldn't be disastrous if we used a jury. There would be more variance in the awards, some real high and some too low, maybe too much variance." (5)

29. "I think they would take more time to try." (25)

30. "The present system is satisfactory. I see no reason to go to juries. Proportional representation might be required." (34)

31. "I can see no advantages to the jury system and perhaps it has some disadvantages, for example with respect to the view, which is an extremely important thing in condemnation. In an ordinary jury case a view is not evidence, but merely an assistance to understanding the evidence. With these commissions, the view is perhaps the most important evidence." (13)
32. "I would prefer selecting people with some knowledge. The weakness of a jury is that they have never heard one of these cases before, and it's ridiculous to expect much of a man in that situation." (15)
33. "Jurors simply wouldn't know enough. You'd be changing the whole principle of condemnation cases. Right now, of course, commissioners aren't bound by the evidence. They can make the award based on their own view of the property. To jurors, the view wouldn't mean anything."
- "I just don't think the system would be practical at all. When you've got a good system, why change it?"
- (Freeholder requirement?) "He would know something more about real estate values. I'll say that much." (20)
34. "Many people simply wouldn't be qualified. Minority groups, ladies and others don't know enough about land values. If we had to get a cross section, I would not be in favor of going to a jury system." (22)
35. "I don't think they ought to be selected as a jury." (45)
36. The judge said he would not be in favor of going to a jury system because the average juror "doesn't know anything about it." He believes we should "stick with qualified people." "The commissioners now know a lot more about real estate than the average person."
- (Freeholder requirement?) The judge doesn't think that would make much difference, since he "wouldn't know much more about real estate than the average man in the street." (51)
37. "I prefer to stay with commissioners. I think they know what they are doing. I think it would delay the trial. It would take longer to put on the evidence because you'd have to educate the jurors, even to the terminology. The first time around, a juror just doesn't catch on. You use terms like a 'scintilla of evidence' and they don't really understand." (26)
38. "No. They should be people who know what their doing. They should have some qualifications." (29)
39. "We have better people on the commissions than you would get on juries." (32)
40. "We now have to have a representative cross section of the community on the jury. So many people that would be representative of a cross section of the

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community would not be competent to serve as commissioners, because you need some people with experience in real estate." (36)

41. "The basic qualification is having knowledge of land values." (37)

42. "I just don't see where the jury system would be any improvement, and it might be less effective than the system we're now using."

(Freeholder requirement?) "I certainly think it would make a substantial difference. If the man had no idea as to the value of real estate, as evidenced by his having bought some at one time or another, he wouldn't be qualified. I don't think either side wants ignorant people on the commissions." (10)

43. "For the very restricted kind of issue that you have in condemnation commissioners are better. It's more flexible and works better. To go to a jury would be changing the whole approach. A jury panel may not have any experience or any real estate holdings."

"With commissioners we sometimes try nine or ten cases in one day (uncontested cases). You couldn't do that with a jury. It would be impossible." (4)

44. "Whenever you're condemning real estate, you ought to have above average people to set the value. After all, commissions have wide leeway to use their own knowledge. If you take an average person, he doesn't know anything about it."

(Freeholder requirement?) "That doesn't mean he knows anything about it. There are lots of ignorant freeholders." (3)

## APPENDIX XI

## COMMISSIONERS SELECTED BY A COMMITTEE

QUESTION: "WOULD YOU SUPPORT A PROCEDURE UNDER WHICH A COMMITTEE WOULD BE RESPONSIBLE FOR SELECTING THE COMMISSIONERS? THIS COMMITTEE, APPOINTED BY THE JUDGE, WOULD HAVE APPROXIMATELY SIX MEMBERS. IT WOULD DRAW UP A LIST OF 25-50 COMMISSIONERS (DEPENDING ON THE SIZE OF THE JURISDICTION), WHO WOULD THEN SERVE FOR TWO OR THREE YEARS. THE COMMISSIONS WOULD BE DRAWN BY LOT AS EACH CASE AROSE, WITH NO COMMISSIONER SERVING TWICE UNTIL ALL THE OTHERS HAD SERVED ONCE. THE COMMITTEE WOULD BE INSTRUCTED TO SELECT ONLY QUALIFIED PERSONS WHO ARE KNOWLEDGEABLE IN REAL ESTATE VALUATION. WOULD YOU BE IN FAVOR OF SUCH AN ARRANGEMENT? DO YOU THINK IT WOULD BE SUBJECT TO THE CRITICISM OF EXCESSIVE JUDICIAL CONTROL?"

Summary of Results

Comments Generally Favoring Selection by a Committee	27
Comments Generally Not Favoring Selection by a Committee	7
Noncommittal Comments	<u>10</u>
Total Responses	44

Comments Generally Favoring Selection by a Committee

1. "I think that would be workable; I don't see any reason why it wouldn't. That would leave what's good about the present system, that is, having commissioners who are somewhat familiar with land values, and also overcoming the objection of the man selecting his real good friends. I think that would be a fair way to do it."
 

"I think it would be very good. To me, it's much better than just going to a jury system, whether they are or are not freeholders."

"That's a real good suggestion. The more I think about it, the better I like it, and I think it would be much fairer than these lists."

"I think that's excellent." (16)
2. "I think that would be better than taking people from the regular jury list because the people would be chosen because of knowledge about property values."

- "That would be better than choosing commissioners for a particular case, and I'm more impressed with it than the regular jury because there you would get women and other persons not versed in real estate, and not qualified."
- "I think it would be better to have a committee do the selecting rather than the judge, but of course the committee would have to be instructed to select qualified people."
- "This would take the pressure off the judge because even under the present system the losing party blames the judge for his selections. You'll never get completely away from criticism of the judge. This would be better, though. Using the committee would answer a lot of the criticism of the public." (28)
3. "I think it would be best if we selected them like we do grand jurors. Have a list drawn up, and then draw by lot when a case comes up. This would be better than what we're doing now."
- "If we appointed a group of three to five men to draw up the list of commissioners, I don't think that would be subject to the criticism that it's too much controlled by the judge. I think the awards would be fairer and more equal." (3)
4. "I think that is a good suggestion, and I think you would come up with fair awards under such a system."
- "I think certainly it would be a good system. Awards would be in line, I think." (24)
5. "It impresses me, just in its basic simplicity. The key would be though, that the committee that selects the master list will see that knowledgeable people get on it. I think that has to be the basic assumption."
- "It would seem to have a lot of merit, in my opinion. If the list were large enough, and I assume there would be some statutory guidelines on it, there would almost have to be a sprinkling of people of different philosophies on it." (47)
6. "I think that would be very good."
- "I support this 100%. I want to be sure 'landowner' is a qualification. They have some feeling for real estate values."
- "There would be less temptation to tamper with these commissioners. Now, people don't tamper with them from any improper motive. They think they're supposed to let them know you've been appointed commissioner in a case, and you're up at the courthouse, and the landowner says 'Nice to see you again. Haven't seen you since we soldiered together.' And the guy gets the message



right off the beam. It's a subtle thing, subconscious maybe. Most people wouldn't insult the man by saying something directly." (23)

7. "I think that would be excellent. That would be better than the judge selecting the commissioners. Of course it would depend on who the judge appoints to the committee. We have to get the people that have the special qualifications for real estate valuation."

"This would remove it from the judge and I don't think it would be a valid criticism that the judge controlled it. But it would depend upon who the judge appoints." (27)

8. The judge thought that this would be "excellent, although a little more cumbersome." He added the caveat, however, that if the federal courts require a cross section of the "criminal as well as the honest" and the "ignorant as well as the knowledgeable" on these commissions, it would be bad. (49)

9. "If the committee was properly instructed to pick people who had some expertise in the field, I would think that would be appropriate. But if we had to have a cross section of the population, it wouldn't be good."

"I would think that would be superior. You'd still have to allow your strikes, of course." (38)

10. "I've thought about that and I like that idea. It would be like a grand jury. You have a list of 60 names, and you draw 7 names each month. No commissioner could serve twice until everybody has served. Then you double back and start at the top of the list again."

"As for how many commissioners you need, I think you have to be flexible and give some discretion to the judge. It would depend on the size of the county, the amount of condemnation and so on. Perhaps you could have a formula, say at least 25 or 30, but not more than a certain number. Maybe you could start with a certain number, but the judge could call back the committee to submit more names if they were needed." (35)

11. "I think that might have a lot of merit."

(Regarding the criticism of judicial control) "I think that's the answer to it. If the statute required the list to be somewhat more extensive, you'd get away from the problem of the judge appointing the same people to hear all the cases. The number could be based on the population of the county, perhaps."

"With the reform of the court system being considered now, perhaps you could have the list drawn up for a judicial circuit instead of just for a county. You'd have to change the requirement of being a freeholder of the county, and make it a freeholder of the circuit." (43)

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12. "This may be an idea that has a lot of merit, if you select them for their specialized knowledge. The problem with it is, how do you select them?"

"You never know what's going to be involved in an ordinary jury case, so you can't get expertise, but you know what's involved in a condemnation case, so you should get people who have an unbiased opinion or knowledge of what the locality is."

The judge indicated there might be trouble if the federal courts required a cross section of the population on the commissions. (37)

13. "I wouldn't be adverse to that. It would be fine with me." (32)

14. "I think a combination of the jury and the commission might be best. We need to expand the number of people who are being called." (25)

15. The judge indicated that this would be "better than getting six names from each side," but it "still isn't too great." He thinks it would be the same as if the judge picked all the commissioners. He thinks it would be no good if a cross section of the population were required to be on there. (48)

16. "I wouldn't see anything wrong with that. We'd probably get people of the same caliber we're getting now. We must be careful to select qualified people." (22)

17. "That would be fine, providing you get good people. That would be much better."

"I think it's desirable to let a committee draw up the list of commissioners. That's better than letting the individual judge do it." (21)

18. "I wouldn't be opposed to that. I think that would work." (7)

19. "That's not a bad solution. Considering what we have now, I'd prefer to have that system, if we get the right people. It's very important to get qualified people. If a cross section of the community were required, you wouldn't get qualified people."

(Regarding the criticism of judge control): "If you used a committee to draw up the list, it would do away with the criticism that the judge controlled it all personally. It would be too far removed from the judge." (2)

20. The judge thinks it would be a "definite improvement," and he is "very much in favor of it."

He believes it would "broaden the responsibility" for selecting the commissioners and would take direct control away from the judge. He does not think it would be subject to the criticisms which were made when the judge selected commissioners for each individual case. (51)

21. "This is what we really have, in sort of an informal way, in this area."  
(Would it be an improvement?) "Definitely." (15)
22. "I think that has some merit to it. I'd go to this plan first (before going to a jury). Of course the membership of the committee becomes extremely important. You might have some of the same problems we've got now."  
"I like the idea of drawing commissioners by lot for a specific case." (12)
23. The judge favors the idea of letting the judge appoint a committee to draw up the list of commissioners. (50)
24. "I think it would be an improvement. This would be my choice. But it's not very different from what we already have here."  
"I think it would be better to let a committee pick the commissioners than the judge."  
The judge believes that it would be bad if the Supreme Court required quotas of women and other groups because of the lack of knowledge those persons have of real estate.  
He thinks that the list should be drawn up for more than a year. (18)
25. "That would depend on the persons that would make the selection of the commissioners. If I'm selecting the committee, suppose I'm a real conservative judge, I'm going to select conservative men. If I'm a real liberal judge, I'll select liberal men. So are you any better off for uniformity throughout the state?"  
"I'd be pleased with your suggestions if we can maintain high standards for the persons that have to act. I'm concerned about the fact that as soon as you do that, someone's going to take it to the federal courts and they're going to declare that you must take an entire cross section of your community, and the only standard will be a freeholder. If that's the case, I'd be against it. 'Freeholder' includes a lot of people." (44)
26. "If it were constitutional, I think it would work all right. But if we have to get a cross section of the community, and that means the educated and those not so well educated, you wouldn't be able to pick qualified people." (33)
27. "That's hard to do, too, because no matter where you are, somebody's going to get his friends on there and keep off the people he doesn't want."  
"They'd get reputable men, but they wouldn't always get the best."  
"It would be hard to get somebody that isn't partial to somebody."  
"If you picked this thing at random you'd come nearer to getting more settlements, providing the Highway Department would go on and let the attorneys deal a little bit." (42)

Comments Generally Not Favoring Selection by a Committee

1. "No. I think you've got to take each case and then select your commissioners for it because if you've got a case in the southern end of the county, you don't want commissioners from that end of the county, which you would get if you picked them at random. I think you've got to go to the other end of the county to get people who don't know anything about the case. No, sir, I'm definitely against that. I don't think that would be practical at all. The system we've got now can't be beat." (54)
2. "I don't believe that's a good system."  
  
"I don't think the selection of commissioners ought to be left to chance. That's why I'm willing to let the property owner select six, and let the condemnor select six. Each is only going to lose by one, any way you figure it."  
  
"That would be about the same as the judge selecting the commissioners." (11)
3. "It might be well to have, for a year, a list of commissioners, which could be, as far as I'm concerned, nominated by the counsel who will have cases coming up. This list would not have to be large. Maybe 25 or 30 names would be sufficient."  
  
"If you go to selecting by lot you have some disadvantages. Some commissioners are fully competent and maybe any freeholder is competent to appraise a run-of-the-mill dwelling house, but even when it goes to farm land there's a lot to be said for having farmers on the commission, or real estate people that work in that area. In some cities you find real estate men who can do a very accurate job of appraising twenty unit apartment complexes, but wouldn't have the slightest idea of how to appraise a farm."  
  
"If we had to go to one of these systems, it would be better to have a committee select the commissioners than let the judge do it." (36)
4. The judge is happy with the system we have now. He doesn't think a list should be drawn up in advance. (29)
5. "The judge would appoint conservative people to the committee. They would be conservative too. You'd get the same thing, wouldn't you?"  
  
"Maybe we could use three judges to draw up the committee." (26)
6. The judge thinks that if you had 75 or 100 people on such a list, uniformity of awards would be a problem. "One commission wouldn't know what another one had done." He believes that uniformity of awards is a very serious consideration.

He noted that to draw a list every year would cause a needless administrative burden, particularly since there may not even be any condemnation cases in a year. He pointed out that the number of commissioners required would vary from one circuit to another.

He prefers to let the judge appoint the commissioners. (46)

7. "I don't see any advantage to that. Conservative judges would appoint conservatives to the committee which would pick conservative commissioners. The liberal judges would do the same." (10)

#### Noncommittal Comments

1. "That's about what we're doing now. We have the list."
 

"If you have to appoint a different group of commissioners every year, you'd soon be in a bad fix. It would be better to draw up a list for three years."

"How would the committee know any better than the judge who to put on the list? The judge wouldn't have much voice over the group that they would select."

"There are forty or fifty exemptions for jurors. Would they apply to those commissioners? Also, wouldn't you have to have complete laws dealing with strikes and all the rest? The present laws dealing with juries wouldn't be suitable at all for this."

"The answer to most condemnation cases is the good qualified group of commissioners that you get." (20)
2. "This is a possibility."
 

"I think it would be extremely difficult to prescribe the qualifications that would make good commissioners, over and above being freeholders. What you need, of course, is people with a knowledge of real estate values in the community."

"Let the clerk of the court draw the names out of a box."

"I think that three commissioners would be sufficient. I would think the number ought to be reduced." (40)
3. The judge has "no objection it." To him it "seems like a practical idea," but he is happy with the present system. (53)
4. The judge is "not opposed to it." (52)
5. "This would depend on who picked the list and the caliber of people on the list, because this is a specialized proposition." (19)
6. "I wouldn't object to it." (14)

7. "I think the judge would be as qualified to pick people as a committee would be." (13)
8. "I have no objection but I think it would be unnecessarily cumbersome." (4)
9. "I see no difficulty in that. It works quite well with juries." (9)
10. "It would further complicate the procedure, but that's to be expected since all of law is getting more complicated."  
  
"What's the difference between a condemnation case and a straight, for example, tort action where there has been damage to real estate? Why not use a regular jury?" (8)

## APPENDIX XII

## COMMISSIONERS APPOINTED BY THE COURT

QUESTION: "DO YOU THINK THE JUDGE SHOULD APPOINT THE COMMISSIONERS? THIS COULD TAKE SEVERAL FORMS. UNDER THE PRE-1968 VERSION THE JUDGE SELECTED COMMISSIONERS CASE BY CASE. OTHER ARRANGEMENTS MIGHT BE THAT THE JUDGE COULD BE REQUIRED TO MAINTAIN A LIST FROM WHICH THE PARTIES WOULD SELECT; OR THE JUDGE COULD APPOINT A LIST OF COMMISSIONERS, WITH THE COMMISSIONERS BEING DRAWN BY LOT FOR EACH CASE. UNDER ANY OF THESE A MINIMUM NUMBER COULD BE REQUIRED. UNDER ANY OF THESE VERSIONS, DO YOU FAVOR THE PRINCIPLE OF APPOINTMENT BY THE JUDGE?"

Summary of Results

Generally Favorable Comments	25
Generally Unfavorable Comments	10
Noncommittal Comments	<u>2</u>
Total Responses	37

Generally Favorable Comments

1. "I feel the court should be granted leeway in selecting these commissioners. I think a new system should be used. I think we should come closer to the jury system. I think the court should try to select a panel of commissioners who would be experts in the field. When it comes time to call commissioners, we should select them like jurors. Let the parties each take their strikes. It would be much easier."
 

"It's especially important to have experts in view of the fact that the commissioners may determine the award based on their own view of the property." (9)
2. "I think the judge should select, like he does for a grand jury, a list of commissioners in advance, say every year or two years. And it shouldn't be a little clique the way it used to be. There should be perhaps sixty people. Make the list big — freeholders and people knowledgeable in real estate values. Then put their names in a box, and draw their names out by lot, like in jury cases, except this would be a special jury. Then I don't see how anybody could kick. Some of the judges in the old days did this anyway."

(Should the attorneys be able to pick from the judge's list?) "Well, I don't think that's good either, although that's better than the present system. The attorney is going to say, in effect, to his client, 'Which one of these are your friends?' No. I think it should be by lot, out of the box." (45)

3. "As a practitioner, even, I was always in favor of letting the judge select them. I was very happy to have it in the hands of the judge, because I thought he would protect me as well as my opponent from that kind of thing." (43)
4. "That's the best system. Let the judges select outstanding men in the community. I think the judge appointed better commissioners than you would get under any other system. I appointed nine men to hear every case. If you have different men in every case it's a travesty." (31)
5. "I think it would be an improvement over what we have now. Of course everything has its shortcomings, but it seems a little funny, where the parties involved select the jury, so to speak. I think it would be superior to what we have now. Maybe there's something better than that, though. It should be put on a professional basis." (38)
6. The judge thinks this would be the best system. He believes the old system worked fine. In his opinion the judges were fair in selecting commissioners. (46)
7. "We had a real blue ribbon commission under the old system. The judge should have more discretion." (22)
8. The judge believes that the old system is best and would certainly be better than what we have now. He thinks if the commissioners were drawn by lot for each case, that would meet a lot of the objections to the old system. (21)
9. The judge says he is "sorry the laws were changed in 1968," and doesn't feel the present system is quite proper. He hasn't had any trouble under the present system, but if things should get "sticky," he would like the authority to appoint the commissioners. (2)
10. "It would be better than the present system. The judge would ask for suggestions anyway." (15)
11. "The judge is in as good a position to pick a commission as anybody would be. Before the law was changed, the attorneys were often asked for names and their suggestions were often used." (13)
12. "I don't know why the law was changed. I didn't see anything wrong with what we had. I very often used the suggestions of my attorneys." (11)
13. "That was better than the present system. We got impartial people and never had any problems." (7)



14. "It's better than the current system of parties picking sides. But it's not too much different." (5)
15. "I think the old system worked better than the present one." (4)
16. "That would be my personal preference." (3)
17. "I like it better than the present system. The problem with that is the judge
18. The judge thinks the old system was the best system, but "landowners were unhappy." (48)
19. The judge believes the best system would be for the judge to pick them, but require him to pick more than we have in the past. He suggests picking 13 commissioners, allowing 6 strikes each, leaving a panel of 7, like a civil jury. His basic idea is to allow the judge to pick more and give the parties more strikes. (49)
20. The judge believes the judge should draw up a list and the parties should be able to pick from it. (52)
21. "I prefer the old system to the present system. We got good blue ribbon type of commissioners and I thought it worked very well. But there were abuses of that, however. Some judges appointed very conservative or very liberal commissioners and used them over and over again." (35)
22. The judge thought it would be a good idea to let the judges appoint commissioners if a limitation on the number of times a man could serve were included. He noted that under the old system the same people were used over and over, and the attorneys complained that the "commissioner had made up his mind." His point is that "if you appoint enough people, they can't all be conservative." (27)
23. "I think it might work better, but you might get some partial judges. Some judges are more liberal than others." (42)
24. The judge favors judge appointment. He explained that before the law was changed he had a list and as each case came up, he would simply take the next nine off the list. In his opinion that "saved a lot of time and was simple." (30)
25. "I've been on the bench for thirty years now, and I have never appointed commissioners without consulting the attorneys and getting their agreement." He indicated that it worked fine when the judge appointed commissioners. (54)

#### Generally Unfavorable Comments

1. "No, because the judges tend to get a little group of people that they have confidence in, and they use the same people every time, or roughly the same people. That's not being critical of the judges. It happened all over the state. I tried cases for the Highway Department before coming on the

bench, and we had a group of commissioners which gave the Highway Department real good results in this county. The judge was very conservative. I don't mean any impropriety, but the judge selected the commissioners. We had nearly the same commissioners every time, and it was very seldom the landowner got a penny more than the Department offered him. Of course, this was the reason for the big change in 1968. The landowner representatives all over the state rebelled against that and I don't blame them. It was stacked for the state. No, I wouldn't want to select them." (45)

2. "I have always very strenuously objected to that because it puts too much power in an agency from which there may be no recourse for either party. If the judge happens to go off one way or the other, you're stuck with it." (37)
3. "The judges controlled it with an iron hand" under the old system. (23)
4. "Some of the judges got in the habit of appointing the same people, and that was bad. It's good to spread it out somewhat." (18)
5. "No. This is an important day in court for that man. Why shouldn't he be able to have a man whom he thinks is going to be fair and impartial to hear the case?" (34)
6. The judge thinks the present system with lists is better because he doesn't know people outside his own county. (17)
7. "No. I like the idea of the parties submitting lists. I know most of the people, and I can exclude anybody that really shouldn't be on there." (16)
8. (Under the old system) "The judge used to name the same commissioners from the same section of the city in 65-70% of the cases, and there was nothing we could do about it."
- "I used to keep a list, but it was open to the parties to make suggestions." (4)
9. "No. I like the present system better." (32)
10. The judge believes the judges would do it fairly, but "if you had a conservative or a liberal judge, you'd see the effect, particularly if the judge appointed them for each case." (50)

#### Noncommittal Comments

1. "I don't think it makes any difference. You're getting good commissioners already." (33)
2. "It wouldn't be too much different from the present system." (44)

## APPENDIX XIII

## PRESENT SYSTEM MODIFIED BY EXPANDING THE LISTS

QUESTION: "ASSUMING VIRGINIA RETAINS ITS BASIC CONDEMNATION PROCEDURE, DO YOU THINK IT WOULD BE AN IMPROVEMENT TO GIVE THE COURT MORE DISCRETION BY REQUIRING THE PARTIES TO SUBMIT MORE NAMES AND GIVING THE COURT MORE STRIKES?"

1. "I'm thinking of requiring the parties to submit more names. I've talked to judges who require the parties to submit thirty names, then the judge selects the nine. I don't see any reason why I shouldn't do it except it makes a little more work. The code says 'at least six', it doesn't say how many. If you've got twelve and you've got to select nine you're greatly handicapped. But even if you require thirty, it's just a matter of degree, and it just makes the landowner run around more and more and try to think up people that are friendly to him, that's all." (45)
2. "That probably would be helpful, both because it would enlarge the discretion of the judge, and also because if somebody can't serve you've got to back up and reschedule the case. The list that the judge works from definitely should be greater in number." The judge further explained that since under the present code only nine commissioners are summoned to court, there are no extras available to replace commissioners who are absent or are challenged for cause. The judge supports the summoning of alternates. He suggests that a panel of thirteen be summoned to provide for alternates and additional strikes for the judge. (37)
3. "I'd react favorably. I've always been in favor of letting the judge select. I'm in favor of letting the judge narrow the list a bit, based on things he might know." (43)
4. "I think the list ought to be a little larger than nine to give the judge a little more discretion. I wouldn't object to having the panel increased to eleven instead of nine, so as to allow three strikes. I think that would overcome some of the difficulties. It would help an awful lot." (21)
5. "If you get too many names it becomes difficult to pick. But maybe a few more names would be all right. Say if each party submitted nine names, giving the judge eighteen, then the judge could pick nine. That would be all right." (29)



## APPENDIX XIV

## A REGIONAL OR STATEWIDE BOARD OF EXPERTS

QUESTION: "DO YOU THINK VIRGINIA SHOULD CONSIDER GOING TO A BOARD OF EXPERTS, EITHER REGIONAL OR STATEWIDE, TO HEAR CONDEMNATION CASES?"

Summary of Results

Generally Favorable Comments	5
Generally Unfavorable Comments	<u>25</u>
Total Responses	30

Generally Favorable Comments

1. "Any way to make it more professional is good. If you could have your real estate board or appraisers select ten or twelve people to sit as the commissioners, and then have a couple of strikes on these. That might be a way of selecting commissioners. But you might have a problem since you would have to have a large number to cover the whole state." (38)
2. "It would probably be a better and fairer system to get experts who really know what they are doing. I would like to, if I could, get as far away as possible from the man's next door neighbor appraising his property. Maybe we could have one board of paid permanent experts to serve four or five judicial circuits. The members would come from all around yet they would be 'mountaineers like the rest of us' and would have the confidence of the people. Maybe the judges from these circuits could get together and appoint one board, or a number of boards, or a group from which boards could be drawn." (2)
3. "Certainly that might have merit to it. We're trying to arrive at fair market value, and the best way to do that is to have experts do it. But I don't think a statewide board would work. Maybe a regional board would." (24)
4. "I think that would be a fine system if it were possible for their appointment and tenure to be entirely removed from politics." (36)
5. "I think that might be all right." (42)

Generally Unfavorable Comments

1. "I'd be afraid that even though the gentlemen were of sterling character their actions would be characterized as political, regardless of what they did."

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Also, it's absurd to have people from out of the community telling local people what their land is worth." (40)

2. "Nobody could know land values all over the state. I think local people know more about their land values. Also, if you had a number of people on there, the man from that area would probably decide it and the others would go along." (28)
3. "I think it's all right, but you're taking the government farther and farther away from the people, which I'm opposed to." (44)
4. "You ought to have people from your own community. One board couldn't know about land in the mountains as well as the seashore and all over the state." (41)
5. "I have some reservations about that. It can get off in either direction." (35)
6. "No. What makes democracy great is that the people themselves sit in judgment." (23)
7. "I think the owner would be apprehensive. If a board were sent in there, he would feel that the cards were stacked against him. We should retain the trial by peers and by the local judge." (22)
8. "I don't like that. Nobody can be familiar with values all over the state. I think you'd have such dissatisfaction with that that it would last to the next general assembly." (14)
9. "I don't like it. If you get a board you don't like because it has a certain view of things, you're stuck. I think the commissioners should be local people. An out of town appraiser just couldn't know land values like local people." (4)
10. "I think it would be subject to the charge that the Governor appoints people favorable to the state." (21)
11. "What redress would there be, appeal to the courts? Aren't you just going to add one more step?"  
  
"One group couldn't know values all over the state." (20)
12. "They would get fixed in their ways." (18)
13. "How could a single board know land values all over the state?" (17)
14. "If you should get the wrong man on there it'd take two or three years to get rid of him." (15)
15. "That's taking it too far from the people. That's just making it strictly an administrative tribunal."

- "They wouldn't know local values."
- "The trial bar would scream. It would be like taking the jury away." (12)
16. "They couldn't be familiar with land values all over the state." (10)
17. "Local commissioners know more about local values." (9)
18. "Landowners wouldn't be satisfied. I'm not in favor of that." (7)
19. "Wouldn't this just be another government agency? I don't think I would favor it."
- "The regional version might have some merit to it. I know the federal system gets very well qualified commissioners." (6)
20. "I think people ought to be judged by the people in their own area. But I can see some advantage to getting more expertise." (5)
21. "Local people know values in their community, and of course it varies greatly from one place to another. I think people would lose confidence under that system." (3)
22. "No. I prefer to have a list of local commissioners drawn up." (16)
23. "No." (1)
24. "No. I don't favor that. It's not practical." (37)
25. "No. That would remove it too far from the people." (46)





## APPENDIX XV

## VALUE DETERMINATION BY THE COURT

QUESTION: "SEVERAL STATES HAVE NO JURY OR COMMISSION. THE TRIAL JUDGE HEARS THE EVIDENCE AND MAKES THE VALUE DETERMINATION. DO YOU THINK VIRGINIA SHOULD CONSIDER THIS ARRANGEMENT?"

Summary of Results

Favorable Comments	0
Unfavorable Comments	<u>32</u>
Total Responses	32

Unfavorable Comments

1. "It would not be good, if indeed the touchstone of the whole system is to have people deciding who have some expertise in the field. Heavens knows the judge knows no more about it than most jurors. That wouldn't make sense." (43)
2. "No. I think that would do more, probably, to undermine what I sense to be the satisfaction with the integrity of the system, in this area at least. I think it's better if one man doesn't decide it." (47)
3. "No. I don't think that's good. Everybody in the world has his slants, and in some counties you're going to get a Highway Department judge, and in others a landowner judge." (45)
4. "That would be terrible. A judge has built-in bias, like everybody else." (23)
5. "The judge would look at it so legalistically, he gets away from values. Judges aren't real estate experts. The composite opinion of these five men is better than that of the judge." (17)
6. "The judge would set a pattern and follow it until it was forcibly brought to his attention that he was too high or too low." (10)
7. "No. I think the commission is better. The judge isn't a real estate expert." (21)
8. "No. I'm not in favor of that. It would put the judge in an intolerable position." (27)

9. "No. The judge isn't a professional. He doesn't know the values. It should be a professional doing the deciding of the facts." (38)
10. "The value of land is such an intangible thing, really you can just put a bracket on it. It's just such a typically jury question."  
 "One judge would be fairly conservative, another fairly liberal, and another on the fence. You'd just have one man sitting there. I don't think it would be proper." (41)
11. "No. Only if the parties consent and the judge is willing to do so. I don't think I should do this. I wouldn't care to assume the burden." (15)
12. "Judges aren't working in real estate all the time. They have no expertise. Also, judges are human, and they vary greatly, for example, on penalties. I don't think you'd get uniformity of results." (26)
13. "Five minds are better than one when it comes to this. No. I wouldn't want to do it." (35)
14. "In a case of this kind, I think you ought to use a commission to decide it." (54)
15. "I think it would rest better with the commission." (40)
16. "No. I wouldn't recommend it." (44)
17. "No. Courts shouldn't take over the jury's role." (32)
18. "I think we should let a jury or commission decide." (25)
19. "It might be good for uniformity, but I don't think that's a good judicial function." (49)
20. The judge thinks this would be "worst of all." He believes that "even a jury would be better." (48)
21. "I think that commissioners are better qualified — if they are properly picked." (46)
22. "No. Judges aren't versed in real estate." (14)
23. "No. It takes a lot of expertise to do these things right." (11)
24. "The judge isn't expert in real estate. I don't think the judge should do it." (9)
25. "No. Judges don't know much about real estate. It takes technical knowledge." (3)
26. "No. The judge doesn't know enough about land values." (2)

Six other judges simply said "No." (Judges 1, 6, 7, 8, 29, and 36.)

## APPENDIX XVI

## TWO-LEVEL PROCEDURES

QUESTION: "SEVERAL STATES USE TWO-LEVEL PROCEDURES. FOR EXAMPLE IN INDIANA, THE COURT APPOINTS THREE COMMISSIONERS WHO DETERMINE THE VALUE. THIS IS NOT DONE IN COURT BUT INDEPENDENTLY. IF EITHER PARTY IS DISSATISFIED, IT HAS A RIGHT OF APPEAL TO THE COURT FOR A FULL TRIAL BEFORE A CIVIL JURY. THE PURPORTED ADVANTAGE OF THIS IS TO DISPOSE OF MANY CASES WITHOUT COURT PROCEEDINGS. DO YOU THINK VIRGINIA SHOULD CONSIDER SOME FORM OF THIS?"

Summary of Results

Favorable Comments	1
Unfavorable Comments	<u>11</u>
Total Responses	12

Favorable Comments

1. "I think this might save the courts and the attorneys a lot of time. If you get at this thing in a preliminary stage, that would settle a lot of them. Perhaps if we could get three independent appraisers to go out and make an impartial appraisal, we'd get many of these resolved before they got to court." (30)

Unfavorable Comments

1. "That would be the worst thing that ever happened. Almost every one of those cases would be appealed." (54)
2. "It would just be duplication, double work." (5)
3. "I don't think it would eliminate very much. Somebody's always dissatisfied." (8)
4. "I like our system much better than theirs. I don't see any need to take two bites at it. But I would like to know more about it. Perhaps it's just getting used to a system." (9)
5. "Let's stay with what we have." (10)
6. "No. It wouldn't solve anything." (12)

7. "There's no reason to go to that." (21)
8. "They would probably end up in court anyway, particularly in my jurisdiction." (24)
9. "That's just two proceedings instead of one, and that would be one too many." (27)
10. "It would be just an extra step. It would delay the thing." (41)
11. "I'd be against that. All you'd be doing is adding to the expense." (44)

## APPENDIX XVII

## THE USE OF COMMISSIONERS IN CHANCERY IN CONDEMNATION CASES

QUESTION: "DO YOU THINK IT WOULD BE USEFUL TO PROVIDE THE COURT THE OPTION OF APPOINTING A SPECIAL COMMISSIONER IN CHANCERY TO HEAR CONDEMNATION CASES? THIS QUESTION ASSUMES THAT THE PRESENT CONDEMNATION PROCEDURE WOULD REMAIN IN OPERATION. EVERYTHING WOULD REMAIN THE SAME AS IT IS NOW EXCEPT THE JUDGE WOULD BE ABLE TO APPOINT AN EXPERIENCED ATTORNEY TO SIT IN THE JUDGE'S PLACE TO PRESIDE AND MAKE RULINGS. THE PARTIES WOULD BE ABLE TO APPEAL THESE RULINGS TO THE JUDGE, WHO WOULD HAVE THE ULTIMATE AUTHORITY. SUCH AN ARRANGEMENT WOULD OF COURSE BE OPTIONAL AND WOULD BE USED ONLY BY JUDGES WHO NEED AND DESIRE IT."

Summary of Results

Generally Favorable Comments	17
Generally Unfavorable Comments	<u>27</u>
Total Responses	44

Generally Favorable Comments

1. "I am 100% in favor of this. I feel very strong about this, I really do. My big point is that it releases the judge to do work other places and contributes substantially to the congested docket problem in Virginia."
- "These cases are dull to the deadly point. They don't challenge me one bit. But they clog up the dockets something terrible, to the point where I'm very much concerned as to the priority of various cases on my docket. I think we could reach a point in my area where these cases are taking up room on the docket that should be devoted to criminal work. That, I think, is a very serious consideration."
- "Because of the sheer volume of work I think there's a very real possibility that it could create problems with other court work."
- "An experienced commissioner could handle it as well as I can. They're not very complicated. And if there's a point of law in the case, I've got to face it anyhow, the way it is now."
- "So why not let somebody else sit there and nod and listen to the evidence and make what few rulings have to be made. It's not unusual at all to go through an entire condemnation case and never have to make a single ruling, when

you have experienced lawyers. So let a commissioner hear it, and if a disputed legal question does arise, then it can be appealed to me and I can call for briefs and get into the research."

"I don't think this would hurt either the landowner or the Highway Department. As a matter of fact it ought to help them greatly. The Highway Department could schedule cases at their convenience instead of having to fit their schedule to the schedule of a busy trial judge. And the landowner wouldn't have to wait for several months. They could go ahead and hear the case right away." (12)

2. "No reason in the world why you couldn't do that. I think that's an excellent idea. A commissioner could hear them just as easily if not better than the court. The law is very stock. We're wasting a lot of valuable time of judges making them hear these cases. There are few legal problems in these cases. You're using too much judicial or legal knowledge in a matter of sitting and waiting." (5)

3. "That would have a great deal of merit. It would save a lot of judicial time. We could use that very well, because it's not like a law case. The instructions are cut and dried and there are very few rulings on evidence that the judge has to make. I think this could be used quite well. I'd like to see us consider that."

"Condemnation cases are terribly boring, and cut and dried. I don't agree that the judge should do every mechanical duty that could be done by someone else just as well." (9)

4. "I think it would be very worthwhile. It would be one of the things to consider for change. We're getting a big backlog and you can only try so many cases a day. If this has to be tried like every other case, we're going to have too many."

"If we used special commissioners, these cases could be tried in lawyers' offices, which would be a great help in relieving the courts' workload."

"The pressure now is less than what it will be two years from now. If there's any direction it ought to go, it would be toward retaining as much of the present system as possible, and still getting a greater workload of cases out of the way. I think this idea, if the specifics can be worked out, is the best idea of all to submit to the General Assembly, because it wouldn't change any of the fundamental practice at all. You can leave both of your options open." (37)

5. "I think that's absolutely right. In many condemnation cases there really is no need for the judge to be there. I think it would be good to allow the judge some discretion along those lines in case his docket becomes crowded. I personally have a light docket, but I think it would be a very good idea to give the judge that option." (16)

6. "It is true that legal questions arise in very few of these cases. Usually they are very pat and the issues are cut and dried. As clear as a bell. Often the judge isn't needed. Of course, the judge could see complex cases coming up and he would try those himself. It would help our backlog problem if the judge were allowed to appoint a commissioner to hear the run-of-the-mill condemnation cases."

(Is the presence of the judge important for appearances?) "I don't think so. Just as many important rights are taken in other actions where commissioners sit." (18)

7. "I see no reason why the judges shouldn't be able to appoint somebody else to hear the case. Often it's boring, the same old stuff. A commissioner could rule on evidence just as well as I can. It would save the judge a lot of time."

"I don't think it's that important to have the judge there. What the landowner is most interested in is being able to tell the commission what he thinks it's worth." (10)

8. "Commissioners in chancery, sitting without any commissioners, could do it so far as I can see. He wouldn't have to be a lawyer, maybe a real estate man. That would be leaving it all up to one man. Of course it would be subject to review by the judge and the Court of Appeals." (36)

9. "I think certainly something could be done to get it off the judges' shoulders." (42)

10. "I think it could be handled very well that way, but here loaded dockets are not a problem." (44)

11. "It might be good to have that power so the judge could do as he sees fit, but we don't have a docket problem here. I agree it's good to have a judge there, but technically a commissioner could do almost as well." (27)

12. "I don't think it would do any harm because if some judges wanted to use it, that would be all right."

"It's true these cases can be easy and boring. But it depends a lot on the lawyers. If you don't have experienced lawyers you've got all the trouble you want." (8)

13. "I have no objection to it, but I don't need it." (23)

14. The judge indicated that there are "merits on both sides." While acknowledging that condemnation cases can be boring, he recognized the importance of having a judge hear it because of better uniformity, appearance and confidence of the litigants. He also pointed out, however, that in divorce cases, commissioners can take away a man's wife, whereas here he would only be taking away his land.

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He questioned the efficiency of using a commissioner, since he finds it quicker to hear divorce cases himself, rather than appointing a commissioner. (46)

15. "A special commissioner could handle it very well. These cases are very often stereotyped. But I don't have any urgent need for it. I can handle my docket."

"It's true that maybe the landowner feels better if he can look the judge in the eye." (2)

16. "I thoroughly agree another man could do it just as well, but I don't see any need for it. It would add extra expense. In general, Virginia has no docket problem." (33)
17. "I don't see any reason why a judge pro tem couldn't hear these cases. You could try it right away without any delay." (26)

#### Generally Unfavorable Comments

1. "I would disagree with that idea. The taking of a man's private property by the government, or worse, by a profit making corporation, is about the harshest bit of muscle the government uses against the citizen, who may be shocked to find out that somebody has the power to take his land; then to be relegated to a sort of droning humdrum hearing before somebody he regards simply as a bureaucrat, I think would really be outrageous. I think these cases are extremely important. They have an emotional impact on the citizen that perhaps nothing else has except perhaps a criminal case. For that reason, I think they deserve the full panoply of the courtroom." The judge noted that the new rules for early retirement of the judges should help the overloaded docket problem. He said that retired judges were "perfect for handling a spate of condemnation cases." (43)
2. The judge was "not attracted" to the idea "on first thought." He believes the key question is whether or not the judge would have the ultimate authority, since if he does have it, the whole proceeding would have to be recorded. Furthermore, said the judge, the reviewing trial judge would have to rely on the cold record rather than having the benefit of hearing the parties testify.

He thought these cases would often come to the judge anyway, so the judge might as well hear them to begin with.

The judge noted that if the commissioner did have the ultimate authority, most lawyers would not want to get involved, since "ticklish and complicated" legal questions sometimes arise.

In his opinion, it is better to have the judge present, since "landowners tend to get emotional and upset about these things." (53)



3. "The experience in contested divorce cases is that he has to review many of these cases anyway, since exceptions are usually filed in contested cases. The court must then sit down and read the whole record, and he has to do what he would do at a hearing before him, except that he doesn't have the advantage of seeing the witnesses testify, and perhaps get some help from that. So the judge may as well try it in the first place and get it over with."  
(40)
4. "I think it would create more problems than it would solve. If some judges are overworked, well, let's get some more judges. But why make a lawyer a judge? A lawyer has his law practice, he's got his back scratching, and his back being scratched."  
  
"Take one of my counties. I've got five lawyers. All right, you're going to be a commissioner in this case, and you in this case, and you in this case. I'm the commissioner in your case, and your case, and you're commissioner in my case and this case — no, sir. Fine in the big city, maybe, but not in the country."  
(45)
5. "I don't know, but I think right now I'd have to say no. I believe the commissioners would act better, would be fairer, and would recognize the responsibility of their report if the judge was present. It adds dignity to the trial and it gives the parties a feeling of more importance to have the judge there." (54)
6. "I'm opposed to that. I don't like it in divorce cases either. Judicial matters ought to be determined by the judge. There is less opportunity for fraud and collusion." (28)
7. "I don't favor having it heard by a commissioner in chancery unless the volume of cases is so great that it prevents the judge from hearing other cases that might be more imminent. Usually the Court of Appeals will assign somebody from a circuit that's not as busy."  
  
"I think when you're dealing with someone's property that he's entitled to his day in court, and that someone trained and skilled in the law and someone with more authority than a commissioner in chancery ought to be sitting. But there may be some points to this that I'm not aware of." (35)
8. "I think you need a judge to keep out improper evidence. I really think it's better to let the judge control that. It's a help to the commissioners." (29)
9. "I agree these cases can be boring at times. But if you get away from trying these suits you lose contact and don't know what the problems are. I'm of the opinion the judge should try them. I don't use divorce commissioners either."  
(14)
10. "I think the judicial presence is important. If you get in a jam you can bring in another judge. We don't have a real docket problem here."  
  
"I don't see any harm, though, in such an optional procedure." (4)

11. "I think it is a court proceeding which should be heard by a judge. I believe the landowner deserves his full day in court." (7)
12. "I disagree (with using special commissioners). I think there are other ways to solve the problem of the court's workload. This is an area involving the public confidence in the system." (47)
13. "I'm inclined to think the judge should sit to decide the case. There's a great likelihood of exceptions. The judge will get it anyway."
- "Using a commissioner would also be more expensive." (6)
14. "I'm afraid it wouldn't be very practical. I wouldn't refer any case to a commissioner if I had time to hear the case myself. I'd be afraid I'd have to rehash it later anyway, from a cold record. I don't think you'd gain too much in the long run."
- "You'd have to start recording it all, too, which means more expense." (20)
15. "How can you get around deciding some of these issues on the spot? If a commissioner admits some improper evidence, for example, the whole affair might be tainted. I think the proper answer would be to assign another judge." (22)
16. "I never believed in turning a judicial job over to a commissioner. Just because they are boring is not a reason to change the system. My docket is not too loaded."
- "I don't use commissioners in divorce cases either. I consider them some of the most important cases I handle." (11)
17. "I think it would delay matters. Also, after the judicial reorganization one of the judges in the circuit should have time to handle these cases." (19)
18. "I prefer to let the judge do it. The answer is more judges if there's too much work." (21)
19. The judge is of the opinion that it would "just make double work," and he believes it is better for the judge to hear the case. (48)
20. The judge believes that it's the judge's job, "and an important one." (49)
21. "The judge will get it anyway. Let him try it to begin with." (24)
22. "Don't take our jurisdiction away. I think the formality of taking land should be in a judicial proceeding and not a quasijudicial one. I'd have to read it all anyway."
- "Psychologically, to the public, it's better to have a judge. The man will think 'They took my land, but it was in a court of law.' " (32)

23. "I think the judge ought to sit. Lots of questions come up. I think it would just delay the proceedings. Bringing in another judge is the answer to the docket problem." (41)
24. "I don't know if I would advocate that or not. It seems to me the caseload ought to be corrected another way."
- "Condemnation isn't our heavy load right now, so I don't think it will help us that much. I don't see condemnation as that much of a problem."
- "But I suppose you could have a commissioner, sort of like divorce cases are handled. I suppose that could be done." (38)
25. "If there is going to be an automatic exception to the commissioner's report, then let the judge try it and get it out of the way. I think it would work fine if you give the commissioner final authority." (3)
26. "I'm not in favor of these two-tier arrangements." (7)
27. "I personally like the system we have now." (17)



## APPENDIX XVIII

## THE USE OF ONE COMMISSION FOR SEVERAL PARCELS

QUESTION: "DO YOU SUPPORT THE USE OF ONE COMMISSION TO HEAR SIX OR EIGHT CASES TOGETHER WHERE THE PROPERTIES ARE LOCATED IN THE SAME AREA AND ARE OF THE SAME TYPE?"

1. "I feel that if you use the same commissioners in all the cases, all the land-owners will be treated alike. That's what I shoot for. That's why we attempt to use the same general group of commissioners. They will have heard one case, and then when they hear the next case they are in a better position to render justice to both landowners." (44)
2. "It makes sense to have it set up so that all the various parcels could be condemned in one proceeding, and one group of commissioners instructed for one case, to hear all the different parcels, and let those commissioners sit essentially as commissioners in chancery. And let the commissioners be selected by the court."
 

"You could instruct all the commissioners at one time. This takes considerable time each day. Also you could have the voir dire to cover all the parcels. Make sure all your commissioners were qualified and instructed. This would save an untold amount of time. Also the commissioners hear the qualifications of the appraisers for all the parcels." The judge had the federal procedure in mind in making these comments. (40)
3. The judge believes "it would be a great thing" if it could be worked out. He emphasized that it is absolutely necessary to retain peremptory strikes. He pointed out that no matter how honest a man might be, there could be "a personal thing there." (49)
4. "I think that's worth working toward. Of course the parties would still have their strikes so it wouldn't exactly be the same commission, but you'd have some of the same people on there." (24)
5. The judge already does this whenever the parties agree to it. He relates that on the first day of the term he gathers all the attorneys together and they submit lists. From those lists, the judge selects nine plus three or four alternates to hear all the cases for the term. (12)
6. "Yes, I think it would be a very good idea, to use the same commissioners for several parcels. I'd prefer it." (16)

7. "I think it's a good idea to consolidate these cases, and to let the one commission hear fifteen or twenty cases. They should be treated like cases arising out of the same accident. There would be better justice for all." (3)
8. "I don't see why you have to have a different commission for each case. We already do that on a series of small parcels." (7)
9. "I think uniformity is an extremely important consideration, and if you use the same commission you'll get more uniformity." (13)
10. "You could certainly try a few cases that way but probably the public isn't ready for the federal system. If the commission could hear the cases of six landowners, that would be ideal and it would move the cases along." (28)
11. "Maybe this would be a good way to limit the number of cases they could sit on." (27)
12. "I already try a group of small cases together when the attorneys agree." (8)

## APPENDIX XIX

## THE COMPENSABILITY OF LEGAL FEES

QUESTION: "DO YOU THINK THE LAW SHOULD REQUIRE THE STATE TO COMPENSATE THE LANDOWNER FOR LEGAL FEES, EXPERT WITNESS FEES AND OTHER COSTS INCURRED IN A CONDEMNATION CASE?"

Summary of Results

Comments Generally Favoring Compensability	10
Comments Generally Not Favoring Compensability	<u>20</u>
Total Responses	30

Comments Generally Favoring Compensability

1. "I certainly would. I think it's completely unconstitutional for the landowner to have to get his 'just compensation' and then pay out a third of the excess, or whatever, to the attorney. I've done some research on this, have become convinced of it for some time, and have wanted to take that case up to the Supreme Court, but never got the right case. How can the landowner get just compensation unless it's a net figure?"  
  
"The Court would have to fix the fees, just like in chancery cases. It happens every day in chancery cases." (41)
2. "Yes. I would. I just don't think it's right for the Highway Commission to come down here and force a man to go to court to get reasonable value and, in effect, force him to pay attorney's fees so that he doesn't get true value."  
  
"It is true that the landowner wouldn't have any incentive to settle. But the fundamental principle is due compensation, and if the landowner has to pay 25% of the value of his property for him to get the award he's entitled to, he hasn't been paid." (33)
3. The judge believes that it should be compensable. He holds that this is different from the usual case, since the man is forced out of his property and the fees can be substantial. He believes that an impartial commission should award fair market value and attorney's fees in the same proceeding. (46)
4. The judge believes that the fees should "definitely" be compensable. He related a story about a penniless landowner who was forced to try his case without expert witnesses. The judge thinks that "there is no problem in fixing attorney's fees. We do it in many cases already." (23)

5. "I would see nothing wrong at all with letting the court allow the landowner reasonable attorney's fees." (16)
6. "If the constitution means what it says, it seems to me they should be compensated for the fees." (8)
7. "The question is would the commissioners still allow enough for the attorney?"  
"We might try it." (15)
8. "The danger I see is that the landowner, if he knew his costs were going to be paid, wouldn't settle on a voluntary basis. Yet, it's true that you're forcing a man to sell, and if he in good faith refuses the offer, then you're forcing him to the cost of litigation. Possibly you could work something out where if the commissioners award X% above the offer, the state will pay part of his costs." (17)
9. "We don't do it in other instances. It does seem unfortunate that a man's land is rewarded only fair market value, since when you take the lawyer's fee out of it, he doesn't get it. Yet it does present problems in encouraging litigation." (38)
10. The judge indicated that he would like to see the fees made compensable. (52)

Comments Generally Not Favoring Compensability

1. "If you're going to do it in condemnation cases, you'd have to do it across the board. You'd have to change the entire philosophy of our legal system. I'm opposed to changing it." (44)
2. "If you award fees to condemnation litigants, how can you deny them to other litigants? I'm not sure the general rule is a good rule, but if it's to be changed, it should be changed across the board." (43)
3. "It's part of a general proposition that prevails throughout the law. The basic idea is to discourage litigation." (37)
4. "No. It's just like any other suit. It would provide an incentive to litigate. I just think it would be opening the door." (35)
5. "We're better off the way it is now. You get into serious problems in fixing lawyer's fees. It's no different from any other case. It gets into the larger problem of compensability of fees. No, I don't think that would solve any problems." (12)
6. "That gets into the broad question." (30)
7. "It fits into a whole general pattern. Other states are experimenting with it." (36)



8. "No. You get into the socialization of the profession. It's not good for the state or court to start setting fees." (11)
9. "I'm not sure it would reduce awards anyway." (5)
10. "You don't do it in other cases. There are problems. Actually, the state is now paying attorney's fees." (22)
11. "That's a hard one, but under the present system, no." The judge implied that landowners are already getting it. (45)
12. "No. They're getting it already." (49)
13. "No, that's not a good idea because the landowners are already getting it. They're getting maybe twice the fair market value of their property. If the judge awarded attorney fees, it would simply increase the amount to the landowner. It wouldn't reduce the awards." (24)
14. "No. That would really add to the costs of things. They're already coming out far ahead of what has been offered." (42)
15. "It would behoove the state to leave it as it is since in my view the commissioners tend to take it into account anyhow. It's a tough problem." (40)
16. "No. I don't think we should do it." (31)
17. "That's not practical at all. We don't do it in any other case. It's not good for the judge to be fixing the fee for the landowner's attorney." (20)
18. "No. It's not practical. You'll get more criticism there if the commission takes these fees into account." (7)
19. "No. It's completely impractical." (4)
20. "No. It would not be practical, since judges and attorneys can't agree on fees." (3)



## APPENDIX XX

## SUMMONING ALTERNATES

QUESTION: "WOULD YOU LIKE TO SEE THE CODE PROVIDE MORE SPECIFICALLY FOR THE SUMMONING OF ALTERNATES IN CONDEMNATION CASES?"

1. "I would like to see the statute changed in this respect. It appears obvious that the court should summons some additional commissioners to take care of a situation where somebody is sick at the last minute. The code doesn't appear to provide for it, so I just provide for it anyway. The counsel here have agreed to it. The statute ought to provide for the summoning of additional commissioners like we summon for a jury. When we summon a jury, we don't summon thirteen jurors, we summons seventeen or eighteen with the understanding that perhaps three or four may disqualify themselves, and we can just pick up the next juror and go on. The same thing is true in a condemnation case. Somebody may disqualify himself and if you don't have an additional commissioner at hand, you've got a problem. I don't have time in my schedule to have mistrials." (5)
2. "If you get only the exact number to sit and somebody's sick or challenged for cause, you've got a problem. Sometimes we try, by agreement, with less than five because of this problem." (14)
3. "In one recent case here we had two no-shows (one was sick, another at a funeral). The parties would not agree to the judge selecting replacements, nor would they agree to trying the case with three commissioners, so we were forced to continue the case." (9)



## APPENDIX XXI

## SUGGESTIONS

Making Strikes Before Trial Day

1. "The strikes should be made in advance. It's just a needless inconvenience for a man who has to take a day off from work to come down here just to be crossed off and go back home. We shouldn't have to put all nine in the box. The parties ought to be required to make their strikes two days in advance." (5)
2. "Strikes could very well be made in advance. The attorney could investigate long in advance. It is not necessary to wait for voir dire." (9)
3. "In 90% of the cases, they could make their strikes in advance. There isn't a great deal of questioning in court as to background, feelings and things of that sort. That's relatively rare, I would say." (38)
4. "I agree with it. The lawyers could go ahead and find out beforehand." (42)
5. "We usually bring in just five commissioners. I think it's good to get it done ahead of time." (32)
6. "In my court many times the parties have exercised their strikes before court, so we only have to bring in the five plus a couple alternates." (20)
7. "Yes, we do it already. We only bring five to the courthouse, by agreement. But if the attorney doesn't know the man or hasn't investigated, you can't require the strikes to be made in advance."
 

"I think an option should be provided so that the attorney can strike either before or after the examination." (15)
8. "I see no reason at all why they couldn't be made in advance. The only problem is if somebody's sick, you might be left short." (44)
9. "Frequently you don't want to strike until you've had a chance to subject the men to voir dire."
 

"It is perfectly permissible for the judge to encourage this at a pretrial hearing, but it might be very unfair in some places to force the parties to make the strikes before the voir dire. So there is every reason to leave it as it is now." (37)
10. "You've got a practical problem if the strikes are made ahead. If somebody is sick on trial day, you're in a fix." (22)

11. "Parties ought to know who they're going to strike, but often don't know."  
 "You have to have extras because you never know who's going to be disqualified on voir dire." (8)
12. "How can they ask them any questions until they appear in court? How are you going to get at that?"  
 "If you only bring in the five and someone is disqualified, it stops the whole proceeding." (29)

#### Waiving the Commission in Uncontested Cases

1. "In cases involving condemnation merely for the purpose of acquiring good title, there's no question as to the value of the land. Everybody agrees on the value, yet we've got to empanel a commission, go out and take the view, and go through the whole business just to acquire title. I think in that particular type of case you ought to allow the court to decide it without a commission. We have that come up frequently in cases where there are infants, unknown owners, persons with a legal disability, and things like that." (14)
2. "One weakness of our present system is that there is no way we can waive a jury, so to speak. We have many uncontested cases where the parties have basically agreed. Yet we have to summon the people in anyway. This happens frequently." (15)
3. "I'd still prefer to leave them (uncontested cases) with the commissioners, because they often give more than the Highway Department's offer. The commissioners are more inclined to raise the award than the judge would be. It takes a little more time, and perhaps a bit more expense, but it's not much." (16)
4. "I think it would be a good idea to allow the parties to agree to a hearing before the judge instead of a commission. We have lots of cases where there is no difference between the parties, yet it's got to be heard before the commission because there are title defects, incompetents, infants or unknown parties. Often the procedure is simply gone through from a technical standpoint."  
 "Of course there's another view of this, that the infant, or whatever, has a right to a hearing before the commission, so somebody can fight for them." (4)
5. "The only little drawback I see to the present law is sometimes we bring out the heavy cannon, with high powered commissioners, to attend a \$200 condemnation." (39)

#### Determining Damages After Construction

1. "There should be a two stage proceeding here. First, one to decide the value of the part taken then a second one to determine damage to the residue."

"The commissioners are being asked to ascertain the damage to the residue prior to construction of the highway, with the result that it is for practical purposes purely speculative. It would seem a good solution to me to determine damages to the residue after construction."

"You wouldn't necessarily have to use the same commission." (6)

2. "If you hear the case before construction, it's easy to imagine tremendous damage which isn't usually that bad." (48)

#### Purchase of Remainder Parcels

1. The judge believes the Highway Department should be able to purchase the whole tract where there are three or four acres remaining. In his opinion the Department does not have enough flexibility. He would like to see them be able to buy the whole thing, and then dispose of it as best as they can when it's all over. (49)

#### Change of Venue

1. "My suggestion for revision in the condemnation statutes is to permit the court, in its discretion, to bring in commissioners from another county. I think it would be used very, very rarely, but in some cases it's important. This can be done in civil cases, of course."
- "I had an experience in one county where it was very difficult to get impartial commissioners and I wish I had been able to go outside the county." (16)
2. "Being able to bring in somebody from an adjoining county might have a certain amount of merit if you're worried about detachment. If in a rural county, everybody's concerned that half of the people are related, and the other half are either close friends or enemies, having somebody from just across the creek in the next county where land values are similar, but people are a little less likely to be connected with the property, to sit as a commissioner might be a good idea. The enlargement of the circuits lends itself to that." (43)

#### Admissibility of Settlements as Comparable Sales

1. "Under the law now, you can't use any sales that were made under the threat of condemnation. The Department might settle for a reasonable amount with a landowner. Then it doesn't offer the next man, with similar property, nearly as much. Now the first transaction cannot be used as evidence. I think it should be. I think that that is not reasonable under modern conditions. I think that the neighbors ought to be able to use that as evidence. The Department shouldn't be able to pay a good amount to one, and small amount to the next. That comes up all the time. There are very few people so poor they can't go to court, so that's a viable alternative. If a landowner settles, why shouldn't that be a comparable sale?" (41)

Interest Percentage

1. "Instead of paying 5% interest on the excess, the state ought to pay more like 10% under present day conditions. There ought to be a penalty if the case has to go to court and there's a big increase." (41)

Money Posted for Unknowns

1. "I think the money which has to be posted in court for unknowns is kept in court too long. A law could be passed which would allow the Highway Department to use the money, with the provision that if the unknown does show up, he'll get full interest." (14)

"Freeholder" Requirement

1. "It's pretty unrealistic that the landowner be a 'freeholder', if 'freeholder' means he's got to own it in his own name. People these days just don't own property in their own name. They own it with their wives, with a joint survivorship deed. If 'freeholder' means in his own name, the law should be changed." (12)



## APPENDIX XXII

## COMMENTS

Necessity for the Judge to Take the View

1. "I haven't missed a single one of them. Not only does the judge get a better idea of the value, but things happen at the view. For example, I think it's natural for the landowner, when something is being pointed out, to take issue with it and inject himself into it. I find that the judge absolutely ought to go, unless it's just an uncontested suit to clear title or something like that." (54)
2. "I think the judge should exercise close supervision over the view to make sure nobody talks to the commissioners." (28)
3. The judge explained that he always goes on the view. He believes this is important because with everybody wandering around, it is easy for a litigant to talk to a commissioner. (51)
4. The judge goes on the view in every case. (49)
5. The judge regularly goes on the view because it helps him to understand the evidence as to value, and because it keeps anyone from talking to the commissioners. (20)
6. The parties almost always ask the judge to go on the view. He believes it makes it easier to make rulings. (30)
7. The judge "quite frequently" goes on the view. He is then in a better position to rule on evidence, he says. (9)
8. The judge "goes occasionally." (6)
9. The judge does not go unless asked, or unless an inexperienced lawyer is involved. (8)
10. "I never go on the view. It wouldn't occur to me to go on the view." (15)
11. "No. It's just a waste of time" (42)
12. "Only if they request me to, and they often do." (11)
13. "I don't go unless I'm asked. It saves lots of time (not to be required to go)." (10)

## APPENDIX XXII

Highway Department Tactical Disadvantage

1. "It's wrong that the Highway Department has to expose itself but the landowner doesn't. The present system is bound to encourage litigation. The Highway Department comes into court with an almost guaranteed figure to the landowner. The landowner's attorney knows that he's going to start with the amount that was offered. I don't think he ought to know that."

"The Highway Department lacks flexibility. It could settle many cases with just a little more money and flexibility. If the Highway Department could offer less it would encourage the landowner to take the offer more often."  
(18)

(See also comments of Judge #45, Appendix VII.)

Contingency Fees

1. The judge stated that contingency fees should be abolished both generally and in particular in condemnation cases. In the judge's view, contingency fees "offer an incentive to landowners to take it to court," especially in condemnation cases. The judge noted that landowners had complained to him about their unhappiness with contingency fees. (49)

Inadequacy of Fair Market Value

1. "Fair market value doesn't really compensate a man. He can't go out and replace his property with the money he got." (33)
2. "Actually, fair market value doesn't compensate the person fairly." (24)
3. "The landowner should get more than what the law presently allows." (31)
4. "It is patently unfair for a man not to be compensated for loss of business profits." (23)
5. "Condemnation is unfair in many instances. It's not enough. But I wouldn't recommend that we allow subjective factors to be taken into account. That would open Pandora's box." (11)

Inadequate Credit to Commissioners

1. "I think we're all inclined to lose sight of the fact that basically commissioners and jurors are all fair and they want to do what's right. They may see that it's basically not fair, that this property has more value to that man than just fair market value. I think commissioners do an excellent job, basically." (7)

2. "One of the troubles is that we don't start off with the assumption that the man is going to be honest, conscientious and fair. We generally get good fair awards. I think we should operate on the premise, and I believe for the most part it's true, that a man under oath to do a job is going to do the best he knows how to do. That has been the hallmark of our entire system of government. A man exercising his trust to the best of his ability." (11)
3. "Ninety-five percent of the commissioners are honest and try to do a good job." (52)
4. "Jurors and commissioners are very fair. They are more conscientious than they are given credit for." (32)

#### Arbitration

1. The judge suggested that arbitration would be a good solution. Each side would select appraisers, who would pick a third man to set the value. (51)
2. "The parties would be bound, and it would be an extrajudicial proceeding. It wouldn't take the time of the court." (40)

#### Impact of the Project on Value

1. "It is very difficult to keep the effect of the project on land value from being considered by the commissioners. It is very difficult now, and it would be impossible with a common law jury. When I was counsel for the Highway Department, it was very difficult to tell the commissioners, 'Remember, it was we who ran the values up!'" (43)
2. "The commissioners are not supposed to take into account the impact of the project on the value. I just don't think they pay any attention to that instruction." (16)

#### The Federal Condemnation Procedure

1. "The federal system in my experience is very efficient and extremely fair. There is usually at least one attorney on the commission. It is almost a special court." (28)

#### The Effect of Federal Funding

1. "Sometimes you see the attitude 'Well, it's the federal government's money, and everyone else is throwing federal money away — who cares?'" (15)
2. "It's common knowledge that it's 90% federal money. That has a tendency to inflate the values." (19)

## APPENDIX XXII

3. "Local projects bring it a little closer to home. It's different from federal aid projects." (20)

The Importance of Uniform Awards

1. The judge stressed that uniformity in the awards is fundamental. Whether they are high or low, they must be the same for all landowners. (49)
2. "Uniformity of awards is very important. We should do whatever we can to achieve it." (48)

The Problem of Damages to the Residue

1. The judge remarked on the difficulty of assessing damage to the residue, "that's the real problem." He believes that "that's where differences in awards come." (49)

## APPENDIX XXIII

## THE LETTER AND QUESTIONS SENT TO THE JUDGES

(Dear Judge Jones),

This is to confirm our appointment to discuss highway condemnation procedures on (Wednesday, June xx, 1972 at 3:30 p.m.) at (your office in the xxxxxx County Court House).

My telephone number, should you need to contact me regarding our appointment, is 977-4200 in Charlottesville.

I am attaching a list of questions to give you a general idea of the areas I am interested in. While I would like to hear your views on these questions, I wish to emphasize that they are merely intended to provide food for thought. The key thing, from my point of view, is to hear what you think is important about the condemnation situation.

I very much appreciate your taking the time to give me your opinions. Your assistance will be most valuable to me in writing my report (Condemnation Procedure Alternatives for Virginia), and ultimately, I hope, to the state in dealing with the condemnation problem.

I look forward to meeting you and talking to you about this matter.

Sincerely,

Dennis G. Merrill  
Graduate Legal Assistant

1. How often do the parties in condemnation proceedings agree on commissioners rather than submit a list of nominees to the court?
2. Do the parties always exercise their right to peremptory challenges?
3. How would you describe the persons typically appointed by landowners and the Highway Department to sit as commissioners? (Professionals in real estate? Persons not in the business, but knowledgeable in real estate? Persons with no particular expertise in real estate?)
4. Are the same persons repeatedly appointed to be commissioners so that, in effect, a body of "professional condemnation jurors" has developed in your jurisdiction? Is there any tendency in this direction? If so, do you think this is good or bad?
5. Would you like to see a limitation on the number of times a commissioner could serve during a given term of court?
6. Do some commissioners have a reputation for being "landowner" commissioners or "highway" commissioners? Of the commissioners who have served more than once, how many have been nominated by both landowners and the Highway Department?
7. To your knowledge have there been any abuses of the appointment procedure (conflicts of interest) in your jurisdiction?
8. Have you suspected conflicts of interest in cases where there was no evidence on which action could be taken?
9. Do you have suggestions for or criticism of the Highway Department with regard to its nominating practices in your jurisdiction? With regard to any other aspect of the Highway Department's conduct in condemnation proceedings?
10. Some states provide, in one form or another, for the appointment of the commissioners by the court instead of soliciting nominations from the parties or drawing jurors from a jury list. Do you favor giving this power of appointment to the judges?
11. Regardless of whether there have actually been conflicts of interest under the present system, do you think there is any significant amount of public suspicion of such conflicts?
12. Would you like to see the qualification for commissioners made more stringent so as to reduce the chances of conflicts of interest?
13. Assuming the present procedure were to remain in effect, what improvements would you suggest?
14. Short of actual conflicts of interest, both sides have complained that under the present system it is almost impossible to get a commission which isn't weighted in favor of one side or the other. In your experience is this true?

15. It has been proposed that the commissioner system be replaced by a jury system. Jurors would be drawn in the same manner as jurors in any other civil case. Two modifications would be made, however; jurors would be required to be freeholders and a majority of the jury could determine the award (unanimity would not be required). What do you think the effect of such a procedure would be?
16. Would you recommend changing to the jury system?
17. In general, would you prefer to have the judge sit as the factfinder rather than a commission or a jury? What advantages or disadvantages do you see in the judge sitting as factfinder?
18. Under current law, the court is without power to set aside the commissioners' report unless it determines that fraud, collusion, corruption or improper conduct entered into the report. (Code of Virginia § 33.1 - 108.) Would you like to see the judges given greater discretion to set aside an award and order a new trial where they believe the award is unreasonably low or high? If so, what new standard should guide the judges?
19. Indiana is one of the several states which use a two-layered procedure. Proceedings are commenced by filing a complaint in the appropriate court. The court thereupon appoints three commissioners to assess damages. After the commissioners file their report, any dissatisfied party may file exceptions, in which event the case proceeds to trial and judgment like any other civil action. (In Indiana this means a jury trial if either party requests it, otherwise the court serves as factfinder.)

Thus, a two-layered procedure; an informal trial before the commissioners followed by the right to "appeal" to the circuit court (usually a trial de novo before a jury).

Do you see advantages or disadvantages in this system over the present system in Virginia?

20. Seven states provide, in one form or another, for referees or masters to sit as factfinders. (In all seven states the referee-master is used in combination with or as an alternative to the court or jury system.) Do you see advantages? Disadvantages?
21. Three states use permanent special boards as factfinders; South Carolina uses a Condemnation Board, Maine a Land Damage Board, and Vermont a State Highway Board. Members of these boards are generally appointed by the governor for two or three year terms. Do you see advantages or disadvantages to this procedure?
22. In summary, which of the above procedures (or combination thereof) would you recommend for Virginia?
23. In what aspects of condemnation procedure do you think there is a need for further research?
24. Do you have any other suggestions, ideas or comments about any aspect of highway condemnation procedures?

