The Sandbagging Phenomenon: How Governments Lower Eminent Domain Appraisals to Punish Landowners

By C. Jarrett Dieterle

Note from the Editor:

This article discusses a controversial practice known as "sandbagging" in eminent domain proceedings. The article describes and criticizes the practice, then suggests ways in which courts and legislatures might seek to curb its use.

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• Katrina Miriam Wyman, *The Measure of Just Compensation*, 41 U.C. Davis L. Rev. 239 (2007), http://lawreview.law.ucdavis.edu/issues/41/1/articles/davisvol41no1_wyman.pdf.

• Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 Mich. L. Rev. 102 (2006), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=875412.

• Steve Calandrillo, *Eminent Domain Economics: Should 'Just Compensation' Be Abolished, and Would 'Takings Insurance' Work Instead?*, 64 Ohio St. L.J. 451 (2003), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=693042.

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Government is instituted to protect property of every sort . . . [t]his being the end of government, that alone is a just government, which impartially secures to every man, whatever is his own.

– James Madison[1]

Introduction

The landmark 2005 Supreme Court case of *Kelo v. New London* sparked a wave of eminent domain reform across the United States.[2] Given the focus of *Kelo*, most of these reforms concerned the "public use" prong of the Fifth Amendment's Takings Clause. The legal community's post-*Kelo* focus, however, may have (understandably) diverted attention away from the second prong of the Takings Clause—"just compensation"—and how it is equally ripe for governmental abuse. This focus on only one prong of the Takings Clause should be resisted; as one scholar has put it, the "current inadequacy" of the public use requirement in the aftermath of *Kelo* "compels attention to the just compensation limitation to protect property rights."[3]

Governments today are often as likely to undermine their citizens' property rights by systematic undercompensation as by elastic definitions of what constitutes a proper "public use." There has been a noticeable trend in local and state governments around the country "sandbagging" or "lowballing"[4] property owners whose property they take, which results in landowners being denied proper compensation for land seized via eminent domain. Sandbagging occurs when a government decides it wants to seize a certain parcel of land pursuant to its eminent domain powers and arranges for an appraisal to determine the land's worth. The government will then make the landowners a pre-condemnation offer based on this first appraisal. If these negotiations fail, the government institutes an eminent domain proceeding to force the sale of the land. But once the case goes to trial, the government pulls a bait-and-switch and uses a second, lower appraisal as its evidence of the land's value.

The result is that landowners face a no-win situation. If they believe the government's initial offer is too low, they not only face the prospect of litigation (with its attendant costs), but they risk the government attempting to punish them by lowering the appraisal later in the process. In other words, governments attempt to dissuade landowners from holding out for more compensation by punishing those that do so, which results in governments getting away with systematic undercompensation in eminent domain proceedings. In essence, a sandbagging government says to landowners, "if you think our

1 James Madison, Property, *The Writings of James Madison*, ed. Gaillard Hunt (1900), Vol. 6, at 101-102, http://oll.libertyfund.org/titles/1941#Madison_1356-06_476.

2 *See* Ilya Somin, *The political and judicial reaction to* Kelo, The Volokh Conspiracy (June 4, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/04/the-political-and-judicial-reaction-to-kelo/?utm_term=.e9101e59e44f.

3 *See* Danielle B. Ridgely, *Will Virginia's New Eminent Domain Amendment Protect Private Property?*, 26 Regent U. L. Rev. 297, 320 (2014).

4 *See* A. Barton Hinkle, *Theft-by-Government Continues Through Eminent Domain*, Reason (Jan. 27, 2016), http://reason.com/archives/2016/01/27/theft-by-government-continues-through-em.

initial appraisal is too low, just see how low we'll go if you take it to court!"

The sandbagging phenomenon has started to receive more exposure in popular media,[5] as commentators have recognized that a government that systematically undercompensates landowners is a government that is failing to protect the basic property rights of its citizens. This article analyzes the sandbagging phenomenon and points out substantive reforms that could be implemented to guard against the practice. The article starts by briefly explaining the doctrinal underpinnings of the Just Compensation Clause of the Fifth Amendment, the rationales for compensating landowners for property taken pursuant to eminent domain, and the prevalence of undercompensation. Then, it discusses the specific phenomenon of sandbagging through case law, scholarly articles, and news reports. Finally, it addresses why sandbagging is so problematic and suggests possible ways to prevent it.

I. Background on Just Compensation

A. Historical and Doctrinal Roots of Just Compensation

Local governments in America started using the power of eminent domain in the pre-Revolutionary colonial era, often for the purpose of building public roads or buildings.[6] While "[n]o colonial charter expressly required compensation," when land was seized by the government, "compensation for takings 'was well established and extensively practiced.'"[7] The first form of a compensation clause appeared in the 1641 Massachusetts Body of Liberties, and just compensation clauses thereafter began to show up in state constitutions, and ultimately the U.S. Constitution.[8]

Over the years, the U.S. Supreme Court has held that just compensation is to be defined as the fair market value of a piece of property at the time of the taking.[9] Fair market value, in turn, has been defined as the amount a willing buyer and a willing seller would mutually agree to in a market transaction for the property at issue.[10] The generally recognized goal when determining a proper amount of compensation is to restore landowners to the same financial position that they were in prior to the taking of their land.[11] States have traditionally interpreted just compensation under state constitutions in the same way.

B. Rationales for Why Just Compensation Is Required When Land is Taken

A few of the many rationales for why just compensation is legally and morally required when the government takes property are worth summarizing here. Some justify such compensation based on notions of natural rights and the Lockean labor theory of property.[12] Locke theorized that there is a natural right to enjoy the fruits of one's own labor, and that property rights stem from that basic right. Thus, taking away property that was built or bought by a person's labor requires compensation; without it, the owner is deprived of that natural right.[13]

Just compensation has also been justified under a corrective justice theory, in which compensation can be viewed "as an attempt to make the victim [the property owner] whole" after the government has interfered with the owner's property rights.[14] Compensation can be viewed through a more utilitarian lens, as well—*i.e.*, as a mechanism to encourage investment in property by providing a backstop if that property is later seized pursuant to eminent domain.[15] This backstop can be particularly helpful in encouraging investment by more risk-averse, less wealthy individuals who might be concerned about a highway being re-routed through a piece of land they are considering for purchase.

Finally, the compensation requirement can constrain the government's exercise of its eminent domain powers. Under this framework, the compensation requirement can be likened to tort liability in that it forces the government to "internalize" and "bear the costs" of its eminent domain decisions.[16] This cost-internalization requires governments to exercise prudence when making decisions about what property to seize via eminent domain.[17] Budget constraints work to limit the amount of property that governments can take insofar as each taking requires a corresponding amount of compensation; therefore governments are "motivate[d] to make efficient decisions" about how much property they should take.[18]

Each of these rationales for just compensation is undermined when governments systematically undercompensate property owners via tactics like "sandbagging." Landowners are

5 *See id.*; Editorial, *Sandbagging, exposed*, Richmond Times-Dispatch (Apr. 19, 2015), http://www.richmond.com/opinion/our-opinion/article_c05a855f-dcbc-5394-9a2e-ad2b4040a46f.html; Jason Marks, *Landowners accuse VDOT of scam*, WAVY.com (Feb. 10, 2014), http://wavy.com/2014/02/10/landowners-accuse-vdot-of-scam/.

6 *See* Ridgely, *supra* note 3, at 302–3.

7 *Id.* at 303.

8 *Id.*

9 *See* Olson v. United States, 292 U.S. 246, 255 (1934) ("[T]he market value of the property at the time of the taking contemporaneously paid in money. . . . Just compensation includes all elements of value that inhere in the property, but it does not exceed market value fairly determined.").

10 *See* United States v. Miller, 317 U.S. 369, 374 (1943) ("It is usually said that market value is what a willing buyer would pay in cash to a willing seller.").

11 *Id.* at 373.

12 *See* Steve P. Calandrillo, *Eminent Domain Economics: Should "Just Compensation" Be Abolished, and Would "Takings Insurance" Work Instead?*, 64 Ohio St. L.J. 451, 489 (2003).

13 *Id.*

14 Katrina Miriam Wyman, *The Measure of Just Compensation*, 41 U.C. Davis L. Rev. 239, 249 (2007); *see also* Calandrillo, *supra* note 12, at 489.

15 *See* Calandrillo, *supra* note 12, at 490-91.

16 *See* Wyman, *supra* note 14, at 246.

17 *Id.*

18 *Id.*; *see also* Calandrillo, *supra* note 12, at 491. Some scholars have cast doubt on this incentive effect. *See* Wyman, *supra* note 14, at 246-48 (noting that governments are often motivated more by political than economic factors and that taxpayers rather than government officials are actually the entities that ultimately pay for any taken property).

deprived of their rights, they are not made whole, investors are uneasy, and governments have less reason to exercise restraint in the use of their eminent domain powers.

C. The Prevalence of Undercompensation

The fair market value standard for just compensation may seem straightforward and sufficient for ensuring that property owners are properly compensated when their property is taken, but lawyers and commentators have long recognized that undercompensation is common even where legal requirements are met.[19]

The main theoretical complaint about the fair market value metric for compensation is that it overlooks many factors that are important in the average property transaction. For one, fair market value routinely ignores factors that individual sellers would consider in an actual voluntary transaction.[20] A family that places extra sentimental value on its family farm, for example, would presumably demand a premium above mere market value in order to part with it. Under the fair market value standard, however, the government merely pays for what it has acquired, not what the owner has lost.[21] Another factor that might be considered in a true market transaction, but that often goes unaddressed in eminent domain sales, is the future value and income that the property might generate.[22] Landowners who lose their property to eminent domain have no chance to reap the benefits of any lucrative future uses of their property.

Fair market value also fails to compensate for more basic costs that landowners incur when they are forced to give up their property. Landowners are not compensated for losses arising from moving expenses, attempts to acquire a new piece of property to replace the old one, or the loss of value a relocated business suffers after being forced to move.[23] And last but definitely not least, landowners who go through eminent domain proceedings must cover any attorney and expert fees that are required for contesting the taking.[24]

While undercompensation can occur at any stage of eminent domain proceedings, it is particularly prevalent in the pre-condemnation stage.[25] Again, pre-condemnation offers are often used by governments to induce landowners to voluntarily sell their property without the hassle of instituting an actual condemnation proceeding. Undercompensation in the pre-condemnation setting is common for several reasons. First, landowners often assume that the government is generally honest and would not attempt to shortchange them for their property, which often makes them willing to simply accept the government's first offer for their land. Second, even if property owners suspect that a pre-condemnation offer might be inadequate, they view any attempts to fight back against the government as futile. Third, property owners frequently decide that contesting a taking is not worth the effort and expense (condemnation lawyers often suggest that litigation contesting undercompensation is not economically feasible unless the spread between the offer and the true value of the property is at least $75,000).[26] Finally, many landowners are upset about losing their property and want to take a quick offer and get on with their lives.[27]

II. The Sandbagging Phenomenon

A. How Sandbagging Happens

Sandbagging happens when a condemning authority appraises a property slated for condemnation—often as the basis for a pre-condemnation offer to purchase the property—only to later *lower* the appraisal estimate if the landowner refuses to accept the condemning authority's initial offer. This is usually done by commissioning two appraisals—a higher appraisal that is used as the basis for the initial offer, and then a lower appraisal for use in an actual condemnation proceeding.

Sandbagging is often—though not always[28]—facilitated by a process known as "quick-take," under which local and state governments (if authorized under state law) can seize a landowner's property immediately.[29] This accelerated process allows the condemning authority to enter the property and start its project before condemnation proceedings are formally instituted, which can be important for time-sensitive government projects that cannot wait several years for an eminent domain case to reach its conclusion. In most quick-take situations, if the landowner refuses the government's initial offer, the government will file a certificate of take with the local court where the land is located, as well as a deposit equal to the government's estimate of the property's value. The condemning authority is then

19 Empirical research has also provided some evidence that could back up concerns that undercompensation is prevalent. *See generally* Yun-Chien Chang, *An Empirical Study of Compensation Paid in Eminent Domain Settlements: New York City 1990-2002*, Law & Economics Research Paper Series Working Paper No. 08-52 (Nov. 2008), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120072.

20 *See* Gideon Kanner, *[Un]Equal Justice under Law: The Invidiously Disparate Treatment of American Property Owners in Taking Cases*, 40 Loy. L.A. L. Rev. 1065, 1088 (2007); Brian Angelo Lee, *Just Undercompensation: The Idiosyncratic Premium in Eminent Domain*, 113 Colum. L. Rev. 593, 595 (2013); Wyman, *supra* note 14, at 255.

21 *See* Kanner, *supra* note 20, at 1088.

22 *See* Wyman, *supra* note 14, at 255.

23 *Id.* at 254; Kanner, *supra* note 20, at 1093.

24 Wyman, *supra* note 14, at 254; Kanner, *supra* note 20, at 1091.

25 Kanner, *supra* note 20, at 1105.

26 *Id.*

27 *See id.* for more on these pre-condemnation factors.

28 Sandbagging simply refers to a situation where a condemning authority values a parcel of property at a certain level, only to lower that valuation later in the eminent domain process. Thus it can happen in non-quick-take settings, as well. Quick-take, however, is particularly ripe for sandbagging.

29 *See, e.g.*, Va. Code § 33.2-1018; Henry Howell, III and Christi Cassel, *The Differences In "Quick-Take" And "Slow-Take" When Property is Condemned*, Waldo & Lyle, P.C., http://www.waldoandlyle.com/resources/waldo-and-lyle-articles/98-the-differences-in-qquick-takeq-and-qslow-takeq-when-property-is-condemned.

required to bring a timely condemnation proceeding against the property.[30]

In the meantime, the property owner can withdraw the deposited funds without compromising her ability to contest the amount of compensation that must be paid for the property during the later condemnation proceeding.[31] The property owner takes a risk in doing so, however, because if the value of the property is determined to be *less* than the amount the government initially deposited during the quick-take process, the landowner is on the hook for *repaying* the difference.[32] Such an outcome can put some types of property owners—such as small business owners who lose their storefront via quick-take and are forced to immediately withdraw the deposited funds in order to buy a new storefront for their business—in an impossible position. If they are later required to reimburse the government if the condemnation proceeding does not go their way, they may lack the liquid assets to do so.[33]

A government that lowers its appraisal of the property in question once a formal proceeding is commenced only increases the stakes for landowners who refuse an initial offer and decide to test their chances in court. In fact, knowledgeable practitioners in the area of condemnation have suggested that the purpose of sandbagging is "to coerce the [land]owner into accepting the pre-litigation offer on pain of running the risk of a verdict below that offer."[34]

Consider this representative example of sandbagging. In 2009, the Virginia Department of Transportation (VDOT) began trying to acquire a .387-acre parcel of land from James and Janet Ramsey in Virginia Beach using Virginia's quick-take process.[35] VDOT, which sought the property for the purpose of constructing an off-ramp for a state highway, ordered an appraisal of the parcel in question. The appraisal found the property to be worth about $246,000. The Ramseys, deciding that this amount was inadequate, refused to accept VDOT's initial offer, electing to hold out for a higher amount at trial. The government accordingly deposited the money as required under the quick-take process, and the Ramseys withdrew it and invested it. Once the case proceeded to court, however, VDOT hired a second appraiser, who testified that the property was only worth around $92,000. The Ramseys attempted to introduce evidence of the first appraisal in their condemnation proceeding, and they had to take their case all the way to the Virginia Supreme Court to establish their right to do so. That portion of their case will be discussed further below.[36]

B. The Prevalence of Sandbagging

The condemnation bar considers sandbagging a fairly common practice,[37] and examples of it have sprung up in New York and California and many places in between.[38] Law professor Gideon Kanner has even created a blog which, among other things, tracks instances of lowballing and sandbagging from around the country.[39]

Ultimately, it is hard to know the true extent of the problem. Many potential examples of it go unreported because landowners accept the government's first offer, even if they view it as inadequate.[40] This reduces the chance that a news reporter will cover a sandbagging story—a news agency is much more likely to cover a case like the Ramseys' that makes it all the way to the Virginia Supreme Court than a story about a landowner that

30 *See generally* Charles M. Lollar and Jeremy P. Hopkins, *Virginia Eminent Domain: Frequently Asked Questions*, Waldo & Lyle, P.C., http://pstrust.org/wp-content/uploads/2013/04/Virginia-Summary-2014.pdf.

31 *Id.*

32 *See* A. Barton Hinkle, *When Eminent Domain Is Just Theft*, Reason (Feb. 17, 2014), http://reason.com/archives/2014/02/17/when-eminent-domain-is-just-theft.

33 *Id.*

34 Gideon Kanner, *Sic Transit Gloria: The Rise and Fall of Mutuality of Discovery in California Eminent Domain Litigation*, 6 Loy. L.A. L. Rev. 447, 461 n.59 (1973).

35 For a full recitation of these facts, see *Ramsey v. Comm'r of Hwys*, 770 S.E.2d 487, 488-89 (Va. 2015); *see also* Hinkle, *supra* note 32.

36 For more discussion on the *Ramsey* case, see Section III.A. below.

37 *See* Kanner, *supra* note 34, at 461 n.59.

38 *See, e.g.*, *Ramsey*, 770 S.E.2d at 488-89 (first offer $246,000; lower to $92,000 at trial); City and County of San Fran. v. Convenience Retailers, No. CGC-11-507339 (2013) (first appraisal of $5 million; lowered to $3.125 million at trial after claiming $1.3 million needed to be deducted for remediation of site); Sacramento Area Flood Control Agency v. Souza, No. 34-2010-00083124 (2013) (first appraisal $330,000; lowered to $195,000 at trial); United States v. Harrell, 642 F.3d 907 (10th Cir. 2011) (first government valuation of a mineral interest was $700,000; government later adduced expert testifying interest was worth $185,500); Land Clearance for Redevelop. Auth. of St. Louis v. Henderson, No. 0622-CC05527 (Mo. Ct. App. Nov. 29, 2011) (initial government valuation of property was $562,500 minus clean-up costs; government's valuation evidence at trial lowered to $230,600 minus clean-up costs); Mich. Dept. of Transp. v. Frankenlust Lutheran, No. 03-003055-CC (Mich. Ct. App. 2006) (first offer $592,000; lowered to $409,000 at trial); CMRC Corp. v. New York, 270 A.D.2d 27 (N.Y. App. Div. 2000) (first offer $4.8 million; lowered to $3.6 million); Community Redevelopment Agency v. World Wide Enterprises, Inc., 77 Cal. App. 4th 1156 (Cal. Ct. App. 2000) (first offer just over $1 million; lowered to $810,000). *See also* Michael Rikon, *Supreme Court, Rockland County Agrees with Claimant's Highest & Best Use, Awards $741,671.00 in Just Compensation*, Bulldozers At Your Door (Mar. 6, 2015), http://eminent-domain-blog.com/supreme-court-rockland-county-agrees-claimants-highest-best-use-awards-741671-00-just-compensation-claimant/ (discussing the New York case of *Ferguson Management Company, LLC v. The Village of Haverstraw*, which involved a first offer of $575,000 that was lowered to $316,500 at trial), *and* Michael Rikon, *Appellate Division Affirms Award in AAA Electricians*, Bulldozers At Your Doorstep (Feb. 27, 2015), http://eminent-domain-blog.com/appellate-division-affirms-award-in-aaa-electricians/ (discussing the case of *Village of Haverstraw v. AAA Electricians, Inc.*, which involved a first offer of $3.4 million that was lowered to $1.5 million); Marks, *supra* note 5 (news investigation finding several examples of sandbagging in Virginia involving the VDOT, including a property appraisal in Virginia Beach that was dropped from $210,000 to $17,000; an offer in Prince William County that dropped from $214,000 to $14,000; and a property appraisal in Northern Virginia that was reduced from $3.9 million to $2.1 million); Hinkle, *supra* note 5 (describing a situation in Virginia where the first appraisal of $466,000 was reduced to $130,000).

39 *See generally Lowball Watch*, Gideon's Trumpet, http://gideonstrumpet.info/category/lowball-watch/.

40 *See* Kanner, *supra* note 20, at 1104-04 (noting that initial eminent domain offers "are frequently accepted by large numbers of property owners," often "in spite of their inadequacy"). For more on why landowners oftentimes accept offers that undercompensate them, see Section I.C.

reluctantly but willingly accepted the condemning authority's initial offer. The same goes for reported case law,[41] which cannot capture situations where no formal eminent domain proceeding occurred or where the dispute was settled out of court. Because of these factors, many situations in which governments engage in or threaten sandbagging tactics never make it into the public eye.

Despite the difficulty of empirically measuring the prevalence of sandbagging across the country, those most in tune with eminent domain law—practitioners in the field and academics who study it—believe that instances of sandbagging are common and on the rise. As one eminent domain attorney from Michigan noted, "a lot of the government agencies . . . across the country" are "lowering their offers to punish people for fighting them."[42] Other practitioners in the field have noted similar trends.[43]

The fact that sandbagging is common across the United States gives rise to real concerns about whether local and state governments are respecting and protecting Americans' property rights. One or two cases could be chalked up to a few "bad apple" local governments, but the wave of sandbagging cases around the country suggests that many governments are engaged in a systematic deprivation of the Fifth Amendment's fundamental protections.

C. Why Sandbagging Is So Problematic and How Governments Rationalize It

Sandbagging is a problem for many reasons. It puts a thumb on the scale for the party that already possesses more power and against the party that is not accused of any wrongdoing. It also distorts the government's role as an impartial entity that is supposed to seek justice rather than victory and distorts the incentives involved in eminent domain.

Eminent domain proceedings present "a classic David-and-Goliath situation" in which the landowner "is confronted by the full legal power of the state, asserting a practically boundless authority to take [their] property against [their] will."[44] Unlike nearly every other form of lawsuit or court case, eminent domain proceedings involve no true "defendant" or party accused of wrongdoing.[45] Rather, condemnees find themselves mired in potential litigation surrounding their property through no fault of their own and "solely because their property is coveted by another."[46] This distinctive posture stems from the fact that condemnation proceedings and the procedures surrounding them have distinct and separate roots from traditional lawsuits under the English common law system.[47]

Therefore, the government's role should not be viewed as that of a plaintiff pressing for its rights, but rather as an impartial entity attempting to fairly compensate those who lose their property through eminent domain.[48] In fact, many government entities require those charged with administering condemnation proceedings to take an oath swearing that they will "faithfully and impartially ascertain the amount of just compensation to which a party is entitled."[49] Because of this obligation, condemning authorities have been likened to prosecutors, whose job is not to just "win" a case but rather to "do justice."[50]

Not only does sandbagging exacerbate this unequal power dynamic inherent in all condemnation proceedings, it also

41 See *supra* note 38. It is worth noting that the sample of sandbagging cases I've provided is far from a comprehensive list. The terms "sandbagging" and "lowballing," while gaining currency among members of the eminent domain bar, are not universal terms used to describe these types of tactics, making case law searches difficult. Further, as touched upon above, most eminent domain condemnation disputes are settled out of court, which means that any reported cases are just the tip of the iceberg when it comes to gauging the true extent of the sandbagging phenomenon.

42 Hinkle, *supra* note 32.

43 *See* Marks, *supra* note 5 (quoting a Virginia eminent domain attorney saying that more and more sandbagging cases are springing up across the state); Michael Rikon, *The Second Higher Appraisal: Stop the Games and Produce It*, Bulldozers At Your Doorstep (May 13, 2015), http://eminent-domain-blog.com/second-higher-appraisal-stop-games-produce/ ("In New York, we frequently see Condemnors file and exchange lower appraisals than the one used to pay an advance payment."); A. Barton Hinkle, *VDOT muscle: An eminently unfair practice*, Richmond Times-Dispatch (Feb. 16, 2014, http://www.richmond.com/opinion/our-opinion/bart-hinkle/article_f39ebb87-2adf-51f7-beae-e97500450530.html (quoting Prof. Gideon Kanner as saying that the practice of sandbagging is "very, very common").

44 Brief for Pacific Legal Foundation and ACLU Fund of Michigan as *Amici Curiae* Supporting Defendant-Appellants, County of Wayne v. Hathcock, Nos. 124070-124078, at 15 (Mich. 2004), http://www.aclumich.org/sites/default/files/file/pdf/briefs/poletownamicusbrief.pdf; *see also* Ridgely, *supra* note 3, at 322 ("[T]he citizen knows that the government wields the power of eminent domain and will exercise it if the parties cannot come to a favorable agreement. The property owner faces an uneven playing field … The government's access to eminent domain gives the government more leverage in negotiations; thus, property owners are automatically disadvantaged.").

45 *See* Trout v. Commonwealth Transp. Comm'r of Virginia, 241 Va. 69, 73 (Va. 1991) ("[T]he parties to a condemnation proceeding are not in the position of plaintiffs and defendants in traditional actions or suits. The exercise of the power of eminent domain, and the implementation of the constitutional just-compensation clause which circumscribes it, grow out of an entirely different history.").

46 Brief for Owner's Council of America as *Amici Curiae* Supporting Appellants, *Ramsey v. Comm'r of Highways*, No. 140929 (Va. 2015), at 7, https://www.scribd.com/document/250389854/Amicus-Brief-of-Owners-Counsel-of-America-in-Ramsey-v-Commissioner-of-Highways-Record-No-140929-Virginia-Supreme-Court ("An owner in an eminent domain action has done nothing wrong, broken no promises, and committed no negligence; he or she is mired in litigation solely because their property is coveted by another.").

47 *See id.* ("The exercise of the power of eminent domain, and the implementation of the constitutional just-compensation clause which circumscribes it, grow out of an entirely different history."); Hamer v. School Bd. of the City of Chesapeake, 240 Va. 66, 72-73 (Va. 1990) (noting that condemnation proceedings originated under English common law pursuant to a writ of *ad quod damnum*, which was later modified under the American system to ensure due process guarantees).

48 *See Hamer*, 240 Va. at 73 (noting that condemning authorities are supposed to be disinterested parties whose role is to impartially ascertain the value of the property at issue, not to act as a jury attempting to decide a case "according to the evidence").

49 *See, e.g.*, Va. Code. § 25.1-230.

50 *See* Owner's Council of America Brief, *supra* note 46, at 7. *See also* United States v. Certain Prop. Located in Borough of Manhattan, 306 F.2d 439, 452-53 (2d. Cir. 1962) ("Just as the Government's interest 'in a criminal prosecution is not that it shall win a case, but that justice shall be done,'

creates perverse incentives for landowners and governments. It discourages landowners from pursuing just compensation challenges, even if they believe they were undercompensated. And it encourages governments to consistently make low initial offers to landowners in an effort to see what they can get away with. After all, as previously discussed, landowners often feel pressure to just accept the government's first offer and avoid the unpleasant hassle of protracted litigation (or the landowners believe that the government would never try to shortchange them).

Given this backdrop, one might wonder how governments could possibly defend their use of lowball offers and sandbagging tactics. The usual justification given by government officials is that they are just trying to protect their taxpaying citizens from overpaying for property that is seized via eminent domain.[51] While this argument may have surface appeal, it creates a "tyranny of the majority" problem in which the government sacrifices the rights of the few (landowners) in favor of the rights of the many (taxpayers). Constitutional rights are not always budget efficient, and rights like those enshrined in the Fifth Amendment are specifically intended to protect minority interests from the masses.

III. Potential Solutions to the Sandbagging Problem

Given the fact that sandbagging appears to be a persistent and growing problem across the United States, it may be appropriate for policymakers and legal reformers to take steps to address it. There are several changes that could be made to current eminent domain law that would help to dissuade governments from lowering appraisals as a means of punishing landowners who hold out for more compensation.

A. Allowing Admission of the First Appraisal or Offer Into Evidence

Perhaps the simplest way to cut back on sandbagging would be to shed more light on the practice. While there has been some increased media attention to the phenomenon of sandbagging, the legal system could also be reformed to make it easier for landowners to expose sandbagging tactics in court. This would mean allowing landowners to introduce evidence of a government's first appraisal in court in order to show that the appraisal was subsequently lowered once the case went to trial.

This could be accomplished by allowing landowners to use the initial appraisal to impeach the state's appraiser when he or she testifies at trial.[52] If the government's appraiser testifies at trial that the value of the property is $64,000, but the same appraiser had originally estimated the value at $200,000, then the landowner should be able to undermine the appraiser's credibility with evidence of the earlier appraisal. Allowing introduction of a higher initial appraisal for impeachment purposes, however, has a significant shortcoming. Governments could elect to switch appraisers midstream to prevent the landowner from using the first appraisal for impeachment purposes.

Courts could also allow evidence of the initial offer as a party admission by the condemning authority, as some courts have already done. In *United States v. 320.0 Acres of Land*, the Fifth Circuit held that statements of just compensation that were provided to a prospective condemnee "are admissible at a subsequent compensation trial as an admission, once it becomes known that at trial the Government is valuing the property at a lower figure."[53] In *320.0 Acres*, the Department of the Interior was seeking to condemn numerous tracts of land as part of the Everglades National Park project.[54] Pursuant to the Uniform Relocation Assistance and Real Property Acquisition Act of 1970—which "exhort[s]" federal agencies to appraise the property at issue, establish an amount the agency believes to be just compensation, and then attempt to acquire the property for this amount—Interior produced initial just compensation estimates, but these were higher ($20,000 and $80,000) than what the government ultimately presented as the value of the tracts at trial ($12,000 and $64,000 respectively).[55]

The federal government argued that the landowners should be barred from introducing these earlier appraisals at trial because they were offers made during a settlement negotiation and thus were excludable under Rule 408 of the Federal Rules of Evidence.[56] The court in *320.0 Acres* rejected this line of argument, noting that estimates of value are distinct from offers made during a negotiation, and pointing out that at the time the appraisals were compiled there were no ongoing settlement

so its interest as a taker in eminent domain is to pay 'the full and perfect equivalent in money of the property taken,' neither more nor less—not to use an incident of its sovereign power as a weapon with which to extort a sacrifice of the very rights the Amendment gives." (citations omitted)).

51 *See* Hinkle, *supra* note 4 (quoting a local town officials as saying the town "has a duty to be the guardian of the taxpayers' hard-earned tax dollars . . . The town cannot squander taxpayers' money by paying an amount that grossly exceeds our experts' appraisal.").

52 *See, e.g.*, County of Costa v. Pinole Point Properties, 27 Cal. App. 4th 1105, 1112-13 (1994) (holding that despite a California statutory provision barring the use of appraisals made in connection with a quick-take deposit for impeachment, if the condemning agency elects to call the appraiser who helped the government prepare its deposit as its valuation witness at trial, that appraiser can be impeached by use of his prior appraisal); *but see* Comm. Redevelopment Agency v. World Wide Enterprises, 77 Cal. App. 4th 1156 (2000) (finding that *Pinole Point* was wrongly decided and holding that appraisals made in connection with a quick-take deposit can never be used at trial). *See also* CMRC Corp., 270 A.D.2d 27 (government argued appraiser's report was immune from discovery because it constituted material prepared for litigation, but court held that if appraiser takes the stand at trial, he would be subject to cross-examination and at that point the report would become discoverable).

53 605 F.2d 762, 824-25 (5th Cir. 1979). The Fourth Circuit, in *Washington Metropolitan Area Transit Auth. v One Parcel of Land*, 548 F.2d 1130 (4th Cir. 1977), held that a landowner who rejected a pre-condemnation offer could not introduce that offer as proof of value in the subsequent condemnation trial. Although at first blush it appears that the Fourth Circuit's holding in *Washington Metro* causes a circuit split with the Fifth Circuit's holding in *320.0 Acres*, the two cases are likely not in tension given that *320.0 Acres* only allowed the introduction of a preliminary statement of just compensation, not an actual offer, into evidence to rebut the government's second lower appraisal.

54 *Id.* at 768.

55 *Id.* at 823-24.

56 *See* Federal Rules of Evidence Rule 408 (forbidding the admission into evidence of offers or statements made during negotiation).

negotiations between the government and the landowners.[57] While acknowledging that the "[g]overnment is [still] free to explain [at trial] why it now believes its earlier appraisal to be inaccurate," the court stated that the government was "not completely free to play fast and loose with landowners—telling them one thing in the office and something else in the courtroom."[58]

The Virginia Supreme Court recently issued a similar holding in the *Ramsey* case, which was discussed above.[59] After the Ramseys rejected VDOT's initial appraisal and offer, the government introduced a much lower appraisal at trial. In response, the Ramseys attempted to introduce evidence of the first appraisal in court. Like the Fifth Circuit in *320.0 Acres*, the Virginia Supreme Court held that Virginia statutory law required condemning agencies to establish a just compensation amount *before* initiating negotiations, meaning that evidence of the initial estimate would not have to be excluded as evidence of settlement negotiations.[60] Furthermore, the *Ramsey* court dismissed concerns of prejudice, ruling that "[t]he probative value of the fact that the [first] appraisal valued the entire property at twice the amount at which [the second appraisal] valued the property outweighs any prejudice to the [condemning authority]."[61]

The court in *Ramsey* also recognized the stakes of this decision by noting that "[p]ermitting the landowner to dispute a condemning authority's contention of a lower value at trial . . . 'will serve as a limited [and wholly appropriate] check on the broad powers of the State in condemnation proceedings.'"[62] As another court put it in a similar context:

> The Constitution of the United States requires that the State deal with the landowner in a fair, honest and above board manner. The State, for the public good, may not coerce private landowners into taking less than fair and adequate compensation for their property. Permitting the landowner to dispute the State's contention of a lower value will serve as a limited check on the broad powers of the State in condemnation proceedings.[63]

While cases like *320.0 Acres* and *Ramsey* provide some protection for landowners by allowing them to expose the government's bait-and-switch tactics,[64] they only have legal force in a few jurisdictions, and thus only apply to a few condemning authorities. Policymakers across the country—particularly at the state level—could also pursue legislation that protects property owners by explicitly allowing the introduction of a condemning authority's first appraisal in the event that the authority seeks to use a lower appraisal at trial. This would go a long way toward exposing instances of sandbagging and would require governments to justify their actions in the public forum of a courtroom.

B. Other Potential Remedies

More aggressive remedies have been suggested to stamp out sandbagging, as well. One idea that has been floated by some eminent domain commentators is a bright line rule barring condemning authorities from lowering a condemnation appraisal or offer at all.[65] In other words, the authority would be tied to whatever offer it initially made and could not lower its just compensation estimate at trial. But this idea has drawbacks. There could be legitimate reasons for a condemning authority to lower its valuation of a piece of condemned property. For example, once the authority enters the land via the quick-take process, it could discover previously-unknown facts that make the property less valuable than originally thought (such as the discovery of hazardous materials that require expensive clean-up).[66]

Another possibility would be to allow landowners to recover litigation expenses and attorney's fees when a condemning authority offers evidence of value in a condemnation proceeding that is below its original deposit, and the ultimate award exceeds the amount of the initial deposit.[67] A variation on this would allow for the recovery of attorney's fees and costs if the condemning authority's second appraisal deviates from its first appraisal by more than a certain amount or percentage. Requiring governments to reimburse the litigation expenses and attorney's fees of landowners in this way could provide a direct

57 *See 320.0 Acres*, 605 F.2d at 823-25.

58 *Id*. at 825.

59 *Ramsey*, 770 S.E.2d 487. *See supra* at Section II.a.

60 *Id*. at 489.

61 *Id*. at 490.

62 *Id*. (citing Mich. Dep't of Transp. v. Frankenlust Lutheran Congregation, 711 N.W.2d 453, 462 (Mich. Ct. App. 2006).

63 Thomas v. State, 410 So.2d 3, 4-5 (Ala. 1981).

64 A few other courts from around the country have come out the same way on this issue. *See, e.g.*, *Thomas*, 410 So.2d at 4-5 (holding that "[i]f the State attempts to establish a lower value, the [prior] statements [of just compensation] are admissible at a compensation trial as an admission by the State."); *Frankenlust Lutheran Congregation*, 711 N.W.2d at 462 ("We hold that a condemning authority is not bound by precondemnation statements and offers of just compensation, and thus may obtain and introduce at trial a different valuation, but if the condemning authority relies on a lower valuation of the property at a subsequent compensation trial, the landowner may introduce evidence of the higher, precondemnation valuation for the purpose of rebutting the authority's lower valuation."); Cook v. State, 430 N.Y.S.2d 507, 509 (N.Y. Ct. Cl. 1980) ("The State should not be allowed to make an admission, and then deny it, without placing its credibility before the trier of fact.").

65 Rikon, *supra* note 43.

66 *See, e.g.*, Community Redevelopment Agency v. World Wide Enterprises, Inc., 77 Cal. App. 4th 1156, 1160-61 (Cal. Ct. of App. 2000) (condemning authority arguing that after it made its initial offer and deposit, it entered the premises and found significant amounts of asbestos in buildings on the property).

67 Letter from Gideon Kanner to California Law Revision Commission, *Attorney Fees in Eminent Domain: Comments of Consultant*, First Supplement to Memorandum 99-7 (June 18, 1999), at 39, http://www.clrc.ca.gov/pub/1999/M99-07s1.pdf.

financial disincentive for governments to engage in sandbagging or lowballing tactics.

IV. Conclusion

Protecting property rights under the Takings Clause extends beyond preventing abuses of the "public use" prong. Governments across the country are using backdoor tactics like sandbagging to systematically deny landowners just compensation when their property is seized through eminent domain. Legislators and policymakers should continue to shine light on these abusive tactics, and push for reforms that would discourage governments from using them.