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## THE FEDERAL JURY

JOE J. FISHER\*

### HISTORICAL SKETCH OF THE JURY

The wise man is his own government. However, when man cannot govern himself wisely, his betters or his peers must substitute a form of government. In the Anglo-American experience<sup>1</sup> both the self-styled betters and the collective force of man in his peer groups have fashioned elements of societal government for those who cannot abide the wisdom of their conscience; and, the judgment of the peer groups<sup>2</sup>

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\* Chief Judge of the United States District Court for the Eastern District of Texas.

1. See A. VANDERBILT, *JUDGES & JURORS: THEIR FUNCTIONS, QUALIFICATIONS & SELECTION* (1958), in which Judge Vanderbilt notes that the jury is one institution that separates trial in common law from trials in earlier laws, such as the Roman law in which trial by jury was unknown. Indicative of this is the absence of jury trials in those forms of Anglo law derived most directly from the Continent. For example, equity, probate and admiralty were nurtured by continental Europe in systems that did not lend themselves easily to the notions of the jury. *Id.* at 51. However, the Continent should be remembered for employing the most rudimentary custom to which the jury could be traced. The Normans used the ancient *recognitio* or *inquisitio* as a device by which the Crown obtained information on local affairs from those most likely to have it. See W. MCKECHNIE, *MAGNA CARTA* 134-35 (1958). Once transplanted into the world of the Anglo-Saxon, the *recognitio* underwent centuries of evolution before Anglo influence transformed it into an institution with a different purpose. See generally *Id.* at 135. Originally it seems that the Anglos used the jury as a method by which those who had the most personal knowledge about the issue in question were called as the jurors. In other words, the jurors gave the testimony. See A. VANDERBILT, *JUDGES & JURORS: THEIR FUNCTIONS, QUALIFICATIONS & SELECTION* 51 (1958). Gradually, the value of impartial jurors was realized until finally Lord Mansfield stated in *Mylock v. Saladine*, 96 Eng. Rep. 278 (K.B. 1764), "I have no doubt of the propriety of changing venue, where an indifferent trial cannot be had, nor of the power of this Court to change it, when such a case appears. A juror should be as white paper, and know neither plaintiff nor defendant, but judge of the issue merely as an abstract proposition upon the evidence produced before him."

2. This is not to intimate that the royal personage and nobility have not had influence in the formation of the procedural aspects of the jury. History witnesses that they have, but the success of the procedures can only be credited to the overall pattern of integrity made each time a chosen 12 deliberated. The juries most surely provided

has molded perhaps the noblest element of that government in the form of the modern civil jury.<sup>3</sup>

Having been insured to the people of the United States through article and amendment to the Constitution,<sup>4</sup> the formalities associated with the right of trial by jury proceeded without severe scrutiny from

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a psychological bounty to the community—reward, punishment, justice, retribution, etc. were all placated by a man's equals without the imprimatur of a lord. Undoubtedly, these virtues of the jury exist even today, but few envisioned such in the beginning periods. Then the main impetus for the growth of the jury system was merely the absence of other ways to settle disputes. With the demise of trial by ordeal, the Crown desperately needed new methods by which it could obtain true facts. Pope Innocent III withdrew papal sanctions from trial by ordeal in the Fourth Lateran Council. Without such trial, the Crown was forced in 1219 to decree freedom for criminals guilty of petty crimes, banishment for those guilty of crimes of a greater significance, and simply imprisonment for those guilty of the most serious offenses. To cope with the void left by the absented trial by ordeal, trial by jury found encouragement. Curiously, the novice jury trial went through at least one period in which it was not too popular. Potts, *Trial by Jury in Disbarment Proceedings*, 11 TEXAS L. REV. 28, 36 (1932). For an analysis of the evolution of trial by jury as well as the social and political ramifications of this institution see W. FORSYTH, TRIAL BY JURY (1971).

3. Three generally accepted elements discernibly appeared in the common law maturing of the jury trial by the time the United States Constitution was adopted: (1) the jury consisted of a fixed number, usually 12, no more and no less; (2) trial was had in the presence and under the superintendence of a judge having power to instruct the jury on the law and to advise the jurors as to the facts; and, (3) the verdict had to be unanimous. *See, e.g., Hibdon v. United States*, 204 F.2d 834, 837 (6th Cir. 1953). Despite the stability of these three elements the function of the jury continued to fluctuate in the era of primitive justice in the United States. When royal judges held sway in the colonies, juries had been highly favored because the royal judges highly favored the Crown. When independence came, juries continued their popularity because trained judges and lawyers were few; in fact, the power of the jury was increased to such an extent that the jury was often the judge of law and fact. It was not until *Sparf v. United States*, 156 U.S. 51, 15 S. Ct. 273, 39 L. Ed. 343 (1895) that it was finally settled that federal juries were to serve only as triers of fact, not judges of the law as well. *See A. VANDERBILT, JUDGES & JURORS: THEIR FUNCTIONS, QUALIFICATIONS & SELECTION* 55-58 (1958). Even today the function of the jury can be debated. *See, e.g., Green & Smith, Negligence Law, No-Fault, and Jury Trial—I*, 50 TEXAS L. REV. 1093 (1972) in which the authors criticize state practice in Texas and give some brief treatment of better federal practice.

4. Article III, Section 2, Clause 3 of the United States Constitution and the sixth amendment guarantee the substance and procedure for criminal jury trials, and the seventh amendment insures the jury in certain civil suits. It is interesting to note that the United States Constitution is perhaps the most grandiose document to actually commit these principles to writing. Some commentators have sometimes attributed this distinction to the Magna Carta, and this notion persists today. Yet it is now believed among many scholarly circles that the phrasing in the Magna Carta's Chapter 39, which forbids the imprisonment or exile or destruction of a freeman without the judgment of his peers, does not deal with trial by jury since it did not exist in the form known today at that time. It is true that the phrasing might have embodied the root principle of the jury trial, but the better interpretation would be that the nobility who forced the signing of the Charter sought the right to settle their disputes among themselves by whatever method they chose. *See also Potts, Trial by Jury in Disbarment Proceedings*, 11 TEXAS L. REV. 28, 34-36 (1932).

the time of the enactment of the Judiciary Act of 1789 until Congress initiated legislative review of the entire judicial code in the 1940's.<sup>5</sup> The Judiciary Act of 1789 had made the qualifications for federal jurors the same as the qualifications which were set for jurors in each state in which each particular federal court sat.<sup>6</sup> The Judicial Code of 1948, as codified in 28 U.S.C. § 1861, made an abrupt change by setting specific standards for juror qualifications.<sup>7</sup> But despite the specific enumeration of federal standards as to age, language, etc., a proviso was retained which continued to tie federal jury qualifications to the standards used by the state courts.<sup>8</sup>

Even after the new code went into practice, the effect of permitting state influence in the federal jury selection process continued to be questioned.<sup>9</sup> When civil rights later emerged as a feverish issue, it became apparent that many organs of government became frustrated somewhere between theory and practice. In 1957, it was determined that the better practice would be to delete any reference to making federal jury qualifications dependent on jurors qualifying for state jury service;<sup>10</sup> therefore, 28 U.S.C. § 1861 was forthwith amended

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5. See 5A J. MOORE, FEDERAL PRACTICE ¶ 47.02 (2d ed. 1971). See also REPORT OF THE COMMITTEE ON THE OPERATION OF THE JURY SYSTEM, 42 F.R.D. 353, 354-55 (1967), in which it is noted that the judges of the federal courts had supported legislation setting uniform federal jury standards ever since they approved the Knox Report in 1943. The Knox Report had reviewed the necessity of having improvements in methods of jury selection.

6. 5A J. MOORE, FEDERAL PRACTICE ¶ 47.02 n.1 (2d ed. 1971), citing Act of Sept. 24, 1789, ch. 20, § 29, 1 Stat. 73, 88.

7. Section 1861, which dealt specifically with the qualifications, read:

Any citizen of the United States who has attained the age of twenty-one years and resides 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.

(4) He is incompetent to serve as a grand or petit juror by law of the State in which the district court is held.

Section 1863(c) also made this proviso:

No citizen shall be excluded from service as grand or petit juror in any court of the United States on account of race or color.

8. See 5A J. MOORE, FEDERAL PRACTICE ¶ 47.02, at 2006 (2d ed. 1971) in which it is noted that subsection 4 of § 1861 retained this proviso so that women would be disqualified to serve as federal jurors in states which refused to extend the privilege to females. In addition, the proviso also kept intact certain state requirements, such as the necessity that a juror be of "good character" and hold certain amounts of property.

9. See REPORT OF THE COMMITTEE ON OPERATION OF THE JURY SYSTEM, 42 F.R.D. 353 (1967).

10. The precise motivation for the enactment of the 1957 legislation is partial

to delete references to state juror qualifications, and a 1-year residency requirement also was added.<sup>11</sup>

Even after the enactment of the 1948 and the 1957 legislation, some segments of the population were excluded from federal jury service through the improper application of discretion. The 1957 legislative changes did not completely complement the reform of 1948 because the federal statutes provided no guidance as to how the district courts were to establish federal qualifications independent of state practices.<sup>12</sup> *Glasser v. United States* had sanctioned the abstraction of discretion with these words:

Jurors in a federal court . . . are to be selected by the clerk of the court and a jury commissioner. This duty of selection may not be delegated. . . . [T]he proper functioning of the jury system . . . requires that the jury be a "body truly representative of the community" . . . . If that requirement is observed, the officials charged with choosing federal jurors *may exercise some discretion* to the end that competent jurors may be called. But they must not allow the desire for competent jurors to lead them into selections which do not comport with the concept of the jury as a cross-section of the community.<sup>13</sup>

It should be remembered that *Glasser* was decided with neither the benefit of the legislative studies made in conjunction with the acts of 1948 and 1957, nor a realization of the social conditions that stimulated the later civil rights reforms. Discretion was still viewed as an

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guesswork. *But see* Judge R.T. Rives' interpretation of the motivation of congressional advocates of the 1957 amendments as it is explained in *Rabinowitz v. United States*, 366 F.2d 34, 48 (5th Cir. 1966). Judge Rives' analysis of the congressional record leads one to believe that a related, yet remote, issue was the actual stimulus: congressional discussion began over controversy as to whether persons accused of judicial contempt should be given a jury trial.

11. 28 U.S.C. § 1861 was amended in 1957 to read:

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. . . .

12. *See* REPORT OF THE COMMITTEE ON THE OPERATION OF THE JURY SYSTEM, 42 F.R.D. 353 (1967). Further evidence of the inadequacies of the 1957 legislation can be seen in the fact that the Judicial Conference authorized the Institute of Judicial Administration in 1957 to update the Knox Report. A copy of the report which was authorized by the 1957 Judicial Conference can be found in *The Jury System in the Federal Courts*, 26 F.R.D. 409 (1960).

13. 315 U.S. 60, 85, 62 S. Ct. 457, 472, 86 L. Ed. 680, 707 (1942) (emphasis added) (citations omitted). The court continued:

Tendencies, no matter how slight, toward the selection of jurors by any method other than a process which will insure a trial by a representative group are undermining processes weakening the institution of jury trial, and should be sturdily resisted. That the motives influencing such tendencies may be of the best must not blind us to the dangers of allowing encroachment whatsoever on this essential right. Steps innocently taken may, one by one, lead to the irretrievable impairment of substantial liberties.

element to be approved unless there be a showing of abuse. It was not until *Rabinowitz v. United States*,<sup>14</sup> that it was judicially realized that discretion might be a subtle instrument that could innocently frustrate the *Glasser* platitudes.

In *Rabinowitz*, the defendants challenged the methods by which jury lists were compiled for the selection of the grand jury which indicted them and the petit juries which convicted them. The jury lists had been compiled by the clerk of the court together with a jury commissioner who had sent out detailed questionnaires to selected individuals. These individuals were selected on the basis of personal knowledge or recommendation; moreover, they were persons who were believed to be intelligent, competent to serve, of good character, and whose opinions and integrity were valued. The questionnaires also inquired as to race. It was conceded that the clerk, his deputy, and the jury commissioner were of excellent character and the challenge was made on the qualifications employed, not on any supposed evil intent to exclude blacks from the juries.<sup>15</sup>

The Court of Appeals for the Fifth Circuit exhaustively reviewed the history of federal jury selections and the record which surrounded the *Rabinowitz* appeals, and found the method employed therein to be violative of the federal statutory scheme.<sup>16</sup> The statutory scheme was held to be a set of precise, uniform standards, which left no room for discretion when the resulting jury lists did not represent a cross-section of the community. Discretion could not be afforded when it permitted a jury commissioner to treat the uniform federal standards only as minimum standards which could be raised with supplemental standards derived from the commissioner's idea of what good jurors should be.<sup>17</sup> The supplementation was thought to permit the commissioner to raise the federal standards despite the congressional will that the standards be lowered to include a broader base of potential jurors.<sup>18</sup>

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14. 366 F.2d 34 (5th Cir. 1966).

15. *Id.* at 37-38. The testimony reproduced therein indicated that the reason for inquiring into race was to insure that some blacks would be selected.

16. Not only did the court reverse the defendants' convictions, but also it ordered the indictments dismissed. *Id.* at 59-60.

17. *Id.* at 50-51.

18. *Id.* It is also interesting to note that as late as 1960 the report to the Judicial Conference, *The Jury System in the Federal Courts*, 26 F.R.D. 409 (1960), made a specific recommendation that the jury list should represent as high a degree of intelligence, morality, integrity and common sense as possible. In light of the *Rabinowitz* decision this may have proven to be a deceptive bit of guidance for jury commissioners.

*Rabinowitz*, however, did not end the issue. Further case law ensued<sup>19</sup> and legislation adopted. Cases decided soon after *Rabinowitz* made it appear that the type of selection system used in *Rabinowitz* could be a valid and proper system, provided the end result produced a fair representation of the community spectrum. It became evident that it was not necessarily the system which was important but the composition of the product of that system.<sup>20</sup>

In 1968 Congress entered the picture with the passage of its Jury Selection and Service Act.<sup>21</sup> This Act revamped the segments of the judicial code which pertained to the jury. In so doing, section 1861 was reworded to clearly state the congressional policy:

It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes. It is further the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States, and shall have an obligation to serve as jurors when summoned for that purpose.

Section 1862 completed the clarification process and now reads:

No citizen shall be excluded from service as a grand or petit juror in the district courts of the United States on account of race, color, religion, sex, national origin, or economic status.

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19. See, e.g., *United States v. Hyde*, 448 F.2d 815 (5th Cir. 1971), *cert. denied*, 404 U.S. 1058 (1972) decided by the same circuit, which analyzed a selection system comparable to that used in *Rabinowitz* but which was found to operate differently. *Hyde* held that the use of key men to select jury lists was not erroneous where blacks are included among the key men, or instructed to disregard race and sex as factors and come up with lists which reflect the broad base of the community. The court further explained that the *Rabinowitz* system was not illegal absent a showing that highly subjective standards were used by a small group of officials who made little effort to insure a fair cross-section of the community. *Id.* at 828. See generally *United States v. Tropiano*, 418 F.2d 1069 (2d Cir. 1969), *cert. denied*, 397 U.S. 1021 (1970) which discusses partial selection of grand and petit jurors through the key man system and the limitations of the *Rabinowitz* decision.

20. See, e.g., *Hunt v. United States*, 400 F.2d 306 (5th Cir. 1968), *cert. denied*, 393 U.S. 1021 (1969). Evidently the Court of Appeals for the Fifth Circuit aimed *Rabinowitz* at the elimination of the jury commissioner's power to raise federal standards above those set by Congress. The "key-men" system as such apparently suffers from no constitutional infirmity in and of itself. Since *Smith v. Texas*, 311 U.S. 128, 61 S. Ct. 164, 85 L. Ed. 84 (1940) it has been recognized that the states could use it provided it functions without racial discrimination. The Supreme Court has recently reviewed the system with respect to its use by the states in *Carter v. Jury Comm'r*, 396 U.S. 320, 90 S. Ct. 518, 24 L. Ed. 2d 549 (1970). *Carter* would permit the states to use the key system and even to set standards such as the requirements that jurors be of "good moral character" and of "sound judgment." *Id.* at 331-37, 90 S. Ct. 524-27, 24 L. Ed. 2d 558-61.

21. Act of March 27, 1968, Pub. L. No. 90-274, 82 Stat. 54.

Section 1863 spelled out in great detail a mandate requiring each judicial district to formulate a plan for random jury selection; the plans were to be approved by a reviewing panel of the appropriate circuit.<sup>22</sup> In addition to these sections, additional portions of the Act spelled out in greater detail how the district courts were to use the master jury wheel,<sup>23</sup> the qualifications for jury service,<sup>24</sup> how jury panels were to be summoned,<sup>25</sup> and the manner in which challenges to the selection procedures can be had.<sup>26</sup>

#### DEMISE OF THE KEY MAN SYSTEM

Since the Federal Jury Selection and Service Act of 1968 was designed in part to eliminate any odious practices found in *Rabinowitz*, the key man systems have been replaced with new jury plans for each federal district that have received the necessary approval of the Judicial Councils of the circuits in which they are located. Since the jury plans were first adopted and approved in 1968, they have been amended several times with the latest revisions being made to include those citizens 18 years of age.<sup>27</sup>

The Court of Appeals for the Fifth Circuit has approved the registration list of voters as representative sources from which the United States District Clerk may select names to place in the master jury wheel.<sup>28</sup> In obtaining names for the master jury wheel, jurors are selected at random from the voter's registration list of the counties within the respective divisions of a federal district. The number of names in each divi-

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22. 28 U.S.C. § 1863 (1970). Section 1863's most important new feature, subsection b(2), stated:

(b) Among other things, such plan shall—

(2) specify whether the names of prospective jurors shall be selected from . . . voters of the political subdivisions within the district or division. The plan shall prescribe some other source . . . in addition to voter lists where necessary to foster the policy and protect the rights secured by sections 1861 and 1862 of this title.

23. 28 U.S.C. § 1864 (1970).

24. *Id.* § 1865.

25. *Id.* § 1866.

26. *Id.* § 1867.

27. 28 U.S.C. § 1865(b)(1) (Supp. 1972) embraced 18-year-olds within the breadth of juror qualifications. It was passed subsequent to the twenty-sixth amendment which extended suffrage to 18-year-olds.

28. The Court of Appeals for the Fifth Circuit has recently recognized it is the use of the voter registration lists that Congress has determined to be the best method for achieving the goal of a "random selection of jurors from a fair cross section, equal opportunity for jury service, and avoidance of discrimination by reason of race, color, sex, religion, national origin or economic status." *United States v. Blair*, 470 F.2d 331, 337 (5th Cir. 1972).



sion to be placed in the master jury wheel shall be divided into the total number of registered voters in the division and the quotient obtained for that division. A starting number from one to 50 shall be drawn by lot, and that numbered name selected from each voter's registration list of each county within the division along with each name thereafter which falls at an interval represented by the quotient. Thus, if the quotient should be the number "50" and the starting number chosen by lot between "1" and "50" is "10", the 10th, 60th, 110th, 160th, etc., name from each voter's registration list of each county within the division shall be selected for inclusion in the master jury wheel for that division. Questionnaires are then sent to the prospective juror, and if the person is qualified and approved for jury duty in compliance with the court's jury plan, the juror's name is placed in the qualified wheel; and, when a judge orders a certain number of jurors summoned for jury duty, the clerk draws at random from the qualified wheel the number of jurors desired. All information pertaining to the jury selection is kept on file with the clerk's office and may be inspected should a contest arise as to any alleged illegality pertaining to jury selection or qualification.<sup>29</sup>

Most federal trial judges agree that the voter's registration list is the best and fairest source from which a representative cross section of interested and concerned citizens may be selected. If a person is not interested enough in his rights and responsibilities as a citizen to register to vote, he is not likely to be concerned with jury service; moreover, he would not in all reasonable probability qualify as a juror.

#### THE SIX-MEMBER JURY

During the past 3 years, there has been a definite movement toward the six-member jury in the federal courts. The December 1972 issue of *The Third Branch*, a bulletin published by the federal judicial center and the Administrative Office of the United States Courts, reports that some 56 federal districts have now adopted local rules for juries of less than 12 members in civil cases. Undoubtedly, the congested caseload of the federal courts has been partly responsible for this innovation, which has gained preeminence as a result of the overall efforts of judges and lawyers to improve the efficiency of court proceedings.

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29. See 28 U.S.C. § 1867 (1970).

In an interesting article, *The Six Man Jury in the Federal Court*, Judge Edward Devitt observes:

The Judicial Conference of the United States at its March 1971 meeting endorsed "in principle" the use of six-man juries in civil cases and its committees are studying the best method for effecting the practise [sic] system-wide, either thru amendment of the Civil Rules of Procedure, the enactment of specific statutory authority, or both.

. . . Employment of six-man juries in civil cases is one way of increasing the efficiency of the Courts and at considerable financial saving to the Government and without sacrifice of essential legal rights of the litigants.<sup>30</sup>

Two of the circuit courts have written opinions approving the six-member jury, *Colgrove v. Battin*,<sup>31</sup> and *Cooley v. Strickland Transportation Co.*<sup>32</sup> Recently the United States Supreme Court granted certiorari in *Colgrove*, thus agreeing to review the constitutionality of procedures which dispose of civil cases in the federal courts through the use of juries of less than 12. If the Supreme Court upholds the Court of Appeals for the Ninth Circuit, which affirmed the district court of Montana in its adoption of a local rule providing that a jury for trial of civil cases shall consist of six persons, such local rules would not violate the seventh amendment to the Constitution. It then would be reasonable to assume that it will only be a question of a very short time before an amendment to the civil rules or a specific statute is enacted providing for a six-member jury in all federal cases.

Reform of civil jury practice could lead to an amendment of the criminal rules or a specific statutory enactment providing for a six-person jury in criminal cases with some exceptions. The Supreme Court

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30. 53 F.R.D. 273, 278 (1971). And Judge Devitt further observes:

The Judges of the Court have been completely satisfied with the new Rule. The practice under it permits an appreciable saving of time for the Court and its supporting personnel in calling, impanelling, interrogating and otherwise managing the jury panel. Obviously it takes less time to poll six jurors than twelve. Six move in and out of the jury box in a shorter time. The same time saving is true in the jurors' examination of exhibits during trial. It is also likely, but difficult to substantiate, that six can come to a unanimous decision more quickly than twelve.

Our experience has given us every reason to believe that the verdicts of smaller juries are just as reasoned and sound, and are based on the same care and consideration of the evidence and faithful subscription to the Court's charge as are the verdicts of the traditional twelve-man jury.

*Id.* at 276.

31. 456 F.2d 1379 (9th Cir. 1972), *cert. granted*, 41 U.S.L.W. 3183 (U.S. Oct. 3, 1972) (No. 71-1442).

32. 459 F.2d 779 (5th Cir. 1972).

in *Williams v. Florida*<sup>33</sup> has already blazed the trail to some extent in holding:

The question in this case then is whether the constitutional guarantee of a trial by "jury" necessarily requires trial by exactly 12 persons, rather than some lesser number—in this case six. We hold that the 12-man panel is not a necessary ingredient of "trial by jury," and that respondent's refusal to impanel more than six members provided by Florida law did not violate petitioner's Sixth Amendment rights as applied to the States through the Fourteenth.

In so holding, the Supreme Court overruled the 70-year-old Supreme Court criminal case of *Thompson v. Utah*,<sup>34</sup> which held that the United States Constitution and sixth amendment required a unanimous verdict of 12 jurors, neither more nor less.

The *Cooley* case originates in the Western District of Louisiana and involves the constitutionality of a local rule of the district court providing that a civil jury "shall consist of six members," under the (1) seventh amendment, (2) Federal Rule of Civil Procedure 48, and (3) 28 U.S.C. § 2072.

The majority of the Court of Appeals for the Fifth Circuit upheld the validity of the local rule by saying that the 12-member panel is not a necessary requirement of "the right of trial by jury" in civil cases. Judge Coleman dissented.<sup>35</sup> Both the *Colgrove* and *Cooley* opinions extensively quote from *Williams*, which contained the following caveat of the Supreme Court:

[W]e do not decide whether, for example, additional references to the "common law" that occur in the Seventh Amendment might support a different interpretation.<sup>36</sup>

In *Williams* the petitioner challenged the constitutionality of a Florida

33. 399 U.S. 78, 86, 90 S. Ct. 1893, 1898, 26 L. Ed. 2d 446, 452 (1970).

34. 170 U.S. 343, 18 S. Ct. 620, 42 L. Ed. 1061 (1898).

35. *Cooley v. Strickland Transp. Co.*, 459 F.2d 779, 789 (5th Cir. 1972). "The Constitutionally mandatory character of the twelve member jury in Seventh Amendment cases was unmistakably enunciated by the Supreme Court in the *civil* case of *Capital Traction Co. v. Hof*, 174 U.S. 1, 19 S. Ct. 580, 43 L. Ed. 873 (1899)." (Emphasis by Judge Coleman.) Judge Coleman reasons:

[I]f I were without the guidance of *Hof* I would nevertheless dissent. If, for reasons of convenience, a District Court by local rule may reduce the size of a jury from twelve to six, why may it not on the same reasoning reduce the number to three, or some other number which would greatly impair, if not effectually destroy, the reasons underpinning trial by jury?

*Id.* at 789.

36. *Williams v. Florida*, 399 U.S. 78, 92 n.30, 90 S. Ct. 1893, 1901 n.30, 26 L. Ed. 2d 446, 456 n.30 (1970).

statute providing that “. . . six men shall constitute a jury to try all . . . criminal cases” (except capital cases).<sup>37</sup> The Supreme Court rejected the challenge and held that “petitioner’s Sixth Amendment rights, as applied to the States through the Fourteenth Amendment, were not violated by Florida’s decision to provide a six-man rather than a 12-man jury.”<sup>38</sup>

Judge Wisom, writing for the majority in *Cooley* and analogizing it to *Williams*, held:

[N]o one has ever contended that the function of the civil jury is *more* important than that of the criminal jury. Changes in the traditional jury, therefore, such as the change approved in *Williams*, which do not offend the concept of “trial by jury” within the context of a criminal case (Sixth Amendment) would not offend that concept within the context of a civil case (Seventh Amendment). It would be anomalous to the point of irrationality to construe the Constitution as sanctioning a six-member criminal jury but not sanctioning a six-member civil jury.<sup>39</sup>

There seems to be no question that the common law of 1791 required a 12-man jury, but as Judge Wisdom says, “Even assuming, as the Court does in *Williams*, that the common law jury in 1791 consisted of twelve members, that number is by no means sacred and is, as the Court noted, ‘a historical accident, unnecessary to effect the purposes of the jury system and wholly without significance except to mystics.’”<sup>40</sup>

Judge Wisdom further observes,

Our task, however, is not to decide the merits of a twelve-man jury but to decide whether the federal district courts may constitutionally reduce the size of the civil jury. The Supreme Court has asserted that “the reliability of the jury as a fact finder hardly seems likely to be a function of its size”, and that the six-member jury in the criminal context performs its “function” as well as the twelve-member jury. We feel compelled to make the same evaluation in a civil context. The aim of the [Seventh] amendment . . . is to preserve the substance of the common-law right of trial by jury, as distinguished from mere matters of form or procedure . . . .”<sup>41</sup>

37. *Id.* at 80 n.3, 90 S. Ct. at 1895 n.3, 26 L. Ed. 2d at 449 n.3, citing FLA. STAT. ANN. § 913.10(1) (1967), as amended FLA. STAT. ANN. § 913.10 (1973).

38. *Id.* at 103, 90 S. Ct. at 1907, 26 L. Ed. 2d at 462.

39. *Cooley v. Strickland Transp. Co.*, 459 F.2d 779, 781 (5th Cir. 1972).

40. *Id.* at 782, citing *Williams v. Florida*, 399 U.S. 78, 102, 90 S. Ct. 1893, 1907, 26 L. Ed. 2d 446, 461 (1970).

41. *Id.* at 782 (citations omitted).

Judge Wisdom holds that Rule 48<sup>42</sup> of the Federal Rules of Civil Procedure does not guarantee a 12-member jury and that rule 48 is not inconsistent with the local rule. When rule 48 was adopted, *Williams* had not been decided and the cases held that a 12-member jury was necessary. "In the light of *Williams*, we cannot read Rule 48 as guaranteeing the twelve-member jury or as precluding a local rule establishing a six-member jury."<sup>43</sup>

Title 28 U.S.C. § 2072<sup>44</sup> was construed by Judge Merrill writing for the court in *Colgrove v. Battin*:

Here we are confronted with the phrase "right of trial by jury as at common law." This language upon its face would appear to deny to the Supreme Court authority to dispense with any characteristics of the jury or of trial by jury known to common law. This would indeed be a sweeping limitation.

. . . . In our view, "as at common law" in the context means "in those cases in which the right existed at common law." The parallel inclusion in § 2072 of the phrase "as declared by the Seventh Amendment" serves to assure that the essence of the right to trial by jury itself will be maintained in appropriate cases governed by the federal rules.<sup>45</sup>

When Congress dealt extensively with the jury system in 1968, perhaps that was the time when a six-member jury in civil cases should have been authorized or Congress should have required each district court to include in its jury plan such a provision. The answer, of course, is that the concept of the six-member jury in civil cases did not originate as a local rule in any federal district until 1970, and presumably the suggestion was never advanced prior to the enactment of the Jury Selection and Service Act of 1968.

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42. The parties may stipulate that the jury shall consist of any number less than twelve or that a verdict or a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury. 28 U.S.C. § 1812 (1970).

43. *Cooley v. Strickland Transp. Co.*, 459 F.2d 779, 784 (5th Cir. 1972). 28 U.S.C. § 2072 now reads:

The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and maritime cases, and appeals therein, and the practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

44. 28 U.S.C. § 2072 (1970).

45. 456 F.2d 1379, 1380 (9th Cir. 1972), *cert. granted*, 41 U.S.L.W. 3183 (U.S. Oct. 3, 1972) (No. 71-1442).

Another interesting observation concerning civil jury trials, irrespective of size, is the trend away from unanimity of the jury verdict. For instance, Texas Rule of Civil Procedure 292<sup>46</sup> provides for a 10 to two verdict; thus a Texas federal district court under *Erie R.R. v. Tompkins*<sup>47</sup> could hold valid a verdict in a federal civil jury case with two less than unanimous. If and when a six-member jury is approved by the Supreme Court, we will then have a situation in which a legal verdict in a civil case in the federal court may be four to two. This development could speed up even more the effective and efficient disposition of federal jury cases because it will minimize the possibility of a hung jury, and litigants will not be deprived of their constitutional right of trial by jury.

#### JURY UTILIZATION

With the publication of a Report on Juror Utilization, the Administrative Office of the United States Courts<sup>48</sup> has joined the crusade among federal judges concerning how jury panels may be more efficiently and effectively used to dispose of jury cases; how the convenience of jurors, litigants and attorneys can better be accommodated; and, if a reduction in jury fees and expenses can be managed with a turn to the six-member jury. As already discussed, the signs are ripe for a universal acceptance of the six-member jury; however, there exists an equally potent modernization which should be universally accepted—the jury pool from which multiple-judge courts may draw. Under this system, a jury panel, say of one hundred or more, may be summoned. The entire panel is qualified and managed by one of the judges and a certain number is ordered to appear in court as requested by a managing judge. As soon as a judge selects a jury in the case being tried, jurors not used go back to the pool and the process is repeated for other judges needing juries.<sup>49</sup> The entire jury pool or a portion may be excused and ordered back for a later date, and the

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46. Texas now uses the 10 to two, and where appropriate a five to one verdict in civil cases. Tex. R. Civ. P. 292. See generally Kronzer & O'Quinn, *Let's Return to Majority Rule in Civil Jury Cases*, 8 HOUS. L. REV. 302 (1970), in which it is noted that a majority of the states now use either a 10 to two or a nine to three verdict in civil cases.

47. 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938).

48. October 1972—The Eastern District of Texas ranks number three in the nation and number one in the circuit.

49. The trial judges of the division must adopt and utilize proper jury pool techniques and be willing to stagger scheduled trial times.

judges may keep a jury pool in service for what is considered a reasonable period of time, perhaps not to exceed 30 days.

In divisions of single or two-judge courts the multiple-jury selection has proven most effective, but its effectiveness is directly related to the administrative ability of the judges who are assigned to each division. Judicial administration begins with pre-trial hearings at which each judge sets a number of cases for jury selection for a certain date. On the date indicated the jury panel appears and the judge selects as many juries as he thinks can reasonably be tried in the period set aside for trial. For example, if the period designated for trial is 3 weeks and none of the cases is protracted, he will select possibly nine or 10 juries, which will be set for trial Monday, Wednesday and Thursday of each week.

After all juries for trial during the 3-week period are selected and impanelled on the day for jury selections, there is no further need for the entire panel to return; only the members of each particular jury will return on the day set for the trial of each case. The entire panel may be instructed to return on a specific date, usually 3 to 4 weeks later, for the selection of more juries that may be needed for a new period of jury trials. Thus, the entire panel may assemble two or three times for jury selections during a jury period of about 8 weeks; but, only the individual jurors selected on a particular jury are to appear for service on the day a case is actually tried. If settlement or some other event should occur in the interim to prevent a trial from starting as scheduled, the jurors will be notified by the clerk of the court under the direction of the presiding judge.

One note of caution should be considered: During the selection of juries, the trial judge with the assistance of his courtroom deputy clerk should avoid common jurors in consecutive cases. Even though all possible care be exercised, a trial judge should anticipate this problem by securing an agreement from the parties and attorneys to proceed with trial with not less than 10 jurors.<sup>50</sup>

To make this system work, trial judges must be convinced of its merit and must assume personal management. Experience garnered

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50. We have never experienced a refusal on the part of litigants or attorneys to agree. If the six-member jury becomes an approved reality, it is suggested that an alternate juror be selected to cure this possible problem, rather than securing an agreement to proceed with less than six members.

from 3 years on the state bench<sup>51</sup> and 13 years on the federal bench<sup>52</sup> enables this writer to endorse the multiple-jury selection system without reservation. All judges in the Eastern District of Texas now employ the multiple-jury selection system with modifications tailored for their particular needs. Each judge admits it works to the entire satisfaction of the attorneys and litigants; and, those required to do jury duty receive a bonus in decided convenience and a savings of time.

#### CONCLUSION

The jury pool and multiple-jury selection systems are advisable innovations and together with the six-member jury concept should go a long way toward meeting the demand and need for change in our day. All three of these innovations foster the administration of justice and aid in the efficient, effective and orderly disposition of heavy caseloads with the gratuitous bounty of a considerable savings in jury expense.

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51. First Judicial District of Texas, comprising the counties of San Augustine, Sabine, Jasper and Newton, 1957-59.

52. Six divisions in the Eastern District of Texas; Beaumont, Tyler, Marshall, Texarkana, Sherman and Paris, as well as in other districts in which we have served, including Southern, Northern and Western Districts of Texas; Jacksonville Division, Florida; and New Orleans Division, Louisiana.