

E n g a g e

The Journal of the Federalist Society's Practice Groups

A Project of the E.L. Wiegand Practice Groups

*Recent Rulemaking Activity by the SEC Under
the Sarbanes-Oxley Act of 2002* by Peter Welsh

*A Reemergence of Regulation at the Interface
Between Patents and Antitrust?*
by Scott Kieff and Hon. Gerald Mossinghoff

*Faith, Funds, and Freedom: Restoring
Religious Liberties for CARE Act
Employers* by James Sonne

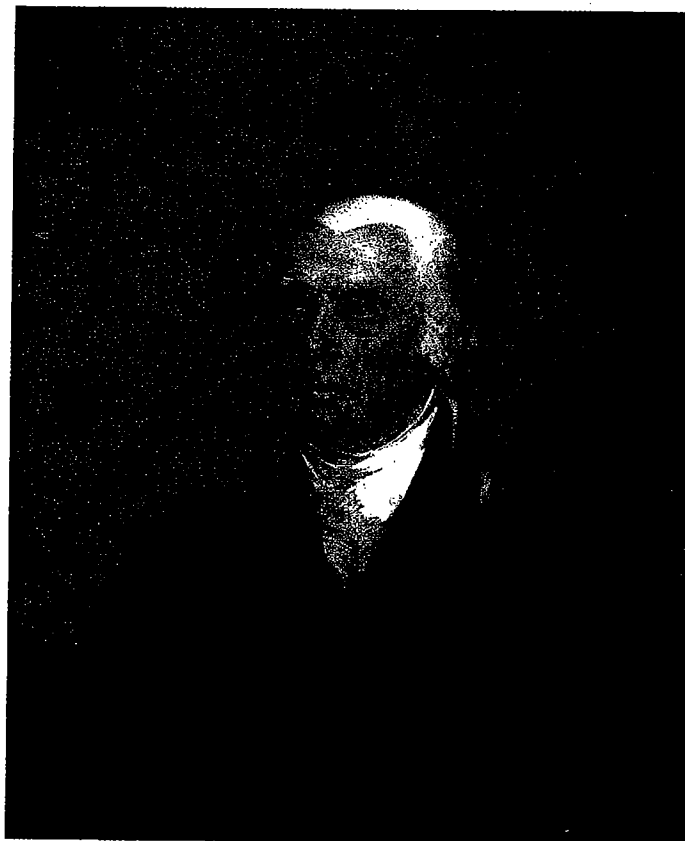
*Are Class Actions Lawyers Systematically
Targeting Regulated Industries?*
remarks by William Barr and Barbara Hart

*The Federalism Implications of International
Human Rights Law* by Christian Vergonis

Book Reviews

Judge Dave and the Rainbow People
reviewed by C. Boyden Gray

Bush v. Gore: The Question of Legitimacy
reviewed by Nelson Lund



James Madison by Chester Harding, National Portrait Gallery, Smithsonian Institution

PRESERVING THE RIGHT TO A REPRESENTATIVE JURY

By KEITH T. BORMAN AND MARK A. BEHRENS*

For over two centuries, the jury system has played an important and revered role in the American justice system.¹ As Alexis de Tocqueville observed long ago, "the practical intelligence and political good sense of the Americans are mainly attributable to the long use they have made of the jury."² Today, jury service is commonly accepted as one of the few obligations of good citizenship. National polls indicate that Americans hold the jury system in the highest regard — 78% percent of the public believe the jury system provides the most fair method of determining guilt or innocence; 69% consider juries to be the most important part of the justice system.³

In light of this strong public support, it is ironic that many Americans view jury service as a duty best discharged by others. In some urban jurisdictions, fewer than 10% percent of all summoned citizens show up in court.⁴ Likewise, in some rural areas, sheriff's deputies have been forced to round up people shopping in the local Wal-Mart to fill the jury box.⁵ According to one study, on average, about 20% of those summoned to jury duty each year in state courts do not respond.⁶ While some of this can be attributed to out-of-date records and summonses that are mailed to the wrong address, many citizens simply ignore their civic obligation. Those who do arrive at the courthouse often avoid service through "occupational exemptions" that benefit certain professions or come presenting a purported "hardship excuse." All too often, potential jurors are successful in getting out of jury duty. This situation has made it difficult for many litigants to obtain a jury representing a true cross-section of the community.

The contradiction between strong public support for the jury system and the avoidance of jury service suggests that the jury system needs to be reformed to better serve Americans. It needs to become more "user friendly." This article discusses several of the core problems undermining the American petit jury system. It then discusses innovative model legislation, the "Jury Patriotism Act," recently developed by the American Legislative Exchange Council ("ALEC"), the nation's largest bipartisan membership association of state legislators. The Act would promote jury service in state courts by alleviating the burden and inconvenience placed on those called to serve while making it more difficult for people to escape from jury service without showing true hardship. Many of the changes suggested by the Act could also be accomplished by courts, so judges may want to consider them as well.

Citizens Avoid Jury Service **Occupational Exemptions**

Some states unnecessarily limit the jury pool and automatically exempt potential jurors from service based on their occupation. Some of the more common exemptions in-

clude lawyers, doctors, public officials, and law enforcement officers. For some reason or another, these people are regarded as too important, socially, politically, or economically, to serve on a jury. The situation is not dissimilar to the policy of granting draft deferments to Vietnam-era students who had the means to afford college, while those who could not were called into service.

Other exemptions appear to be obsolete remnants of a time past. For example, Nevada continues to exempt various categories of "essential" railroad workers, such as firemen, brakemen, conductors, engineers, and switchmen, notwithstanding the fact that firemen are no longer employed on train crews and trains now operate with just two crew members (instead of six or more).⁷ Wyoming apparently considers embalmers as too important for jury service.⁸

Regardless of the reason, "broad categorical exceptions not only reduce the inclusiveness and representativeness of a jury panel, but also place a disproportionate burden on those who are not exempt," most notably blue-collar workers, the retired, and the unemployed.⁹

Vague or Lax "Hardship Excuse" Standards

Many who do arrive in court try to escape jury service through a so-called "hardship" excuse. Standards for courts to excuse jurors for hardship are often lax, vague, or, at worst, nonexistent. For example, Washington allows courts to excuse jurors for "undue hardship, extreme inconvenience, public necessity, or any reason deemed sufficient by the court for a period of time the court deems necessary."¹⁰ Some states even encourage judges to release anyone in a business or profession. For instance, Virginia allows courts to excuse prospective jurors who allege a "particular occupational inconvenience."¹¹ Virtually anyone who is gainfully employed and wishes to avoid jury service may meet this broad standard.

Administratively, many jurisdictions signal to their citizens that jury service is not an important responsibility. Several state statutes authorize judges to delegate the granting of excuses to court clerks or other staff. In some courts, a quick telephone call to the clerk or merely checking a box on a form with a prepaid return envelope may suffice. If those seeking a hardship excuse had to appear before a judge, it is doubtful that many would risk inventing or exaggerating an alleged hardship. Further easing the way to an exemption, most state statutes do not require summoned jurors to provide the court with written verification of the claimed hardship, such as a statement from an employer, a doctor's letter, or proof of caretaker responsibilities.

Financial Hardship

Financial hardship can be a legitimate reason for excusing jurors from service. Many jurisdictions offer jurors no more than what is essentially lunch money and a bus

token after the first day of service. According to the National Center for State Courts, the average juror compensation from the court for less than five days of service is about \$18.53 per day.¹² After five days, this stipend increases to an average of \$24.26 per day of service.¹³ The lack of adequate compensation may be particularly troublesome for jurors who are selected to serve on the rare, lengthy trial.

Lack of adequate compensation for jurors has several unfortunate results. Some jurors may simply not show up in court. Others are likely to arrive and claim financial hardship. Courts presented with such claims often find they have no choice but to excuse workers because they do not have the resources to provide any significant compensation above the small jury fee. Consequently, the basic democratic right to be tried by a jury of one's peers may be largely illusory in a system whose juries are disproportionately composed of retired and unemployed individuals, especially in lengthy trials. Such juries may be non-diverse and unrepresentative, and may produce arbitrary results for plaintiffs, defendants, and prosecutors.

The Length and Inflexibility of Jury Service

Citizens called to jury service have other obligations. They have jobs that require their presence, children or other family members for whom they are responsible, travel plans that cannot be altered without penalty, and other personal and professional commitments. Too many courts require potential jurors to waste enormous amounts of time waiting at the courthouse for possible assignment. For example, in Kentucky, jurors are advised that "[i]n some metropolitan areas, a person may be required to serve as few as fourteen days, while in some rural areas, a person may be asked to serve as many as 150 days."¹⁴ Idaho requires citizens to serve up to ten days of jury duty and be available for as long as six months for service within any two-year period.¹⁵ In Washington, a juror may be required to be physically present at the courthouse for two weeks or longer.¹⁶ In these and other jurisdictions, the commitment of two weeks or more causes severe disruption in domestic schedules, personal plans, and business activities.

Another deterrent to jury service is the inflexibility of many court systems in accommodating the demands of juror calendars. Courts summon jurors to appear on a certain date and do not give them a simple means of rescheduling their service should they have a conflict. If juries in this country are to be truly representative of their communities, courts must accommodate professionals who face the demands of business and travel commitments. These citizens are productive and efficient at work, and they expect public service to be the same. While idealists might expect jury service to trump all other considerations, busy workers resent obligations that waste their time. This stands in the way of attaining diverse, representative juries.

Lack of a Significant Deterrent

Research shows that a significant number of those who do not respond to jury summonses fail to do so

because they have little fear of receiving a penalty, or believe that the penalty will be a mere "slap on the wrist." For instance, in Illinois, failure to respond to a jury summons is punishable as contempt of court, with a fine ranging between \$5 to \$100.¹⁷ Likewise, Virginia courts may punish no-shows with a fine of between \$25 and \$100, and Vermont jurors may face a minimal \$50 fine.¹⁸ Courts may waive these small fines if a juror provides "good cause" or a "satisfactory excuse" for why he or she failed to appear. When the penalty for not showing up for jury service has little more sting than a parking ticket, it is no wonder that so many people disregard their jury summons. Furthermore, most jurors have figured out that even these minor threats are hollow because many courts do not penalize no-shows.

Protecting the Right to a Representative Jury

Model legislation – the Jury Patriotism Act – has been developed by the American Legislative Exchange Council ("ALEC") to address the discouraging state of jury participation in America. The Act addresses the five major reasons citizens avoid jury service: occupational exemptions, the lack of coherent standards for excusing jurors from service, the financial burden jury service can impose, the insensitivity and inflexibility of courts toward the schedules of prospective jurors, and the absence of a penalty sufficient to deter people from avoiding their jury service obligation.

Elimination of Occupational Exemptions

The first principle of the Jury Patriotism Act is that all citizens have a civic obligation to serve on juries regardless of their occupation or income level. This cross-section of the public is necessary to ensure a diverse and representative jury, and to distribute the burden of jury service equally throughout the population. The first step to a more representative jury is the elimination of occupational exemptions from jury service. The Jury Patriotism Act repeals state laws establishing or recognizing such exemptions.

Limit the Grounds for Excuses

The Act also addresses the problem of vague and undefined "hardship" excuses that exist in many states by providing greater guidance to courts regarding acceptable reasons for excusing a prospective juror from service. Under the Act, a prospective juror seeking a hardship excuse must demonstrate that jury service would cause "undue or extreme physical or financial hardship" to him or her or to a person under his or her care or supervision. Since defining similar standards has proven problematic in many jurisdictions, the Act is explicit. It recognizes only three acceptable bases for the court to grant a juror an excuse for hardship: (1) the impossibility of obtaining an appropriate substitute caregiver for a person under the prospective juror's personal care or supervision; (2) the incurring of costs that would have a substantial adverse impact on the payment of the individual's necessary daily living expenses or on those for whom he or she provides the primary means of support; or (3) physical illness or disease. Absence from employment is

expressly excluded as a sole basis for excusing a potential juror from service.

In order to address the liberal granting of requests for an excuse, the Act permits only members of the judiciary, and not court employees, to authorize excuses. Jurors must also provide the judge with documentation supporting their request for an excuse. These grounds and procedures would more closely reflect true hardship and limit the opportunity for abuse.

Provide One Automatic Postponement of Jury Service

The Jury Patriotism Act recognizes that jury service is time consuming and, therefore, disruptive. For this reason, the Act grants every prospective juror the right to one postponement without cause, and it empowers jurors to set a date within six months of receiving their summons on which they will appear. Given that most jury service ends within one week, providing jurors with up to six months notice should allow them ample time to plan for their participation without undue stress or inconvenience. The courtesy of a postponement procedure would reduce the incentive for professionals who have commitments to patients and clients, or others who have family responsibilities or vacation plans, to avoid jury service. As the American Bar Association has observed, “[d]eferral of jury service accommodates the public-necessity rationale upon which most exemptions and automatic excuses were originally premised, while enabling a broader spectrum of the community to serve as jurors.”¹⁹

Obtaining a first postponement of service under the Jury Patriotism Act would be quick and easy. Individuals would simply request the postponement by telephone, online, in person, or in writing. A potential juror would not have to provide any reason for the postponement – only a date on which he or she will appear for jury service within six months. The Act sets a higher standard, however, for future postponements. Additional deferrals may be granted only in the event of an extreme emergency, defined as a death in the family, sudden grave illness, a natural disaster, or a national emergency in which the juror is personally involved. These grounds must be such that the summoned juror could not have anticipated them at the time he or she requested the initial postponement.

Adopt a Uniform One-Day/One-Trial System

A shorter term of service would also relieve some of the hardship currently placed upon jurors. The Jury Patriotism Act guarantees that a potential juror would not be required to spend more than one day at the courthouse unless he or she is selected to serve on a jury panel. This practice, known as the “one-day/one-trial” system, has been adopted by about half of the state courts.²⁰ Over the past three decades, courts have transitioned to the one-day/one-trial system as a response to high excusal rates, the inconvenience and hardship resulting from lengthy terms on those who are unable to obtain an excuse, and the frustration and boredom imposed on jurors by lengthy terms of service.

The one-day/one-trial system works. When New

York adopted the one-day/one-trial system, it reduced its statewide average term of service, previously over five days, to just 2.2 days.²¹ Under the one-day/one-trial system, 85% of Massachusetts jurors complete their service in just one day and 95% finish in three days.²² Not only does the one-day/one-trial system result in less time spent in the courthouse for jurors, it also means fewer days of employee absences from work for jury duty. Research by the California Judicial Council found that the majority of employees returned to work the next business day after reporting for jury service under the one-day/one-trial system.²³

Jurors favor the one-day/one-trial term of service. In an early study of juror attitudes, 90.8% of 5,500 jurors selected the one-day/one-trial system as preferable to a thirty-day term, and a majority would not object to being called again.²⁴ The one day/one-trial system term also may vastly reduce the need for hardship excuses. One court found that requests for excusal after the adoption of the one-day/one-trial system fell to 1.36%, and most of these requests were accommodated by the court’s postponement policy.²⁵ It should be no surprise that the survey also revealed that the one-day/one-trial system increased positive attitudes about jury duty and about the justice system generally.²⁶ Recently, the National Center for State Court’s Best Practices Institute recognized the one-day/one-trial system as a particularly effective practice.²⁷

Wage Replacement or Supplementation

Better compensation for jurors may be key to obtaining more representative juries. The Jury Patriotism Act takes steps to address the financial hardship issues that undermine citizen participation in civil trials. The Act provides wage replacement or supplementation through a “lengthy trial fund” financed by court filing fees. Jurors who serve on civil trials lasting longer than three days would receive supplemental compensation if they would otherwise be excused from service due to financial hardship.

Provide Special Compensation to Jurors on Lengthy Trials

The number of jurors called to serve on lengthy trials is relatively small, but those who find themselves in that situation may suffer severe financial hardship as a result. While jurors have an obligation to serve, there is a limit on how much an individual citizen can be asked to sacrifice for the civil justice system, particularly when the case involves a dispute between private parties. For this reason, the Jury Patriotism Act would help relieve the heightened burden on jurors serving on lengthy civil cases. The fund would provide jurors who are not fully compensated by their employers with increased wage replacement or supplementation after the ninth day of service.

Increase the Penalty for No-Shows

As discussed above, most states currently threaten no-shows with contempt of court, punishable by a small fine or even a few days in jail; but rarely is any penalty imposed. Jury service, however, is an important obligation of citizen-

ship and a critical part of the criminal and civil justice systems. Those who disregard a jury summons compromise the judicial system and jeopardize the rights of litigants. For this reason, the Jury Patriotism Act punishes a failure to appear as a misdemeanor. This penalty should communicate to jurors the importance of jury service.

Conclusion

Americans overwhelmingly support the jury system. Yet, many people fail to appear for jury duty when summoned, or strive to get out of jury duty once they enter the courthouse. Most of these individuals do not lack a sense of civic duty. Rather, they are discouraged from jury service as a result of hardship and headache imposed by antiquated systems that do not provide adequate financial compensation, leave little or no flexibility as to the dates of service, and may involve unnecessary time sitting around in a waiting room. Moreover, loosely defined hardship exemptions provide many with an easy means of escape. ALEC's Jury Patriotism Act identifies and addresses the major causes of low jury participation in all levels of society; it will make jury service more flexible, less burdensome, and more attractive. State legislatures should adopt the Act. Courts also should do their part to make sure that the burdens of service are shouldered by all, and the promise of a fully representative jury becomes a reality in every courtroom in America.

* Keith T. Borman is the managing partner of the Washington, D.C. office of Shook, Hardy & Bacon L.L.P. He received his B.A. from Occidental College in 1970 and his J.D. from the University of Michigan Law School in 1973.

Mark A. Behrens is a partner in the Public Policy Group of Shook, Hardy & Bacon L.L.P. in Washington, D.C. He is Vice-Chair (Programs) of the Federalist Society's Litigation Practice Group, Advisor to the American Legislative Exchange Council's Civil Justice Task Force, and co-counsel to the American Tort Reform Association. Mark received his B.A. in Economics from the University of Wisconsin-Madison in 1987 and his J.D. from Vanderbilt University in 1990, where he served on the *Vanderbilt Law Review*.

Footnotes

¹ See U.S. Const. art. III, § 2, cl. 3 and amend. VI; U.S. Const. amend. VII. Most state constitutions also establish a right to a jury trial in civil matters. See, e.g., Conn. Const. art. I, § 19; Fla. Const. art. I, § 22; Pa. Const. art. I, § 6; Va. Const. art. I, § 11.

² Alexis de Toqueville, *Democracy in America*, vol. 1, at 285 (J. P. Mayer ed. 1975).

³ See Am. Bar Ass'n, *Perceptions of the U.S. Justice System 6-7* (1998), available at <<http://www.abanet.org/media/perception/perceptions.pdf>> (last visited Jan. 14, 2003).

⁴ See Robert G. Boatright, *Improving Citizen Response to Jury Summonses: A Report With Recommendations* vii (Am. Judicature Soc'y 1998).

⁵ See Amy Merrick, *When the Jury Box Runs Low, Deputies Hit Wal-Mart: Personal Summonses Get Job Done When Mail Doesn't; Out for Milk, Off to Court*, Wall St. J., Aug. 20, 2002, at A1.

⁶ See Boatright, *supra* note 4, at 13. Others have estimated that as many as two-thirds of the approximately 15 million Americans

summoned do not report for jury service. See David Schneider, *Jury Deliberations and the Need for Jury Reform: An Outsider's View*, *Judges' J.*, vol. 36, no. 4, at 25 (Fall 1997).

⁷ See Nev. Rev. Stat. § 6.020(1)(d) (2001).

⁸ See Wyo. Stat. Ann. § 33-16-105 (Michie 2002).

⁹ Am. Bar Ass'n, *Standards Related to Juror Use and Management* 51 (1993) [hereinafter ABA Standards].

¹⁰ Wash. Rev. Code § 2.36.100(1) (2002).

¹¹ Va. Code Ann. § 8.01-341.2 (Michie 2002).

¹² See Nat'l Center for State Courts, *Examining the Work of State Courts*, 2001, at 90 (2002), available at <http://www.ncsconline.org/D_Research/csp/CSP_Main_Page.html> (last visited Jan. 14, 2003) (based on 1999 statistics).

¹³ See *id.*

¹⁴ Admin. Office of the Courts, *Commonw. of Ky., You the Jury: Kentucky Jury Handbook 4* (2001), available at <http://www.kycourts.net/Resources/You_the_Jury_%20Handbook.pdf> (last visited Jan. 14, 2003).

¹⁵ See Idaho Code § 2-216 (2002).

¹⁶ See Wash. Rev. Code § 2.36.100 (2001). Implementation of this requirement varies by county.

¹⁷ See 705 Ill. Comp. Stat. 305/15 (2002); see also Tex. Gov't Code Ann. § 62.111 (Vernon 2001).

¹⁸ See Va. Code Ann. § 8.01-356 (Michie 2002); Vt. Stat. Ann. tit. 4, § 958 (2002).

¹⁹ ABA Standards, *supra* note 9, at 51.

²⁰ See Nat'l Center for State Courts, *Best Practices Inst., Jury Administration and Management: Term of Service*, available at <http://www.ncsconline.org/Projects_Initiatives/index.htm#Best> (last visited Jan. 14, 2003) [hereinafter Best Practices].

²¹ See N.Y. State Unified Court System, *Continuing Jury Reform in New York State* 12 (Jan. 14001), available at <<http://www.courts.state.ny.us/juryreform.pdf>> (last visited Jan. 14, 2003).

²² See Office of Jury Commissioner for the Commonwealth, *Introduction*, <<http://www.state.ma.us/courts/jury/introduc.htm>> (last visited Jan. 14, 2003).

²³ See Don Wolfe, *Employers: Support Jury Service or Stop Complaining*, *Silicon Valley / San Jose Bus. J.*, July 5, 2002, available at <<http://www.sanjose.bizjournals.com/sanjose/stories/2002/07/08/editorial3.html>> (last visited Jan. 14, 2003).

²⁴ See David E. Kasunic, *One Day/One Trial: A Major Improvement in the Jury System*, *Judicature*, Aug. 1983, at 81 (Aug. 1983) (citing a 1976 study of juror attitudes conduct by a professor with a specialty in statistics and sociology).

²⁵ See *id.* at 81-82.

²⁶ See *id.* at 81.

²⁷ See Best Practices, *supra* note 20.