

**Revisions to the Jury Plan of the  
United States District Court for the District of Massachusetts:  
Notes of the Jury Plan Committee**

The Jury Plan Committee (the “Committee”) of the United States District Court for the District of Massachusetts has proposed, and the District Court has accepted certain revisions to the Jury Plan of the United States District Court for the District of Massachusetts. These revisions are reflected in the attached redlined version of the plan.

I. Introduction

A. The Statutory Framework

The Jury Selection and Service Act (“JSSA”), 28 U.S.C. §§ 1861-1878, provides:

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

28 U.S.C. § 1861. Section 1862 of the JSSA prohibits discrimination, namely, the exclusion of persons from federal jury service “on account of race, color, religion, sex, national origin, or economic status.” 28 U.S.C. § 1862. In addition, § 1863 of the JSSA requires each United States District Court to develop a written plan that will affirmatively meet the statute’s objectives. *See* 28 U.S.C. § 1863. For most federal districts, the JSSA provides that jurors are to be drawn from either voter registration lists or lists of actual voters of the political subdivisions within the district or division, supplemented as necessary to achieve the objectives of the JSSA.

Before 1989, this court selected potential jurors from voter registration lists. In 1989, the court amended its Jury Plan, with the approval of a reviewing panel of the Judicial Council of the

First Circuit, as required by § 1863(a) of the JSSA. Acting pursuant to the provision of §1863(b)(2) of the JSSA, which requires supplementation of voter lists, where necessary, the court authorized the selection of potential jurors from the numbered local resident lists prepared annually by the 351 cities and towns in Massachusetts. Pursuant to Mass. Gen. Laws ch. 234A § 10, each city and town in Massachusetts is required annually to make a sequentially numbered list of the names, addresses, and dates of birth of all persons over the age of seventeen residing in the municipality and to submit that list to the Office of the Jury Commissioner. The court made an express finding in the 1989 amendment to its Jury Plan that the resident list “includes all registered voters, supplemented by all residents not registered to vote and represents a fair cross section of the community in this District.” The 1989 amendment, in the language of §1863(b)(2), therefore “supplemented” the list of registered voters with the annual resident lists. (In the proposed revision to the Jury Plan, this finding has been eliminated as superfluous in light of the amendment to the JSSA discussed in the following paragraph.)

In 1992, Congress amended the JSSA to provide for the primary use of the annual resident lists by the District of Massachusetts. Pub. L. No. 102-572 § 401, 1992 U.S.C.C.A.N. (106 Stat. 4506), 1992 W.L. 309178 \*6. In permitting this “Massachusetts exception” to the use of voter lists or voter registration lists, as the source of the court’s jury pools, Congress explained:

The Jury Act . . . requires that, with limited exceptions, prospective jurors must be selected from voter lists. In order to obtain better representation of minorities and otherwise advance the policy of universal service, district courts may supplement voting lists, but they are not authorized to supplant them. Uniquely in the State of Massachusetts, however, an alternative to voter lists exists that both improves the representativeness of juries and enhances

administrative efficiency. This section allows the district of Massachusetts to rely on this alternative source, a comprehensive residents list exclusively.

H.R. Rep. 102-1006(I), \*23, 102nd Cong., 2nd Sess. 1992, 1992 U.S.C.C.A.N., \*\*3932; S. Rep. 102-342, 102nd Cong., 2nd Sess. 1992, 1992 WL 187372 (same).

In turning to the numbered resident lists as the source for jury pools, this court and Congress concluded that the annual requirement of the cities and towns to produce a list of the names, addresses, and dates of birth of its residents over the age of seventeen would produce the most comprehensive and fairest accounting of persons eligible for jury service possible in Massachusetts.

B. Litigation

Over the years defendants in criminal cases have raised constitutional challenges to the representativeness of jury venires in this court. The First Circuit has rejected all of such challenges, concluding in each case that the defendant had not made out a *prima facie* case of a violation of the fair cross-section guarantee of the Sixth Amendment, and, in one case, that the defendant had not made out a *prima facie* case of a violation of the cognate, statutory fair cross-section requirement.

For example, in *United States v. Hafen*, 726 F.2d 21 (1st Cir. 1984), the defendant unsuccessfully asserted that the jury venires in the Eastern Division – that part of the District of Massachusetts comprising all counties east of Worcester County – underrepresented African-Americans. As noted above, at the time of that challenge, the source list for jury pools in the Eastern Division was voter registration lists, rather than the resident lists. *Id.*

In *United States v. Pion*, 25 F.3d 18 (1st Cir. 1994), the defendant asserted that jury venires in the Eastern Division underrepresented Hispanics. The district judge in that case found, and Pion did not dispute, that “the broadest data available – resident lists – are used to make up the Master Jury Wheel from which Eastern Division jury venires are drawn.” *Id.* at 23. Thus the First Circuit concluded that “since the names included in the Master Jury Wheel are randomly drawn from the most inclusive data available . . . there can be no reasonable inference that the jury-selection process systematically excludes Hispanics at any stage . . . .” *Id.*

In *United States v. Royal*, 174 F.3d 1 (1st Cir. 1999), a defendant, for the first time, challenged the proposition that the resident lists themselves represent a fair cross-section of the community of the Eastern Division. *Id.* at 1, 11. Royal argued that the lists underrepresented African-Americans, and that the underrepresentation amounted to a systematic exclusion of African-Americans from Eastern Division juries, in violation of the Sixth Amendment. *Id.* at 11. He argued further that the constitutional violation was exacerbated by the failure of the selection process to provide for follow-up as to undelivered and returned summonses, a large proportion of which were traceable to areas with significant African-American populations. *Id.* Based on the record before it, the First Circuit rejected the challenge.

The most recent constitutional challenge to the court’s Jury Plan – and the impetus for formation of the Committee – was *United States v. Green*, 389 F. Supp. 2d 29 (D. Mass.) *rev’d sub nom., In Re United States*, 426 F.3d 1 (1st Cir. 2005). The defendants in *Green*, who were African-Americans, contended that the composition of the jury wheel for the Eastern Division violated both the Sixth Amendment of the Constitution and the JSSA because it was developed from resident lists that are inaccurate and out of date, and that these deficiencies were most acute

in cities and towns (and in zip code areas within municipalities) with the highest percentages of African-Americans. *Green*, 389 F. Supp. 2d at 35-36. The district judge in *Green* had before her an extensive record concerning the operation of the resident lists, including statistical data, responses to questionnaires from all of the city and town clerks of the Eastern Division as to the manner in which each compiles its resident list, expert reports and voluminous briefing. *Id.* at 39. The factual questions concerning the jury issues were examined over several days of hearings. *Id.*

On the basis of all the evidence, the district judge found that the resident lists were not “functioning as the [court’s] Jury Plan assumed they would.” *Id.* at 58-59. She found, among other things, that “the resident lists undercount African-American from the outset... [and that in many cities and towns the resident lists] are not improved and updated annually as required by state law, resulting in disproportionately high rate of undeliverable and nonresponses in heavily African-American poor, and urban communities” *Id.* at 59. The district judge concluded, however, that the defendant had not met the First Circuit’s standards for a constitutional violation, even in light of what the court found to be demonstrable defects in the exclusive use of resident lists as the source from which the jury pools are chosen. *Id.* at 63.

On the other hand, the district judge sustained the defendants’ statutory challenge to the court’s jury selection process, ruling that the court as a whole had a duty under the JSSA to supplement the resident lists to address problems that compromised the capacity of the resident lists to produce jury pools from a fair cross-section of the community of the Eastern Division. *Id.* at 69-72. The failure of the court and its personnel to discharge that duty amounted to a substantial failure to comply with the JSSA, the district judge held. To remedy the violation of

the JSSA she found, the district judge ordered, for the *Green* case, that, for all summonses returned to the court as undeliverable, new summonses would be mailed to residents living in the same zip code area as the undeliverable summonses. The same procedure would be followed with respect to summonses to which there was no response after a second mailing; in other words, for all summonses for which there was no response after a follow-up second summons, new summonses would be sent to residents in the same zip code area as the nonresponders.

On the government's petition for the issuance of a writ of mandamus, the Court of Appeals for the First Circuit ruled that the remedial order of the district court in *Green* did not comport with the court's Jury Plan and was not justified, in any event, because the Jury Plan did not violate the JSSA. *In re United States*, 426 F.3d 1, 5-6 (1st Cir. 2005). Furthermore, the Court of Appeals ruled, the remedy ordered by the district judge amounted to a *de facto* amendment of the Jury Plan, which an individual judge of the court is not permitted to do under the JSSA. *Id.* at 7.

C. The Proposed Revision

Notwithstanding the ruling of the Court of Appeals as to the necessity and propriety of the order entered by the district judge in *Green*, the factual findings of the district judge raised an important question, one with which this court is deeply concerned: whether the determination the court made in 1989 that the annual resident list "represents a fair cross-section of the community in this District" continues to be appropriate under circumstances now existing. The Jury Plan Committee thus was established by then Chief Judge William G. Young to review the court's Jury Plan in light of the district court's findings in *Green*. As originally established, the

Committee consisted of five judges of this court. The clerk and two members of her staff were added to the Committee shortly after the Committee's first meeting.

A primary focus of the Committee has been to determine whether there exist more reliable sources of data on Massachusetts residents than the annual resident lists that may be used in putting together the Master Jury Wheel for this district. The Committee considered a number of alternative proposals for source data.

The Committee followed with particular interest a proposal that was then pending in the Massachusetts Legislature for a comparative study of the reliability and accuracy of the residential data in the annual resident lists and residential data that would be in a list denominated "the administrative records list" and derived from a compilation of information maintained in the electronic databases of the Secretary of State, the Registry of Motor Vehicles, the Department of Revenue, the Board of Higher Education, the Department of Transitional Assistance, the Office of Medicaid, the Department of Public Health and the Division of Unemployment Assistance. The proposal was for a three-year study of whether residential data for use in developing jury pools could be more reliably obtained from the administrative records list than from the annual resident lists. In the spring of 2006, the Legislature rejected this proposal. Thus, an avenue for the study of an alternative to the annual resident lists has been foreclosed, at least for the time being. However, if the Committee determines, in its future work, that the administrative records list or some other source of residential data is more reliable than the annual resident lists, the Committee expects to propose a comprehensive revision to the court's Jury Plan to make use of that data, either in a substitution for, or in supplementation of, the annual resident lists as the source of names for the court's Master Jury Wheel.

In the meantime, the Committee has proposed the revision to the court's Jury Plan transmitted with this statement. As amended, the Jury Plan would permit the court's Jury Department to issue a new summons to a randomly selected person in the zip code area for each original summons returned to the court as undeliverable from that zip code area. Undeliverability of an original summons would be the only criterion for the issuance of a new summons; beyond that, the revised Jury Plan envisions no geographic or other targeting for a second-round mailing of summonses. This procedure would be used in each of the court's three divisions.

Although not required to do so by statute, the Committee, as directed by the court, gave notice to the Bar of the proposed revisions to the Jury Plan and invited comments on a draft of the revisions. The Committee received five letters commenting on the Jury Plan from the United States Attorney; the Boston Bar Association; Pamela Wood, Jury Commissioner of Massachusetts; Patricia Garin of Stern Shapiro Weissberg & Garin LLP; and Jack E. Robinson Esq. In addition, the court solicited and received comments on the proposed revision from the General Counsel's office of the Administrative Office of the United States Courts (the "AO"). The comments were generally favorable. All of them were carefully considered by the Committee and reported to the court. All of the comments informed the Committee's deliberative processes, and several suggestions of the commentators were incorporated into the present revision of the Jury Plan. Additional suggestions that were more far-reaching than the changes the Committee proposed remain under study by the Committee.

To accomplish the changes in the Jury Plan contemplated by the present revision, the Committee proposed and the court approved substantive changes in paragraphs 5 and 6 and the

addition of new paragraphs 7 and 8 to the existing Jury Plan. In summary, these changes establish a Master Jury Wheel from which an initial draw of potential jurors is to be made and a Supplemental Jury Wheel from which a draw of potential jurors will be made to replace those potential jurors randomly drawn from the Master Jury Wheel whose summonses were returned as undeliverable. The wheels will be identical in size, and each will be created in accordance with the Massachusetts Jury Commissioner's random selection procedures outlined in the Commissioner's regulation entitled "Specification of Random Selection Methods and Procedures (describing the use by the Commissioner of the Marsaglia Random Number Generator). A separate supplemental wheel is necessary to prevent any compromise in geographic proportionality that might result if the supplemental draw were made directly from the Master Jury Wheel. *See* 28 U.S.C. 1863(b)(3) (requiring that each political subdivision within a judicial district or division be "substantially proportionally represented in the master jury wheel for that judicial district [or] division"). As revised, these paragraphs also prescribe the manner by which random selection is to be made both for the initial draw and the supplemental draw.

The revised Jury Plan also provides that the names in both the Master Jury Wheel and the Supplemental Jury Wheel be submitted twice a year to the national change-of-address system of United States Postal Service and corrected for misstated address information before any summonses are issued. Until earlier this year, the court's Jury Department had submitted names in the Master Jury Wheel to the change-of-address system annually. The Committee directed the Jury Department to make the submission twice a year before any revision in the Jury Plan was proposed. The revised Jury Plan will formalize that procedure and include the submission of names in the Supplemental Wheel in the change-of-address inquiry. In addition, the Committee

directed the Jury Department to lengthen from six to ten weeks the period between issuance of the jury summons and the date a potential juror is expected to appear for service.

As we noted at the outset of this commentary, the policy of the JSSA goes beyond simply the elimination of discrimination. The JSSA seeks to ensure to all litigants entitled to a jury trial in the federal courts the right of a jury drawn at random from a fair cross section of the community of the relevant division of the district. The more inclusive the source list for a court's jury pool, the better may the court achieve that goal. There is no perfect source of potential jurors; voter registration lists, lists of actual voters, and annual resident lists have all proven to have flaws. It is likely that any new source, like an administrative records list, will also have flaws. The question is what source gives us the closest approximation of the fair cross-section ideal. Answering that question remains the Committee's principal work.

This much is certain: the more flawed the source of potential jurors for the Master Jury Wheel, the more tension there will be between the JSSA's "randomness" requirement, on the one hand, and the "fair cross-section" requirement on the other. A random draw from less than accurate lists exalts one goal over the other. The present revision of the Jury Plan attempts to restore the balance between the two.

The revised Jury Plan aims at reducing the tension inherent in an imperfect system. In the end, we expect that, with an initial and supplemental draw, as discussed above, together with improvements in the way the court tests the accuracy of residential information and issues summonses for jury service, and with juror educational programs that the court is now considering, the court can achieve an overall improvement in its ability to develop a jury pool

that assures that every litigant entitled to a jury trial in this district will get a jury randomly selected from a fair cross section of the community of the relevant division of the district.

The Committee emphasizes that the proposed Jury Plan revision will apply to all communities, not simply those with high minority populations or where a specific problem with a city or town census may have arisen. While the Committee expects that the number of minorities on jury panels is likely to increase under the proposal, any such increase is likely to be a by-product of an improved response rate in those cities and towns that have both substantial minority populations and outdated resident lists.