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Legislation and Administration: Confrontation -- Recent AEC Regulation Expands Confrontation in Security Risk Hearings

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LEGISLATION AND ADMINISTRATION

CONFRONTATION — RECENT AEC REGULATION EXPANDS CONFRONTATION IN SECURITY RISK HEARINGS.

I. Introduction

In the conclusion to his book, *Loyalty and Security,* Mr. Ralph S. Brown wrote as follows:

> There are few constitutional imperatives in the field of employment [security] tests, and the evolution of new imperatives is a cautious process; witness the twenty-year gestation of the principle that racial segregation in public education cannot lawfully exist. Whether our guidance is to come from the spirit or the letter of the Constitution, the other branches of government have a responsibility equal to the courts'. If statutes and executive orders were properly conceived and executed, the courts would have little to do.[1]

On April 30, 1962, the Atomic Energy Commission, accepting this responsibility, attempted to expand one of the administrative "imperatives" in the security risk field. On that date the AEC issued an amendatory regulation establishing a uniform procedure for the determination of eligibility for access to restricted data.[2] Generally, this amendment resulted in extending to government employees the confrontation procedures formerly available only to national defense contractor employees.

During the years following World War II, the federal government has created numerous security measures developed and designed to protect the internal security of the United States.[3] Under these programs, various federal employees as well as the employees of government defense contractors are required to have clearances for security-sensitive job activities. The granting or revocation of such clearances is of the utmost importance to the individuals employed in these sensitive positions.

The immediate consequence of a denial or revocation of a security clearance is loss of gainful employment. Pursuant to these so-called "security" programs, the determination of an employee's security clearance is frequently made on the basis of information obtained from confidential sources, both professional undercover agents and casual informants.[4] The employee in such a situation is often denied the right to examine adverse evidence or cross-examine adverse witnesses.[5] The

1 BROWN, LOYALTY AND SECURITY, 484 (1958).

2 27 Fed. Reg. 4324 (1962), revoking 10 C.F.R. Part 4 (1960), and amending 10 C.F.R. Part 10 (1960).

3 Federal Civilian Employees Loyalty Program, 64 Stat. 476 (1950), 5 U.S.C. § 22-1 (1958); Industrial Personnel Security Review Regulation, 32 C.F.R. § 155 (1962); AEC Security Program, Atomic Energy Act, 68 Stat. 940 (1954), as amended, 42 U.S.C. § 2163 (1958); Port Security Program, Magnuson Act, 64 Stat. 427 (1950), as amended, 50 U.S.C. § 191 (1958), 33 C.F.R. § 121 (1962).

4 *Report of the Commission on Government Security,* S. Doc. No. 64, 85th Cong., 1st Sess. 237 (1957). The Commission was created in 1955 pursuant to Pub. L. No. 304, 69 Stat. 595.

5 The right to confrontation is well ingrained in our common law tradition. This right is guaranteed in a federal criminal prosecution by the provisions of the sixth amendment of the federal constitution. Some commentators have concluded that the constitutional requirement of confrontation is merely a codification of the common law hearsay rule as pertaining to a criminal trial. Professor McCormick wrote as follows: "It seems probable that the purpose of the American provisions for confrontation was to guarantee the maintenance in criminal cases of the hard-won principle of the hearsay rule. . . ." MCCORMICK, EVIDENCE § 231, at 484 (1954).

This basic common law procedure has not been neglected in the area of Administrative law. Section 7 of the Administrative Procedure Act provides that: "Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts." 60 Stat. 241 (1946), 5 U.S.C. § 1006 (c) (1958). However, the provisions of the Administrative Procedure Act do not apply to administrative security hearings. "That act [the APA] is on its face not applicable." *Parker v. Lester,* 112 F.Supp. 433,441 (N.D. Cal. 1953). Although this decision was reversed on appeal, the court of appeals concurred in the view that "the Administrative Procedure Act and its requirements for notice, hearing and judicial review, are not applicable in this case." 227 F.2d 708, 715 (9th Cir. 1955).

Government's rationale in taking actions so contrary to common law procedures is that the disclosure of investigative sources would seriously jeopardize the internal security of the nation. The identity of informants who have volunteered derogatory evidence is withheld for similar reasons. From these circumstances arises the problem of achieving a proper balance between the individual's right to confrontation and cross-examination and the Government's duty to protect internal security.

It is the purpose of this article to briefly survey the history of the Government's internal security program and to consider the significance of the recent AEC regulation on that program.

II. The Historical Background of Loyalty Programs

Loyalty programs attempting to preserve national security are not entirely innovations of the twentieth century. For example, the federal government's earliest effort at a loyalty measure took the form of the Alien & Sedition Act of 1798.[6] This Act, a fruitless effort by the Federalists to control political opinion, expired by its own terms in 1801. Recent federal loyalty programs, however, have been concerned with the dismissal of employees in positions of government or private employment, the abuse of which may be detrimental to national security.

Prior to World War II, very little effort was made to control the security clearance of these persons.[7] But, with the outbreak of the war, the operation of the industrial security programs fell under the express directives of the President. Within days after the Pearl Harbor invasion, President Roosevelt issued an executive order which authorized both the Secretary of War and the Secretary of the Navy "to establish and maintain military guards and patrols, and to take other appropriate measures, to protect . . . national-defense material. . . ."[8]

The year 1947 can be established as the modern starting date for security risk cases, emphasizing the problems of confrontation and cross-examination. In that year President Truman created his Federal Employees' Loyalty Program.[9] His executive order made it clear that a federal employee suspected of disloyalty had no right of confrontation.[10] Six years later President Eisenhower issued Executive Order 10450 which altered the criteria and procedures to be used in the Loyalty Program instituted under President Truman in 1947.[11] Yet, Executive Order 10450 dealt very ambiguously with the question of the accused individual's right to confrontation and cross-examination. The most specific language in the order regarding this question seemed to be that, "Such reports and other investigative material and information shall be maintained in confidence, and no access shall be given thereto except, with the consent of the investigative agency concerned. . . ."[12]

In a 1959 decision,[13] the Supreme Court held that a man could not be deprived of the opportunity to follow his profession through a proceeding which denied him the rights of confrontation and cross-examination, unless there existed explicit Presidential or Congressional authority for such a denial. Subsequent to this decision, President Eisenhower revised the 10450 order by issuing Executive

6 1 Stat. 596 (1798).

7 REPORT OF THE COMMISSION ON GOVERNMENT SECURITY, S. Doc. No. 64, 85th Cong., 1st Sess. 236 (1957).

8 Exec. Order No. 8972, 6 Fed. Reg. 6420 (Dec. 12, 1941).

9 Exec. Order No. 9835, 12 Fed. Reg. 1935 (1947).

10 Part IV, § 2 of Exec. Order No. 9835, 12 Fed. Reg. 1935 (1947) stated in part that:

> the investigative agency may refuse to disclose the names of confidential informants, provided it furnishes sufficient information about such informants on the basis of which the requesting department or agency can make an adequate evaluation of the information furnished by them, and provided it advises the requesting department or agency in writing that it is essential to the protection of the informants or to the investigation of other cases that the identity of the informants not be revealed.

11 Exec. Order No. 10450, 18 Fed. Reg. 2489 (1953).

12 Section 9(c), Exec. Order No. 10450, 18 Fed. Reg. 2489 (1953).

13 Greene v. McElroy, 360 U.S. 474 (1959).

Order 10865.[14] This latter directive made explicit provisions for the denial of the rights of an accused party in such a proceeding to confront and cross-examine adverse witnesses.[15]

III. Cases on the Summary Procedure Problem

The ultimate constitutional question involved in the above-mentioned loyalty proceedings is whether Congress or the President can authorize a summary procedure in cases where the accused is labeled a "security risk." The Supreme Court, in the main, has evaded this constitutional issue.[16] In *Greene v. McElroy*,[17] a leading case in this area, the Court explicitly stated: "Whether those procedures under the circumstances comport with the Constitution we do not decide."[18] That case involved the corporate vice-president of a government defense contractor, whose security clearance was lifted by a government loyalty board. Because of this, the vice-president was unable to obtain employment in the aeronautics field which he had chosen as his profession. Prior to the revocation of the clearance, Greene was allowed to know the evidence on which the government's charges rested — the reports of secret investigators. However, Greene was not allowed to confront his accusers nor to cross-examine them. On appeal, the Supreme Court reversed on the grounds that the Defense Department was not explicitly empowered by the President or Congress to deprive Greene of the ability to follow his chosen profession in a proceeding in which he was not accorded the rights of confrontation and cross-examination.

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14 Exec. Order No. 10865, 25 Fed. Reg. 1583 (1960). This Executive Order was subsequently amended by President Eisenhower. However, the amendment did not affect the confrontation and cross-examination sections of 10865 which are alluded to herein. For the amendatory order, see Exec. Order No. 10909, 26 Fed. Reg. 508 (1961).

15 Section 4(a), Exec. Order No. 10865, 25 Fed. Reg. 1583 (1960), contains explicit provisions permitting the denial of confrontation and cross-examination in security risk investigations. The pertinent language of this Section is:

> An applicant shall be afforded an opportunity to cross-examine . . . except . . . in the circumstances described in either of the following paragraphs:
>
> (1) The head of the department supplying the statement certifies that the person who furnished the information is a confidential informant . . . and that disclosure of his identity would be substantially harmful to the national interest.
>
> (2) The head of the department concerned or his special designee for that particular purpose has preliminarily determined . . . that the statement concerned appears to be reliable and material, and . . . that failure to receive and consider such statement would, in view of the level of access sought, be substantially harmful to the national security and that the person who furnished the information cannot appear to testify (A) due to death, severe illness . . . or (B) due to some other cause determined by the head of the department to be good and sufficient.

Part (b) of Section 4 takes some of the harshness out of part (a) by providing as follows:

> Whenever procedures under paragraphs (1) or (2) of subsection (a) of this section are used (1) the applicant shall be given a summary of the information which shall be as comprehensive and detailed as the national security permits, (2) appropriate consideration shall be accorded to the fact that the applicant did not have an opportunity to cross-examine such person or persons, and (3) a final determination adverse to the applicant shall be made only by the head of the department based upon his personal review of the case.

16 Peters v. Hobby, 349 U.S. 331 (1955); Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950), *aff'd per curiam*, 341 U.S. 918 (1951).

17 360 U.S. 474 (1959). *Taylor v. McElroy*, 360 U.S. 709 (1959), was a companion case to *Greene*. However, subsequent to the commencement of the action in *Taylor*, petitioner Taylor received the security clearance which he demanded. As a consequence, the Supreme Court, *per curiam*, remanded the case to the District Court with instructions to dismiss the complaint as moot.

18 Greene v. McElroy, 360 U.S. 474, 508 (1959).

Though criticized by one of its own members,[19] the Court seemed determined to stand by the "lack of authority" argument in its handling of "security risk" cases. However, in the case of *Cafeteria Workers v. McElroy*,[20] the Court touched on a segment of the constitutional question involved. *Cafeteria Workers* involved a cook in a naval gun factory. The cook, Rachel Brawner, was required to have an identification badge in order to enter and leave the premises of the gun factory. One morning she was notified by her supervisor that he had been told by the security officer to pick up her badge "for security reasons." Mrs. Brawner was not told what the security standards were nor why she had failed to meet them, nor was she afforded a hearing to meet the evidence supporting the conclusion that she was a security risk. The Court of Appeals, sitting *en banc*, affirmed the District Court holding that government officers have "unfettered" power to control ingress and egress to federal property and that they were within their authority in applying this power to Rachel Brawner.[21] The Supreme Court affirmed in a 5-4 decision.[22] The Court in its opinion first faced the "authority" issue. The majority found that the summary procedures involved in this case were explicitly provided for in the applicable statutes and regulations. After deciding this issue, the Court turned to the constitutional question of whether such summary procedures violated the requirements of the due process clause of the fifth amendment. On the theory that government employment, in the absence of legislation, can be revoked at the will of the appointing officer, it held that the procedures used in the case at hand did not violate the fifth amendment's due process clause.[23]

There seem to be two distinguishing factors between *Greene* and *Cafeteria Workers*. First, in *Greene* the authority to utilize such summary procedures was ambiguous; whereas, in *Cafeteria Workers* it was unequivocal. Secondly, in *Greene* the individual was denied the right or ability to follow his chosen profession; while, in *Cafeteria Workers* the individual was merely dismissed from her employment as a cook, and there were supposedly no future prohibitions as to her obtaining another cooking job. However, it is submitted that the Court in *Cafeteria Workers* failed to recognize the real issue in the case. The issue is not, as the majority states, whether Rachel Brawner can be summarily dismissed from her job as a cook; rather, the issue is whether she can be summarily dismissed from this job *and* summarily branded as a "security risk." This issue is alluded to in the dissenting opinion in the following language:

> Petitioner was not simply excluded from the base summarily, without a notice and chance to defend herself. She was excluded as a "security risk," that designation most odious in our times. The Court consoles itself with the speculation that she may have been merely garrulous, or careless with her identification badge, and indeed she might, although she will never find out. But, in the common understanding of the public with whom petitioner must hereafter live and work, the term "security risk" carries a much more sinister meaning. . . . It is far more likely to be taken as an accusation of communism or disloyalty than imputation of some small personal fault.[24]

The dissenters conclude with force that the Government ought not affix a "badge of infamy" to a person without some statement of the charges and some opportunity for the person to answer them.[25]

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19 Mr. Justice Clark, dissenting in *Greene*, stated that, "[T]he action of the Court in striking down the program for lack of specific authorization is indeed strange. . . ." 360 U.S. 474, 515. He advocated that the Court should have decided the Constitutional issue in *Greene*, and not simply the "lack of authority" issue.

20 367 U.S. 886 (1961). See 36 NOTRE DAME LAWYER 576 (1961).

21 Cafeteria Workers v. McElroy, 284 F.2d 173 (D.C. Cir. 1960).

22 Mr. Justice Brennan wrote the dissenting opinion. He was joined by Chief Justice Warren, and Justices Black and Douglas.

23 Cafeteria Workers v. McElroy, 367 U.S. 886 (1961).

24 *Id.* at 901-02. (dissenting opinion).

25 *Id. at* 902. (dissenting opinion).

The *Cafeteria Workers* decision has had no effect on the executive branch of the Government, as did the *Greene* case. However, the decision seems to have had an effect on the administrative arm of the Government. The *Cafeteria Workers* case put a constitutional stamp of approval on the summary procedures utilized in this area. This, it appears, would tend to upset the desired balance in favor of the Government. But, in what can be considered a reaction to this type of judicial thinking, two regulations have recently been promulgated. These regulations, in a varying degree, are designed to give greater protection to individual rights in the "security risk" area.

The first such regulation was issued by the State Department in January of 1962.[26] Prior to this regulation it had been the State Department's practice to deny passports without assigning any reason except that the applicant's travel would not be in the best interests of the United States.[27] In the future, however, all persons who apply for passports and are tentatively denied same, shall be allowed to confront and cross-examine their accusers.[28]

Since the State Department's passport regulation is not directly concerned with the Government's industrial-security program, it will not be dealt with at any greater length. It is included as evidence of a possible trend toward greater recognition of individual rights in the heretofore summary methods of "security risk" hearings.

The second regulation was issued in April of 1962 by the Atomic Energy Commission. This regulation is directly concerned with the industrial security program and it will be considered in detail below.

IV. The AEC's New Security Regulation

On April 30, 1962, the Atomic Energy Commission issued an amendatory regulation which extended to government employees the confrontation and cross-examination procedures formerly available only to defense contractor employees. This regulation, while not as far reaching as the State Department's new passport regulation, nonetheless appears to be a significant step toward greater protection of individual rights in "security risk" hearings.

The new AEC amendment revoked Part 4 and expanded Part 10 of the Commission's 1960 regulations. Under these regulations, Part 4 set up procedures for determining eligibility for security clearance for AEC employees, and Part 10 instituted procedures to determine the security clearance for AEC contractor employees. As a consequence of the new AEC amendment, a uniform procedure for determining the eligibility for security clearances has been established within the Commission. In the words of the AEC's former General Counsel Mr. Neil D. Naiden:

> The revocation of Part 4 and the amendments to Part 10 are designed to establish uniform procedures for determining the eligibility for access to Restricted Data or Defense Information under the Government and in-

26 27 Fed. Reg. 344 (1962), amending 22 C.F.R. §§ 51.135-51.170 (1954).

27 22 C.F.R. §§ 51.135-51.170 (1954).

28 The Liberal press immediately praised this action as a "major civil liberties advance. . . ." Civil Liberties, No. 196, March, 1962, p. 1, col. 2. (Monthly Publication of The American Civil Liberties Union).

The new State Department Regulation provides in part that "A person whose application for a passport or renewal of a passport has been tentatively denied . . . shall be entitled . . . to be informed of the evidence upon which the Passport Office relied as a basis for the tentative denial; to be informed of the source of such evidence; and to confront and cross-examine adverse witnesses." 27 Fed. Reg. 344 (1962), amending 22 C.F.R. § 51.138(a) (1954). The regulation further provides that "the Passport Office shall not take into consideration confidential security information that is not made available to the applicant. . . ." 27 Fed. Reg. 344 (1962), amending 22 C.F.R. § 51.138(b) (1954). To make certain that its new policy of confrontation is adhered to upon the denied applicant's permitted appeal to the Board of Passport Appeals, the regulation provides that "The Board shall not take into consideration any confidential security information which is not part of the record." 27 Fed. Reg. 344, 345 (1962), amending 22 C.F.R. § 51.156 (1954).

> dustrial security programs of the AEC. These amendments extend to Government employees the confrontation and cross-examination procedures formerly available to contractor employees. The Commission's procedures for both will now be uniform.[29]

A. The Pre-April, 1962 Regulations

An analysis of Part 4 and Part 10 of the Commission's 1960 security clearance regulations discloses a sharp difference in the procedural treatment given to government employees and that given to contractor employees.

First, the jurisdictional scope of Part 4 was limited to employees of and applicants for employment with the Atomic Energy Commission.[30] This part set up an administrative hearing and review system to handle questions relating to an individual's eligibility for a security clearance.[31] The hearing requirements were analogous to a trial-type hearing in that witnesses were allowed to testify and various types of evidence were admitted for the hearing board's consideration.[32] Among the evidence introduced at such hearings were reports of investigations that had been conducted by the Government on the accused individual. However, Part 4 specifically prohibited the accused individual from examining these reports or questioning the parties who had prepared them. It provided, in relevant part, that "The reports of investigation shall not be disclosed to the individual or his representative."[33] Despite the clandestine nature of these investigative reports, the measure explicitly stated that such reports could be considered by the hearing Board in reaching its determination of the issues involved. The language of the regulation is that "The Board shall carefully consider all material before it, including the reports of investigation. . . ."[34]

A further restriction imposed on the accused government employee by the former Part 4 concerns the individual's ability to call and confront adverse witnesses. It provided that witnesses will be called if possible, but that the confidential nature of the sources of some information may make such a confrontation impossible. This restriction is worded in the following manner:

> Boards are encouraged to request the presence of witnesses whose testimony is important to the resolution of material issues . . . to make arrangements, if possible, for such witnesses to appear, be confronted by the individual, and be subject to examination and cross-examination. . . . Because of the confidential nature of the sources of information or for other reasons, confrontation of witnesses by the individual may not always be possible.[35]

It seems that the ambiguous confrontation restrictions set up by this regulation, i.e., information which has a source of a "confidential nature," afforded little procedural protection to the government employee. In April of last year, number "4" was stricken from the AEC's security regulations.

Part 10 of the Commission's previous regulations set up a hearing and review system identical to that provided for by the now void Part 4.[36] The specific procedures instituted for such hearings, however, were not similar.[37] The jurisdictional

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29 Letter of June 21, 1962, from Mr. Neil D. Naiden on file in the Notre Dame Law Library.

The nation's press met the action by the AEC with mixed emotions. The New York *Times* gave the regulation objective front-page treatment. N. Y. *Times,* May 1, 1962, p. 1, col. 6. However, *National Review,* a weekly magazine, unconvincingly claimed that the AEC's "foolish" move put an end to the Nation's security program. *National Review,* May 22, 1962, p. 353, col. 2.

30 10 C.F.R. § 4.2(a),(b) (1960).

31 10 C.F.R. §§ 4.20-4.27 (1960).

32 *Ibid.*

33 10 C.F.R. § 4.27(l) (1960).

34 10 C.F.R. § 4.28(a) (1960).

35 10 C.F.R. § 4.27(m) (1960).

36 10 C.F.R. §§ 10.20-10.27 (1960).

37 Part 10 was enacted in accordance with Exec. Order 10865 and the prohibitions against confrontation and cross-examination contained therein are identical to those provisions in the Exec. Order.

scope of this part was limited to employees of or applicants for employment with AEC contractors, agents, access permittees and licensees.[38] It had no blanket prohibition against the production of investigative material as did Part 4. Further, Part 10 set up specific criteria, discussed below, by which confrontation and cross-examination can be denied.[39] A denial of procedural safeguards under Part 10 would seem to be the exception and not the rule.

The Commission's amendment to Part 10 expands its jurisdictional scope, so that it now includes government employees as well as contractor employees.[40] However, the exact procedures of the prior version are left untouched. Thus, these procedural safeguards afforded by the former Part 10, are now applicable to all AEC security clearance hearings.

B. *The Scope of the New Regulation*

Part 10 of the amended regulation provides, with certain limitations hereafter mentioned, that "the record may contain no information adverse to the individual on any controverted issue unless,"[41] (1) the information has been made available to the individual and he offers no objection,[42] or (2) the information is made available to him and he has an opportunity to cross-examine the person providing the information.[43] Therefore, the general rule under Part 10 is that the suspect individual is permitted to confront and cross-examine adverse witnesses. However, the regulation contains several exceptions to this rule.

The main exception contained in Part 10 directly and substantially affects the rights of the individual. It provides that an individual may cross-examine all witnesses adverse to him except under two situations. The first is where the party supplying the information is deemed a confidential informant the disclosure of whose identity would be substantially harmful to the national interest. In the now extinct Part 4, the government employees could be denied confrontation by a finding that the information in question came from a source of a "confidential nature." Albeit the two tests are similar, the new rule presents more stringent guidelines than the former. For example, besides a finding that the disclosure of the informant's identity would endanger national interests, said informant must have been engaged in government intelligence work. Under the prior regulation, such findings were not necessary.

The second situation in which confrontation may be denied is where the Commission deems the information reliable and material and the person furnishing it cannot appear to testify because of: (a) sickness or death, in which case the information is made available to the individual, or (b) due to some other cause determined by the Commission to be sufficient. This latter clause appears, on its face, to be a catchall. However, considering it in reference to clause (a) which immediately precedes it, clause (b) does not seem to give the AEC a carte blanche. Moreover, when confronted specifically with the question of whether this clause could serve as an escape hatch whereby the AEC could deny confrontation in any case it pleased, the Commission answered in the negative. Elaborating, the General Counsel of the AEC, Mr. Joseph F. Hennessey, made the following comment:

> In our view, the import of the language of this clause, which derives from Section 4(a)(2)(B) of Executive Order No. 10865, February 20, 1960, would be limited to rare and presently unforeseen cases. The determination must be made by the Commission (*cf.* Sec. 10.32(a)), and I expect it would make such findings sparingly.

38 10 C.F.R. § 10.2 (1960).
39 10 C.F.R. § 10.27(k),(l),(m),(n),(o) and (p) (1960).
40 27 Fed. Reg. 4324 (1962), amending 10 C.F.R. § 10.2(c) (1960).
41 10 C.F.R. § 10.27(k) (1960).
42 10 C.F.R. § 10.27(k)(1) (1960).
43 10 C.F.R. § 10.27(k)(2) (1960).

> The basic policy of the Commission is to conduct its security program "in a manner consistent with traditional American concepts of justice" (Sec. 10.4). In promulgating its regulations, the Commission did not devise a procedure whereby confrontation might arbitrarily be denied. Whether or not a specific cause is good and sufficient would be determined in the light of all the facts and circumstances of a particular case in accordance with established judicial interpretation.[44]

This important exception reads as follows:

> The individual shall be afforded an opportunity to cross-examine persons who have made oral or written statements adverse to the individual relating to a controverted issue except that any such statement may be received and considered by the Board without affording such opportunity in either of the following circumstances:
>
> (1) The head of the department supplying the statement certifies that the person who furnished the information is a confidential informant who has been engaged in obtaining intelligence information for the Government and that disclosure of his identity would be substantially harmful to the national interest;
>
> (2) The Commission or its special designee for that particular purpose has preliminarily determined, after considering information furnished by the investigative agency as to the reliability of the person and the accuracy of the statement concerned, that the statement concerned appears to be reliable and material, and the Commission or such special designee has determined that failure of the Board to receive and consider such statement would, in view of the access to Restricted Data or defense information sought, be substantially harmful to the national security and that the person who furnished the information cannot appear to testify (i) due to death, severe illness, or similar cause, in which case the identity of the person and the information to be considered shall be made available to the individual, or (ii) due to some other cause determined by the Commission to be good and sufficient.[45]

Three less significant exceptions to the general rule of confrontation are contained in Part 10. The first is concerned with testimony directed at a group or person other than the accused individual. In the words of the regulation, "A written or oral statement of a person relating to the characterization in the notification letter of any organization or person other than the individual may be received and considered by the Board without affording the individual an opportunity to cross-examine. . . ."[46] As can be seen, this exception does not directly affect the accused individual's interest. However, if the individual is a member of the organization, this may constitute a serious inroad on his right to confrontation and cross-examination. The second exception is concerned with the regular records kept by an investigative agency pursuant to its duties to the AEC. Such records, not including investigative reports, are allowed to come into evidence without authenticating witnesses. However, they are subject to rebuttal.[47] The third exception under Part 10 is concerned with business records or other physical evidence other than investigative reports, which, because of its classified nature, may not be inspected by the individual. Such evidence is allowed providing the Commission deems its entrance into the case material.[48]

V. *Conclusion*

As we have seen, the AEC's amendatory regulation has increased the rights of the individual in security clearance hearings. This increase has not resulted in an absolute grant of procedural safeguards to the individual; however, in unifying the procedures within the AEC, the amendatory regulation extends certain privileges to government employees. Heretofore, government employees involved in security clearance hearings in the AEC were not allowed to examine the in-

44 Letter of Dec. 10, 1962, from Mr. Joseph F. Hennessey, on file in the Notre Dame Law Library.
45 10 C.F.R. § 10.27(m) (1960).
46 10 C.F.R. § 10.27(l) (1960).
47 10 C.F.R. § 10.27(o) (1960).
48 10 C.F.R. § 10.27(p) (1960).

vestigative reports despite the fact that these reports may have adversely affected their interest. Under the new regulation, government employees can now inspect such investigative reports along with the contractor employees. In the prior regulation, Part 4, the government employees could be denied the right to confrontation and cross-examination by a finding that the information involved came from a source of a "confidential nature." By reason of its ambiguity, this created a poor criterion. As a general rule, the AEC employee can confront and cross-examine under the amended regulation; and the exceptions to this rule are clearly defined. The test of the source being merely of a "confidential nature" is omitted, and the new test is that the "person who furnished the information is a confidential informant who has been engaged in obtaining intelligence information for the Government and that disclosure of his identity would be substantially harmful to the national interests. . . ."[49] Admittedly, this passage also sets up a general and somewhat vague criterion. However, the latter test demands closer scrutiny and affords greater protection than the more ambiguous rule of determining that the source is of a "confidential nature."

The problem in the "security risk" area is to design a fair hearing process which will not disturb the government's efforts to prevent infiltration by enemy agents. It is obvious that requiring the government to disclose all its evidence or all its informers in every security proceeding will involve a great cost in undercover agents; on the other hand, secrecy renders the accused individual subject not only to false accusations but also to arbitrary government power. The danger to the individual in this type of a proceeding is described by Adolf Berle in the following manner:

> The danger is the ancient one of irresponsible power, functioning outside the discipline of law implicit in organized government. Because the issue [arises] over Communists, who are deservedly unpopular, its real nature has not been clearly apprehended.[50]

The ultimate goal in the "security risk" area seems to be to create a process which will achieve a proper balance between the individual's right to certain procedural safeguards and the Government's duty to protect internal security. It is submitted that the AEC's recent amendatory regulation strikes a proper balance between the interests involved and thus meets the requirements of this goal.

Frank P. Maggio

DETERMINATION OF JUST COMPENSATION IN EMINENT DOMAIN PROCEEDINGS FOR LAND SUBJECTED TO ILLEGAL USES OR CONDITIONS.

I. Introduction

Perhaps the most difficult segment of eminent domain proceedings is the determination of just compensation to be paid the property owner for his loss. In an effort to find this just compensation, courts have universally turned to the concept of the "market value" of the property, i.e., the price a willing buyer would pay and a willing seller would accept. However, situations arise where it is argued that the market value standard does not properly reflect the just compensation to which the condemnee is entitled. Such a situation exists where the market value of property is enhanced by reason of an illegal use or condition which has not been abated or corrected by the proper authorities. Frequently, property which is condemned has been maintained or used in violation of health, safety, or building codes or other laws which control the use or condition of property. Prospective

49 10 C.F.R. § 10.27(m)(1) (1960).

50 BERLE, THE 20TH CENTURY CAPITALIST REVOLUTION 105-106 (1954). For general background information on the security risk problem, see Krasnowiecki, *Confrontation of Witnesses in Government Employee Security Proceedings,* 33 NOTRE DAME LAWYER 180 (1958).

purchasers, assuming that such laws and regulations will continue to be unenforced, are eager to invest in such property. As it is not subject to governmental sanctions, the expenses of maintaining the land are negligible. Capitalization upon the ineffective enforcement of existing sanctions yields a high rate of return to the owner of the property. An inflated market value results. It is thought, however, that municipalities and other local governmental bodies should not have to pay excessive prices in the acquisition of land used or maintained in such a manner solely because (as the condemnee argues) the market value reflects such a price. The purpose of this note is to examine the statutory and case law applicable to the determination of just compensation to be paid the owner of property which has been subjected to unlawful uses or conditions.

II. A Statutory Survey

The legislatures of at least 12 states have met the problem by expressly authorizing the admissibility of evidence of illegal uses or conditions in eminent domain proceedings.[1] Four of these states have statutes stamped from the same die, while four others have taken their laws from another legislative pattern. The relevant provisions of the Kentucky, Michigan, New York, and Wisconsin statutes are identical:

> Evidence shall be admissible bearing upon the insanitary, unsafe or substandard condition of the premises, or the illegal use thereof, or the enhancement of rentals from such illegal use, and such evidence may be considered in fixing the compensation to be paid, notwithstanding that no steps to remedy or abate such conditions have been taken by the department or officers having jurisdiction. If a violation order is on file against the premises in any such department, it shall constitute prima facie evidence of the existence of the condition specified in such order.[2]

Oklahoma, Nevada, North Dakota, and Vermont also have employed identical statutory language in this respect:

> In any proceeding to fix or assess compensation for damages or the taking or damaging of property, or any interest therein, through the exercise of the power of eminent domain or condemnation, evidence or testimony bearing upon the following matters shall be admissible and shall be considered in fixing such compensation or damages in addition to evidence or testimony otherwise admissible:
>
> (a) Any use, condition, occupancy or operation of such property which is unlawful or violative of, or subject to elimination, abatement, prohibition, or correction under, any law or any ordinance or regulatory measure of the state, county, municipality, other political subdivision, or any agency thereof, in which such property is located, being unsafe, substandard, insanitary or otherwise contrary to the public health, safety, or welfare.
>
> (b) The effect on the value of such property of any such use, condition, occupancy, or operation, or of the elimination, abatement, prohibition, or correction of any such use, condition, occupancy, or operation.
>
> The foregoing testimony and evidence shall be admissible notwithstanding that no action has been taken by any public body or public officer toward the abatement, prohibition, elimination or correction of any such use, condition, occupancy or operation. Testimony or evidence that any public body or public officer charged with the duty or authority so to do has rendered, made or issued and judgment, decree, determination or order for the abatement, prohibition, elimination or correction of any such use, condition, occupancy or operation shall be admissible and shall be prima

1 Ariz. Rev. Stat. Ann. § 12-1150 (A)(1) and (4) (1956); Ill. Rev. Stat. ch. 47, § 9.5 (Supp. 1961); Ky. Rev. Stat. § 99.240 (4) (1955); Mich. Stat. Ann. § 5.3058 (17)(3)(d) (1958); N.Y. Priv. Hous. Fin. Law § 216 (4) (d) (1962); Nev. Rev. Stat. § 279.290 (2) (a), (b) and (3) (1957); N.C. Gen. Stat. § 40-40(a) and (d) (1950); N.D. Code § 40-58-08 (2) (a) (b) and (3) (1960); Okla. Stat. Ann. tit. § 1613 (d) (1), (2) and (e) (1959) R.I. Gen. Laws § 45-29-32 (d) (1957); Vt. Stat. Ann. tit. 24 § 3209 (b)(1), (2) and (c) (1959); Wisc. Stat. Ann. § 66.414 (2) (b) (1957).

2 Ky. Rev. Stat. § 99.240 (4) (1955); Mich. Stat. Ann. § 5.3058 (17)(3)(d) (1958); N.Y. Priv. Hous. Fin. Law § 216 (4)(d) (1962); Wis. Stat. Ann. § 66.414 (2)(b) (1957).

facie evidence of the existence and character of such use, condition or operation.[3]

Arizona in its public works program and North Carolina in its general eminent domain statute have adopted provisions identical to each other.[4] Illinois[5] and Rhode Island[6] have followed their own individual form of legislation.

While the above statutes are worded differently, all are identical in their effect. Evidence of illegal use is admissible and is to be considered in fixing the compensation, notwithstanding the fact that the proper authorities have taken no action to remedy the condition.

Certainly, such legislation would be desirable in all jurisdictions.[7] But condemnors in those jurisdictions which have no such legislation are not helpless in

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3 Nev. Rev. Stat. § 279.290 (2)(a), (b) and (3) (1957); N.D. Code § 40-58-08 (2) (a), (b) and (3) (1960); Okla. Stat. Ann. § 11-1613 (d) (1), (2) and (e) (1959); Vt. Stat. Ann. § 24-3209 (b) (1), (2) and (c) (1959). Note that the statutes are identical in wording but vary as to numeration.

4 Ariz. Rev. Stat. Ann. § 12-1150 (A) (1) and (4) (1956) and N.C. Gen. Stat. § 40-40 (a) and (d) (1950):

For the purpose of determining the value of the land sought to be condemned and fixing just compensation therefore, the following evidence in addition to other evidence which is relevant, material and competent shall be relevant, material and competent and shall be admitted and considered by the special master:

(1) Evidence that a building or improvement is unsafe or unsanitary or a public nuisance, or is in a state of disrepair, and of the cost to correct any such condition, notwithstanding that no action has been taken by local authorities to remedy such conditions.

* * *

(A) Evidence that such building and improvements are being used for illegal purposes or are being so over-crowded as to be dangerous or injurious to the health, safety, morals or welfare of the occupants thereof and the extent to which the rentals therefore are enhanced by reason of such use.

5 Ill. Rev. Stat. ch. 47, § 9.5 (Supp. 1961):

Evidence is admissible as to (1) any unsafe, unsanitary, substandard or other illegal condition, use or occupancy of the property; (2) the effect of such condition on income from the property; and (3) the reasonable cost of causing the property to be placed in a legal condition, use or occupancy. Such evidence is admissible notwithstanding the absence of any official action taken to require the correction or abatement of any such illegal condition, use, or occupancy.

6 R.I. Gen. Laws § 45-29-32 (d) (1957):

In any proceedings for the assessment of compensation and damages for property taken or to be taken by eminent domain for an authority, the following provisions shall be applicable:

* * *

(d) The facts may be proved bearing upon the unsanitary, illegal or substandard condition of the premises notwithstanding that no steps have been taken by the department or offices having jurisdiction with a view to remedying or abating such conditions.

7 But Cf. Letter of Nov. 12, 1962, from John G. Duba, Commissioner, Department of Urban Renewal, City of Chicago, on file in the Notre Dame Law Library:

> Under the "unit rule" in Illinois, witnesses must testify to a value of the property as a whole and cannot ascribe a value to land and improvements separately, nor may a witness show the costs of improvements to a property, *Dept. of Public Works vs. Pellin,* 7 Ill., 2nd 367, 131 NE 2nd 55, *City of Chicago vs. Giedrates,* 14 Ill. 2nd 45, 150 NE 2nd 577.
>
> In view of the foregoing, which seems to conflict with the statute, our office has found that the most successful way to introduce evidence concerning unsafe, unsanitary, or illegal conditions or uses is through a description of the property and its physical condition. This can be presented by the expert witness when he describes the property or at the time that he sets forth the factors upon which he based his opinion of value. This, it should be pointed out, is quite different from the method contemplated in Ill. Rev. Stat. 1961, Chapt. 47, Sec. 9.5 (1). The statute would require introduction of evidence concerning the cost of correcting existing illegal conditions. This would not assist the condemnor because it would 'open the door' to evidence concerning the cost of improvements and would result in litigating a multitude of collateral issues which would not be relevant to the issues before the court.
>
> In conclusion, it is our opinion that the statute does not assist the condemnor and that under the present framework of the law, adequate protections and safeguards exist which an experienced trial lawyer can use to

this respect. A substantial body of case law has developed which *authorizes the admissibility of evidence of illegal uses or conditions and prohibits compensation based on value enhanced by reason of such illegality.* Thus, the municipality or other public body has a two-edged sword working for it: (1) Evidence of illegal use may be introduced to *refute* a submitted market value attributable to such unlawful use, and (2) The jury cannot consider such evidence other than to *reduce* the market value.

III. The Judicial Approach to the Problem

The courts have uniformly held that compensation cannot be based on value attributable to illegal uses or conditions in eminent domain proceedings, and that evidence of such uses and conditions are therefore relevant. This holds true both where the unlawful use exists at the time of the proceedings[8] and where the owner has sought to show the illegal use to which the land could be put.[9]

A. Present Illegal Uses or Conditions

One of the earliest cases in which the issue was presented was *Kingsland v. Mayor.*[10] Plaintiff had constructed a platform and shed from his wharf into the Hudson River between two piers, permission having been granted by the city. However, this was contrary to a state statute prohibiting all structures outside the established bulkhead line except piers and their approaches. When the New York City Dock Department constructed a new bulkhead in front of plaintiff's wharf, thereby cutting off access to it, plaintiff sought damages. The referee, in evaluating the wharf, took into consideration the platform and shed. The court of appeals held this to be erroneous:

> Adding to the value of the wharf-right, with its lawful incident of preferential use, by taking into account an unlawful platform and shed, and the chance of maintaining it unmolested, is giving to the property, as an element of increased value, its convenient situation for violating the law and capitalizing the existing and expected profits of that violation. The same reasoning might lead to an increase of value in cases much more harmful and reprehensible. Suppose the city, under competent authority, should take a house and lot for the purpose of a park, and destroy the dwelling, and the owner seeking its value shows that owing to its peculiar location, it can be rented as a house of ill-fame or as a gambling den for twice the rent obtainable for any lawful purpose, and when reminded that such uses are illegal should answer that he had obtained such rental for years, and the city had winked at it and never once raided his house, or enforced the

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protect the public body in paying just compensation. Perhaps of some interest to you is the fact that we do not know of any experienced lawyer representing a condemning agency in the metropolitan Chicago area who has used the section of the statute in question.

8 United States v. 257.654 Acres of Land, 72 F. Supp. 903 (D. Hawaii 1947); United States v. Chandler-Dunbar Water Co., 229 U.S. 53 (1913); In re Neptune Avenue, 254 App. Div. 690, 3 N.Y. Supp. 2d 825 (1938); Department of Public Works v. Hubbard, 363 Ill. 99, 1 N.E. 2d 383 (1936); Costello v. City of Scranton, 108 Pa. Super. 573, 165 Atl. 670 (1933); Appeal of Phillips, 113 Conn. 40, 154 Atl. 238 (1931); Joly v. City of Salem, 276 Mass. 297, 177 N.E. 121 (1931); In re Pearsall Street in City of New York, 135 N.Y. Supp. 763 (Sup. Ct., 1912); In re Hallett and Howland Streets in City of New York, 135 N.Y. Supp. 823 (Sup. Ct., 1912); Kennebec Water District v. City of Waterville, 97 Me. 185, 54 Atl. 6 (1902); McKinney v. Nashville, 102 Tenn. 131, 52 S.W. 781 (1899); In re Daly, 45 App. Div. 622, 61 N.Y. Supp. 480 (1899); Lawrence v. Metropolitan Elevated R., 126 N.Y. 485, 27 N.E. 765 (1891); Kingsland v. Mayor, 110 N.Y. 569, 18 N.E. 435 (1888); In re Union Depot Street Ry. & Transfer Co. of Stillwater, 31 Minn. 297, 17 N.W. 626 (1883); Diedrich v. The Northwestern Union Ry., 42 Wis. 248 (1877); Harvey v. Lackawanna & Bloomsburg R., 47 Pa. 428 (1864).

9 United States v. 1,108 Acres of Land, 204 F. Supp. 737 (E.D.N.Y. 1962); Castle Heights Water Co. v. Price, 178 App. Div. 687, 165 N.Y. Supp, 816 (1917); Portland and Seattle Ry. v. Ladd, 47 Wash. 88, 91 Pac. 573 (1907); Burke v. Sanitary District of Chicago, 152 Ill. 125, 38 N.E. 670 (1894).

10 110 N.Y. 569, 18 N.E. 435 (1888).

> law; that he could have sold for the amount he claimed, the purchaser taking the chance of the blindness of the police or the endurance of the citizens; and that what he could sell for to another in the same business was market-value and market-value he should have. We can all see the absurdity of that claim, but not so readily when the illegal use, for which value is claimed, is merely illegal and not also immoral and criminal. The view we have just taken rests upon the absolute illegality of any structures save piers outside of the fixed bulkhead line.[11]

A Tennessee court, eleven years later, was confronted with the precise situation to which the New York court had previously alluded. In *McKinney v. Nashville*,[12] condemnation proceedings were instituted to acquire land on which a saloon was situated. The trial judge allowed evidence tending to show that gambling had been carried on in the building and that, because of this unabated illegal use, the market value of the land had been inflated. On appeal, this ruling received the Tennessee Supreme Court's approval:

> In the progress of the trial of the case, evidence was permitted to go to the jury that tended to show that gambling was frequently, if not habitually, carried on in one or more rooms of the property, and that this fact inflated the rental value of the property. In regard to this, the trial judge said to the jury, if they found that gambling was carried on there, and that it did inflate the rental value, then, to the extent of such inflation, the rent received cannot be considered as indicating either the rental or the market value. We think there is no error in this. Gambling is an offense against the law and the use of any portion of this property for gambling purposes was in violation of the law. And, if it was true that such illegitimate use did inflate the rental value of this property, then the jury were properly told that a rent, inflated by this use, to the extent of the inflation, could not be taken into consideration as constituting a part of the rental value. It is true that it might be a matter of difficulty to determine where the rental value from a legitimate use ended and that from the illegitimate use began, yet that is the misfortune of the owner, for which the city is not responsible. In this case, however, we think that there is sufficient evidence to guide the jury, at least approximately in determining the value of this inflation.[13]

Illustrating the uniformity in which the courts have applied this principle, i.e., value attributable to illegal use is not to be considered to enhance the market value, was the case of *Lawrence v. Metropolitan Elevated R*,[14] in which, interestingly enough, property illegally used was not devalued. Plaintiff owned a building which he let out to tenants. The defendant railway company constructed an elevated railway in the street adjoining plaintiff's premises. As a result of the construction and operation, plaintiff claimed a loss of tenants and rents. After the court awarded damages and enjoined defendant from further maintenance and operations unless plaintiff was compensated for the permanent depreciation of the premises, the railway appealed. Defendant had attempted to establish at trial that plaintiff's tenants used the building for prostitution and that the rental value of the premises for this purpose was not diminished. The trial judge, however, disallowed the introduction of the evidence. In affirming, the New York Court of Appeals made this distinction:

> The fact that the house had been used as a house of prostitution did not enter as an element into the award of damages, nor could that fact be properly considered. *If the plaintiff had sought to enhance the damages on the ground that the rental value of the house as a house of prostitution had been depreciated by the construction of the railway, and the award had been based upon that consideration, the defendants would have had a just ground of complaint.* . . . But the injury was wholly independent of such use. The occupation of the house as a house of prostitution was no justification of the injury of which plaintiff complains. The plaintiff is not seeking to enforce any claim founded upon such occupation. The

11 *Id.* at 439.
12 102 Tenn. 131, 52 S.W. 781 (1899).
13 *Id.* at 782-83.
14 126 N.Y. 485, 27 N.E. 765 (1891).

> judgment neither sanctions nor encourages such use. It awards damages which the plaintiff has sustained, however, the house may have been occupied[15]

The same result has been reached where the property condemned is used or maintained in a manner which constitutes a nuisance. An early decision reflecting judicial refusal to award compensation under such circumstances was *In re Daly*.[16] There, the condemnee owned property on which a mill dam was situated. Through operation of the dam, a pond had been formed and, as a result, the mill dam had previously been judicially declared a nuisance. The issue presented was whether the owner could recover the value of the mill dam and machinery without water power. The New York Appellate Division, second department, decided that he could not.

In *Joly v. City of Salem*,[17] petitioner had been the owner of certain filled and unfilled tidewater flats. Those that had been filled were done without a license, the public having dumped filling on the flats with petitioner's acquiescence. Declaring the filled flats to be a nuisance and subject to abatement, the court refused compensation for the value of the filled flats and pointed out that "it is settled, with some possible exceptions, that nothing can be allowed by way of compensation for privileges which the owner of land enjoys contrary to law or to public right."[18]

Several cases have arisen where the illegal use of property involved encroachment upon the public domain similar to the situation in the *Kingsland* decision. Again, all were decided against compensation for illegal use. Illustrative of the type of case and the courts' reasoning was *In re Union Depot Street Ry. and Transfer Co. of Stillwater*.[19] Land bordering a navigable stream was to be taken for a railway. The owner of land had built structures from his bank into the stream in accordance with Minnesota law which permits such landings, piers and wharves into the river to the point of navigability. Holding that the owner had not exceeded his right, he was awarded compensation in full for his property. The court reasoned:

> Suppose, however, a riparian owner has unlawfully intruded into the water beyond the point of navigability, as above defined, and filled up the bed of the stream beyond that point for the sole purpose of extending his possessions, and so as to obstruct and interfere with the public right of navigation. This would constitute a *purpresture*. . . . When it is proposed to take his property for public use by the exercise of eminent domain, he can claim no additional compensation by reason of it. When condemned or taken, the corporation who acquired it would presumably have to remove it, at least, there is not presumption that it would be allowed to remain, and therefore there is no reason why the party condemning the property should pay more for it on account of his unlawful encroachment upon public rights. The mere chance that it might be allowed to remain, cannot be made the basis of compensation to the person who made it.[20]

In *Diedrich v. The Northwestern Union Ry.*,[21] compensation was denied for an embankment built into the lake from the shore by respondent. Finding that this constituted an intrusion upon the public fee, the Wisconsin Supreme Court said respondent had no property right in the embankment, and, therefore, was not entitled to an award for it.

Similarly, where encroachments upon a public street by abutting land-owners were removed and it was shown that the owners' deeds gave them rights only to the edge of the street, compensation was denied.[22]

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15 *Id.* at 766.
16 45 App. Div. 622, 61 N.Y. Supp. 480 (1899).
17 276 Mass. 297, 177 N.E. 121 (1931).
18 *Id.* at 123.
19 31 Minn. 297, 17 N.W. 626 (1883).
20 *Id.* at 629.
21 42 Wis. 248 (1877).
22 In re Pearsall Street in City of New York, 135 N.Y. Supp. 763 (Sup. Ct. 1912); In re Hallett and Howland Streets in City of New York, 135 N.Y. Supp. 823 (Sup. Ct. 1912).

In *Harvey v. Lackawanna & Bloomsburg R.*,[23] the owner of a tract of coal land built five tramways across a state highway to gain access to his wharves. The court held he had no personal right over the highway and, therefore, when a railway took over the highway and removed the tramways, plaintiff was awarded no damages. Pennsylvania's Justice Read declared:

> For this alleged injury is his real claim for damages. His being the owner of the soil does not give him any more right over the highway, or the passage along or over it, than any other individual.
>
> * * *
>
> It is clear, therefore, that the placing of these five diagonal tramways across the state road was an unlawful act, and amounted to a nuisance, which the defendants were entirely justified in abating, and that therefore no damages can be claimed by the plaintiff.[24]

In one case, however, compensation was made for the value of land attributable to an existing unlawful use. This position was taken in 1906 by an Illinois court in *Freiberg v. South Side Elevated R.*[25] The railroad had petitioned to take a 15-foot strip of land owned by the Freibergs. The trial judge permitted evidence which tended to show that a saloon and dance hall situated on the property were conducted without a license and in other ways operated illegally. The jury was then instructed to take this into account in the determination of an award as an item inflating the true value of the owner's property. On appeal, the judgment was reversed:

> The fact that the value of the property had been increased, in the eyes of possible purchasers, by a business conducted in an unlawful manner in a part of the building by a tenant, either with or without the connivance of the owners, and that the purchaser on that account would regard the property as of greater value, is wholly immaterial. That does not concern the railroad company. . . . If appellants have been guilty of a violation of the statutes and ordinances, it is not in this suit that the penalties may be inflicted. If these persons offend, they should be prosecuted and punished, but the law governing persons, natural or artificial, who desire to possess themselves of the property of the Freibergs, will not on that account be suspended. This corporation, exercising the power of eminent domain, will not be permitted to take appellants' property from them without making just compensation, even if they have violated the laws both of city and state.[26]

Several reasons may be advanced to explain the taking of this definitely minority position. First, the court had previously stated that "the record is barren of any evidence which indicates that the value of the property was any greater on account of the fact that the saloon and dance hall had been conducted in an unlawful manner than it would have been had they been conducted in a lawful manner."[27] If this were the only reason, however, the court's subsequent strong statement of its position would have been unnecessary. Second, the court also stated that "We find no authority cited in appellee's brief to sustain the superior court in the position taken by it in this regard."[28] As several of the cases discussed above were already on record at the time, perhaps counsel for appellee were at fault in not bringing these cases to the court's attention. But it seems that the underlying principle of these cases, the axiom that a man should not profit from his wrongful act,[29] which the court did not even mention, should have occurred to the court without the benefit of appellee's brief. It is noteworthy that the court cited

23 47 Pa. 428 (1864).
24 *Id.* at 436-37.
25 221 Ill. 508, 77 N.E. 920 (1906).
26 *Id.* at 922-23.
27 *Id.* at 922.
28 *Id.* at 923.
29 Burke v. Sanitary District of Chicago, 152 Ill. 125, 38 N.E. 670, 672 (1894):
> As the respondents, then, had no legal right to improve their land by erecting dikes thereon in such manner as to flood the lands of others, it would seem to follow, necessarily and logically, that the value of their land, as af-

no authorities to sustain its position either. Finally, the court overemphasized the fact that the railroad would ultimately come into ownership of the land. Yet, the railroad had no inherent power to take land, but rather, derived its right from the sovereign and exercised its right within a framework of rules and laws established by the sovereign.[30] This is the same sovereign whose laws were violated by the Freibergs. No reason is apparent why the condemnee in this particular instance should be treated differently merely because the property condemned would be put to a private rather than public use.

But, the *Freiberg* case no longer appears to be sound authority in light of a 1936 case in the same jurisdiction espousing the contrary principle and the recent Illinois legislation. In the 1936 case, *Department of Public Works v. Hubbard*,[31] condemnation proceedings were brought to acquire defendant's land for a state highway. In determining the award to be paid defendant for the value of a hedge fence of an unlawful height, Illinois' highest tribunal said this:

> While it may be said that there was actual value in said hedge as fence posts, insofar as they contained such, it surely cannot be said that the loss of shade, windbreaks, or as nesting places for birds may entitle the owner to damages where such hedge constitutes an unlawful fence.[32]

With the *Freiberg* case apparently laid to rest and all other cases in accord, the rule seems definitely established that the owner of land cannot recover for value attributable to existing illegal uses or conditions in eminent domain proceedings. As will be seen, this same rule carries over in cases where potential illegal uses are considered.

B. Future or Potential Illegal Uses

In determining the market value of property, its present use is not the only use considered. The evaluation of fair market value should reflect not only the purpose for which the property has theretofore been used, but other uses which might render it more profitable. There is, however, a restriction. The more profitable operation must be one allowed by law to be carried out on the premises.[33]

Thus, in *Portland and Seattle Ry. v. Ladd*,[34] compensation for the value of a possible use was denied where that use would involve injury to adjoining land. In that case, appellants owned land which would be valuable as a stone quarry. Adjoining the land was property owned by appellee railroad which sought to acquire a strip of the land owned by appellant. The trial judge ruled that evidence of the value as a stone quarry was to be disregarded. It appeared that such quarrying would involve blasting of rock, sending the rock upon appellee's land and constituting a trespass. The Washington court gave its approval:

> It requires no argument to show that, if appellants' property was so situated that it could not be utilized without injury to others, its use would not be permitted at all; and, if the value of appellants' property was dependent upon other property which they did not own and could not acquire, then, as shown by the appellants themselves, the property had no value, and, of course, was not damaged. We think the instruction was proper in this case.[35]

A similar case, *Castle Heights Water Co. v. Price*,[36] resulted in the same decision. Appellant contended there that, with proper machinery, a great deal more water could be drawn off his condemned land. However, the commissioners

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> fected by its capability of improvement in that manner, was not a proper matter for the consideration of the jury, in assessing their compensation. This is only an application of the familiar legal maxim that no person will be allowed to take advantage or profit by his own wrong.

30 Johnson v. Fulton County, 103 Ga. 873, 121 S.E. 2d 54 (1961).
31 363 Ill. 99, 1 N.E. 2d 383 (1936).
32 *Id.* at 386.
33 United States v. Meadow Brook Club, 259 F. 2d 41, *cert. denied*, 358 U.S. 921 (1958).
34 47 Wash. 88, 91 Pac. 573 (1907).
35 *Id.* at 576.
36 178 App. Div. 687, 165 N.Y. Supp. 816 (1917).

who valued the land determined that such water would be drawn off the surrounding lands also and, therefore, such operations would be illegal. Presiding Justice Jenks of the New York Appellate Division said that "the fact that the water company, or any other person, might actually do this thing, in disregard of the rights of third persons, should not be taken into consideration."[37]

Of more practical significance today is the situation where zoning laws prohibit the use of land for various purposes. For the same reason as other potential use cases, the courts have refused compensation for value attributable to a future use prohibited by existing zoning ordinances. In a most recent case, the court refused to consider the value of land as an industrial site where it would be in violation of zoning regulations. Chief Judge Burchhausen concluded, in *United States v. 1,108 Acres of Land,*[38] that "Such evidence as was offered on the theory of industrial usage must be disregarded. Present zoning regulations prohibit such use and no market or demand was shown to justify the probability of a change in zoning to permit such use."[39] As this court implied, the probability of removal of existing zoning ordinances, if sufficiently shown, will make evidence of a presently prohibited potential use admissible.

IV. Conclusion

The refusal by courts and legislatures to consider value attributable to illegal uses can be analyzed in at least three ways:

1. "It seems more probable that the issue is not one of legal sanctions but rather one of legal or doctrinal consistency and the choice which is presented to the courts is between consistency in the standard of valuation and consistency in adherence to those policies which are expressed in the legal prohibition of particular uses of property. When one considers that market value is used by the courts in condemnation cases as a measure of just compensation, it is not surprising that the courts will prefer consistency in their concepts of justice and morality to consistency in their standards of valuation."[40]

2. There seems to be an underlying principle permeating most of the decisions: A man should not profit from his own wrongdoing. Thus, instead of talking in terms of market value, the courts openly criticize the notion of receiving an award for unlawful use and predicate their decision upon the suppression of illegally gained benefits.[41]

3. But the refusal to recognize the value of unlawful use in the determination of just compensation can be grounded on a more logical and concrete concept: the concept of rights being taken. In analyzing the nature of "taking" in eminent domain proceedings, the Supreme Court of the United States said in *United States v. General Motors Corporation:*[42]

> The critical terms are "property," "taken," and "just compensation." It is conceivable that the first was used in its vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. On the other hand, it may have been employed in a more accurate sense to denote the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. In point of fact the construction given the phrase has been the latter.[43]

The owner, then, to seek an increased award for a particular present or potential use, must base his contention upon the value of the right taken to use the land in that manner. Where the use being considered is illegal, however, the owner has

37 *Id.* at 818.
38 204 F. Supp. 737 (E.D.N.Y. 1962).
39 *Id.* at 739.
40 1 ORGEL, VALUATION UNDER EMINENT DOMAIN, § 33 at 163 (2d ed. 1953).
41 Burke v. Sanitary District, *supra,* note 30.
42 323 U.S. 373 (1944).
43 *Id.* at 377-78.

no right. While an unlawful act may be justifiable or excusable, no one has the right to perform an illegal act. It follows that where there is no right existing, it cannot be taken and where there is no right taken, there need be no compensation.

From an examination of statutory and case law on the subject, it is apparent that there is sufficient authority to authorize the admissibility of evidence of illegal uses or conditions and reduce accordingly the compensation awarded. The statutes are clear, the cases convincing. Municipalities and other instrumentalities of local government, therefore, are adequately supplied with authority to prevent compensation being paid to those who would extract from the public a reward for violation of its laws.

Donald E. Wintrode