Washington Law Review

Volume 42 | Issue 1

10-1-1966

Jury Selection—Key-Man System Eliminated

anon

was outside carrier insurer liability should be placed upon the carrier, while the burden of proving that the carrier's negligence proximately caused the damage should be placed upon the shipper. While this division of proof has the disadvantage of complicating litigation, it provides a balance between carrier acceptance of responsibility which is properly the shipper's, and preservation of carrier motive to exercise due care. A divided risk of damage was the rule at common law, and, as codified by the Carmack Amendment,[34] should also be that of the United States despite unfortunate intimations to the contrary in the principal case.

JURY SELECTION—KEY-MAN SYSTEM ELIMINATED

Defendant was indicted by a federal grand jury for perjury. The jury commissioner solicited names of prospective jurors from various "key-men," community leaders who had been instructed in the qualifications which the jury commissioner felt prospective jurors should have. On appeal the Court of Appeals for the Fifth Circuit dismissed the indictment. *Held*: Key-man jury selection violates the standards for jury selection prescribed by the Civil Rights Act of 1957.[1] *Rabinowitz v. United States*, 366 F.2d 34 (5th Cir. 1966).

With passage of the Civil Rights Act of 1957, amending 28 U.S.C. § 1861, the states lost control over qualifications of federal jurors.[2] That act together with the establishment in *Glasser v. United States*,[3] of the rule that a jury must represent a cross-section of the community from which it was selected, set forth the criteria for juror selection.

[34] That the Carmack Amendment codifies the common law rules of carrier liability, see Secretary of Agriculture v. United States, 350 U.S. 162, 165 n.9 (1956).

[1] 71 Stat. 634, 638 (1957), which amended 28 U.S.C. § 1861 (1950) to read:
Qualifications of Federal jurors
Any citizen of the United States who has attained the age of twenty-one years and who has resided for a period of one year within the judicial district, is competent to serve as a grand or petit juror unless—
(1) He has been convicted in a State or Federal court of record of a crime punishable by imprisonment for more than one year and his civil rights have not been restored by pardon or amnesty.
(2) He is unable to read, write, speak, and understand the English language.
(3) He is incapable, by reason of mental or physical infirmities to render efficient jury service.

[2] Before the 1957 Civil Rights Act, section 1861 had a fourth subsection which stated, 28 U.S.C. § 1861(4) (1950):
(4) He is incompetent to serve as a grand or petit juror by the law of the State in which the district court is held.

[3] 315 U.S. 60 (1942).

While two other courts have indicated that section 1861 merely set a minimum standard,[4] the principal case is the first decision construing section 1861 as the sole standard for juror selection.

The majority in *Rabinowitz* concluded that Congressional intent to set uniform standards for federal jury selection was clear. The court attempted to implement the "mood of Congress [as] summarized by its legislation,"[5] and cited many Congressional speakers who urged uniform federal jury standards. The 1957 Senate debates were quoted extensively by the court as indicating an intent to have uniform jury standards promulgated by the Civil Rights Act.[6] Having thus established Congressional intent, the majority rejected any possibility that the standards of the 1957 act were merely minimum standards. The court compared section 1861 with section 1863,[7] which prescribes the procedure by which a judge may excuse a juror from service, concluding that it would be anomalous for Congress to enact a standard in section 1861 which could give a jury commissioner more discretion than a judge to exclude potential jurors. A jury commissioner, the court concluded, had no latent discretion to raise standards of jurors. Lack of such discretion and Congressional intent of uniformity convinced the majority that section 1861 set a sole standard. One judge concurred specially to avoid an evenly split court. He rejected the sole standard test as "doctrinaire"[8] and emphasized the cross-section test as the true criterion. A dissent rejected the sole standard test, interpreting *Glasser* to permit selection of more competent jurors, and found no language in section 1861 to compel the majority's conclusion.

---

[4] United States v. Henderson, 298 F.2d 522 (7th Cir. 1962), *cert. denied*, 369 U.S. 878 (1962) (limited use of criterion of eighth grade education did not violate § 1861); United States v. Ware, 237 F. Supp. 849 (D.D.C. 1964), *aff'd*, 356 F.2d 787 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 919 (1966) (no proof of systematic exclusion of pardoned convicts). Compare Gorin v. United States, 313 F.2d 641 (1st Cir. 1963); United States v. Agueci, 310 F.2d 817 (2d Cir. 1962), *cert. denied sub nom.* Guippone v. United States, 372 U.S. 959 (1963); United States v. Greenberg, 200 F. Supp. 238 (S.D.N.Y. 1961); United States v. Hoffa, 196 F. Supp. 25 (S.D. Fla. 1961), which avoid construing § 1861 and rely on the cross-section test.

[5] Rabinowitz v. United States, 366 F.2d 34, 60 (5th Cir. 1966).

[6] *Id.* at 48-50. One example which the court said "made crystal clear" the intent was an exchange between Senators O'Mahoney and Kefauver. The latter asked, *id.* at 49, 103 CONG. REC. 13154 (1957):

> Thereby [the amendment] establishes a uniform system in Federal courts all over the United States, so that there can be no possible discrimination with respect to anyone because of his race or color. Is that correct?
> Mr. O'Mahony: The Senator is correct....

[7] 28 U.S.C. § 1863 (1962) allows a judge to exclude jurors for good cause, undue hardship, or delay in the administration of justice, but not on account of race or color.

[8] 366 F.2d at 72.

The court's construction of section 1861 should be compared with the language and legislative history of that section. Section 1861 disqualifies persons from jury service who are illiterate, incapable of rendering efficient jury service, or convicted of a crime punishable by one year's imprisonment and remain unpardoned. The key language of section 1861 is "competent to serve . . . unless . . . ."[9] This is hardly language suggestive of an affirmative duty, yet by the sole standard test it becomes one. Before the Civil Rights Act was amended to its present form, the opponents of state control of federal juror selection, as permitted in section 1861 (4), advanced uniformity as their primary argument in favor of federal standards for federal courts.[10] The majority in *Rabinowitz* failed to recognize that uniformity in this context in all probability meant no more than elimination of state standards in selection of jurors for federal courts.

The majority and dissent made contrasting use of *The Jury System in the Federal Courts*,[11] which was approved by the Judicial Conference of the United States in 1960. The majority noted that the Judicial Conference sought legislation approving selection of jurors with as "high a degree of morality, integrity, intelligence, and common sense"[12] as is consistent with the cross-section test. As the dissent observed, however, the 1960 *Report* treats the juror qualifications established in section 1861 as minimum, rather than sole, standards which may be upgraded as long as the cross-section test is met.[13] The *Report's* interpretation of section 1861 was approved in *United States v. Ware*[14] and in *United States v. Henderson*,[15] where the court stated: "Recognition that the statute envisions 'efficient' service requires rejection of a conclusion that an intelligence level equated with mere literacy was intended to be imposed as a maximum standard. . . . " The majority in the principal case stated that there was no conflict with *Henderson*.[16]

[9] For the full text of section 1861 see note 1 *supra*.

[10] The "Knox Report," REPORT TO THE JUDICIAL CONFERENCE OF THE COMMITTEE ON SELECTION OF JURORS (1942), represents the beginning of sustained attack on state qualifications for federal juries. Because state standards had to be used in each federal court there were forty-eight sets of standards with sixty-eight classes of possible grounds for exceptions. "Knox Report" at 31-45.

[11] 26 F.R.D. 409 (1960). [Hereinafter referred to as *Report*.] The *Report*, was written by a committee of federal district court judges as a follow-up to the "Knox Report," *op. cit. supra* note 10.

[12] *Id.* at 419, 421.

[13] See *id.* at 437, and exhibit at 507-08, 513-14.

[14] 237 F. Supp. 849 (D.D.C. 1964), *aff'd*, 356 F.2d 787 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 919 (1966) (dictum concerning 11 D.C. CODE ANN. § 230(a) (1961) which is parallel to § 1861). The opinion was written by one of the *Report's* authors, Judge Holtzoff.

[15] 298 F.2d 522, 525 (7th Cir. 1962), *cert. denied*, 369 U.S. 878 (1962).

[16] 366 F.2d at 51 n.32. By footnoting *Henderson*, the court avoided dealing with

However, *Henderson* unquestionably construed section 1861 as creating a minimum, not a sole standard.

If any intent can be attributed to the 1957 Congress concerning federal jury qualifications, it was that of compromise. The final draft of section 1861 is partially the result of two compromise Senate amendments, compelled by certain opposition to the initial version of the bill.[17] The first of these compromise amendments provided the right to jury trial for civil rights contempt cases.[18] Northern opposition to this amendment, based on the presumed bias inherent in Southern jury selections, resulted in a second compromise which eliminated this objection by abolishing state control over jury selection standards.[19] The stated purposes of the latter amendment were: (1) uniformity of federal juror qualifications, (2) prevention of Negro exclusion from federal juries, and (3) creation of a new civil right—the right to serve as a juror.[20] The new amendment provided for juror qualifications acceptable to both the North and South, thereby paving the way for passage of the entire bill. The intent of Congress, therefore, does not warrant the statutory construction in the principal case. The sponsors were attempting to achieve a compromise which would reduce opposition to the bill; however, the court overlooked this compromise nature of the amendment, and emphasized a design for uniform qualifications.[21] It is overly creative to conclude that Congress intended to set a sole standard of jury qualification—the court in effect rewrote both legislative history and the statute.

The essential requirement of any jury is that it be composed of the

---

the case on its merits. The quote in text was not mentioned at all. While a Seventh Circuit decision was not controlling in the Fifth Circuit, it deserved more attention than a footnote.

[17] The initial version of the bill was H.R. 6127, 86th Cong., 1st Sess. (1957). The House bill had no provision for juror qualifications. However, the bill made contempt proceedings for failure to comply with a federal court order in civil rights cases solely a matter of court discretion—jury trials were not permitted. In the Senate, lack of a jury trial caused bitter Southern opposition to the bill. See 103 CONG. REC. 11003 (1957), and the preceding debates.

[18] This amendment, offered by Senator O'Mahoney, introduced § 1861, including subsection (4), into the debates.

[19] The Church amendment merely deleted subsection (4) from § 1861 to meet Northern objections. 103 CONG. REC. 13154 (1957). For statements of the Northern opposition to the initial amendment see the remarks of Senator Javits, *id.* at 11566-68.

[20] See the statements of Senator Church, *id.* at 13154.

[21] Northern liberals opposed the Church amendment because they thought it would not place sufficient Negroes on juries. See the comments of Senators Douglas, *id.* at 13250; Clark, *id.* at 13276, 13289-91; and Morse, *id.* at 13317. These Senators voted against the amendment because they favored a stronger one. Ironically the *Rabinowitz* construction of § 1861 is apparently what they were hoping would be written into the statute if the Church amendment failed.

peers or equals of the person whose rights it is selected to determine,[22] and *Glasser* requires that a federal jury represent a cross-section of the community from which it is selected. In *Thiel v. Southern Pacific Co.*,[23] the Supreme Court established six factors to be considered in determining the cross-section of a community: racial, political, social, geographical, religious, and economic. The cross-section test, however, is not self-executing, and its accurate application is crucial. The inherent discretion of a key-man jury selection increases the likelihood of discrimination or misapplication of the cross-section test. As a community leader known by the white jury commissioner, a Negro selected as a key-man may be one who identifies more with prevailing views of middle-class whites than those of the Negro community.[24] The possibility of accurate representation of the community may be further reduced where, as in *Rabinowitz,* all key-men are white. In the principal case the court should have eliminated the key-man system to implement the purpose of the cross-section test.[25]

The result in *Rabinowitz,*[26] elimination of the key-man method, was correct, but by using the wrong approach, the court did not meet the problem facing federal courts in the South: how to impanel a legal jury.[27] The concurring opinion, however, does clarify the

---

[22] Strauder v. West Virginia, 100 U.S. 303, 308 (1880).

[23] 328 U.S. 217 (1946).

[24] *Cf.* ZINN, SNCC: THE NEW ABOLITIONISTS 236 (2d ed. 1965). The discussion there concerns the leaders of Negro colleges, but is relevant in other situations.

[25] Under the cross-section test the defendant has the burden of proof in showing that the selection system is illegal. Norris v. Alabama, 294 U.S. 587 (1935). This can be difficult to prove when there are some Negroes on the jury lists. See Akins v. Texas, 325 U.S. 398 (1945). The dissent said the defendant had failed to establish a prima facie case as had been done in United States *ex rel.* Seals v. Wiman, 304 F.2d 53 (5th Cir. 1962), *cert. denied,* 372 U.S. 915 (1963) (venire 1.3% Negroes, juries 0.82% Negroes, adult population 31.7% Negroes). However, even though proportional representation is not required, see Hill v. Texas, 316 U.S. 400 (1942), the jury list in the principal case contained only 5.8% Negroes in a district where the total adult Negro population was 34.55%. 366 F.2d at 39. Also when new names were added to the list in 1959, there were only four known Negroes in 553 names. *Id.* at 38. It is thus apparent that on racial grounds a cross-section of the community was in no way represented on the jury lists. The concurring opinion was explicit on this point and its relationship to the key-men: "[O]ne thing [is] clear. No matter how conscientious they were, the jury selectors did not add enough names of qualified Negroes because they did not know them." *Id.* at 78. The majority noted, however, that because of the statutory construction it was unnecessary to decide the cross-section question. *Id.* at 51 n.33.

[26] The majority's construction of § 1861 as a sole standard could be interpreted as requiring jury commissioners to visit every home in the district to compile a list of prospective jurors who meet the literal qualifications of that section. While the logic of the opinion could reach this result, the obvious impracticality of the solution requires its rejection. The concurring judge may have been referring to this problem when he said: "I am not at all certain just what is decided." *Id.* at 72.

[27] The 1966 Civil Rights Bill, H.R. 14765, would have solved part of the problem by requiring use of lists of qualified voters. That bill's passage appears distant.

problem. That opinion relied on several Supreme Court cases[28] involving application of the cross-section test to state juries, which required jury commissioners to familiarize themselves with the identity and availability of potentially qualified jurors in all significant elements of the community.[29] If jury commissioners did acquaint themselves with the community, and then combined such acquaintance with readily available methods of obtaining names of prospective jurors (voter registration lists, tax rolls, utilities rolls, telephone books and city directories),[30] they could establish impartial jury lists which reasonably represent a cross-section of the community.[31] The court should have adopted the concurring judge's conclusions about the duty of jury commissioners and thereby met the problem of juror selection without an unnecessary statutory construction.

VALIDITY OF STATE PROPOSITION EFFECTIVELY REPEALING ANTI-DISCRIMINATION LAWS

The California Legislature did not attempt to prevent property owners from selecting buyers or tenants on the basis of racial considerations until 1959. Then, by enacting the Hawkins Act[1] and the Unruh

Furthermore, use of voter lists would discriminate heavily against the Negro community because Southern voter lists are unlikely to represent a cross-section of the community until fear of reprisals for registration is eliminated. See ZINN *op. cit. supra* note 23, at 138-39; The New Republic, Aug. 13, 1966, pp. 10-11. For state and federal jury selection provision of 1966 Civil Rights Bill, see Comment, 52 VA. L. REV. 1069 (1966).

[28] Cassell v. Texas, 339 U.S. 282 (1950); Hill v. Texas, 316 U.S. 400 (1942); Smith v. Texas, 311 U.S. 128 (1940).

[29] One week after *Rabinowitz*, the Fifth Circuit accepted the arguments of the concurring opinion in a state jury selection case. Brooks v. Beto, 366 F.2d 1 (5th Cir. 1966).

[30] City directories are ideal for the urban areas of the South which have them. However, singular use of any one source for juror selection is unsatisfactory. In 1963 only 69% of the households in Georgia had telephones. The whole Fifth Circuit had 68.3% while the national average is 81%. STATISTICAL ABSTRACT OF THE UNITED STATES 38, 517 (1965).

Use of tax rolls would discriminate against the large number of tenants in the South. In 1959, 24.1% of the farms in Georgia were tenant operated. The Fifth Circuit average (excluding Florida) is 25% compared with the national average of 19.8%. *Id.* at 615, 621. Non-farm housing presents a similar problem. In 1960, 38% of the Southern non-farm housing was rented (whites 33.6%, non-whites 58.4%, *Id.* at 761. Unfortunately use of census lists in juror selection is prohibited by 13 U.S.C. § 9(1962).

[31] In Note, 75 YALE L.J. 322, 329 n.38 (1965), it was contended that the more sources used in selecting the jury list, the more difficult it is for a judge to supervise the process. See also Comment, 73 YALE L.J. 90 (1963), which questions how closely Southern district court judges follow appellate decisions.

[1] §§ 35700-35741. Section 35720 makes it unlawful:

> For the owner of any publically assisted housing accommodation which is in, or to be used for, a multiple dwelling [or a single family dwelling], with knowledge of such assistance, to refuse to sell, rent or lease or otherwise deny to or