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Interest Rates in Eminent Domain: Is 6% Just Compensation in a 12% World

Mark R. Kaplan

INTEREST RATES IN EMINENT DOMAIN: IS 6% JUST COMPENSATION IN A 12% WORLD?

I. INTRODUCTION

Interest rates now run well into double figures.[1] Yet, the Federal Declaration of Taking Act[2] and many state statutes currently provide for the payment of interest in eminent domain actions at a rate of 6% or less.[3] However, the blame for this inequitable situation does not lie solely with legislative bodies, for the ascertainment of just compensation, of which interest for delay in payment is an integral part,[4] is ultimately a judicial function.[5] With few exceptions, the courts have either deferred to the legislatures[6] or been unable to find evidence of sufficient magnitude to override the statutorily specified rates.[7]

There is, however, a glimmer of hope for the owner whose property is taken by an exercise of eminent domain. The Ninth Circuit Court of Appeals has held that, in certain circumstances, the constitutional requirement of just compensation necessitates the application of an interest rate greater than the 6% rate specified by the Declaration of Taking

1. The prime interest rate on January 10, 1979 was 11.75%. Wall St. J., Jan. 10, 1979, at 29, col. 5.

2. 40 U.S.C. § 258a (1976) [hereinafter cited variously as the Declaration of Taking Act or the Act].

3. 40 U.S.C. § 258a (1976) provides, in pertinent part: "[T]he said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking . . . ." See 3 J. SACKMAN, NICHOLS' THE LAW OF EMINENT DOMAIN § 8.63 (rev. 3d ed. 1978) [hereinafter cited as NICHOLS'], and I. LEVEY, CONDEMNATION IN U.S.A. 1467-1837 (1969) for surveys of state laws regarding eminent domain procedure, including allowances and rates of interest.

4. *See* notes 13-17 *infra* and accompanying text.

5. *See* notes 20-21 *infra* and accompanying text.

6. *See, e.g.*, William v. Denver, 147 Colo. 195, 363 P.2d 171 (1961); Honolulu v. Bonded Inv. Co., 54 Haw. 385, 507 P.2d 1084, 1090-91 (1973); Carolina Power & Light Co. v. Copeland, 258 S.C. 206, 188 S.E.2d 188, 194 (1972).

7. *See* United States v. 100 Acres of Land, 468 F.2d 1261, 1269 (9th Cir. 1972), *cert. denied*, 414 U.S. 822 (1973) (holding that the condemnee introduced no evidence at trial to entitle it to a rate of interest greater than that specified in the Declaration of Taking Act); Milstar Mfg. Corp. v. Waterville Urban Renewal Auth., 351 A.2d 538, 545 (Sup. Jud. Ct. Me. 1976) (holding that since there had been no challenge to the statutory rate of 6% for 150 years, it was still appropriate); Nassau v. Eveandra Enterprises, Inc., 42 N.Y.2d 849, 850, 366 N.E.2d 287, 288, 397 N.Y.S.2d 627, 628 (1977) (mem.) (holding that the appropriate interest rate is not measured by fluctuations in the prevailing economic rate and therefore the condemnee had failed to show the 6% statutory rate to be unconstitutional).

Act.[8] Additionally, the United States Court of Claims has gone a step further to define the proper rate of delay compensation as being equivalent to the prevailing interest rate.[9] This comment will focus on the concept of delay compensation and the effect that these federal decisions will have on the law of eminent domain.

II. BACKGROUND

The United States Constitution requires that when private property is taken for public use, the owner must be paid just compensation.[10] This requirement of just compensation has been extended to the states by the fourteenth amendment.[11] Often, either by design or by accident, the entity exercising the power of eminent domain takes property prior to paying for it.[12] In such instances, the United States Supreme Court has held:

> Where the United States condemns and takes possession of land before ascertaining or paying compensation, the owner is not limited to the value of the property at the time of the taking; he is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking.[13]

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8. United States v. Blankinship, 543 F.2d 1272, 1274 (9th Cir. 1976).

9. Tektronix, Inc. v. United States, 575 F.2d 832, 836 (Ct. Cl.), *cert. denied*, 439 U.S. 1048 (1978); Pitcairn v. United States, 547 F.2d 1106, 1124 (Ct. Cl. 1976) (per curiam), *cert. denied*, 434 U.S. 1051 (1978).

10. U.S. CONST. amend. V provides in pertinent part, "nor shall private property be taken for public use, without just compensation."

11. U.S. CONST. amend. XIV, § 1 provides that no state shall "deprive any person of life, liberty, or property, without due process of law." Conspicuously absent from the due process clause is any mention of a just compensation requirement for the taking of private property by a state. However, in Chicago, Burlington, & Quincy R.R. v. Chicago, 166 U.S. 226, 241 (1897), the United States Supreme Court long ago held that when "private property is taken by the State . . . for public use, without compensation made or secured to the owner" the taking "is, upon principle and authority, wanting in the due process of law required by the Fourteenth Amendment to the Constitution of the United States." Thus, the Supreme Court has read a compensation requirement into the due process clause of the fourteenth amendment. *See generally* Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553 (1972); Grant, *The "Higher Law" Background of the Law of Eminent Domain*, 6 WISC. L. REV. 67 (1931); Grant, *The Natural Law Background of Due Process*, 31 COLUM. L. REV. 56 (1931).

12. *See, e.g.*, 40 U.S.C. § 258a (1976), which entitles the United States to take title immediately upon the filing of a declaration of taking and to litigate the amount of compensation owing to the owner at a later date. In cases of inverse condemnation, the unintended taking occurs and the owner later files suit against the taking entity to recover just compensation owed to him as a result of the taking. In either instance, taking occurs prior to payment.

13. Seaboard Air Line Ry. v. United States, 261 U.S. 299, 306 (1923). *Accord*, Jacobs v. United States, 290 U.S. 13, 16-17 (1933); Phelps v. United States, 274 U.S. 341, 344 (1927).

Thus, the owner is entitled to additional compensation for the delay between taking and payment.

Over the years, courts have adopted various theories for paying additional compensation for the delay. Some have viewed the additional amount as compensation for loss of use of the property.[14] The better view is that, as the owner is entitled to payment contemporaneously with the taking, he is compensated not for loss of use of the property, for it is really no longer his, but for the loss of use of the money owed to him at the moment of the taking.[15] The owner is then to be compensated for his loss of use of the money owed him and "[i]nterest at a proper rate 'is a good measure by which to ascertain the amount so to be added'."[16]

Thus, interest at a proper rate to compensate for the delay in payment constitutes an element of just compensation.[17] As such, interest or some other form of delay compensation is constitutionally required when property is taken by the exercise of eminent domain prior to payment.[18]

Because just compensation is a constitutional requirement,[19] the rate of interest to be paid as delay compensation is ultimately a matter for judicial determination.[20] Therefore, the right to receive interest as a part of just compensation is not dependent on statutory authorization.[21]

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14. *See* Jackson County v. Hesterberg, 519 S.W.2d 537, 540 (Mo. App. 1975) (quoting Arkansas-Missouri Power Co. v. Hamlin, 288 S.W. 2d 14, 17 (Mo. App. 1956)).

15. *See, e.g.*, United States v. Blankinship, 543 F.2d 1272, 1275 (9th Cir. 1976), and authorities cited therein. The *Blankinship* court stated: "[H]e who pays $1.00 tomorrow to discharge a debt of $1.00 due and payable today, pays less than he owes." *Id.*

16. Jacobs v. United States, 290 U.S. 13, 17 (1933) (citing Seaboard Air Line Ry. v. United States, 261 U.S. 299, 306 (1923)).

17. Jacobs v. United States, 290 U.S. 13, 17 (1933).

18. 28 U.S.C. § 2516(a) (1976) provides that "[i]nterest on a claim against the United States shall be allowed . . . only under a contract or Act of Congress expressly providing for payment thereof." The Supreme Court, in United States v. Alcea Band of Tillamooks, 341 U.S. 48, 49 (1951) (per curiam), held that the only exception to the rule of sovereign immunity from the payment of interest "arises when the taking entitles the claimant to just compensation under the Fifth Amendment. Only in such cases does the award of compensation include interest."

19. *See* notes 10-11 *supra* and accompanying text.

20. Monongahela Navigation Co. v. United States, 148 U.S. 312, 327 (1893), *cited in* United States v. 100 Acres of Land, 468 F.2d 1261, 1268 (9th Cir. 1972), *cert. denied*, 414 U.S. 822 (1973). *See also* Marbury v. Madison, 5 U.S. (1 Cranch) 49, 70 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

21. *See* Shoshone Tribe v. United States, 299 U.S. 476, 497 (1937), in which the Court stated: "[T]he fact is unimportant, there having been an appropriation of property within the meaning of the Fifth Amendment, that the jurisdictional act is silent as to an award of interest or any substitute therefor." *See, e.g.*, cases cited in 3 NICHOLS', *supra* note 3, § 8.63 at 167-68 & n.18. *Contra*, Carolina Power & Light Co. v. Copeland, 258 S.C. 206, 188

However, Congress, along with many state legislatures, has promulgated statutes governing eminent domain procedures. Many of these statutes allow for interest at specified rates.[22] But as noted above, just compensation is not dependent on legislative will and, therefore, the courts are not bound by these statutory interest rates.

Eminent domain takings occur in many forms, all of which require the payment of just compensation.[23] Therefore, the right to just compensation, including interest on delayed payments, accrues whether the taking occurs pursuant to inverse condemnation, patent infringement,[24] statute,[25] or judicial procedure.[26] As the right to payment occurs contemporaneously with the actual taking,[27] the date of the taking determines when delay compensation starts to accrue. Different jurisdictions have established various methods for determining the date of taking.[28] In addition, the date of the taking differs depending on the type of taking actually employed.

Many statutory schemes allow the condemnor to take title automatically and to enter into possession before final judgment.[29] Under such schemes, the condemnor files a declaration of taking and pays the *esti-*

S.E.2d 188, 194 (1972) (quoting South Carolina State Highway Dept. v. Southern Ry. Co., 239 S.C. 1, 121 S.E.2d 236 (1961)) (" 'The amount of just compensation to be paid can only be determined under the provisions of an act of the Legislature . . .'.").

22. *See* note 3 *supra.*

23. The United States Constitution demands that just compensation be paid for private property taken for public use. U.S. CONST. amend. V. However, no distinction is made between the various procedures by which takings occur.

24. *See* Waite v. United States, 282 U.S. 508, 509 (1931). For the history of the development of the concept of delay compensation in inverse condemnation and patent infringement cases, see Tektronix, Inc. v. United States, 552 F.2d 343, 353-55 (Ct. Cl.) (Bennett, J., concurring), *modified*, 557 F.2d 265 (Ct. Cl. 1977), *subsequently appealed from trial court disposition*, 575 F.2d 832 (Ct. Cl.), *cert. denied*, 439 U.S. 1048 (1978) and authorities cited therein.

25. *See* United States v. Miller, 317 U.S. 369, 381 (1943); United States v. Blankinship, 543 F.2d 1272, 1275 (9th Cir. 1976).

26. *See* Shoshone Tribe v. United States, 299 U.S. 476, 497 (1937).

27. Phelps v. United States, 274 U.S. 341, 344 (1927).

28. *See* 3 NICHOLS', *supra* note 3, § 8.63[1] and authorities cited therein for a survey of the various methods used for determining when a taking has occurred.

29. *See, e.g.*, 40 U.S.C. § 258a (1976), which provides, in part:

> Upon the filing said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein . . . .

mated value of the property into court.[30] Most jurisdictions allow the owner to withdraw the amount deposited while awaiting a final adjudication of the condemnor's right to take and a determination of the exact amount of compensation due.[31] If the owner has the right to withdraw the funds, the right to interest on the amount deposited ceases.[32] However, the owner's right to interest still accrues on the difference between the final award and the deposit.[33] The owner is not allowed interest on the amount deposited, which he may withdraw, because he has the use of that portion of his compensation. Therefore, the rationale of paying interest to compensate the owner for the loss of use of his money no longer applies.

The Federal Declaration of Taking Act[34] is representative of the statutory schemes that allow the condemnor to take title and possession immediately upon filing a declaration of taking and depositing with the court the amount of estimated compensation owed to the owner.[35] The Act was signed into law on February 26, 1931 during the height of the depression. The purpose of the Act was to expedite the taking of property for public works in order to create jobs and to help relieve the major unemployment problem that beseiged the United States.[36] However, the House of Representatives debate with respect to the Act indicates that it was "not strictly an emergency measure." Rather, it was to be considered a "permanent feature of the law."[37]

In developing this legislation, Congress was acutely aware that the issue of determining just compensation was within the province of the

30. *Id.*

31. *But see* Redevelopment Agency v. Goodman, 53 Cal. App. 3d 424, 431-35, 125 Cal. Rptr. 818, 821-24 (1975), in which the court held that, if the condemnee appeals the condemnor's right to take, he may neither withdraw the fund from the court nor obtain legal interest on the fund. The condemnee is, however, entitled to the interest actually earned by the fund while it remains in the custody of the court. *Contra*, Locasio v. Rosewell, 50 Ill. App. 3d 704, 365 N.E.2d 949, 953 (1977) ("interest earned is to be deposited into the county corporate fund"). With the legal rate of interest at 7% in California, it is quite possible that the condemnee who challenges the condemnor's right to take, will receive a greater interest award than the condemnee who fails to challenge and receives the legal rate.

32. With regard to the final award of just compensation, 40 U.S.C. § 258a (1976) provides that "interest shall not be allowed on so much thereof as shall have been paid into the court." *But see* State v. Reuter 352 N.E.2d 806, 808 (Ind. 1976), where interest was allowed on the fund deposited into court because the condemnee would have been constrained by rigid surety procedures had he withdrawn the fund.

33. *See* cases cited notes 24-26 *supra.*

34. 40 U.S.C. § 258a (1976).

35. *See* note 29 *supra.*

36. H.R. REP. No. 2086, 71st Cong., 3d Sess. 1 (1930); S. REP. No. 1325, 71st Cong., 3d Sess. 1 (1931).

37. 74 CONG. REC. 777, 779 (1930).

judiciary.[38] Why, then, did Congress establish a specific 6% rate of interest to be paid in takings pursuant to the Act?[39] The Act was intended to impose no hardship on the owners of property condemned by the United States,[40] for the owner was to receive "interest at the usual rate."[41] Although the 6% rate of interest specified by the Act was considerably higher than money market rates in 1930,[42] it was consistent with the rate of interest allowed by the Court of Claims in other types of eminent domain proceedings.[43] The statutes granting jurisdiction to the Court of Claims to adjudicate inverse condemnation[44] and patent infringement[45] eminent domain cases did not specify an interest rate. Thus, it appears that the 6% rate of interest adopted by the Court of Claims was *judicially created*.[46] Therefore, Congress was merely codifying the existing judically created rate of delay compensation in the Declaration of Taking Act.

In applying the Declaration of Taking Act, the federal courts viewed the 6% statutory rate as presumptively just compensation.[47] Similarly, most state courts have held that there is a presumption that the statutorily specified rate meets the state and federal constitutional require-

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38. *See* H.R. REP. No. 2086, 71st Cong., 3d Sess. 1 (1930), in which the House Committee on the Judiciary stated:

> Operation under this measure will result in no hardship on the owners of property taken by the Government. Their rights are amply protected thereunder. By this bill it is sought merely to provide a means whereby the Government may take title immediately, *and leave the amount of compensation to be determined by the court according to the usual procedure.* (emphasis added).

39. The Act provides for the payment of interest as follows:

> [T]he said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the day of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court.

40 U.S.C. § 258a (1976).

40. *See* note 38 *supra.*

41. 74 CONG. REC. 777, 779 (1930).

42. In 1930, the prime interest rate was 3.50%, dropping to 2.75% in 1931. 1 J. FINANCIAL PLAN. 91 (1977). The yield on 90 day Treasury bills was 2.494% per annun in 1930 and 1.402% per annum in 1931. U.S. DEPT. COM., BUS. STATISTICS 86 (biennial ed. 1959). The United States did not sell longer term Treasury bonds until 1942. Corporate bond yields averaged 5.09% annually in 1930 and 5.81% in 1931. U.S. DEP'T COM., BUS. STATISTICS 101 (biennial ed. 1959).

43. *See* Pitcairn v. United States, 547 F.2d 1106, 1120 (Ct. Cl. 1976) (per curiam), *cert. denied*, 434 U.S. 1051 (1978).

44. 28 U.S.C. § 1491 (1976). *See* notes 119-20 *infra* and accompanying text.

45. 28 U.S.C. § 1498 (1976). *See* note 121 *infra* and accompanying text.

46. *See generally* Pitcairn v. United States, 547 F.2d 1106, 1120-24 (Ct. Cl. 1976) (per curiam), *cert. denied*, 434 U.S. 1051 (1978).

47. *See* United States v. 40,379 Square Feet of Land, 58 F. Supp. 246, 251 (D. Mass. 1944); 3 NICHOLS', *supra* note 3, § 8.63[3] at 362.

ments of adequate delay compensation.[48] At the same time, the courts have overwhelmingly recognized that, because just compensation is a judicial decision, the presumption that statutory rates are constitutional may be rebutted by sufficient evidence of a more reasonable rate.[49] Both state and federal courts, however, have been reluctant to find evidence sufficient to override the applicable statutory rate.[50]

Until 1976, the 6% interest rate specified by the Act had successfully withstood challenge in cases in which the taking strictly followed the procedures set forth therein. However, in cases in which the taking deviated from the statutory procedure, the courts were more willing to authorize the payment of a different interest rate. For example, in *United States v. 412.715 Acres of Land*,[51] the United States had taken possession of the owner's land in 1942 but had not filed a declaration of taking until 1945. The court found that the taking had occurred in 1942, but that, under the Act, legal title had not passed to the United States until it had filed the declaration of taking in 1945.[52] Until legal title had passed to the Government in 1945, taxes continued to be assessed and became liens against the land.

After the Government filed a declaration of taking and paid a fund into the court to cover the market value of the land, it then acquired title free and clear of all encumbrances.[53] The liens, which had been created by the Government's failure to file a declaration of taking promptly, attached to the fund. The result was that the owner was required to pay the liens out of his compensation. The court recognized that, in condemnation proceedings not governed by the Act, the United States often pays delay compensation based upon the legal rate of interest of the state in which the land is located.[54] In *412.715 Acres of Land*, the land was located in California, which had a legal rate of interest of 7%. Exercising his judicial discretion to fix the rate of delay compensation, the trial judge awarded the owner 7% interest on the

48. *See* note 6 *supra*.

49. *See generally* United States v. Blankinship, 543 F.2d 1272 (9th Cir. 1976); United States v. 412.715 Acres of Land, 60 F. Supp. 576 (N.D. Cal. 1945); *In re* Washington Heights, 82 Misc. 2d 557, 369 N.Y.S.2d 932 (N.Y. Sup. Ct. 1975). *But see* Carolina Power & Light Co. v. Copeland, 258 S.C. 206, 188 S.E.2d 188 (1972).

50. *See* note 7 *supra*.

51. 60 F. Supp. 576 (N.D. Cal. 1945).

52. *Id.* at 577.

53. *Id.*

54. *Id.* at 578. *Accord*, United States v. A Certain Tract or Parcel of Land, 47 F. Supp. 30, 33 (S.D. Ga. 1942) (holding that, in cases in which the Declaration of Taking Act is not invoked, federal courts are usually constrained to apply the local rate of legal interest as delay compensation).

jury's compensation award to cover the time period between the 1942 date of taking and the 1945 date on which the Government filed a declaration of taking and deposited a fund into court.[55] The additional 1% interest was designed to compensate the owner for the tax liability created by the failure of the Government to file a declaration of taking.[56]

To support his decision that the California legal rate of interest should be paid as delay compensation in *412.715 Acres of Land*, the trial judge relied on an earlier district court decision from Georgia, *United States v. A Certain Tract or Parcel of Land*.[57] That case involved a taking by the United States that did not fall within the jurisdiction of the Act. The trial judge awarded the owner delay compensation at the 7% legal rate utilized in Georgia.[58] However, the judge also stated: "If some more satisfactory guide than local law is available and is supplied, the courts may use that, i.e., the current interest rates or other satisfactory evidence as to a 'reasonable rate of interest' . . . , but none has been furnished here."[59]

In *412.715 Acres of Land*, the owner specifically asked for the California legal rate of 7% interest. The issue of the prevailing, or money market, rate of interest as delay compensation was not raised.[60] Similarly, in *A Certain Tract or Parcel of Land*, no evidence of prevailing interest rates was introduced. At the time of these cases, the 6% and 7% rates of delay compensation were substantially greater than the money market interest rates.[61]

In 1972, an owner of property taken pursuant to the Declaration of Taking Act appealed the lower court's application of a 6% interest rate in *United States v. 100 Acres of Land*.[62] Drake's Beach (the owner) argued that the 6% rate authorized by the Act was not a reasonable rate of interest because it was not the current prevailing economic rate and, therefore, would not fully compensate him for the delay in payment.[63]

55. 60 F. Supp. at 578.
56. *Id.*
57. 47 F. Supp. 30 (S.D. Ga. 1942).
58. *Id.* at 32.
59. *Id.* at 33.
60. 60 F. Supp. at 577.
61. During 1933-1947, a period encompassing both *A Certain Tract or Parcel of Land* and *412.715 Acres of Land*, the prime interest rate was only 1.50% per annum. 1 J. FINANCIAL PLAN. 91 (1977). Corporate bond yields were equally low; the average annual yield was 3.34% in 1942 and 2.87% in 1945. U.S. DEP'T COM., BUS. STATISTICS 101 (biennial ed. 1959). United States Treasury bonds yielded even less: 2.46% annually in 1942, 2.37% in 1945. *Id.* at 102.
62. 468 F.2d 1261 (9th Cir. 1972), *cert. denied*, 414 U.S. 822, 864 (1973).
63. *Id.* at 1268.

The Ninth Circuit never really decided this issue. Still, the court properly held that interest, as a part of just compensation, was to be determined by the judicial process.[64] The question therefore became "whether interest is a question of law to be decided by the court, or . . . a question of fact to be determined by the trier of fact."[65] The court held that, given the many variables affecting interest rates in each factual situation, the issue of interest as delay compensation was a factual question to be determined by the trier of fact.[66]

The record showed that Drake's Beach had not introduced any evidence regarding interest during the valuation trial and thus, the court concluded, the question had never properly been placed before the jury.[67] The court further held that by failing to make the interest question an issue at the trial, Drake's Beach had waived its opportunity to do so and, therefore, was not entitled to another trial.[68]

The *100 Acres of Land* case brings into focus the fact that, while interest rates in the money market have undergone changes since the promulgation of the Declaration of Taking Act in 1931, the 6% interest rate specified therein has remained unchanged. In 1931, the prime interest rate was 2.75%.[69] By the time the *100 Acres of Land* case came to trial in 1969, the prime rate had risen to 8.5%.[70] Similarly, Moody's Average Yield for Corporate Domestic Bonds had risen from 5.81% in 1931 to 7.36% in 1969.[71] Furthermore, the United States Government, the most secure debtor in the country, was paying 6.85% interest on its three- to five-year bonds.[72]

By the mid-1970's, interest rates were experiencing drastic fluctuations. The prime rate soared to a high of 12% in July 1974.[73] One year later, it had declined to 6.75%.[74] Bond yields also rose greatly. The average yield on long term corporate bonds was 9.03% in 1974 and

64. *Id.* at 1268-69 (citing Monongahela Navigation Co. v. United States, 148 U.S. 312, 327 (1893)).

65. *Id.* at 1269.

66. *Id. See, e.g.*, United States v. Blankinship, 543 F.2d 1272, 1274 (9th Cir. 1976).

67. 468 F.2d at 1269-70. The Ninth Circuit found that Drake's Beach did not raise the issue of interest until after the jury had awarded just compensation. *See* Confederated Salish & Kootenai Tribes v. United States, 437 F.2d 458, 460 (Ct. Cl. 1971).

68. 468 F.2d at 1270.

69. *See* note 42 *supra.*

70. 1 J. FINANCIAL PLAN. 91 (1977).

71. U.S. DEP'T COM., BUS. STATISTICS 101 (biennial ed. 1959); U.S. DEP'T COM., BUS. STATISTICS 105 (21st biennial ed. 1977).

72. U.S. DEP'T COM., BUS. STATISTICS 256 (21st biennial ed. 1977).

73. 1 J. FINANCIAL PLAN. 93 (1977).

74. *Id.*

climbed to a high of 9.57% in 1975.[75] United States government bonds were also on the rise. Three- to five-year bonds were yielding an average of 7.81% in 1974.[76] By 1975, this figure was marginally reduced to 7.55%.[77] Meanwhile, the courts continued to apply the 6% statutory rate.[78]

III. *UNITED STATES V. BLANKINSHIP*[79]

A. Facts and Analysis

In 1976, the Ninth Circuit was confronted directly with the interest rate issue that it had failed to resolve four years earlier in *100 Acres of Land*. In *United States v. Blankinship*,[80] the court held that "the Fifth Amendment under certain circumstances does require the use of a rate of interest in excess of 6 percent."[81] After it reviewed the long line of cases that had held delay compensation to be a judicial issue, the court reached the following conclusion:

> [T]he 6 percent figure employed by Congress in the Declaration of Taking Act cannot be viewed as a ceiling on the rate of interest allowable in computing just compensation with respect to a deficiency. *It will*, of course, *operate as a floor*. No lesser rate than 6 percent is consistent with the intent of Congress; a rate no greater than 6 percent in some instances will contravene the Fifth Amendment.[82]

The *Blankinship* case involved the taking of several parcels of land in May 1973 pursuant to the Declaration of Taking Act. Two of these parcels, the Wilson parcel and the Double-O-Bar parcel, were severely undervalued by the United States. As a result, the amount deposited into the court as the estimated value of each of these properties was greatly deficient. Consequently, in the Wilson and Double-O-Bar

75. U.S. DEP'T COM., BUS. STATISTICS 105 (21st biennial ed. 1977).

76. BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, ANN. STATISTICAL DIG. 1971-1975, at 121 (1976).

77. *Id.*

78. *See* Milstar Mfg. Corp. v. Waterville Urban Renewal Auth., 351 A.2d 538, 545 (Sup. Jud. Ct. Me. 1976); Nassau v. Eveandra Enterprises, Inc., 42 N.Y.2d 849, 850, 366 N.E. 2d 287, 288, 397 N.Y.S.2d 627, 628 (1977) (mem.). Holding the 7% statutory rate of Louisiana to be sufficient, the district court for the Western District of Louisiana stated: "Interest at the rate of 7% . . . is fair and reasonable, as is the statutory rate of legal interest in Louisiana, especially at times when the prime rate of interest in this country . . . is in the nine to ten percent (9% to 10%) range, or higher." United States v. 71.29 Acres of Land, 376 F. Supp. 1221, 1226 (W.D. La. 1974).

79. 543 F.2d 1272 (9th Cir. 1976).

80. *Id.*

81. *Id.* at 1274.

82. *Id.* at 1276 (emphasis added).

cases, both juries found that the owners were entitled to almost double the amounts deposited by the United States. In Double-O-Bar, the deficiency was more than $450,000. In Wilson, the deficient amount was in excess of $1,400,000.[83]

After the jury verdicts in the respective cases, the trial judge held additional hearings to determine the rate of interest to be paid on the deficient amounts.[84] Rather than automatically using the 6% rate specified by the Declaration of Taking Act, the trial judge considered evidence of other measures of delay compensation, such as, the prime interest rate, rates of interest paid on certificates of deposit by local banks, and the yield on short term Treasury bills.[85]

In the Double-O-Bar case, the delay compensation hearing was held in December 1974. The trial judge, considering the aforementioned factors, fixed the interest rate at 8.5%.[86] The interest rate to be paid on the Wilson deficiency was determined to be 8%,[87] reflecting these same economic factors as they existed in May 1975. After depositing the deficient amounts with interest at 6% in October 1975, the United States appealed to the Ninth Circuit, contending that the trial court should have employed the 6% rate specified by the Declaration of Taking Act in both cases.[88] These appeals were consolidated in *United States v. Blankinship*.

After holding that the trial court was not bound by the 6% rate of interest specified by the Declaration of Taking Act,[89] the Ninth Circuit was faced with a more difficult task. The court had yet to determine the following questions: (1) under what circumstances is a rate greater than 6% required? and (2) in what manner are such circumstances es-

83. *Id.* at 1274.

84. *Id.* This is apparently an innovation by the trial judge. In the Ninth Circuit's earlier decision of United States v. 100 Acres of Land, 468 F.2d 1261, 1269 (9th Cir. 1972), *cert. denied*, 414 U.S. 822, 864 (1973), the court ruled that the determination of interest was an issue of fact to be determined by the jury. As in *100 Acres of Land*, the issue of interest was not presented to the jury in *Blankinship*. Rather, the trial judge in *Blankinship* held an additional hearing to determine interest, at which he acted as the trier of fact.

85. 543 F.2d at 1274-75. However, neither this opinion nor the opinion of the trial judge on remand, United States v. Blankinship, 431 F. Supp. 403 (D. Or. 1977), indicates the relative weight assigned to each instrument by the trial judge in arriving at his award of delay compensation.

86. 543 F.2d at 1275.

87. *Id.*

88. *Id.* at 1274. The United states contended that the 6% rate specified by the Declaration of Taking Act was "applicable to each taking pursuant thereto without regard to then prevailing interest rates." *Id.*

89. *Id.*

tablished?[90] Furthermore, implicit in these questions is the additional issue of which measures should be used to determine the proper rate of delay compensation if the 6% rate is not applicable.

To these questions, the Ninth Circuit gave a less than conclusive answer. The court first held that the "determination of whether a proper and reasonable rate in excess of 6 percent is required and the amount of such rate is a factual question and should be determined by the trier of fact."[91] The court then reversed the 8% and 8.5% interest rates awarded by the trial judge because he had failed to consider evidence that the court considered to be of great importance in determining the proper rate of delay compensation.[92] The court was convinced that the United States customarily pays a lower interest rate on its obligations than other borrowers pay. The court was of the opinion that the evidence considered by the trial judge did not adequately make this distinction, even though the judge did consider the yield of 90- to 180-day Treasury notes in determining delay compensation.[93]

The Ninth Circuit equated the seizing of land by the United States pursuant to the Declaration of Taking Act to the substitution of a risk-free obligation of the United States in exchange for the owner's land.[94] This "obligation" began to accrue as of the date of taking and "matured" on the date the United States deposited the deficiency, plus proper interest, into the court. Therefore, the Ninth Circuit believed the Government's obligation to be more like a Treasury note with a relative maturation date than an accumulation of yields on 90- to 180-day Treasury bills.[95]

The *Blankinship* court was concerned that using the prime rate and rates of certificates of deposit to determine delay compensation would result in distortion. This is because these rates are more reflective of the general commercial rate of interest than of the interest rate paid by

90. *Id.*

91. *Id.* However, the court made no mention of the fact that, at the trial level, the determination of the applicable interest rate was made by the judge as the trier of fact, and not by the jury.

92. 543 F.2d at 1274.

93. *Id.* at 1274-75, 1276.

94. *Id.* at 1276.

95. *Id.* However, the dissent took issue with the analysis of the majority that, in taking land under the Declaration of Taking Act, the United States substitutes an obligation of the United States that is free from the risk of default. Judge Kilkenny stated: "This analysis is fundamentally unsound: What the United States substitutes for the ownership of land is its obligation to pay the owner *just compensation* for the property taken. Undue emphasis, as here, upon the monetary returns from obligations of the United States Treasury is not warranted." *Id.* at 1277 (Kilkenny, J., concurring and dissenting) (emphasis in original).

the United States on its risk-free obligations.[96] The court stated that the use of short term Treasury bill yields would not counter these distortions as effectively as would the use of the yield on a Treasury note having the same duration as the period between taking and final payment.[97] It is interesting to note that the average yield on 90-day Treasury bills from May 1973 to May 1975 was 7.07%, while 180-day bills had an average yield of 7.45% during the same period.[98] The Treasury notes of the desired duration actually considered by the district court on remand yielded either 6.78% or 6.92%.[99] The difference between the yields on short and long term bonds is incredibly small.

The court also noted that the trier of fact is not inexorably bound by Treasury note yields alone in fixing the proper amount of delay compensation. The Ninth Circuit realized that a claim for just compensation held by an owner of condemned land is not nearly as marketable as an actual Treasury security of the United States. Therefore, the court stated that allowing for this feature in fixing delay compensation would not be unreasonable.[100]

The Ninth Circuit was aware that a consideration of longer term notes might be inconsequential.[101] As an appellate rather than a fact-finding body, the court merely wished to emphasize that the obligation owed to the condemnee was one owed by the United States Government and that interest on that obligation should be ascertained, therefore, with a view to the special characteristics of the United States as a debtor. As a result of the failure of the district court judge to consider the longer term Treasury notes, the *Blankinship* court did not have to rule on the constitutionality of the application of the 6% rate specified by the Declaration of Taking Act to the facts of the cases before it. However, the court did state that it "strongly" suspected that the use of the 6% rate under these facts was indeed barred by the fifth amendment.[102]

On remand, "in light of all indices in the record," the trial judge assumed that 6% was an inadequate rate.[103] He then proceeded to fix

96. *Id.* at 1276.

97. *Id.*

98. BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, ANN. STATISTICAL DIG. 1971-1975, at 121 (1976).

99. United States v. Blankinship, 431 F. Supp. 403, 404 (D. Or. 1977).

100. 543 F.2d at 1277.

101. *Id.* at 1276.

102. *Id.*

103. 431 F. Supp. at 404. Apparently, the trial judge interpreted the disparity between the money market rate for the sum of the indicators he considered and the 6% rate specified by

the rate of delay compensation in accordance with the Ninth Circuit opinion. But he gave the appellate court opinion as narrow an interpretation as possible. The judge read the opinion as merely requiring him "to *consider* rates of longer term Treasury bonds, along with rates of the other types of obligations used earlier."[104] In recomputing the delay compensation awards after considering the Treasury note rates, the trial judge lowered his original interest rates by 0.75%. The adjusted interest rate awarded to Double-O-Bar was 7.75%, while the rate in the Wilson taking was 7.25%.[105]

In October 1975, the United States had deposited 6% interest along with the difference between the original deposit and the jury award. This left the United States owing 1.75% and 1.25% interest in the respective cases from the date of taking in 1973 until October 1975. However, due to the pendency of the appeal, the owners did not receive their additional delay compensation on that date.[106] As a result, the trial judge awarded an additional 6% post-judgment interest on the 1.25% and 1.75% delay compensation still owing; such interest was to run from October 1975 until final payment.[107] As the delay compensation constituted a part of the award of just compensation, the allowance of the additional 6% interest did not constitute an impermissible compounding of interest; rather, it was post-judgment interest on the award of just compensation improperly withheld since October 1975.[108]

B. Significant Holdings

1. The 6% rate of interest is a floor, not a ceiling, in computing delay compensation.

In *Blankinship* the Ninth Circuit interpreted the 6% figure as being the lowest rate at which interest could be assessed under the Declaration of Taking Act. At the same time, the court indicated that the facts of a particular case might necessitate payment of a higher rate of inter-

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the Declaration of Taking Act as evidence of the fact that the statutory rate would not satisfy the fifth amendment requirement of just compensation.

104. *Id.* (emphasis in original). In Pitcairn v. United States, 547 F.2d 1106 (Ct. Cl. 1976) (per curiam), *cert. denied*, 434 U.S. 1051 (1978), the Court of Claims, in its analysis of *Blankinship*, stated: "The Court of Appeals held that the trier had to consider and take into account such short-term *actual* Government obligations (not that the trier was bound by those rates)." *Id.* at 1122 n.18 (emphasis in original).

105. 431 F. Supp. at 404.

106. *Id.*

107. *Id.* at 404-05.

108. *Id.*

est.[109] The statement by the Ninth Circuit that the 6% rate specified by the Act is not a "ceiling" on interest rates payable in takings pursuant to the Act is fully in accord with the established principle that the determination of just compensation is a judicial rather than a legislative function.[110] The decision is significant because it marks the first time that a federal court has construed the fifth amendment's just compensation requirement to include the payment of interest at a rate greater than 6%.

2. The applicable money market interest rates are determinative of whether the fifth amendment requires the payment of more than 6%.

Although the *Blankinship* court expressly held that the determination of whether a rate of delay compensation in excess of 6% is required is a question of fact,[111] implicit in the court's discussion was the assumption that money market rates provide the most equitable basis for that determination. This is evidenced by the court's own comparison of the statutory rate of 6% to current money market interest rates. The court noted that the trial court should have focused on the yield on Treasury bonds to effectuate an appropriate comparison. Although leaving the final determination to the trial court, the Ninth Circuit implied that 6% is an inadequate rate of interest whenever the United States Government is paying more than 6% interest to borrow money.

This reasoning is basically consistent with the argument put forth by the condemnee in *United States v. 100 Acres of Land*,[112] namely, that the current prevailing economic rate is determinative of just delay compensation. Although the trial court in *Blankinship* applied the prevailing economic rate by considering the interest rates on several different types of instruments, the Ninth Circuit modified that standard by supplementing the analysis with an emphasis on the interest rates of United States Treasury notes.

The concept of prevailing economic rates as determinative of delay compensation, whether modified by the Ninth Circuit or not, is fully in accord with the general principle of determining just compensation in

109. 543 F.2d at 1276.

110. Furthermore, the Ninth Circuit's interpretation fully comports with the intent of the framers of the Act to allow for the payment of interest at "the usual rate." *See* note 41 *supra* and accompanying text. However, the court did not attempt to reconcile its decision with legislative intent, although this authority was available.

111. 543 F.2d at 1274.

112. 468 F.2d 1261 (9th Cir. 1972), *cert. denied*, 414 U.S. 822, 864 (1973). *See* notes 62-63 *supra* and accompanying text.

eminent domain takings. Where equitable to both condemnor and condemnee, just compensation has been determined historically by market value.[113] Market or "fair market" value is defined as the price that a willing buyer would pay to a willing seller.[114] The prevailing interest rate on a money market instrument (*e.g.*, a United States Treasury note) is, in actuality, the price paid by a willing borrower to a willing lender for the use of money. Therefore, it follows from the *Blankinship* opinion that, just as the Government must pay fair market value as just compensation for the property it takes, it must also pay fair market value to the owner for the delay in receiving his compensation. This fair market value, as defined by the *Blankinship* court, is determined by what the United States Government pays on the open market for the money it borrows.

3. The use of United States Treasury notes by the *Blankinship* court shows calculation of delay compensation from the point of view of the condemnor.

With few exceptions, it is a well-established principle of the law of eminent domain that just compensation is determined from the point of view of the condemnee, not the condemnor.[115] In *Blankinship*, the Ninth Circuit violated this principle by emphasizing the use of United States Treasury instruments to determine delay compensation. The interest rates on government bonds represent the cost to the United States of borrowing money, not the cost to the condemnee of borrowing the same amount of money for the same period of time. The cost to the United States of borrowing money is considerably less than the cost to the average condemnee. If the owners in *Blankinship* had borrowed an amount equivalent to their compensation awards for the period during which payment was delayed, their interest payments would have been greatly in excess of interest rates paid by the United States on Treasury instruments.[116] If just compensation is to be calculated with an eye to

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113. *See* Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470, 474 (1973). The same day the Court decided *Almota Farmers*, it decided United States v. Fuller, 409 U.S. 488 (1973). In *Fuller*, the Court stated that fair market value "is 'not an absolute standard nor an exclusive method of valuation'." *Id.* at 490 (quoting United States v. Virginia Electric & Power Co., 365 U.S. 624, 633 (1961)).

114. Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470, 474 (1973).

115. *See* Boston Chamber of Commerce v. City of Boston, 217 U.S. 189, 195 (1910); 3 NICHOLS', *supra* note 3, § 8.61 and cases cited therein.

116. As noted by the trial judge in *Blankinship*, the Government paid either 6.78% or 6.92% on its bonds during the period of delay in *Blankinship*. The prime interest rate during

the loss suffered by the condemnee, then interest rates payable by the United States are not relevant to the calculations.

In condemnation takings involving a sovereign other than the United States, basing an award upon the credit rating of the condemnor can work inequity on the sovereign. One need look no further than the recent financial problems that have plagued such major American cities as Cleveland and New York to see that this theory, if applied to takings by those cities, would result in the payment of delay compensation far in excess of that required by the fourteenth amendment.[117]

A measure of compensation based upon the actual cost to a particular condemnee of borrowing money is equally unsatisfactory. Even though just compensation traditionally has been determined by what the condemnee has lost and not by what the taker has gained, it would be inequitable to require the condemnor to indemnify an insolvent condemnee. If the court were to look to the property owner's credit rating in assessing delay compensation, a poor credit risk would receive a greater interest rate than a good credit risk who owned the same property!

By instructing the trial judge to consider the interest rate paid by the United States on its Treasury bonds, the *Blankinship* court failed to consider any of the above-mentioned policy considerations. However, these distinctions have received considerable discussion in post-*Blankinship* eminent domain cases heard by the United States Court of Claims.[118]

IV. INTEREST RATES IN THE COURT OF CLAIMS

The United States Court of Claims has jurisdiction, pursuant to the Tucker Act,[119] over suits against the United States for uncompensated takings by inverse condemnation, which claims are constitutionally based.[120] The Patent Infringement Act also grants jurisdiction to the

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this period ranged from 6.75% to 12%, averaging approximately 9.25%. 1 J. FINANCIAL PLAN. 93 (1977).

117. *See* note 11 *supra*. *See also* Wall St. J., Jan. 2, 1979, at 15, col. 1: "The bond market denied access to a few prospective issues last year. It refused to readmit New York City. . . . Its door slammed closed to Cleveland, which . . . became the first large U.S. metropolis to default in about 45 years."

118. *See* Pitcairn v. United States, 547 F.2d 1106, 1122-24 (Ct. Cl. 1976) (per curiam), *cert. denied*, 434 U.S. 1051 (1978).

119. 28 U.S.C. § 1491 (1976).

120. The Tucker Act states in pertinent part: "The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded . . . upon the Constitution . . . ." *Id.* A suit by an owner whose property has been taken by inverse condemnation by the United States is a claim founded upon the Constitution and is, there-

Court of Claims to hear suits against the United States for patent and copyright infringement.[121] Such infringement constitutes a taking of a property right protected by the fifth amendment,[122] thus entitling the owner of the patent or copyright to "reasonable and entire compensation."[123]

As both the Tucker Act and the Patent Infringement Act apply to takings that require just compensation, the owners of property taken by inverse condemnation or patent infringement are entitled to delay compensation for the period between the taking and final payment. Both inverse condemnation and patent infringement, by their very definitions, involve cases in which payment is never contemporaneous with the taking. In such cases, the delay between taking and payment may literally span decades.[124] Consequently, delay compensation often becomes a major part of the entire award of just compensation.[125]

Unlike the Declaration of Taking Act, neither the Tucker Act nor the Patent Infringement Act specifies a particular interest rate to be paid as delay compensation. Thus, the Court of Claims has been faced with the task of determining a viable standard for fixing interest rates for delay compensation. For the first half of the century, the court generally followed trends in investment yield rates.[126] The court historically has employed the same rate in all eminent domain cases, whether pursuant to the Tucker Act or the Patent Infringement Act.[127]

The interest rate employed by the Court of Claims from 1927 to 1937

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fore, within the jurisdiction of the Court of Claims. *See* Regional Rail Reorganization Act Cases, 419 U.S. 102, 125-27 (1974) (citing United States v. Causby, 328 U.S. 256, 267 (1946)).

121. 28 U.S.C. § 1498 (1976).

122. *See generally* Crozier v. Krupp. 224 U.S. 290 (1912).

123. 28 U.S.C. § 1498 (1976) provides for recovery of "reasonable and entire compensation," which has been interpreted by the Supreme Court to include interest for the delay in payment. *See* Waite v. United States, 282 U.S. 508, 509 (1931).

124. In Pitcairn v. United States, 547 F.2d 1106 (Ct. Cl. 1976) (per curiam), *cert. denied*, 434 U.S. 1051 (1978), the taking occurred in 1946 and final judgment was not reached until 1977. The Government had not paid for the taking for over thirty years!

125. *See* Tektronix, Inc. v. United States, 575 F.2d 832 (Ct. Cl.), *cert. denied*, 439 U.S. 1048 (1978). In *Tektronix*, the Court of Claims found the condemnee to be entitled to interest of $1,995,087, plus $491.66 per day, until payment was made on a just compensation award of $2,243,220. *Id.* at 836-38. The delay compensation almost equalled the original award.

126. For a history of delay compensation treatment in the Court of Claims, see Pitcairn v. United States, 547 F.2d 1106, 1120 (Ct. Cl. 1976) (per curiam), *cert. denied*, 434 U.S. 1051 (1978). The court noted, however, that these rates were 1 to 2 points higher than long term corporate bond yields, *id.* at 1122, and that the rate of delay compensation awarded from 1956 through 1960 was "higher than the prime rates and the rates at which the Government could then have borrowed money." *Id.* at 1124.

127. *Id.* at 1120.

was the same 6% rate prescribed by the Declaration of Taking Act in 1931.[128] After 1937, the rate dropped to 5%[129] and remained at that level until 1944 when the rate dropped again to 4%. The 4% figure remained stable until it was successfully challenged in 1976.[130] It is interesting to note that while the rate of delay compensation employed by the Court of Claims underwent several changes, the 6% rate specified by the Declaration of Taking Act remained unchanged.

As noted above, the 4% rate of delay compensation awarded by the Court of Claims in 1944 remained unchanged for over thirty years. This stagnation of the interest rate occurred "not because of any affirmative determination that . . . an increase was improper or unwarranted, but rather because [the Court of Claims] was not confronted with a case that presented the necessary evidence properly."[131] Almost immediately after the *Blankinship* opinion was handed down, a successful challenge to the 4% rate of delay compensation was made in *Pitcairn v. United States*.[132] *Pitcairn* involved infringement by the United States of various patents held by the Autogiro Company, covering helicopter rotor structures and control systems. In that case, the first taking by patent infringement occurred in 1946.[133] That date marked the point from which delay compensation began to run. The Court of Claims did not render final judgment until March 1977.[134] Although Autogiro's right to delay compensation did not cease until final payment by the United States, the 1977 date illustrates the tre-

128. *See id.* and text accompanying notes 42-43 *supra.*

129. Pitcairn v. United States, 547 F.2d 1106, 1120 (Ct. Cl. 1976) (per curiam), *cert. denied*, 434 U.S. 1051 (1978). The prime rate was 1.5% during the same period. 1 J. FINANCIAL PLAN. 91 (1977).

130. Pitcairn v. United States, 547 F.2d 1106, 1120 (Ct. Cl. 1976) (per curiam), *cert. denied*, 434 U.S. 1051 (1978); Tektronix, Inc. v. United States 552 F.2d 343, 353 n.18 (Ct. Cl.), *modified*, 557 F.2d 265 (Ct. Cl. 1977), *subsequently appealed from trial court disposition*, 575 F.2d 832 (Ct. Cl.), *cert. denied*, 439 U.S. 1048 (1978).

131. Pitcairn v. United States, 547 F.2d 1106, 1124 (Ct. Cl. 1976) (per curiam), *cert. denied*, 434 U.S. 1051 (1978). Cited in *Pitcairn* in support of this proposition were: Drakes Bay Land Co. v. United States, 459 F.2d 504, 512 (Ct. Cl. 1972) (erroneously held that the 6% interest paid by the United States in condemnation cases involving land that became part of the same National Park was interest on the judgments, not interest as a part of delay compensation); Amerace Esna Corp. v. United States, 462 F.2d 1377, 1381 (Ct. Cl. 1972) (no evidence offered to justify requested 6% rate); Confederated Salish & Kootenai Tribes v. United States, 437 F.2d 458, 460 (Ct. Cl. 1971) (evidence offered to justify 6% rate was not timely offered); Carlstrom v. United States, 177 F. Supp. 245, 250 (Ct. Cl. 1959) (no special circumstances present to warrant the application of a rate other than the customary one of 4%).

132. 547 F.2d 1106 (Ct. Cl. 1976) (per curiam), *cert. denied*, 434 U.S. 1051 (1978).

133. *Id.* at 1115.

134. *Id.* at 1106.

mendous length of time for which Autogiro was entitled to claim delay compensation. Thus, arriving at the correct standard for computing interest rates becomes an extremely critical factor in such cases.

In *Pitcairn*, both the United States and Autogiro urged that the 4% rate, applied since 1944, should not be applied in that case. The United States suggested that the trial judge arrive at a rate of delay compensation by considering the yields on hypothetical long term government bonds that had been constructed solely for the purpose of the litigation.[135] Autogiro urged that the court use Moody's Composite Index of Yields on Long Term Corporate Bonds.[136]

The trial judge found that the Government's hypothetical bonds would yield 3.1% per annum from the time of taking until final payment. He found this rate of delay compensation to be "both inadequate and improper."[137] Examination of the trends indicated by Moody's Composite Index of Yields on Long Term Corporate Bonds led the trial judge to break down the time of delay into several periods and to assign different interest rates to each period. The interest rates determined by the trial judge ranged from a low of 4% for the years 1947 through 1955 to a high of 7.5% for the years 1971 through 1975.[138]

As justification for his decision to use Moody's Bond Index as a measure to determine delay compensation, the trial judge relied on section 6621 of the Internal Revenue Code.[139] This section provides for

135. *Id.* at 1120.

136. *Id.*

137. *Id.* at 1122 n.18.

138. *Id* at 1121. The rates established by the trial judge were as follows: 4% for the period 1947-1955, 4.5% for 1956-1960, 4.75% for 1961-1965, 6.5% for 1966-1970, and 7.5% for 1971-1975. The actual yields indicated in Moody's Composite Index for these periods are: 3.1% for the period 1947-1955, 4.26% for the period 1956-1960, 4.6% for the period 1961-1965, 6.7% for the period 1966-1970, and 8.3% for the period 1971-1975. U.S. DEP'T COM., ANN. STATISTICAL DIG. 105 (21st biennial ed. 1977).

139. I.R.C. § 6621 provides:

(a) In general.—

The rate of interest . . . is 9 percent per annum, or such adjusted rate as is established by the Secretary under subsection (b).

(b) Adjustment of interest rate.—

The Secretary shall establish an adjusted rate of interest for the purpose of subsection (a) not later than October 15 of any year if the adjusted prime rate charged by banks during September of that year, rounded to the nearest full percent, is at least a full percentage point more or less than the interest rate which is then in effect. Any such adjusted rate of interest shall be equal to the adjusted prime rate charged by banks, rounded to the nearest full percent, and shall become effective on February 1 of the immediately succeeding year. An adjustment provided for under this subsection may not be made prior to the expiration of 23 months following the date of any preceding adjustment under this subsection which changes the rate of interest.

In his dissent, 547 F.2d at 1128-30 (Skelton, J., concurring and dissenting), Judge Skelton disapproved of the use of I.R.C. § 6621, stating:

the payment of 9% interest by the government on overpayments of federal taxes and allows for annual adjustment of that rate when the prime rate is a full point more or less than the interest rate then in effect.[140] The significance of this Internal Revenue Code section to the decision to use Moody's Index, as seen by the trial judge, was that "Congress thus gives statutory sanction to the use of a commercial rate index or indicator in determining the rate of interest to be paid by the Government."[141]

In a supplement to the trial judge's opinion,[142] the Court of Claims affirmed the use of Moody's Composite Index of Yields on Long Term Corporate Bonds as a basis for the determination of the proper rate of delay compensation.[143] In so holding, the court stated:

> [L]ong-term corporate bond yields are an indicator of broad trends and relative levels of investment yields or interest rates. They cover the broadest segment of the interest rate spectrum. The corporate bond market is large, substantially in excess of long-term Government bonds and long-term corporate yields measure basic trends and relative levels of interest rates from one period to another.[144]

The Court of Claims agreed with the trial judge's rejection of the hypothetical long term government bonds as the measure for determining delay compensation.[145] The court found these bonds, although representative of the cost to the United States of borrowing money, to be irrelevant in measuring the injury caused to Autogiro by the delay in

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> There is not the slightest evidence or indication that Congress intended the Act to apply in any way to eminent domain cases. Besides, there is a big difference between interest on an overpayment of taxes and interest in a taking case. An overpayment of taxes allows the Government to use the taxpayer's money until a refund is made and the nine percent interest is payment by the Government for such use. Whereas, in a taking case, interest is not paid for use of the money belonging to the party whose property is taken, but is awarded to him as a part of his damages in the form of delayed compensation.

Id. at 1130. Judge Skelton did not correctly analyze the proposition for which the trial judge cited I.R.C. § 6621. The trial judge merely used this section as support for the proposition that Congress, in adjusting the interest rate, gave sanction to the use of economic indicators for determining the rate of interest to be paid by the government. *See* note 141 *infra* and accompanying text. As the rate specified by I.R.C. § 6621 was designed to reflect the prevailing prime interest rate, *see* I.R.C. § 6621(b) *supra*, it is a satisfactory guide for determining the rate of delay compensation. However, it should be considered in conjunction with other indicators, as it only reflects the rate at which the most favored borrowers may borrow money. *See* 547 F.2d at 1124. The prime interest rate was also one of the factors utilized by the trial court to determine delay compensation on remand in United States v. Blankinship, 431 F. Supp. 403, 404 (D. Or. 1977).

140. *See* I.R.C. § 6621, *supra* note 139.

141. 547 F.2d at 1121.

142. *Id.* at 1122 n.17.

143. *Id.* at 1124.

144. *Id.*

145. *Id.* at 1122, 1124.

compensation.[146] The *Pitcairn* court attempted to harmonize this view with the *Blankinship* holding by differentiating between the long term hypothetical bonds and the actual, shorter term, United States Treasury notes utilized in *Blankinship*.[147] The Court of Claims also accurately pointed out that the trial judge in *Blankinship* was not bound by those rates, but merely had to consider them.[148] The court further stated that the trial judge had taken the actual yields on those bonds "into account."[149] The court did not say, nor is there any other evidence, that the trial judge actually used these Treasury notes in his determination of the rate of delay compensation.

Implicit in the selection of Moody's Index as the proper measure of delay compensation by both the trial judge and the Court of Claims is the rejection of the use of United States Treasury notes as suggested by the *Blankinship* court. Whether measured by hypothetical or actual government bonds, the result is the same: "[C]ompensation [is determined] only according to the point of view of the taker without reference to that of the owner since he is hardly likely to be able to borrow money at the rates the Government can."[150] As discussed above, this method of valuation contravenes the compensatory purpose of the law of eminent domain.[151]

The *Pitcairn* court also rejected the notion that the rate of delay compensation could be based either in whole or in part on the actual cost to the condemnee of borrowing money.[152] The court's rationale was that condemnees are not usually in the business of borrowing money; therefore, delay compensation based on such costs is too speculative.[153]

As the Court of Claims found the cost of borrowing money to either the condemnor or the condemnee to be unacceptable, it focused upon Moody's Index as a compromise between the two competing theories.

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146. *Id.* at 1122. *See* notes 115-16 *supra* and accompanying text.

147. 547 F.2d at 1122 n.18. The court stated that *Blankinship* "dealt with relatively short-term, actual Treasury securities—not with hypothetical long-term Government bonds never actually issued." *Id.*

148. *Id. See* note 104 *supra* and accompanying text.

149. 547 F.2d at 1122 n.18. In his dissent, Judge Skelton disagreed, stating:

> It does not appear that there was any evidence at the trial showing the rate of interest that would have been available to the plaintiff if it had invested, on the dates of taking, the total amounts due it in marketable public debt securities issued by the United States Treasury during the periods involved here. Without such evidence, we are not justified in awarding interest of more than six percent . . . .

Id. at 1130 (Skelton, J., concurring and dissenting).

150. *Id.* at 1122.

151. *See* notes 115-16 *supra* and accompanying text.

152. 547 F.2d at 1123-24.

153. *Id.*

The court was impressed by the breadth of the corporate bond market and by the fact that Moody's Index covers the broadest segment of the interest rate spectrum. In choosing Moody's Index, the Court of Claims implicitly indicated that the prevailing or fair market interest rate should determine delay compensation. For, as Moody's Index covers a large segment of the interest rate spectrum, it indicates the *average* market cost of borrowing money.

In a later patent infringement case, *Tektronix, Inc. v. United States*,[154] the Court of Claims reiterated its preference for Moody's Composite Index of Yields on Long Term Corporate Bonds.[155] In *Tektronix*, the infringement period began in 1959,[156] thus entitling the owner of the infringed patents, Tektronix, to delay compensation from that date until final payment. The trial judge did not apply the interest rates established in *Pitcairn* for the applicable periods, but established new rates to apply to *Tektronix*.[157] He based the determination of delay compensation on the yields of Aaa corporate bonds and actual Treasury securities.[158]

The Court of Claims reversed the decision of trial judge, holding that the *Pitcairn* rates were to be automatically applied to just compensation cases without any need of proof on an individual case basis.[159] However, as *Pitcairn* only considered interest rates through 1975, the *Tektronix* court held that the presumption of 7.5% interest could be overcome for those years after 1975 if an appropriate showing were to be made.[160] The court further held that such a showing had to be made in a manner consistent with the theory developed in *Pitcairn*.[161] The only reasonable inference that can be drawn from this requirement is that, since the *Pitcairn* theory of delay compensation was based on

154. 552 F.2d 343 (Ct. Cl.), *modified*, 557 F.2d 265 (Ct. Cl. 1977), *subsequently appealed from trial court disposition*, 575 F.2d 832 (Ct. Cl.), *cert. denied*, 439 U.S. 1048 (1978).

155. 552 F.2d at 352-53.

156. *Id.* at 345. *But see id.* at 352 (indicating a 1960 commencement date).

157. *Id.* at 352 & n.16.

158. *Id.* at 352.

159. *Id. See* note 138 *supra* for the rates established in *Pitcairn*.

160. 552 F.2d at 352. In a subsequent decision based upon the *Tektronix* litigation, Tektronix, Inc. v. United States, 575 F.2d 832 (Ct. Cl.), *cert. denied*, 439 U.S. 1048 (1978), the Court of Claims affirmed the trial judge's implementation of a delay compensation rate of 8% to be applied from January 1, 1976 until payment. *Id.* at 836. In affirming the 8% rate, the court harmonized its holding with *Pitcairn*, stating that "it should be noted that the *Pitcairn* opinion focused solely on the period before 1976. Although the 7½ percent rate [in *Pitcairn*] was ultimately applied to a period extending beyond 1975, the *Pitcairn* opinion, and our 1977 opinion in this case, left the door open for proof that a different rate should be applied in years after 1975." *Id.*

161. 552 F.2d at 352-53.

Moody's Composite Index of Yields on Long Term Corporate Bonds, all delay compensation in the future should also be based on Moody's Corporate Index.

The *Tektronix* opinion, in rejecting the trial court's use of Aaa corporate bonds and actual Treasury securities, further demonstrates the Court of Claim's disapproval of the utilization in *Blankinship* of actual Treasury securities to determine delay compensation. Although the court in *Pitcairn* attempted to reconcile its decision with *Blankinship*, no such attempt was made in *Tektronix*. The *Tektronix* opinion, however, did not purport to pass upon delay compensation cases pursuant to statutes in which Congress has established a "different rate."[162]

The court's disclaimer notwithstanding, both *Tektronix* and *Pitcairn* should stand for the proposition that interest at less than the prevailing market rate does not meet the constitutional requirement of just compensation for delay in payment to the condemnee. Just compensation is not a statutory determination.[163] Nor is it determined by the procedural remedy employed. The proposition that delay compensation, or the entire award for that matter, differs depending upon the procedure of the court hearing the case is ludicrous. The only rational explanation for the court's disclaimer is that it was an attempt to dismiss the dissent's contention that the court's adoption of the *Pitcairn* rates of delay compensation "amount[ed] to legislation that can only be enacted by Congress."[164]

V. THE IMPLICATIONS OF *Blankinship* AND THE COURT OF CLAIMS CASES WHEN APPLIED TO STATE LAW

The holding in *Blankinship*, as expanded by the Court of Claims in *Pitcairn* and *Tektronix*, is especially significant in light of the recent upward surge of interest rates. At the time *Blankinship* was decided, the prime interest rate had settled back to 6.75%.[165] However, by April 1978, when the Court of Claims decided the final *Tektronix* case, the rate had climbed back up to 8%.[166] In the nine month period since *Tektronix*, the prime rate has reached 11.75%.[167] These statistics

162. *Id.* at 353 n.19.

163. *See* note 20 *supra* and accompanying text.

164. 552 F.2d at 355 (Skelton, J., concurring and dissenting). Judge Skelton contended that the majority, by holding that the *Pitcairn* rates were to apply from then on, had usurped Congress' legislative powers. This contention is easily defeated because the issue of just compensation is one to be determined by the judiciary, and not the legislature.

165. 1 J. FINANCIAL PLAN. 93 (1977).

166. 64 FED. RES. BULL. A26 (Sept. 1978).

167. Wall St. J., Jan. 10, 1979, at 29, col. 5.

clearly demonstrate that interest at 6% cannot possibly constitute just compensation at a time when the most secure borrowers have to pay almost double that amount.

Even in light of these developments in the federal courts and the money market, many states continue to pay delay compensation at a rate of 6% or less.[168] Although the states are not bound by *Blankinship* or the decisions of the Court of Claims, they are required by the United States Constitution[169] to pay just compensation for property taken by the exercise of their powers of eminent domain.[170] As just compensation is determined by what the owner has lost, and not by the identity of the taker, the principles developed in *Blankinship*, as supplemented by *Tektronix* and *Pitcairn*, have clear constitutional impact on state procedures for determining delay compensation.

The principles developed in these cases are most beneficially applied if considered in conjunction with one another. First, *Blankinship* should be viewed as standing primarily for the proposition that statutory interest rates operate only as a floor for delay compensation, although the Constitution may require greater compensation. This enables a state statute to remain constitutional on its face, while allowing for a greater rate of compensation if required by the fourteenth amendment. The determination of whether a greater rate of interest is required is one made by the trier of fact.

Next, application of the principles set forth in *Pitcairn* and *Tektronix* provides a model to be used by the trial court in making the determination of whether a greater interest rate is required. The trier of fact should examine the trend in investment yield rates. As indicated in *Pitcairn*, this is easily accomplished by analyzing one or more of the indices assembled for this purpose. If the applicable statute allows for a greater rate, then the statutory rate should be applied. If the statutory rate is substantially less than the market rate, then the principles of just compensation require application of that market rate to determine a constitutionally just delay compensation.

Mark R. Kaplan

168. *See* cases cited in note 78 *supra*.
169. U.S.CONST. amend. XIV, § 1.
170. *See* note 11 *supra* and accompanying text.