THE JURY BOX

A Publication of
Edward P. Schwartz Consulting

Vol. 2, No. 6. November, 2006




It's almost election day! Can you feel the electricity in the air? It's every American's opportunity to join in that *other* form of participatory democracy. Voters across the country will have the chance to punch confusing cards, pull rusty levers and touch electronic screens that create no paper trail, in order to register their views on topics they know very little about.

Lest you think that these elections are all about gay marriage, staying the course and Congressional pages, there *are* a few ballot initiatives regarding jury trials. In this issue of THE JURY BOX, I will review a few of the interesting jury-related questions facing voters this election season.

Having introduced the e-mail version of THE JURY BOX earlier this year, I am diving deeper into the cyber-revolution by starting my own weblog, or "blog." I will use the blog as an opportunity to offer periodic opinions on legal topics, many of which will involve jury trials. One nice thing about a blog is that it offers readers the opportunity to question, comment on and criticize the blogger. So, please visit http://juryboxblog.blogspot.com often and add your two cents.

– Edward P. Schwartz

In recent years, most jury-related **ballot initiatives** have involved tort reform. This year, we see some quite creative use of the jury system to attempt to cure other government ills (real or perceived). While most attempts at tort reform, such as damage caps or administrative review panels, stem from a lack of faith in the ability of jurors to sensibly reflect community values, this year's initiatives attempt to inject those community values into governmental decisions that have typically been free of direct public involvement.

"Take" that!

The 2005 U.S. Supreme Court decision in *Kelo v. New London*, CT, which permitted the city to seize private property under eminent domain, in order to transfer it to a third party for commercial development, has spawned a backlash of takings reform. While some reform efforts have been concentrated in state legislatures, a few states have seen enterprising land-owners take the issue directly to the voters.

In Montana, voters will be given the chance to vote on Initiative 154, which would (1) codify compensation for regulatory takings, (2) eliminate the ability of any government to transfer property from one private party to another (with a few public use exceptions), and (3) allow for jury trials in appeals of property valuations. The initiative's wording states that:

> *The appeal must be tried upon the same notice and in the same manner as other civil actions. Unless a jury is waived by the consent of all parties to the appeal, the appeal must be tried by a jury.*

Clearly, this provision was added in order to inflate the price that the government would have to pay landowners. Government officials and developers are justifiably concerned that this provision would substantially increase the cost of doing business.

There is a similar provision on the ballot in Nevada. The People's Initiative to Stop Takings of Our Land (with the very wild-west acronym of PISTOL), like the Montana measure, would subject property valuations to jury review at the landowner's request. In addition, in Nevada, the factual issue of whether the proposed use is, in fact, public and not private, can be put to a jury. Finally, this initiative would require the government to compensate the property owner for the "highest valued use" for the property. As such, an owner could try to convince a jury that his property is suitable for a casino, golf course or luxury condominium development. The government would be forced to pay the price set by the jury.

Never to be outdone by its Eastern neighbor, California has its own eminent domain measure, Proposition 90, which largely mimics Nevada's proposal.

Given how much trouble jurors typically have calculating damage awards, I am not confident that they are well-equipped to make this kind of monetary determination. As I have discussed in earlier issues of THE JURY BOX, jurors usually adopt an "anchor and adjust" strategy in calculating damage awards. I believe that these valuation hearings would simply become competitions to get the jury to buy into one anchor or another. This system will lead to wild variations in property valuation and may lead governments to greenlight parallel development plans, ultimately choosing the one whose jury-determined price tag seems most reasonable. While such a system might benefit some landowners, it seems just as likely to harm potential sellers whom the government will be reluctant to approach at all. The amount of government-sponsored development will clearly decline and that might not be a good thing.

Penny Wise, Pound Foolish

The Seventh Amendment to the U.S. Constitution guarantees a jury trial in civil disputes involving at least $20. This is one amendment that has not been applied to the states through the 14th amendment. As such, states can set their own minimum stakes for the civil jury trial right.

At the moment, Article 5 of the Maryland Constitution (together with Article 23) guarantees a jury trial for civil disputes in excess of $5,000. House bill 413, in the form of a Constitutional amendment, would raise the minimum qualifying amount to $10,000.

This proposal demonstrates the ambivalence Americans feel towards the civil jury system. Most efforts to reduce the jury's

influence focus on cases with *large* stakes. Consider efforts to cap punitive and non-economic damages and to eliminate juries in complex litigation and class-action suits. This Maryland proposal would eliminate juries in small stakes cases, on the theory that they are too cumbersome in such an environment to justify the time and expense associated with using them. So, if juries aren't good for large cases and they're not good for small cases, one has to wonder what cases they *are* good for. Interestingly, while many jury reform proposals have garnered public support, an overwhelming majority of Americans still believe that the jury system is critical to our democratic system. So, the ideal enjoys great support; the practice – not so much.

Aloha unanimity!

There is a rather narrow proposal on the ballot in Hawaii that bears watching. The public has been frustrated by the difficulty in securing convictions against sexual predators because of a statutory provision requiring each act of "continuing sexual assault" against a minor to be found unanimously by the jury. Senate bill 2246 would amend the Hawaii Constitution to allow the state legislature to:

> *Define a) what behavior constitutes a continuing course of conduct, and, b) what constitutes the jury unanimity that is required for a conviction.*

Louisiana and Oregon have used non-unanimous verdicts in (non-capital) criminal cases for centuries, a practice that was held constitutional by the U.S. Supreme Court in 1972. Unlike the LA and OR systems, this amendment would permit a different decision rule to apply to only one type of case. What does the jury do if there are multiple charges against the defendant, each implicating different voting rules? Would a conviction on a "continuing sexual assault" charge have *collateral estoppel* implications for other charges requiring unanimous verdicts?

If this proposal were to pass and the Hawaiian legislature were to enact a non-unanimous rule, I could imagine prosecutors strategically charging a defendant with continuing sexual assault, as opposed to other available charges, so as to trigger the less demanding voting rule.

As many of you know, I have been a proponent of non-unanimous voting rules in criminal cases for a long time. It would allow for the elimination of peremptory challenges and, consequently, more representative jury deliberation (The HI proposal does nothing along this dimension). That said, I am not sure that I would advocate this piecemeal approach. The confusion that it would introduce will likely overshadow any benefits in crime prevention.

A new twist on the hanging judge

A radical proposal to enhance judicial accountability was offered in several states, but it only secured the necessary signatures to get on the ballot in South Dakota. Amendment E, the Judicial Accountability Initiative Law (Or J.A.I.L. – I am not making this up, people) would allow citizens to sue judges or other public officials for damages resulting from their decisions.

A special grand jury would be convened, comprised only of people who have

> *attained to the age of thirty years, and have been nine years a citizen of the United States, and have been an inhabitant of South Dakota for two years immediately prior to having his/her name drawn.*

All lawyers, convicted felons and peace officers are excluded from serving on this grand jury. This grand jury would

> *Hav[e] power to judge both law and fact… Their responsibility shall be limited to determining, on an objective standard, whether any civil lawsuit against a judge would be frivolous or harassing, or fall within the exclusions [enumerated above]…, and whether there is probable cause of criminal conduct by the judge complained against.*

The acts for which judges (and other judicial and quasi-judicial officials) could be held liable include:

> *Any deliberate violation of law, fraud or conspiracy, intentional violation of due process of law, deliberate disregard of material facts, judicial acts without jurisdiction, blocking of a lawful conclusion of a case, or any deliberate violation of the Constitutions of South Dakota or the United States, notwithstanding Common Law, or any other contrary statute.*

Presumably, even in South Dakota, these kinds of acts would get a judge in trouble under the current law. What really changes here is that this independent grand jury can force any case against a judge to go to a jury trial.

The grand jurors are to be instructed that:

> *All allegations in the complaint are to be liberally construed in favor of the complainant. The jurors … are not to be swayed by the artful presentation of the judge.*

At this point, the judge's challenged conduct would be subject to the whims of a citizen jury, whose appreciation for the subtleties of civil and criminal procedure probably doesn't rise to that of the judge. The jury would be:

> *Instructed that they have power to judge both law and fact… Upon conviction, sentencing shall be the province of the special trial jury, and not that of the selected trial judge.*

A judge would be in real peril of being punished for handing down a principled, but unpopular decision. (How is a judge supposed to enforce the exclusionary rule in such an environment?)

We already know that judges in states with judicial elections perform worse than appointed judges on a number of metrics. Directly elected judges are more predictably anti-defendant than even judges who face retention elections. They get reversed on appeal more often, too. The framers of the Constitution clearly believed that judicial responsiveness to public pressure was a *bad* thing. I tend to agree. As much as I support using lay juries for many types of judicial decisions, and giving them more respect and responsibility than they currently enjoy, this South Dakota proposal is an unambiguously bad idea (and probably unconstitutional, too).