I T is proposed, and bills to carry out the proposal are now pending in Congress, that the federal system of jury selection be substantially revised, chiefly by establishing "uniform qualifications" for jurors who serve in the federal courts. An examination of these bills reveals that the proposed revision not only contemplates the elimination of conformity with state statutes insofar as they prescribe qualifications for, and exemptions from, jury service, but also contemplates a startling increase in the discretionary powers of the federal judges with respect to the whole process of jury selection. As an aid to a consideration of the merits of the proposed revision, an attempt will be made in Part One of this discussion to give a complete, even if elementary, analysis of jury selection as developed at common law and by statute. In Part Two, brief references will be made to the bills now pending in Congress.

PART ONE

GENERAL ANALYSIS

Jury selection may be described, at least tentatively, as an administrative procedure, conducted according to legislative rules and standards, subject to judicial review. The validity of this tentative description will be discussed after the proposed analysis has been made.

I

LEGISLATIVE RULES AND STANDARDS

A. Qualifications for Jury Service

1. Service in General

(a) Physical capacity. In order to render efficient jury service, a juror should be able to see clearly, hear clearly, and speak with sufficient clarity to make himself understood. He should be able to attend court, and should be free from every bodily condition likely to impair the quality of his thinking. Beyond these simple requirements physical qualifications need not go. Statutes, however, have not stopped here, but have required other physical qualities such as a minimum age, a

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specified sex, a particular color of skin. Being under a certain maximum age also has been required.

Age measured in years has reference to physical existence, and may or may not indicate the state of maturity of a person’s mind. It is customary, however, to assume that persons under a certain, minimum, physical age are not mentally qualified to serve as jurors. But it is not proper to assume that persons over the minimum physical age have a corresponding mental age. It is also improper to assume that a person over a certain maximum age is either mentally, physically, or otherwise unfit for jury service. It may be proper to exempt the latter persons from jury service, but in doing so care ought to be taken not to give the intended exemption the effect of a disqualification.

An inference as to a person’s physical, mental, or other capacity for jury service cannot properly be drawn from the mere fact of sex. Exemption of women engaged in bearing and rearing children is another matter.¹

It is likewise improper to draw an inference as to a person’s capacity to serve as a juror from his race or from the color of his skin. Color may indicate social position, but, as noted below, social position is not a basis for jury service.

(b) Mental capacity. To serve as a juror a person should have at least average adult intelligence. Assuming that mental growth ceases at the age of fourteen,² he should have a mental age of at least fourteen. Furthermore, this capacity should be constant. If at unpredictable times a person may lack full mental capacity he is not qualified for jury service.

In addition to ability to think clearly a juror should have certain knowledge, habits, and attitudes. More specifically, he should have a sufficient knowledge of human affairs to distinguish truth from error. By habit he should be cautious in reaching conclusions. In attitude he should be public-minded, that is to say, he should have an established sense of responsibility for the welfare of the community in which he serves. In attempts to prescribe these qualities statutes have provided that jurors must be “discreet,” “judicious,” “of sound mind and discretion,” “of sound judgment,” “intelligent,” “well informed,” “of fair education.” A minimum physical age is prescribed in the hope that these qualities will be found in persons who reach that age.

Knowledge of the English language is specifically required. This

¹ See infra, p.
² See PINTER, INTELLIGENCE TESTING, p. 83 and passim (1935).
qualification, however, is not related to intelligence or to education, but, like the requirements that a juror be able to hear and speak, has to do with ability to communicate with others.

(c) Moral character. Statutes commonly provide that jurors must be of "good moral character." More specifically, according to some statutes, jurors must be "temperate," "not habitual drunkards," "not professional gamblers," not convicted of certain crimes. The habits and other facts referred to are indicative of bad moral character. It should be noted, also, that habitual drunkards and drug addicts are likely to be lacking in mental and physical capacity at unpredictable periods of time.

(d) Reputation. To be qualified for jury service a person must not only have a good moral character, he must have a good reputation. If his reputation for morality is bad, he is disqualified even though it can be shown that he is not immoral. Proof of bad reputation is the usual method of proving bad character. Statutes dealing with reputation provide that jurors must be "respectable," "reputable," "of good reputation."

(e) Religious beliefs. Although jurors are persons sworn, statutes at an early period provided that persons having religious scruples against taking an oath might affirm. It may be assumed that these provisions will take care of the person who has no scruples against an oath, but does not have the religious faith necessary to take an oath.

Persons having religious scruples against serving as jurors are, according to the statutes of at least one state, exempt from jury service. It would seem, however, that persons holding such a belief are so lacking in public-mindedness that they should be declared disqualified for, not merely exempt from, jury service.

A religious belief or practice may be deemed evidence of bad moral character, such as a belief in, or the practice of, polygamy.

Where a person is opposed to the enforcement of a certain law because of his religious beliefs, he is disqualified for jury service in cases involving that law, not because of his religious beliefs, but because of his opposition to the law.

Religious beliefs may be evidence of disqualification for jury service but are not, in themselves, either qualifications or disqualifications for such service.

(f) Political status. Assuming that a person is physically fit for jury service, has average adult intelligence, and is of good moral char-

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8 Iowa Code (1939) § 10843.
acter, is it necessary that he also be a "citizen" or qualified to vote? At an earlier period it was thought desirable to have aliens on juries in certain cases. Residence, not citizenship, was emphasized at common law. With the development of statutory schemes of jury selection it was found convenient to prescribe for jurors whatever qualifications had been prescribed for voters. When it became settled that voters must be citizens, jurors also had to be citizens.

Wherever it is provided that qualifications for jury service are the same as prescribed for voters, a change may be made in the qualifications of voters without much thought being given to its effect on jury service. Women became qualified for jury service in some states by having conferred upon them the right to vote.

As a matter of principle, it seems reasonable to hold that the burdens of jury duty should fall only on persons who have certain political privileges, principally the right to vote. This approach, however, will lead to an exemption (not a disqualification) of noncitizens and nonvoters from jury service.

Noncitizens or nonvoters are, in practically all instances, persons who have not been in the community long enough to become citizens or voters, or are persons who have not taken a sufficient interest in political privileges to take the steps necessary to acquire them. If they are not settled residents of the community they may or may not have a sufficient interest in the welfare of the community to serve as jurors. If they have lived in the community long enough to acquire citizenship and the right to vote, but have not done so, their failure may properly be taken as evidence of insufficient public-mindedness.

(g) Residence. There are, or have been, at least four unrelated reasons for requiring that a juror reside within a specified area: (1) To obtain jurors who have knowledge of events, values, and persons involved in a particular case. (2) Procedural convenience. (3) To limit the burdens of jury service. (4) To obtain jurors who have an established sense of responsibility for the welfare of the community in which they serve.

(1) At common law jurors were selected from the place in which the particular cause of action arose so they might have a knowledge of the events, values, and persons involved in the case. Residence in the given locality was not a requirement for jury service in general, but for service in the particular case. In relaxing this early requirement statutes gradually expanded the area until it became the county in which the venue was laid, which, finally, came to be the county in which the inquest or trial was held.
(2) With respect to jury service in general, the chief reasons for requiring a certain residence are related to the selection procedure. Selecting officers act, ordinarily, on their own knowledge which is limited to persons who reside nearby. Summoning officers do not, ordinarily, act outside their bailiwicks.

(3) The jury service of a particular area should be performed by the residents of that area. Furthermore, jurors should not be required to travel far from their homes for jury service.

(4) Settled residence in a community should, and ordinarily does, give a person some sense of responsibility for the welfare of the community. In performing a public service for the community a resident is conscious of the condemnation which will follow if the service is not well performed. It must be recognized, however, that many settled residents are not public-minded. A proper attitude toward the community cannot be assumed from mere residence.

While it may be proper to exempt nonresidents from jury service, and to provide, as a matter of procedural convenience, that only residents be summoned, it seems improper to classify nonresidents as disqualified.

(h) **Economic status.** If a person is physically fit for jury service, has average adult intelligence, is of good moral character, is a voter, and is a settled resident of the community, should he also be a property-owner in order to be qualified for jury service? Assuming, but not conceding, that the average property owner has a greater sense of responsibility for the welfare of the community than has the average person who does not own property, it must be recognized that a particular juror is not an average person, but is an individual who must be judged on his own merits. While it is clear that a sense of responsibility for a proper administration of justice in the community is, or should be, a requirement for jury service, it is not clear that this subtle qualification can be determined by mechanical tests such as residence, economic status, or social position.

(i) **Social position.** What has been said with respect to economic status applies equally to social position. While it may be true that persons of high social position in the community are, as a class, more concerned with public welfare than are persons of low social position, no conclusion from this general fact, if it is a fact, can be drawn with respect to any particular person.

English statutes provide that special juries should be made up of persons legally entitled to be called "esquires," persons of "higher degrees," "bankers or merchants," etc. Early American statutes ex-
cluded from jury service "unfree" persons and persons whose color placed them in a low social position. Attempts are still made in some localities to exclude from jury service persons whose low social position is due to color. The latter practice being unconstitutional, the chief remaining trace of social position as a qualification for jury service is to be found in the statutes which limit jury service to the property-owning class.

(j) No criminal record. Having been convicted of certain crimes is a special disqualification for jury service according to the statutes of many states. Conviction of crime may be considered evidence of a bad moral character. Reputation, also, is involved. Some early statutes indicate that the disqualification was based, originally, on the idea that a person guilty of certain crimes is not qualified to take an oath.

(k) No prior jury service. Having served as a juror within a certain time is, from one viewpoint, a temporary disqualification; from another viewpoint, a temporary exemption. If the object of the statute is to curb the use of "professional" jurors, it is a disqualification. If the object is to distribute the burdens of jury duty, it is an exemption.

(l) Not a volunteer. Having volunteered for jury service is made a disqualification in some jurisdictions in an attempt to eliminate the "professional" juror.

(m) Not exempt. Some statutes provide that exempt persons shall not be listed or summoned for jury service. By doing so they turn all exemptions into disqualifications. If a selecting officer should, without statutory authority, adopt a practice of not listing or summoning exempt persons, he would in effect create disqualifications not provided by statute. Any practice of systematically refusing to list or summon a certain class of persons has this undesirable effect.

2. Service in a Particular Inquest or Trial

(a) Special knowledge. It is possible to select as jurors for a particular inquest or trial persons having two types of special knowledge: (1) Knowledge of the events, values, and persons involved in the cause, including a knowledge of the trustworthiness of the witnesses who will testify in the cause. (2) Knowledge of methods, practices, and customs involved in the cause, such as the methods of carrying on certain businesses.

(b) At early common law jurors were expected to decide cases from their own knowledge. This being true, the jurors, or some of them, had to be summoned from the place where the case arose. A trace of this practice will be found in constitutions and statutes which require
a jury of the vicinage for certain inquests and trials.\textsuperscript{4} Such a provision for criminal cases is now looked upon as fixing the place of trial; not as requiring jurors who have a personal knowledge of the persons and matters involved in the trial. But even so, there is an occasional reference to the fact that jurors of the vicinage may be able to decide the facts better than other jurors because of their knowledge of the personal qualities of the parties and their witnesses. Where a jury of the vicinage is required for an inquest to condemn land, a principal reason for the requirement is the assumption that persons residing near the land have knowledge of land values in the vicinity not possessed by persons who do not reside near the land.

(2) Early statutes authorized special juries for causes which were of “too great nicety” or “intricacy” for “ordinary” jurors. The original idea was to provide “expert” jurors for difficult cases. Although a special jury was ordered for a particular case, the special qualifications were not, in reality, qualifications for the particular case, but for the class of cases to which the particular case belonged. For cases involving the custom of merchants, juries of merchants could be summoned and sworn. For inquests to determine pregnancy, juries of women might be called. It should be noted, also, that qualifications for special juries were not limited to special knowledge of matters which untrained persons might not readily understand. Other special qualifications such as ownership of more property than owned by ordinary jurors, and higher social positions, might also be required. Upon the development of elaborate jury lists, and the discarding of social and property qualifications for jury service, the scheme of providing “expert” jurors for difficult cases largely disappeared.

(b) Impartiality. Constitutions and statutes commonly provide that jurors shall be “impartial.”\textsuperscript{5} It is at once apparent that this requirement is not a qualification for jury service in general, but is a qualification which a juror must have for service in a particular inquest or trial. In determining whether a proposed juror is “impartial” answers to four questions may have to be considered: (1) Is he opposed to the law involved in the particular case? (2) Does he have an opinion concerning the facts of the case? (3) Is he biased for or against any of the parties to the case? (4) Is he interested (financially) in the outcome of the case? Some statutes deal with the various phases of partiality under

\textsuperscript{4} The Sixth Amendment to the Federal Constitution provides that the accused in a criminal case “shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.”

\textsuperscript{5} For instance, see note 4, supra.
the head of "bias." Actual bias is a present state of mind proved as a fact. Implied bias is a presumed state of mind. Many statutes provide, impliedly if not expressly, that certain states of mind shall be presumed (conclusively) from certain facts. The four kinds of bias indicated by the above questions will be discussed separately:

(1) If a person is so opposed to a statute or other law which may have to be enforced in a particular case that he is unwilling to enforce it, he is disqualified to serve as a juror in that case. This is a matter of actual bias, there being ordinarily no statutory presumptions of this type of bias. Statutes specifically provide that persons opposed to the death penalty may not serve as jurors in the trial of offenses punishable by death. A federal statute provides that persons who believe in polygamy may be excluded from juries impaneled in prosecutions for polygamy.

(2) If a person holds an opinion as to the truth of "facts" which must be proved in the particular case, and is not able to put his opinion aside so as to be guided solely by evidence produced in court, he is disqualified to serve as a juror because of actual bias. Courts have held that disqualifying bias of this type may be presumed from the mere fact that the person has held or expressed an opinion on the facts, but this view has been discarded. Some statutes provide that a person may not serve as a juror if he was a member of the grand jury which found the indictment involved in the particular case; if he has served as arbitrator in the same controversy; if he has served as a juror on a previous trial of the same cause. Persons subpoenaed as witnesses in a particular case may not serve as jurors in that case. These specific statutory disqualifications are based, at least in part, on the presumption that the persons mentioned have formed opinions as to the facts which they cannot lay aside.

(3) Statutes commonly provide that bias for or against a party to a suit must be presumed from certain facts. A person who is the party's "master," "servant," "counsellor," "steward," "attorney," or who is "of kin" to the party is disqualified to serve as a juror in the particular case. The obvious basis of the disqualification is presumed bias for the party. If a person is disqualified because he has "an action depending between him and the party," the basis is bias against the party. The relationship between the party and the prospective juror may be so remote that a statute will declare that the relationship shall not disqualify. A statute of this type provides that certain employees of the

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United States shall be qualified to serve as jurors in prosecutions con­
ducted in the name of the United States.7

(4) If a person has a financial interest in the outcome of a particu­
lar inquest or trial, he is, usually, presumed to be biased. Where the
interest is slight, such as the interest all taxpayers in a city have in the
outcome of an action against the city, a statute may declare that the
interest is not sufficient to disqualify. An owner of property in a town­
ship is, sometimes, declared disqualified to sit as a juror in an inquest
to condemn other property in the township. In the one case a presump-
tion of bias is not to be drawn; in the other, the presumption must be
drawn although the juror’s interest, if any, is slight.

B. Persons Exempt from Jury Service

1. Public officers and employees. For purposes of jury selection
public officers and employees may be classified in three ways: (1) Those
whose functions are policy-forming and those whose functions are not
policy-forming. (2) Those who are paid for their services and those
who are not paid for their services. (3) Those who devote substantially
all of their time to the office or employment and those who do not. If
their functions are policy-forming they must perform them in person;
if not policy-forming, performance by substitutes will do as well. If
the public servant is paid for his services he has no basis for seeking
relief from the burdens of jury service. If his public services are volun­
tary, it may be found desirable to exempt him from jury service in
order to equalize the burdens of public service. If the officer or em­
ployee is not active in his office or employment there is no reason for
exempting him from jury service.

Statutes which exempt specified officers and employees usually list
(a) officers whose functions are policy-forming and (b) employees for
whom substitutes are not readily available. Early statutes expressly
recognized the principle of exempting from jury service persons who
were performing, or had performed, on a volunteer basis certain other
public services. Sometimes the exemption from jury service was granted
for life. Some statutes “excuse” only those officers who are actually
performing the duties of their offices.

2. Persons engaged in certain professions. In considering whether

7 D. C. Code (1940) § 11-1420. Although this statute does not, in so many
words, say that employees of the United States are eligible to serve in prosecutions con­
ducted in the name of the United States, it has this effect as it makes the employees
eligible for service in criminal cases in a jurisdiction where criminal cases are prosecuted
in the name of the United States. This statute was held constitutional in United States
persons engaged in certain professions should be exempt from jury service, three questions should be asked: (1) Are the services of the profession so personal in nature that, ordinarily, they must be performed by a certain member of the profession, and not by another? (2) Must the services be rendered at times which cannot be postponed? (3) Is the person involved actively engaged in the practice of his profession? The professions usually listed in exemption statutes are those concerned with health, spiritual affairs, education, and legal counsel. Most services rendered in these professions meet the tests suggested above. Some statutes limit the exemption to persons who are active in the practice of the profession. Many statutes, however, fail to include this important limitation.

3. Persons engaged in certain businesses. Statutes which exempt persons engaged in certain types of work in certain businesses commonly recognize a distinction between businesses which are strictly private, and those affected with a public interest. They do not, however, adequately recognize that substituted service in a business, though inconvenient and expensive from the viewpoint of the business, is not undesirable from the viewpoint of the public. Exemption statutes, passed in periods of labor scarcity, may not suit periods in which the supply of labor is abundant. In principle, exemptions should be granted only where they serve a public, as distinguished from a private, interest.

4. Women. Women who have the responsibilities of maintaining homes and rearing children render services which are personal in nature and which cannot, ordinarily, be properly performed by substitutes. If their services are not performed at the times required, the public interest may suffer. There is, on the other hand, no reason why women not having such duties should be exempt from jury service.

5. Persons over a certain age. If it is presumed that a person over a certain age (60, 65, or 70) is physically or mentally unfit for jury service, being over the maximum age is a disqualification. If it is presumed that such a person has carried his share of the burden of jury service, an upper age limit is an exemption intended to equalize the burdens of public service.

6. Persons who have served as jurors within a certain time. As pointed out above, a statute which excludes a person from jury service for a certain period of time after he has served as a juror, sets up a disqualification or an exemption, depending on whether the object of the statute is to limit the use of "professional" jurors, or is to distribute the burdens of jury service.
C. Persons Excused from Jury Service

1. "Excuse" distinguished from "disqualification" and "exemption." A disqualified person may not serve as a juror even though he is willing to do so. An exempt person may serve or not at his election. An excused person is one who is allowed for special reasons to postpone his turn of jury duty.

2. Specific ground of excuse. Instead of exempting members of certain professions or persons holding certain public offices regardless of whether they are active in such professions and offices, some statutes provide that these persons shall be "excused" if it appears at the time that they are actually engaged in the work of the profession or public office. When the fact appears, excuse is mandatory; not a matter of discretion. Ill health of a prospective juror or of a member of his family is a specific ground of excuse under some statutes. It should be noted, however, that where a person summoned as a juror is too ill to serve, his illness should be considered a temporary disqualification, rather than a ground for excuse. Discharge because of temporary disqualification or because of claimed exemption is often miscalled "excuse."

3. General grounds of excuse. As expressed in an early statute, a person should be excused from jury service whenever "the interests of the public, or of the individual juror, will be materially injured" by his attendance. In applying these standards it is important to remember that an "excuse" is merely a postponement of the person's turn of service. If service at a later time will be just as injurious as service at the present time, an excuse cannot properly be given. Repeated excuses to prevent the same injury cannot be given without in effect granting an exemption not provided by statute.

II

Administrative Procedures

A. Classes of writs of venire facias. Writs of venire facias, and their various statutory substitutes, fall into four main groups or classes: 1. Writs which command an officer to summon a specified number of qualified persons to serve as jurors in a particular inquest or trial. 2. Writs which command an officer to summon certain (named) persons to serve as jurors in a particular inquest or trial. 3. Writs which command an officer to summon a specified number of qualified persons to serve as jurors in a particular court or group of courts. 4. Writs which
command an officer to summon certain (named) persons to serve as
jurors in a particular court or group of courts.

B. Procedure I (writs of class I). Writs of class one were used
in England from an early date; also in the United States as shown by
the illustration given below. Early writs of this class specified the num­
ber of persons to be summoned and indicated, with varying degrees of
detail, what qualifications these persons must have. Illustration:

_Northwest Territory, 1799:_ “The UNITED STATES to
the Sheriff of the County of Wayne, GREETING: We command
you that you cause to come before the Justices of our court of com­
mon pleas in and for the said county of Wayne on Monday the
tenth of March, at 10 o’clock in the forenoon Twelve good & law­
full men of the body of the County, each of whom shall be worth one
hundred pounds in real & personal property, by whom the
truth of the matter may be better known, and who neither to John
Dodemead plaintiff or to Robert Gouie defendant in any affinity
do relate, to make a certain Jury of the Country between the
parties aforesaid in a plea of Trespass vi et armis....”

Another writ issued from the same court on the same day merely re­
quired that the sheriff summon twelve to twenty-four “sober & Judi­
cious men of good reputation.”

According to the writ quoted in full, the persons to be summoned
must be “good,” “lawful,” “of the county,” worth £100, and not re­
lated to either party. These qualifications, it will be noted, are of two
general types: (1) Qualifications which all jurors must have, without
regard to the inquest or trial mentioned in the writ. (2) Qualifications,
in addition to general qualifications, which fit a person for service in
the particular inquest or trial.

From another viewpoint, the specifications of qualifications set out
in writs of class one were either (1) general or (2) specific. Where
specific, the officer merely made a finding of fact in following the rule
set forth in the writ. Where general, the officer might be called upon
to apply a standard, or might be required to follow specific rules im­
licit in the general term. In summoning a “judicious” person the

8 Files of the Court of Common Pleas, Wayne County, Northwest Territory, now
located in Legal Research Building, University of Michigan. A similar writ will be
found in BROWNLOW, WRITS JUDICIALE, COMMON PLEAS 155 (1653). Modern writs
of this type appear in 10 ENCYC. OF FORMS (1899) under the following headings:
“VENIRE FACIAS.... In Courts of Record.... Open Venire [pp. 988-989]
.... In Justices’ Courts .... Open Venire [pp. 995-998] .... In Coroners’ In­
quests [p. 999] .... SPECIAL VENIRE FACIAS.... To Complete Trial Jury
.... Open Venire [pp. 1019-1021] .... In Capital Cases [p. 1021].”
officer applied a standard. In summoning a “lawful” person he had to follow all rules of law, statutory or otherwise, which prescribed qualifications for jury service.

If, as may be required by present-day statutes, the officer must “select” or “draw by lot” from a list of qualified persons prepared by someone else, the writ will not contain a statement of the qualifications required for jury service. Even where he still selects “at large” from a specified district, as he did at common law, he is guided by statutes rather than by the wording of the writ.

Where the officer selects “at large” he must determine (1) whether the persons selected have the qualifications required of all jurors, and (2) whether they have the qualifications necessary for service in the inquest or trial mentioned in the writ. Where he “selects” from a list, he need only determine whether those selected are qualified to serve in the particular inquest or trial. Where he “draws by lot” he acts ministerially.

Where it is the duty of the officer selecting at large to refrain from summoning exempt persons, he must decide in each instance whether the proposed juror is exempt. Where there is no such duty, the officer need not consider whether a person is exempt until the exemption is claimed. As the officer proceeds with the summoning of the required number of persons a convenient opportunity is presented for claiming exemptions and asking for excuse.

Although effective when properly carried on by a good officer, selection at large under writs of class one is open to abuse. The chief abuses are jury “packing” and a tendency to summon persons easiest found—the “professional” juror, the loafer on the courthouse steps, the man who goes to the station to see the train come in. Certain leading citizens, easy to find not far from the court house, may be called upon to do more than their share of jury duty.

Selection at large under writs of class one is adaptable for use in summoning a common trial jury, a special trial jury, or an inquest. Talesmen may be summoned by this procedure. Once used almost exclusively, the procedure has fallen into disfavor, due to the possibility of abuse mentioned above.

C. Procedure II (writs of class 2). Early writs of class two, containing as they do the names of the persons to be summoned, made no reference to qualifications for jury service. Illustration:

_Indiana Territory, 1804_: “THE UNITED STATES to John Conner constable of the town of Detroit, GREETING: We command you, that you have before the Justices of our court of
common pleas, at Detroit, on the first Tuesday of June next the bodies of the several persons named in the panel annexed to this writ, Jurors summoned in our said court before our Justices, at Detroit, between Robert Forsyth, William Smith & Thomas Forsyth, merchants trading in company, under the firm of Forsyth, Smith & Comp; and Thomas McCrae Esq' Sheriff of the County of Wayne, and Jacob Clemens, of a plea of trespass on the case ...."

Under writs of class two the summoning officer, as such, does not select the persons who are to serve as jurors in the particular inquest or trial mentioned in the writ, but merely summons the persons named in the writ. The selection is made by the sheriff, the clerk, or some other officer designated by statute or by the court before the writ is issued.

In making up the list which is to be inserted in or attached to the writ the selecting officer must consider in the case of each person proposed for listing (1) whether he is qualified for jury service in general and (2) whether he is qualified to serve in the inquest or trial for which the jury will be summoned. In making the list the officer is bound by directions in any order made by the court, and by the rules and standards of jury selection prescribed by law. If the list is made up of names selected from a list of persons already selected as generally qualified for jury service, the officer need consider only the qualifications required for the particular inquest or trial. If he must draw from such a list by lot, he, like the summoning officer, acts ministerially.

While the procedure developed in connection with writs of class two is suitable for obtaining common juries, special juries, and inquests, its principal use has been to obtain "struck" juries in courts of record and common juries for trials before justices of the peace. It has been used, also, as a device for having an officer other than the summoning officer make the selection where the latter was suspected of bias.

D. Procedure III (writs of class 3). Writs of class three command the summoning of a certain number of qualified persons to serve as jurors in a certain court or group of courts. Illustration:

9 Files of the Court of Common Pleas, Wayne County, Indiana Territory, now located in Legal Research Building, University of Michigan. Modern writs of this type appear in 10 ENCYC. OF FORMS (1899) under the following headings: "VENIRE FACIAS ... IN JUSTICES' COURTS ... Jurors Drawn or Selected [pp. 989-994] ... SPECIAL VENIRE FACIAS ... To COMPLETE TRIAL JURY ... Jurors Drawn from Box [pp. 1017-1018] ... In Capital Cases [pp. 1018-1019]." Modern writs ordering the summoning of "struck" juries will be found in 17 ENCYC. OF FORMS 301-302 (1903).
"Michigan Territory, 1821: "The United States of America To the Marshal of the Territory of Michigan. We command you to summon Thirty six persons qualified by Law to serve as petit Jurors to appear before the Judges of the Supreme Court of the Territory of Michigan, sitting as a Circuit and District Court of the United States of America, at the Council House in the City of Detroit on Tuesday, next following the third monday of September next, at Ten of the Clock in the forenoon of said day, to serve as petit Jurors....""

In carrying out the command of this writ the officer must select persons "qualified by Law." This means that the persons selected must have all the general qualifications required for jury service. The officer does not, however, determine whether the persons summoned are qualified for service in any particular case. The court must determine their qualifications in this respect after they appear in court.

The practice of summoning a group of persons to serve as jurors for a certain period of time in a particular court or group of courts is less expensive and more convenient than the practice of summoning a separate jury for each case pending in the court or group of courts. The practice is, however, open to the abuses mentioned in the discussion of Procedure I, except insofar as the abuses are made more difficult by having all the names mixed in a box and not called in the order in which they appear in the officer's return.

If the officer named in the writ is required to draw by lot the specified number of prospective jurors from a list, made by others, of persons generally qualified for jury service, he does not pass on the qualifications of the persons selected by him, but merely performs a ministerial duty.

Although in selecting at large under Procedure III the selecting officer does not determine qualifications for any particular case, he can still pass on claims of exemption and requests for excuse.

Procedure III is designed to obtain "common" juries for cases pending in court, and is not suitable for obtaining "struck" juries, "special" juries, or inquests. Where grand jurors are summoned for service at a term of court, they are, in reality, summoned for a particular inquest, and not for any matter which may be pending in the court.

Miscl. File No. 225, Records and Files of the Supreme Court of the Territory of Michigan, now located in Legal Research Building, University of Michigan. Modern writs of this type are classified in 10 Encyc. of Forms (1899) as "special," "open" venires "To Complete Panel" (pp. 1015-1017). The same forms may be used to order the summoning of grand jurors.
E. Procedure IV (writs of class 4). Writs of class four command the summoning of certain (named) persons to serve as jurors in a certain court or group of courts. Illustration:

Michigan Territory, 1835: "The United States of America To the Sheriff of the County of Wayne Greeting: We command you that you summon Moses Stafford, Caleb Harrington, Pierre Beaubien, Silas J. Young, William Bradner, Asa Madison, Ezekiel Sackett, Francis Rotner, Warren Stone, Jehue Burt, Marvin Wilcox, Solomon Davis, Gilbert Dolson, Jacob Ramsdell, Stephen M. Aldrich, Dexter Briggs, Thomas Dare, John Truax, Luther Wait, Abijah M. Brown Henry Anderson John Everett Peleg Whitman and Thomas Chadwick, if they may be found in the said County of Wayne, who have been selected and drawn pursuant to the statute in such case made and provided, to be and appear before the Judges of said Supreme Court at the Court House in the City of Detroit on Tuesday the Thirteenth day of January Instant at 10 O'clock forenoon then and there to serve as Petit Jurors...." 11

Under writs of class four, as under writs of class two, the summoning officer, as such, does not pass on the qualifications of the persons summoned by him for jury service. His duties are purely ministerial. The qualifications of the persons named in the writ have been determined in an earlier administrative proceeding.

The officer, charged with the duty of making a list of qualified persons from which names can be drawn for insertion in venires of class four, must decide that each person listed has all the qualifications required for jury service in general. He cannot, of course, consider whether the prospective jurors will have the qualifications required for service in any particular case. This phase of the selection process is left to the court.

Where selecting officers make a general jury list they may be required to include in the list all qualified persons within the jury district, or may be directed to list only a certain number. If all are listed and the names to be inserted in any venire are taken from the list by lot, the abuses referred to in connection with Procedure I entirely disappear. The same is true if the names of a number less than all are listed, pro-

11 Misc. File No. 287, Records and Files of the Supreme Court of the Territory of Michigan, now located in Legal Research Building, University of Michigan. Modern writs of this type appear in 10 Encyc. of Forms (1899) under the heading: "VENIRE FACIAS . . . . IN COURTS OF RECORD . . . . JURORS DRAWN OR SELECTED [PP. 977-987]." Also see 14 Hughes, Federal Practice, Jurisdiction and Procedure 260-261, 264-265 (1931).
vided the number is very large. Furthermore, if all names must be
drawn before any person serves a second time, the burdens of jury
service will be distributed.

Under Procedure IV, as under Procedure II, no opportunity is
presented for claiming exemptions and asking for excuses before the
jurors must appear in court. This means that this phase of jury selec-
tion, in addition to that of determining whether persons summoned are
qualified for service in a particular case, is left to the court.

III

Judicial Review

A. Qualifications of selecting officers. Parties to inquests and trials
have a right to a jury selected according to law by qualified officers. If
any necessary step in the selection procedure has been taken by a dis-
qualified officer, a party may, at the commencement of the inquest or
trial, move to quash the panel of jurors on this ground.

A person acting as a selecting officer may be disqualified (1) be-
cause not authorized to act, or (2) because of bias. Where the regular
selecting officer is disqualified because of bias (interest in the outcome
of the cause or prejudice for or against a party) another officer should
act in his place. If the biased officer acts, or advises his substitute, the
panel should be quashed if the officer exercised any judgment or dis-
cretion in the selection process. If he acted merely ministerially and
had no opportunity to "pack" the panel, there is no reason to nullify
his acts.

B. Procedure followed by selecting officers. Parties to inquests and
trials may move to quash a panel of jurors (1) where the selecting of-
ficers have not taken all necessary procedural steps substantially in the
manner prescribed by law, or (2) where they have systematically re-
fused to follow rules and standards of qualification prescribed by law.

(1) The elaborate selection machinery set up by statute is design!!d
to accomplish two main purposes: (a) To distribute the burdens of
jury duty. (b) To prevent the "packing" of jury panels. Each statutory
step prescribed to accomplish either of these purposes should be con-
sidered mandatory, and substantial compliance required.

(2) If, in making jury lists or in summoning unnamed jurors, the
selecting officer, intentionally or otherwise, includes persons who
should not be selected, his error can be corrected upon objection to the
individual jurors. If the officer systematically excludes classes of per-
sons who are qualified for jury service, his error can be corrected upon
motion to quash the panel.
Upon a motion to quash the panel the court reviews the procedure followed by the selecting officer and determines whether there has been substantial compliance with the mandates of the statute.

C. Qualifications of individual jurors. In making jury lists and in summoning unnamed jurors the selecting officer decides with respect to each proposed juror whether he is qualified for jury service in general. In following some procedures he decides also whether the proposed jurors are qualified for service in a particular inquest or trial.

(1) When a person's name appears on a jury panel there is, or should be, a presumption that he has all the qualifications required by law for jury service in general. In other words, it is, or should be, presumed that the officer has properly performed his duties. If a party challenges the juror for lack of some required qualification the court reconsiders the question and either sustains or overrules the selecting officer's decision. In doing so the court does not, ordinarily, review the evidence upon which the officer acted, but acts on new evidence produced before the court. Where the officer has acted on written evidence, such as answers to questionnaires, it is desirable that the court have this evidence before it in reaching its decision.

(2) Where the selecting officer also determines whether a prospective juror is qualified for service in the particular inquest or trial, the court, on challenge for cause, reviews the officer's decision. Where the selecting officer does not pass on the person's qualifications for service in the particular inquest or trial, the court must make or permit an investigation of this matter in court before the inquest or trial can begin.

At common law a voir dire examination of prospective jurors took place only after challenge for cause. The persons on the panel were presumed qualified until challenged. After challenge they were interrogated on voir dire to prove or disprove the alleged disqualifying fact. In present-day practice a voir dire examination is commonly allowed before challenge. This examination is a means of investigating the qualifications of the persons returned as jurors. An investigation, which at one time took place out of court, now takes place in court. The court is not trying the truth of a challenge but is merely bringing to light facts which may or may not be grounds for challenge. Since the judge is performing duties which at common law were performed by an ad-

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12 In United States v. Johnson, (C.C.D.C. 1806) 26 Fed. Cas. 624 at 625, Case No. 15,484, "F. S. Key, for the defendant, requested that the jurors might be asked whether they had formed and delivered any opinion upon the case. The Court . . . refused to suffer the question to be asked, saying, that if the defendant wished to challenge the jurors for favor he might do so."
ministrative officer out of court, it is proper that he conduct this investi-
gation as he sees fit with or without aid from the attorneys in the cause
so long, of course, as he does not prejudice the rights of any party to
the cause.

D. Exemptions from jury service. Where a summoning officer is
commanded to summon a specified number of unnamed persons for
jury service the officer may pass on claims of exemption. Where he is
commanded to summon certain (named) persons he cannot pass on
claims of exemption. If the officer denies a claim of exemption the
juror may appeal to the court. If the officer has no power to pass on
claims of exemption, the claim must, in the first instance, be made to
the court. In view of the fact that parties to an inquest or trial have no
interest in a juror’s claim of exemption and are not affected by the
court’s decision, it seems clear that the court’s decision is not a decision
in the cause but is an administrative ruling made by the court simply
because the selecting officer no longer has an opportunity to make it.

By some statutes selecting officers are commanded not to list or
summon exempt persons. Under such a statute it should be assumed
that persons selected have been found not exempt. A claim to the court
for exemption under such a statute is, in effect, a claim for a review of
the decision of the selecting officer.

E. Excuses from jury service. What has been said with respect to
claims of exemption applies also to requests for excuse. If the court
grants an excuse it does not act in the particular inquest or trial, but
performs a duty which might just as well, and perhaps better, be per-
formed by an administrative officer out of court.

IV
Comments and Conclusions

A. Legislative rules and standards. From a common-law system
of jury selection we have, in the last century and a half, moved step
by step toward and into a period in which jury selection is largely, and
in some jurisdictions almost entirely, regulated by constitutions and
statutes. Statutes prescribe qualifications for jury service in general,
the grounds of exemption, and, sometimes, the grounds of excuse.
Elaborate procedures are prescribed for making and returning jury
lists; for drawing and summoning jury panels. In some jurisdictions,
but not all, statutes provide what inferences as to bias must be drawn
from certain facts. In these jurisdictions the statutory system is com-
plete. In jurisdictions lacking this feature the common-law presump-
tions as to bias still control.
The power of the legislature to regulate jury selection has so long been recognized that it is no longer open to question. In an exercise of this power one legislature went so far as to name in a statute the persons who were to serve as jurors in an inquest authorized by the statute.

B. Administrative procedures. At common law trial jurors and jurors for numerous inquests were selected and summoned by the sheriff. If the sheriff was disabled or disqualified, the coroner acted in his place. These officers were appointees of the executive; not appointees of the court. If, however, both officers were unable to act, the court appointed eligors to make the selection. Lists for "struck" juries were sometimes made by the clerk of the court, who might or might not be an appointee of the court. Under modern statutes the selecting officer may be an appointee of the executive, an appointee of the court, or an officer elected by the people. It has been held that the constitutional right to jury trial is not infringed by a statute which provides that jurors be selected by a board of jury commissioners appointed by the governor. A statute authorizing a court to appoint jury commissioners has been held not to infringe a constitutional provision which prohibited the legislature from conferring upon a court or judge power to appoint to public office. The commissioners were held to be officers of the court.

At common law the court took the initiative in the selection process by issuing a precept or venire for a jury. The selecting officer was guided by the precept or writ and did not act upon his own initiative. Under modern statutes the selecting officer may be required by statute to take certain steps toward the selection of jurors without waiting for a precept or venire from the court.

At common law the court did not, in the first instance, pass on the qualifications of prospective jurors or determine their right to exemption. This duty, in the first instance, was performed by the officer who selected or summoned the jury. This was true of qualifications for service in a particular case as well as for service in general. Under modern statutes the duty of determining, in the first instance, whether a person otherwise qualified is qualified to serve in the particular inquest or trial commonly rests upon the court. This is a departure from the common law. Some modern statutes have provided that the court

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16 State v. Mounts, 36 W. Va. 179, 14 S.E. 407 (1892).
or judge must, in the first instance, make up jury lists for jury service in general. This also is a departure from the common law. Such a statute, however, has been held by the Supreme Court of Kansas not to confer on the judge additional duties for which his salary may be increased during his term of office. The court, in so holding, said:

"... but whatever regulations the legislature may make, and whatever aids the legislature may furnish, the selecting of persons from the inhabitants of the proper county to sit as jurors for the trial of issues of fact in court forms a department of the business of the court, coordinate with that of hearing and deciding, and consequently cannot be classified as 'administrative' in origin, purpose, or character, in the true sense in which that term is employed in constitutional law." 17

In reaching this conclusion the court called attention to the fact that at common law the court might appoint persons to select jurors when the regular officers were disqualified, and to the further fact that the court at common law took the initiative by ordering that a jury be selected and summoned. The court also called attention to the power of a court to take steps to obtain a jury when other measures are inadequate or fail. But, even so, the fact remains that at common law the court did not, in the first instance, pass on the qualifications of persons selected for jury service. The Supreme Court of the United States has held that the making of a jury list is "not a judicial act"; that the conferring of power to make jury lists on a court is not to be considered as conferring on the court additional judicial power. In making the list the court acts "as a board, and not as a judicial body." 18

The question of whether the procedure of jury selection should be classified as "administrative" or as "judicial" is important in determining constitutional questions of the character indicated above. It is also important in considering whether the time of a court should be taken up with this type of work. Reference has been made to one case in which the selection of a jury consumed nine and a half weeks, involved the summoning of 10,000 veniremen, the examination of nearly 5,000 talesmen, and cost the state between $40,000 and $50,000. 19 It is the writer's view that the procedure should be classified as "administrative" in character, and that selection for a particular inquest or trial, as well as for service in general, should be made in the first instance out of

18 Clinton v. Englebrecht, 13 Wall. (80 U.S.) 434 (1871).
19 Wiloughby, Principles of Judicial Administration 510 (1929).
court. Furthermore, an administrative officer, not a judge or court, should in the first instance pass on claims of exemption and requests for excuse.

C. Judicial review. Where, as at common law, jury selection in the first instance takes place out of court, the court’s function is, properly speaking, to review the action of the selecting officer. If the court's part in jury selection should be limited to review of administrative decisions a great saving in the time of the court would be effected. The voir dire examination used as a mere “fishing expedition” for grounds of challenge would be eliminated, and the voir dire in court limited to its original purpose, viz., the proof or disproof of facts on which challenges are based.

The judicial review referred to should be a full review of the facts as well as the law and as a matter of convenience should be based on evidence as well as upon any materials used by the selecting officer.

If adequate steps are taken to guard against an improper voir dire examination out of court, the review here suggested should fully safeguard the rights of all parties to jury cases. If their rights can be fully safeguarded in this way, any burden of jury selection, beyond reviewing the action of selecting officers, is an unnecessary burden on the courts, and should be removed. Specifically and principally, the voir dire examination in court before challenge should be abolished.

**PART TWO**

**PROPOSED REVISION OF FEDERAL SYSTEM**

The Judicial Conference of Senior Circuit Judges of the United States at its September 1941 session appointed a committee to investigate the need of improvement in methods of jury selection in United States courts. In September 1942 this committee (Judge John C. Knox, Chairman, and Judges Colin Neblett, Walter C. Lindley, James M. Proctor, and Harry E. Watkins) made a report to the Judicial Conference in which it recommended that conformity with state practice in jury selection be abandoned; that acts be passed by Congress (a) to establish standards for the selection of federal jurors (b) to provide a jury commission for each federal district court, and (c) to provide for

\[\text{\textsuperscript{20}}\text{The newly-developed practice of having prospective jurors fill out questionnaires can be extended so as to cover qualifications for service in a particular case. The Report of the Commission on the Administration of Justice in New York 203 (1934) states: "When juries are impaneled by counsel in the assembly room, the court is uninterrupted and can apply all its time to actual trials (with the result that there has been an increase in the number of jury trials)."}\]
payment of jury fees, expenses, and costs. The first proposed act was
designed to abolish conformity; the other two, to modify existing legis­
lation. On January 11, 1944, Senator Van Nuys introduced in the
United States Senate three bills (S.1623, S.1624, and S.1625, 78th
Congress, 2d session) to carry into effect the recommendations of the
committee of judges. The Senate bills are based on bills recommended
by the committee, but differ from them in some respects.

I

QUALIFICATIONS FOR JURY SERVICE

A. Service in General

1. Physical capacity in general. Senate Bill 1623 provides that no
person “having physical or mental infirmities” shall be “eligible” to
serve as a juror, if he is “incapable,” in the judgment of the jury com­
mission or the court, of rendering “efficient jury service.” Senate Bill
1624 makes it a duty of the jury commission to select persons “capable
of rendering satisfactory service.” The bills do not indicate what physi­
ical “infirmities” will render a person incapable of “efficient” and “satis­
factory” service. Except as controlled by these very general standards
the matter of physical capacity is left to the jury commission and to
the court.

2. Age. Senate Bill 1623 prescribes a minimum age of twenty-one,
but does not exempt or disqualify persons over a maximum age. With
respect to maximum age the Report to the Judicial Conference states:
“In many states persons over 60 or 65 years of age are either disquali­
fied to act as jurors or granted exemption. Many of these are entirely
capable of performing jury service. The Committee is convinced that in
each state the district courts should be permitted to call older men for
jury service if in doing so hardship will not result” (p. 41).

3. Sex. Senate Bill 1623 makes it clear that women are to be quali­
fied for jury service. The Report to the Judicial Conference states:
“The Committee is of the opinion that women as a group are capable
of acting as jurors and should irrespective of state law be called for
service in the Federal courts” (p. 23).

4. Color. Senate Bill 1623 makes no reference to color as a qualifi­
cation for jury service. Section 415 of title 28, U.S.C., provides that
“No citizen possessing all other qualifications which are or may be pre­
scribed by law shall be disqualified for service as grand or petit juror
in any court of the United States on account of race, color, or previous
condition of servitude.” The Report to the Judicial Conference contains
an extended discussion of jury selection in districts which have large
negro and other minority racial groups (pp. 18–22). The problem is not whether race or color shall be made a statutory basis of selection, as any such statute would be unconstitutional, but to determine how discrimination against classes of persons can best be prevented. “The Committee has concluded that in this, as in other administrative matters, the sound judgment of the district courts must be exercised” (p. 22).

5. Mental capacity in general. Senate Bill 1623 disqualifies a person having “mental infirmities” if, “in the judgment of the jury commission or the court,” the person is incapable of performing “efficient” jury service. Senate Bill 1624 directs the jury commission to select “intelligent” and “fair-minded” persons who are “capable of rendering satisfactory service.” Here again very general standards are set up, leaving each jury commission and court free to establish its own specific standards. With respect to mental tests, the Report to the Judicial Conference says: “Prospective jurors in the state courts in some cities are given a multiple-answer examination to determine their general intelligence and familiarity with the legal language that may be used at the trials where they will serve. On the basis of present experience, the practice is not recommended” (p. 81).

6. Knowledge of English. To be eligible for jury service under Senate Bill 1623 a person must be able “to read, write, speak, and understand the English language.” This requirement is very specific and makes literacy, as well as ability to communicate with others, a qualification for jury service. The Report to the Judicial Conference indicates an intention to set up literacy as an independent qualification (p. 42).

7. Moral character and reputation. Senate Bill 1624 directs the jury commission to select persons who are “honest” and of “good reputation.” Senate Bill 1623 disqualifies a person who “has been convicted in any court of record, of a felony, or of a misdemeanor involving moral turpitude.” While the words “moral character” are not used in the bills, it seems abundantly clear that jurors must have this general qualification. A more specific statement of the qualification, except as made with respect to conviction of crime, does not seem feasible.

8. Religious beliefs. According to the Report to the Judicial Conference jury selection is to be made “without reference to maximum age, sex, color, or religion” (p. 42).

9. Political status. Senate Bill 1623 provides that “any citizen of the United States of the age of 21 years and over,” who is not disqualified, may be called to serve as a grand or petit juror. This part of the statute declares what persons may be required to serve as jurors. Citizens only are to bear this burden. From the Report to the Judicial Conference, however, it appears that the committee considered “citizenship” a qualification for jury service (pp. 42 and 44). It is to be noted at this point that the Senate bills do not require that jurors be qualified to vote. This omission is necessary if a uniform standard of selection for all the federal courts is to be established.

10. Residence. Senate Bill 1623 provides that certain qualified persons may be called to serve as jurors “in the district court of the United States for the district in which he or she resides.” The Report to the Judicial Conference states: “A desire to save expense, as well as the time of jurors, tends to limit the area from which a particular panel will be selected. On the other hand, a broad distribution is often desirable to avoid local prejudice and to prevent the burden of jury duty from falling upon residents of a restricted portion of the jurisdiction. The statute (U.S.C., Title 28, § 413) gives the court wide discretion in this respect, bounded only by the stated considerations of impartiality, economy, and equality of burden” (p. 26). “The problem of geographical representation, the Committee believes, is one for the unfettered discretion of each court” (p. 30).

11. Economic and social status. Under the Senate bills a juror need not be a taxpayer or the owner of property. The Report to the Judicial Conference recommends that the sources from which jurors are selected should include “all economic and social groups in the community”; that “economic and social status including race and color should be considered only to the extent necessary to assure there is no discrimination on account of them” (p. 5).22

12. No prior jury service. Senate Bill 1623 provides that persons who “within any immediately preceding period of one year, have served five or more days as a grand juror or petit juror in any State court of record or at any preceding term in any Federal court ... may claim exemption at their option.” The bill proposed in the Report to the Judicial Conference fixed the period at two years and provided that exempt persons should not be called. Section 423 of title 28, U.S.C., provides that “no person shall serve as a petit juror in any district court

more than one term in a year.” It is of interest to note the conflict of view as to whether prior service within a specified time should be a disqualification or an exemption. The Report to the Judicial Conference has much to say about “volunteers,” yet does not recommend a disqualification of “volunteers.” It may be the committee intended to curb the use of “professional” jurors by the proposed two-year limitation.

13. Not a volunteer. The Report to the Judicial Conference states: “Particularly in the large metropolitan areas it has been found that a class of so-called professional jurors has developed. The members of such groups seek to make a partial livelihood from the small fee provided for jury service. ... The experiences and investigations of the Committee are persuasive that any attempt to draw a line of distinction between desirable and undesirable volunteer jurors is practically impossible. It is thought, also, that the dangers inherent in accepting volunteers are so great that all offers for voluntary jury service should be rejected” (pp. 25-26). As pointed out in subdivision 12, supra, the Report does not recommend a statutory disqualification of “volunteers,” nor does a provision to this effect appear in the Senate bills.

B. Service in a Particular Inquest or Trial

1. Special qualifications. Senate Bill 1624 provides that all jurors must be drawn by chance from a box or wheel “except as otherwise permitted” by sections 417 and 418, title 28, U. S. C. The sections referred to provide, respectively, for summoning talesmen and special juries. Section 418 reads: “When special juries are ordered in any district court, they shall be returned by the marshal in the same manner and form as is required in such cases by the laws of the several states.” It seems clear that, under Senate Bill 1624, special jurors for federal courts will continue to be selected according to state practice. Query: Must they have the special qualifications, if any, required by state statutes?

Section 258 of title 40, U.S.C., provides that “the practice, pleadings, forms and modes of proceedings” in condemnation cases “shall conform, as near as may be” to state practice. In a recent federal condemnation case, United States v. 25,936 Acres of Land, it was held proper to select jurors from the county in which the land was located, instead of from the federal district at large, under a New Jersey statute which provided: “When an order is made for a struck jury for the

23 (D.C.N.J. 1943) 51 F. Supp. 969.
trial of a civil action, the sheriff of the proper county...shall deliver ...
to the justice or judge of the court before whom the jury is to be struck, a
book containing the names of the several persons in the county
qualified to serve as jurors” and the judge or justice shall select the
names of thirty-six or forty-eight “whom he considers to be the most
impartial and indifferent between the parties and best qualified as to
talents, knowledge, integrity, firmness and independence of sentiment
to try the cause.” 24 In Frazen v. Chicago, etc., Ry. Co. 25
the court denied that defendants in a condemnation cause in the federal court
had a “right,” claimed under a state statute, to trial by a jury selected
from the “freeholders” of the county in which the land was located. Senate
Bill 1624 provides: “The jury commissioners of the District of Co-
lumbia shall select and keep a separate list of persons to be drawn as
jurors in condemnation proceedings brought by the United States or
the District of Columbia, who shall have the qualifications of Petit
jurors and in addition thereto such special qualifications as may be pre-
scribed by law.” Query: Must jurors for condemnation cases outside
the District of Columbia have the special qualifications, if any, required
by state statutes?

2. Impartiality. Under section 411 of title 28, U. S. C., as now
in force, federal courts follow state statutes which prescribe qualifica-
tions for jury service in general. Also they follow, or should follow,
state statutes which prescribe qualifications for service in a particular
inquest or trial. In Southern Pacific Co. v. Rauh the federal court
applied a state statute which provided: 26 “But on the trial of such chal-
lenge, although it should appear that the juror challenged has formed
or expressed an opinion upon the merits of the cause from what he may
have heard or read, such opinion shall not of itself be sufficient to sus-
tain the challenge, but the court must be satisfied from all the circum-
cstances that the juror cannot disregard such opinion, and try the issue
impartially.” After calling attention to the federal statute which re-
quired conformity with state jury qualifications, the court said: “We
must therefore look to the law of the state of Oregon to determine the
qualifications of the jurors in this case.” 27 In Vause v. United States 28
the federal court applied a state statute which provides that a juror may
be challenged for “implied bias” in a criminal action, the juror “Being

24 Id. at 969.
25 (C.C.A. 7th, 1921) 278 F. 370.
26 (C.C.A. 9th, 1892) 49 F. 696 at 698.
27 Ibid.
28 (C.C.A. 2d, 1931) 53 F. (2d) 346.
a party adverse to the defendant in a civil action, or having complained against or been accused by him in a criminal prosecution." 29 After referring to the facts of the case before it the court said:

"...at common law, this would be a question not wholly clear. In Crawford v. United States, 212 U.S. 183, 29 S.Ct. 260, 53 L.Ed.465, 15 Ann. Cas. 392, the common law was applied and an employee of the government was held to be disqualified. The defendants rely largely upon that case. We do not think it in point here, because the New York statute, rather than the common law, controls. 28 USCA 41I provides: 'Jurors to serve in the courts of the United States, in each State respectively, shall have the same qualifications, subject to the provisions hereinafter contained, and be entitled to the same exemptions, as jurors of the highest court of law in such State may have and be entitled to at the time when such jurors for service in the courts of the United States are summoned.' Section 424 of the same title relates to peremptory challenges, but section 41I applies to challenges for cause." 30

In holding that the state statute governed challenges for cause, the court recognized that conformity under section 41I means conformity as to qualifications for service in the particular case as well as to qualifications for jury service in general.

The Report to the Judicial Conference contains no discussion of the need of statutory regulation of challenges for cause. The Senate bills likewise are silent. With the repeal of the conformity provisions of section 41I all state statutes dealing with impartiality or bias will disappear insofar as the federal courts are concerned. If no federal statutes are enacted in their place, all questions concerning these qualifications must be decided by the common law. Where statutes of long standing are removed, the common law is likely to be found archaic, its development having been arrested by the introduction of the statutes.

II

PERSONS EXEMPT FROM JURY SERVICE

Senate Bill 1623 provides that three classes of persons shall be exempt: (1) Persons who have served as jurors within a certain period of time. (2) Certain public officers. (3) Persons on active duty with the armed forces. No other classes are named in the statute. In view of the fact that state exemptions will no longer be recognized, all quali-

29 Id. at 355.
30 Ibid.
fied persons engaged in any profession or business may be required to serve unless in the particular federal district an exemption is granted under the following provision of Senate Bill 1623:

"If at any time, and for good and sufficient reasons, it appears that the public welfare will be served by relieving any person or class of persons from jury service, or if the performance thereof will impose undue hardship or extreme inconvenience upon any person or class of persons, the senior district judge of any judicial district, or such other judge as he may designate, may, in his discretion, excuse that person or class from jury service for such period of time as he may consider proper. In districts in which a district court is regularly held in more than one city the judge presiding at the court to which a juror has been called for service may excuse persons or classes of persons from jury service."

Under this provision "classes" of persons usually exempted by state statute can be exempted by the federal judge, but he need not do so, and there is no provision for a review of his decision. On the other hand, the judge may relieve any "class" of persons from jury service without regard to legislative policy, and again there is no provision for review. While there is ample precedent for conferring on a court or judge power to "excuse" individual jurors, there is no precedent known to the writer for conferring on a court or judge power to determine what "classes" of persons should be relieved of the burdens of jury service. The "exemption" concept has been developed by statute and involves broad questions of public policy. If the power to set up exempt classes is given to the judges of each district it seems unlikely there will be uniformity in the federal courts throughout the country. The Report to the Judicial Conference calls attention to the many classes of persons exempt by state statutes (p. 36) and points out that some of the statutes "were enacted only because powerful pressure groups forced such action" (p. 39). If Senate Bill 1623 is passed these "pressure groups" will have to present their claims to the judges of the federal courts.

III

PERSONS EXCUSED FROM JURY SERVICE

The section of Senate Bill 1623 quoted in the preceding paragraph sets up the same standards for "excusing" individuals as it does for excusing or exempting "classes" of persons. An individual may be excused when "public welfare" will be served thereby and when service
will impose “undue hardship or extreme inconvenience” upon the individual.

IV

METHODS OF JURY SELECTION

A. Talesmen. Section 417 of title 28, U.S.C., provides: “When, from challenges or otherwise, there is not a petit jury to determine any civil or criminal cause, the marshal or his deputy shall, by order of the court in which such defect of jurors happens, return jurymen from the bystanders sufficient to complete the panel...” An illustration of procedure under this statute will be found in Cravens v. United States. The Report to the Judicial Conference states: “It will be generally agreed that the use of talesmen is not desirable and is to be avoided except as a last resort” (p. 97).

B. Regular jurors. Senate Bill 1624 provides:

“SEC. 276. JURORS; JURY COMMISSION.—(a) APPOINTMENT.—The judge for the district, or if there be more than one judge, the majority of the district judges for each district court of the United States, or in the event of no agreement by the majority, the senior district judge of that court shall appoint for the district one or more citizens of good standing residing in the district as jury commissioners to serve during the pleasure of the court.... (c) DUTIES. The clerk of the district court and the commissioner shall constitute the jury commission for the district.... In the performance of all the duties of their office, the jury commissioners shall act subject to the instructions of the senior district judge, and the administration in each district of this and other laws relating to the selection of jurors in the district courts shall be subject to the direction of the senior district judge of the district.... It shall be the duty of the commission, under the supervision of the senior district judge, and subject to the requirements of section 275 of the Judicial Code (U.S.C., title 28, sec. 411) to select without reference to party affiliation the names of qualified persons who may be called to serve as jurors in the district court and who in their opinion are intelligent, honest, fair-minded, of good reputation, and capable of rendering satisfactory service, and keep suitable records regarding them. The commission shall have the power to transmit to prospective jurors questionnaires approved by the senior district judge and to issue to prospective jurors subpoenas enforceable by the district court, for the purpose of determining whether any person is qualified to be selected

81 (C.C.A. 8th, 1932) 62 F. (2d) 261.
as a juror. They, and those duly assigned to assist them, may conduct personal examinations of or interviews with prospective jurors, subject to the direction of the senior district judge. Any person who willfully fails or refuses to answer or falsely answers any questionnaire transmitted to him or fails to respond at authorized examinations or interviews may be punished for contempt of court. The commission may administer oaths to prospective jurors and witnesses and use such other procedures as may seem to the court conducive to securing full information regarding the qualifications of persons to serve as jurors in the district court. Each district court may, in its discretion, use either the questionnaire or personal interview system, or both, in determining the qualifications of jurors. ...(d) DRAWING.—It shall also be the duty of the jury commission, upon order of the district judge subject to whose instruction it acts, to arrange for the drawing of names of persons selected pursuant to subdivision (c) of this section to serve as grand and petit jurors in the district court, and, except as otherwise permitted by sections 280 and 281 of the Judicial Code (U.S.C., title 28, secs. 417 and 418), no person shall serve as a juror whose name is not so drawn. The names shall be drawn from a box, wheel, or similar device that will insure that the drawing is by chance, containing at the time of the commencement of each drawing the names of not less than three hundred persons selected as provided in subdivision (c) of this section. Names shall be drawn publicly by the clerk or a deputy and a jury commissioner, or by a judge and jury commissioner, or by a judge and the clerk or a deputy. ..."

This procedure is, in general, the same as now provided by section 412 of title 28, U.S.C. There are, however, a number of new features. The provision for examination of jurors out of court by questionnaires, interviews, etc., is new, as is the provision which sets up general standards of qualification for jury service. Among other new provisions are those which expressly state that the entire procedure shall be under the supervision of the senior district judge. The requirement of the present law that the commissioner and the clerk "each place one name in the box alternately" has been dropped. Various features of the bill are discussed in the Report to the Judicial Conference (pp. 54–61).

V

Conclusion

The proposed revision of the federal system of jury selection involves two questions of general policy: (1) Should conformity be
abandoned? (2) Should rules and standards of jury selection be made by statute, or left largely or entirely to the courts? As to the first question the writer is inclined to agree with the opinion of the revisers that a wholly independent federal system of selection is preferable to the system now in use. As pointed out in the Report to the Judicial Conference (p. 40), such a development would be in line with the adoption of the Rules of Civil Procedure and the proposed Rules of Criminal Procedure. As to the second question, the writer is inclined to the opinion that specific statutory qualifications for jury service, and specific statutory regulations of exemptions and excuses are preferable to the scheme of the proposed revision. The Senate bills do not leave these matters entirely to the courts, but do abandon large areas now occupied by state statutes. If the view should prevail that rule-making by courts is preferable to legislation, it would then be well to consider whether, in the interest of uniformity, the rules should not be made by the Supreme Court instead of by each senior district judge.