



1955

An Analysis of Alternative Constructions of the Requirement That Federal Jurors Be Competent Under State Law

Follow this and additional works at: <https://digitalcommons.law.yale.edu/ylj>

Recommended Citation

An Analysis of Alternative Constructions of the Requirement That Federal Jurors Be Competent Under State Law, 64 *YALE L.J.* (1955).
Available at: <https://digitalcommons.law.yale.edu/ylj/vol64/iss7/5>

This Article is brought to you for free and open access by Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in *Yale Law Journal* by an authorized editor of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.

AN ANALYSIS OF ALTERNATIVE CONSTRUCTIONS OF THE REQUIREMENT THAT FEDERAL JURORS BE COMPETENT UNDER STATE LAW

PRIOR to 1948 statutory provisions required federal court jurors to have the same qualifications, and entitled them to the same exemptions, as jurors in the highest court of the state in which the federal court convened.¹ This procedure resulted in a complete lack of uniformity among federal juries since state jury selection statutes vary widely,² sometimes giving judges or jury commissioners wide discretion in disqualifying jurors.³ Furthermore, state exemption statutes often eliminate those classes most likely to yield excellent jurors.⁴ Therefore, statutory revision was proposed, not only to create uniform qualifications for federal jurors, but also to avoid those state qualifications and exemptions which made the selection of an intelligent jury difficult.⁵

1. "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." 36 STAT. 1164 (1911), 28 U.S.C. § 411 (1946).

For the history of the old statute, see Hickey, *Improvement of the Jury System in Federal Courts*, 35 GEO. L. J. 500 (1947).

2. See REPORT TO THE JUDICIAL CONFERENCE OF THE COMMITTEE ON SELECTION OF JURORS 33 (1942) (hereinafter cited as JUDICIAL CONFERENCE). See also VANDERBILT, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION 163-80 (1949) (hereinafter cited as VANDERBILT); Hickey, *supra* note 1.

3. See, e.g., CONN. GEN. STAT. § 2373 (Supp. 1953): "permanently disqualified for jury service by reason of physical infirmities or otherwise." (Emphasis added.) See also MICH. STAT. ANN. § 27.246 (1938) ". . . of good character, of approved integrity, of sound judgment, . . . and free from all legal exceptions." The flexibility made possible by such provisions is not inherently undesirable, but there is no reason why federal courts should be bound by state court discretionary determinations.

4. State exemption statutes often reflect legislative reaction to pressure group activity. JUDICIAL CONFERENCE 33, 39. Many professional groups, especially doctors and lawyers, are exempt from jury service in a large percentage of the states. JUDICIAL CONFERENCE 36-39; VANDERBILT 172-81. So many high calibre classes are exempt that "in some states exemption from jury service has become a badge of distinction." Wicker, *Jury Panels in Federal Courts*, 22 TENN. L. REV. 203, 204 (1952).

5. The problem of federal jury selection was subjected to intensive study by a committee of district judges appointed to conduct the investigation by the Conference of Senior Circuit Judges in 1941. In September, 1942, the committee submitted its report. JUDICIAL CONFERENCE. The report was circulated to judges and bar associations for comments and suggestions. The Judicial Conference met in 1943 and recommended the adoption of the legislation which had been found advisable by the committee. The proposed legislation called for uniform and liberal federal qualifications, with very few exemptions, leaving the district judges a large degree of discretion in determining whether or not individuals or classes should be subject to jury service. This resulted in the introduction of Senate Bills 1623, 1624, 1625 in the Seventy-Eighth Congress. The reports

In 1948, Congress enacted section 1861,⁶ which was intended to provide uniform standards of qualifications for jurors in federal courts.⁷ The statute reads:

"Any citizen of the United States who has attained the age of 21 years and resides within the judicial district is competent to serve as a grand or petit juror unless:

- "(1) He has been convicted in a state or federal court of a crime punishable by imprisonment for more than one year and his civil rights have not been restored by pardon or amnesty.
- "(2) He is unable to read, write, speak, and understand the English language.
- "(3) He is incapable, by reason of mental or physical infirmities, to render efficient jury service.
- "(4) *He is incompetent to serve as a grand or petit juror by the law of the state in which the district court is held.*"

of the Judicial Conference for 1944, 1945, and 1946 contain a renewal of its recommendations in support of these bills. VANDERBILT 149-205; Hickey, *supra* note 1.

A major target of the attacks on state statutory requirements was the exclusion of women jurors. MOORE, COMMENTARY ON U.S. JUDICIAL CODE 373 (1949). This disqualification because of sex, although steadily decreasing, is still operative in four states. In 1942 twenty states disqualified women from jury service. JUDICIAL CONFERENCE 34. By 1947, fourteen states still required only male jurors. VANDERBILT 166. The following state statutes still allow only male jurors: ALA. CODE tit. 30, § 21 (1940); MISS. CODE § 1762 (1942); TEX. CIV. STAT. art. 2133 (Vernon 1925); W. VA. CODE ANN. § 5261 (1949). Many states exempt all women from jury duty; others allow women with children under 16 to claim exemptions. In Florida, women are qualified, but must register with the clerk of the circuit court their desire to be placed on the jury list in order to be eligible. FLA. STAT. ANN. § 40.01 (1951). In Nebraska and Rhode Island women are ineligible in those districts which have no accommodations for women jurors. NEB. REV. STAT. § 25-1601.01 (1943); R.I. GEN. STAT. c. 506 § 37 (1938). In 1947 there were only 17 states where women enjoyed precisely the same status as men. Fisher, *Women as Jurors*, 33 A.B.A.J. 113 (1947).

Another criticism of state statutes was that property requirements were among the qualifications for jurors. See, *e.g.*, MONT. REV. CODE ANN. § 93-1301 (1947); N.C. GEN. STAT. § 9-11 (1943). Furthermore, a number of states require jurors to be over 25. CONN. GEN. STAT. § 7906 (1949); R.I. GEN. STAT. c. 506, § 1 (1938). Persons over 65 were disqualified in some states even though they might make excellent jurors. WYO. COMP. STAT. ANN. § 12-101 (1945); W. VA. CODE ANN. § 5261 (1949); S.C. CODE § 38-52 (1952). And some of the southern states, by limiting jurors to those qualified as electors, require payments of poll tax to be eligible for jury service. MISS. CODE ANN. § 1762 (1942); see *Myers v. State*, 167 Miss. 76, 147 So. 308 (1933).

6. 62 STAT. 951 (1948), 28 U.S.C. § 1861 (1952).

7. The statute was part of a general revision of federal judicial procedure. The Reviser's note to § 1861 states:

"The revised section prescribes uniform standards of qualification for jurors in Federal Courts instead of making qualifications depend upon State laws. This is in accord with proposed legislation recommended by the Judicial Conference of the United States.

"The last paragraph is added to exclude jurors incompetent to serve as jurors in the state courts."

Emphasis has been added to the portion of the statute quoted in the text.

It is clear that the original purpose of the statute is defeated by clause 4,⁸ which appears to require a federal jury commissioner to recognize at least some state restrictions. The extent to which state requirements are to be followed is confused by the use of the word "incompetent," seldom used in state qualification statutes.⁹ Moreover, while the previous statute provided for identical exemptions and qualifications in state and federal courts, the new statute has separate sections setting up distinct federal qualifications,¹⁰ exemptions,¹¹ and excuses.¹² Because of the uncertainty engendered by clause 4, clarification of the statute is necessary to facilitate the work of federal judges and jury commissioners.¹³

8. Clause 4 was not included in the proposed legislation recommended by Judicial Conference. It is clear from the activities of the Conference after the passage of § 1861 that clause 4 is not in harmony with its desire for federal uniformity. See note 44 *infra*. There is no mention in any hearing, report, or debate to explain why it was thought necessary to include clause 4. Similarly, there is no indication in the legislative history of what effect Congress felt clause 4 would have on the rest of § 1861.

9. A majority of the states speak in terms of "qualifications," "exemptions," and "excuses." But see CAL. CODE CIV. PROC. §§ 198, 199 (1949) ("competency"); ORE. REV. STAT. § 10.030 (1953) (same); TEX. STAT. ANN. art. 2135 (1923) (same).

10. 62 STAT. 951 (1948), 28 U.S.C. §§ 1861(1), (2), (3) (1952). See text at note 6 *supra*.

11. 62 STAT. 952 (1948), 28 U.S.C. § 1862 (1952):

"Exemptions

"The following persons shall be exempt from jury service

"(1) Members in active service in the armed forces of the United States.

"(2) Members of the Fire or Police department of any State, District, Territory, or Possession or subdivision thereof.

"(3) Public officers in the executive, legislative, or judicial branches of the government of the United States, or any State, District, Territory, or Possession or subdivision thereof who are actively engaged in the performance of official duties."

12. 62 STAT. 952 (1948), 28 U.S.C. § 1863 (1952):

"Exclusion or excuse from service

"a) A district judge for good cause may excuse or exclude from jury service any person called as a juror.

"b) Any class or group of persons may, for the public interest, be excluded from the jury panel or excused from service as jurors by order of the district judge based on a finding that such jury service would entail undue hardship, extreme inconvenience, or serious obstruction or delay in the fair and impartial administration of justice.

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

13. To secure information on this subject an inquiry was sent to all federal district court clerks, asking them to explain their current practices in selecting federal jurors. It was hoped, by this means, to determine the extent to which the federal jury selection system is affected by state laws, and to measure the changes in the selection process since the 1948 revision. The 40 replies received indicated clearly that confusion exists in this field due to the vagueness of the current statute. The replies will be cited hereinafter as *Confidential Communications to Yale Law Journal*.

A separate problem is whether or not clause 4 incorporates any or all state *causes for challenge*. This question is beyond the scope of the instant note which is concerned only with the problems facing federal judges and jury commissioners in selecting proper jury panels, and not with questions concerning the propriety of a juror in a particular case.

Most state statutes speak in terms of "qualifications" and "exemptions" rather than in terms of "competency." There are two categories of state qualifications. The more common and important one includes the specific, objectively determinable, basic qualifications, such as age, residence, sex, and education.¹⁴ The second category embraces discretionary qualifications. These include both "moral" and "reputation" requirements as well as more general "fitness" qualifications which allow the judge or jury commissioner to declare a person ineligible without more detailed statutory justification.¹⁵ Three types of exemptions exist. Many state statutes require exempted classes to claim their exemptions.¹⁶ Other statutes provide for automatic exemptions which strike certain classes from jury lists without their request.¹⁷ And still other statutes authorize courts or jury commissioners to excuse individuals in specific cases for hardship or extreme inconvenience.¹⁸ Finally, some statutes defy classification, since they can be construed as creating either qualifications or exemptions.¹⁹

Clause 4 is susceptible of a number of interpretations. The safest but most restrictive approach for the jury commissioner is to declare "incompetent" all those who are either disqualified or exempt under state law for whatever reason.²⁰ However, this view would render virtually meaningless the language

14. Although they are not uniform throughout the states, every state has some basic statutory requirements. See, e.g., COLO. REV. STAT. c. 78-1-1(1) (1953); ILL. STAT. ANN. c. 78, §§ 2(1), (2), (3) (Supp. 1954); VA. CODE § 8-174 (Supp. 1954).

15. See *supra* note 3. See also, e.g., ILL. ANN. STAT. c. 78, § 2(4) (Supp. 1954); VT. REV. STAT. § 1586 (1947).

16. See, e.g., COLO. REV. STAT. cc. 78-1-3, 78-1-7, 78-1-8 (1953); TEX. REV. STAT. art. 2137 (Vernon 1925).

17. See, e.g., CONN. GEN. STAT. § 7927 (1949); ILL. ANN. STAT. c. 78, § 4 (Supp. 1954). See also *People ex rel. Elliot v. Wallace*, 247 Ill. App. 489 (1928); ORE. REV. STAT. §§ 10.130 (1953); PA. STAT. ANN. tit. 17, § 1092 (1930). In these states exemptions often have the same effect as disqualifications because the only way an exempt person might get an opportunity to serve would be specifically to waive his exemption. Even when exemptions must be claimed, jury commissioners often withhold or delete the names of persons who might claim exemptions.

Some state statutes do not clearly indicate whether the exemption is automatic or whether it must be claimed. See, e.g., CAL. CODE CIV. PROC. §§ 200, 202 (1950).

18. See, e.g., ORE. REV. STAT. § 10.050 (1953); OHIO GEN. CODE ANN. § 11419-18 (1938).

19. See, e.g., IOWA CODE § 609.2 (1954) which declares "ineligible" any person "who has been exempted by law from jury service." Query whether such persons are disqualified or merely exempt. See also note 29 *infra*.

20. A majority of the federal districts seem to have adopted this construction. 60% of replies to our questionnaires indicated that the federal courts were still following state statutes on qualifications and exemptions. *Confidential Communications to Yale Law Journal*. This number may not, however, be a completely accurate reflection of the number of courts which feel bound by this construction, since some may have adopted state exemptions as a matter of discretion. See 28 U.S.C. § 1863, note 12 *supra*. It is interesting to note, however, that only one federal district clerk felt that there had been anything more than a minor change after the 1948 revision. Only 25% felt that there had been any change at all.

of the rest of the section, since practically all state statutes encompass the requirements in the preceding three clauses. Moreover, such a construction seems inconsistent with certain other provisions of Title 28. For example, a section on exemptions, section 1862,²¹ was enacted simultaneously with section 1861. Thus, it would seem that the status of those persons previously exempt because of state statutes should no longer be determined by section 1861, but should be resolved exclusively by section 1862.²² Possibly the strongest objection to this restrictive approach is that it activates all the rigid requirements of state law and hampers the choice of a well equipped jury, thus preserving the disadvantages of the old statute.

Perhaps the most defensible interpretation of section 1861(4) is that it incorporates all state qualifications, but no state exemptions.²³ This is supported by the inclusion of clause 4 in a section which is entitled "Qualifications," and which lists minimum federal requirements. Furthermore, the word "competent" is used in the first sentence of the section, apparently as a synonym for "qualified."²⁴ This construction would allow the federal jury commissioner to select jurors who would have been exempted under the old statute, but it would retain the disadvantages inherent in federal incorporation of state qualifications. Furthermore, the commissioner would still be faced with the problem of differentiating between qualifications and exemptions.²⁵ Most states, for instance, have statutes temporarily disqualifying or exempting persons who have served on a jury in either the same state or the same court in which they are now potential jurors.²⁶ Some states, apparently basing their prohibition on a reluctance to burden the citizen with more than his share of duties, provide

21. See note 11 *supra*. A similar argument can be made with respect to the section on exclusions. See note 12 *supra*.

22. It would appear that Congress, by adding its own section on exemptions, intended to preclude the continued use of state exemptions. On the other hand, it might be argued that the federal statute on exemptions was merely to be used in addition to state exemptions and that the state exemptions are still encompassed in federal regulations by clause 4. It would seem logical, on the other hand, that if Congress meant to incorporate state exemptions, it would have stated so in the exemption statute rather than in the section for qualifications.

23. About 35% of the federal districts are following this practice. *Confidential Communications to Yale Law Journal*. In addition, a substantial number of jury commissioners may feel bound only by state qualifications, but follow state exemptions because of tradition and practice. See note 20 *supra*. Dean Wicker, of the Tennessee College of Law, who is also jury commissioner for the Northern Division of the Eastern District of Tennessee, has adopted this construction of § 1861. Wicker, *Jury Panels in Federal Courts*, 22 TENN. L. REV. 204, 207 (1952). One reply indicated that a district judge felt that § 1861 required him to *exempt* those people disqualified under state law. If the exemption was automatic this might have the same effect as a disqualification. See note 17 *supra*.

24. See text at note 6 *supra*.

25. See note 19 *supra*.

26. Although almost every state has some prior service provision, they vary widely as to the prior period covered, the courts included in the provision, and the effect of such prior service (disqualification, exemption, or cause for challenge). VANDERBILT 170 n.73.

for an *exemption* for those with prior jury service.²⁷ Other states appear to have enacted the provision to protect litigants against "professional jurors," and *disqualify* persons with prior service.²⁸ In some states, however, the effect of the prior service statute is unclear, and the jury commissioner may be faced with the difficult problem of deciding whether a potential juror is exempt or disqualified.²⁹

A third possibility would be to construe "incompetent" to cover only basic qualifications.³⁰ This would be a reasonable construction of clause 4 since the three preceding clauses of section 1861 similarly deal only with basic qualifications. And this approach would allow federal jury commissioners to disregard state discretionary qualifications,³¹ a practice which would be especially desirable where state commissioners and judges can arbitrarily disqualify a person without specific statutory guidance.³² Furthermore, state exemptions would also be ignored.

27. See, e.g., ARK. STAT. ANN. § 39-224 (1947); MASS. ANN. LAWS c. 234, § 2 (1932). See *Commonwealth v. De Stasio*, 297 Mass. 347, 8 N.E.2d 923 (1937). See also Blume, *Jury Selection Analyzed* 42 MICH. L. REV. 831, 840 (1944).

28. See MISS. CODE § 1762 (1942); W. VA. CODE ANN. § 5264 (1949); Blume, *supra* note 27, at 836.

Prior service in a federal court within a year is ground for challenge according to the federal statutory provision. 62 STAT. 953 (1948), 28 U.S.C. § 1869 (1952). This does not immunize the federal commissioners from the state provisions incorporated by § 1861(4). Yet it could be argued that Congress, by making prior service only a ground for challenge, expressed its intent that such service shall not be an absolute disqualification. See *Papernow v. Standard Oil Co.*, 228 Fed. 399 (D.R.I. 1915). A New York clerk stated that his practice was to disregard a three year prior service statute since it was his conclusion that § 1869 was controlling and that the federal courts were not bound by state prior service provisions. *Confidential Communications to Yale Law Journal*.

Many "professional jurors" make excellent jurors since they are genuinely interested and have ample time to serve. They are often alert elderly people whose previous jury experience is an asset for their present service. A number of jury commissioners would like to accept these jurors but find the state limitations insurmountable.

29. In Connecticut, for example, the statute provides that the jury list shall not include the name of any person who has "been a member of a regular jury panel and as such has actually served as a juror more than once within five years previous to the date of said list." CONN. GEN. STAT. § 2376c (Supp. 1953). There is no certain way of determining whether this provides for an exemption or a disqualification. *But cf. McCarten v. Connecticut Co.*, 103 Conn. 537, 542 (1925). Yet the federal jury commissioner in that district must, because of caution, exclude such persons from federal jury service, even though he does not recognize state exemptions as binding on the federal system.

In North Dakota a provision states that "no governing body of any subdivision shall select therefrom any person to serve as a juror who has served on the regular panel as a juror from such subdivision during the preceding ten years." N.D. REV. CODE § 27-0909 (1943). There is no indication as to whether this is an exemption or disqualification.

30. In *United States v. Foster*, 83 F. Supp. 197 (S.D.N.Y. 1949), the only decision which has considered clause 4, Judge Medina held that the clause embraces the basic qualifications. However, he was not concerned with, and consequently left unanswered, the extent to which clause 4 incorporates state exemptions and discretionary qualifications.

31. For examples of such discretionary qualifications, see note 3 *supra*.

32. Allowing federal commissioners to disregard state discretionary regulations would

The final alternative is for the jury commissioner to construe clause 4 in its narrowest sense. Juror "competency" is used by many authorities to describe something quite apart from juror "qualifications." These writers employ "competency" to refer to a juror's fitness to act in a particular case, as distinguished from the qualifications necessary for jury duty in general.³³ Defining terms in this fashion would enable a jury commissioner to disregard all state qualifications and exemptions. Only state rules concerning such matters as ineligibility because of bias or interest in a particular case would then have any effect on federal juries. These rules are substantially uniform,³⁴ and allow the trial judge to exercise a large degree of discretion.³⁵ However, this interpretation seems unrealistic, since, in effect, it reads clause 4 out of section 1861. In addition, the words "incompetent" and "disqualified" are frequently used

have a twofold effect. First, it would relieve the federal jury commissioner of any possible duty to respect, as binding, disqualifications because of such vague criteria as "esteem in the community" or "reputation for honesty," when these are found lacking by state officials. This is especially significant in those instances where the federal jury commissioner uses the state jury lists to assemble federal jurors. In these cases those disqualified for such matters could, under this interpretation, be reinstated on the federal list. Secondly, where the federal jury commissioner compiles his own list, he would no longer be troubled by the possible obligation to fulfill state discretionary requirements. This is especially significant in large districts where the commissioner cannot be expected to check personally on the jury candidates. See, *e.g.*, VT. REV. STAT. § 1586 (1947) ("mentally, morally, and physically qualified"). See also FLA. STAT. ANN. § 40.01 (1943). This statute provides for "basic" qualifications under the heading "General qualifications" and "General disqualifications." Section 40.01(3) is titled "Duty of persons selecting jury lists" and provides:

"In selection of jury lists only such persons as the selecting officers know, or have reason to believe, are law abiding citizens of approved integrity, good character, sound judgment and intelligence, and who are not physically or mentally infirm, shall be selected for jury duty."

33. Most legal writers use the words in this sense. 8 WORDS AND PHRASES 357 (1951) has two definitions under "competent juror." The first is from *Mount v. Welsh*, 118 Ore. 568, 247 Pac. 815 (1926). It defines a "competent juror" as "one who is impartial and indifferent as to the parties and cause." The second excerpt, from *Whitehead v. State*, 97 Miss. 537, 52 So. 259 (1910), finds a juror competent if he "may fairly be supposed to yield to the testimony and leave the mind open to a fair consideration thereof . . ." Similarly, in the WEST'S DIGESTS, "Qualifications of Jurors and Exemptions" are outlined in one chapter, *Jury*, c. III, whereas "competency" is listed in another chapter together with challenges and objections, *Jury*, c. V, and refers to cases where the juror is being questioned concerning his ability to serve in a particular case. 50 C.J.S., *Juries* §§ 134-53 (1947) discusses "qualifications and exemptions." It refers to race, color, sex, physical capacity, age, intelligence, etc. In 50 C.J.S., *Juries* § 208(a) (1947), competency is described as follows: "The term, 'competency,' as applied to jurors, and as used in the following sections, relates to their fitness to act as such in a particular case, as distinguished from the qualifications necessary for jury duty in general."

34. Compare, *e.g.*, N.Y. CRIM. CODE § 376, with MINN. STAT. ANN. § 631.30 (1947) and VA. CODE § 8-199 (1950).

35. See *United States v. Sferas*, 210 F.2d 69 (7th Cir.), *cert. denied*, 347 U.S. 935 (1954); *Acree v. State*, 153 Fla. 561, 15 So. 2d 262 (1943); *State v. Grillo*, 16 N.J. 103, 106 A.2d 294 (1954); *Moore v. Middlewest Freightways*, 266 S.W.2d 578, 585 (Mo. 1954) (dictum).

interchangeably by courts and legislators.³⁶ Furthermore, the inclusion of clause 4 in a section on qualifications and the use of "competent" earlier in the section indicate that this construction is probably not consistent with Congressional intent.³⁷ But courts could point to a change in terminology from the previous statute as an indication that Congress used the term consciously aware of its unique meaning. Since Congress had not used the word "competent" in any previous statute, yet saw fit to use it in section 1861, it would be logical to infer that the legislators wanted to express a meaning different from the one conveyed by the term "qualifications," which they continued to use in its old sense. Moreover, the legislative history of the statute indicates Congress' intent to establish uniform federal qualifications and exemptions.³⁸

Since the meaning of section 1861(4) has not yet been crystallized by court decisions,³⁹ a major problem facing the jury commissioner is the degree of discretion which he can exercise in compiling the jury list. On the one hand, he should be conservative in his selection since, especially in a large district, it would be wasteful to have potential jurors incur the time and expense of coming to the courtroom, only to be disqualified by the trial judge.⁴⁰ On the other hand, it is relatively safe for the commissioner to gamble against a possible reversal of a verdict on the grounds of an improperly selected jury. Irregularities in the qualifications of jurors are generally waived by a failure to make a timely challenge.⁴¹ And even if the question of qualification of jurors is

36. See, e.g., *Ford v. United States*, 201 F.2d 300 (5th Cir. 1953); *Moore v. State*, 197 Ind. 640, 151 N.E. 689 (1926); *Tollackson v. City of Eagle Grove*, 203 Iowa 696, 213 N.W. 222 (1927). See also note 9 *supra*.

37. See text at note 6 *supra*. If clause 4 were only meant to incorporate state statutes dealing with bias or interest in a particular case it would more properly belong in 28 U.S.C. § 1870, see note 52 *infra*, which gives federal judges discretionary powers to rule on disqualification for "cause or favor." It could furthermore be argued that by putting clause 4 among a number of qualification statutes Congress clearly implied that it was to be interpreted as a qualification requirement.

38. See notes 7-8 *supra* and accompanying text.

Since the fourth alternative is at least a rational interpretation, courts would seem on safe ground in construing "competency" in its narrowest sense. See notes 41-43 *infra* and accompanying text. A jury commissioner, however, would be somewhat foolhardy to accept jurors who would be disqualified in the state courts, since most federal judges will probably refuse to accept this interpretation and will disqualify jurors disqualified under state statutes.

39. Judge Medina's opinion, the only one in the field, does little to clarify the statute. See note 30 *supra*.

40. "Federal jurors often live a hundred miles from the Federal court. They receive seven cents a mile and seven dollars a day for their services. Thus monetary and lost time considerations make imperative in the Federal court system a careful, cautious selection of those best qualified, and the elimination of the obviously incompetent, undesirable and unfit prior to the deposit of names in the jury box." Wicker, *Jury Panels in Federal Courts*, 22 TENN. L. REV. 203, 212 (1952). The loss of time by the court and the litigating parties is an implicit factor in the above statement.

41. Where the objection to a juror relates to a statutory disqualification (*propter defectum*) rather than to actual prejudice or bias (*propter affectum*), the disqualification is ordinarily waived by failure to assert it until after the verdict. *Queenan v. Oklahoma*,

litigated at trial, appellate courts will be reluctant to reverse a verdict if no actual bias is shown.⁴² The inclusion of a juror properly exempt can never be challenged by a litigating party.⁴³

Although courts and jury commissioners can ameliorate the effects of clause 4 on section 1861 by adopting a narrow construction, it is highly improbable that they can completely obviate its disadvantages. Only legislative repeal can eliminate the confusion which now attends clause 4's application.⁴⁴ Even more important, abolition of the clause would allow uniform regulation of jury selection for the federal courts. This would be a logical extension of the policy underlying the Uniform Federal Rules of Civil and Criminal Procedure.⁴⁵

190 U.S. 548 (1903). The disqualification is waived even though the facts which constitute it were not previously known to the appellant. *Ford v. United States*, 201 F.2d 300, 301 (5th Cir. 1953); *Brewer v. Jacob*, 22 Fed. 217 (C.C.W.D. Tenn. 1884).

42. See federal statutes on harmless error. FED. R. CRIM. P. 52(a) :

"Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

FED. R. CIV. P. 61 :

"[N]o error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict . . . unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

There are a number of states which have specific provisions declaring that service on a jury of a person disqualified from service under state provisions shall not of itself vitiate any indictment found on a verdict rendered by such a jury unless actual injury to the complaining party be proved. See, *e.g.*, N.M. STAT. ANN. § 19-1-2 (1953); ARIZ. STAT. ANN. § 39-115 (1947). These statutes are not binding on the federal courts, however, since such questions are controlled by common law rather than state statutory law. *Strang v. United States*, 53 F.2d 820 (5th Cir. 1951).

Trial judges have always been given a great deal of discretion in their rulings on juror competency. *United States v. Sferas*, 210 F.2d 69, 75 (7th Cir.), *cert. denied*, 347 U.S. 935 (1954); *Bratcher v. United States*, 49 F.2d 742, 745 (4th Cir.), *cert. denied*, 325 U.S. 885 (1945).

43. An exemption is a personal privilege and can never be asserted or questioned by anyone but the exempted party. *Nick v. United States*, 122 F.2d 660, 670 (8th Cir.), *cert. denied*, 314 U.S. 687 (1941); *White v. United States*, 16 F.2d 870 (9th Cir. 1926), *cert. denied*, 274 U.S. 745 (1927).

44. A bill was introduced in the Eighty-Third Congress sponsored by the Judicial Conference to repeal clause 4, but was indefinitely postponed. *Hearings Before Subcommittee of the Senate Committee on the Judiciary on Uniform Qualifications for Jurors*, 83d Cong., 1st Sess. (1953). The bill has not been re-introduced in the present session of Congress.

Replies from about half of the nation's district courts showed that there were at least five interpretations of § 1861(4) in use at the present time. 60% of the districts follow state exemptions and qualifications. See note 20 *supra*. 35% feel bound only by state qualifications. One court exempts those persons disqualified by state provision. See note 23 *supra*. Another district seems to follow only state exemptions and disregards state qualifications. Finally, two districts respect neither state qualifications nor exemptions. *Confidential Communications to Yale Law Journal*.

45. JUDICIAL CONFERENCE 40; testimony of Knox, *Hearings Before House Committee on the Judiciary on H.R. 3379, 3380, 3381*, 79th Cong., 1st Sess. 6 (1945).

Opponents of federal uniformity claim that it is undesirable because it would destroy the congruency which now exists in certain states between federal and state juries.⁴⁶ This may be important when litigants can choose between federal and state courts. Even when the two systems had absolutely identical requirements for jurors, there were advantages in choosing one over the other because of practical differences in the process of selection.⁴⁷ The imposition of totally different federal regulations, it is argued, would aggravate the problem. However, section 1861 effects an unfortunate compromise between the desire for federal uniformity, and for the advantages of intra-state consistency. Not only is federal uniformity frustrated by clause 4, but because of the vagueness of the statute there is no assurance of uniformity between state and federal courts within a state.⁴⁸ In any event, diversity between the two court systems is not too great a price to pay for federal uniformity, since the continued imposition of outmoded and arbitrary state requirements on the federal jury process prevents the selection of the most capable jury available.⁴⁹

Finally, if clause 4 were abolished, the trial judge would be given more freedom to decide upon qualifications, exemptions, and challenges.⁵⁰ He now enjoys considerable discretion in excusing and excluding jurors under section 1863,⁵¹ and in ruling on the challenges of litigants under section 1870.⁵² Yet,

46. About 65% of the federal district clerks feel that the advantages of federal uniformity outweigh the usefulness of intra-state uniformity. Those who thought that uniformity within the two systems in a state should be preserved gave two reasons. The inequity of having a differently chosen jury in the federal system, which may arrive at a different verdict than one reached by a state court on a similar set of facts, was the primary reason given by the clerks. Others indicated the simplicity achieved by preserving similar practices as their reason for preferring intra-state uniformity. *Confidential Communications to Yale Law Journal*.

47. VANDERBILT 150; Potts, *Desirability of the Federal System of Selection of Jury*, in IDAHO STATE BAR ASS'N, PROCEEDINGS 58, 59 (1926); Stayton, *Report Upon Federal and State Jury Questionnaire*, 17 TEX. L. REV. 62 (1938).

48. In about 40% of the states, federal courts are not now utilizing state requirements in the selection of jurors. Moreover, in at least 4 states, the practices among the various federal courts within the states differ in respect to the adoption of state requirements. *Confidential Communications to Yale Law Journal*.

49. "Conformity with state practice in both qualifications and exemptions sometimes disqualified or exempted precisely the classes needed to restore the usefulness and prestige of the jury system. Disqualifying or exempting highly qualified classes has the effect of seriously decreasing the reservoir of superior jurors. Wicker, *Jury Panel in Federal Courts*, 22 TENN. L. REV. 203, 204 (1952). See also JUDICIAL CONFERENCE 40, 41.

50. If clause 4 were abolished, only the very few federal qualifications and exemptions would remain, and the broad compulsory requirements and exemptions enacted by state statutes would be replaced by a discretionary power in federal trial courts to grant such relief. If these courts find any state rules to be advantageous, they can apply them on a voluntary basis. A number of district court judges feel that they are not bound by state exemptions, yet apply them as a matter of discretion. *Confidential Communications to Yale Law Journal*.

51. See note 12 *supra*.

52. 62 STAT. 953 (1948), 28 U.S.C. § 1870(2) (1952): "All challenges for cause or favor, whether to the array or panel or to individual jurors, shall be determined by the court."

if state regulations are encompassed by section 1861 (4), these functions would be governed in great detail by state statutes. The advantages of the flexibility inherent in allowing district judges to make *ad hoc* decisions on these matters would seem easily to outweigh the danger of judicial abuse.⁵³

There have been an increasing number of proposals for the reform or abolition of the jury system.⁵⁴ Repeal of section 1861 (4) would improve the quality of federal juries and would be a significant step towards elimination of some of the defects emphasized by these critics.

53. The advisability of allowing a great deal of judicial discretion is not necessarily linked with the issue of federal uniformity. Although the Judicial Conference felt that wider discretion was one advantage to be gained by a new uniformity statute, there are some who advocate federal uniformity with qualifications and exemption provisions not permitting wide discretion on the part of the trial judge. See Blume, *Jury Selection Analyzed: Proposed Revision of Federal System*, 42 MICH. L. REV. 831, 862 (1944).

54. See, e.g., FRANK, COURTS ON TRIAL cc. VIII, IX (1949); FRANK, LAW AND THE MODERN MIND 181 (1930); Duane, *Civil Jury Should be Abolished*, 12 AM. JUD. SOC. J. 137 (1930); Galston, *Civil Jury Trials and Tribulations*, 29 A.B.A.J. 195 (1943); Hoffman & Brodley, *Jurors on Trial*, 17 MO. L. REV. 235 (1952).