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Drew L. Kershen, *University of Oklahoma College of Law*



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THE JURY SELECTION ACT OF 1879: THEORY AND PRACTICE OF CITIZEN PARTICIPATION IN THE JUDICIAL SYSTEM

Drew L. Kershen*

I. INTRODUCTION

Throughout the history of the federal judicial system, only three major pieces of legislation have been adopted to regulate the procedures by which persons are selected for service on grand and petit juries in the federal courts. The earliest such legislation was section 29 of the Judiciary Act of 1789, which was signed into law by President Washington on September 24, 1789.¹ The most recent major legislation on this topic is the Jury Selection and Service Act of 1968 signed by President Lyndon Johnson on March 27, 1968.² On June 30, 1879, ninety years after the Judiciary Act of 1789, and almost ninety years before the Jury Selection and Service Act of 1968, President Rutherford B. Hayes signed the only other major legislation governing jury selection methods.³ While I have chosen to refer to the 1879 Act as the Jury Selection Act of 1879, this title is mine alone, for the selection procedures analyzed in this article were actually set forth in the second section of an act determining appropriations for judicial expenses.⁴

* Professor of Law, University of Oklahoma Law Center. B.A. 1966, Notre Dame; J.D. 1968, University of Texas; LL.M. 1975, Harvard.

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Ms. Jan Chesley, Research Assistant at the University of Oklahoma; Mr. Andrew King, Editor of the Papers of Daniel Webster at Dartmouth University; Ms. Barbara Rust, Archivist at the Federal Records Center in Fort Worth, Texas; and Professor Robert Shalhope, Professor of History at the University of Oklahoma.

Many other persons also provided information about historical documents or offered comments that increased my understanding. To these persons, I also express my sincere appreciation.

1. Act of Sept. 24, 1789, ch. 20, § 29, 1 Stat. 73.

2. Jury Selection and Service Act of 1968, 28 U.S.C. §§ 1861-1874 (1976).

3. Act of June 30, 1879, ch. 52, § 2, 21 Stat. 43.

4. During the first session of the 46th Congress, the House and Senate debated five pieces of legislation, each containing a provision relating to jury selection methods: H.R. 2, 46th Cong., 1st Sess. (1879); S. 375, 46th Cong., 1st Sess. (1879); H.R. 2252, 46th Cong., 1st Sess. (1879); S.J. Res. 39, 46th Cong., 1st Sess. (1879); H.R. Res. 2381, 46th Cong., 1st Sess. (1879). Section 2 of H.R. Res. 2381, which was officially entitled "H. Res. 2381 making appropriations for Certain Judicial Expenses," is the provision on jury selection methods which I call the Jury Selection Act of 1879.

In a previously published article,⁵ I analyzed the meaning and impact of the selection procedures contained in the Judiciary Act of 1789 and the Jury Selection and Service Act of 1968. The previous article did not require a close consideration of the Jury Selection Act of 1879. The 1879 Act, however, significantly altered the day-to-day operations of the federal trial courts. This article, consequently, completes the historical analysis of jury selection legislation by examining the changes instituted by the 1879 Act.⁶ To understand why the 1879 Congress abandoned the procedures of the 1789 Judiciary Act, as well as the impact the new procedures had on the practices of federal trial courts, this article analyzes the methodology of grand jury selection between 1872 and 1887.⁷ Utilizing the records of the United States Circuit Court for the District of Louisiana,⁸ and examining a seven year period

5. Kershen, *Vicinage* (pts. I & II), 29 OKLA. L. REV. 803 (1976) and 30 OKLA. L. REV. 1 (1977).

6. The legislative history of the Jury Selection Act of 1879 is found in the debates on the five pieces of legislation cited in note 4 *supra*. The initial language proposing changes in jury selection methods was almost identical in all five pieces of legislation. Hence, the debates about one jury selection provision are identical to the debates on the other pieces of legislation. H.R. 2 was introduced on April 16, 1879, passed the House on April 26, 1879, and the Senate on May 20, 1879. President Hayes vetoed the bill and the veto was sustained on May 29, 1879. S. 375 was introduced on April 8, 1879 and passed the Senate on June 6, 1879. The House debated this Senate bill but did not take final action to pass or to defeat the bill. H.R. 2252 was introduced on June 10, 1879, in the House of Representatives where it was debated and passed the same day. The Senate passed this bill with amendments on June 16, 1879, and the House concurred in the Senate amendments on June 18, 1879. President Hayes vetoed the bill and the veto was sustained on June 23, 1879. S.J. Res. 39 was introduced on June 24, 1879, and passed the Senate on June 28, 1879. In the House, the resolution was tabled on June 30, 1879. H.R. Res. 2381 was introduced and passed in the House on June 26, 1879. The Senate passed the resolution on June 27, 1879. This resolution became law when signed by President Hayes on June 30, 1879.

7. The names of the grand jurors for the April and November terms of court were obtained from the Juror Record Books. Addresses, at which service was obtained upon individual grand jurors, were available for the November 1874, April 1875, November 1875, April 1876, November 1876, November 1877, April 1886, November 1886, April 1887, and November 1887 terms. For the other terms of court, no service addresses were recorded in the Juror Record Books.

Once the names and addresses, if available, of the grand jurors were obtained, I then checked the Federal Census Records of 1870 and 1880 for the purpose of obtaining demographic information about the grand jurors. If a grand juror could be adequately identified in the census records, I was able to learn the sex, age, race, place of residence, occupation, and economic wealth of that person. Demographic information was then compiled on the identified grand jurors for each term of court. Through this compilation, I obtained a composite picture of each grand jury for the period of 1872 through 1887. By comparing the composite picture of the grand juries before the passage of the Act in 1879 with the composite picture of the grand juries after passage of the Act, changes in the characteristics of persons serving as grand jurors, which might be attributable to the new methods mandated by the Act, were discovered.

My research was limited to grand jurors because the number of persons who served as petit jurors was too large to be manageable. Appendix A gives a full list of the grand jurors and the terms in which the grand jurors served.

8. The court records of the United States Circuit Court for the District of Louisiana are located in the Federal Archives in Fort Worth, Texas. I used the Minute Books, which provide a chronological account of actions taken by the court, and Juror Record Books, which identify those called to serve as jurors.

The circuit court of Louisiana was selected more by default than methodological design. The Louisiana records were accessible and appeared to provide complete information. While I now believe that Louisiana was a good choice, I do not make any claim that the impact of the Jury

prior to the 1879 Act and an eight year period after the Act, this article creates a "time-lapse" historical picture of how the theory underlying the legislation affected the practice of a particular federal trial court.

II. THE PROVISIONS OF THE JURY SELECTION ACT OF 1879

The three changes made by the Jury Selection Act of 1879 are easily stated: (1) federal courts were now independently authorized to utilize a federal jury box,⁹ into which the names of at least 300 persons possessing the requisite qualifications for jurors had been placed, as the immediate source of juror names; (2) the federal judge was authorized to create a jury selection commission to be composed of the clerk of the court and a jury commissioner named from good-standing citizens with membership in the principal political party opposed to the party of the clerk of the court; and (3) the clerk and the jury commissioner were to place names in the jury box alternately, without reference to party affiliation, until the required number of jurors for the box had been reached. In addition, the 1879 Act reaffirmed two prior jury selection procedures: (1) from the Judiciary Act of 1789, the 1879 Act reasserted the provision permitting the federal courts, if they so desired, to follow the procedures for jury selection utilized in the state courts of the state where the federal court presided; and (2) from the Civil Rights Act of 1875, reaffirmed that jurors were not to be excluded from jury service on account of race, color, or previous condition of servitude. Finally, the Jury Selection Act of 1879 repealed those sections of the Revised Statutes of 1874 (sections 820 and 821) which disqualified from jury service those persons who had voluntarily assisted in the secession of the Confederate states.¹⁰

Selection Act of 1879 on federal grand juries in Louisiana would be typical of the impact which the 1879 law had in other federal judicial districts.

9. The 1879 Act stated that the names of jurors were henceforth to be publicly drawn from a "box." Throughout this article I use the term "federal jury box" to refer to the container from which names of persons are drawn. In most federal courts today, the term commonly used to refer to the comparable container is "federal jury wheel" while the term "federal jury box" ordinarily refers to the place in the courtroom where the jurors are seated during the trial.

10. The Jury Selection Act of 1879 read as follows:

SEC. 2. That the per diem pay of each juror, grand or petit, in any court of the United States, shall be two dollars; and that the last clause of section eight hundred of the Revised Statutes of the United States, which refers to the State of Pennsylvania, and sections eight hundred and one, eight hundred and twenty, and eight hundred and twenty-one of the Revised Statutes of the United States, are hereby repealed; and that all such jurors, grand and petit, including those summoned during the session of the court, shall be publicly drawn from a box containing, at the time of each drawing, the names of not less than three hundred persons, possessing the qualifications prescribed in section eight hundred of the Revised Statutes, which names shall have been placed therein by the clerk of such court and a commissioner, to be appointed by the judge thereof, which commissioner shall be a citizen of good standing, residing in the district in which such court is held, and a well-known member of the principal political party in the district in which the court is held opposing that to which the clerk may belong, the clerk and said commissioner each to place one name in said box alternately, without reference to party affiliations, until the whole number required shall be placed therein. But nothing herein contained shall be construed to prevent any judge from ordering the names of jurors to be drawn from the boxes used by the State authorities in selecting

Central to an analysis of the six provisions of the 1879 Act, and their subsequent effect on the Circuit Court for the District of Louisiana, is an initial understanding of the historical factors leading to the repeal of sections 820 and 821.

A. Repeal of Sections 820 and 821

During the Civil War, the United States Congress passed numerous laws which imposed loyalty tests and loyalty oaths upon persons assuming positions of trust in the federal government.¹¹ Failure to meet the test or refusal to take the oath disqualified the applicant. Under an act passed on June 17, 1862, Congress provided for two loyalty qualifications for those persons summoned to serve as federal jurors.¹² In section 1 of the Act, Congress provided that persons who had voluntarily aided or joined the rebellion against the United States were disqualified to serve as federal jurors. If a person upon voir dire questioning was discovered to have voluntarily aided or joined the rebellion, then either party to the lawsuit could challenge that person for cause, thereby dismissing the juror from the prospective panel. Under section 2 of the Act, Congress set forth a loyalty oath wherein the person swore allegiance to the United States Constitution and forswore having ever rendered assistance to the rebellion against the United States. At their discretion, either the United States district attorney or the United States trial judge could require the individual members of the panel of prospective jurors to take this oath. If a member of the panel refused to take the oath, he was discharged from further jury service. Section 1 of the Act eventually became section 820 of the Revised Statutes of 1874; section 2 eventually became section 821.

During the late 1860's and early 1870's, as the need for extraordinary federal powers declined and sentiment grew in favor of reconstructing functioning governments in southern states, Congress began to waive the loyalty qualifications for holding federal office. In place of these tests and oaths, which denied federal employment to individuals who had assisted in the rebellion, Congress often substituted a modified loyalty oath which simply required the person to swear that he would henceforth support and defend the Constitution of the United States.¹³

jurors in the highest courts of the State; and no person shall serve as a petit juror more than one term in any one year, and all juries to serve in courts after the passage of this act shall be drawn in conformity herewith: *Provided*, That no citizen possessing all other qualifications which are or may be prescribed 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. Jury Selection Act of 1879, 21 Stat. 43.

11. *E.g.*, Act of Aug. 6, 1861, ch. 64, 12 Stat. 326; Act of July 2, 1862, ch. 128, 12 Stat. 502. See generally H. HYMAN, *ERA OF THE OATH* (1954) [hereinafter cited as HYMAN].

12. Act of June 17, 1862, ch. 103, 12 Stat. 430.

13. *E.g.*, Act of Feb. 21, 1871, ch. 62, 16 Stat. 419. Passage of these "modified" oaths had an ironic effect. Northerners who had always remained loyal to the Union were still made to swear to the "iron-clad" oath, passed July 2, 1862, which required affirmations of both past and future loyalty. By contrast, southerners who had been disloyal were only required to take the "modified"

Similarly, the United States Supreme Court exhibited displeasure (Radical Republicans might even say hostility) with the loyalty requirements.¹⁴ As early as 1867, in the cases of *Cummings v. Missouri*¹⁵ and *Ex parte Garland*,¹⁶ the Supreme Court ruled that loyalty requirements which focused on participation in the terminated Civil War could not constitutionally be imposed upon persons who desired to practice their chosen professions, either as ministers in the state of Missouri or as attorneys in the federal courts.¹⁷ The Supreme Court opinions contained the implication that other similar loyalty requirement laws would also be declared unconstitutional.¹⁸ In light of these decisions, Congress must have felt additional pressure to repeal Civil War era laws imposing loyalty requirements upon persons seeking to hold federal positions.

Congress felt particularly pressured to ameliorate the juror loyalty requirements because federal courts in the southern states found it nearly impossible to obtain an adequate number of persons who could meet the loyalty requirements and serve either as grand jurors or as petit jurors in criminal and civil cases. Communication after communication poured into the office of the attorney general complaining about the practical difficulties of conducting federal judicial business when juries could not be impanelled because of the stringent requirement.¹⁹ Yet, at the same time, Republican congressmen were justifiably concerned that if persons who were antagonistic to federal laws served as federal jurors, the federal laws could be effectively nullified by their presence on the jury.²⁰ These fears about antagonism to fed-

oath, requiring only that they swear future allegiance to the federal union. This anomaly persisted until 1884 when the "iron-clad" oath was repealed. Act of May 13, 1884, ch. 46, 23 Stat. 21.

HYMAN, *supra* note 11, chs. 5, 11 & 12 provide a good description of the reasons which motivated Congress to modify and ultimately to repeal the "iron-clad" loyalty oath.

14. See generally HYMAN, *supra* note 11, chs. 9 & 10.

15. 71 U.S. (4 Wall.) 277 (1866).

16. 71 U.S. (4 Wall.) 333 (1866).

17. The majority opinion in both *Cummings* and *Garland* was authored by Justice Field, whose opinion concentrated on the *ex post facto* clause, bill of attainder clause, and the power of the President to pardon as reasons for invalidating the loyalty requirements imposed by the state and federal statutes. Justice Miller, joined by Chief Justice Chase and Justices Swayne and Davis, filed a dissenting opinion which was stated to be applicable to both *Cummings* and *Garland*. 71 U.S. (4 Wall.) 382 (1867). In the dissent, Justice Miller concluded that the Supreme Court should defer to the Congress and the legislature of Missouri because the question of what qualifications, if any, should be required of a person to hold an office or to practice a profession is a question peculiarly within the competence of the legislative branches of government.

18. See, e.g., *Pierce v. Carskadon*, 83 U.S. (16 Wall.) 234 (1872).

19. HYMAN, *supra* note 11, at 146 & 204 n.65. I have not read the correspondence to which Professor Hyman refers in the footnote.

20. See, e.g., CONG. GLOBE, 42d Cong., 1st Sess. 654 (1871) (remarks of Sen. Osborn), app. at 78 (remarks of Rep. Perry).

Republican congressmen were not the only federal officeholders who were worried about the enforcement of federal laws by federal jurors. District Judge Amos Morrill (E.D. Tex.), in a letter to the attorney general about juries, commented, "I am fully convinced that a large majority of the white population in this state would not be convinced that any man had violated the revenue laws or the enforcement acts by any testimony." Letter from Amos Morrill to George H. Williams

eral laws were heightened by events occurring throughout the South. Congress received a constant stream of reports from southern freedmen and white Union loyalists about the outrages perpetrated against them by nightriders of the Ku Klux Klan or the Knights of the White Camellia.²¹ Congress thus faced a dual task to rejuvenate the federal judicial system: (1) Congress had to pass federal laws that provided adequate protection to freedmen and unionists; (2) Congress had to insure that federal courts would be able to obtain an adequate number of jurors whose loyalty to the federal union was sufficiently strong to insure enforcement of federal laws.

During the years 1870 and 1871, Congress took three actions designed to reassert federal judicial authority. First, Congress passed two enforcement acts which were meant to protect the civil rights of citizens as defined under the fifteenth and fourteenth amendments to the United States Constitution.²² By the passage of these acts, Congress hoped to provide the needed protection to freedmen and southern unionists.²³ Second, to insure that the federal courts would be able to obtain jurors in civil cases, empanel grand juries for federal criminal indictments, and empanel petit jurors to try federal indictments, Congress expressly repealed section 1 of the Act of June 17, 1862. As a result of this repeal, parties to the litigation were no longer able to challenge a person for cause on the ground that that person had voluntarily aided or participated in the past rebellion against the United States. Left untouched by the repeal, however, was section 2 of the Act of June 17, 1862, which prescribed the oath which could be demanded of those summoned as jurors at the discretion of the United States federal judge or the United States attorney.²⁴ Third, Congress provided a new oath

(Dec. 6, 1872) (Record Group 60, Dept. of Justice, Chronological Files, East Texas Jan. 1871-July 1877, Box 669, National Archives).

21. See generally A. TRELEASE, *WHITE TERROR: THE KU KLUX KLAN CONSPIRACY AND SOUTHERN RECONSTRUCTION* (1971).

22. An Act to enforce the Right of Citizens of the United States to vote in the several States of this Union, and for other Purposes, May 31, 1870, ch. 114, 16 Stat. 140; an Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes, April 20, 1871, ch. 22, 17 Stat. 13 (the 1871 Enforcement Act is commonly known as the Ku Klux Klan Act).

23. See, e.g., CONG. GLOBE, 42d Cong., 1st Sess. app. at 166 (1871) (remarks of Rep. Williams). See generally A. TRELEASE, *WHITE TERROR, THE KU KLUX KLAN CONSPIRACY AND SOUTHERN RECONSTRUCTION PART VI: THE FEDERAL GOVERNMENT AND THE KU KLUX KLAN, 1870-1872* (1971).

24. Act of April 20, 1871, ch. 22, § 5, 17 Stat. 15. Initially, the House voted to repeal both §§ 1 and 2 of the 1862 Act. CONG. GLOBE, 42d Cong., 1st Sess. 521 (1871). The Senate refused to concur in the House action and voted to strike the repealer language from the bill. CONG. GLOBE, 42d Cong., 1st Sess. 708 (1871). In the conference committee, a compromise was devised whereby § 1 of the 1862 Act would be repealed, but § 2 would be retained. Those who explained this compromise stated that as between private litigants no issue of disloyalty to the Union would likely affect the issues being litigated. Hence, the ability to challenge a prospective juror on the basis of past disloyalty was subject to tactical abuse by private litigants. As to cases in which the government was a party, however, particularly offenses under the Enforcement Acts, past disloyalty might well indicate an unwillingness to act fairly with respect to the government's case.

for those summoned as grand or petit jurors in cases in which the civil rights of citizens had allegedly been violated. In accordance with this oath, persons were required to swear that they had not "directly or indirectly, counselled, advised or voluntarily aided any such combination or conspiracy" to violate a person's civil rights.²⁵ By this oath, Congress hoped to screen out those persons who by their actions had demonstrated antagonism to the enforcement of civil rights. At the same time, Congress hoped that the attendant mitigation of the previously stringent loyalty requirements of the 1862 Act would ensure that reliable persons could be obtained for jury service.²⁶

The actions taken by Congress apparently had the desired effect. The federal courts began to clear their dockets of cases which had accumulated for want of qualified jurors.²⁷ At the same time, vigorous enforcement of the new acts resulted in hundreds of indictments and numerous trials against persons accused of violating the civil rights of freedmen and white southern unionists.²⁸ But federal judges at the trial court level and the office of the attorney general apparently misunderstood Congress's act of repeal. These trial judges and the United States attorney apparently interpreted the 1871 Act to repeal both the juror challenge and the test oath, when in fact the test oath had been explicitly protected from repeal. Only the juror challenge, invocable by the litigants to the particular legal action, had been repealed in the 1871 Act.²⁹

Hence, the United States attorney and the federal trial judges needed the oath requirement of § 2 of the 1862 Act as a means of protecting the government's interest. CONG. GLOBE, 42d Cong., 1st Sess. 750, 756 & 807 (1871) (remarks of Rep. Shellbarger, Sen. Edmunds & Rep. Garfield).

25. Act of April 20, 1871, ch. 22, § 5, 17 Stat. 15. The oath was known as the Ku Klux Klan oath.

26. The Ku Klux Klan oath, authorized by the 1871 Enforcement Act, was mandated for grand jurors or petit jurors hearing evidence relating either to crimes committed in violation of the 1871 Enforcement Act or to civil rights suits arising under the provisions of the 1871 Enforcement Act. Hence, both the government and private litigants could utilize the Ku Klux Klan oath to insure that persons antagonistic to the fourteenth amendment would be excluded from juries hearing cases relating to civil rights.

By contrast, the 1862 juror oath could only be invoked at the request of the United States district attorney and the federal trial judge. But governmental appointees could invoke the 1862 oath for any jury panel summoned for federal jury service, regardless of the types of cases the prospective jurors were likely to hear. CONG. GLOBE, 42d Cong., 1st Sess. 568 (1871) (remarks of Sen. Edmunds).

27. HYMAN, *supra* note 11, at 146.

Professor Hyman does not indicate whether civil suits not involving civil rights issues were the primary targets of the docket clearing. I would speculate that these civil suits were the cases primarily cleared because private litigants could no longer stymie a case by using the 1862 juror challenge, and the district attorney did not invoke the 1862 oath because the federal government had no interest in who served as jurors in cases solely between private litigants. See notes 24 & 26 *supra*.

28. A. TRELEASE, WHITE TERROR: THE KU KLUX KLAN CONSPIRACY AND SOUTHERN RECONSTRUCTION ch. 25 (1971).

29. The minute books for the circuit court of Louisiana do not indicate that the 1862 juror oath was used during the period between 1871 and 1874. Minutes, Eastern District of Louisiana, Circuit Court, New Orleans Division, vols. 13, 14, 15 (Nov. 1870-March 1874) (Record Group 21, Entry #115, Federal Archives, Fort Worth, Texas) [hereinafter cited as Minutes]. By contrast, the

In 1866, Congress had created a commission to revise and codify federal laws with the intent of simplifying reference to federal statutes.³⁰ This work was completed in 1874 when Congress enacted the Revised Statutes of 1874. In the process of enactment of the Revised Statutes, Congress overlooked the revisors' inclusion of section 1 of the Act of June 17, 1862, which had been repealed just two years before by section 5 of the Enforcement Act of 1871. The revisors included the previously repealed provision under section 820 of the Revised Statutes. Section 2 of the Act of June 17, 1862, which had not been affected by the repealing language of the Enforcement Act of 1871, was included by the revisor as section 821 of the 1874 statutes. Section 822 of the Revised Statutes of 1874 then set forth the juror oath that was passed as part of the Enforcement Act of 1871. Thus, after 1873, the loyalty requirements for federal jurors were as stringent as those existing prior to the passage of the Enforcement Act of 1871. In fact, the requirements may have been more stringent because of the additional oath mandated by the Enforcement Act of 1871.³¹

minutes for the periods prior to 1871 and after 1874 do indicate that the district attorney had invoked the 1862 juror oath. *See, e.g.*, Minutes, vol. 10, Dec. 3, 1866, at 61; Minutes, vol. 18, May 5, 1876, at 279.

Professor Hyman in his discussion of the passage of the 1871 Enforcement Act also writes with the belief that the 1871 Act repealed the 1862 juror test oath. In his discussion of the juror oaths, Professor Hyman relies to a large extent upon correspondence between district attorneys and the Justice Department. Professor Hyman's belief that the 1862 oath had been repealed thus assuredly reflects the attitudes being expressed in the letters. HYMAN, *supra* note 11, at 146-48. The attitude of the letters corresponds to the actions taken by the district attorney in Louisiana.

30. Act of June 27, 1866, ch. 140, 14 Stat. 74.

31. An obvious question is why the revisors included the 1862 juror challenge provision in the Revised Statutes despite its express repeal in the 1871 Enforcement Act. Numerous explanations are possible, none of which are conclusively supported or rebutted by the documents on the revision process. But after having read the reports of the revisors to Congress, and the annotations which the revisors appended to each section of the Revised Statutes, one explanation does seem more plausible than the others. In reports rendered to Congress, the revisors indicated both the enormity and the difficulty of the task. For each section of the Statutes at Large, the revisors were required to determine whether that section "was of a general and permanent nature and should therefore, be included in the revision. . . ." The annotations for § 820 (1862 juror challenge) and § 821 (1862 juror oath) make reference solely to the 1862 Act by which these provisions were originally enacted into law. The annotation for § 822 (1871 Ku Klux Klan oath) describes the section as for "Grand and petit jurors, in cases under act of 20 April 1871" with citation to the Statutes at Large.

Based on the comments in the reports and the annotations, it appears that the revisors considered the 1871 repeal of the 1862 juror challenge not to be a repeal of a "general and permanent nature." Rather, the revisors apparently thought the repeal was limited to cases arising under the 1871 Enforcement Act with a concomitant substitution of the Ku Klux Klan oath in those cases for the general and permanent 1862 juror oath used in all other cases. As for all other federal cases not arising under the 1871 Enforcement Act, the revisors seemingly concluded that the 1862 juror loyalty requirements were the general and permanent law, which necessitated their inclusion in the Revised Statutes of 1874. H.R. Misc. Doc. No. 31, 40th Cong., 3d Sess. (1869); S. Misc. Doc. No. 3, 42d Cong., 2d Sess. (1871); Annotations, REV. STAT. §§ 820, 821, 822 (1874). If the revisors had consulted the debates on the repealer clause of the 1871 Enforcement Act, they would have realized that Congress did indeed intend for the repeal to be a complete repeal. *See* note 24 *supra*. In light of the enormity of the task, however, the revisors were very unlikely to have researched legislative intent when making a decision as to whether a law was of a "general and permanent nature."

The Revised Statutes of 1874, which contained both juror loyalty requirements from the 1862 Act, created widespread confusion. The inclusion of the 1862 requirements in the 1874 statutes did not necessarily mean that the 1862 provisions were part of the law. When Congress created the Commission to Revise the Laws, it made clear that the revisors lacked the power to affect the substance of the law. If the revisors, by inserting the 1862 Act's juror challenge provision, changed the substance of the law, then section 820 could be considered invalid. Congress, however, appeared to have accepted the revisors' work by enacting the revised statutes into law. The Justice Department was willing to wait for judicial resolution of the dilemma.³² The confusion surrounding passage of the new statutes also left United States attorneys bereft of guidance in setting jury loyalty requirements. The local United States attorneys, mistakenly concluding that the 1862 juror test oath had been repealed by the 1871 Act and then revived in the 1874 statutes, reinstituted use of the 1862 juror test oath after 1874.³³ These attorneys acted as if the revisors had resurrected the juror test oath when in fact the revisors had only resurrected the juror challenge provision of the 1862 Act. The juror test oath had never been repealed. The local attorneys had mistakenly thought that the 1871 Act repealed both tests. Hence, the confusion about post-1873 juror loyalty requirements was compounded by the mistaken impression of United States attorneys about what the law had been after the passage of the 1871 Act.

The judicial decision desired by the Justice Department came in the Fifth Circuit decision of *United States v. Hammond*.³⁴ Hammond was indicted by a grand jury for violation of federal revenue laws. Challenging the indictment, Hammond asserted that the grand jury included several individuals who were disqualified under section 820 because they had voluntarily aided or served in the past rebellion. In defense of the indictment, the United States attorney responded that Congress had not meant to revive the 1862 juror challenge provision when it enacted the Revised Statutes of 1874.³⁵ Congress, he contended, merely failed to notice that the revisors had exceeded their authority by inserting the previously repealed provision. Hence, the

32. HYMAN, *supra* note 11, at 146.

33. Minutes, Vol. 16, April 9, 1875; HYMAN, *supra* note 11, at 146.

34. 26 F. Cas. 99 (C.C.D. La. 1875).

35. The United States attorney also made two other arguments in defense of the indictment. The federal attorney argued that even if § 820 were a valid law, its juror challenge was not available to private litigants, but was restricted to use by the United States district attorney in conjunction with the request for utilization of the juror oath set forth in § 821. Judge Woods responded that §§ 820 and 821 were independent sections with the juror challenge of § 820 available to all parties to a case. Finally, the United States attorney demurred to the plea in abatement filed by Hammond on the basis that the plea had not been properly invoked due to errors in the form of the plea and in the prayer for relief. Judge Woods agreed with the government and upheld the validity of the indictment. *Id.* at 100-01.

United States attorney concluded, section 820 should not be considered a valid law. Judge Woods disagreed, ruling:

The work of the compilers, including section 820, was submitted to congress, and the whole re-enacted by the adoption of the Revised Statutes. The compilers may have exceeded their authority, congress may not have designed to re-enact section 820, but it has done so, and we cannot go behind the law and cure the mistakes and inaccuracies of congress.³⁶

By this ruling, juror challenges based on past disloyalty to the United States received renewed statutory life. The stage was now set for Supreme Court consideration of the juror loyalty requirements. Two cases challenging the constitutionality of these juror loyalty requirements reached the Supreme Court in 1878. In both, the Court gingerly sidestepped the constitutional challenges.³⁷ In *Burt v. Panjaud*,³⁸ the Court ruled that section 820 could not be used by a litigant to question a juror specifically about past involvement in the rebellion. To permit such direct voir dire questioning, the Court stated, would be to require a prospective juror, under oath, to answer incriminating questions in violation of the fifth amendment. But the Court did not rule section 820 to be completely unconstitutional. Rather, the Court held that a litigant could use section 820 to challenge a prospective juror for cause, provided the litigant could establish that the prospective juror had voluntarily assisted or joined the rebellion. Relying on statutory construction of section 821, the Supreme Court in *Atwood v. Weems*³⁹ ruled that the oath set forth in the statute could be administered only at the discretion of either the United States district attorney or the United States judge. Because *Atwood v. Weems* was a civil case in which the United States attorney was not a party, and because the district judge had not opted to invoke the oath, the oath prescribed in section 821 could not permissibly be used in that litigation. The constitutionality of section 821 was nowhere addressed in the majority opinion.

Justice Field, who had authored the majority opinions in *Cummings v. Missouri* and *Ex parte Garland* in 1867,⁴⁰ concurred in both the *Burt* and *Atwood* cases.⁴¹ His concurring opinions, however, explicitly stated that both sections 820 and 821 were unconstitutional and should be so declared by the Supreme Court. Because the states formerly in rebellion had been restored to the "normal and constitutional

36. *Id.* at 102.

37. Nor did the Supreme Court directly discuss the validity of § 820 as a law. Rather, the Supreme Court opinions are written as if the validity of § 820 was unquestioned. Hence, the Supreme Court had impliedly affirmed Judge Woods's decision in the *Hammond* case that § 820 was a valid federal statute.

38. 99 U.S. 180 (1878).

39. 99 U.S. 183 (1878).

40. See text accompanying notes 15-17 *supra*.

41. *Burt v. Panjaud*, 99 U.S. 183 (1878); *Atwood v. Weems*, 99 U.S. 187 (1878).

relations to the Union," Justice Field could see no justification for these loyalty requirements. While his views were couched in the terminology of legal arguments about the meaning of specific constitutional provisions, Justice Field was clearly concerned that these sections, if permitted to stand, created a new subservient class upon whom the stain of rebellion had been indelibly poured, forever preventing them from assuming the status of equal citizenship with other Americans.

With the legislative history and these Supreme Court decisions as the background, the forty-sixth Congress considered bills to repeal sections 820 and 821 of the Revised Statutes of 1874. The forty-sixth Congress was the first post-Civil War Congress to attain Democratic majorities in both the House and Senate. In the rancorous and venomous debate over the Jury Selection Act of 1879, the Democrats⁴² presented four arguments to support the repeal of sections 820 and 821. First, the Democrats argued that section 820 should be repealed because its very existence was a result of deliberate fraud on the part of the revisors in 1873. The Democrats claimed that the revisors had purposefully exceeded their authority in reinserting the 1862 juror challenge provision, despite its express repeal in 1871. Democrats insisted that the revisors were motivated by a desire to punish Southerners who had undeniably supported the rebellion. Each time a jury panel was summoned, the statute would be used to exclude and stigmatize them as untrustworthy citizens.

42. During the debates which resulted in the repeal of §§ 820 and 821, the legislators who spoke for repeal were all Democrats, while those who spoke against repeal were all Republicans. Moreover, when votes were taken on various motions and amendments concerning repeal of §§ 820 and 821, the votes were along straight party lines. Thus, even though every Democrat did not agree with every word uttered in favor of repeal, and every Republican did not agree with every word uttered against repeal, the arguments in favor and against repeal can correctly be characterized, respectively, as Democratic and Republican arguments. Not even factions within the Democratic and Republican parties strayed from a straight party line to form coalitions with members of the opposite party. The Jury Selection Act of 1879 was debated and passed as a party issue. See United States Congressional Roll Call Voting Records, [1789-1979] (Inter-University Consortium for Political and Social Research). This information was subjected to the Factor Analysis Program set forth in N. NIE, C. HULL, J. JENKINS, K. STEINBRENNER & D. BENT, *MANUAL FOR STATISTIC PACKAGE FOR THE SOCIAL SCIENCE (SPSS)* (2d ed. 1975). The factor analysis as applied to both the United States Senate and the United States House of Representatives for the first session of the 46th Congress showed only one common factor in the votes on jury selection legislation by the senators and representatives—party membership. In addition, a hand-tabulated count of the recorded votes in the United States Senate revealed the same common factor. Eighteen recorded votes on the various bills affecting jury selection methods were set forth in the Congressional Record. On these eighteen votes, the 42 Democratic senators cast a total of 756 individual votes: yes, no, paired yes, paired no, or absent. Of these 756 individual votes, only 15 Democratic votes deviated from the majority voting pattern of the Democratic senators. Hence, Democratic senators voted as a party bloc 98.12% of the time on jury selection legislation. On the 18 recorded votes, the 32 Republican senators cast a total of 576 individual votes: yes, no, paired yes, paired no, or absent. Of these 576 individual votes, only 5 Republican votes deviated from the majority voting pattern of the Republican senators. Hence, Republican senators voted as a party bloc 99.13% of the time on jury selection legislation. Two senators, Booth, a member of the Anti-Monopolist Party in California, and Davis, an Independent Democrat from Illinois, were not counted in these totals.

According to the Democrats, the inclusion of section 2 of the Act of June 17, 1862, setting forth the discretionary oath of present and past allegiance, as section 821 of the Revised Statutes was an equally fraudulent act by the revisors. The Democrats charged that the test oath provision of the Act of June 17, 1862 had merely created a mechanism to challenge jurors for cause. If a person on the jury panel were proffered the oath and refused to take it, then that person was subject to a challenge for cause as provided in the prior section of the 1862 Act. Under the Democrats' interpretation of the 1862 Act, sections 1 and 2 were coordinate sections having no independent significance. Because the disqualification under section 1 of the 1862 Act had been expressly repealed in the Enforcement Act of 1871, no further reason existed for the oath prescribed by section 2 of the 1862 Act. Hence, the Democrats argued that even though section 2 had not been expressly repealed, section 2 had been impliedly repealed by the Enforcement Act of 1871. Because the revisors "assuredly knew" that section 2 had been impliedly repealed in 1871, the Democrats argued, the only explanation for why section 2 appeared as section 821 in the Revised Statutes of 1874 was the same reason they had given for the existence of section 820 in the Revised Statutes: vindictive fraud. By repealing sections 820 and 821 in 1879, the Democrats asserted, Congress was simply returning the law to the state in which a Republican Congress had properly left it in 1871.⁴³

The Democrats also proclaimed that it was anomalous to retain loyalty requirements for jurors. Looking around the congressional chambers, Democratic orators pointed to numerous representatives and senators who had served the Confederacy. Additionally, Democrats listed numerous judges and district attorneys who held posts in the federal judicial system despite service in the Confederacy. All these federal officeholders were permitted to assume their positions by taking a modified oath of allegiance to the Constitution. Persons summoned to serve as federal jurors, however, did not qualify for jury service merely by taking the oath required of other federal officeholders. To be a juror, the more stringent loyalty requirements of sections 820 and 821 were imposed. Democrats asserted that ordinary persons who desired to fulfill their civic duty as jurors should not be subjected to stiffer requirements than persons who held elective or appointed federal offices. The Democrats proposed an easy resolution of the anomaly: repeal of

43. *See, e.g.*, 9 CONG. REC. 1782, 1827 (1879) (remarks of Sen. Bayard & Sen. Beck). In 1871, during the debate on repeal of the juror loyalty requirements (contained in the House 1871 Enforcement Bill), Senator Thurman (D-Ohio) argued that §§ 1 and 2 of the 1862 Act were coordinate sections; consequently, it made no sense to repeal § 1 while retaining § 2. CONG. GLOBE, 42d Cong., 1st Sess. 704, 708, 762. Senator Thurman did not expressly articulate the argument that to repeal the juror challenge provision would impliedly repeal the juror oath provision.

sections 820 and 821.⁴⁴

Democrats also lectured the opposition about the holdings and implications of the Supreme Court decisions in *Cummings*, *Garland*, *Burt* and *Atwood*. As the Democrats read these cases, they clearly established that the loyalty requirements of sections 820 and 821 were unconstitutional. In light of these Supreme Court cases, the Democrats urged that the only responsible action Congress could take was the repeal of sections 820 and 821. The repeal of these sections would bring the statutory law into conformity with the Constitution.⁴⁵

Finally, Democrats assailed the manner in which these loyalty requirements were used in the federal courts in the southern states. Democrats were certain that Republicans desired to retain these two sections, not merely because the sections permitted jurors who had supported the rebellion to be punished anew each jury term; even more sinister, Republicans desired these statutes as a means of direct partisan control of the juries. In case after case, Democratic legislators contended, these loyalty requirements had been used to purge the federal juries not of white Southerners, but more specifically of white southern Democrats. Jurors who had once served the Confederacy but now belonged to the Republican Party were not subjected to questioning under section 820 nor tendered the oath of section 821. Through this discriminatory application of the loyalty requirements, persons accused of crimes in federal courts were being deprived of fair and impartial juries. Republican indictments and Republican verdicts, not indictments and verdicts based on the law and the facts of the case, were being returned in the federal courts of the South.⁴⁶

In response, Republicans offered a different interpretation of why sections 820 and 821 were still valid laws. Republicans conceded that the 1862 juror challenge provision had been expressly repealed in 1871 and should not have been reenacted as section 820 in the Revised Statutes of 1874. The Republicans, however, flatly rejected the Democratic charge that this had occurred due to vindictive fraud on the part of the revisors. No evil motive against southern people lay behind the reinsertion of the 1862 juror challenge; rather, the reinsertion was a simple mistake on the part of both the revisors (who must have overlooked its repeal in 1871) and Congress (which had failed to scrutinize the revisors' work with sufficient care).⁴⁷ In order to demonstrate their good faith, moreover, the Republicans on three occasions offered an amendment limiting the repealer provision of those bills to repeal of section

44. See, e.g., 9 CONG. REC. 565, 783, 917, 1779 & 1782 (1879) (remarks of Rep. Dickey, Rep. Atherton, Rep. Goode, Sen. Hampton & Sen. Bayard).

45. See, e.g., 9 CONG. REC. 1781 & 2035 (1879) (remarks of Sen. Hampton & Sen. Morgan).

46. See, e.g., 9 CONG. REC. 1385, 1779, 1811 & 1817 (1879) (remarks of Sen. Butler, Sen. Hampton & Sen. Thurman).

47. See, e.g., 9 CONG. REC. 286, 1384 & 1793 (1879) (remarks of Sen. Edmunds & Sen. Conkling).

820 alone. The amendment, however, was defeated each time.⁴⁸

In defense of section 821, Republicans reasserted their interpretation, previously presented during debate on the Enforcement Act of 1871, that the juror challenge and test oath provisions of the 1862 Act were independent sections designed to accomplish different purposes.⁴⁹ The juror challenge provision was meant to be invoked by litigants during the voir dire process of jury selection, in order to permit the litigants to select a fair and impartial jury. In contrast, the test oath provision was to be invoked by government officials as a way to protect the integrity of the jury panels against those Southerners antagonistic to the enforcement of federal laws.⁵⁰ Hence, Republicans contended that repeal of the juror challenge section in 1871 had absolutely no effect on the continuing legal validity of the test oath provision. As far as the Republicans were concerned, the actions taken in 1871 could not reasonably be interpreted to imply repeal of the test oath provision. Thus, the inclusion of the test oath provision in the Revised Statutes in 1871 did not constitute fraud on the part of the revisors. Rather, it demonstrated that the revisors had properly performed their duty by including an unrepealed provision of federal law.

Finally, the Republicans rejected the broad reading of the Supreme Court cases which the Democrats had cited as showing the constitutional invalidity of sections 820 and 821. Contrary to Democratic readings, the *Burt* and *Atwood* cases had upheld the power of Congress to specify grounds of disqualification and to prescribe oaths for jurors which related to past participation in rebellion against the United States. Republicans asserted, therefore, that repeal was not required because Supreme Court decisions and statutory law were in harmony.⁵¹

Yet the source of the rancor and venom which permeated the debate on the repeal of these loyalty requirements was not to be found in differing legal interpretations of the relationship between the two re-

48. 9 CONG. REC. 1483, 1786 & 2366 (1879) (amendment in the Senate to H.R. 2, defeated 27 to 37; amendment in the Senate to S. 375, defeated 16 to 26; amendment in the House to H.R. Res. 2381, defeated in a voice vote).

Democrats were unimpressed with the Republican maneuver to limit the repeal to § 820. Because § 821 authorized the United States attorney to use the test oath even in cases in which the United States was not a litigant, the Democrats argued that the repeal of § 820 by itself would be a futile action on the part of Congress. Democrats proclaimed that § 821 with its test oath was clearly the more repugnant provision. Real relief for white southern Democrats from oppressive requirements for jury service, they asserted, could only be obtained by its repeal. See, e.g. 9 CONG. REC., app. at 92 (1879) (remarks of Sen. Thurman).

49. CONG. GLOBE, 42d Cong., 1st Sess. 750, 756 & 807 (1871) (remarks of Rep. Shellbarger, Sen. Edmunds & Rep. Garfield).

50. 9 CONG. REC. 1384, 1794 & 1813 (1879) (remarks of Sen. Conkling & Sen. Edmunds). The Republican interpretation of §§ 820 and 821 as independent sections, setting forth separate juror loyalty requirements, was also the interpretation adopted by the Supreme Court in *Burt v. Panjaud*, 99 U.S. 180 (1878) and *Atwood v. Weems*, 99 U.S. 183 (1878).

51. See, e.g., 9 CONG. REC. 1809 (1879) (remarks of Sen. Edmunds). See notes 37-40 and accompanying text *supra*.

quirements or of the decisions of the Supreme Court. Rather, the animosity resulted from the differing perceptions held by Democrats and Republicans. The Democrats claimed that it was anomalous and partisan to impose loyalty requirements on federal jurors. In contrast, the Republicans claimed that the loyalty requirements of sections 820 and 821 simply granted the federal courts the same power to scrutinize jurors as was granted courts at common law. Courts asked prospective jurors whether they were so prejudiced against the laws they were being asked to enforce that they could not fulfill their duties as jurors. Far from being applied in a partisan manner, Republicans claimed that a careful examination of cases cited by Democrats as instances of abusive application of the loyalty requirements would reveal that the requirements had been used solely to insure the government of impartial jurors. The loyalty requirements resulted in jurors whose minds were open to the enforcement of federal laws and the evidence the government would present. The Republicans further argued that repeal of sections 820 and 821 would deprive the government of valid mechanisms for obtaining impartial jurors. Republicans asserted the Democratic cries for repeal of these sections were actually cries to allow "red-handed traitors" to serve as jurors in the federal trials of "fellow traitors." No matter what arguments the Democrats could muster for repeal, Republicans could not be dissuaded from their belief that to repeal sections 820 and 821 would be to surrender the Union into the hands of her enemies.⁵²

Looking back to the repeal of sections 820 and 821 more than 100 years after the legislative debates, it is clear that these two sections acquired symbolic meaning in the minds of both Democrats and Republicans. For the Democrats, these two loyalty requirements symbolized continuing stigmatization of southern whites as untrustworthy American citizens and aroused in Democrats the unwaivering drive to restore the honor of southern whites through repeal of the loyalty requirements. For the Republicans, these two loyalty requirements symbolized the heroic efforts made by so many to preserve the Union from its enemies and aroused in Republicans the terrifying fear that if the requirements were repealed, then these efforts would have been in vain.⁵³

52. See, e.g., 9 CONG. REC. 1390 & 1794 (1879) (remarks of Sen. Conkling & of Sen. Edmunds).

53. Despite the rancor of the debate about the repeal of §§ 820 and 821, the fact that these two sections were repealed in 1879 was apparently promptly forgotten by almost everyone. Congress continued to debate the repeal of the juror loyalty requirements, along with the repeal of a surviving "iron-clad" test oath for certain federal officers, until 1884. In that year, Congress once again passed a law which expressly repealed §§ 820 and 821 of the Revised Statutes of 1874. Act of May 13, 1884, ch. 46, § 4, 23 Stat. 21. During the debate which led to the passage of the bill containing the repealer language, not a single congressman indicated knowledge that these two sections had been repealed five years earlier. 15 CONG. REC. 554, 586, 712, 1420, 3937, 3949, 3952, 4174 (1884). During the same period, a United States attorney in Florida used § 820 to exclude four persons from jury service in a case involving violations of federal election laws. The accused challenged the use of § 820 on constitutional grounds. When the case reached the Supreme Court,

B. The Impact of Juror Loyalty Requirements

Although slanted by ideological bias, the perceptions of both Democrats and Republicans had some basis in reality. Through an examination of the records of the Circuit Court for the District of Louisiana, the modern scholar can ascertain the actual impact of loyalty requirements on groups of individuals in the post-Civil War period.

From 1870 through 1879, four persons served as United States attorney for the District of Louisiana: A. B. Long, James R. Beckwith, George S. Lacey, and Albert H. Leonard.⁵⁴ No biographical information was available on Long, Lacey, or Leonard. They were most assuredly Republican patronage appointments, however, because throughout this period Republicans occupied the White House. James Beckwith, moreover, who served as United States attorney from November 12, 1870 until his removal on March 2, 1877, was an active partisan Republican as evidenced by a report in the *New Orleans Times-Picayune* listing Beckwith as a vice-president of a Republican campaign rally.⁵⁵

During this same 1870-1879 period, three persons served as federal trial judges in the Louisiana federal courts: Edward H. Durrell and Edward C. Billings as district judges and William B. Woods as circuit judge. Durrell and Woods were both active members of the Republican Party. Durrell was involved in the reconstruction of the New Orleans and Louisiana governments and was even mentioned as a possible Republican vice-presidential candidate in 1868.⁵⁶ Woods had been active in Republican politics in Alabama during Reconstruction while being married to the sister of the Republican senator from that state.⁵⁷ Billings had moved from New York to New Orleans in 1863 after the

the Court upheld the prosecutorial use of § 820 on technical procedural grounds. *United States v. Gale*, 109 U.S. 65 (1883). During the course of his opinion, Justice Bradley recalled that § 820 had been repealed in 1871, that for some "unexplained reason" it had been included by the revisors in the Revised Statutes, that Congress had overlooked this action when it approved the Revised Statutes, and that the Court "hoped that their attention will be called to" these facts. *Id.* at 74. What Justice Bradley (and the attorneys for the government and the accused) failed to recall was that the statute being challenged had been repealed three years before the date of the trial in which it was invoked.

Even Professor Hyman, in his book on the Civil War oaths, completely overlooked the 1879 repeal of the juror loyalty requirements. His discussion of the debate in 1879 failed to mention that the debate resulted in repeal of the juror loyalty requirements. HYMAN, *supra* note 11, at 146-50.

54. A. B. Long: late 1860's until Nov. 1870; James R. Beckwith: Nov. 1870 until March 1877; George S. Lacey: March 1877 until June 1878; Albert H. Leonard: June 1878 until the early 1880's. Records for the District of Louisiana app. (Barbara Rust, Archivist, Federal Archives and Record Center, Fort Worth, Texas).

55. *New Orleans Daily Picayune*, Nov. 2, 1884, at 12, col. 3.

56. District judge, May 1863 to Dec. 1874. 30 F. Cas. 1371 (1897) (biographical notes of the federal judges).

57. Circuit judge, Dec. 1869 to Dec. 1880. Baynes, *A Yankee from Georgia: A Search for Justice Woods*, 1978 YRBK. SUP. CT. HIST. SOC. 31; 30 F. Cas. 1403 (1897) (biographical notes of the federal judges).

recapture of New Orleans by Union forces. No further biographical information which would identify Judge Billings as an active Republican was available.⁵⁸

Journal entries make clear that the district attorneys and the federal judges did use the loyalty requirements of sections 820 and 821 extensively. From the time the Revised Statutes of 1874 went into effect on June 22, 1874, until the repeal of sections 820 and 821 on June 30, 1879, the Circuit Court of the District of Louisiana held ten terms of court. In eight terms, beginning with November term 1874 through April term 1878, the grand jury summoned to serve for the term was required to qualify under either one or both of the two loyalty requirements. No grand jury was summoned for the circuit court in April term 1879. Hence, the November term 1878 was the only term when these sections were not used by the United States attorney or the federal judges to qualify grand jurors.⁵⁹

58. District judge, Feb. 1876 to Dec. 1893. 30 F. Cas. 1363 (1897) (biographical notes of the federal judges).

59. Nov. term 1874, § 821, Minutes, vol. 16, April 9, 1875, at 352; April term 1875, § 821, Minutes, vol. 16, April 27, 1875, at 438; Nov. term 1875, § 821, Minutes, vol. 18, April 6, 1876, at 126; April term 1876, § 821, Minutes, vol. 18, May 4, 1876, at 274; Nov. term 1876, § 821, Minutes, vol. 19, Dec. 11, 1876, at 120; April term 1877, § 820, Minutes, vol. 20, April 25, 1877, at 175; Nov. term 1877, §§ 820 & 821, Minutes, vol. 21, Nov. 20, 1877, at 325; April term 1878, §§ 820 & 821, Minutes, vol. 23, April 29, 1878, at 53.

The proper oath to require of grand jurors constantly changed as Congress passed new laws with additional or different oath requirements and as the Supreme Court handled cases challenging the constitutionality of any oath requirements. As a result, United States attorneys were likely to be often confused as to what oaths they should use as grand juries were impaneled. See notes 29, 32, 33 & 53 *supra* and accompanying text. The records of the circuit court in Louisiana reflect these constant changes in oath requirements.

At the end of the Civil War in 1865, Louisiana United States attorneys used the 1862 oath which ultimately became § 821 of the Revised Statutes. See, e.g., Minutes, vol. 10, Dec. 3, 1866, at 61; Minutes, vol. 11, May 18, 1868, at 123. But then in November 1868, the United States attorney informed the circuit court that the 1862 oath would no longer be used because of a "ruling of the Chief Justice of the United States." Minutes, vol. 11, Nov. 27, 1868, at 218. Instead, the grand jurors now took an unidentified oath which was simply designated as the "oath of office required by law." See, e.g., Minutes, vol. 12, May 5, 1870, at 275. I have been unable to determine what the ruling of the Chief Justice was or why that ruling was entered.

After the passage of the Enforcement Act of 1871, which contained the Ku Klux Klan oath that eventually became § 822 of the Revised Statutes, United States attorneys in Louisiana used this Ku Klux Klan oath to qualify grand jurors who would be considering allegations involving violations of civil rights. See, e.g., Minutes, vol. 14, Jan. 18, 1872, at 109; Minutes, vol. 15, Jan. 15, 1873, at 88. For grand jury terms in which no civil rights cases would be presented for consideration, the district attorney asked grand jurors to take the unidentified "oath of office required by law." See, e.g., Minutes, vol. 14, Dec. 12, 1871, at 74, and May 8, 1872, at 349. See note 29 *supra* and accompanying text.

As the text indicates, once the Revised Statutes were passed, the United States attorney began to use the oath contained in § 821. The unidentified "oath of office required by law" disappears and was not mentioned during the period 1874 to 1879. Section 822, the Ku Klux Klan oath, was used, however, during the 1874 to 1879 period. Three times, November term 1874, April term 1875, and November term 1876, § 822 was required of grand jurors who were also required to take the § 821 oath. For the only term between 1874 and 1879 in which neither § 820 nor § 821 was used, November term 1878, the § 822 oath was required of the grand jurors. Minutes, vol. 23, Dec. 14, 1878, at 357.

As soon as §§ 820 & 821 were repealed in 1879, the Louisiana district attorney responded

Whether the court adopted the loyalty requirements of section 820 or the loyalty provisions of section 821 depended on the personal preference of the United States attorney. James Beckwith required grand jurors to take the section 821 oath during the five terms he served as United States attorney (November 1874 to November 1876). Beckwith was removed from office in March 1877 at the beginning of Rutherford B. Hayes's term as president. George Lacey, who replaced Beckwith, adopted the practice of using section 820 to challenge persons summoned as grand jurors. Section 820 allowed the court to determine if a juror was disqualified. In all instances, the court approved the jurors. Only after the court issued its ruling on disqualification did Lacey request that the section 821 oath be administered to prospective grand jurors. All the prospective grand jurors promptly took the tendered oath. After Lacey resigned in June 1878, Albert Leonard abandoned use of either section 820 or section 821 for the November term 1878. Leonard requested only that the grand jurors take the Ku Klux Klan oath of section 822. Hence, Beckwith took the most stringent approach to juror loyalty and undoubtedly excluded more persons from jury duty than either Lacey or Leonard.⁶⁰

Utilization of these loyalty requirements impaired the ability of the federal court to empanel grand and petit juries. In November term 1875, the marshal had to summon ten additional persons to fill the grand jury. When they answered the summons and were tendered the section 821 oath, four prospective jurors informed the court that they were unable to take the oath.⁶¹ Similarly, in April term 1876, two hundred names were on the petit jury venire issued to the marshal. On May 5, 1876, when these persons appeared in court for jury duty, United States attorney Beckwith requested that the court have them swear the section 821 oath. Forty-four persons informed the court that they could not take the oath. When another thirty persons claimed legitimate excuses from jury duty, only fourteen persons were left who could act as petit jurors.⁶² Mr. Beckwith was then forced to ask the

correctly by no longer using them. After the Jury Selection Act of 1879, the grand jurors in the circuit court were once again required only to take the previously utilized, unidentified "oath of office required by law." See, e.g., Minutes, vol. 25, Nov. 22, 1879, at 413; Minutes, vol. 26, Dec. 20, 1880, at 366. But see note 53 *supra*.

60. Beckwith's hardline approach to juror loyalty requirements would probably indicate that his removal at the beginning of Hayes's terms as president was more than coincidental. Hayes was elected president in the scandal-plagued 1876 election after being awarded the disputed electoral votes of Louisiana. In order to obtain these Louisiana electoral votes, Republicans promised to end reconstruction in Louisiana. W. HAIR, *BOURBONISM AND AGRARIAN PROTEST: LOUISIANA POLITICS 1877-1900* at 10-14 (1969). Although I have no documentary evidence to link Beckwith's removal to this compromise, in light of Democratic complaints about abuses in federal jury selection, the removal of a hardline United States attorney would certainly seem to be an action desired by Louisiana Democrats. See 9 CONG. REC. 1479 (1879) (remarks of Sen. Jonas of Louisiana).

61. Minutes, vol. 18, April 6, 1876, at 126.

62. Minutes, vol. 18, May 5, 1876, at 279-80; Record of Summons to Jurors, 1875-1900, entry #165, bk. #03874, 1st list of 200 names for petit jurors (April term 1876) (Record Group 21,

court to issue an additional venire of two hundred names. Only after these newly selected persons answered the summons for jury duty was the court able to obtain a sufficient number of persons to serve as petit jurors for the scheduled trials.⁶³ Of course, the administration of a loyalty oath to a panel of prospective jurors did not always result in an insufficient number of jurors. In November term 1876, 150 persons were summoned for grand jury duty. Of these 150 persons, fifty-seven claimed legitimate excuses, fifteen were dead or could not be located, and only six refused to take the section 821 oath. From those persons who remained as prospective jurors, the court was able to select twenty to serve as grand jurors.⁶⁴

The records of the proceedings of the circuit court contain the names of forty-eight persons who refused to take the section 821 oath.⁶⁵ Of these forty-eight persons, sufficient biographical information has been located on six. Four of those six persons were active members of the Democratic Party.⁶⁶ One of the six was a mayoral candidate for a minor party.⁶⁷ The sixth person was an active Republican partisan.⁶⁸

While the historical evidence is sketchy in many respects, it is sufficient to demonstrate that the perceptions of both the Democrats and Republicans were based in reality. Republican officials did use the loyalty requirements; the loyalty requirements did have a significant impact upon the impaneling of grand and petit juries; Democrats as well as Republicans were excluded from jury service because of their inability to satisfy the loyalty requirements. From the Republican perspective, this information could well indicate that the officials most closely associated with jury selection felt that the loyalty requirements were

Eastern District of Louisiana, Federal Archives & Record Center, Fort Worth, Texas) [hereinafter cited by the book number].

The excuses granted by the court, listed in the Record of Summons, include old age, under age, alien status, illness, occupation, and prior service. Although not reflected in the Record of Summons for this particular list, the reason the figures in the text do not add to 200 names most likely relates to persons being absent and persons being unlocated or deceased.

63. Minutes, vol. 18, May 5, 1876, at 280; #03874, 2d list of 200 names for petit jurors (April term 1876). Of these 200 names, the Record of Summons indicates that 19 claimed legitimate excuses, 35 were not located. Twenty-two persons on this second list were marked as petit jurors.

64. Minutes, vol. 19, Dec. 11, 1876, at 120; #03792, list of 150 names at 2-9 & 26 (Nov. term 1876). The Minute Books do not reflect any difficulty in empaneling either grand or petit juries after James Beckwith was removed. George Lacey and Albert Leonard adopted a different approach to juror loyalty requirements. See note 60 *supra* and accompanying text.

65. Minutes, vol. 18, April 6, 1876, at 126 and May 5, 1876, at 279.

66. M. D. Lagan, elected as a Democratic congressman from the Second Congressional District in 1886. New Orleans Daily Picayune, Nov. 4, 1886, at 1, col. 6; Thomas Hassam, signer of political advertisement on behalf of Democratic congressional candidate. New Orleans Daily Picayune, Nov. 3, 1884, at 4, col. 5; Numa Dufour, vice-president of Democratic campaign rally, New Orleans Daily Picayune, Nov. 9, 1884, at 2, col. 4; Joseph Collins, candidate on municipal ticket of People's Democratic Association, a reform Democratic municipal ticket, New Orleans Daily Picayune, Oct. 31, 1880, at 2, col. 6.

67. John G. Fleming, mayoral candidate for Workingmen's Ticket, New Orleans Daily Picayune, Nov. 9, 1878, at 1, col. 5.

68. Jacob Hassinger, vice-president of Republican campaign rally, New Orleans Daily Picayune, Nov. 2, 1884, at 12, col. 3.

necessary. The data might also indicate that the loyalty requirements were not being used solely to exclude Democrats from the juries. From the Democratic perspective, however, this same information could well be interpreted as indicating that local federal officials, all Republicans, were purging the jury panels of numerous southern whites whose only unfitness for jury duty resided in the fact that their political beliefs had, in times past, led them to support the Confederacy and, in times present, to support the restoration of Democratic rule in state and local governmental affairs. Hence, when Senator Jonas of Louisiana, during the debate on the repeal of sections 820 and 821, claimed that sixty percent of the persons summoned for jury duty in a particular case were unable to meet the loyalty requirements, the claim must be viewed as partisan overstatement.⁶⁹ At the same time, Senator Blaine's taunting demand that the Democrats provide the name of even one person whose conviction was corruptly obtained through partisan jurors should be seen as an equally partisan understatement.⁷⁰ The historical evidence would indicate that Senator Jonas had probably no more magnified the abusive use of sections 820 and 821 than Senator Blaine had minimized it.

III. AUTHORIZATION FOR A FEDERAL JURY BOX

Even with repeal of sections 820 and 821 of the Revised Statutes of 1874, the Democrats were not satisfied. The Democrats had not yet accomplished many of the reforms of the jury selection system that they considered necessary. Senator Thurman of Ohio best expressed the Democratic attitude when he intoned:

Sir, you may repeal . . . both of these statutes [sections 820 and 821] and you will not have reached the root of the evil at all. There still remains the power of the marshal and the clerk to fill the jury box with partisans and mere partisans alone; partisans of one political party, and but one. This is what the law is, and that is what has been done; and shame it is that it has been done.⁷¹

As the quotation from Senator Thurman indicates, the Democratic members of Congress realized that repeal of sections 820 and 821 meant only that certain persons previously subject to exclusion from jury service were now, due to repeal of these sections, eligible to serve as jurors. Repeal did not mean, however, that those persons freed from exclusion would actually be included on lists of potential federal jurors. To ensure that these newly eligible persons would be included on the jury selection lists, Democrats presented specific proposals to further change the way in which jurors were selected in federal courts.

Complaints that federal officials, particularly United States mar-

69. 9 CONG. REC. 1479 (1879).

70. 9 CONG. REC. 2000 (1879).

71. 9 CONG. REC. app. at 92 (1879).

shals, possessed too much discretionary power over the creation of jury lists were not first voiced in 1879. As early as 1800, shortly after trials under the Alien and Sedition Law,⁷² and again around 1810, during trials for enforcement of the embargo statutes,⁷³ legislators and judges asserted this same complaint. Furthermore, the complaints of 1800 and 1810, as the complaint of 1879, were based on the argument that United States marshals used their discretionary power so as to place on the juror lists only the names of persons sympathetic to the position of the federal government. As a consequence, persons who were accused of violating federal laws faced jurors who held no sympathy for the actions of the accused. In the minds of those who articulated this complaint, the system of jury selection allowed federal marshals to pack the jury with "hanging" jurors.⁷⁴

The root of this "evil" was grounded in section 29 of the Judiciary Act of 1789, which implicitly assumed that the common law method for obtaining lists of persons to serve as jurors would be the juror selection method adopted in the federal courts. The common law method utilized the writ of *venire facias*, whereby the trial court at the beginning of the trial term issued to the sheriff a writ commanding that a specified number of "good and lawful" men be summoned to the court to serve as jurors. In conformity with the writ, the sheriff went into the vicinage (the geographical area within which the jurors were required to reside), selected persons whom the sheriff considered to be "good and lawful" men equal in number to that specified in the writ, and summoned them to court as prospective jurors. If a litigant believed that the list was not fair and impartial, he could challenge it by providing proof that the sheriff who had compiled the list was not a disinterested party to the litigation. When such proof was properly provided, the court would quash the list and order preparation of a new list.⁷⁵ Section 29 followed the common law procedure in one other respect. Federal judges were given the power to appoint a substitute marshal (the federal official comparable to a sheriff at common law) in those instances in which the court, prior to issuing the writ, determined that the regular marshal

72. 10 ANNALS OF CONG., 6th Cong., 1st Sess. 36 (1800) (remarks of Senator Pickney).

73. Compare *United States v. Coit*, 25 F. Cas. 489 (D.N.Y. 1812) (No. 14,829) with *United States v. Price*, 27 F. Cas. 620 (D.N.Y. 1810) (No. 16,088).

74. The perception that the *venire facias* method of juror selection was subject to abuse by marshals desiring "hanging" juries was a widespread perception shared by members of both major parties. See J. PROFFATT, A TREATISE ON TRIAL BY JURY § 114, at 159-60 (1880); S. THOMPSON & E. MERRIAM, A TREATISE ON JURIES vi-vii (1886); H. EX. DOC. No. 14, 44th Cong., 1st Sess. 7 (1875) (Report of Attorney General Pierrepont); CONG. GLOBE, 41st Cong., 2d Sess. 241 (1869) (remarks of Rep. Scofield, R.-Pa.).

75. This challenge to the list of jurors prepared by the sheriff was called a challenge to the array. The challenge to the array was further divided into two types of challenges: (1) *for principal cause* when the sheriff had an interest in the litigation or was related to a party to the litigation; and (2) *for favor* when evidence could be adduced that the sheriff was biased or partial for reasons other than those listed for principal cause challenges. W. FORSYTH, HISTORY OF TRIAL BY JURY 145-49 (reprint 1971); J. PROFFATT, A TREATISE ON TRIAL BY JURY §§ 149-151, at 201-03 (1880).

was not "indifferent" or "disinterested" in the cases to be tried. Obviously, section 29 placed great confidence in the impartiality and honesty of the marshal. Equally important, section 29 placed the burden of rectifying any abuses upon the individual litigant.⁷⁶

By 1789, when the federal system came into existence, several states had abandoned the common law *venire facias* method of obtaining jurors to serve in the state courts.⁷⁷ Additionally, as the years passed, more and more states cast aside the *venire facias* method in favor of a juror selection method which depended upon the utilization of a jury box.⁷⁸ Under the jury box system, courts compiled a substantial list of names of persons qualified to serve as jurors. These names

76. The phrase "good and lawful" provided the standard which guided the sheriff in the exercise of his discretion as he selected persons to serve as jurors. "Good" persons were males who possessed the necessary proper moral character demanded of jurors. "Lawful" persons were males who possessed the requisite legal qualifications for jury service.

At the common law, if the sheriff could be challenged successfully for principal cause, either before or after the writ of *venire facias* was issued, then the writ was directed to the coroners of the county. If the coroners were also subject to challenge, the court would direct that the writ be executed by persons, called *elisors*, who were appointed by the court.

Descriptions of the common law method of summoning the panel and challenging the array can be found in W. FORSYTH, HISTORY OF TRIAL BY JURY 139-49 (1875); J. PROFFATT, A TREATISE ON TRIAL BY JURY §§ 44-47, 131-137, at 67-74 & 178-87 (1880); S. THOMPSON & E. MERRIAM, A TREATISE ON JURIES §§ 44, 66, 125-40, at 40-41, 62-65, 104-19 (1882). See generally G. EDWARDS, THE GRAND JURY, PART II ORGANIZATION & QUALIFICATION (reprint 1973).

77. Massachusetts (which at that time also included the state of Maine) and New Hampshire abandoned the *venire facias* method in 1785. Rhode Island also appears to have abandoned the common law method prior to 1789, but certainly no later than 1798. *United States v. Richardson*, 28 F. 61, 70-71 (C.C.D. Me. 1886).

78. For example, in Pennsylvania, the legislature passed a law in 1805 creating a jury commission (composed of the sheriff and county commissioners) which had the duty to meet 30 days prior to the term of court for the Court of Common Pleas to prepare a list of names, chosen from citizens subject to taxation, which would be sufficient to meet the needs for jurors in that court throughout the year. The name of each person selected by the jury commissioners was then written on a piece of paper and deposited in a jury box. When jurors were needed for the court, names were drawn from the jury box. In 1816, the method was extended to apply to all county courts in the state. Act of March 29, 1805 and Act of Feb. 13, 1816 in J. PURDON, DIGEST OF THE LAWS OF PENNSYLVANIA 1700-1830, at 482, 489 (1831).

North Carolina had modified the common law method in 1779 in substituting the justices of the county courts for the sheriff. The selection method of the justices of the county courts was basically the same discretionary exercise of power as had been exercised by the sheriff in the common law method. See LAWS OF THE STATE OF NORTH CAROLINA ch. 157, at 395 (Potter ed. 1821). In 1806, North Carolina changed from the modified common law method to a jury list (compiled from the tax returns of the county), prepared by the justices of the county courts. The names on the jury list were placed in a jury box and were drawn as necessary. An act amendatory and supplemental to an act, entitled "An act for the more uniform and convenient administration of justice," passed at that session of the General Assembly. *Id.* ch. 694, at 1055.

Maryland finally abandoned the *venire facias* method for a jury box system in the year 1867. Compare MD. CODE, PUB. GEN. L. art. 50, at 350-53 (Scott and McCullough ed. 1860) with MD. CODE, PUB. GEN. L. art. 50, §§ 19-27, at 135-40 (Mayer Supp. 1861-67).

In the District of Columbia, the jury selection method initially used in the local courts was the same method used in Maryland, the state from which the territory which became the District of Columbia had been carved. Because Maryland used the common law *venire facias* method to obtain jurors, the District of Columbia similarly used the common law method. In 1862, however, Congress acted to adopt a jury box method for the District of Columbia. Act of June 16, 1862, ch. 102, 12 Stat. 428.

were transcribed onto pieces of paper which were then placed in the jury box. As a jury term of a particular court approached, the appropriate state official would order that a certain number of names, adequate to meet the expected juror needs of the court, be drawn from the jury box. After the required number of names had been drawn from the box, the clerk of the court would compile the list of names and present the list to the sheriff. The sheriff then notified the persons whose names had been drawn as to the time and place at which they were required to report for jury service.⁷⁹

The states apparently changed the method of jury selection from the *venire facias* method to the jury box method for two related reasons. First, legislators and judges believed that the *venire facias* method was not conducive to the efficient management of judicial business. Adoption of the jury box method allowed the compilation of a large list of potential jurors from which the names of persons could be readily drawn. These lists were prepared sufficiently far in advance of the jury terms so as to insure that the courts were not delayed in holding trials due to tardy summoning of jurors to the courthouse.⁸⁰ As has been previously indicated, moreover, complaints were common that the *venire facias* method allowed the sheriff too much power to select specific persons who would serve on the juries. Under the jury box method, persons served as jurors in a particular jury term because their names had been drawn from the jury box containing the names of all persons on the master jury list, rather than because the sheriff had decided to select those persons for jury service. Only after the names had been selected in the blind draw did the sheriff enter the procedure with the duty to notify persons whose names had been selected. In other words, the change from the *venire facias* method to the jury box method had the consequence of reducing the function of the sheriff from a discretionary function to a ministerial function.

Other language in section 29 of the Judiciary Act of 1789 provided that jurors serving in the federal courts were "to be designated by lot or otherwise in each State respectively according to the mode of forming juries *therein now practiced*, so far as the laws of the same shall render such designation *practicable by the courts or marshals* of the United States;"⁸¹ In light of this statutory language, whenever a state used a juror selection method other than the common law *venire facias* method, federal courts were forced to decide how much conformity had to exist between the federal and state methods of juror selection. Courts consistently encountered the issue of how meticulously the fed-

79. For a general survey of the jury box methods that were developed in the various American jurisdictions, see J. PROFFATT, A TREATISE ON TRIAL BY JURY §§ 121-130, at 168-78 (1880) and S. THOMPSON & E. MERRIAM, A TREATISE ON JURIES §§ 43-53, at 39-52 (1882).

80. See J. PROFFATT, A TREATISE BY JURY § 131, at 178-79 (1880); S. THOMPSON & E. MERRIAM, A TREATISE ON JURIES § 66, at 62-65 (1882).

81. Act of Sept. 24, 1789, ch. 20, § 29, 1 Stat. 88.

eral selection procedures had to conform to state procedures in order to be in compliance with the language of section 29.⁸²

In New England and New York, the federal courts solved the conformity problem by using as jurors persons selected by state officials in precisely the same manner as persons chosen for jury duty in the state courts.⁸³ In other federal judicial districts, the federal courts decided that state officials could not be utilized by the federal courts in the federal juror selection process, but then conformed the federal procedures to state practice by adopting rules which created a federal version of the state procedures.⁸⁴ In still other federal judicial districts, the federal judges refused to abandon the common law *venire facias* method which utilized the federal marshal even though the state procedures now used a jury box rather than the *venire facias* method.⁸⁵ Finally, in

82. *E.g.*, *United States v. Tallman*, 28 F. Cas. 9 (C.C.S.D.N.Y. 1872) (No. 16,429); *United States v. Williams*, 28 F. Cas. 666 (C.C.D. Minn. 1871) (No. 16,716); *United States v. Wilson*, 28 F. Cas. 725 (C.C.D. Ohio 1855) (No. 16,737); *United States v. Dow*, 25 F. Cas. 901 (C.C.D. Md. 1840) (No. 14,990).

83. In describing the federal jury selection method in the federal courts in New York, Senator Conkling commented that state officials had selected federal jurors since at least 1798. 9 CONG. REC. 2003-04 (1879). In 1879, Senator Conkling's comment was true with respect to the Northern District of New York, but not with respect to the Southern District of New York. *United States v. Tallman*, 28 F. Cas. 9 (C.C.S.D.N.Y. 1872) (No. 16,429). The federal courts had utilized state officials in the selection process in the New England states since the earliest days of the Republic. *United States v. Richardson*, 28 F. 61 (C.C.D. Me. 1886).

84. *E.g.*, *United States v. Collins*, 25 F. Cas. 545 (C.C.S.D. Ga. 1873) (No. 14,837); *United States v. Gardner*, 25 F. Cas. 1254 (C.C.N.D. Ga. 1873) (No. 15,187); *United States v. Tallman*, 28 F. Cas. 9 (C.C.S.D.N.Y. 1872) (No. 16,429); *United States v. Woodruff*, 28 F. Cas. 761 (C.C.D. Ill. 1846) (No. 16,758).

For a general survey of selection procedures in the federal judicial districts in the Fifth Circuit in the South, see Letter from William B. Woods to George H. Williams (Jan. 22, 1873) (Record Group 60, Dept. of Justice, Chronological Files, East Texas, Jan. 1871-July 1877, Box 669, National Archives). The federal courts conformed to state procedures through the creation of a federal jury box method utilizing federal jury commissioners to compile the master jury list. While many federal courts appointed lay persons to serve as federal jury commissioners, one court took the position that it had no authority to appoint lay persons to the jury commission unless Congress specifically created the office for the judicial branch. *United States v. Tallman*, 28 F. Cas. 9, 12 (C.C.S.D.N.Y. 1872) (No. 16,429). See also Act of March 19, 1842, ch. 7, § 5 Stat. 471 (specifically authorizing the federal courts in Pennsylvania to create a federal jury commission, using lay commissioners, so as to permit the federal courts to conform to the state practice in Pennsylvania).

85. For example, refer to the practice in use in the Eastern District of Texas and the District of Maryland. Apparently, the federal courts refused to conform to the state procedures in Texas and Maryland for reasons of inertia and reconstruction politics. Texas did not change to a jury box method until 1871. Maryland did not make this change until 1867. Act of Dec. 1, 1871 in 7 H. GAMMEL, THE LAWS OF TEXAS 60 (1898); MD. CODE, PUB. GEN. L., art. 50, §§ 19-27, at 135-40 (Mayer Supp. 1861-1867). Until these dates, the federal courts sitting in these two states had been using the federal marshal in a *venire facias* system for decades.

Moreover, the federal judges were likely very suspicious that to conform the federal juror selection procedures to the state procedures in these two states would result in the selection of jurors who were hostile to federal laws and federal interests. Compare Letter of William B. Woods to George H. Williams (Jan. 22, 1873) with Letter of Amos Morrill to George H. Williams (Dec. 6, 1872) (Record Group 60, Dept. of Justice, Chronological Files, East Texas, Jan. 1871-July 1877, Box 669, National Archives). See 9 CONG. REC. 1810, 1817, 1818-19 (1879) (exchange between Sen. Edmunds, R.-Vt. & Sen. White, D.-Md., remarks of Sen. White, exchange between Sen. Edmunds and Sen. White).

those states where the *venire facias* was still executed by the sheriff, federal courts simply continued to use the federal marshal to execute the federal court's *venire facias*.⁸⁶

As can be determined from the history of these federal juror selection procedures, federal trial courts employed diverse juror selection methods. So great was the diversity that by the mid-1870's Attorney General Pierrepont issued a report requesting that Congress pass a uniform juror selection method for the federal trial courts. The Attorney General did not, however, propose specific juror selection plans for congressional consideration.⁸⁷

Using Pierrepont's report as a petard upon which to hoist their Republican colleagues, Democrats hailed their 1879 proposals as satisfying the need for uniformity.⁸⁸ After hearing the Democratic plea for uniformity, Republican Senator Conkling of New York responded with derision. How is it possible, Conkling asked rhetorically, that "states' rights" advocates would be trumpeting proposals mandating uniformity in all federal courts in direct contravention of existing requirements that federal courts conform to local state practices.⁸⁹ Conkling could ask the question rhetorically because he knew from the debate that the source of Democratic cries for uniformity came not from the pure spring of nationhood (the source of the uniformity proposal from Attorney General Pierrepont), but from the poisoned well of Reconstruction politics.⁹⁰

With the fervor of a tent revival, Democratic legislator after Dem-

86. *E.g.*, Tennessee in 1879 still used the common law *venire facias* method, as modified to permit the justices of the peace, rather than the sheriff, to exercise the discretionary power to select specific persons for service at particular terms of court. Thus, in the federal judicial districts in Tennessee, the federal marshal was still empowered to execute the *venire facias* through the marshal's personal selection of "good and lawful" men to serve as jurors. 9 CONG. REC. 1791, 2003-04 (1879) (remarks of Sen. Harris, exchange between Sen. Bailey & Sen. Conkling). Tennessee had adopted the use of justices of the peace, in place of the sheriff, from the statutes of North Carolina. *Id.* at 2002. See note 78 *supra*.

87. H.R. EX. DOC. NO. 14, 44th Cong., 1st Sess. 7 (1875). Attorney General Pierrepont's call for a uniform federal juror selection method was endorsed by Attorney General Devens in his reports to Congress for the years 1877 and 1878. H.R. EX. DOC. NO. 7, 45th Cong., 2d Sess. 8 (1878); H.R. EX. DOC. NO. 7, 45th Cong., 3d Sess. 13 (1878).

88. 9 CONG. REC. 1893, 1897, 1390, 2008, 2034 (1879) (remarks of Rep. McMahon, Sen. Eaton, Sen. Wallace, Sen. Hereford).

89. 9 CONG. REC. 1390 (1879) (remarks directed specifically against Sen. Eaton).

90. The Democratic proposals for changes in the methods of jury selection never required absolute uniformity of selection methods in all federal courts. The first three bills the Democrats introduced on this topic, H.R. 2, S. 375, and H.R. 2252, contained a sentence which read as follows: "But nothing herein contained shall be construed to prevent any judge in the district in which such is now the practice from ordering the names of jurors to be drawn from the boxes used by the state authorities in selecting jurors in the highest courts of the state."

This sentence permitted the federal courts in New York and New England to continue the jury selection practice which those courts had used since the earliest days of the Republic. The federal courts in New York and New England would request the state authorities to draw from state jury boxes the number of names which the federal judge felt was needed to meet the needs of the federal court for jurors. Once the names had been drawn by the state authorities, the names were forwarded to the federal court. The federal judge then instructed the United States marshal

ocratic legislator stood to present testimonials about the oppression of the federal judicial system, all of which allegedly resulted from the unbridled discretion possessed by federal marshals in selecting jurors. While Democratic orators admitted that this unbridled discretion had existed from the earliest days of the Republic, abuses of the discretion had been tolerable in earlier times because they had occurred in isolated instances in which the alleged crime was of real social harm. The Democrats, however, noted that the federal courts had been granted enlarged jurisdiction by recent Republican congresses to protect Republican officeholders from corruption prosecutions in state courts, and that now the federal courts were primarily concerned with the prosecution of political crimes, especially alleged election frauds. Democratic speakers described the unbridled discretion as a constant source of abuse which could no longer be tolerated.

In the minds of Democratic legislators, the power granted to United States marshals by section 29 of the Judiciary Act of 1789 was being used to subvert the American conception of a jury's role: to grant the defendant a fair and impartial jury of one's peers. Democratic members mentioned numerous cases from many different states as il-

to summon those persons to the court at the appropriate time to serve as jurors. See note 83 *supra* and accompanying text.

During the Senate debate of H.R. 2252, Senator Hill of Georgia moved to amend the above-quoted sentence by striking from it the language "in the district in which such is now the practice." Hill contended that all federal judges should have the opportunity to use names selected from the state jury boxes, not just those federal judges in New York and New England. Hence, his amendment deleted the restrictive language. 9 CONG. REC. 2033, 2043 (1879). Two Democratic colleagues spoke against Hill's amendment because they said it undermined the intention of the proposed legislation to promote uniformity. They also feared that the amendment would put federal judges at the mercy of state officials, upon whom federal courts would have to rely to obtain names of persons to summon as jurors. *Id.* at 2034, 2043-44 (comments of Sen. Hereford & Sen. Wallace). Despite these critical comments from fellow Democrats, Hill's amendment was adopted on a voice vote. *Id.* at 2044.

On June 27, 1879, as Republicans made one final attempt to defeat passage of the Jury Selection Act of 1879, Senator Conkling and Senator Kirkwood of Iowa denounced the legislation because it contained the Hill amendment authorizing federal judges to utilize the state jury boxes. Conkling and Kirkwood shuddered at the thought that the resolution of legal questions in federal court might be subject to decision by jurors selected from state boxes filled under jury laws passed by state legislatures. To prove that federal courts should not trust state jury boxes, they referred to recent events in Alabama and Louisiana where Democratic state legislatures had drafted jury selection legislation designed to limit jury service to white Democrats. But these Republican pleas to protect the national interest fell on deaf ears. The jury selection legislation was read the third time and passed. *Id.* at 2380-83.

Federal judges, however, did not allow the fears of Senators Conkling and Kirkwood to become reality. Except for the federal courts in New York and New England, federal judges did not resort to the use of state jury boxes after passage of the Jury Selection Act of 1879. *Cf.* *United States v. Richardson*, 28 F. Cas. 61 (C.C.D. Me. 1886). More particularly, in Louisiana the federal judges implemented the "uniform" provisions of the Jury Selection Act of 1879 and totally ignored the state jury boxes. The Louisiana federal judges adopted this course of action because they did not want to have their courts dependent upon hostile state officers and because they did not want to utilize state boxes filled in accordance with the jury selection methods approved in 1877 and 1878 by the "Redeemer Democratic" government. See notes 105, 106 & 115 *infra*. The authorization for the use of state jury boxes, contained in the 1879 Act, basically became an anachronism.

lustrative of how United States marshals, owing their appointments to Republican political patronage, had summoned none but Republicans for jury duty in the federal courts. Democrats asserted that public confidence in the federal legal system was ebbing away as the public viewed the spectacle of law not as a reflection of impartial justice, but rather as a reflection of raw partisan power.⁹¹

To restore public confidence in the jury system, Democrats proposed to abandon the *venire facias* method of jury selection. In its place, the Democratic proposal authorized the federal courts, for the first time in the nation's history, to utilize a federal jury box. By switching to a jury box system, Democrats intended that the marshal be stripped of discretionary authority. The Democrats perceived the marshal's role as ministerial, limiting his authority to the administrative functions of summoning to jury service those individuals whose names had been drawn from the jury box. To insure that the names contained in the jury box could not be considered suspect by the public, the pro-

91. Representative Atherton (D-Ohio) complained that in southern states the United States marshals selected only Republicans for federal jury service and that these Republicans were usually "ignorant and prejudiced colored men." 9 CONG. REC. 783 (1879).

Senator Harris (D-Tenn.) claimed that in years past, in the Western District of Tennessee, the United States marshal specifically asked persons being considered for jury service whether they would return verdicts favoring the government position. If the person being questioned answered negatively, then the marshal bypassed that person for jury service. *Id.* at 1791.

Representative Herbert (D-Ala.) told the House that trials presently being conducted in the federal court in Montgomery, Alabama were being conducted before jury panels containing no Democrats and composed mostly of Republican governmental employees. *Id.* at 1901.

Senator Hill (D-Ga.) regaled the court with his personal experience as a defense lawyer in a voter intimidation and voter fraud case in the Southern District of Georgia. See *United States v. Collins*, 25 F. Cas. 545 (C.C.S.D. Ga. 1873) (No. 14,837). In that case, the defense filed a motion which established that the district judge had purposefully changed the juror selection rules so as to insure that jurors favorable to the position of the federal government would be obtained. The federal circuit justice accepted the motion as true, but ruled that the newly adopted rule was proper because the new rule adequately conformed to Georgia state procedures. Senator Hill, moreover, told the Senate that when the defense called the United States marshal as a witness in motion hearings, in order to examine him on his administration of the new rule, the marshal took the fifth amendment. The court ruled that the marshal had properly invoked the fifth because his answers to questions about the administration of selection procedures could possibly force the marshal to incriminate himself. 9 CONG. REC. 2009-10, 2028-33 (1879).

Senator Morgan (D-Ala.) asserted that the federal marshal, in his "unbridled" discretion, almost always selected for jury service either persons of African descent or Northern adventurers. These persons were predisposed to act in a manner which satisfied two goals of the marshal: guaranteeing indictments and convictions against white Democrats and protecting federal officials against prosecutions for corruption by returning "No Bills" on charges presented to federal grand juries. *Id.* at 2035-36, 2038-40. Senator Thurman (D-Ohio) charged that corruption in jury selection was not limited to southern states. He had received information from a reputable attorney in a northern state that the federal marshal included none but Republicans on federal jury panels in his district. *Id.* app. at 91. For similar statements by reconstruction congressmen, see *id.* at 1792, 1811, 1819-20, 1900, 2026, 2365 (remarks of Sen. Houston, D-Ala.; Sen. Hampton, D-S.C.; Sen. White, D-Md.; Rep. McMahon, D-Ohio; Sen. Saulsbury, D-Del.; Rep. Atkins, D-Tenn.).

From the North Carolina legislature, Congress received a complaint about the power of the marshal to select federal jurors through execution of the writ of *venire facias*, in contradiction of the jury box procedures utilized in the state courts. Joint Resolution of the Legislature of the State of North Carolina, H.R. Misc. Doc. No. 54, 42nd Cong., 3d Sess. (1873). *Cf.* Concurrent Resolution, No. 23, 1879 La. Acts, 6th Legis., 1st Sess. 37.

posed legislation mandated that at least 300 names be in the box at the time federal jurors were drawn. Three hundred names were considered sufficient to guarantee that whoever selected names for inclusion in the box would be forced to select individuals other than his immediate acquaintances in order to satisfy his quota of names. Finally, to preclude a biased selection from the 300 names, the bill required that the names be publicly drawn. A public drawing insured both that official action would be visibly accountable and that the principle of random selection would govern who was selected for jury duty at a particular term of court.⁹²

Republicans responded with sarcasm and inquired why a system of jury selection which had served federal courts so well for ninety years should suddenly be abandoned. Such a time-honored method should not be abandoned in the absence of an adequate study ascertaining which selection method should be substituted for the *venire facias* method. When Senator Carpenter (R-Wis.) urged that the bill be returned to committee to permit further study, his suggestion was ignored and the bill was passed.⁹³

Republican opponents of the legislation also emphasized that the Democratic arguments presented on behalf of their proposal were *non sequiturs*. The Democratic presentation had focused on abuses by the marshals of their authority in selecting and summoning jurors. This argument, however, showed only that certain United States marshals had on occasion acted unlawfully. References to illegal actions, Republicans countered, established neither the superiority of the jury box system nor the inherent defectiveness of the *venire facias* method. On the contrary, Republicans contended that the most expansive and legitimate conclusion that could be drawn from the Democratic arguments was that Congress needed to exercise greater supervisory control over the judicial system. Nevertheless, defects in the administration of the *venire facias* system, Republicans pleaded, should not confuse fellow members of the forty-sixth Congress into incorrectly concluding that the *venire facias* system had been proven defective and ought,

92. For a general discussion of the specific provisions of the Democratic proposal for changes in the method of selecting federal jurors, see 9 CONG. REC. 1783-84, 1900-01, 2000-01, 2034, 2376, app. at 91-92 (1879) (remarks of Sen. Bayard, D-Del.; Rep. McMahon, D-Ohio; Sen. Wallace, D-Pa.; Sen. Hereford, D-W. Va; Sen. Saulsbury, D-Del.; Sen. Thurman, D-Ohio).

The state of North Carolina adopted an interesting procedure to insure that the drawing of the names from the jury box would be above suspicion. Prior to the beginning of the term of the superior court, the judge of the local county courts was required to order that a child under the age of 10 years draw from the master jury box the names of between 30 and 42 persons. The names of those drawn were then placed in a second jury box. At the beginning of the term of court for the superior court, the judge would order a child under 10 to draw names from the second jury box. The first 18 names drawn would constitute the grand jury for the court. The names remaining in the second jury box would constitute those who would serve as petit jurors for the court. REV. CODE OF N.C., ch. 31, §§ 25-36, at 161-64 (Moore & Briggs ed. 1855).

93. 9 CONG. REC. 1822, 2025, 2041 (1879) (remarks of Sen. Conkling, Sen. Dawes, and passage of the bill under debate).

therefore, to be abandoned in favor of the jury box system.⁹⁴

Democratic and Republican disagreements about the proper role for federal marshals in juror selection procedures, as with disagreements about the repeal of the juror loyalty requirements, did not stem from factual disagreements. Both Democrats and Republicans "could" have agreed about how a marshal selected a jury in a particular case, but they would have disagreed still about whether the marshal's actions were proper. In 1879, Democrats considered federal marshals as biased political partisans, while Republicans simultaneously viewed federal marshals as defenders of the integrity of federal laws.⁹⁵

In the district of Louisiana, at least, Democratic and Republican perceptions of federal marshals had a basis in reality. During the 1870's three persons served as federal marshal: Stephen B. Packard, John Robert Graham Pitkin, and Jack Wharton.⁹⁶ All three marshals were active partisan members of the Republican Party, though Wharton belonged to a different faction than did Packard and Pitkin.

Packard was a leading member of the Customs House faction of the Republican Party during the 1870's. In the fall of 1876, Packard resigned as federal marshal to become the Republican nominee for governor in the upcoming November election. The results of the 1876 gubernatorial election were so bitterly contested that for a short time Louisiana had two rival state governments. Armed conflict between the two governments loomed as a distinct possibility. Finally, the national compromise of 1876 led to the withdrawal of federal armed support for the Packard government and thereby insured its collapse.⁹⁷

94. *Id.* at 1390, 1814, 1904, 2004 & 2027 (remarks of Sen. Conkling, Sen. Edmunds, Rep. Cannon, Sen. Dawes).

95. The best example of diametrically opposed interpretations of the actions of a United States marshal involved the actions of George Turner, a federal marshal in Alabama. The Democratic interpretation of Turner's actions was presented to the Senate by Senator Morgan of Alabama, who lambasted Turner for packing federal juries so as to convict white Democrats and to protect corrupt Republican officeholders. *Id.* at 2035-41. By comparison, Senator Conkling presented the Republican interpretation of the actions of Marshal Turner in words which portrayed him as the courageous defender of freedom, justice, liberty, and equality for United States citizens of all races. *Id.* at 2379-82.

96. Stephen B. Packard: April 16, 1869 until Sept. 8, 1876; John Robert Graham Pitkin: Sept. 8, 1876 until June 9, 1877; Jack Wharton: June 9, 1877 until April 14, 1882. Records for the District of Louisiana app. (Barbara Rust, Archivist, Federal archives and Record Center, Fort Worth, Texas).

97. McDaniel, *Francis Tillou Nicholls and the End of Reconstruction*, 32 LA. HIST. Q. 357 (1949). See also Leach, *The Aftermath of Reconstruction in Louisiana*, 32 LA. HIST. Q. 631-39 (1949).

Packard's opponent in the 1876 election was Francis T. Nicholls. The *New Orleans Daily Picayune* reported on Monday, November 13, 1876, that Nicholls had been elected governor by a majority of more than 8,000 votes. But on December 6, 1876, when the Louisiana Returning Board (which was dominated by Customs House Republicans) reported the official returns, Packard was declared the winner by approximately 3,400 votes. The official result differed from previously reported final returns because the Returning Board determined that approximately 10,000 Democratic ballots had been obtained through fraud and were, therefore, invalid. See McDaniel, *supra* note 94, at 383-93; Leach, *supra* note 94, at 635-37.

The Customs House faction took its name from the customs house in the port of New Orle-

Pitkin, also a member of the Customs House faction, helped instigate challenges to approximately 8,000 registered voters in the 1876 election. The *New Orleans Daily Picayune* described these challenges as a plot to steal the election for Republicans by depriving white Democrats of their eligibility to vote. By contrast, Pitkin characterized his actions as careful enforcement of the election laws for the purpose of preventing voter fraud.⁹⁸ As late as 1884, Pitkin was still sufficiently prominent in Republican party affairs to be vice-president of a Republican campaign rally.⁹⁹

Wharton was an active Republican more closely associated with the Warmouth faction of the Louisiana Republican Party. During the summer of 1880, members of the Customs House faction worked to support the third term candidacy of former President Grant. Wharton and former Governor Warmouth, however, were active in opposition to the Grant candidacy. After the Grant supporters (including former Marshal Pitkin) bolted the state Republican convention, Wharton was elected as a William T. Sherman delegate to the national convention.¹⁰⁰

Even though the United States marshals in the district of Louisiana during the 1870's can be identified as active Republican partisans, the congressional debate to substitute the jury box method of juror selection for the common law *venire facias* method was only peripherally relevant to the Circuit Court for the District of Louisiana. Already as early as December 1865, the Louisiana federal circuit court had adopted court rules requiring the jurors to be selected through the jury box system. In accordance with the 1865 rules, the court created a jury commission composed of the clerk of the court, the United States mar-

ans. The customs house was also, coincidentally, the seat of the federal courts in Louisiana. *New Orleans Daily Picayune*, Nov. 4, 1876, at 1, col. 5.

98. *New Orleans Daily Picayune*, Nov. 3, 1876, at 1, col. 3; *id.*, Nov. 5, 1876, at 1, cols. 1 & 7. See also 9 CONG. REC. 855 (1879) (remarks of Rep. Bragg, D-Wis.). Cf. *New Orleans Daily Picayune*, Nov. 6, 1876, at 2, col. 4 (letter from Marshal Pitkin to the President of the Democratic State Central Comm.).

99. *New Orleans Daily Picayune*, Nov. 2, 1884, at 12, col. 3.

100. Leach, *The Aftermath of Reconstruction in Louisiana*, 32 LA. HIST. Q. 631, 698-700 (1949). The Warmouth faction of the Louisiana Republican Party was much more acceptable to the Democratic Party than was the Customs House faction. This was so because the Customs House faction was dominated by persons commonly called Radical Republicans and because the Warmouth faction had joined with the Democratic Party in the gubernatorial election of 1872 to support John McEnery, in opposition to the Customs House candidacy of William P. Kellogg. McDaniel, *Francis Tillou Nicholls and the End of Reconstruction*, 32 LA. HIST. Q. 357, 360-70 (1949).

Pitkin's association with the Customs House faction and Wharton's association with the Warmouth faction probably explains why Wharton replaced Pitkin as United States marshal in June 1877. Marshals were subject to appointment by the President. REV. STAT. §§ 776, 779, 793 (1874). Hence, when the Compromise of 1876 was reached in Washington to give Hayes the presidency in return for the end of reconstruction in Louisiana, Pitkin's removal as marshal may have been a concrete way of ending reconstruction in Louisiana. Because Wharton was a "Warmouth" Republican, his appointment kept the patronage in the Republican Party while not offending the Democrats. Hayes thereby scored political points in both political parties. Cf. generally McDaniel, *supra* note 97, at 384-437. See note 60 *supra*.

shal, and two freeholders selected by the court from the community. The jury commission then prepared a list containing not less than 100 names of "good and lawful men . . . capable of discharging the duties of jurors." These names were written on paper ballots and placed into a locked box. When a federal jury was needed, the court would order the clerk, while in the presence of the federal judges, to draw forty-eight names from the box. Those forty-eight persons were summoned to court by the United States marshal and became the grand and petit jurors for the term of court.¹⁰¹

In December 1872, the federal court issued new juror selection rules to "conform as near as is possible to the Laws now in force in the State of Louisiana." The basic steps in the selection process in the 1872 rules were procedurally very similar to the 1865 rules. The persons eligible, however, were quite different. The clerk of the court and the federal marshal were still on the jury commission, but the two freeholders on the jury commission were now required to be qualified electors. The 250 persons whose names were to comprise the potential juror list were now also required to be qualified electors and were to be selected without regard to race or color. Finally, the clerk was to draw the names from the jury box while in the presence of the judges and the federal marshal.¹⁰²

101. Minutes, vol. 9, Dec. 12, 1865, at 148-49. Due to the disruption caused by the Civil War, it is not entirely clear what procedures for the selection of jurors were followed in the Louisiana state courts at the time the federal court adopted the jury box method. Two procedures apparently were used in the Louisiana state courts. One procedure, applicable only to Orleans Parish, involved the compilation of a master jury list of qualified persons by the Orleans Parish sheriff. The names were then placed in a jury box and were drawn from the box when persons were needed to serve as grand and petit jurors in the criminal courts of the parish. Act of March 25, 1831 in I. CURRY & H. BULLARD, DIGEST OF THE STATUTE LAWS OF LOUISIANA 524 (1842). The second procedure, used in all other Louisiana parishes, required the parish judges, plus two freeholders from the parish, to compile a master list of persons "capable of fulfilling the duties of jurors." These names were then placed in a jury box and, 20 days prior to court terms, names were drawn from the box to indicate who should be summoned for jury service at the upcoming court term. *Id.* at 526 (Act of March 6, 1840).

In 1866, the Louisiana legislature passed a law applicable to St. Martin and Vermillion parishes which created a jury commission more closely resembling the 1865 federal jury commission. Under this 1866 law, the state jury commission was composed of the sheriff, the court clerk, the parish recorder, and three freeholders from the parish. Act of March 8, 1866, No. 66, 1866 La. Acts, 2d Legis., 1st Sess., at 114.

102. Minutes, vol. 15, Dec. 23, 1872, at 70-72. The Louisiana law to which the federal rules were to conform apparently was a law passed by the state legislature in 1868. The 1868 Louisiana law required the freeholders who served as jury commissioners and the persons whose names were to be placed on the master jury list to be qualified electors. Act of September 29, 1868, No. 110, 1868 La. Acts, 1st Legis., 1st Sess., at 141-44. The requirement that jurors be "qualified electors" was the significant change from prior juror selection methods. I discovered no reason to explain why the federal court waited four years before implementing the "qualified elector" requirement for commission members and persons to be included on the master list.

Three weeks prior to the passage of the 1868 juror selection law, the state legislature had passed a law which set forth the requirements for being considered a qualified elector in the state of Louisiana. Those requirements were that the person be at least 21 years of age, a born or naturalized citizen of the United States, a resident of the state and parish for a specified period of time, and not subject to disfranchisement under the first paragraph of art. 99 of the State Constitu-

Although the federal marshal, as provided in both the 1865 and 1872 court rules, was a member of the jury commission which selected the names for the initial list of potential jurors, the United States marshal under these two sets of court rules clearly had less discretionary power to influence the composition of particular juries than in a common law *venire facias* system. With the promulgation of new court rules for juror selection in January 1875, the United States marshal lost all discretionary power and was reduced to ministerial duties. To bring federal juror selection procedures into conformity with the recently enacted Louisiana juror selection law,¹⁰³ the 1875 federal rules created a jury commission composed of two qualified voters who were citizens of the United States and residents of Orleans Parish at the time of their selection by the court. Under the 1875 rules, the marshal performed two tasks: drawing the names from the jury box after the names had been selected by the jury commissioners and summoning the persons whose names had been drawn to serve as grand and petit jurors for the court term.¹⁰⁴ After 1875, the federal circuit court in Louisiana issued no further juror selection guidelines until the court issued rules complying with the provisions of the Jury Selection Act of 1879.¹⁰⁵ Hence,

tion of 1868. Act of September 7, 1868, No. 56, § 5, 1869 La. Acts, 1st Legis., 1st Sess. at 66. The September 7, 1868 law reflected, even if it did not consciously track, the provisions of the fourteenth amendment to the United States Constitution which had been officially adopted on July 28, 1868.

103. Act of April 10, 1874, No. 124, 1874 La. Acts, 3d Legis., 2d Sess. at 220. This Louisiana law made two changes in state juror selection procedures: (1) the composition of the jury commission was changed to two commissioners who were qualified voters from Orleans Parish; and (2) the persons whose names were to be included on the master jury list were no longer required to be qualified voters (*i.e.*, persons who had the qualifications to vote and who had registered to vote), but were simply required to be persons "having the qualifications requisite to register to vote." *Id.* at § 5, at 121. The April 10, 1874 law was applicable only to the Parish of Orleans. For the juror selection procedure followed in the other Louisiana parishes, see Act of May 4, 1873, No. 94, 1873 La. Acts, 3d Legis., 1st Sess. at 165.

104. Minutes, vol. 16, Jan. 15, 1875, at 246-48. The federal court also conformed the January 1875 rules to the second change that had been introduced into the state procedures in 1874. Persons whose names could be selected no longer had to be registered voters; they only had to have the "qualifications requisite to register as voters." See note 103 *supra*. These January 1875 court rules were promulgated at the first federal court term after passage of the Louisiana law. The quick response of the federal court to conform its rules to the Louisiana procedures was distinctly different from what had occurred in earlier years. See note 102 *supra*.

In November 1875, the federal court abrogated the January 1875 rules and substituted new juror selection rules. These November 1875 rules were formulated by a committee of the court, composed of J. A. Campbell, United States Attorney J. R. Beckwith, and C. L. Walker. While the procedural steps in the selection process and the two changes adopted in the January 1875 rules were continued, the November 1875 rules were more detailed. The commissioners were now enjoined to select the 400 person master list without consultation with any person, and with impartiality toward all persons "having the qualifications requisite to register as voters." The commissioners, moreover, were not to select any person who had approached the commissioners, or had had other persons approach the commissioners, with a request to be selected for jury service. The commissioners also could not select persons who were unable to read and write the English language. Minutes, vol. 17, Nov. 29, 1875, at 158, 164-66.

105. Federal juror selection rules for the District of Louisiana, adopted in compliance with the Jury Selection Act of 1879, can be found in Minutes, vol. 25, Nov. 13, 1879, at 293-94.

While the federal court did not change its juror selection rules between November 1875 and

fears that federal marshals possessed excessive power should have been assuaged in Louisiana as early as 1875. Although the Jury Selection Act of 1879 and the new court rules in Louisiana stripped United States marshals of their allegedly excessive powers, Democrats were not satisfied. Democrats were convinced that abuses in federal jury selection were widespread; consequently, they proposed a series of other reforms in the juror selection process.

IV. CREATION OF THE FEDERAL JURY COMMISSION

A. Partisanship in Jury Selection

While authorization of a federal jury box would curb the excessive discretionary power of United States marshals, Democrats considered this reform by itself inadequate to restore integrity to the federal jury selection process. Even in those federal courts where the jury box method had already been adopted to conform to the jury selection practices of the state courts, Democratic legislators noted numerous instances in which federal jurors had allegedly been selected in a rampantly corrupt manner.¹⁰⁶

Democrats asserted that at the core of the corruption, in all instances, was the principle of partisanship. Democratic members

November 1879, the same cannot be said for the state of Louisiana. As soon as the Democrats regained control of the state government in 1877, the Democrats took action to repeal the juror selection laws and the election laws which had been passed under prior Republican administrations. See Juror Selection Procedures for Parishes Other than Orleans Parish: Act of March 8, 1877, No. 44, 1877 La. Acts, 5th Legis., 1st Sess. at 55 *repealing* Act of April 30, 1873, No. 94, 1873 La. Acts, 3d Legis., 1st Sess. at 165; Juror Selection Procedures for Orleans Parish: Act of March 13, 1877, No. 56, 1877 La. Acts, 5th Legis., 1st Sess. at 72 *repealing* Act of April 9, 1874, No. 124, 1874 La. Acts, 3d Legis., 2d Sess. at 220 (repealed act conformed to the federal juror selection rules of 1875); Act of April 2, 1878, No. 24, 1878 La. Acts, 5th Legis., Extra Sess. at 280; election registration and voter qualification: Act of April 30, 1877, No. 101, 1877 La. Acts, 5th Legis., Extra Sess. at 168 *repealing* Act of July 24, 1874, No. 155, 3d Legis., 2d Sess., included in 1875 La. Acts, 4th Legis., 1st Sess. at 5.

106. *E.g.*, the federal circuit courts in Louisiana and Georgia had adopted the jury box method so as to conform to state juror selection practices. Yet the adoption of the jury box method in these federal courts did not quell criticism of the selection procedures in those federal courts by Democratic senators. 9 CONG. REC. 1479-80, 2008-10 & 2028-33 (1879) (remarks about Louisiana by Sen. Jonas, D-La.; remarks about Georgia by Sen. Wallace, D-Pa. & Sen. Hill, D-Ga.).

Senator Hill informed the Senate that from 1869 to 1872 the federal courts in Georgia had selected the federal jurors from jury lists prepared by state officers in accordance with the relevant state laws. The state laws required the state officials to select as jurors "upright and intelligent" citizens whose names appeared in the county tax books. In December 1872, however, Senator Hill stated that the federal judges in Georgia purposefully abandoned the use of the state jury boxes as the source of federal jurors. Instead the federal judges adopted a federal jury box system that utilized federal jury commissioners who selected "upright and intelligent" citizens from the judicial district at large, rather than from the state tax books. Under the new federal system, therefore, the federal commissioners were calling persons for federal jury service who would not be considered to be persons possessing the requisite qualifications for juror service in the state courts. As a result, Senator Hill reported to the Senate that it was his belief that not a single federal jury in the Georgia federal courts since 1872 could be considered a legally constituted jury. *Id.* Cf. note 91 *supra*.

charged that the Republican Party had consistently used the federal judicial system for partisan ends. Republican abuse of the judicial system, Democrats claimed, took three forms: positions in the federal judicial system including the positions of marshal, court clerk, district attorney, and federal judge, had been allocated during Republican administrations on a patronage basis to insure that the positions were occupied by partisan Republicans whose loyalty was primarily toward the maintenance of Republican power.¹⁰⁷ The Republicans, moreover, passed a significant number of statutes designed to involve the federal judiciary in partisan political disputes.¹⁰⁸ Most of the Republican legislation was directed toward regulation of the election process. Finally, when cases arising under these Republican-inspired laws came before the federal courts for trial, partisan occupants of the bench devised jury selection schemes whereby none but partisan Republicans were called for jury service, thus insuring that the verdict desired by the Republican Party would be returned.¹⁰⁹ In light of this pervasive partisanship in the federal judiciary, Democrats argued that any reform of the juror selection procedures must necessarily be a systematic reform which could not be limited solely to curbing excessive discretionary power on the part of federal marshals.

Democratic members of Congress claimed that continuation of the partisan system of federal juror selection would cause litigants to avoid the federal courts at all costs. These litigants would thus seek redress in state courts, where justice was more likely to be obtained.¹¹⁰ Those

107. *E.g.*, 9 CONG. REC. 783, 1901, 2037-39 (1879) (remarks of Rep. Atherton, D-Ohio; Rep. McMahon, D-Ohio; Sen. Morgan, D-Ala.).

108. Senator Morgan of Alabama probably best expressed the Democratic viewpoint on this aspect of Republican abuse of the federal judicial system when he said:

After the war, in 1865 and 1866 and 1867, for the first time the courts of the United States were given jurisdiction of political offenses. I am not complaining that your courts were then empowered to decide upon political offenses; it may have been necessary that it should have been; yet the fact is that that was the first time that any statute of the United States required a judge or a court of this country to pass upon a man's politics. . . .

Because you have conferred upon your Federal courts jurisdiction of political offenses, because you have constrained your judges to go down into the strifes of the elections and there select the agencies of party to carry out their dirty schemes, because you have stained the ermine of the judiciary of this country with these foul stains and blots, we have felt ourselves compelled to come to the rescue and to adopt a system of legislation that we never would have thought of resorting to but for the necessity that you put us under to relieve the country from the influence of partisanship in the jury box and upon the bench.

9 CONG. REC. 2038 (1879).

Indeed, two bills (H.R. 2 and H.R. 2252) which contained the Democratic proposals for change in the federal jury selection system, and which ultimately became the 1879 Act, were explicitly vetoed by President Hayes during the first session of the 46th Congress because those bills either prohibited or severely curtailed federal supervision of elections. 9 CONG. REC. 2291 (1879).

109. The theme that federal juries were being selected in a manner designed to insure that they would support and protect Republican policies was constantly asserted by Democratic speakers during the debates about proposed changes in jury selection methods. References to specific speakers and their comments may be found by reading notes 91 and 106 *supra*.

110. *E.g.*, 9 CONG. REC. 1900-01, 2026, 2028 (1879) (remarks of Rep. McMahon, Sen. Saulsbury & Sen. Hill). *Cf. also* 9 CONG. REC. 1783, 1901 (1879) (remarks of Sen. Bayard, Rep. Herbert & Rep. Clymer).

litigants unable to avoid federal courts, moreover, would be forced to have their cases heard by totally unqualified persons. Federal juries would continue to be filled with colored men, government employees, and biased individuals. As a result, federal court defendants and litigants would be deprived of the right to a fair and impartial jury of their peers.¹¹¹

To achieve the systematic reform they desired, Democratic legislators stressed that the selection of federal jurors could not remain within the sole control of any one person or one political party. Power in juror selection had to be dispersed among persons and among political parties. Democratic legislators proposed that this dispersion be accomplished through the creation of a two-person jury commission to be composed of the clerk of the court and a citizen, appointed by the judge, of "good standing" in the community who was a "well-known member of the principal political party" opposed to that to which the court clerk belonged.¹¹²

Republicans flatly rejected the Democratic assertion that the federal judicial branch manipulated the juror selection procedures to achieve corrupt or partisan verdicts. They challenged their Democratic colleagues to name anyone who had been unjustly indicted or convicted by packed juries. When Democrats referred to specific cases, Republicans confidently predicted that close examination of Democratic allegations would reveal them to be nothing more than "clap-trap."¹¹³

Republicans contended that Democrats were asking federal courts to include on federal juries persons openly contemptuous of the laws they would be asked to enforce.¹¹⁴ In light of the motives underlying the Democrats' proposed "reforms," Republicans asserted, the juror selection procedures of the federal courts remained a necessary compo-

111. *E.g.*, 9 CONG. REC. 783, 2036-40 (1879) (remarks of Rep. Atherton & Sen. Morgan). *Cf.* 9 CONG. REC. app. at 50 (1879) (remarks of Rep. New).

112. All five bills introduced by Democrats during the first session of the 46th Congress to change the method of federal jury selection contained the provision for a two-member jury commission with the members of the commission coming from the opposing principal political parties. 9 CONG. REC. 492 (1879) (H.R. 2), 1778 & 1779 (S. 375), 1900 (H.R. 2252), 2300 (S.J.R. 39), 2364 (H.R. 2381).

Democratic explanations of this proposal as a remedy for past abuses in jury selection can be found in the debates at 9 CONG. REC. 783, 2033, 2376 and app. at 92 (1879) (remarks of Rep. Atherton, Sen. Hill, Sen. Saulsbury & Sen. Thurmon).

113. 9 CONG. REC. 1794, 1811-13, 2000 (1879) (remarks of Sen. Edmunds & Sen. Blaine). Even if an instance or two could be found in which the jury selection system had been undermined so as to achieve partisan results, Republicans argued that these isolated instances of abuse did not prove that the jury selection system needed reform. To the contrary, they argued, isolated instances of abuse should be handled by impeachment and removal of the offending federal officials and through appellate review. *Id.* at 1390, 2004, 1904, 2026-27 (remarks of Sen. Conkling, Rep. Cannon & Sen. Dawes).

114. *Cf.*, *e.g.*, 9 CONG. REC. 1384, 1390, 1794 (1879) (remarks of Sen. Conkling & Sen. Edmunds).

nent of legal efforts to protect the civil rights of blacks.¹¹⁵

In the Republican view, moreover, the system proposed by the Democrats would seriously undermine public faith in the impartiality of the jury system. Under the Democratic plan, the clerk and the appointed citizen were clearly meant to think of themselves as the representatives of their political parties. As a result, the clerk would select the names of 150 partisans from his party, while the citizen would select the names of 150 partisans from his party. The impact of these selection procedures on the public perception of justice would be devastating because citizens would know that the ideal of juror impartiality had been abandoned in favor of the ideal of partisanship. The impact of such selection procedures upon legal business conducted in federal courts, moreover, would be equally devastating, for jurors were unlikely to be able to return a true bill or to reach unanimity on a verdict.¹¹⁶

Many Democrats took offense at the Republican interpretation of the proposal. Nowhere in the language creating the jury commission, some Democrats countered, was there any indication that the clerk and the private citizen were to select partisan persons for jury service. While the language did clearly indicate that the two selectors were to come from different political parties, this language simply insured that no single person or single political party was permitted to exercise ex-

115. *E.g.*, 9 CONG. REC. 1902, 1903 (1879) (remarks of Rep. Keifer & Rep. Bayne). Republican antagonism to the Democratic proposals was reinforced by their understanding of the results achieved under state jury selection systems praised by Democratic senators. Senator Edmunds of Vermont, for example, engaged in an exchange with Senator White of Maryland which established that under the Maryland system no blacks were called for jury service:

Mr. Edmunds: Therefore in the poll books, running right down without regard to the alphabet, there would be the name of one colored man in eight as you go through the whole list. If they are taken out by chance, how can it happen that year after year that chance will never hit a certain eighth of that list?

Mr. White: I cannot tell how it happens, Mr. President, nor can anybody else tell you how it happens; but it is perfectly certain that it does happen, and happens in every county in the state, whether there are Republican judges in it or not; . . .

9 CONG. REC. 1819 (1879).

As for the Georgia system which Senator Hill had so lavishly praised, notes 91 and 106 *supra*, the Republican senators had access to the published opinions of Judge Erskine in which he defended his decision to no longer use state officials in the federal jury selection process. Judge Erskine wrote:

But to return; nearly seventeen hundred names were forwarded to the marshal (before the abrogation of this rule) by these clerks who responded to his request, . . . While this rule was of force, more than two hundred and fifty names were drawn from the jury box by the court, or its officers, the marshal and the clerk; but strange as it may appear, every ballot drawn from the box contained the name of a white person. Now, as the ratio of the classes, in this judicial district, has been for years past, as eight white to five colored, or nearly so, it is obvious to the common mind that this mode of designating, or selecting the jurors, cast the entire burden of jury service in the federal court upon one of the classes only—white citizens; . . .

United States v. Gardiner, 25 F. Cas. 1255 (C.C.N.D. Ga. 1873) (No. 15,187). See also United States v. Collins, 25 F. Cas. 552 (C.C.S.D. Ga. 1873) (No. 14,837).

116. *E.g.*, 9 CONG. REC. 847, 1791, 1814, 1900, 1902, 1903, 1905, 1906, 2000, 2377 (1879) (remarks of Rep. Hazelton, Sen. Blaine, Sen. Edmunds, Rep. Garfield, Rep. Keifer, Rep. Bayne, Rep. Urner, Rep. Mitchell & Sen. McMillan).

clusive control over the selection process. By involving two persons of different political persuasion in the selection process, the names included in the federal jury box would necessarily represent a broader spectrum of society than could be obtained by granting the power of selection to one person. These Democrats argued that the end result of the specific language under discussion would be to mandate a jury box widely representative of the community, from which fair and impartial jurors would undoubtedly be obtained.¹¹⁷

Other Democrats agreed with the Republican prediction that the language would result in persons being selected on the basis of political affiliation. These Democrats argued, however, that this result was not necessarily undesirable. Jury boxes were already filled with the names of partisans, although partisans solely of the Republican Party. At least both political parties would be treated fairly by this selection method. As Representative McMahon (D-Ohio) riposted, "Now, if they are to be packed at all, I prefer that they be packed half and half."¹¹⁸ Other

117. *E.g.*, 9 CONG. REC. 783-84, 1783-84, 1901, 1902, 2365, 2376 (1879) (remarks of Rep. Atherton, Sen. Bayard, Rep. Herbert, Rep. Hooker, Rep. Atkins & Sen. Saulsbury). Three Democrats compared the juror selection system proposed for adoption in the federal courts to the juror selection system which had been in use in Pennsylvania since 1867. Under the Pennsylvania system, two juror commissioners were elected for each county through an election in which the citizens were permitted to vote for only one person as juror commissioner. The two top vote-getters, however, were elected. The Pennsylvania law was designed to insure, and had insured, that the two members of the juror commission would come from opposing political parties. As a result of this system, Democrats claimed that fair and impartial juries had been obtained for the state courts and that the system had worked so well in achieving impartiality in juries that nobody in the state desired to change the system. *Id.* at 1901-02, 2001 (remarks of Rep. Herbert, D-Ala. and Rep. Clymer, D-Pa.; Sen. Wallace, D-Pa.).

Rep. Bayne, a Pennsylvania Republican, challenged the Democrats' description of how well the Pennsylvania system worked. Rep. Bayne claimed that the Pennsylvania system had produced bickering between commission members and abuses in the jury system which had never before occurred in Pennsylvania. The problems had become so intolerable in Allegheny County that state judges took control of the selection system to make it function. In his mind, the Pennsylvania system did not provide a good model for imitation in the federal system. *Id.* at 1903. *See also id.* at 1906 (remarks of Rep. Mitchell, R-Pa.).

Forty years after the passage of the Jury Selection Act of 1879, a district judge in Louisiana overruled a challenge which claimed that the grand jury, which had returned the indictment, had been improperly selected under the Act because the jury commission was composed of the Democratic court clerk and an Independent as jury commissioner. The district judge reasoned that the purpose of the 1879 Act was to insure the selection of jurors who were free from political bias and that this purpose was better served by the appointment of an Independent, than by the appointment of a political partisan, to the position of jury commissioner. *United States v. Caplis*, 257 F. 840 (W.D. La. 1919).

The *Caplis* decision is an ironic victory for nonpartisanship in the jury selection system. The use of an Independent as a jury commissioner violated the specific language of the Jury Selection Act of 1879. Moreover, as a practical matter in Louisiana in 1919, the *Caplis* decision simply insured the continued exclusion of the Republican Party from governmental power and the continued domination of all governmental power by the Democratic Party. With the *Caplis* decision, the federal jury selection system in these parishes of Louisiana had come half circle since the 1870's: domination by a single political party, the Republican Party, was replaced by a politically bifurcated jury commission meant to prevent domination by a single political party, which in turn was replaced by domination of a single political party, the Democratic Party. *Cf.* *United States v. Rondeau*, 16 F. 109 (C.C.E.D. La. 1883).

118. 9 CONG. REC. 1900 (1879). *See also id.* at 877, 1791, 2033, 2376 (exchange between Rep.

Democrats, moreover, asserted that creation of a politically divided jury commission did nothing more than grant recognition to the political realities existent in the nation. Although political parties may not have been contemplated by the founding fathers, in the year 1879 it was not possible to deny that political parties had become integral to the governmental structure. Indeed, only a few years earlier, Republicans had acted upon this same recognition when they guided legislation through Congress creating bipartisan commissions to oversee electoral returns. If honest counts in elections could be obtained by each party appointing a partisan poll-watcher to the electoral commission, then analogously honest verdicts in federal court cases would be obtained through utilization of partisan jurors drawn from jury boxes filled through the proposed jury commission method.¹¹⁹

In response to Republican accusations that the proposed jury system would result in juries composed primarily, if not exclusively, of political activists, Ohio Democratic Congressman Warner induced the House sponsor of the legislation to accept an amendment stating that the clerk and the jury commissioner were to place names alternatively into the jury box "without reference to party affiliation." This amendment was apparently designed to blunt Republican criticism of the Democratic proposals. No specific explanation, however, was offered as to why this language was needed or how the amendment affected interpretation of the legislation as previously written.¹²⁰

In later debate in the Senate, Democrats offered two differing explanations as to what the language "without reference to party affiliation" was meant to accomplish. Senator Wallace told the Senate that the Warner amendment was adopted to make clear that jury commissioners were not required to select for jury service only members of the commissioner's political party. Senator Wallace indicated that the jury commissioners could still consider political affiliation as they prepared their list of names to be deposited in the jury box, but the political affiliation of the person was only one attribute which the commissioners were to consider in selecting the best persons for jury service.¹²⁰

In contrast, Senator Saulsbury claimed that the Warner amendment simply clarified the intent of the legislation as originally drafted. According to Senator Saulsbury, the legislative intent had been, and after the Warner amendment more clearly remained, to permit jury commissioners to select qualified and unbiased persons for jury service.

Talbott, D-Md., and Rep. Hazelton, R-Wis.; exchange between Sen. Eaton, D-Conn. and Sen. Blaine, R-Me.; remarks of Sen. Hill; exchange between Sen. Saulsbury, D-Del. and Sen. Allison, R-Iowa).

119. *E.g.*, 9 CONG. REC. 1792, 2375, app., at 92 (1879) (remarks of Sen. Houston, Sen. Eaton, and Sen. Thurman).

120. 9 CONG. REC. 1905 (1879).

121. *Id.* at 2000-01 (1879).

The political affiliation of a prospective juror was to play no part in the decision about his desirability for jury service.¹²²

Senator Allison of Iowa claimed that if Senator Saulsbury's interpretation of the Warner amendment was correct, then the thrust of the jury selection legislation had been changed completely. As Senator Allison interpreted the language of the jury selection bill as originally presented to the Senate, the legislation specifically intended that partisan jury commissioners select fellow partisans for jury service. Although Senator Allison proclaimed that he would welcome nonpartisan juror selection, he remained unconvinced that the Warner amendment accomplished such a feat.¹²³ When Representative Urner, a Maryland Republican, tested Democratic support for nonpartisan selection by introducing an amendment more explicitly prohibiting consideration of party affiliation of a potential juror, it was voted down.¹²⁴

Republicans were generally skeptical that the Warner amendment seriously weakened the partisanship which pervaded the selection process proposed by the Democrats. Republicans characterized the Warner amendment as a feeble attempt to remove partisanship from the selection process after it had already been firmly established by the partisan composition of the jury commission itself. Jury commissioners, chosen precisely because they were "well-known" partisans, could not be expected to abandon their political allegiance when choosing names for the jury box.¹²⁵ As Representative Butterworth (R-Ohio) argued, if partisanship was to be removed from the selection process, it had to be removed at its source in the jury commission, not by focusing on those to be selected by partisan commissioners. Nevertheless, Butterworth's amendment to strike the language creating the partisan jury commission was defeated.¹²⁶ Democratic legislators stood fast for the specific

122. *Id.* at 2376 (1879).

123. *Id.* at 2376 (1879) (exchange between Sen. Allison and Sen. Saulsbury).

124. Representative Urner's amendment would have left the selection of jurors solely in the hands of the court clerk, but the court clerk would have been admonished to "select such three hundred persons with special reference to their probity and intelligence and without any regard to their political faith or party affiliation." This amendment was defeated 91 to 71. 9 CONG. REC. 1905-06 (1879).

Cf. Amendment offered by Representative Herbert (D-Ala.), on behalf of the House Committee on the Judiciary. This amendment preserved the partisan composition of the jury commission but used stronger language than the Warner amendment to prevent the jury commissioners from selecting persons on the basis of their political affiliation. *Id.* at 1959. Before the amendment could be accepted or rejected, the House voted to adjourn. *Id.* at 1959-62.

The Herbert amendment was offered on June 12, 1879 as an amendment to S. 375, two days after the Warner amendment had been made to H.R. 2252. When S. 375 returned to the House calendar on June 17, 1879, the Herbert amendment was adopted. *Id.* at 2095-96. The House, however, adjourned before final action could be taken on S. 375. *Id.* at 2098. S. 375 was never again reconsidered by the House and the language of the Warner amendment was later included in H.R. Res. 2381, the bill which ultimately was signed into law.

125. 9 CONG. REC. 2001, 2377 (1879) (remarks of Sen. Allison and Sen. Dawes; Sen. McMillan).

126. 9 CONG. REC. 2365 (1879).

At times Republican skepticism about the Warner amendment gave way to sarcasm as evi-

language as proposed and voted down amendments to the legislation that Republicans had offered.¹²⁷

denced by an exchange between Senator Blaine and Senator Wallace. After Blaine had pestered Wallace to provide an explanation of the language "without reference to party affiliation," Blaine obligingly provided an explanation of the Warner amendment himself:

An idea this moment occurs to me as to the interpretation of this measure, and I will offer it for the benefit of the Senate. In the Senate it was openly avowed that the republican was expected to choose republicans and the democrat was expected to choose democrats, and that would get rank partisans of both sides. The only construction I can give to this new provision, upon full deliberation, is that the republican is expected to select the democrats and the democrat is expected to select the republicans.

9 CONG. REC. 2000-01 (1879) (exchange between Sen. Blaine and Sen. Wallace).

Republicans also expressed concern about the possibility of three or more significant political parties primarily because of the strength of the Greenback parties in many states or judicial districts. While the Senate had no members who were Greenbackers, the House had seven members who were affiliated with Greenback parties: Gillette of Iowa, Jones of Texas, Ladd of Maine, Lowe of Alabama, Murch of Maine, H. B. Smith of New Jersey, and Weaver of Iowa. These seven members constituted 2.3% of the House. In response to the Democratic proposals for change in the jury selection system, Greenbackers tried to prevent the total exclusion of members of their own party from service as jury commissioners. Thus, Representative Weaver of Iowa presented an amendment on June 10, 1879 to H.R. 2252 which would have changed the requirement that the lay commissioner be selected from the "principal" opposition political party to the party of the clerk of the court. The Greenbackers advocated a requirement that the lay commissioner simply come from "a" political party opposed to that to which the clerk belonged. The amendment failed by a teller vote of 89 "yes" to 96 "no." 9 CONG. REC. 1791, 1900 (1879).

Two weeks later when the House had before it H.R. Res. 2381, the bill which eventually became the Jury Selection Act of 1879, Rep. Weaver tried a slightly different approach to protect Greenback participation upon the jury commissions. Representative Weaver proposed that the principal opposition political party be defined as the principal opposition political party "in the district in which the court is held." By this amendment, Weaver meant to insure that the localized strength of Greenback parties would not be ignored by the federal judge appointing lay commissioners. The amendment was adopted by the House on a nonrecorded vote of 62 "yes" and 55 "no." *Id.* at 2366. On the final vote for passage of H.R. Res. 2381, the Greenback House members joined solidly with the Democrats to vote in favor of the bill. (Rep. Ladd, Greenback-Me., did not vote). *Id.* at 2367.

Republicans similarly worried about judicial districts which had two court clerks with the clerks being members of different political parties. Republicans wondered if this situation meant that the court would have to appoint two lay jury commissioners so as to provide the requisite partisan balance on the jury commissions. *Id.* at 2377 (1879) (remarks of Sen. Allison, R-Iowa). Senator Eaton (D-Conn.), immediately rejoined that he considered this expression of legislative concern to be nothing more than "carping." *Id.*

Cf. United States v. Caplis, 257 F. 840 (W.D. La. 1919) (discussed in note 117 *supra*).

127. Federal judges interpreted the 1879 Jury Selection Act in a flexible manner. When challenges to indictments or verdicts were presented by defendants, on the basis that the procedures of the Jury Selection Act of 1879 had not been meticulously followed, federal judges ruled that good faith, substantial compliance with the mandated selection procedures was all that Congress intended. Hence, federal judges were unreceptive to those challenges brought under the Act which they felt raised only technical violations. *See, e.g.,* United States v. Caplis, 257 F. 840 (W.D. La. 1919); United States v. Breese, 172 F. 765 (D.C.W.D.N.C. 1909); United States v. Green, 113 F. 682 (D.C.S.D. Ga. 1902); United States v. Greene, 108 F. 816 (D.C.S.D.N.Y. 1901); United States v. Chaires, 40 F. 820 (C.C.N.D. Fla. 1889); United States v. Ewan, 40 F. 451 (C.C.N.D. Fla. 1889); United States v. Paxton, 40 F. 136 (C.C.N.D. Fla. 1889); United States v. Eagan, 30 F. 608 (C.C.E.D. Mo. 1887); United States v. Richardson, 28 F. 61 (C.C.D. Me. 1886); United States v. Rondeau, 16 F. 109 (C.C.E.D. La. 1883); United States v. Ambrose, 3 F. 283 (C.C.S.D. Ohio 1880). Only one case showed sympathy for a challenge based on failure to comply with selection procedures. *See* United States v. Antz, 16 F. 119 (C.C.E.D. La. 1883).

B. Operation of a Partisan-based Jury Commission

In view of the legislative history, two historical inquiries are open to investigation from the records of the Circuit Court for the District of Louisiana.

1. How well did the jury commission system mandated by the 1879 legislation function in the federal Circuit Court of the District of Louisiana?

The Jury Selection Act of 1879 was signed into law by President Hayes on June 30, 1879, during April term 1879. The circuit court took no action in response to the legislation during the remainder of the April term. On November 13, 1879, immediately after the beginning of the November term 1879, the court promulgated new rules conforming to the requirements of the Jury Selection Act of 1879.¹²⁸ Specifically, the court created a two-person jury commission. Mr. F.A. Woolfley, clerk of the court and a Republican, was appointed as one member of the commission. Mr. Jules Cassard, a "well-known member" of the principal opposition party, the Democratic-Conservative Party, was appointed by the court as the citizen commissioner.¹²⁹ These two persons were ordered to create a list of 350 names to be placed in the jury box. By November 24, 1879, Mr. Woolfley provided the court with a list of 179 names. On the same date, Mr. Cassard provided a list of 173 names. Consequently, within a period of nine days from the promulgation of the court rules, the circuit court of Louisiana had a jury box properly filled and ready for use during the jury term.¹³⁰

Thereafter, the circuit court records indicate that whenever the number of names in the jury box dropped below the 300 required by law, the court would order the clerk and the citizen commissioner to create a supplementary list of names. Each time new names were added to the box, they were clearly identified as names provided either by the clerk or the citizen commissioner. The number of names on the list provided by each person was almost identical.¹³¹

According to court rules, the court had sole discretion to appoint a

128. Minutes, vol. 25, Nov. 13, 1879, at 293-94.

129. Minutes, vol. 25, Nov. 13, 1879, at 294. F. A. Woolfley had been an appointee in the federal judiciary since 1869, when he was first appointed a United States commissioner. Minutes, vol. 11, March 20, 1869, at 331. By the November term 1872, Woolfley was the court clerk of the circuit court of Louisiana. See Lists of Prospective and Selected Jurors, 1866-1900, Entry 164, vol. #03875 at 88 (Records of United States District Courts, Record Group 21, Federal Archives and Records Center, Fort Worth, Texas) [hereinafter cited as Lists of Jurors].

Jules Cassard remained active in Democratic Party politics through at least the November elections of 1884. During the 1884 election, Cassard was listed as a vice-president of a Democratic campaign rally. New Orleans Daily Picayune, Nov. 9, 1884, at 2, col. 4.

130. Minutes, vol 25, Nov. 24, 1879, at 387. The list of names is actually set forth in Lists of Jurors, vol. #03793, at 77.

131. Lists of Jurors, vol. #03793, at 82-119. The period covered in the lists contained on those pages of the Juror Book is from January 8, 1880 through April 1887.

citizen commissioner at the beginning of each term of court. The court, moreover, reserved the power to remove the citizen commissioner at any time the court deemed such removal appropriate. Mr. Cassard served as jury commissioner until the November term 1880. Beginning with the November term 1880 and lasting through the November Term 1883, Mr. C. H. Hyams served as jury commissioner on behalf of the Democratic-Conservative Party, while Mr. Woolfley continued to be the Republican clerk of the court.¹³² Beginning with the April term 1884, Mr. J. N. Marks, a Democratic-Conservative, served as the citizen commissioner opposite Republican clerks of the court.¹³³

Although two cases, *United States v. Antz*¹³⁴ and *United States v. Rondeau*,¹³⁵ arose in 1883 to challenge the jury selection system, neither involved a challenge of the jury commissioner system of selection itself. Hence, all evidence from the court records indicates that the commissioner system of the 1879 legislation worked smoothly to provide the circuit court at all times with a properly filled jury box from which federal jurors could be drawn.

2. *Did the composition of the federal juries in the circuit court of Louisiana correspond to the description of federal juries as sketched by Democrats during the congressional debate and were the Democrats correct in their assessment that the proposed jury commission system would rectify the alleged shortcomings of that composition?*¹³⁶

- a. *Composition of federal grand juries prior to 1879*

The Democratic accusation of partisanship in the federal juries

132. Lists of Jurors, vol. #03793, at 92-98 and 112-15. Minutes, vol. 27, Dec. 15, 1880, at 357; Minutes, vol. 30, April 18, 1882, at 221.

133. Minutes, vol. 33, June 14, 1884, at 363. The records do not clearly indicate whether Mr. J. N. Marks thereafter served continuously as the citizen commissioner of the Democratic Party until April term 1889, but on November 5, 1889, Mr. Marks was the Democratic lay jury commissioner when another 600 names were added to the jury box. Lists of jurors, vol. #03793, at 131.

On the same supplementary jury list, Mr. E. R. Hunt was listed as the clerk of the circuit court. *Id.* As to when Mr. Hunt became the court clerk, or as to when (after November term 1883) Mr. Woolfley left the position of the court clerk, the court records were not clear.

The court clerks throughout the period from 1883 to 1889, in addition to Republicans F. A. Woolfley and E. R. Hunt (if there were any others), were assuredly members of the Republican Party because they would have been appointed by the circuit judge, Don A. Pardee. Judge Pardee was appointed to the position in March, 1881 after the previous circuit judge, William B. Woods, was confirmed as a Justice on the United States Supreme Court in December 1880. 30 F. Cas. 1389, 1403. Prior to becoming the circuit judge, Mr. Pardee had been chairman of the Louisiana Republican Party. New Orleans Daily Picayune, Nov. 1, 1880, at 3, col. 2. Pardee was a member of the Warmouth faction of the Louisiana Republican Party. Leach, *The Aftermath of Reconstruction in Louisiana*, 32 LA. HIST. Q. 631, 639 (1949). *Cf.* note 100 *supra*.

134. 16 F. 119 (C.C.E.D. La. 1883).

135. 16 F. 109 (C.C.E.D. La. 1883).

136. To answer this question, I used the records of the circuit court to obtain the names of those persons selected for grand jury duty for the various terms of court during the years 1872 to 1887. I then examined the enumeration sheets on individuals and households compiled for Orleans Parish in the 1870 and 1880 censuses in an attempt to locate in the census records each

was really a two-fold accusation. Democrats charged that no matter which jury selection system was utilized in a particular federal trial court, the system was dominated by partisan Republicans. As a consequence of this Republican domination, Democrats also claimed that the persons being called to serve as federal jurors were, in almost all instances, unqualified or biased individuals.

The circuit court in Louisiana had utilized a jury commission in the selection of jurors since 1865. From 1865 until January 1875, the jury commission was composed of the United States marshal, the circuit court clerk, and two laypersons who were appointed as jury commissioners. Between January 1875 and November 1879, the jury commission consisted solely of two laypersons appointed by the court as jury commissioners. In November 1879, the jury commission was reconstituted in accordance with the provisions of the Jury Selection Act of 1879.¹³⁷ Consequently, an assessment of the political views of jury commission members is critical to an evaluation of the Democrats' charge that Republicans dominated the jury selection system.

Stephen B. Packer and F.A. Woolfley served on the jury commissions from 1870 through January 1875 because of their respective positions as United States marshal and circuit court clerk. As previously noted, both Packard and Woolfley were members of the Republican Party, although Packard was apparently the more partisanly active of the two.¹³⁸

Nine persons have been identified as having served as jury commissioners during the 1870's:¹³⁹ Robert Watson (November terms 1872

person who had been selected as a grand juror. For those persons whom I was able to locate in the census records, I found information which indicated their race, age, occupational status, literacy, place of birth, and location of residence in Orleans Parish. I then tabulated this data for each grand jury so that I would have the ability to compare the composition of one grand jury to the composition of any other grand jury. More particularly, once the data on each grand jury had been tabulated, I had the ability to compare the composition of grand juries formed prior to the 1879 act with those grand juries formed after the 1879 act.

I also consulted three other sources: the New Orleans Daily Picayune for the days immediately preceding and immediately following the November elections for the years 1872 to 1887; the general census information relating to the state of Louisiana and Orleans Parish set forth in the statistical volumes for the 1870 and 1880 censuses; and several books and articles on Louisiana politics during this period. From these sources, I hoped to obtain the names of those persons who were politically active during the 1870's and 1880's so that these names could be compared to the names of those persons who had served as grand jurors. In addition, I hoped to acquire general political and social information on Louisiana and Orleans Parish which would permit me to compare the composition of federal grand juries to the political and social composition of the society in general.

From the information gathered from these sources, and from the comparisons which this information permitted me to make between individual grand juries and between grand juries and the society in general, I was able to answer the question as to the impact of the Jury Selection Act of 1879 upon the composition of federal grand juries in the circuit court of Louisiana.

137. A more detailed discussion of the procedures utilized in the Circuit Court for the District of Louisiana can be found in text accompanying notes 101-05 *supra*.

138. See notes 97 & 129 *supra*.

139. The circuit court met two times a year: April term and November term each year. Hence from the year 1872 until the passage of the Jury Selection Act of 1879 during the April term

and 1873),¹⁴⁰ a Mr. Levy (November terms 1872 and 1873),¹⁴¹ Benjamin F. Flanders (November terms 1874 and 1875 and April terms 1875 and 1876),¹⁴² Joseph H. Ogelsby (November terms 1874, 1875, and 1877 and April terms 1875 and 1876),¹⁴³ William C. Black (November term 1876),¹⁴⁴ Aristide Mary (November term 1876),¹⁴⁵ James G. Clark (November term 1877),¹⁴⁶ Charles B. White (April term 1879),¹⁴⁷ and J. N. Marks (April term 1879).¹⁴⁸ Of these nine persons, information as to political persuasion could be located only for four. Benjamin F. Flanders, Joseph H. Ogelsby, and Aristide Mary were listed as vice-presidents of a Republican campaign rally in November 1884, seven years after the Democrats returned to power in Louisiana.¹⁴⁹ J. N. Marks was labeled by the circuit court in June 1884 as a prominent member of the Democratic-Conservative Party of Louisiana.¹⁵⁰

While information as to the lay jury commissioners is incomplete, what is known about Packard, Woolfley, Flanders, Ogelsby, and Mary indicates that the Democratic charge of Republican domination of the jury selection process was not an imagined or irrational perception of the selection procedures used in Louisiana. Only one person involved in the selection process prior to November 1879, J. N. Marks, had connections with the Democratic party, and he was appointed in April 1879 after the Democrats had already made their legislative proposals for change in the juror selection process.

Democratic orators had claimed during the congressional debate that the grand jurors were either biased or unqualified. According to Democrats, the biased jurors were either active Republicans, government employees who owed their jobs to Republican patronage, or

1879, the circuit court conducted a total of 15 terms. For each term of court, the judge appointed two laypersons to serve as jury commissioners. Hence, a total of 30 jury commissioners served during the 1872-1879 period.

As the text indicates, I was only able to find records which gave the names of nine persons who served as jury commissioners. Because several of these persons served in that capacity more than once, they account for 18 of the possible 30 jury commissioners. Aside from the nine listed in the text, other persons almost certainly served as jury commissioners.

140. List of Jurors, vol. #03875, at 88 (Nov. term 1872) and 101 (April term 1873).

141. *Id.*

142. List of Jurors, vol. #03875, at 119 (Nov. Term 1874), 127 (April term 1875), and 133 (Nov. term 1875). List of Jurors, vol. #03793, at 8 (April term 1876).

143. *Id.* Minutes, vol. 21, Nov. 5, 1877, at 239 (Nov. term 1877).

144. Minutes, vol. 20, April 18, 1877, at 128 (Nov. term 1876).

145. *Id.*

146. Minutes, vol. 21, Nov. 5, 1877, at 239 (Nov. term 1877).

147. Minutes, vol. 24, April 23, 1879, at 465 (April term 1879).

148. *Id.*

149. New Orleans Daily Picayune, Nov. 2, 1884, at 12, col. 3. Aristide Mary had previously been a candidate for the parish office of Administrator of Assessments on the Citizens' Conservative Association ticket. New Orleans Daily Picayune, Oct. 27, 1878, at 3, col. 7. The Citizens' Conservative Association was attacked in the Daily Picayune as a party that claimed to be interested in reform within the Democratic Party, when in reality it was a party interested in fusion with the Republicans. *Id.*, Oct. 21, 1878, at 1, col. 5 & 2, col. 2.

150. See note 133 *supra*.

Northerners who had moved to the South after the war and were, therefore, unfamiliar with the customs and mores of the South.¹⁵¹ The unqualified individuals, according to the Democrats, were either illiterate or lacking in good moral character. The Democrats generally attributed these traits to black grand jurors.¹⁵²

From November term 1872 to November term 1878, 257 persons were called to serve as grand jurors.¹⁵³ Of these 257 persons, only 30 (11.7%) were actively engaged in partisan politics as holders of elected political office, as nominees for elective office, or as party members actively participating in political campaigns. These 30 persons held the following political affiliations: 19 were Republican activists (63.3%),¹⁵⁴ 4 were Democratic activists (13.3%);¹⁵⁵ and 7 were members of minor

151. Senator Morgan of Alabama probably best stated the Democratic viewpoint about "biased" individuals being called to serve as federal jurors when he said:

There were about eight million white people in the South at the time of the rebellion . . . I think it can be asserted as a universal truth that every man and woman in the Southern States participated in the rebellion to the extent that is denounced in sections 820 and 821 of the Revised Statutes of the United States. . . . I find myself entitled as a man to a fair and impartial trial by a jury of the vicinage under the express provision of an amendment to the Constitution of the United States . . . and yet I find that all those people who know me, all those who are blood of my blood and flesh of my flesh and bone of my bone, are disenfranchised from serving on the jury. . . .

More than that. The balance of the population of the South consisted only of the African race and of those adventurers who came in there from the Northern States, or those good citizens, of whom I thank God there are a great many, who have come to settle among us in good faith and who are entirely welcome into our midst; but that is a small number. We have to throw ourselves upon the negro race for trial, and, in reference to the white race, unless we pick up the adventurers with those honorable men who have settled among us for the purposes of actual living and neighborhood with ourselves, we have to take this sort of jury.

9 CONG. REC. 2036 (1879).

Then several pages later in the Congressional Record, Senator Morgan in the same speech asserted: "I have read that [affidavit] for the purpose of showing the Senate what importance is attached to the two requisites for a juror in Alabama, one that he should be a republican, and the other that he should be a friend of the marshal." *Id.* at 2039.

Finally, Senator Morgan added this further description of who served on federal juries in Alabama:

Now, I beg leave to say in addition to this that it has been my observation in both grand and petit juries in the State of Alabama, that it is a rare instance of the assemblage of either one that there is not a number of Federal officials upon it. It is the commonest thing to find Federal officials, particularly those who are connected with the revenue service and the administration of justice, deputy marshals and men like that, upon the Federal grand juries in that State.

Id. at 2040.

152. Senator Morgan again articulated the most succinct Democratic statement of the qualifications of persons being called for jury service under the jury selection methods used prior to 1879 when he informed the Senate: "[M]any a time have I argued cases before juries composed largely of negroes. I have argued cases before them involving thousands of dollars of property that depended upon the contents and construction of papers which the men upon the jury could not themselves read." 9 CONG. REC. 2036 (1879).

See also *id.* at 783, 1479, 2028 (remarks of Rep. Atherton, Sen. Jonas, and Sen. Hill).

153. Appendix A provides the complete list of names of those called for grand jury service and the terms in which they were summoned. If a person was called for jury service at more than one grand jury term, that person was counted separately each time he was called for service.

154. See app. E.

155. See app. E.

political parties (23.3%).¹⁵⁶

While the number of persons identified as political activists is small, their political affiliation tends both to confirm and refute the Democratic charges.¹⁵⁷ The political affiliation of the activists confirms the Democratic charge that Republicans dominated grand juries; the same information refutes the Democratic charge that nobody but Republicans were called to grand jury service. The information on political activists tends to indicate, in other words, that the Democrats were correct about Republican domination but nonetheless exaggerated the degree of Republican control of grand juries.¹⁵⁸

The identity of two of these politically active persons does give a tantalizing glimpse into why Democrats might have been fearful of Republican domination of the grand jury process in Louisiana. C. S. Sauvinet was summoned to grand jury service in January 1873 just two months after he had lost a bitterly contested election for civil sheriff to his Democratic opponent.¹⁵⁹ Sauvinet was excused from jury service, but four months later he was called anew to serve on the grand jury for April term 1873.¹⁶⁰ On the grand jury from which Sauvinet had been excused, J. Madison Wells was included. Wells had been a Republican governor of Louisiana during the 1860's and four years after his jury service became the chairman of the infamous Louisiana Returning Board that provided the crucial electoral votes for the election of Rutherford B. Hayes as President in 1876.¹⁶¹

The mere fact that Sauvinet and Wells had been summoned for

156. See app. E.

157. Compare text accompanying notes 177-79 *infra*.

158. The Democratic concern about Republican domination of the grand juries acquires a more concrete dimension when the laws governing the return of indictments are studied. Under the federal grand jury laws, the grand jury could range in size from 16 to 23. An indictment could be returned if 12 grand jurors voted for a "true bill." Hence in "politically tinged" cases, the Democrats knew that the Republicans would only need a majority of the grand jury to be able to obtain indictments against their political foes. REV. STAT. §§ 808, 1021 (1874). These requirements had originally been mandated in 1865. Act of March 3, 1865, ch. 86, § 1, 13 Stat. 500.

159. New Orleans Daily Picayune, Nov. 22, 1872, at 1, cols. 5 & 6.

160. Sauvinet's name appears on the checked list of 24 names of persons summoned for grand jury service on the second grand jury for November term 1872. List of Jurors, vol. #03875, at 88. Several pages later in the juror book, when the final list of grand jurors is presented, Sauvinet's name does not appear on the list. *Id.* at 94. See also Minutes, vol. 15, Jan. 15, 1873, at 88 (list of second grand jury for November term 1872). Seven pages later in the Juror Book, Sauvinet's name appears on the list of grand jurors for April term 1873. List of Jurors, vol. #03875, at 101.

161. An unfavorable description of Wells is given in Leach, *The Aftermath of Reconstruction in Louisiana*, 32 LA. HIST. Q. 631, 635-38 (1949). In 1878, Wells was the Republican nominee for Congress from the Fourth District of Louisiana. Wells was defeated in a typical Louisiana election in which charges and countercharges of fraud and voter intimidation were common. *Id.* at 645-49, 684-96. Indictments against Natchitoches Parish officials and leading citizens for conspiracy to prevent voters from voting for Wells were returned in the circuit court in New Orleans. B. F. Jonas was a defense attorney in this case. As a Democratic senator from Louisiana, Senator Jonas informed his fellow senators, during the debate concerning the Jury Selection Act of 1879, about the "injustices" his clients had suffered as a result of these "politically-motivated" indictments. 9 CONG. REC. 1479-81 (1879). See also *id.* at 562 (remarks of Rep. Elam, D-La. which indicate that the Natchitoches citizens were acquitted).

grand jury service was enough to raise suspicions among Democrats that the grand jury was being used as a partisan tool. The Democrats' feeling of persecution acquires further strength in light of the fact that the grand jury to which Sauvinet and Wells had been summoned was specifically instructed to investigate voter intimidation and election fraud.¹⁶² In the minds of Democrats, no further proof was needed to establish beyond reasonable doubt that Republican domination of grand juries was dangerous to the life and liberty of Democrats in Louisiana.

Of the 257 persons called for grand jury service between November term 1872 and November term 1878, census data is available on 168. The biographical data on these grand jurors provides a basis for evaluating Democratic claims of excessive jury service by government employees and Northern transplants.¹⁶³

162. Minutes, vol. 15, Jan. 15, 1873, at 88. The grand jury for which Sauvinet and Wells had been summoned was the second grand jury to be called during November term 1872. The first grand jury for November term 1872 had been selected on November 27 and then sworn as grand jurors on December 3, 1872. The court minutes for December 3, 1872 then continue:

And having been duly sworn, they were by direction of the Court tendered the oath required by the fifth Section of the act of Congress of the United States entitled "An Act to enforce the provisions of the fourteenth amendment to the Constitution of the United States and for other purposes," approved 20th April 1871; and the said Jurors having severally taken and subscribed the said Oath, it was ordered that the same be filed of record.

And thereupon the Court specifically charged said jury to enquire into and true presentment make of any and all violations of the provisions of the said act.

Id. at 49, 53.

The oath to which the minutes refer was an oath that the persons called to serve as grand jurors had "never, directly or indirectly, counseled, advised, or voluntarily aided any such combination or conspiracy" to violate the civil rights of American citizens. This oath is commonly called the Ku Klux Klan oath. REV. STAT. § 822 (1874).

Despite having taken the Ku Klux Klan oath, the first grand jury November term 1872 was unable to agree upon any "true bill," and on December 13, 1872, the court minutes record the following:

On motion of J. R. Beckwith, United States Attorney, suggesting to the Court that there has been irregularity in the Venire issued at the present term of the Court summoning Grand and Petit Jurors, as in the execution thereof,

It is ordered that the said Venire be quashed and the Grand and Petit Jurors summoned and in attendance by virtue thereof be discharged from further attendance at the present term of Court.

Minutes, vol. 15, Dec. 13, 1872, at 61, 63.

The minutes do not give any indication as to the nature of the "irregularity" in the venire that led United States Attorney Beckwith to have the first grand jury quashed (after only 10 days of service) and a new second grand jury summoned. I would speculate that he was not happy with the composition of the first grand jury and was seeking a second grand jury which contained jurors who would be more favorably disposed to the indictments being sought by the United States government. I make this speculation for four reasons: (1) the November term 1872 grand jury was being asked to investigate voter intimidation and voter fraud shortly after a bitter election campaign. See text accompanying note 159 *supra*. (2) Mr. Beckwith apparently was a headline United States attorney with respect to recalcitrant Democrats. See notes 54-70 *supra* and accompanying text. (3) Persons like Sauvinet and Wells were summoned to serve on the second grand jury for November term 1872. (4) A comparison of the racial composition of the first grand jury November term 1872 with the racial composition of the second grand jury November term 1872 reveals that no blacks were summoned to serve on the first grand jury, but at least five blacks were summoned to serve on the second grand jury. See app. B *infra*.

163. Appendix A provides a complete list of the 257 persons summoned for grand jury service

Although only two to three percent of Orleans Parish residents were employed by the government,¹⁶⁴ nearly eight percent of grand jurors during the six-year period were employed in government jobs.¹⁶⁵ The jobs ranged from clerk for the internal revenue office to a police officer to employees of the United States mint and New Orleans Custom House.¹⁶⁶ Of course, the fact that a particular grand juror held a government job does not necessarily mean that that person was a member of a political party or obtained the job through political patronage. Yet assuredly some of these grand jurors were government employees precisely because of their loyalty to the Republican party. In light of the additional fact that the percentage of grand jurors who held government employment was higher than the percentage in the population

between November 1872 and November 1878. Appendix A also indicates which persons were adequately identified in the census data.

Not all 168 identified grand jurors were located in both the 1870 and the 1880 census data. Ninety-seven of the grand jurors were located in the 1870 census information; 119 were located in the 1880 census. When the overlap between grand jurors who were located in both the 1870 and 1880 censuses is taken into account, the total of grand jurors identified in the census data is then 168 persons for the grand jury terms November 1872 to November 1878. See app. B *infra* for information on these 168 grand jurors by combining the information obtained from the 1870 census and the 1880 census. The information is then compiled for each individual grand jury term.

App. C *infra* provides information on each individual grand jury term based solely on information obtained from the 1870 census. See app. D *infra* for information on each individual grand jury term based solely on information obtained from the 1880 census.

164. In both the 1870 census and the 1880 census, the Census Bureau classified occupations as follows: (1) agriculture; (2) professional and personal services, including such jobs as barbers, journalists, laborers, lawyers, teachers, and officials and civil employees of government; (3) trade and transportation which included such jobs as store clerks, bankers, bartenders, railroad managers, sailors; (4) manufacturing, mechanical, and mining industries which included such jobs as apprentices to trades, butchers, harness makers, manufacturers, saw-mill operatives.

In the 1880 new Orleans census, 57,831 men 16 years and older were in the workforce. Of these 57,831 men, 1,264 were classified as officials and civil employees of government, a number equal to 2.2% of the total workforce. I TENTH CENSUS, STATISTICS OF THE POPULATION OF THE UNITED STATES 891, *Table XXXVI, Persons in Selected Occupations in Fifty Principal Cities, Etc.: 1880. New Orleans, Louisiana* (1883).

The figures for the 1870 census show a total workforce of men 16 years and older as 49,349. Of these 49,349, 1,542 were classified by the census as government employees, a percentage of 3.1. I NINTH CENSUS, STATISTICS OF THE POPULATION OF THE UNITED STATES 792, *Table XXXII, Selected Occupations, with Age and Sex, and Nativity, The City of New Orleans, State of Louisiana* (1872).

165. Although the official census data does provide an occupation classification scheme, the census figures are only aggregate figures. Individual listings of persons on the census rolls contain employment information, but do not indicate how this occupation will be classified when the aggregate figures are compiled. Hence, I had to devise my own occupation classification scheme which I then applied to the individual persons on the census rolls identified as grand jurors. I classified occupations into four categories: (1) government/political: jobs such as police officer, civil servant, government clerk; (2) blue collar: jobs such as stevedore, brickmason, ironmonger; (3) white collar: jobs such as owners of businesses, store clerk, insurance agent; (4) unknown: those for whom no occupational data was given or who were listed as students in the census. See app. B *infra* for the statistical information.

166. *E.g.*, Wm. M. Batchelor, November term 1878, government employee at the Customs House; Gustave Boutin, November term 1875, government clerk at the Internal Revenue Office; Nat. Burbank, April term 1876, government clerk at the Internal Revenue Office; A. Ramos, November term 1875, police officer; Boyd Robinson, April term 1878, government employee at the United States Mint.

as a whole, the Democratic claim of juror partiality gains credibility.¹⁶⁷ Democrats noted that jurors economically dependent on the government would be tempted to side with the government, despite the countervailing interests of justice.

Persons born in states that remained loyal to the Union, and who therefore might be labeled "carpetbaggers" by Democrats, also participated to a significant degree on federal grand juries in the 1872-1878 period, when compared to their percentage in the total population of Orleans Parish. Twenty of the ninety-seven grand jurors (20.6%) located in the 1870 census were born in Union states. By comparison, only 6.5% of the total population of New Orleans in 1870 was born in Union states.¹⁶⁸ Information from the 1880 census yields a similar picture because 17.6% (21 of 119) of the identified grand jurors were born in Union states, whereas only 4.4% of the total population in 1880 claimed Union states as place of birth.¹⁶⁹

Available data for the 1872-1878 period, however, provides little support for Democratic allegations that federal juries were also packed with illiterates. Only three (all black) of the ninety-seven grand jurors identified through the 1870 census were listed in the census as unable to read or to write. Only five (three black and two white) of the 119 grand jurors identified from the 1880 census were listed as unable to read or to write.¹⁷⁰ By comparison, the 1870 census provides figures indicating that 21.2% of the New Orleans male population over twenty-one years of age (the sex and age group eligible for grand jury service in Louisi-

167. Whether government employees were subject to challenge for cause because of implied bias was a question in the 1870's which the Supreme Court had not yet decided. The Supreme Court eventually ruled that government employees could serve as jurors and their service did not violate the accused's right to a fair and impartial jury. *Frazier v. United States*, 335 U.S. 497 (1949); *United States v. Woods*, 299 U.S. 123 (1936); *Crawford v. United States*, 212 U.S. 183 (1909).

168. See app. C *infra* for information about place of birth for the grand jurors identified in the 1870 census. The census data indicates that 12,348 Orleans residents of the total Orleans population of 191,418 claimed Union states as their place of birth. I NINTH CENSUS OF THE UNITED STATES, STATISTICS OF POPULATION, TABLES I TO VIII INCLUSIVE 380-85, *Table VII, Population of Each State and Territory (By Counties) Classified by Place of Birth, New Orleans* (1872).

As used in the text, "Union states" means all states and territories of the United States which did not secede to join the Confederate States of America. The Confederate States of America had eleven member states: Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Texas, Arkansas, and Tennessee.

169. See app. D for information about place of birth for the grand jurors identified in the 1880 census. In 1880, 9,565 Orleans residents told the census enumerator that they had been born in Union states. The total population for Orleans Parish in 1880 was 216,090. PT. I, COMPENDIUM OF THE TENTH CENSUS 542-45, Table XXXII, *Native population of fifty principal cities distributed according to states and territories of birth, New Orleans* (1883).

170. Of the five persons from the 1880 census, two were excused from jury service because of inability to read or to write English. Both had French surnames: Gustave Imbert (mulatto, April term 1875) and Gustave Esnard (white, April term 1875). Mr. Esnard had already served once as a grand juror, in the second grand jury November term 1872, prior to the adoption of the court rule requiring English literacy.

See apps. C & D for indication of the grand jury terms at which these illiterate persons had been called for jury service.

ana) was illiterate.¹⁷¹ No comparable information for Orleans Parish can be obtained from the 1880 census, but voter registration figures for 1879 indicate that 26.4% of the registered voters were unable to write their names.¹⁷² Consequently, census data indicates that jury commissioners of the 1870's excluded a sizeable percentage of the Orleans population because they were illiterate. The Democratic claims, consequently, appear to be without merit.

When Democrats claimed that federal grand juries were populated with unqualified persons, they were, however, referring primarily to black grand jurors. The allegation that blacks were being allowed to serve as jurors was accurate in the circuit court for Louisiana. Of the 168 jurors identified in the census data, 53 (31.5%) identified themselves as black and 115 (68.5%) as white.¹⁷³ These racial percentages on the grand juries are comparable to the racial percentages in the total population of Orleans Parish. For 1870, the black population of Orleans Parish was 26.4 percent and the white percentage was 73.6.¹⁷⁴ Similarly, for 1880, the black population constituted 26.7 percent while the white population equaled 73.3 percent of the population.¹⁷⁵ Hence, black citizens were not only being allowed to serve on federal grand juries, but they were being allowed to serve in significant numbers during the years 1872 through 1878.

In light of all the available evidence, the Democrat description of the selection process and of those individuals being called to serve as

171. In Orleans Parish, 10,101 males age 21 and over were listed as illiterate. I NINTH CENSUS, STATISTICS OF THE POPULATION OF THE UNITED STATES 414, *Table X, School Attendance and Illiteracy, State of Louisiana* (1872). The total male population 21 and over in Orleans Population in 1870 was 47,737. *Id.* at 629, *Table XXIV, Selected Statistics of Age and Sex, State of Louisiana*.

The eligibility requirements for juror service in the United States circuit court of Louisiana are detailed in notes 101-105 *supra* and accompanying text.

172. In 1879, 41,505 persons were registered to vote in Orleans Parish. Of this total, 10,964 wrote their names by making a mark. ANNUAL REPORT OF THE SECRETARY OF STATE (1879), at 6-7, *Exhibit A, Statement of the Registered Voters of the State of Louisiana for the Year 1879*.

173. Of the 53 grand jurors who identified themselves in the census as colored, 13 were blacks and 40 were mulattos. These figures constitute 7.7% and 23.8% respectively, of the 168 identified jurors. See app. B *infra* for the racial composition of the grand juries for the years 1872 to 1878.

174. I NINTH CENSUS OF THE UNITED STATES, STATISTICS OF POPULATION, TABLES I TO VIII INCLUSIVE 34, *Table II, Population of the State of Louisiana by Race and by Parish* (1872). The Census Bureau aggregate data did not give a further breakdown of the figures on the colored population into black and mulatto categories.

175. PT I, COMPENDIUM OF THE TENTH CENSUS 353, *Table XXIII: Population by race and by counties* (1883).

The first grand jury November term 1872 had no black grand jurors. April term 1878 and November term 1878 had the next lowest absolute number of black grand jurors and percentage of black grand jurors. Only two of the identified grand jurors in April and November terms 1878 were blacks, but they constituted a percentage of 16.7 and 15.4 respectively. By contrast, nine black grand jurors served on the April term 1873 and November term 1876 grand juries, constituting 56.2% and 40.9% of the identified grand jurors for those terms. With respect to the other terms of court during the 1872-1878 period, the percentage of identified grand jurors who classified themselves as black remained at approximately 30%. These figures indicate that if November term 1872 is excluded, then through the entire 1872-1878 period, blacks in New Orleans were included on grand juries in percentages which approached or bettered the percentage of blacks in the total population of Orleans Parish.

grand jurors cannot be considered a total fabrication. At least in Louisiana, evidence indicates that persons likely to be loyal to the Republican party were frequently utilized as federal grand jurors. These persons, moreover, were selected through a system dominated by active Republicans. Thus, while the Democratic claims about the shortcomings of the system and the grand jurors can be greatly discounted due to the political hatreds and fears of the Reconstruction Era, the evidence does demonstrate that partisanship pervaded the system. Consequently, Democratic congressmen were understandably intent on obtaining passage of the Jury Selection Act of 1879. Although the demands for reform in jury selection appear to have been motivated by legitimate concerns of juror partisanship, the question still remains whether the Democratic-inspired changes rectified the abuses documented by supporters of the 1879 Jury Selection Act.

*b. Composition of federal grand juries after 1879*¹⁷⁶

The statistical picture of grand juries from 1879 through 1887 establishes that Democrats were successful, at least in Louisiana, in changing the composition of grand juries. The 1879 Act remedied each of the abuses outlined by Democrats in the pre-enactment debates.

The Democrats had complained that partisan Republican activists dominated the grand juries under the old system.¹⁷⁷ After 1879, the complaint was no longer valid. Of the 365 grand jurors serving from 1879 to 1887, 39 (10.7%) were identified as active political partisans. The political identification of those 39 persons, however, was almost the exact opposite of the political identification of those grand jurors who served prior to 1879. Twenty-four of the 39 politically active grand jurors (61.5%) were members of the Democratic Party.¹⁷⁸ Only 9

176. To evaluate the impact of the Jury Selection Act of 1879 on composition of federal grand juries in Louisiana, I chose the period from November term 1879 through November term 1887 for statistical study of the jury composition. During that period, 365 persons were summoned to serve as grand jurors in the circuit court which sat in New Orleans. By using the census information from 1870 and 1880, 208 grand jurors were adequately identified for the statistical study. These 208 grand jurors represent 57% of the total number of person called as grand jurors.

Appendix A provides a complete list of the 365 persons summoned for grand jury service between November 1879 and November 1887. App. A *infra* also indicates which of those 365 persons were adequately identified in the census data.

Not all 208 identified grand jurors were located in both the 1870 and the 1880 census data. One-hundred and nineteen of the grand jurors were located in the 1870 census; 159 were located in the 1880 census. When the overlap between grand jurors who were located in both the 1870 and 1880 census is taken into account the total of grand jurors identified in the census data is 208 persons for the grand jury terms, November 1879 to November 1887.

See app. B for information on these 208 grand jurors by combining the information obtained from the 1870 census and the 1880 census. The information is then compiled for each individual grand jury term; Appendix C provides information on each individual grand jury term based solely on information obtained from the 1870 census; Appendix D provides information on each individual grand jury term based solely on information obtained from the 1880 census.

177. See notes 154-57 *supra* and accompanying text.

178. See app. E *infra*.

grand jurors (23.1%) could be identified as active in the Republican Party.¹⁷⁹ If either political party dominated grand juries after 1879, the evidence indicates that it was the Democratic Party.

Democrats had complained in the pre-1879 period that northern carpetbaggers were being used on federal juries to insure Republican domination. After the 1879 change in juror selection, persons born in Union states were still selected for grand jury service, but not with the same frequency. According to the 1870 census, 20 of the 119 identified grand jurors (16.8%) were born in northern states; information from the 1880 census indicates that 23 of the 159 identified grand jurors (14.5%) came from northern states. The grand juries during the 1879 to 1887 period contained approximately 4 percent fewer persons with a northern background than had the grand juries from 1872 to 1878. During the post-1879 period, northern-born persons still served on grand juries to a greater degree than their percentage in the general population would warrant. But the fact that their level of participation decreased must have diminished Democratic anxieties about carpetbagger control of the jury system.¹⁸⁰

Democrats were also successful in reducing black participation on grand juries. White-supremacist Democrats in the South had complained bitterly about the participation of blacks on federal grand juries. Democrats hoped the the selection system being adopted in the Jury Selection Act of 1879 would reduce or eliminate participation by blacks on federal juries. Louisiana Democrats must have considered the new selection system a rousing success because of the 208 grand jurors identified for the 1879-1887 period, only 16 (7.7%) listed their racial self-identification as black. One hundred and ninety-two grand jurors (92.3%) identified themselves as white. These figures on black participation on federal grand juries after 1879 clearly indicates that blacks in Orleans Parish no longer participated in the federal jury system to any significant degree.¹⁸¹

The 1879 Jury Selection Act had the most profound effect on the racial composition of grand juries. Of the identified grand jurors who served during four of the terms following 1879, none were black. Eight grand juries during the post-1879 period had only one black juror. On

179. See app. E *infra*. In addition, six other grand jurors could be identified as politically active, but their party identification was unclear or they were active in minor political parties. These six grand jurors constitute 15.4% of the 39 grand jurors found to be active in partisan politics.

180. Information about the percentage of northerners on the pre-1879 grand juries, and about the percentage of Northern-born persons in the population of Orleans Parish as a whole, is located in notes 168-69 *supra* and accompanying text.

181. Data on the racial composition of the pre-1879 grand juries and on the racial composition of the population of Orleans Parish as a whole is located at notes 173-75 *supra* and accompanying text. Of the 16 persons who identified themselves as colored, 4 listed themselves as black and 12 listed themselves as mulatto. Hence, the percentage of the 208 identified grand jurors who were black is 1.9, and who were mulatto is 5.8.

only three grand juries, November term 1882, November term 1883, and April term 1886, did the percentage of blacks begin to approach the percentage of black grand jurors serving on pre-1879 grand juries.¹⁸²

In two respects, the grand juries of the 1879-1887 period resembled the grand juries of the 1872-1878 period. The number of literate jurors and jurors employed by the government remained stable. Despite a high illiteracy rate in Orleans Parish, the grand jurors of both the pre-1879 period and the post-1879 period were overwhelmingly literate. None of the 159 grand jurors identified through the 1880 census were listed as unable to read and write. Only 3 grand jurors identified in the 1870 census were listed as illiterate, a number amounting to 2.5 percent of the 119 grand jurors located in the 1870 data.¹⁸³

The percentage of jurors holding government employment also remained consistent. Sixteen of the 208 identified grand jurors held jobs which were governmental in nature. Hence, 7.7 percent of the grand jurors identified in the 1879 to 1887 period were possibly open to charges that their grand juror service would be influenced by allegiance to the government. This percentage for the 1879 to 1887 period is identical to the percentage of identified grand jurors of the 1872 to 1878 period who held government positions.¹⁸⁴ Consequently, the method

182. During both November term 1882 and the April term 1886, two blacks served as grand jurors, constituting a percentage of identified grand jurors of 11.8% and 12.6% respectively. During November term 1883, four blacks served as grand jurors, 30.8% of the identified grand jurors. Despite these three grand jury terms, the information on particular grand juries during the 1879 to 1887 period makes clear that blacks had been reduced to token participation in the federal grand jury system.

Appendix B provides information on the racial composition of each individual grand jury and permits a comparison of the pre-1879 grand juries with the post-1879 grand juries.

183. The illiteracy rate for the pre-1879 grand juries and for the Orleans Parish population is located at notes 170-72 *supra* and accompanying text.

184. Information on grand juror employment in a government job for the 1872-1878 period is located at notes 164-67 *supra* and accompanying text. Although I was able to identify 7.7% of the grand jurors, both before and after 1879, as holding government jobs, I had no information indicating which political party had made the patronage appointments of the identified grand jurors. Hence, the only conclusion I can draw is that the likelihood that a person employed in a government job would be selected for grand jury service did not change once new selection procedures mandated by the Jury Selection Act of 1879 were implemented.

However, during the 1870's the Republican Party dominated the elected governmental offices from whence patronage came, both in the state of Louisiana and the United States. The Democrats did not control the governorship of Louisiana until after the compromise of 1876 permitted Francis Nicholls to assume the gubernatorial chair. Control of the state legislature by Republicans until 1877 also meant control of the election of United States senators. No Democrat occupied the White House during the 1870's. By contrast, the Democratic Party dominated the elective positions in the state of Louisiana throughout the 1880's. No Republican was elected to the position of governor. While the Republicans could still win election to state offices in "Black Belt" parishes, Orleans Parish was a Democratic stronghold throughout the 1880's. Democrats also constituted the majority party in the state legislature. In addition, Democrats were able to elect Grover Cleveland to the presidency for the period 1884-1888. Hence, while Republicans dominated the patronage-dispensing offices in the 1870's, the Democrats dominated these same offices in the 1880's.

For a study of the political situation in Louisiana during the period of this grand jury study,

of jury selection used before or after 1879 did not change the likelihood that a person employed in a patronage position would be selected for grand jury service.

The statistical picture of grand jurors in the 1879-1887 period undoubtedly presents a portrait more pleasing to Louisiana Democrats than the statistical picture of 1872-1878 grand jurors.¹⁸⁵ Fewer active Republicans, fewer northerners, and substantially fewer blacks served on grand juries. But even though the composition of the grand juries changed, would it be correct to conclude that the new composition was attributable to changes in juror selection methods mandated by the 1879 Act?

c. Changes in jury composition: causation

After 1879, one of the two juror commissioners for the federal circuit court was a member of the Democratic Party, while the other was a member of the Republican Party. When the jury box was filled for the first time with at least 300 names, and thereafter when additional names were placed in the jury box, the Democratic commissioner provided half of the names for the box, and the Republican commissioner provided the other half. Assuming that the Democratic commissioner selected persons he considered favorable to the states' rights and white supremacist policies of the Democratic Party, then half the names in the box should have been white Democrats. If a similar assumption is made that the Republican commissioner selected persons he considered favorable to the policies of the Republican Party, then half the names in the box should be those of Republicans—including blacks, who comprised a significant proportion of Republican strength in the South. Nonetheless, only 23.1 percent of politically active grand jurors from 1879 to 1887 were Republicans. Only 7.7 percent of the identified grand jurors during this time were black, even though approximately 15 percent of the grand jurors would have been black if the Republican commissioner had selected blacks at pre-1879 juror selection percentages. If the difference between pre-1879 and post-1879 grand juries was attributable solely to changes in juror selection methods, then the

see generally W. HAIR, *BOURBONISM AND AGRARIAN PROTEST: LOUISIANA POLITICS 1877-1900* (1969); J. JACKSON, *NEW ORLEANS IN THE GILDED AGE: POLITICS AND URBAN PROGRESS 1880-1896* (1969); Singletary, *The Election of 1878 in Louisiana*, 40 LA. HIST. Q. 46 (1957).

185. An additional statistic indicates a difference between grand juries selected before and after 1870. The grand juries prior to 1879 contained 34.3% blue collar workers (58 of the 168 identified grand jurors) and 53.6% white collar workers (90 of 168). By contrast, the grand juries chosen after 1879 reflect a blue collar percentage of 20.7 (43 of the 208 identified grand jurors) and a white collar percentage of 68.3 (142 of 208). The grand juries after the change in selection methods were filled with more persons who, based on occupational status, could be characterized as "upright," "stable," or "leading" members of the community.

Appendix B provides occupational information for each grand jury term from November 1872 through November 1887.

percentages of both Republicans and blacks on post-1879 grand juries should have been approximately double their actual levels.

The percentage of either active Republicans or blacks is approximately half of what could be expected if the difference in composition between pre-1879 and post-1879 grand juries were attributable solely to the change in juror selection methods. Thus, while the data supports the conclusion that the Jury Selection Act of 1879 had a significant impact on the composition of grand juries, other independent factors account for the additional underrepresentation of Republicans and blacks in post-1879 grand juries.

Active Republicans and blacks were underrepresented on the 1879-1887 juries because of policies adopted during the 1880's by the Republican Party. In the decade following the end of Reconstruction, the Republican Party deemphasized support for civil rights and broadened its southern membership to include white businessmen, as well as Union loyalists and blacks. These changes in Republican Party policy may well have influenced the selection decisions of the Republican jury commissioner when he contributed names to the jury box. Thus, the extra underrepresentation may be attributed to policy changes by the Republican Party.¹⁸⁶

Although the change in juror selection methods was not the only cause of the changed composition of post-1879 grand juries, this fact does not diminish the importance of the Jury Selection Act of 1879. Its passage had a profoundly depressing effect on white and black Republicans in the South. The Act was part of the Democratic campaign to dismantle Reconstruction and destroy the vestiges of Republican rule in the South.¹⁸⁷ The passage of the Jury Selection Act, moreover, permitted the Democrats to reacquire, indeed to solidify, a hold on power

186. See generally W. HAIR, *BOURBONISM AND AGRARIAN PROTEST: LOUISIANA POLITICS 1877-1900* (1969).

187. Senator Dawes gave a Republican description of this campaign by the Democratic Party to destroy Reconstruction when he stated:

I cannot, however, but believe that this [H.R. 2252—jury selection bill] is the most vicious of all the measures yet undertaken in the name of this new evangel of reform. There have been during this extra session quite a number of measures inaugurated with more or less success for the purpose of carrying out the proclamation under which this new order of things has been inaugurated. We set out with a new theory of the elective franchise, that the power of that franchise was hereafter to be measured by the number of pieces of paper in the ballot-box without regard to how they came there or without regard to the number of freemen entitled to deposit them. An attempt was made to seize the Presidency upon this theory; . . . Power has been obtained in one branch at least of the National Legislature upon this theory, and so obtained an assault has been made upon the Army . . . followed by an effort to deprive the civil officers of the Government of the power to enforce the peace. After that came provisions to strip the United States courts of their jurisdiction and limit as far as possible the subjects over which they could exercise any jurisdiction or authority whatever. But it has been reserved to what are supposed to be the last hours of this extra session to set on foot this new measure by which it is attempted to establish a new jury system for the United States, under which party spirit is to stalk into the courthouse itself . . . and there to accomplish, if possible, what this most malignant demon of party spirit cannot accomplish elsewhere.

9 CONG. REC. 2025 (1879).

in all branches of government. After the Jury Selection Act of 1879, the federal jury system was also open to influence and even to domination by the Democratic Party.

For blacks, the Jury Selection Act of 1879 was particularly devastating. Although blacks would have faced antagonism whatever the method of juror selection, the change in juror selection methods in 1879 guaranteed that fewer indictments and fewer guilty verdicts would be obtained against white Democrats attempting to deny blacks their newly acquired civil rights. Because the 1879 Act allowed Democrats to hold one of the two jury commissioner positions, white Democrats were assured of fifty percent of the grand juries and fifty percent of the petit juries—sufficient jury strength to protect the people and policies of the Democratic Party from federal judicial scrutiny. After 1879, the federal grand jury system in Louisiana was, for all practical purposes, closed to blacks attempting to protect their rights.

V. THE CIVIL RIGHTS PROVISIO

The composition of the new jury commission should have induced fear in blacks and other supporters of civil rights. The legislative history of the adoption of the civil rights proviso of the Jury Selection Act of 1879, and its precise language, likely turned that fear into despair.

Nothing in the first two Democratic proposals to change the method of jury selection explicitly indicated whether the rights of blacks to serve on juries was to be protected. To Republicans, this silence represented a glaring defect in the legislation. Thus, on June 5, 1879, Senator Edmunds (R-Vt.) proposed adding the language of section four of the 1875 Civil Rights Act¹⁸⁸ making clear that blacks were still entitled to serve as jurors in both federal and state courts.¹⁸⁹

Democratic senators immediately objected that the Constitution did not empower Congress to control eligibility for jury service in state courts. These Democratic senators conceded that Congress had the power to control eligibility for jury service in the federal courts, but asserted that no comparable power existed for Congress to regulate state court procedures. The Edmunds amendment, Democratic senators railed, permitted unconstitutional federal interference in the sovereign affairs of the states.¹⁹⁰ The Democrats sent the Edmunds

188. Act of March 1, 1875, ch. 114, § 4, 18 Stat. 336. The Act reads in part:

That no citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as a grand or petit juror in any court of the United States, or of any State, on account of race, color, or previous condition of servitude; and any officer or other person charged with any duty in the selection or summoning of jurors who shall exclude or fail to summon any citizen for the cause aforesaid shall, on conviction thereof, be deemed guilty of a misdemeanor

189. 9 CONG. REC. 1786 (1879).

190. 9 CONG. REC. 1787 (1879) (comments of Sen. Thurman, Sen. Hill of Georgia, Sen. Whyte, Sen. Beck, Sen. Eaton & Sen. Bayard). During the debate concerning this particular amendment, Republican senators never once mentioned that the right to serve on state juries was

amendment to a crushing defeat.¹⁹¹

Senator Conkling (R-N.Y.) promptly introduced an amendment adopting the language of section 4 of the Civil Rights Act of 1875, but excepting state courts from the proviso. Conkling maintained that, because his legislation removed concerns of federal encroachment on state sovereignty, Democrats should agree to the civil rights guarantee.¹⁹² Nonetheless, Democratic senators took the floor and argued that the amendment was superfluous because identical protection existed under the Civil Rights Act of 1875.¹⁹³ Democrats quickly acted upon their belief by voting to defeat the Conkling amendment.¹⁹⁴

Republicans were not willing, however, to forsake the rights of blacks to serve on juries. Senator Edmunds rejoined the debate to accuse the Democrats of purposefully ignoring the fourteenth amendment. Edmunds claimed, moreover, that Democratic floor leaders had purposefully failed to inform the Senate that repealer language in the legislation, stating that "[a]ll general and special laws in conflict herewith are hereby repealed," impliedly repealed section 4 of the Civil Rights Act of 1875.¹⁹⁵ Senator Conkling charged that the jury selection legislation was designed to repeal protection afforded blacks under the Civil Rights Act of 1875.¹⁹⁶

Conkling's argument brought forth an angry rejoinder from Senator Thurman (D-Ohio), who intoned that no reasonable judge could possibly interpret the repealer language of the proposed legislation as repealing section 4 of the 1875 Civil Rights Act. Democrats had neither the intention nor the desire, Thurman assured the Senate, to deprive blacks of their rights.¹⁹⁷ Senator Bayard (D-Del.) agreed with Senator Thurman, but he moved, on behalf of the judiciary committee,

already protected in the Civil Rights Act of 1875. Furthermore, the only constitutional defense made for the amendment was a snide assertion offered by Senator Edmunds. He claimed that the amendment was part of the commerce power of Congress because the legislation on jury selection methods, to which the amendment would be attached, was legislation concerned with "trade" in jurors. *Id.* at 1786-87. Republican senators were apparently gleefully willing to let their Democratic colleagues exhibit either their ignorance of, or their unbending opposition to, the provisions of the fourteenth amendment and the Civil Rights Act of 1875.

191. 9 CONG. REC. 1787-88 (1879).

192. 9 CONG. REC. 1788 (1879).

193. 9 CONG. REC. 1788-90 (1879) (exchange between Sen. Hill, D-Ga., Sen. Bayard, D-Del., Sen. Thurman, D-Ohio & Sen. Conkling, R-N.Y.).

194. 9 CONG. REC. 1790 (1879).

195. 9 CONG. REC. 1793 (1879).

196. 9 CONG. REC. 1815-16 (1879) (exchange between Sen. Conkling & Sen. Thurman).

197. 9 CONG. REC. 1816-17 (1879). Republicans could justifiably be skeptical of the argument being made by Sen. Thurman that no person could reasonably argue that adoption of the jury selection legislation would impliedly repeal § 4 of the Civil Rights Act of 1875. During the same debate on the jury selection legislation in which Sen. Thurman made his argument against implied repeal of § 4 of the 1875 Civil Rights Act, other Democrats were arguing that the express repeal of § 1 of the Act of June 17, 1862 by the Ku Klux Klan Act of 1871 had impliedly repealed § 2 of the Act of June 17, 1862. See text accompanying notes 24, 43, 49 & 50 *supra*. Even if Republican senators were willing to accept that Senator Thurman sincerely believed in his argument, Republicans would not accept that Thurman spoke for his fellow Democrats.

that the bill be recommitted to committee to correct the alleged defect pointed out by Senator Edmunds.¹⁹⁸ As Republicans jeered in disbelief at the reason expressed by Bayard for recommitment, Senator Thurman reluctantly agreed to support the motion to recommit:

It is simply because there is something wrong in this Government that this bill does not become a law precisely as it is. When the men who have the charge of the Government in the legislative department, and who have a duty to perform, are compelled to pause by the fact that another department of the Government has power to stop our legislation, and that therefore we are obliged to consult not simply what is right, but what is practicable, the Senator from New York [Conkling] gets up and wants to sneer at the Judiciary Committee and at the majority of the Senate.¹⁹⁹

The motion to recommit failed to pass. Republicans, sensing the legislation as presently worded would be vetoed by President Hayes, joined Democrats who preferred to be "right" rather than "practicable."²⁰⁰

Six days later, on June 10, 1879, as the House debated another version of the jury selection legislation, Representative McMahon (D-Ohio) informed the House that the Committee on the Judiciary had added a proviso to the bill not found in prior jury selection bills. McMahon then blandly explained that the purpose of this proviso was "to demonstrate what was already the fact, that we did not in any way intend to abridge the rights of our colored citizens as jurors, and that we intended to guarantee them all their rights everywhere, whatever may be the State law upon the subject."²⁰¹ This proviso was eventually

198. 9 CONG. REC. 1821 (1879).

199. 9 CONG. REC. 1822 (1879).

200. 9 CONG. REC. 1828 (1879). The motion to recommit failed to pass by a vote of 27 against and 15 for the motion. Except for Senator Hill of Colorado, Republicans voted solidly against the motion to recommit. By contrast, only 13 Democrats, plus Senator Davis (Ind. D-Ill.), voted to recommit. A majority of the Democrats joined the Republicans in voting against the motion. Those 14 Democrats were Beck of Kentucky, Eaton of Connecticut, Hampton of South Carolina, Harris of Tennessee, Hereford of West Virginia, Hill of Georgia, Jonas of Louisiana, Maxey of Texas, Pendleton of Ohio, Slater of Oregon, Vest of Missouri, Voorhees of Indiana, Whyte of Maryland, and Withers of Virginia. Although each of these Democrats voted against the motion to recommit, records of the legislative debates indicate that Senators Beck, Eaton, Hereford, Pendleton, Slater, Vest, and Voorhees believed that the legislation as drafted was "right" because the repealer language of the legislation could not reasonably be interpreted as an implied repeal of § 4 of the Civil Rights Act of 1875. Senators Hampton, Harris, Hill, Jones, Maxey, Whyte, and Withers most likely intended that the repealer language be interpreted to repeal § 4 of the 1875 Act. However, they believed the legislation was "right" to repeal that "abominable," "unconstitutional" 1875 act.

This one vote on the motion to recommit accounts for 87% of the deviant Democratic votes that occurred throughout all the votes taken on the various jury selection bills debated during the first session of the 46th Congress. See note 42 *supra*.

201. 9 CONG. REC. 1893 (1879). The proviso read as follows: "that no citizen possessing all other qualifications which are or may be prescribed 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." Moreover, the repealer language which had been included in previous versions of the jury selection legislation, and which had provoked the comments in the Senate (by Edmunds, Conkling, Thurman, and Bayard) about implied repeal of § 4 of the 1875 Civil Rights Act,

included in H. Res. 2381, the bill that ultimately became the Jury Selection Act of 1879.

McMahon was less than truthful about the proviso. The proviso was included in the legislation to avoid a veto, not to protect the civil rights of blacks.²⁰² The Democrats' proviso, moreover, was limited to protecting the rights of blacks to serve on federal grand juries. The rights of blacks to serve on state court juries, a right explicitly protected in the Civil Rights Act of 1875, was not expressly protected in the proviso. Democrats were prepared to argue in future litigation that this proviso, as an expression of the legislative intent of a Democratic Congress, impliedly repealed any broader protection of the right to serve on juries granted by the Civil Rights Act of 1875.²⁰³

VI. CONCLUSION

As the statistics previously presented indicate, the participation of blacks on federal juries was reduced to an insignificant level after passage of the Jury Selection Act of 1879. Hence, the proviso protecting the rights of blacks to serve on federal juries was not translated into practical application. But although the words of the proviso were to

was now missing from the House version of H.R. 2252. The repealer language never again reappeared in later versions of the jury selection legislation.

On June 12, two days after the McMahon proviso was discussed, the House debated S. 375. As part of that debate, Representative Herbert of Alabama offered an amendment which stated "that this act shall in no way impair the force and effect of Section 4 of the Act of March 1, 1875, entitled an Act to Protect All Citizens in their Civil Rights." *Id.* at 1959. This language added to S. 375 clearly protected the right of blacks to serve on juries in both state and federal courts, which is greater protection than that afforded by the McMahon proviso. But S. 375 was never passed by the House and Democrats apparently decided that the McMahon proviso would adequately protect the jury selection legislation from a presidential veto. Thus, when H.R. Res. 2381 was presented to Congress, the McMahon language, rather than the Herbert language, was used as the civil rights proviso to the jury selection legislation which ultimately became law. *Cf.* note 124 *supra*.

202. During the debate on the motion to recommit S. 375, Senator Conkling taunted Senator Bayard who had introduced the motion to recommit by saying,

The long and short of this matter is that the Committee on the Judiciary . . . brought in here a bill . . . pressed it in committee to a conclusion, brought it here and pressed it, so that last evening [June 5] it was only after a struggle that we were permitted to adjourn . . . But during the night the Democratic members of the Judiciary Committee, or somebody else who controls the doings and destinies of this body, has discovered that it will not do to pass this bill. Why not? We are told now for the first time by the Senator from Delaware [Bayard]; and what does he say? Because of a defect which we [Republicans] sought yesterday to remedy . . . Now it turns out that at half after the hour the next day [June 6] these charioteers of legislation have concluded that it will not be safe to submit this bill to the executive approval.

9 CONG. REC. 1822 (1879).

When Senator Thurman responded that Conkling was wrong about the reason why Senator Bayard, on behalf of the Judiciary Committee, had moved to recommit, the Senate was sidetracked from the substantive debate to a debate concerning whether the comments of Senator Thurman had improperly disparaged the motives and character of fellow senators, in violation of the rules for debate of the Senate. *Id.* at 1824.

203. See notes 197, 200 *supra*.

prove irrelevant, the legislative history of the passage of the proviso retained great meaning.

Democratic complaints about methods of federal jury selection were not altogether unjustified. Democratic proposals for change could thus be viewed sympathetically as proposals to restore impartiality and integrity to the jury selection process. But after the congressional debate on the civil rights proviso of the jury selection legislation, no doubt could exist that Democratic proposals for change were not meant to obtain impartiality and integrity. Rather, the Democratic proposals were designed to obtain power for the Democratic Party and its adherents. The debate over the civil rights proviso established that Democrats were intent on employing jury selection methods at least as unethical as those allegedly utilized by Republicans under older methods of jury selection. The civil rights proviso debate demonstrated that tampering was not the issue; rather, the real issue was whose rights, blacks or white southern Democrats, would be abridged by methods of jury selection used in federal courts.

The debate about the adoption of a civil rights proviso in the jury selection legislation, and especially the language of the proviso as finally adopted, also clearly indicated that Democrats had not accepted the new constitutional order created by ratification of the thirteenth, fourteenth, and fifteenth amendments. The Democrats purposefully limited the proviso to the protection of the rights of blacks to serve on juries in federal courts. They continued to believe that the thirteenth, fourteenth, and fifteenth amendments had not increased the power of the federal government over the states. As far as the Democrats were concerned, the states of the Confederacy had lost the Civil War and hence the right to secede; but Democrats believed that the Union was still a union of sovereign states joined by a constitution whose fundamental principle of state sovereignty was unaffected by the Civil War amendments.²⁰⁴

The Democratic proposals for change in jury selection methods, and the debate about those proposals, demonstrated that the bitterness of the Civil War was a powerful obstacle to fair and just laws. The Jury Selection Act of 1879 thus stood as a portent of the next ninety years in United States history. Democratic intransigence in constitutional interpretation and federal weakness in protecting statutorily protected civil rights characterized the post-Civil War period.

204. Senator Hampton of South Carolina most succinctly stated the viewpoint of unyielding Democrats about the impact of the Civil War on the United States Constitution when he argued during the debates over the jury selection legislation:

Now I do not propose to make any constitutional argument on this subject. It is sufficient for me to say that I hold the form and character of our Government to have been unaltered by the late war, and that the mutual relations of the general Government and the several States of the Union remain precisely as they were when the Union was formed. I hold the recent constitutional amendments have wrought no change in these relations and in these views.
9 CONG. REC. 1780 (1879).

Discrimination against blacks in jury selection was but a microcosm of a greater historical tragedy. Black Americans would have to wait until the Jury Selection and Service Act of 1968 before receiving acceptance as full citizens in the jury box.

APPENDIX A

First Grand Jury—November Term 1872

Robert B. Ancoin^(?); J. Banduc*; Daniel Berry*; Jules A. Blanc*; Fred K. Camerden*; A. I. Doize*; Felix A. Ducros*; John G. Fleming*; E. F. Golson; J. J. Irby^(?); John Klein*; Everett Lane; Geo. W. Manson*; L. C. Morris; Charles Pothoff; G. G. Steever^(?); James Wallace; John S. Wallis; E. B. Wheelock*; Joseph H. Wilson.

Second Grand Jury—November Term 1872

J. M. Burchard*; Armand R. Clagne; James Desban; C. B. H. Duplessis*; Ansel Edwards; Gustave Esnard*; Emile Forstall; William George*; Charles Grandpre*; E. B. Granger*; John M. Hoyle; W. W. McCullough; Theo Meeks*; W. H. Pemberton*; J. H. Perkins; Louis Pessou*; Henry Rey*; Octave Rigaud*; C. S. Sauvinet*; H. Shelby; C. L. St. Cyr*; L. C. Talhard; John H. Walsh; J. Madison Wells*.

April Term 1873

George Alces; Leonville Augustin*; Albert Bacas*; Paul Bonseigneur*; Dennis Burrell; Jules Chevalier; Amos S. Collins*; O. T. Connor; G. Donato*; David Douglas*; Bazile Graves; Edward Heath*; Samuel E. Hermann; R. G. Hobbs; Alfred Jones; Casimir Labatt*; Adolphe Lacroix; J. Langles; Placide Maresche; Miles Moore*; Honare Pothier*; Joseph Presas; Hemogue Raphael*; Eusibe Reggio*; Edward Rillieux; A. Rougelot*; Bernard Saulay; C. S. Sauvinet*; Mortimer F. Smith*; Seymour Straight; Levi Williams*.

November Term 1873†

Data not collected for this term.

April Term 1874†

Data not collected for this term.

November Term 1874

Frank Alexander*; Frank Baumer*; William Bernard; John Burrows*; Charles Conckling*; Jules Desalles*; August Dreden; Lucien Dubuc*; Charles Duplantier*; E. Dussuau Sr.^(?); Oscar Elmore*; Alce Labat; F. J. Leche*; Emile Mary; V. A. Meillieur; Charles Randal*; James Riley; Edward Roberts*; Hy Saunders; J. S. Sauvinet*; James Scott; Hyman Smith*; Florestan St. Cyr.

April Term 1875

C. J. Adolphe*; George W. Andrews*; Leonard Boyer*; Baptiste D'hautrine; Albert Delisle*; Daniel Donovan*; Gustave Esnard*; Benjamin E. Hardy*; George Herriman Sr.*; E. A. Hughes*; G. Imbert*; Theodole Imbert; I. H. Keith*; Emile Lambert*; Joseph H. Meillieur*; Stephen Montplaisir*; Robert Pavageau*; Theodole Picou*; Morant S. Robertson^(?); A. Romain; W. Van Norden*; William Weber*; Ernest Young*.

November Term 1875

A. M. Blanc*; Thomas Boswell*; Gustave Boutin*; F. C. Christophe*; James Coughlin*; F. Dede*; Eugene Duvernay*; Spencer Field, Jr.*; Lafayette Folger*; Louis Gaspar; A. B. Gernon; M. M. Greenwood*; William Hart; John H. Keller*; Samuel G. Kreeger; Joseph Montplaisir*; Isham Nicholas; John O'Neil*; I. B. Pirole*; A. Ramos*; Austin Roundtree*; James B. Sinnott*; H. B. Stephens*; Adrien Vidal; George W. Wright*.

* Names of grand jurors identified in the census data of 1870 and 1880.

(?) The spelling of the names (including initials) in the Juror Books of the Circuit Court was unclear to me.

† Data was not gathered for the terms indicated either because no grand jury was summoned for that term or because I inadvertently failed to locate the list of grand jurors for that term.

April Term 1876

Elijah C. Baxter*; Samuel Bell; Lino Bergacque (?); Charles A. Blase; Nat Burbank*; R. D. Carl*; Wm. M. Dane; A. J. Delisle*; Aristide Ducurge*; Ernest Dumas*; Anthony Frederick*; Jeff Harrison*; Joseph Mansion*; John Mascaro*; John Preston*; George Seymour*; Gustave Tournade; Wm. Wagner*; James Ward; John Ward*; D. C. Wooten*.

November Term 1876

C. J. Adolphe*; B. Anglade*; D. C. Azaretto*; P. E. Bechtel*; J. G. Bienvenu*; J. M. Burchard*; Pierre Casanave*; C. Cavanac, Jr.; Victor Dejean*; Geo. Delanzac*; Aristide Duconge*; T. Esnard*; Leopold Guichard, Jr.*; J. B. Jourdain; Lucien Lamaniere (?); Agamyr Lanabere*; J. Langles; John A. Letten*; Mandeville Marigny*; James Nott*; Wm. Penberton*; M. C. Randell; Henry Rey*; L. S. Rodriguez; C. L. St. Cyr*; Horace A. Stackhouse*; Paul Villermain*.

April Term 1877†

Data not collected for this term.

November Term 1877

C. J. Adolphe*; A. E. Albert*; Joseph Alcina; Edgar Davis; Jules Dejean; Wm. Desgouttes*; M. B. DuBuisson*; Louis Duplantier*; C. N. Edward; Henry Govan*; W. H. Hire*; J. D. Maxent*; T. C. McCandlish*; W. Mier*; G. Nedit*; G. Porteous*; Hugo Redwitz*; W. J. Richards*; George Waters*.

April Term 1878

Pablo Alcina*; Frank L. Armstrong*; J. L. Bienvenue*; Joseph Blandin; George Burkhardt*; Fred. Cordes; Joseph Coleman; W. B. Conger, Jr.*; A. Darcantel*; John T. Gould; Stoddart Howell*; D. T. Kirby; W. S. Lacour*; L. Lamothe; George D. May; G. W. Miller; Julian Neville; Nelson Peychaud*; George D. Pritchett; John Roberts; Boyd Robinson*; James T. Rodd*; Jules Tardos, Jr.*.

November Term 1878

James Barry; Wm. M. Batchelor*; P. E. Bechtel*; Joseph F. Bourges*; Lewis L. Bourges*; J. F. Callico*; E. Dejean*; J. W. Donnellan; James Fitzpatrick; W. C. Flanders*; J. B. Glaudin; A. Grosch, Jr.*; Harvey W. Green; Daniel C. Harrison*; E. Heath*; D. T. Kirby; J. M. Leclerc*; O. P. Letten*; W. W. Lyons*; John H. McVean (?); H. T. Vennard.

April Term 1879†

Data not collected for this term. The April term 1879 was the last term held prior to the effective date of the Jury Selection Act of 1879.

November Term 1879

W. R. Barstow (?); J. T. Burdeau*; Olivier Carriere*; P. Casenave*; John Chaffe*; Aaron DeSola*; R. B. Flores (?); Oscar J. Forstall*; W. A. Gwyn*; Felix M. Jacobs*; Thomas G. Mackie*; Francis Meteye*; Henry K. Nixon*; Henry Otis*; Henry C. Parker; J. H. Paty; Joseph A. Pinson; John Quinlan; William Simpson.

April Term 1880

E. E. Adams*; Thomas S. Barton; Alphonse Coutin, Jr.*; E. Dejean*; Jules Delpit*; Jules Desalles*; Gustave Duplantier*; Chas. E. Fortnier*; M. L. Fribourg*; C. Glacious; Robert Jones;

* Names of grand jurors identified in the census data of 1870 and 1880.

(?) The spelling of the names (including initials) in the Juror Books of the Circuit Court was unclear to me.

† Data was not gathered for the terms indicated either because no grand jury was summoned for that term or because I inadvertently failed to locate the list of grand jurors for that term.

Horatio Lange*; A. Leaumont; Peter Lenn; W. H. Nicolls; J. E. Riegstorff*; Peter Ross; Joseph Shakespeare*; Wm. L. Shepard*; L. R. Thomas.

November Term 1880

J. U. Adams; Phillip Avegno*; Max Beer*; A. Boishlanc*; Paul Bouligny*; John S. Carter; Ernest Chassagniol*; L. O. Desforbes*; Henry Fortier; H. N. Jenkins; S. Katz; C. R. Kennedy*; Leopold Lange; Hilel Marks; James McGrath; Benjamin Poincy*; A. Salaun*; George Talfrey; Stephen J. Turpin; Jules Varian.

April Term 1881

Edward Borcia; Joseph Claro; Jules J. D'Aquin (?); Joseph Dauphin; B. M. Deno; R. Douvillier; G. H. Dunbar*; B. F. Eschelman*; Peter Ford; Wm. P. Freret*; Wm. J. Furmiss*; Frank George; O. Hopkins*; George W. Keller*; J. H. Keller*; Numa H. Larose*; Gustave Luminaris; A. Lusto*; W. H. Mathews*; R. Nagle; Terry Nugent*; Auguste Pierre; Chas. R. Post*; Joseph Solari; W. R. Stauffer*; James Stewart; Ed. Villere*; E. D. Willet; Joseph B. Wolfe*.

November Term 1881

A. M. Bickham*; Ed Bourgeois*; R. S. Burke; Frank Caldwell*; Chas. J. Carriere; H. L. Canonge*; Bernard Cohen*; James Craig; J. Trineman, Jr.*; Anthony Frederick*; Edward Fulton*; Wm. Gottschalk*; E. F. Haskell*; Julius C. Hubbell; Anatole Johns; A. Lambert; Charles Lewis; Chas. Macready*; Leopold A. Pons*; Samuel W. Rawlins*; Christopher Ullman*; Tho. S. Waterman*; A. J. Wilder.

April Term 1882

B. F. Aguiard; Wm. W. Armstrong; D. C. Azaretto*; T. A. Beck*; Felix Conturie*; Wm. B. Cumberland*; James Fitzpatrick; S. Flash; J. F. Jailliot; Benas Jones; F. A. Kraft*; Eugene Krost*; Pierre A. Lambert, Jr.*; Richard Lambert; John A. Letten*; John Lorenzo*; Joseph Luminaris; Geo. McCloskey*; W. H. McMurray*; C. H. Miller; Louis Pessou*; C. A. Phillipi (?); J. Potter; R. H. Ruggold; Ed Scully*; T. E. Selle; G. Sorajouru (?); Paul A. Villerman*; Chas. Waldon; Henry Webber; W. D. Weston*; James Wilder*.

November Term 1882

P. O. Aliex; Samuel Alston*; Adolph Billet*; Felix Flechier*; H. C. Gause*; C. T. Grandpre*; Wm. Kern; George Kernan; George Lambert*; Horatio Lange*; John L. Leefe*; Lionel Levy*; George Maritche*; John S. Meilleur*; Richard Murphy*; James Prevost; M. C. Randall; James J. Reiss*; Geo. Sarpy*; Marshall Smith; John Soublet*; L. C. Souchon; Urban Thenrer*; L. Terrebonne*; B. D. Wood.

April Term 1883†

Data not collected for this term.

November Term 1883

J. E. Bohler*; Paul Dagoret*; Joinville Foucher; M. Glaudin*; Armstead Gregoire; Ernest Hewlett*; Wm. A. Holt; Richard Johnson; M. J. LeBlanc; S. J. Lefebvre; Theo. Lilienthal*; D. H. Marks*; T. J. Mooney*; Thomas Poree*; L. A. Pons*; Auguste Prevost*; James Rainey; Adam Ravanack (?); John P. Richardson; Alfred Seymour*; H. L. Stevenson*; Wallace Wood*; Chas. Wright.

* Names of grand jurors identified in the census data of 1870 and 1880.

(?) The spelling of the names (including initials) in the Juror Books of the Circuit Court was unclear to me.

† Data was not gathered for the terms indicated either because no grand jury was summoned for that term or because I inadvertently failed to locate the list of grand jurors for that term.

April Term 1884

Paul Benedic*; Albert Bloom*; R. H. Chaffe*; D. D. Colcock*; Joseph Davis; R. Devonshine*; James D. Edwards*; Emile Erier; Hicks Faust; John Fink; John Fox; W. H. Furneaux; L. F. Garic*; Stoddart Howell*; William Joubanc (?); John Lorenzo*; E. Marlette; James McGrath; Edward Moore; B. T. Post*; Robert Roberts; William Wilder*; William Williams.

Special Term 1884

E. H. Adams*; T. V. Baquet*; Jules Cassard; Octave Calogne*; Joseph E. Comes; L. J. Courtanet; Samuel E. Davis; A. J. Doize*; John Erman*; Aaron Feibel*; J. M. Ferguson; Thomas Fernon*; M. M. Fuller; Francis J. Ganbert*; Oscar Garic*; Michael H. Hoffman*; A. Humphreys; A. H. Isaacson*; Walter L. Jewell*; Lizar H. Josephs*; John Lambert; John McDonald; L. W. Perkins*; J. C. Potts*; George Rice; Thomas J. Robinson; Felix Spranley*; Stephen Washington; J. B. Woods.

November Term 1884

Armand Baer; Frank A. Behan*; E. D. Burke; James C. Campbell; J. A. DeBen*; Lucien Dolhonde; Joseph Donaldson*; C. Driscoll; Washington Emanuel*; Albert Epps*; Jacob Hassinger*; L. Joshua; Eugene Meisler (?); Henry P. Olivier; Louis Poursine*; W. H. Richards*; John Rogers; Louis Sass*; John Sheffer*; Joseph Simon*; John S. Woods; S. R. Williams; William Young.

April Term 1885†

Data not collected for this term.

November Term 1885†

Data not collected for this term.

April Term 1886

John A. Anderson*; Philip Beck*; Aug. Bruneau*; Charles E. Fortier*; A. Geiger*; Felix Grima, Jr.*; W. M. Grunewald*; Edward Heath*; J. Heres*; T. H. Hutcheson*; John Koper*; I. A. Marmion (?); A. E. McConnell*; Henderson McCray; Michael Neader*; Anthony Reidl; Frank Roder*; Chas. Schaeffer; George Schwab*; A. J. Sexton*; W. J. Stark; J. F. Tervalon; Bernard Wadleigh.

November Term 1886

John Abbott*; Fred Barrett*; P. Berry*; George Brierre (?); G. W. Clark; A. J. Cobourn (?); M. J. Cusack*; William T. Hardie*; Henry Miller*; Alfred B. Morel; A. F. Nolasco; Fred J. Odendahl*; M. J. O'Hara; Foster Olroyd*; Ulyses Populus; Theodore Prados (?); Charles H. Read; Gabriel Schwartz*; Joseph Schwartz*; John Slemmer*; H. B. Stevens*; L. Szabarry*; John J. Voelkel*.

April Term 1887

Fred Behrends; Chas. H. Cantrel; E. M. Champon*; Armand Clouet (?); Lawson Garic*; Samuel Garic*; Silas Gillen*; David Goldstein*; J. D. Hawkins* (?); A. M. Hill*; Thomas I. Irvine*; O. W. Jacobs; S. F. Johnson; Chas. R. Kennedy*; C. B. Lecarpenteur*; L. Lourds; Peter McGrath*; Abe Meyer; Eug. Nancamp; Alphonse Peigne; L. R. Perry*; David Wilson*; D. E. Zeiglere.

* Names of grand jurors identified in the census data of 1870 and 1880.

(?) The spelling of the names (including initials) in the Juror Books of the Circuit Court was unclear to me.

† Data was not gathered for the terms indicated either because no grand jury was summoned for that term or because I inadvertently failed to locate the list of grand jurors for that term.

November Term 1887

Leon Bertoli; John Blank; Ed Booth*; Benjamin Conyess (?); J. B. Desangles; C. W. Doyle*; Chas. Dunn*; Robert Freeman*; Archibald Glenn*; Wm. C. Griffin; Louis Guillard*; H. Hamblach; E. Jolet; C. F. Kranz*; Lucius Logan*; Herman Meader; Wm. Meyer (?); Chas. A. Moret*; George W. Morgan; J. A. Muir; Charles Otis*; Richard R. Schmidt; M. Scooler*; Joseph Simon*; C. E. Staub*; W. W. Taylor; Ed Uter*; Paul J. Valetton*; Frank Williams*; Louis Wolf*.

METHODOLOGY

Appendix A lists those who were called for grand jury service during the years which were studied. Those persons whose name is followed by an * were the persons whom I felt had been adequately located and identified in the census records of 1870 and 1880.

As for the process of matching a name from the list of grand jurors with a name found on the census rolls, I used the following approach. I first matched the name itself in terms of the first name, middle name or initial, and last name. While matching the names themselves, I tried to match the spelling of the name on the grand jury list with the spelling of the name on the census list. I did, however, realize that, for example, a French surname to an Anglo court clerk or an Anglo census enumerator might sound to have a spelling for the court clerk different from the spelling which the census enumerator used. For example, the French surname "Marie" was likely to be spelled "Mary" by Anglo clerks and enumerators.

After the names and spellings had been matched, I then used the age and the citizenship listed for the person located in the census to determine whether that person could have been old enough and the correct legal status to be eligible for service at the time that the person with the same name served on the federal grand jury.

Finally, for the jury terms November 1874 through November 1877, and April 1886 through November 1887, I used the address to which the summons for jury service had been delivered to match to the address listed by the person on the census sheet. These were the only terms for which a service address was listed with the name in the Juror Books. The service address, like the other pieces of information mentioned in the preceding paragraphs, was helpful, but not conclusive because oft times the service address was expressly stated to be the person's place of work while the census address of the person was almost invariably the person's residence.

I did not do any matching on the basis of my own presuppositions as to who was likely to be called for jury service in terms of "maturity," "social status," "occupational status," "prestige residence," or "racial heritage." The matching was done only on the basis of the "objective" evidence of name, spelling, age, citizenship, and service address. If the names of two persons were located in the census which when judged by the "objective" evidence matched the name of a person on the grand jury list, I concluded that I had not adequately located and identified the grand juror for whom I was looking.

As a result of the above-described process, which I designed to be a "conservative" identification process, I was able to locate and identify adequately 376 grand jurors from a total of 622 persons who were called for jury service between November term 1872 and November term 1887. This is a percentage of 60.5.

* Names of grand jurors identified in the census data of 1870 and 1880.

(?) The spelling of the names (including initials) in the Juror Books of the Circuit Court was unclear to me.

† Data was not gathered for the terms indicated either because no grand jury was summoned for that term or because I inadvertently failed to locate the list of grand jurors for that term.

APPENDIX B

GRAND JURIES FOR THE UNITED STATES CIRCUIT COURT OF
LOUISIANA COMPOSITE DATA DRAWN FROM
THE 1870 AND 1880 CENSUS

	Term	Race			Occupation			
		number of identified grand jurors			number of identified grand jurors			
K E Y	Date of the jury term	by racial self-designation			by occupation			
		% of the identified grand jurors			% of the identified grand jurors			
	% of jurors identified	by racial self-designation			by occupation			
		Black	White	Mulatto	Government Political	Blue Collar	White Collar	Unknown
	20 November 1872 First Grand Jury 50%	0	10	0	1	1	8	0
		0%	100%	0%	10.0%	10.0%	80.0%	0%
	24 November 1872 Second Grand Jury 58.3%	1	9	4	1	2	9	2
		7.1%	64.3%	28.6%	7.1%	14.2%	64.3%	14.2%
	31 April 1873 51.6%	3	7	6	1	6	8	1
		18.7%	43.7%	37.5%	6.3%	37.5%	50.0%	6.3%
	November 1873	DATA NOT COLLECTED			FOR THIS TERM			
	April 1874	DATA NOT COLLECTED			FOR THIS TERM			
	23 November 1874 56.5%	3	7	3	0	10	3	0
		23.7%	53.8%	23.7%	0%	76.9%	23.1%	0%
	23 April 1875 82.6%	1	13	5	0	12	5	2
		5.3%	68.4%	26.3%	0%	63.2%	26.3%	10.5%
	25 November 1875 76.0%	1	13	5	2	5	11	1
		5.3%	68.4%	26.3%	10.5%	26.3%	57.9%	5.3%
	21 April 1876 71.4%	1	10	4	3	5	7	0
		6.7%	66.7%	26.7%	20.0%	33.3%	46.7%	0%
	27 November 1876 81.5%	1	13	8	1	4	16	1
		4.5%	59.1%	36.4%	4.5%	18.2%	72.7%	4.5%
	April 1877	DATA NOT COLLECTED			FOR THIS TERM			
	19 November 1877 78.9%	2	12	1	1	6	8	0
		13.3%	80.0%	6.7%	6.7%	40.0%	53.3%	0%
	23 April 1878 52.2%	0	10	2	2	3	7	0
		0%	83.3%	16.7%	16.7%	25.0%	58.3%	0%
	21 November 1878 61.9%	0	11	2	1	4	8	0
		0%	84.6%	15.4%	7.7%	30.8%	61.5%	0%
	April 1879	DATA NOT COLLECTED			FOR THIS TERM			
	257 Total: November 1872 to April 1879 65.4%	13	115	40	13	58	90	7
		7.7%	68.5%	23.8%	7.7%	34.4%	53.6%	4.2%

Term	Race			Occupation			
	Black	White	Mulatto	Government Political	Blue Collar	Whit Collar	Unknown
19 November 1879 63.2%	0 0%	11 91.7%	1 8.3%	2 16.7%	0 0%	9 75.0%	1 8.3%
20 April 1880 60.0%	0 0%	11 91.7%	1 8.3%	1 8.3%	2 16.7%	8 66.7%	1 8.3%
20 November 1880 45.0%	0 0%	9 100%	0 0%	1 11.1%	0 0%	8 88.9%	0 0%
29 April 1881 51.7%	0 0%	14 93.3%	1 6.7%	0 0%	1 6.7%	14 93.3%	0 0%
23 November 1881 65.2%	1 6.7%	14 93.3%	0 0%	0 0%	5 33.3%	10 66.7%	0 0%
32 April 1882 53.1%	1 5.9%	16 94.1%	0 0%	1 5.9%	9 52.9%	6 35.3%	1 5.9%
25 November 1882 68.0%	0 0%	15 88.2%	2 11.8%	2 11.8%	2 11.8%	13 76.5%	0 0%
April 1883	DATA NOT COLLECTED			FOR THIS TERM			
23 November 1883 56.5%	0 0%	9 69.2%	4 30.8%	1 7.7%	7 53.8%	5 38.5%	0 0%
23 April 1884 47.8%	0 0%	11 100%	0 0%	1 9.1%	1 9.1%	9 81.8%	0 0%
29 Special Term 1884 51.7%	0 0%	14 93.3%	1 6.7%	2 13.3%	4 26.7%	7 46.7%	2 13.3%
23 November 1884 47.8%	0 0%	10 90.9%	1 9.1%	0 0%	1 9.1%	10 90.9%	0 0%
April 1885	DATA NOT COLLECTED			FOR THIS TERM			
November 1885	DATA NOT COLLECTED			FOR THIS TERM			
23 April 1886 69.6%	1 6.3%	14 87.5%	1 6.3%	2 12.5%	4 25.0%	10 62.5%	0 0%
23 November 1886 60.7%	0 0%	14 100%	0 0%	2 14.3%	2 14.3%	9 64.3%	1 7.1%
23 April 1887 56.5%	1 7.7%	12 92.3%	0 0%	0 0%	3 23.1%	9 69.2%	1 7.7%
30 November 1887 60.0%	0 0%	18 100%	0 0%	1 5.6%	2 11.1%	15 83.3%	0 0%
365 Total: November 1879 to November 1887 57.0%	4 1.9%	192 92.3%	12 5.8%	16 7.7%	43 20.7%	142 68.3%	7 3.4%

APPENDIX C

GRAND JURIES FOR THE UNITED STATES CIRCUIT COURT OF
LOUISIANA DATA DRAWN FROM THE 1870
CENSUS

Term	Race			Place of Birth		Literacy	
KEY							
Grand Jury Term	Racial self-designation of those grand jurors identified in the census data			Place of birth for the identified grand jurors as listed in the census data		Race and number of grand jurors who were illiterate	
Number summoned for jury service	Black	White	Mulatto	La.	Other State	Foreign	
November 1872 First Grand Jury 20	0	6	0		Ind., N.Y. Pa., Md. N.Y., Ohio		
November 1872 First Grand Jury 24	1	4	3	5	N.Y. Va. Fla.		
April 1873 31	2	5	6	11	S.C.	Fra.	Colored 1
November 1873	DATA NOT COLLECTED			FOR THIS TERM			
April 1874	DATA NOT COLLECTED			FOR THIS TERM			
November 1874 23	1	4	1	2	N.Y.	Ire. Ger. Eng.	
April 1875 23	0	6	2	3	N.Y. Md. Ohio	Ger. Fra.	
November 1875 25	1	5	4	5	N.Y. Ga. Mass.	Ire. Switz.	
April 1876 21	1	6	4	4	Ala., N.Y., Md., Tenn.	Spain Spain Eng.	Colored 2
November 1876 27	1	8	3	8	N.J., N.Y.	Spain Ger.	
April 1877	DATA NOT COLLECTED			FOR THIS TERM			
November 1877 19	0	6	1	4		Ger. Eng. Ire.	
April 1878 23	0	7	2	6	Pa., N.Y.	Fra.	
November 1878 21	0	6	1	6	N.H.		
April 1879	DATA NOT COLLECTED			FOR THIS TERM			
Total November 1872 to April 1879	7 7.2%	63 65.0%	27 27.8%	54 55.7%	26 26.8%	17 17.5%	
					North 20 20.6%	South 6 6.2%	
November 1879 19	0	6	1	4	Mass.	Fra. Den.	
April 1880 20	0	6	0	5	Me.		
November 1880 20	0	6	0	5		Ger.	
April 1881 29	0	8	0	4	Miss. Md. N.Y.	Switz.	White 1

Term	Race			Place of Birth			Literacy
	Black	White	Mulatto	La.	Other State	Foreign	
November 1881 23	1	8	0	2	Ky., Tex. Mass., Tenn. Mass.	Spain. Ger.	Colored 1
April 1882 32	0	12	0	6	N.Y., N.Y. N.J., Ala.	Spain Ger.	
November 1882 25	0	8	1	4	Fla. Va.	Ger. Ger. Ger.	
April 1883	DATA NOT COLLECTED			FOR THIS TERM			
November 1883 23	0	5	2	3	Miss.	Ire. Ger. Ger.	
April 1884 23	0	7	0	4	S.C. Miss. Pa.		
Special Term 1884 29	0	12	1	4	Md. Mo. Pa. S.C. 1 Unknown	Port. Ger. Fra. Fra.	White 1
November 1884 23	0	7	1	2	N.Y. Ohio	Ger. Ger. Ger. Spain	
April 1885	DATA NOT COLLECTED			FOR THIS TERM			
November 1885	DATA NOT COLLECTED			FOR THIS TERM			
April 1886 23	0	6	0	4		Swe. Fra.	
November 1886 23	0	5	0	0	N.Y. 1 Unknown	Eng. Ire. Ger.	
April 1887 23	0	4	0	1	Pa. Mass.	Fra.	
November 1887 30	0	12	0	6	Ohio Tenn	Ger. Ire. Fra. Ger.	
Total November 1879 to November 1887	1 0.8%	112 94.1%	6 5.0%	54 45.4%	31 26.1%	32 26.9%	
				North 20 16.8%	South 11 9.2%	2 Unknown	

APPENDIX D

GRAND JURIES FOR THE UNITED STATES CIRCUIT COURT OF
LOUISIANA DATA DRAWN FROM THE 1880
CENSUS

Term	Race			Place of Birth			Literacy
Grand Jury Term	Racial self-designation of those grand jurors identified in the census data			Place of birth for the identified grand jurors as listed in the census data			Race and number of grand jurors who were illiterate
Number summoned for jury service	Black	White	Mulatto	La.	Other State	Foreign	
November 1872 First Grand Jury 20	0	6	0	3	Pa. Va. Md.		
November 1872 Second Grand Jury 24	0	7	4	8	N.Y. Va.	Den.	
April 1873 31	1	4	1	2	Me. Mo. S.C. 1 Unknown		Colored 1
November 1873	DATA NOT COLLECTED			FOR THIS TERM			
April 1874	DATA NOT COLLECTED			FOR THIS TERM			
November 1874 23	2	5	2	6	S.C.	Ire. Eng.	Colored 1
April 1875 23	1	12	3	9	N.Y. Ohio Md.	Ger. Fra. Fra. Ger.	Colored 1 White 2
November 1875 25	0	11	2	5	Ill. Me. Ky. N.Y.	Ire. Ire. Switz. Fra.	
April 1876 21	0	8	1	2	Ala. N.Y.	Spain Spain Ire. Eng. Ger.	
November 1876 27	1	10	5	14	N.J.	Spain	
April 1877	DATA NOT COLLECTED			FOR THIS TERM			
November 1877 19	2	9	1	8	Pa.	Eng. Ire. Spain	
April 1878 23	0	9	1	7	N.Y. Pa. N.Y.		
November 1878 21	0	10	1	8	Me. Me. Ill.		
April 1879	DATA NOT COLLECTED			FOR THIS TERM			
Total November 1872 to November 1878	7 5.9%	91 76.5%	21 17.6%	72 60.5%	26 21.8%	20 16.8%	
							North 21 17.67%
							South 5 4.2%
							1 Unknown

Term	Race			Place of Birth			Literacy
	Black	White	Mulatto	La.	Other State	Foreign	
November 1879	0	9	0	4	Mass. Mo.	Fra. Den. Eng.	
19							
April 1880	0	9	1	8	Me.	Ger.	
20							
November 1880	0	6	0	6			
20							
April 1881	0	12	1	8	Va. Md. Pa.	Switz. Ire.	
29							
November 1881	0	12	0	5	Mass. Tex. Tenn. Mass.	Spain Ire. Ger.	
23							
April 1882	1	10	0	5	N.J. Ala.	Ire. Ger. Ger. Ger.	
32							
November 1882	0	10	2	6	S.C. N.C.	Ire. Ger. Ger. Ger. Fra.	
23							
April 1883	DATA NOT COLLECTED			FOR THIS TERM			
November 1883	0	7	3	6	Miss. S.C. N.J.	Ger.	
23							
April 1884	0	7	0	3	S.C. Miss. Ohio Pa.		
23							
Special Term 1884	0	8	0	2	Md. Mo.	Ger. Fra. Fra. Mex. Ger.	
25							
November 1884	0	8	1	3	Ohio	Den. Ger. Ger. Ire. Spain	
23							
April 1885	DATA NOT COLLECTED			FOR THIS TERM			
November 1885	DATA NOT COLLECTED			FOR THIS TERM			
April 1886	0	13	1	6	Me. Wisc. Pa. S.C.	Swe. Eng.	
29							
November 1886	0	12	0	3	Miss., N.Y. Ala., Md. Me.	Ire. Ger. Ger. Hung.	
23							
April 1887	1	11	0	5	Miss., N.C. Pa., Miss. Ky.	Ire. Fra.	
23							
November 1887	0	14	0	8	Miss. Ohio Tenn. Miss.	Ger. Fra.	
30							
Total	2	148	9	78	42	39	
November 1879 to November 1887	1.3%	93.1%	5.6%	49.1%	26.4%	24.5%	

Term	Race			Place of Birth			Literacy
	Black	White	Mulatto	La.	Other State	Foreign	
					North 23 14.5%	South 19 11.9%	

APPENDIX E

POLITICALLY ACTIVE GRAND JURORS

I. NOVEMBER TERM 1872 THROUGH NOVEMBER TERM 1878

Republicans

C. J. Adolphe, April term 1875, November term 1876, and November term 1877, Republican legislator for the Seventh District of Orleans Parish from 1868 to 1872. C. VINCENT, BLACK LEGISLATORS IN LOUISIANA DURING RECONSTRUCTION 228, 230 (1976) [hereinafter cited as VINCENT]; Edgar Davis, November term 1877, Republican legislator for the Fifth District of Orleans from 1870-72. *Id.* at 230; Edward Heath, April term 1873 and November term 1878, Vice-President at Republican campaign rally. New Orleans Daily Picayune, Nov. 2, 1884, at 12, col. 3; J. B. Jourdain, November term 1876, Republican candidate for the state legislature from Seventh Ward. New Orleans Daily Picayune, Nov. 2, 1874, at 1, col. 5; John H. Keller, November term 1875, Vice-President at Republican campaign rally. New Orleans Daily Picayune, Nov. 2, 1884, at 12, col. 3; J. Langles, April term 1873 and November term 1876, Republican senatorial candidate for the First District of Orleans. New Orleans Daily Picayune, Nov. 2, 1874, at 1, col. 5; Felix J. Leche, November term 1874, Vice-President at Republican campaign rally. New Orleans Daily Picayune, Nov. 2, 1884, at 12, col. 3; Joseph Mansion, April term 1876, Republican legislator for the Fifth District of Orleans from 1868-1870. VINCENT at 228; George D. May, April term 1878, Secretary of 1880 Republican State Convention. Leach, *The Aftermath of Reconstruction in Louisiana*, 32 LA. HIST. Q. 699 (1949); Joseph H. Meillieur, April term 1875, Republican Supervisor of Election Registration. Report of Board of Registration to the General Assembly for 1869, at i-ii Appendix; Edward Roberts, November term 1874, Republican Election Supervisor, Ninth Ward. New Orleans Daily Picayune, Oct. 29, 1880, at 2, col. 6; C. S. Sauvinet, November term 1872 and April term 1873, Republican Civil Sheriff for Orleans Parish 1870-72. New Orleans Daily Picayune, Nov. 22, 1872, at 1, cols. 5 & 6; J. Madison Wells, November term 1872, Republican Governor of Louisiana in 1866-68; Republican Chairman of Louisiana Returning Board in 1876. See note 161 *supra*; E. B. Wheelock, November term 1872, signer of endorsement for Republican candidate. New Orleans Daily Picayune, Nov. 4, 1890, at 4, col. 5.

Democrats

James Barry, November term 1878, Democratic state legislator for the Second District of Orleans 1882. List of Representatives in 1882 LA. ACTS; George Burkhardt, April term 1878, Democratic candidate for representative from Seventh Ward. New Orleans Daily Picayune, Nov. 2, 1874, at 1, col. 5; Charles Cavanac, November term 1876, Democratic candidate for Administrator of Commerce. New Orleans Daily Picayune, Oct. 27, 1876, at 1, col. 3; John A. Letten, November term 1876, Democratic representative from Seventh District of Orleans during 1880's. List of Representatives in 1884 LA. ACTS.

Minor Parties

John G. Fleming, November term 1872, Mayoral candidate for Workingman's Ticket. New Orleans Daily Picayune, Nov. 9, 1878, at 1, col. 5; W. H. Hire, November term 1877, Coroner nominee of the Workingman's Ticket. New Orleans Daily Picayune, Oct. 29, 1878, at 5, col. 7; Stoddart Howell, April term 1878, Councilman nominee of Independent Citizens' Party for Ninth Ward. New Orleans Daily Picayune, Oct. 28, 1882, at 4, col. 3; Mandeville Marigny, November term 1876, Criminal Sheriff nominee of the Citizens' Ticket, the Citizens' Conservative Association, and the Workingman's Ticket. New Orleans Daily Picayune, Oct. 27, 1878, at 3, cols. 6 & 7. He had also been an "Independent" nominee for Criminal Sheriff upon the Republican ticket in 1876. New Orleans Daily Picayune, Oct. 27, 1876, at 8, col. 7; W. H. Pemberton, November term 1876 and November term 1878, senatorial nominee for the Third District on the Citizens' Ticket. New Orleans Daily Picayune, Oct. 27, 1878, at 3, col. 6 and Oct. 29, 1878, at 6, col. 5; George W. Waters, November term 1877, nominee for state representative for the Seventh District on the Workingman's Ticket. New Orleans Daily Picayune, Oct. 29, 1878, at 5, col. 6.

II. NOVEMBER TERM 1879 THROUGH NOVEMBER TERM 1887

Democrats

T. A. Beck, April term 1882, Democratic city councilman from 1888-1892. J. JACKSON, NEW ORLEANS IN THE GILDED AGE: POLITICS AND URBAN PROGRESS 1880-1896 326 (1969) [hereinafter cited as JACKSON]; Leon Bertoli, November term 1887, Democratic state representative for the Fourth District of Orleans from 1886-1888. List of Representatives in 1886 LA. ACTS. He had previously been a Democratic candidate for Administrator of Water Works in 1874. New Orleans Daily Picayune, Nov. 2, 1874, at 1, col. 5. In 1878, however, Bertoli was a nominee for state representative on the Workingman's Ticket. *Id.*, Oct. 28, 1878, at 5, col. 6; A. M. Bickham, November term 1881, listed in an endorsement for Democratic candidates. New Orleans Daily Picayune, Nov. 3, 1884, at 4, col. 5; Edw. Booth, November term, 1887, Democratic nominee for councilman for the First Municipal District in 1882 and earlier a Democratic candidate for the state legislature. New Orleans Daily Picayune, Oct. 28, 1882, at 4, col. 4 and Nov. 2, 1874, at 1, col. 5; Paul Boulogny, November term 1880, Democratic Election Supervisor. New Orleans Daily Picayune, Oct. 29, 1880, at 2, col. 6; John Chaffe, November term 1879, Vice-President for Democratic campaign rally. New Orleans Daily Picayune, Nov. 9, 1884, at 2, col. 4; Ernest Chassagniol, November term 1880, Democratic Election Supervisor. New Orleans Daily Picayune, Oct. 29, 1880, at 2, col. 6; L. O. Desforges, November term 1880, listed in an endorsement for Democratic candidates. New Orleans Daily Picayune, Nov. 3, 1884, at 4, col. 5. He later served as a Democratic city councilman during the years 1892-1896. See JACKSON at 327; G. H. Dunbar, April term 1881, Democratic city councilman from 1888-1892. See JACKSON at 326. In 1882, however, Dunbar was a candidate for city council on the Independent Citizens' Party ticket. New Orleans Daily Picayune, Oct. 28, 1882, at 4, col. 3; Armstead Gregorie, November term 1883, listed in an endorsement for Democratic candidates. New Orleans Daily Picayune, Nov. 3, 1884, at 4, col. 5; A. H. Issacson, Special term 1884, Democratic candidate for Administrator of Finance. New Orleans Daily Picayune, Oct. 27, 1878, at 3, col. 5; C. R. Kennedy, November term 1880 and April term 1887, Democratic state representative for the Sixth District of Orleans from 1884-1888. List of State Representatives in 1884 & 1886 LA. ACTS. Democratic City Comptroller for years 1892-96. See JACKSON at 327; John A. Letten, April term 1882, Democratic state representative for the Seventh District of Orleans Parish during the 1880's. List of State Representatives in 1884 LA. ACTS; D. H. Marks, November term 1883, listed in endorsement for Democratic candidates. New Orleans Daily Picayune, Nov. 2, 1890, at 7, col. 4; Hilel Marks, November term 1880, listed in endorsement for Democratic candidates. New Orleans Daily Picayune, Nov. 2, 1890, at 7, col. 4; T. J. Mooney, November term 1883, Democratic candidate for Recorder, 4th Recorder's Court. New Orleans Daily Picayune, Oct. 28, 1882, at 4, col. 4; James Prevost, November term 1882, listed in an endorsement for Democratic candidates. New Orleans Daily Picayune, Nov. 3, 1884, at 4, col. 5; J. E. Riengstorff, April term 1880, Democratic candidate for Administrator of Assessments. New Orleans Daily Picayune, Oct. 27, 1876, at 1, col. 3; A. Salaun, November term 1880, listed in an endorsement for Democratic candidates. New Orleans Daily Picayune, Nov. 3, 1884, at 4, col. 5; Joseph Shakespeare, April term 1880, Democratic mayor of New Orleans elected in November 1880 on the People's Democratic Association ticket. New Orleans Daily Picayune, Oct. 31, 1880, at 2, col. 6 and *id.* Afternoon Edition, Nov. 3, 1880, at 2, col. 1; Jules Varian, November term 1880, listed in an endorsement for Democratic candidates. New Orleans Daily Picayune, Nov. 3, 1884, at 4, col. 5; E. D. Willet, April term 1881, Vice-President Democratic campaign rally and endorser of Democratic candidates. New Orleans Daily Picayune, Nov. 9, 1884, at 2, col. 4 and *id.*, Nov. 2, 1890, at 7, col. 4; J. B. Woods, Special term 1884, Democratic city councilman for the years 1888-1892. See JACKSON at 326.

Republicans

Jacob Hassinger, November term 1884, Vice-President of Republican campaign rally. New Orleans Daily Picayune, Nov. 2, 1884, at 12, col. 3; Edward Heath, April term 1886, Vice-President of Republican campaign rally. New Orleans Daily Picayune, Nov. 2, 1884, at 12, col. 3; S. Katz, November term 1880, Vice-President of Republican campaign rally. New Orleans Daily Picayune, Nov. 2, 1884, at 12, col. 3; J. H. Keller, April term 1881, Vice-President of Republican campaign rally. New Orleans Daily Picayune, Nov. 2, 1884, at 12, col. 3; J. A. Muir, November term 1887, listed in an endorsement for Republican candidates. New Orleans Daily Picayune, Nov. 4, 1890, at 4, col. 5; Frank Roder, April term 1886, Vice-President of Republican campaign rally. New Orleans Daily Picayune, Nov. 2, 1884, at 12, col. 3; M. Scooler, November term 1887, listed in an endorsement for Republican candidates. New Orleans Daily Picayune, Nov. 4, 1890,

at 4, col. 5; L. Szabarry, November term 1886, Vice-President Republican campaign rally. *New Orleans Daily Picayune*, Nov. 2, 1884, at 12, col. 3; W. D. Weston, April term 1882, Republican Election Supervisor, 10th Ward. *New Orleans Daily Picayune*, Oct. 29, 1880, at 2, col. 6.

Minor Parties or Unclear Party Membership

Samuel E. Davis, Special term 1884, nominee for Administrator of Police on the Workingman's Ticket. *New Orleans Daily Picayune*, Oct. 29, 1878, at 5, col. 6; James D. Edwards, April term 1884, Vice-President of Republican campaign rally. *New Orleans Daily Picayune*, Nov. 2, 1884, at 12, col. 3. But eight years earlier, he was listed as a candidate for Administrator of Water Works on the Democratic Party Slate. *New Orleans Daily Picayune*, Oct. 27, 1876, at 1, col. 3; Stoddart Howell, April term 1884, nominee for councilman for the Ninth Ward for the Independent Citizen's Party. *New Orleans Daily Picayune*, Oct. 28, 1882, at 4, col. 3; Lionel Levy, November term 1882, President of the Citizen's Conservative Association. *New Orleans Daily Picayune*, Oct. 31, 1878, at 1, col. 5. *See* note 149 *supra*; C. A. Phillipi, April term 1882, nominee for councilman for the Sixth Ward for the Independent Citizen's Party. *New Orleans Daily Picayune*, Oct. 28, 1882, at 4, col. 3; Alfred Seymour, November term 1883, nominee for a Justice of the Peace position on the Workingman's Ticket. *New Orleans Daily Picayune*, Oct. 29, 1878, at 5, col. 6.