One May v. the 800-Pound Gorilla: An Argument for Truly Just Compensation in Condemnation Proceedings

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# ONE MAN V. THE “800-POUND GORILLA”: AN ARGUMENT FOR TRULY JUST COMPENSATION IN CONDEMNATION PROCEEDINGS

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## I. INTRODUCTION

What Appalachia needs to do to save itself is pave the way from here to elsewhere. Or, at least that’s what some bureaucrats thought back in the early 1960s, when the Appalachian Regional Commission proposed building more than twenty highways through some of the wildest stretches of land left in the East.\(^1\) Believing that a critical mass of asphalt would foster economic and social development in these isolated regions, the commission called for pavement to connect rural outposts stretching from New York to Mississippi.\(^2\) One of the highways proposed as part of the “Appalachia Development Highway System” was Corridor H, and it was planned to stretch across 140 miles of West Virginia, from the center of the state at Weston to the eastern border with Virginia.\(^3\) Once completed, the highway would cut east from Interstate 79, Exit 99, through the municipalities of Elkins, Parsons, and Davis, through two national forests, and through the towns of Bismark, Moorefield, and Wardensville.\(^4\) The purpose of Corridor H was to quickly connect the interior of West Virginia to Washington, D.C., and other metropolitan points in the East.\(^5\) Additionally, officials envi-

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\(^2\) Id.

\(^3\) Id.


\(^5\) See White Paper, supra note 1.
sioned Corridor H as an emergency escape route from the nation’s capital. The proposed cost was over $1 billion.

Yet, more than forty years after officials laid plans for the highway, only about sixty-four miles of Corridor H have been built. Today, the completed sections of the highway run from Weston to Elkins (approximately forty miles), from Elkins to Kerens (nine miles), and from Moorefield to Wardensville (approximately twenty miles). Currently, $840.3 million has been spent on the project, and officials estimate completion will cost an additional $1.3 billion. No end is in sight. Today, the western-most stretch of highway unceremoniously ends at Kerens, where several lonely cement barriers block eastbound drivers from plunging off the end of the unfinished road. Vehicles are shunted off the highway and onto Route 219, the old-fashioned two-lane, replete with tiny towns and hairpin turns that Corridor H aims to eventually bypass.

The reasons for delay are many, but politics reigns chief among them. Environmental watchdogs have branded Corridor H as the “road to nowhere” because it won’t actually connect with a four-lane highway in Virginia. Additionally, Corridor H requires 100 separate stream crossings and would cut asphalt swaths through the George Washington and Monongahela National Forests, the largest roadless areas in the East. The highway would come alarmingly close to Blackwater Falls State Park, one of the crown jewels of West Virginia’s park system. A lawsuit brought by citizens in 1996 halted construction near Elkins; as a result of the suit’s settlement in 2000, the remaining 100 miles had to be broken into nine segments and the state must justify each segment before construction can begin. In short, with a revised price tag of more than $2 billion, coupled with its long reach across private and public lands, Corridor H has become a bureaucratic boondoggle.

This Note explores the historical background as well as the future implications of Corridor H and concludes that the government must be more forthright and transparent in its condemnation of private lands. First, this Note analyzes one case of Corridor H condemnation in West Virginia wherein the landowner fought for the right to see all the appraisals the state performed on his land. Second, this Note examines the background of discovery in condemna-

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7 White Paper, supra note 1.
8 Id.
9 Id.
11 Elsa Brenner, supra note 6.
13 Id.
tion cases, specifically the expert witness rule found in both the West Virginia and Federal Rules of Civil Procedure. In examining this discovery rule, this Note explores the split that exists in the courts over whether landowners have a right to see all the appraisals the government performed on their condemned property in a suit for just compensation. Third, this Note closely examines two arguments that landowners have made in an attempt to force the state to fully disclose all its appraisals of condemned land.

Finally, this Note ultimately concludes that condemnation proceedings are inherently "exceptional circumstances" and the government's appraisals are therefore not shielded from discovery by Rule 26(b)(4)(B). Thus, in the discovery phase of a just compensation suit, the state should be forced to reveal all the appraisals it performs on condemned land, not just the appraisals it hand-selects to use at trial. For, as Justice Larry Starcher of the West Virginia Supreme Court of Appeals wrote, "the government is the proverbial 800-pound gorilla. . . . In these lopsided circumstances, a property owner is entitled to anything that can help make the case for full compensation. These are inherently 'exceptional circumstances.'"16

II. A CASE STUDY OF CONDEMNATION LAW IN WEST VIRGINIA

One specific issue complicating the whole Corridor H project is the state's prerequisite need to condemn private lands. Take, for example, the situation of Fort Pleasant Farms, located in the city of Moorefield, West Virginia. Here, the state spent several years fighting to complete its condemnation of approximately forty-eight acres of Fort Pleasant Farms.17 Although the state has already taken the land, the issue of "just compensation" remains.18

Of course, the state and the landowner place different monetary values on the land.19 The landowner's appraisals of the taken land, which includes the

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16 *Cookman*, 639 S.E.2d at 700 (Starcher, J., dissenting).
17 "The taking diagonally severed Fort Pleasant's 160 acre parcel of land and, as a result, 13.58 acres in the south residue was left completely landlocked. Furthermore, the remaining residue of 98 acres in the northern portion of the parcel has been damaged because the access road to the acreage has been eliminated and additional surface water has been diverted onto the property as a result of the highway. The taking also included approximately 2.5 million yards of fine, fissel shale in a DOH designated quarry area . . . ." Defendant's Proposed Findings of Fact and Conclusions of Law at 2, W. Va. Dep't of Transp. v. Fort Pleasant Farms, Inc., No. 04-C-51 (Circuit Court of Hardy County, W. Va. July 13, 2007).
18 The federal government has a constitutional mandate to give the landowner "just compensation" for any taking in an eminent domain proceeding. *U.S. Const.* amend. V. Because the taking of private property without just compensation was also found to violate the Due Process Clause of the Fourteenth Amendment, the Supreme Court incorporated that mandate to the states in *Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 241 (1897).
19 "Because land appraisal is complex and technical, usually evidence on the issue of value consists principally of the opinions of opposing experts. These opinions are notoriously disparate." United States v. Meyer, 398 F.2d 66, 69 (9th Cir. 1968).
land that the state took, damaged, and landlocked, fall between $2.6 million and $3 million; this figure includes an overall mineral value of approximately $1 million.20 The state’s valuation of the land, however, appears to be much less. In June 2004, the West Virginia Department of Highways paid out $189,340 as estimated just compensation.21 Then, without any further explanation, the state later paid the landowner additional sums of $102,200 and $73,386.16.22 Finally, in August 2005, the state gave the landowner an additional $35,743.79.23 These deposits bring the landowner’s “just compensation” for the taking, damage, residue, and lost minerals to $400,855.95.24 That figure is a long way from the landowner’s estimates of $2.6 million to $3 million.

So how did the state arrive at its figure? No one but the state knows, and it’s not talking. Instead of trying to resolve the problem in a transparent and forthright fashion, the state simply refused to show the landowner all the state-performed appraisals of his property. In fact, the state fought hard to maintain the secrecy of its appraisals in the Fort Pleasant case: after the circuit court ordered the state to produce all of its appraisals, the state twice appealed to the state’s highest court.25

As far back as 2004, the Fort Pleasant Farms landowner sought information via discovery procedures.26 He not only sought the state-performed appraisal reports and evaluations of his condemned property, but he also sought all state-performed appraisals and evaluations on other condemned properties located within one-half mile of the Fort Pleasant property.27 The state refused to furnish these documents. However, in early 2006, Hardy County Circuit Court Judge Donald Cookman granted the landowner’s motion to compel the state to hand over the documents.28 In response, the state sought a writ of prohibition from the Supreme Court of Appeals.29 The Supreme Court of Appeals, in W. Va. Department of Transportation v. Cookman,30 remanded so the lower court could make the findings of fact and conclusions of law necessary to justify production of the documents.31 The circuit court did just that, and in August 2007,

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20 Defendant’s Proposed Findings of Fact and Conclusions of Law, supra note 17, at 2.
21 Id.
22 Id.
23 Id. at 2-3.
24 Id. at 3.
26 Defendant’s Proposed Findings of Fact and Conclusions of Law, supra note 17, at 3.
27 Id. The landowner also originally sought appraisals on all condemned land done within one mile of his property, but later revised that request to condemned properties located within one-half mile of his property. Id. at 3-4.
28 Id. at 4.
29 Cookman, 639 S.E.2d at 696.
30 Id. at 693.
the circuit court again ordered the state to produce the appraisals. The state subsequently petitioned the Supreme Court of Appeals for a second writ of prohibition, but was denied any relief.

Put simply, the state of West Virginia has taken a citizen’s land, arguably worth millions of dollars, and has wordlessly given him a few hundred thousand dollars as “just compensation.” Furthermore, the state has staunchly resisted the landowner’s requests that it justify how it arrived at its figure. This procedure cannot be the logical result of a law that calls for the “fair and equitable treatment by state agencies of persons displaced from property” and “to assure consistent treatment of persons and promote public confidence in . . . land acquisition practices.”

It boggles the mind as to how the West Virginia Department of Highways can, in good faith, fulfill its statutory mandate “to avoid litigation . . . to assure consistent treatment . . . and [to] promote public confidence . . .” by operating in secret. As regards Fort Pleasant’s property, the state’s production of all the appraisals it commissioned on the condemned land would go a long way towards explaining how state officials decided that $400,000 was “just compensation” for the land. Furthermore, a consistent judicial policy requiring the government to produce all of its appraisals in all condemnation cases would certainly help balance the power inequities that exist between a property owner and the condemning state.

However, as of today, the right of a West Virginia landowner to discover the government’s appraisals in condemnation cases remains in flux. Because the West Virginia Supreme Court of Appeals refused to definitively settle this important discovery issue, the circuit courts are left to their own and varied devices. The Supreme Court of Appeals should have seized on the Fort Pleasant situation as an opportunity to clarify the law, and should have ruled that landowners have an automatic right to all the government’s appraisals in eminent domain cases because, as this Note articulates, this is the only fair solution for both landowners and taxpayers.

31 Id. at 700.
32 Order Granting Renewed Motion to Compel, at 5, W. Va. Dep’t of Transp. v. Fort Pleasant Farms, Inc., No. 04-C-51 (Circuit Court of Hardy County Aug. 16, 2007).
35 § 54-3-2.
36 Id.
37 Defendant’s Proposed Findings of Fact and Conclusions of Law, supra note 17, at 3.
III. THE RULES OF CONDEMNATION

The main rules guiding condemnation cases like the Fort Pleasant Farms case detailed above are the eminent domain statutes and the expert witness discovery rules. Regarding the former, the specific purposes of eminent domain law are:

(1) to require the establishment of a uniform policy for the *fair and equitable treatment* by state agencies of persons displaced from property in order that *such persons shall not suffer disproportionate injuries* as a result of programs designed for the benefit of the public as a whole and (2) to encourage and expedite the acquisition of real property or any interest therein by agreements with persons so as *to avoid litigation* and relieve congestion in the courts, to *assure consistent treatment* of persons and *promote public confidence* in the land acquisition practices of any state agency.  

Furthermore, the courts seem to impose on the government a good faith requirement to treat the landowner fairly: "[T]he defendant is always entitled to just compensation for property taken. The condemnor concedes the right to compensation and *presumably is always willing to pay a certain sum.*" Additionally, the U.S. Supreme Court has said that the "guiding principle" of just compensation is one of reimbursement. Therefore, the U.S. Supreme Court stated in United States v. Reynolds," [(t)he owner is to be put in the same position monetarily as he would have occupied if his property had not been taken."

Intertwined with the state and federal condemnation statutes is the "expert witness" discovery rule, or Rule 26(b)(4) of both the West Virginia and the Federal Rules of Civil Procedure. Before Congress in 1970 added the federal expert witness rule into the Federal Rules of Civil Procedure, courts had no sta-

39 *Id.* (emphasis added).
41 *Id.* at 925 (citing United States v. Reynolds, 397 U.S. 14 (1970)).
43 *Id.* at 16.
45 West Virginia added the expert witness discovery rule to the West Virginia Rules of Civil Procedure in 1978.
tutary polestar to help them determine whether to compel discovery of all the government’s expert appraisals in condemnation cases. Thus, the extent to which expertly held facts and opinions were discoverable “was the subject of much discussion and division in the federal courts.” However, the majority of cases held that the landowner was generally not entitled to discovery of the government’s expert appraisals.

A. An Anti-Landowner Policy

One eminent domain scholar and attorney, M. Jay Devaney, has classified the pre-rule federal courts into four different groups based on the courts’ attitudes towards discovery of expert appraisals. The first group imposed the most limits on discovery and refused discovery of any information regarding the use of expert appraisers, including the appraisers’ names and addresses. A second group of courts distinguished between facts upon which the appraisals were based and the opinions of the appraisers, permitting discovery of the former, but not the latter. A third group of courts permitted discovery of comparable sales data based on the belief that lists of sales were “the best evidence of fair market value.” Moving towards liberalization of discovery, a fourth group of courts “did recognize some discovery of the adverse party’s expert opinion.”

The arguments these courts adopted in defense of their anti-discovery policies are varied, and include attorney-client and work-product privilege. Although these two arguments no longer have much force in the realm of expert discovery, one argument adopted by the pre-rule courts—the state’s “unfairness” argument—had the most force, and, thus, retains some vestigial relevance today. As the Ninth Circuit in United States v. Meyer noted:

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47 Hoover v. United States Dep’t of the Interior, 611 F.2d 1132, 1140 n.11 (5th Cir. 1980).
49 Id. at 1099.
50 Id.
51 Id. at 1100.
52 Id.
53 Id. at 1101-02. See Hickman v. Taylor, 329 U.S. 495, 508 (1947) (rejecting the argument that the attorney-client privilege protects “information which an attorney secures from a witness while acting for his client in anticipation of litigation”); United States v. Meyer, 398 F.2d 66, 73-74 (9th Cir. 1968) (rejecting the argument that the work-product doctrine protects expert information); Shell v. State Rd. Dep’t, 135 So.2d 857, 860 (Fla. 1962) (rejecting the argument that the worksheets of the state’s appraisers are protected work product).
54 Meyer, 398 F.2d 66.
lost of the decisions denying pretrial access to the opinions of experts employed by the opposing party rest on the ground that to allow such discovery would be unfair to the opposing party, because it would permit the discoverer to exploit the diligence of opposing counsel and shirk counsel’s own duty of independent preparation.55

Basically, this argument posits that such a practice of disclosure would help the landowner at the expense of the state. This argument relies on the mistaken premise that it is somehow fairer to force the individual landowner, whose land is already being condemned, to pay for the appraisals the parties need to determine the land’s value.56 In its defense, the government argued that “requiring the city to inform the landowner of the appraised value of the easement[... will chill its ability to obtain easements... at a nominal cost through negotiation.”57 As if the state should ever be in the position of trying to wrest land from a private landowner at a nominal cost.

The majority of pre-Rule courts that bought the state’s preposterous “unfairness argument” consequently prevented landowners from discovering all of the government’s expert appraisals.58 As one court reasoned, because the “land is open to inspection by all parties, no information concerning the same is sought from the Government that is not readily available to the [landowners].”59

This “unfairness” principle was used by the Tenth Circuit Court of Appeals in 6816.5 Acres of Land v. United States.60 Here, the government condemned 6,816.5 acres of the landowner’s 33,150-acre New Mexico ranch for a 10,000-acre reservoir project.61 The jury awarded the landowner $155,000 as just compensation, after the government argued that the project would positively affect the value of the landowner’s property and that those benefits should offset any monetary compensation it owed him.62 The landowner fought the government for more compensation and tried to compel discovery of the contents of an appraisal report made by an expert the government hired but did not call at trial.63 However, the Tenth Circuit Court of Appeals sided with the government and said that the trial court did not abuse its discretion in prohibiting discovery

55 Id. at 75.
59 7,534.04 Acres of Land, 18 F.R.D. at 146 (stating that “the burden of proof is upon the property owner to prove the value of the land in question”).
60 6816.5 Acres of Land v. United States, 411 F.2d 834 (10th Cir. 1969).
61 Id. at 835.
62 Id. at 836-37.
63 Id. at 839.
of the government’s appraisal reports.\textsuperscript{64} The Court found “if the landowner ‘wanted more expert testimony on value it was for . . . [him] to produce such evidence.’”\textsuperscript{65}

In deciding \textit{6816.5 Acres of Land}, the Tenth Circuit relied on \textit{Dicker v. United States},\textsuperscript{66} a D.C. Circuit case where the government condemned warehouse property and unimproved lots in Washington, D.C.\textsuperscript{67} The government’s expert appraisals of the property ranged from $1,400,000 to $1,372,000, and the landowners’ experts’ appraisals ranged from $2,962,000 to $2,577,000.\textsuperscript{68} However, the landowners later learned that two other government experts appraised the property in excess of $2 million.\textsuperscript{69} Not surprisingly, the government did not call those experts at the condemnation proceeding.\textsuperscript{70} The landowners sought discovery of these appraisals, but the court denied their request:

\begin{quote}
the [landowners] have not been prejudiced. Any testimony [the experts] might have given would have been cumulative only. That the Government consulted them but did not use their opinions is not relevant evidence of value; Appellants could not show the prior consultation in order to bolster the witnesses’ credibility, nor could they seek to arouse jury prejudices by showing the prior consultation under the guise of proving the experts’ qualifications.\textsuperscript{71}
\end{quote}

The Court then said that the landowners must provide their own expert testimony on the value of the land.\textsuperscript{72} Thus, before 1970, courts generally denied landowner’s requests for government appraisals in condemnation cases because of perceived unfairness to the government.\textsuperscript{73}

\textsuperscript{64} Id.

\textsuperscript{65} Id. at 839 (citing \textit{Dicker v. United States}, 352 F.2d 455, 457 (D.C. Cir. 1969)).

\textsuperscript{66} \textit{Dicker}, 352 F.2d at 455.

\textsuperscript{67} Id.

\textsuperscript{68} Id. at 456-57.

\textsuperscript{69} Id. at 457.

\textsuperscript{70} Id.

\textsuperscript{71} Id.

\textsuperscript{72} Id.

\textsuperscript{73} See also \textit{United States v. Meyer}, 398 F.2d 66 at 75 (9th Cir. 1968) (“Most of the decisions denying pretrial access to the opinions of experts employed by the opposing party rest on the ground that to allow such discovery would be unfair to the opposing party because it would permit the discoverer to exploit the diligence of opposing counsel and shirk counsel’s own duty of independent preparation.”).
B. Pro-landowner Stirrings in the Ninth Circuit

Against this backdrop of anti-landowner prejudice, the Ninth Circuit Court of Appeals in 1968 tried to change the judiciary’s harsh stance with its bold decision in *United States v. Meyer.*

In *Meyer,* the government condemned privately held land in California’s Yosemite National Park. As part of the pre-trial condemnation proceeding, the landowner deposed three government appraisers and called for the production of their appraisal reports; the appraisers (on the advice of government counsel) refused to produce them and also refused to answer many of the landowner’s deposition questions, including questions regarding comparable sales and the nature and character of the condemned property. The Court noted “essentially, the witnesses testified only to the fact that they had been employed by the government. . . .” The only documents they produced were their employment contracts, copies of photos of the property, and some maps. The landowners objected, yet received no relief from the trial court.

However, the Ninth Circuit overturned the trial court and compelled the government to produce the appraiser’s reports. The Court said:

> In sum, in condemnation cases full pretrial disclosure of appraisers’ opinions and the details upon which they are based is required if the rules are to accomplish their purpose to “make a trial less of a game of blind man’s bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent.”

In reaching this holding, the Court rejected the government’s long-used “unfairness” argument by stating that it was “not an acceptable ground for barring discovery of facts known and opinions held by appraisers in condemnation cases” because the risks of abuse are not great when balanced against the need for expert testimony in condemnation cases. The court said that “the testimony of appraisers is the crux of the trial, and full disclosure of their opinions and the foundations upon which they rest are essential to adequate litigation.”

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74 *Id.* at 68.
75 *Id.*
76 *Id.*
77 *Id.* at 69 n. 2.
78 *Id.*
79 *Id.* at 69.
80 *Id.* at 77.
81 *Id.* at 70 (citing *United States v. Proctor & Gamble,* 356 U.S. 677, 682 (1958)).
82 *Id.* at 75.
83 *Id.*
More pointedly, the only issue tried in condemnation cases is that of just compensation, because the government almost always has the power and the right to condemn land.\textsuperscript{84}

Therefore, the court opined that:

[w]here the opinions of experts are central to litigation, as in condemnation cases, the irreducible risk of abuse must simply be accepted. In the end, the central object of litigation is not to reward diligent counsel and penalize lazy or inept counsel, but to achieve a just adjudication of the controversy between the parties. That can be accomplished only by a full exposure of the relevant facts.\textsuperscript{85}

Furthermore, the \textit{Meyer} court rejected the government’s argument that the landowner was free to obtain the same information from other appraisers by recognizing that the landowner was not seeking additional appraisals, he was seeking the \textit{government’s} appraisals.\textsuperscript{86} These reports are, necessarily, only available from the government’s appraisers.\textsuperscript{87} The court justified the production of these reports in condemnation cases by stating that property appraisal is “complex and technical,” and evidence of a property’s value consists primarily of expert opinions, which are “notoriously disparate.”\textsuperscript{88} Thus, “there is no basis to believe that the information sought to be elicited, since it is subjective in nature, might be obtained . . . except by . . . the only person, the expert, who has such information.”\textsuperscript{89}

Finally, the \textit{Meyer} court anticipated the advent of the new “expert witness” rule, i.e., Federal Rule of Civil Procedure 26(b)(4), and recognized the distinction that the new rule would make between those experts that parties intend to call at trial and other experts that parties merely consulted, but did not intend to call at trial.\textsuperscript{90} The Court found it sound policy to compel production of expert appraisal reports when the government planned to call the expert as a trial witness.\textsuperscript{91} The Court stated “cross examination of appraisers regarding the basis of their opinions is one of the principal means for testing the weight which should be given to their opinion testimony. Pretrial discovery is particularly

\textsuperscript{84} Id. at 71.
\textsuperscript{85} Id. at 75.
\textsuperscript{86} Id. at 72.
\textsuperscript{87} Id.
\textsuperscript{88} Id. at 69.
\textsuperscript{89} Id. at 72 n.7 (citing United States v. 23.76 Acres of Land, etc., 32 F.R.D. 593, 596 (D. Md. 1963)).
\textsuperscript{90} Id. at 76.
\textsuperscript{91} This distinction is \textit{FED. R. CIV. P. 26(b)(4)(A).}
important to preparation for effective cross-examination of such witnesses. . .

But, is it sound policy to compel production of the appraisal reports of experts whom the government consults, but does not plan to call at trial? The court recognized that this policy argument was not as compelling because it could not ground its reasoning in the necessity of adequate cross-examination, nor could it claim that discovery from non-testifying witnesses clarified the dispute or narrowed the issues. However, the Meyer court did manage to solidly anchor its reason for compelling production of the reports of non-testifying experts by recognizing that non-testifying appraisers may have:

- discovered facts, applied techniques, or arrived at opinions which, though not acceptable to the government, were nevertheless relevant to the subject matter of the litigation and helpful to the landowner. It would be intolerable to allow a party to suppress unfavorable evidence by deciding not to use a retained expert at trial.

Thus, the Meyer Court rejected the government’s “unfairness” argument and attempted to place the government, with its limitless resources, and the landowner, with his finite resources, on a somewhat level playing field. Had the majority of courts followed Meyer, modern condemnation proceedings would be fairer to landowners because Meyer helped to equalize the inherent power imbalance that exists between the government and a lone individual.

C. Meyer Ignored

However, the 1968 Meyer decision lost much of its persuasive force when Federal Rule of Civil Procedure 26(b)(4) was born in 1970.96 Federal Rule 26(b)(4), the so-called “expert rule,” can be divided into two parts: Part A, or Rule 26(b)(4)(A), regulates discovery of expert information when the other side expects to call the expert at trial; Part B, or Rule 26(b)(4)(B), regulates discovery of expert information when the other side does not expect to call the expert at trial.97 Rule 26(b)(4)(B) states:

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92 Meyer, 398 F.2d at 72.
93 Id. at 76.
94 Id.
95 Id.
96 "The most compelling reason why Meyer is not controlling is that it was decided prior to the amendment of the discovery rules in 1970 which added Rule 26(b)(4).” Hoover v. United States, 611 F.2d 1132, 1141 (5th Cir. 1980).
Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial. But a party may do so only . . . on showing exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.\(^98\)

Of course, in condemnation cases, Rule 26(b)(4)(B) is most applicable, primarily because the landowner is trying to compel discovery of experts’ reports even when those experts are not on the government’s list of disclosed experts expected to testify at trial.

One of the first cases to interpret this rule in light of a condemnation proceeding is United States v. John R. Piquette Corp.\(^99\) In this case, the government condemned the landowners’ property for office space.\(^100\) The landowners sought to compel production of appraisals of experts whom the government intended to call at trial, as well as experts whom the government did not intend to call at trial.\(^101\) Recognizing the historical division among the courts over the discoverability of non-testifying experts’ opinions, the court rejected the “pre-amendment liberality” of Meyer.\(^102\) The Court believed “the best course is to follow the . . . amended rule rather than the ‘free discovery’ advanced by the Meyer case.”\(^103\) The court based its reasoning on the judiciary’s old fear of “unfairness” to the government, and said that the procedure of the new rule limits the risk of unfairness by limiting discovery to trial witnesses.\(^104\) Thus, the Piquette court held that the landowner could not compel production of appraisals performed by experts that the government hired but did not plan to call at trial, unless the landowner could show “exceptional circumstances.”\(^105\)

Eighteen years after Piquette, the judiciary’s fear of unfairness to the government was still alive and well, and it was still guiding court decisions regarding discovery in condemnation cases. In Hoover v. United States,\(^106\) the

\(^{98}\) FED. R. CIV. P. 26(b)(4)(B).


\(^{100}\) Id. at 372.

\(^{101}\) Id. at 371-372.

\(^{102}\) Id. at 371. The Piquette court characterized the Meyer court’s standard as “free discovery of the opinions of all experts whether they were to be used at trial or not.” Id. This statement glosses over the narrow fact that Meyer was a condemnation case and that the Meyer court specifically argued for such “free discovery” in condemnation cases only.

\(^{103}\) Id. at 372.

\(^{104}\) Id. at 373 (citing Proposed Amendments to Civil Rules, 43 F.R.D. 211, 235).

\(^{105}\) Id. at 372-73.

\(^{106}\) Hoover v. United States, 611 F.2d 1132 (5th Cir. 1980).
government condemned a privately owned Alabama cave and 264 acres of surrounding land because the cave was home to an endangered species of bat. The landowner sought the appraisal of an expert that the government hired but did not expect to call at trial. Sympathetic to the government's argument that disclosure would compromise its "competitive position" with the landowner, the court relied on the anti-landowner precedent of *Piquette* and its ideological brethren and declared that under Rule 26(b)(4), "the government enjoys a qualified privilege protecting the contents of the appraisal report in condemnation proceedings." Thus, the court denied the landowner's request for the appraisal, broadly stating that "it is clear that a landowner is not entitled as a matter of right to discover the government's appraisal report."

In sum, despite the bold advances made by *Meyer*, some courts still cling to the government's tired, old "unfairness to the government" argument. These courts have refused to push the government towards transparency in just compensation proceedings. And it appears Federal Rule 26(b)(4)(B) has given these courts another tool to help them accomplish this dubious goal: instead of intelligently analyzing eminent domain case law, and instead of exploring the ideological fissures present in condemnation precedent, courts may simply use Federal Rule 26(b)(4)(B) to erect a discovery barrier of "exceptional circumstances" whenever a landowner moves to compel the government to produce appraisal reports made by experts whom the government does not expect to call at trial. Sadly, some courts still seem to be under the mesmerizing spell of the government's smoke-and-mirrors unfairness argument. As if a Lilliputian individual seeking to obtain just compensation for the land that the government swiped out from under him could ever put the Brobdingnagian government in an "unfair" position.

IV. WHY THE LAW IS AN ASS

The fact that some courts are still using the discovery Rules to help the government obtain and keep its "competitive position" against individual landowners in condemnation cases is just absurd. As a matter of public policy,
courts should use the Rules to level the playing field for landowners by forcing the government to justify how it arrived at its take-it-or-leave-it figure of "just compensation." As the Florida Supreme Court wisely said in *Shell v. Florida State Road Department*:\(^{114}\)

> It must be borne in mind that in a condemnation proceeding the property of the land owner is subject to taking by the condemnor without the owner's consent. The condemnee is a party through no fault or volition of his own. . . . [I]t [is] incumbent upon the condemnor to award 'just' compensation for the taking. In view of this constitutional mandate, the awarding of compensation which is 'just' should be the care of the condemning authority as well as that of the party whose land is being taken. Unlike litigation between private parties condemnation by any governmental authority should not be a matter of 'dog eat dog' or 'win at any cost.' Such attitude and procedure would be decidedly unfair to the property owner. He would be at a disadvantage in every instance for the reason that the government has unlimited resources created by its inexhaustible power of taxation.\(^{115}\)

Therefore, if the state is to satisfy its statutory and constitutional mandates to ensure that the landowner receives just compensation for a taking, the concept of "unfairness" should not even enter the state’s financial equation: “If the governmental unit or agency is seeking to effectuate the ‘summum bonum,’ as it should in every condemnation suit, there is no justification for cutting corners or being secretive to the possible detriment of the individual land owner whose property is being taken from him against his will.”\(^{116}\)

Furthermore, the Florida Supreme Court argued that the state would gain an *advantage* by revealing all its appraisals to the landowner because the landowner would likelier settle if he learns the state’s basis for its valuation of his property.\(^{117}\) Such a “speedy and inexpensive”\(^{118}\) settlement is not only preferable, but also satisfies the federal and West Virginia statutory mandate to “avoid litigation and relieve congestion in the courts.”\(^{119}\) Furthermore, speedy settlements, as opposed to lengthy and consequently expensive litigation, could also save taxpayers’ money.

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\(^{114}\) *Shell v. Fla. Rd. Dep't*, 135 So. 2d 857 (Fla. 1962) (holding that, as a matter of public policy, appraisals performed at the request of the government in a condemnation suit are not protected by Florida's attorney work product doctrine).

\(^{115}\) *Id.* at 861 (emphasis added).

\(^{116}\) *Id.* at 861 (emphasis added).

\(^{117}\) *Id.*

\(^{118}\) *Id.*

\(^{119}\) W. VA. CODE § 54-3-2 (1972).
Thus, truly just compensation is not only a goal that the state should strive to reach, but it is also a constitutional mandate which the state must satisfy. So, why have the courts time and time again sided with the state against the landowner? Why has the judiciary saddled landowners with the heavy burden of proving unfairness in a condemnation proceeding? Why is the government trying to wrangle property from landowners at a "nominal cost?" \(^{120}\)

We may never know why the judiciary does what it does, but the remainder of this Note discusses two arguments that landowners might be able to use to defeat such judicial hostility. As discussed below, landowners must strive to compel the judiciary to recognize, as a matter of public policy, the value of transparency in condemnation actions.

V. A PUSH TOWARDS FAIRNESS

Recall that the discovery rules generally do not permit opposing parties to discover the facts or opinions held by experts retained by the other side, whom the other side does not expect to call at trial. \(^{121}\) But there are two exceptions to this general rule: parties can discover facts or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means. \(^{122}\)

Thus, under this rule, it appears that courts can compel the government to produce expert appraisals if the appraisals were conducted before the government anticipated litigation over the condemnation, \(^{123}\) or the court can compel the government to produce such appraisals where the landowner shows "exceptional circumstances." \(^{124}\) Although both arguments could help rebalance the power between the government and the lone landowner, this Note concludes that the "exceptional circumstances" argument is preferable because a court's acceptance of this argument would conclusively establish government transparency as a matter of public policy in condemnation proceedings.

\(^{120}\) Columbia, S.C. v. Costle, 710 F.2d 1009, 1013 (4th Cir. 1983).


\(^{123}\) Hereinafter, this argument shall be known as the "not in anticipation of litigation" argument.

\(^{124}\) Hereinafter, this argument shall be known as the "exceptional circumstances" argument.

https://researchrepository.wvu.edu/wvlr/vol111/iss2/8
A. **Not in Anticipation of Litigation**

Using the "not in anticipation of litigation" argument, the landowner can argue that the state simply does not commission its appraisals of condemned land in anticipation of litigation — and thus cannot invoke the discovery shield of 26(b)(4)(B) by claiming that it hired its expert appraisers in anticipation of litigation - because the whole purpose of the eminent domain law is to *avoid* litigation: "The purposes of this article are . . . to encourage and expedite the acquisition of real property or any interest therein by agreements so as to avoid litigation and relieve congestion in the courts." As one Court noted "a process designed to avoid litigation can hardly be said to be one in anticipation of litigation."

This argument was discussed by the Federal District Court of Maryland in *Washington Metropolitan Area Transit Authority v. One Parcel of Land in Prince George's County,* where the Court held that the government's pre-condemnation appraisal reports are not obtained in anticipation of litigation - and therefore not entitled to the enhanced discovery protection of 26(b)(4)(b) - as a matter of law. In this case, the Washington Metropolitan Area Transit Authority ("WMATA") condemned land in Prince George's County for the extension of a light rail line. The government initially appraised the condemned land at $888,923, but claimed it was worth only $51,000 at the time of the taking. The landowner, through discovery, asked the government to disclose the identity of its pre-condemnation appraiser and also asked for a copy of the original appraisal report that formed the basis of the agency's determination of "just compensation." The magistrate found as a matter of fact that the government's appraisal was not prepared in anticipation of litigation, and thus ordered the government to "give full and unevasive answers to the interrogatories and defendant's requests for production of documents." The Federal District Court upheld the magistrate's ruling, but took it one step further by stating that the appraisal report was not prepared in anticipation of litigation as a matter of law.

In reaching this holding, the Court relied on the language of federal condemnation law, which states *inter alia* that the purpose of the federal condemnation law (which requires the condemning agency to obtain a pre-
condemnation appraisal)\textsuperscript{134} was "... to avoid litigation and relieve congestion in the courts."\textsuperscript{135} The Court also relied on American Jurisprudence Second, which states that the statutory requirement of negotiation in eminent domain proceedings is for the government to acquire private lands without litigation, which saves the public and the condemnee the costs of litigation.\textsuperscript{136}

Therefore, the Court concluded that the government's offer and the underlying appraisal are not documents prepared in anticipation of litigation and, thus, are not protected from discovery by Rule 26(b)(4)(B).\textsuperscript{137} "To conclude otherwise would thwart the intent of Congress in its establishment of a mandatory process specifically designed to avoid litigation. A process designed to avoid litigation can hardly be said to be one in anticipation of litigation,"\textsuperscript{138}

Chief Justice Robin Davis of the Supreme Court of Appeals of West Virginia saw some logic in the above argument and used it in her dissent in the Fort Pleasant case. In applying the \textit{One Parcel of Land} "not in anticipation of litigation" analysis to the Fort Pleasant case, she concluded that the majority erred when it prohibited discovery of the state's pre-condemnation appraisal reports regarding the Fort Pleasant landowner's property.\textsuperscript{139} "Because the pre-condemnation appraisal reports were not created in anticipation of litigation, they are subject to discovery under Rule 26(b)(1), regardless of whether the preparing expert will testify in the condemnation proceedings."\textsuperscript{140} Justice Davis's apparent willingness to rebalance condemnation law in West Virginia offers citizens a glimmer of hope for fundamental fairness in these proceedings, but for reasons detailed below, this "not in anticipation of litigation" argument is not the best argument one can make.

On one hand, the "not in anticipation of litigation" argument makes good sense in light of Congress's statutory mandate to the government to "avoid litigation" in the condemnation process. By showing its appraisals to the landowner, the government will fulfill the purpose of the statute by "promot[ing] public confidence in [its] land acquisition practices."\textsuperscript{141} Furthermore, by forcing the government to show \textit{all} of its appraisals instead of just its lowest appraisal, the court would begin lifting the veil of secrecy surrounding just compensation proceedings and the state would begin to reverse its "win at any cost" policy.

However, this "not in anticipation of litigation" argument suffers from a few flaws: first, it is technical in nature and, therefore, the government can easi-

\textsuperscript{135} \textit{Id.; One Parcel of Land}, 342 F.Sup.2d at 381 (emphasis in original).
\textsuperscript{136} \textit{One Parcel of Land}, 342 F. Supp. 2d at 381.
\textsuperscript{137} \textit{Id}
\textsuperscript{138} \textit{Id}
\textsuperscript{140} \textit{Id}
\textsuperscript{141} § 54-3-2.
ly devise strategies to get around it. For example, the government could obtain one appraisal of the condemned land and wait for negotiations to fail and litigation to ensue before commissioning any more appraisals. These later appraisals would, technically, be performed in anticipation of litigation, and the state could persuasively argue that they are protected by Rule 26(b)(4)(B). Second, the federal cases advancing this argument impose one questionable limitation, which Justice Davis’s dissent seems to have implicitly accepted: although these cases permit the landowner to call the government’s appraiser and to see his report, they prevent the landowner from informing the jury that the appraiser was originally employed by the government. The cases prohibit this information from being brought to the jury’s attention for fear of “prejudice.” Justice Davis seems to accept this limitation, although she does not explicitly adopt it as sound legal policy.

This limitation is questionable for two reasons: one, this limitation is based on the old “unfairness to the government” argument, which should be laid to rest as a matter of public policy; two, it undercuts the transparency that is necessary for the government to fulfill the purpose of the condemnation statute. The Court should reject any argument that a single landowner, who is subjected to the awesome power of the government in a condemnation proceeding and who can be forcibly removed from his land by the government if he refuses to cooperate, can put the government in an unfavorable position in a condemnation proceeding. As noted above, in condemnation proceedings, there is generally no question as to whether the government has the authority to take the land. Thus, the only question that remains is how much compensation the landowner will receive in exchange for the taking. Therefore, the government is not in an unfavorable position, but in a favorable one, because it has the inherent power to simply take the land it needs, and the judiciary has given the government legal latitude to determine, with apparent impunity, what constitutes “just compensation.” The onus is on the landowner to show that the government is acting unfairly. It seems, therefore, that condemnation proceedings are more than fair to the state and fundamentally unfair to the aggrieved condemnee.

Second, the landowner should be permitted as a matter of policy to disclose to the jury that an expert appraiser was originally hired by the government. Under the Federal Rules of Evidence, any party can impeach any witness. Expert witnesses are routinely questioned about their feelings, biases, or prejudices if revelation of these emotions would shed light on the value of their tes-

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143 Id.
144 Cookman, 639 S.E.2d at 704 (Davis, C.J., dissenting).
145 Fed. R. Evid. 607. Under the Rule, “impeaching” includes exposing a witness’s bias and prejudices. Id.
timony.\textsuperscript{146} "Cross-examination may be used to bring out the fact that a witness is regularly or frequently employed as an expert witness by one of the litigants, or to prove facts and circumstances which would naturally create a bias in the mind of the witness for or against the cause of either of the litigants."\textsuperscript{147}

Why should an expert appraiser in a condemnation proceeding receive special treatment? Why are courts protecting the bargaining position of the government at the expense of the citizen landowner? It is fundamentally unfair for the courts to give the government more ammunition against the individual in a condemnation proceeding by letting the state protect the fact that it hired certain appraisers. The courts have a mandate to help the landowner achieve "just compensation" for his land, yet the courts undercut this mandate when they help the government operate in secret. As a matter of public policy, the courts should be working to balance the power imbalance inherent in eminent domain proceedings. The courts should prevent the government from assuming a competitive position against the landowner and should not be trying to obtain an individual's land at the lowest possible cost; the government should assume a position of social responsibility and should work to ensure that the landowner is justly compensated for the taking. Disclosing the fact that an expert appraiser was originally hired by the government—and that his appraisal was subsequently rejected by the government—would help the jury weigh the credibility of the expert's testimony because it would show jurors all the facts they need to establish the true value of "just compensation."

In sum, although the "not in anticipation of litigation" argument would help rebalance the West Virginia's weighted condemnation scales, it is hyper-technical and therefore fatally flawed. Furthermore, prohibiting the landowner from informing a jury that an expert appraiser was originally hired by the state is a material and prejudicial limitation that the courts should reject in the name of "just compensation." This argument may win some of the time, but the landowner can make a better argument.

B. Inherently Exceptional Circumstances

Although the "not in anticipation of litigation" argument does move the government in the direction of transparency and fundamental fairness, it does not go far enough. A better argument is one not based on technicalities, but one based on sound public policy. Thus, the landowner should argue—and courts should adopt the reasoning—that condemnation proceedings are inherently "exceptional circumstances," and, therefore, are not shielded from discovery by 26(b)(4)(B).\textsuperscript{148} Under this reasoning, the state's appraisals should only be protected by the general discovery rule, Rule 26(b)(1).\textsuperscript{149}

\textsuperscript{146} 31A AM. JUR. 2D Expert and Opinion Evidence § 74 (2007).

\textsuperscript{147} Id.

\textsuperscript{148} "A party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation."

https://researchrepository.wvu.edu/wvlr/vol111/iss2/8
Meyer, discussed above, set the stage for this argument by forcing the state to show the landowner appraisals performed by all its experts.\textsuperscript{150} Recall that in Meyer, the Ninth Circuit Court of Appeals reasoned that it would be "intolerable" to let the state suppress unfavorable expert evidence by neglecting to call certain experts at trial.\textsuperscript{151} Furthermore, the court laid the foundation for the argument that condemnation proceedings inherently constitute exceptional circumstances by concluding that condemnation actions have uniqueness "because of their reliance upon expert opinion as to value."\textsuperscript{152}

Although most courts have not incorporated the Meyer ideals into their interpretations of Rule 26(b)(4)(B) and have refused to follow its liberal spirit, some courts have been brave enough to follow the balanced approach that Meyer offers. For example, The Supreme Court of Alaska not only followed Meyer, but took it one step further with its decision in Alaska v. Leach\textsuperscript{153} by holding, in part, "that the very nature of a condemnation case in and of itself constitutes 'exceptional circumstances' within the intendment of Civil Rule 26(b)(4)(B)...."\textsuperscript{154} In Leach, the government condemned private land and gave the landowner a copy of the appraisal prepared by the expert whom the state planned to call at trial.\textsuperscript{155} When the landowner requested the appraisals prepared by experts whom the state did not plan to call at trial, the state refused.\textsuperscript{156} The landowner asked the trial court to order the state to produce the appraisals of the state's non-testifying experts, and the trial court granted the landowner's request; the Alaska Supreme Court affirmed this decision.\textsuperscript{157}

In reaching this holding, the court soundly rejected the state's "unfairness argument." The state argued that it would be unfair to let the landowner benefit from the state's trial preparation without showing that he could not obtain the same information elsewhere.\textsuperscript{158} However, the court said:

The question should not be decided on the basis of what is fair or unfair to petitioner's counsel, but rather on the basis of what is most likely to attain the objectives of the rule. The broad pol-
icy of all our rules permitting discovery is to eliminate surprise at the trial and to make it convenient for the parties to find and preserve all available evidence concerning the facts in issue, thereby encouraging the settlement or expeditious trial of litigation.\textsuperscript{159}

Thus, the Court rejected the state’s unfairness argument by stating that “considerations of unfairness do not furnish a basis” for rejecting the landowner’s request.\textsuperscript{160} Furthermore, the Court pointed out that Alaska’s Civil Rule 26(b)(4)(C) requires the party seeking the discovery (i.e., the landowner) to pay the other party (i.e., the state) a portion of the expert’s fees and expenses.\textsuperscript{161} This rule ameliorates much of the unfairness the state claims to bear.

After rejecting the state’s unfairness argument, the court held that condemnation actions, standing alone, satisfy the exceptional circumstances test of Rule 26(b)(4)(B). Relying on \textit{Meyer} and drawing on its own policy of liberal interpretation of the discovery rules,\textsuperscript{162} the court pointed out several factors that make condemnation actions in and of themselves “exceptional circumstances.”\textsuperscript{163} These factors include the unique character of condemnation proceedings and the nature of the discovery sought.\textsuperscript{164} Thus, the Alaska Supreme Court took \textit{Meyer} one logical step further by definitively holding that condemnation cases inherently constitute exceptional circumstances outside the restrictive boundaries of Rule 26(b)(4)(B). At least in Alaska, the landowner in a condemnation proceeding is entitled to all of the state’s expert appraisals, whether or not the state plans to call all the experts at trial. As the \textit{Meyer} court said, “[I]t would be intolerable to allow a party to suppress unfavorable evidence by deciding not to use a retained expert at trial.”\textsuperscript{165}

\textit{Leach} remains good case law in Alaska, yet the overwhelming majority of courts have failed to follow its bold lead.\textsuperscript{166} Courts seem sympathetic to the government’s trite “unfairness” argument. Yet, the judiciary’s anti-landowner, pro-government stance cannot be the logical result of a federal law whose purpose is to “avoid litigation and relieve congestion in the courts.”\textsuperscript{167} The judiciary’s stance cannot be the logical result of a constitutional mandate to provide

\begin{footnotes}
\item[159] \textit{Id.} at 1385.
\item[160] \textit{Id.}
\item[161] W. VA. R. Civ. P. 26(b)(4)(C) is identical to the Alaska Rule.
\item[163] \textit{Leach}, 516 P.2d at 1386.
\item[164] \textit{Id.} The \textit{Leach} court also pointed to its liberal discovery policy as a factor in determining whether condemnation actions, standing alone, are inherently exceptional circumstances.
\item[165] \textit{Id.} (citing United States v. Meyer, 398 F.2d 66, 76 (9th Cir. 1968)).
\item[166] \textit{Leach}, 516 P.2d 1383.
\item[167] § 4651.
\end{footnotes}
"just compensation" to the aggrieved landowner.\(^\text{168}\) As the Florida Supreme Court stated in *Shell*, unfairness to the state is not the issue: unfairness to the landowner is.\(^\text{169}\) Due to the unique nature of condemnation proceedings and due to the state’s mandate to ensure that the landowner receives just compensation, the state simply does not have a competitive position to protect.

In the name of common sense, good judgment, fundamental fairness, and constitutionality, all courts should follow *Meyer* and *Leach*. Condemnation cases, as noted above, simply are exceptional circumstances. Just ask any individual who has been ousted from his home whether this extraordinary governmental action constitutes “exceptional circumstances.” Just ask any individual if he or she has the financial resources to compete with the government, and it becomes clear, under Rule 26(b)(4)(B), that condemnation cases are inherently exceptional circumstances because it is impracticable, if not financially impossible, for the landowner to obtain all the facts or opinions regarding the value of his land.

Thus, courts should be forcing governmental agencies to play fair in the eminent domain game. The Alaska Supreme Court and the Ninth Circuit Court of Appeals got it right,\(^\text{170}\) yet other courts continue to drag their proverbial feet. In West Virginia, with condemnation at the fore because of Corridor H, the Supreme Court of Appeals of West Virginia should be working to rebalance the scales of power in condemnation actions. However, the Supreme Court recently rejected the opportunity to change the state’s condemnation policies for the better by sidestepping the Fort Pleasant case.\(^\text{171}\)

Recall that, in the Fort Pleasant case, the state originally sought a writ of prohibition against the Circuit Court of Hardy County because the lower court had ordered the state Department of Highways to produce appraisals and other evaluations relating to the condemned property prepared by all its experts, whether or not the state planned to call these experts as witnesses in the proceeding.\(^\text{172}\) Although the Supreme Court recognized the underlying discovery issue as an “important policy question,”\(^\text{173}\) the court declined to decide the *real* question and simply granted the state’s requested writ of prohibition on technical grounds. Specifically, the Supreme Court evaded the big policy question by latching onto procedure; it remanded the case back to the circuit court with an

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\(^{168}\) U.S. CONST. amend. V.

\(^{169}\) *Shell v. Fla. Rd. Dep’t.*, 135 So.2d 857, 861 (Fla. 1962).

\(^{170}\) *See generally* United States v. *Meyer*, 398 F.2d 66 (9th Cir. 1968); *Leach*, 516 P.2d 1383.


\(^{172}\) *Id.* The state also objected to the circuit court’s order to produce appraisals on land it had condemned within one-half mile of the subject property, but that issue is not the subject of this paper.

\(^{173}\) *Id.* at 698.
order that the circuit court make "findings regarding the presence or absence of 'exceptional circumstances'" that warranted the discovery of the appraisals. 174

However, the Supreme Court strongly hinted that it would take up the real issue if the parties came before it again, and even adopted a new syllabus point designed to facilitate its review of this specific discovery issue: "In order to facilitate future review of orders requiring the production of discovery from or regarding non-testifying experts or consultants, we now specifically hold that a circuit court is required, pursuant to Rule 26(b)(4)(B) . . . to make specific findings regarding the existence of exceptional circumstances justifying the discovery of facts known or opinions held by an expert or consultant who has been retained . . . in anticipation of litigation or preparation for trial and who is not expected to be called as a witness . . . before the circuit court may compel such discovery. . . ." 175

Thus, the Fort Pleasant parties were sent back to circuit court, and the lower court was ordered to make the appropriate findings regarding the existence or absence of exceptional circumstances before compelling the state to turn over its appraisals. 176 And the circuit court did just that: in August of 2007, the Circuit Court of Hardy County made the necessary findings and, once again, compelled the state to turn over the appraisals of its non-testifying experts. 177 Specifically, the court found that "condemnation actions are unique in and of themselves." 178 Furthermore, the court also found that "exceptional circumstances are present in this case, thus warranting WVDOH production of all appraisal reports performed on the condemned property at hand, and also those appraisal reports completed by testifying experts on property surrounding Fort Pleasant's property." 179 Once again, the state appealed to the West Virginia Supreme Court for a writ of prohibition. 180 And yet again, despite its ideological posturing in Cookman, the Supreme Court rejected the case. The Supreme Court's action has left West Virginia's circuit courts to flounder in its indeterminate wake.

Thus, the debate over the discoverability of appraisals performed by non-testifying experts hired by the state in condemnation proceedings continues in West Virginia. In Hardy County, the state must turn them over. But what about in the state's other fifty-four counties? Why did the Supreme Court sidestep this important issue?

174 Id.
175 Id. at 699.
176 Id. at 700.
178 Id. at 5.
179 Id.
Although the make-up of the West Virginia Supreme Court recently changed, deep division over the issue likely remains. Justice Starcher, whose term expired at the end of 2008, concurred in the court’s new syllabus point but dissented from the majority on policy grounds. Justice Starcher seems to want to follow the legacy of Meyer and Leach because he argued in his dissent for a balanced approach to condemnation. Justice Starcher wrote that, “[i]n condemnation cases, the government is the proverbial 800-pound gorilla. It can take your property, period. . . . In these lopsided circumstances, a property owner is entitled to anything that can help make the case for just full compensation. These are inherently ‘exceptional circumstances.’”

Furthermore, just as the Meyer and Leach courts did, Justice Starcher rejected the state’s “unfairness” argument as a matter of public policy. He argued that the state “is supposed to be transparent. Secrecy is the exception in the doing of governmental business.” Following the spirit of Meyer, Justice Starcher said that the people “have an absolute right to know how a government arrived at a suggested price for land, including advice that experts told the government—but that the government decided not to follow.” Finally, Justice Starcher upbraided the state for acting like the U.S. Department of Homeland Security: “The Department of Transportation’s ‘secrecy policy’ on what other appraisers told them suggests that the DOT thinks they are dealing with port security, instead of what a citizen is due for his property.”

Justice Starcher has evaluated the issue correctly. He correctly sees that the state should not be allowed to take a competitive, aggressive stand against the aggrieved landowner. He correctly states that the state should not be allowed to employ secretive tactics, especially in condemnation cases where “the only issue is how much the property is worth” and where the state has a constitutional mandate to ensure that the landowner receives just compensation for the taking. Thus, Justice Starcher gives West Virginians a glimmer of hope for fairness in condemnation actions. Although his words are found in a dissent, his strong dissent suggests that if the Supreme Court ever decides to confront this “important policy question” head-on, it will have lively debate on the issue.

Justice Starcher’s dissenting position in Cookman is stronger than Justice Davis’s dissenting position, because she relies on the technical “not in anticipation of litigation” argument. Although this argument works in Mary-

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181 Cookman, 639 S.E.2d at 700 (Starcher, J., dissenting).
182 Id.
183 Id. (emphasis in original).
184 Id.
185 Id.
186 Id.
187 Id. (emphasis added).
188 Id. at 701 (Davis, C.J., dissenting).
land, her position is on shaky ground in West Virginia because of the new syllabus point adopted by the West Virginia Supreme Court in Cookman. The language of this syllabus point indicates that the majority considers the state’s non-testifying experts to be hired in anticipation of litigation: “a circuit court [must] make . . . findings . . . of exceptional circumstances justifying . . . discovery . . . of opinions . . . held by an expert or consultant who has been retained . . . in anticipation of litigation or preparation for trial and who is not expected to be called as a witness . . .” Thus, because the West Virginia Supreme Court has already decided that the state acts in anticipation of litigation when it hires expert appraisers in condemnation cases, a West Virginia condemnee will have a hard time convincing a court that the state was not acting in anticipation of litigation, no matter what the condemnation statute says.

The conceptual framework the West Virginia Supreme Court built with its new syllabus point in Cookman is a positive, albeit small, step towards the balanced approach advocated by Meyer and Leach because it would easily allow the court to finally find, as Justice Starcher did in his dissent, that all condemnation cases inherently constitute “exceptional circumstances” outside the boundaries of Rule 26(b)(4)(B). The Court could build upon this syllabus point by laying down new common law that compels the state to share all its appraisals of condemned land with the condemnee. The Circuit Court of Hardy County has taken a first step towards fundamental fairness by ordering the state to turn over its appraisals in the Fort Pleasant case; maybe the bold actions of Judge Cookman will inspire the justices of the West Virginia Supreme Court of Appeals to do the same.

VI. CONCLUSION

Meyer and Leach stand for fundamental fairness in condemnation proceedings. The state should never be allowed to take a competitive stance against the individual landowner in a condemnation proceeding because, as a matter of public policy, the state should ensure that the landowner receives “just compensation” for the taking. This requirement is not only good policy, but is also a constitutional mandate. Furthermore, the state would be advantaged if it shared its appraisals with the landowner because the landowner would understand the state’s basis for formulating just compensation, and would be less likely to file suit.

Given that the construction of Corridor H has pushed the issue of eminent domain to the forefront of social, political, and judicial discourse, the Su-

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190 Cookman, 639 S.E.2d at syl. pt. 4.
191 Id. at syl. pt. 6 (emphasis added).
192 Both 42 U.S.C. § 4651 and W. Va. Code § 54-3-2 specifically state that one purpose of the condemnation law is to “avoid litigation and relieve congestion in the courts. . . .”
One Man v. The ’800-Pound Gorilla’

The Supreme Court of Appeals should seize this timely opportunity to settle this discovery issue once and for all. The Court, as per Justice Starcher, should lay down new common law that compels the state to share all its expert appraisals of condemned land with the condemnee in the name of “just compensation.” As Justice Starcher said in his dissent, “the government is the proverbial 800-pound gorilla...[i]n these lopsided circumstances, a property owner is entitled to anything that can help make the case for full compensation. These are inherently ‘exceptional circumstances.’”

Now all the West Virginia Supreme Court of Appeals has to do is something—anything—about it.

Allison Minton*

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193 Cookman, 639 S.E.2d at 700 (Starcher, J., dissenting) (emphasis in original).

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