In the

Supreme Court of the United States

EUGENE R. KELLEY, COMMISSIONER OF THE SUFFOLK COUNTY POLICE DEPARTMENT,	)	
Petitioner,	)	
vs.	)	No. 74-1269
EDWARD JOHNSON, etc.,	)	
Respondent.	)	

Pages 1 thru 31

Washington, D. C.
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v.	:	No. 74-1269
EDWARD JOHNSON, etc., Respondent.	:	

Washington, D. C.,

Monday, December 8, 1975.

The above-entitled matter came on for argument at 1:03 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

PATRICK A. SWEENEY, ESQ., Assistant County Attorney, 691 Fort Salonga Road, Northport, New York 11768; on behalf of the Petitioner.

LEONARD D. WEXLER, ESQ., 28 Manor Road, Smithtown, New York 11787; on behalf of the Respondent.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 74-1269, Kelley against Johnson.

Mr. Sweeney, you may proceed whenever you're ready.

ORAL ARGUMENT OF PATRICK A. SWEENEY, ESQ.,

ON BEHALF OF THE PETITIONER

MR. SWEENEY: Mr. Chief Justice, and may it please the Court:

In July of 1971, the Police Commissioner of Suffolk County amended the Rules and Regulations of the Suffolk County Police Department concerning certain grooming regulations for the members of the police force.

In substance, the rules stated that members of the force should be neat and clean at all times, and that male personnel should comply with grooming standard with respect to hair. Hair on the head should be neat, clean, and trimmed; it should not touch the ears or the collar, and the hair in front of the head should be groomed so that it does not fall below the band of properly worn headgear. In no case would the bulk or length of the hair interfere with the proper wear of any authorized headgear.

The grooming regulation also mentioned sideburns, that they should be neatly trimmed. With respect to mustaches, a short and neatly trimmed mustache may be worn. As to beards and goatees, the face should be clean-shaven.

Wigs are also mentioned in the regulation, that an individual may wear a wig for cosmetic reasons to cover natural baldness, if he so desires.

This regulation was to take effect August 1, 1971. On August 4, 1971, an action was commenced in the federal district court for the Eastern District of New York, basically for a declaratory judgment and a permanent injunction enjoining the Suffolk County Police Department from enforcing such a regulation.

The plaintiff's complaint in that case stated that the mere existence of the regulation violated his First Amendment right of free expression, and the second aspect is that the regulation violated the Fourteenth Amendment of the Constitution of the United States because no State shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.

The issue before --

QUESTION: Where in these papers is the regulation that you summarized for us?

MR. SWEENEY: The regulation is in the Appendix, on page 57 and 58. I will mention that there was an amendment to even that regulation, and that is on page 48.

QUESTION: What -- 48?

MR. SWEENEY: Yes.

The main one that I just referred to is on pages 57 and 58.

QUESTION: And what's the gist of the amendment?

MR. SWEENEY: The amendment basically was a compromise that, for instance, with respect to mustaches, if they happen to go below the lower lip, that that didn't matter.

QUESTION: Unh-hunh. How many members of the Suffolk County Police Department?

MR. SWEENEY: There are approximately 2600 members of the Suffolk County Police Department, of which approximately 2100 are uniformed police officers.

QUESTION: And this applies -- well, at least,it provides for waivers or exemptions --

MR. SWEENEY: Yes.

QUESTION: -- for non-uniformed personnel?

MR. SWEENEY: Yes, it does. For non-uniformed personnel and personnel who would be assigned to particular undercover duties, an exception would be made.

QUESTION: Unh-hunh.

QUESTION: Mr. Sweeney, does the Suffolk County Police Department have jurisdiction over incorporated cities within Suffolk County, or just outside of the incorporated cities?

MR. SWEENEY: Just in Suffolk County.

QUESTION: Well, in the incorporated cities, they are

not regarded as being part of Suffolk County?

MR. SWEENEY: Yes -- well, in Suffolk County, they would have jurisdiction over most of the towns within the County, so that that is the predominant police force in Suffolk County. There are some local village police departments.

QUESTION: And is their jurisdiction concurrent?

MR. SWEENEY: Yes.

Now, the issues before this Court, whether or not the length of hair, whether it's on the head or facial, or a combination of both, is a First Amendment right, and if it's -- or does it fall within at least a penumbra of the First Amendment. And if it's not under the First Amendment, does it fall under the Fourteenth Amendment?

Third, if it does fall within either one of these Amendments, is it a substantial right equivalent to, for instance, free speech, or is it an ingredient of personal liberty which, though not substantial, is nevertheless a right?

And lastly, as applied to police officers in Suffolk County, does the State's interest in effective law enforcement by uniformed police -- appearance of police officers, outweigh the individual's right to govern his personal choice of appearance?

Now, when the case first came before the federal district court for the Eastern District of New York, it was basically on papers and affidavits submitted to the court.

Chief Judge Mishler in that case dismissed the complaint, stating basically that the Suffolk County Police Department, because it was quasi-military in character, and that uniformity of dressing, grooming, are essential to effective law enforcement, the complaint was dismissed.

On appeal, the Second Circuit Court of Appeals reversed, stating, in substance, that there should have been a hearing or some testimony concerning the State's interest in this case. They did -- while stating that they held no view on the merits, they did state that hair, in and of itself, presents a substantial constitutional question; they stated that the life of hair is an ingredient of an individual's personal liberty, and that personal liberty is not composed simply of the freedoms held to be fundamental, but includes the freedom to act on less significant personal decisions.

After a hearing before Chief Justice Mishler, he more or less reversed what he had stated before, feeling himself bound by what the Second Circuit had reiterated in terms of quasi-military, and stated that uniformity of police officers and safety of police officers are not legitimate State interests.

The Second Circuit Court of Appeals affirmed without opinion, and of course we are here before this Court on a petition for certiorari.

First, with reference to whether or not hair is a

substantive right.

QUESTION: Mr. Sweeney, at this point do I understand the New York State courts have gone the opposite way on this very issue?

MR. SWEENEY: That's correct. In Greenwald v. Frank, the highest court of the State of New York, the Court of Appeals, unanimously affirmed the appellate division's second department. They squarely ruled on an issue which was before the Nassau County -- which was a similar regulation in Nassau County, which is the sister county of Suffolk County.

QUESTION: And do I correctly -- do I understand that the federal court, the Second Circuit, has upheld a regulation against attack so far as firemen are concerned?

MR. SWEENEY: That's correct, also. And that is both in thie case and with respect to firemen, those were cases decided after the Court of Appeals in the State of New York had ruled that with respect to police officers the issue was one of a modest regulation, because the Suffolk County Police Department was quasi-military in character, that there was not a substantial federal question present.

What constitutes a neat appearance in the opinion of the Police Commissioner of Suffolk County should be left to the discretion of the Police Commissioner. The length of hair, in and of itself, doesn't arise to basic constitutional questions.

Substantive constitutional rights and liberties should only be recognized by this Court where fundamental liberties are at stake.

Certainly this Court has seen fit to go beyond the literal language of the Bill of Rights by defining such rights as right of privacy; but we do not have that issue present here.

The burden should not be on the State, here the Suffolk County Police Department, to show that this regulation is constitutional; there should be -- a regulation of this type -- a presumption of constituionality.

My adversary, in his brief, --

QUESTION: Well, isn't there a presumption of constitutionality with respect to every kind of regulation or statute?

MR. SWEENEY: Yes.

QUESTION: Well, then you're just saying the general rule should apply here as well as other --

MR. SWEENEY: Yes, it should apply here. And my adversary has mentioned that, in that respect, that you can seek review in a State court where a regulation is arbitrary.

And I don't disagree with that viewpoint. I think that's what was done in Greenwald v. Frank. And I think that's what should have been done in this case, and that was the proper way to decide. Because it can always be tested for reasonableness in a State court.

QUESTION: Are you suggesting that the State court would demand more of the State, in effect, under its reasonableness or arbitrariness, than the federal courts could under the Constitution?

MR. SWEENEY: I think that the State courts probably, since they hear suits by Patrolmen Benevolent Associations constantly, on various regulations or rules of police departments, that they are more familiar with, at least having a hearing as to arbitrariness, and that with a rule of this nature, that is the proper -- they would have the burden of showing arbitrariness at that point. And I think that's the better approach in any -- this regulation is no different from any other regulation that may be part of the rules and regulations of the Suffolk County Police Department. It's always subject to reasonableness.

Two cases are in conflict, which is one of the reason a petition for certiorari was brought to this Court, and that is between the Second Circuit decision here and the Eighth Circuit.

Now, if you look at the underlying reasoning in both Circuits, they both do not define the length of hair as a substantial constitutional right; they merely both say it's less significant. Certainly it's not enumerated in the Constitution, but they both lend -- speak in terms of the Fourteenth Amendment.

In that respect they both place a burden of proof upon, in this case, the Suffolk County Police Department to show a legitimate State interest reasonably related to the regulation.

With respect to a police officer, he certainly is the most visible representative of government that we have in this country today. It is the position of the Police Commissioner that the grooming of the hair is no different from cleaning and pressing his uniform, cleaning his fingernails, bathing frequently; it's just part of those rules and regulations.

If you're going to isolate every one of these regulations, then we can be in court on every single one of them. There has to be, not a separation of this as a basic fundamental right.

Their appearance say as much about that police officer, about themselves, as the agency they represent; and for the public trust they hold, uphold.

Grooming standards, as part of uniform regulations, is a legitimate State interest. There's an unquestioned interest of a local police department in effective law enforcement.

And if you look at the two decisions again, you'll see that they are really differing on what is a legitimate State interest. One court is saying, and the Eighth Circuit is saying, Yes, we believe that's a legitimate State interest;

and the second court, by affirming what Chief Judge Mishler has stated, is saying it is not a legitimate State interest.

QUESTION: Well, is it your position that there is a constitutional right in these people that would protect them if the State could not show a legitimate State interest?

MR. SWEENEY: I'm saying that, firstly, if -- presuming, arguendo, there is a right, I'm saying that it's not substantial, that it may be protected by the Fourteenth Amendment. But the State's interest in effective law enforcement outweighs that individual police officer in having his hair at any length he chooses.

We are all subject to some infringement on our personal liberties. If I was to come before Your Honors now wearing a bathing suit, I probably would not have gotten past the guard.

Now, I guess that there is some infringement on my personal liberty at that point, but certainly the fact that this is a third branch of government and the dignity of the Court outweighs my individual preference at that point.

QUESTION: So that if we sustain your position, we will let you in with your hair at your length?

MR. SWEENEY: Well, the regulation of this Court, I believe, is a guidelines that says "conservative business dress"; I'm not sure, at some point, what that means.

QUESTION: Well, you don't work for us, either, do you?

Except in the remote sense -- getting more and more remote -- that you're an officer of the Court.

MR. SWEENEY: Yes.

QUESTION: Your regulation bar goatees, too, doesn't it?

MR. SWEENEY: Yes, it does.

QUESTION: That would have barred a certain man to sit where Chief Justice Burger now sits: Justice Hughes.

MR. SWEENEY: I can say this, it would probably bar many of the Presidents of the United States, and it would probably bar Jesus Christ, if he was alive today, or Moses. But, by the same token, any of those individuals, if they lived today, to be a Suffolk County police officer, I couldn't be one -- I'm over 29 years old, so I couldn't be one for that reason. I would have to take a Civil Service test. There are many reasons why one would become a police officer, there are many restrictions on it.

QUESTION: Well, what if Suffolk County passed an ordinance requiring all of its citizens, when they appeared on the public streets, to be dressed in Liederhosen -- do you think that would raise a constitutional problem?

MR. SWEENEY: Yes, I believe it would.

QUESTION: Well, then, you do in effect feel that there is some right, constitutional right, somewhere, perhaps surrendered by policemen, to regulate your own dress?

MR. SWEENEY: Yes, I do.

I look at the --

QUESTION: They surrender some of it when they are required to wear uniforms.

MR. SWEENEY: There certainly do. And I believe the regulation of hair is part of that, and I attach that to the Appendix or in a separate volume, excerpts from the rules and regulations of the Suffolk County Police Department.

QUESTION: But there is a difference. When they go home, they can take off their uniforms, and dress any way they want. But they can't very well change their -- the length of their hair?

MR. SWEENEY: No. But when they go home, even on their personal time they can't associate with persons known to be convicted of a misdemeanor or a felony, and that's certainly restriction on their personal lives.

And Election Law 426 of the State of New York says that the police officer cannot be a member of a political committee, a political club, or contribute money to them. Now, certainly, that's all on his own personal time.

QUESTION: That's something like the Hatch Act, that's all; isn't it?

Up to the now the Hatch Act has survived, has survived constitutional scrutiny.

MR. SWEENEY: All right, --

QUESTION: And you are saying this is of a piece with that limitation?

MR. SWEENEY: Well, I'm just indicating that this is one of many infringements, if you want to say it, on what may be termed rights.

QUESTION: Well, isn't it a greater infringement, if you call it that, a greater limitation when the police regulations forbid his making a political speech?

MR. SWEENEY: Yes, I would agree --

QUESTION: That's a direct --

MR. SWEENEY: I would think it is greater.

QUESTION: That's a direct conflict with the First Amendment, isn't it?

MR. SWEENEY: Yes. I think it's a greater infringement, yes.

QUESTION: Incidentally, what do you conceive is the burden that the Court of Appeals imposed on your client in the district court on remand?

MR. SWEENEY: After reading the decision many times, it would seem to me that the burden placed was the rational relationship test, --

QUESTION: Not the compelling?

MR. SWEENEY: Not the compelling interest. But I think there was some confusion in that decision, because they talked about a substantial constitutional issue, and then they

talked about rationality. And I think, even Chief Judge Mishler had a problem with that, because you'll see at the conclusion of his case, he says that we did not establish a legitimate State interest, which shows he was not sure of the burden of proof at that point himself.

QUESTION: The language, I notice, is that the Commissioner had the burden of establishing a genuine public need for the regulation.

MR. SWEENEY: Right. And so that presented problems.

I would say that, if anything, it should have been a legitimate State interest, and that that was shown by the record.

QUESTION: Just the rationality test.

MR. SWEENEY: Yes.

I would reserve any time I have left for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Wexler.

ORAL ARGUMENT OF LEONARD D. WEXLER, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. WEXLER: Mr. Chief Justice, and may it please the members of the Court:

The first police department was established in New York City in 1844, not by right of the United States Constitution or the New York State Constitution, but local laws.

After that, many police departments were formed, and the first laws declaring police departments or policemen quasi-military were in the 1880's. Masterson vs. French in New York, 1888, McAuliffe vs. City of New Bedford, 1880's in Massachusetts, Hart vs. Board of Fire Commissioners, 1880, New York.

Thereafter, these cases became the leading cases cited in both the State and federal courts throughout the country that policemen are quasi-military.

I feel those cases were wrong. It was not until this Court said, in Garrity?, that policemen, like teachers and lawyers, are not relegated to watered-down versions of constitutional rights. And it was finally the Dwen case, this case, that said policemen are not quasi-military, they are ordinary civil service workers.

Now, what has happened to police departments since 1844? The most significant thing was the civil service law which was passed after all the leading cases of the 1880's.

QUESTION: Do you think a policeman can be required to wear a uniform while on duty?

MR. WEXLER: Yes, sir.

QUESTION: Do you think all citizens of Suffolk County could be required to wear uniforms while in public?

MR. WEXLER: No.

QUESTION: Then surely there are differences, where

the State may demand more of a member of the police force than of an individual citizen.

MR. WEXLER: Yes, sir, as an employee, if there's a compelling State interest, of course.

QUESTION: Why do we get a "compelling State interest" standard when we're talking about what regulations a State can impose on an employee?

MR. WEXLER: Because there are certain needs the State has which supersedes the needs of an individual, and therefore the burden is placed upon the State to prove that need, the right to wear a uniform.

Of course, if there is a need, they have a right to do it.

QUESTION: Buy why a "compelling State interest"? Why not simply a test of reasonableness or rationality?

MR. WEXLER: Well, we're taking away someone's rights. If we're dealing with rights, constitutional rights, there should be a compelling State interest, not to test the reasonableness. These are not whims or rules, these are rights of people we're talking about, and there should be a compelling state interest if we're going to make the individual give up his rights.

QUESTION: What about the right to have a pressed uniform? Suppose I just like to wear baggy pants, I give it up when I go in the police department, don't I?

Also, I have to shine my shoes when I go in the police department, don't I?

MR. WEXLER: I think they may be compelling State interests. Yes, I think you give that right up.

QUESTION: Well, why do you have to have shiny shoes? What State interest is in that? Appearance?

MR. WEXLER: Maybe you don't -- appearance; but maybe you don't.

QUESTION: Well, what if -- and isn't hair appearance?

MR. WEXLER: It's more than that. You have to have shiny shoes --

QUESTION: Well, isn't it appearance?

MR. WEXLER: Yes, it is appearance there.

QUESTION: And shining your shoes is an appearance.

MR. WEXLER: Yes.

But I think there's different rights involved --

QUESTION: There is a difference: one's on one end and the other is on the other end!

MR. WEXLER: Yes.

[Laughter.]

MR. WEXLER: But I don't mean by that alone.

Well, as I said, what happened to police departments? I'm talking about quasi-military, the basis of the Barry case, the Dwen case; I said civil service came in after these leading

cases in the 1880's. Civil service took away the right of the police commissioner to appoint, promote, suspend, retire; he no longer has that authority, and civil service in New York State said the military, the State military is excluded from that.

I'm trying to show the distinction why those cases do not apply, the old leading cases.

QUESTION: Well, no one has argued that the policemen and soldiers are exactly alike.

MR. WEXLER: The argument has been, up until Dwen --

QUESTION: Exactly alike?

MR. WEXLER: No, quasi.

QUESTION: Quasi.

MR. WEXLER: I want to establish --

QUESTION: "There is something like".

MR. WEXLER: I want to establish they're not.

QUESTION: They're not anything like?

MR. WEXLER: No.

I pointed out civil --

QUESTION: I see.

MR. WEXLER: I pointed out civil service has changed the appointment, the promotion, the retirement, the discharge. Excluding the military.

Then we have -- I'm sorry?

QUESTION: If the police cannot maintain order in the

town, who do they send in?

MR. WEXLER: I think the police can maintain order in the town.

QUESTION: I said if they find an area where they can't, who do they send in? The militia, don't they?

MR. WEXLER: Yes.

QUESTION: So why would you send the military in to do a civilian job, if the police are a civilian job?

MR. WEXLER: That's gone beyond the police authority, then.

QUESTION: Right.

So it must be quasi at least.

MR. WEXLER: No, I don't think so.

If I can be permitted to continue on in that --

QUESTION: Well, if you have a school strike, you don't send in the military to teach school, do you?

MR. WEXLER: No.

QUESTION: And if you have a strike in some other department, any other department in government, you don't send the military in for that, do you?

MR. WEXLER: Yes, you do. In the postal strike, you sent the policemen in.

QUESTION: To move the mail, not to do the postal work, not to sort the mail.

MR. WEXLER: Sir, I thought that was the job of

the postals, to move the mail.

QUESTION: The State postal service? Well, I don't know anything about any State postal service.

I'm talking about the State.

The only department that is supplanted by the military is the police department.

MR. WEXLER: I beg to differ, sir. When there was talk about the riots in the jail, they were going to send the State Militia to take over the supervision, the running of the jails.

QUESTION: Did they?

MR. WEXLER: That's what the talk was, and that's what they --

QUESTION: Did they?

MR. WEXLER: They did not.

QUESTION: What standard did Judge Mishler apply on the remand, as you understand it?

MR. WEXLER: Compelling --

QUESTION: You're arguing compelling.

MR. WEXLER: Yes.

QUESTION: What he says is that the defendant failed to establish a legitimate State interest. And he says, the rule is an arbitrary limitation and a purposeless restraint. Is that what you -- does that spell out compelling?

MR. WEXLER: Yes.

Well, continuing, then, the courts passed CPA Article 78, giving the procedure in which the test, the findings of the head of the department, including the Police Commissioner -- it's been traditionally that the courts would not interfere or limitly interfere in the proceedings in the military.

Here we set up a legal proceeding to test the actions of a Police Commissioner.

I think the greatest significance to show that the police is not even quasi-military is the Taylor law. The Taylor law provided that the police will be their bargaining unit, and be a union, and negotiate all terms and conditions -- not with the Police Commissioner, but with the County Representatives, where the Police Commissioner is not one of the parties to the action.

Now, what are the terms and conditions that are being contracted between the County -- and that's any municipality -- that the Police? The hours, the wages, the uniform.

If the County and the PBA, in their negotiations, decided there would be no uniform, the Police Commissioner must enforce it. If they decided the uniform would be white, regardless of what the Police Commissioner says, it has to be white.

In addition to the uniform, the hours, the terminal leave, the equipment, guns carried by policemen are now negotiable -- negotiated, rather.

In addition thereto, their tour of duty, their personal leave, when their tour of duty ends, when it starts, what shift they've in; these are all negotiable items. Can we envision patrolmen or the lowest rank in the service negotiating with Congress to establish a book of rules that the Commander-in-chief must follow? That's what we have now in police departments.

The patrolmen, the PBA negotiates with the County to create a contract which is then turned over to the Police Commissioner, who must administer that contract.

Now, I agree --

QUESTION: Isn't that -- doesn't that suggest that if they are so upset about this hair regulation, they should negotiate it with the County? Negotiate it out.

If that's the way things are done.

MR. WEXLER: They haven't been able to.

QUESTION: Well --.

MR. WEXLER: That may be a possibility. Everything else is negotiated, I agree.

QUESTION: What if the union imposed on the Department the requirement that they all have crew haircuts; what would be your remedy then?

MR. WEXLER: If the union imposed that, sir?

QUESTION: Yes.

The union negotiated a contract requiring crew hair-

cuts essentially like that provided for the United States Marines.

MR. WEXLER: Then I don't think the contract can contract away constitutional rights of its members. I think the membership would have a right to attack it.

Again, my argument is trying to show they are no longer quasi-military, in view of the fact of the rights that have been taken away from the Police Commissioner that he originally had. As I said, the contract book that's negotiated, first was very small, it gets bigger and bigger each year; which means the Police Commissioner has lost his power. He is just the administrator of the book, with certain other powers, of course. But --

QUESTION: Well, why did you sue him? You sued the Commissioner.

MR. WEXLER: Because he is the one who passed this regulation. He is the one who put it forth.

I have to talk about the other case, the Kamerling case. My brother makes opposition, saying, how can you have two different decisions from the Second Court of Appeals.

I have to tell this Court that I handled the trial of Dwen and the appeal, and the trial of Kamerling and the appeal. Kamerling was based on Dwen.

In that Court the City of New York were able to show that firemen responding to a fire must wear facial masks,

because most of them go into fires where there are numerous gases, and they have to wear it. They were able to prove, through a legitimate State interest, that the seal of the mask is affected by facial hairs, and they proved this through many laboratory reports, and therefore there was a legitimate State interest to regulate hair because of the safety to the men. And it --

QUESTION: Suppose you proved that, though, did you, in the term of that case?

MR. WEXLER: Not on that theory, sir. I opposed it concerning the proof they offered. I conceded Dwen, and I rely on Dwen. I did fight the proof, whether it is so or not; if it is so, then they are right under Dwen.

And, in affirmance of the fact, found that they were right, there was leakage in the gas masks.

QUESTION: Well, is this the standard of a court to review statutes or legislative ordinances by, they hold a trial and make findings of fact? I thought that was for the legislature.

MR. WEXLER: No. When the issue was involved, we had trials in both cases, hearings, witnesses were called, fact situations. In the Dwen case, the finder of the fact, Judge Mishler, found the police department has failed to prove their -- the point.

In the Kamerling case, they found that the Fire

Commissioner did. He found a compelling State interest, that they should regulate hair, because of the seal on the gas masks.

QUESTION: A little while ago you spoke of a legitimate State interest. Do you draw a distinction between that and a compelling State interest?

MR. WEXLER: No, the same: legitimate or compelling would be the same.

QUESTION: They don't sound the same to me, but you have so defined them, in any event.

MR. WEXLER: Yes.

QUESTION: All right.

MR. WEXLER: Can I briefly say that with all this legalistic talk about hair, doesn't it really break down to a person's grooming habits and prejudice? We -- I'm sure when the police department was established in 1844, the policemen had the kind of hair, the handlebar mustache, the mutton chops, and so forth. When the decisions calling them quasi-military were passed, I'm sure all policemen had the bushy hair, the mustaches, and so forth, as we traditionally see.

It wasn't until the Sixties, when the hippies came in, where hair became a dirty thing, and we started to regulate hair. The regulation that we're attacking only came in in 1971. So, prior to that, there was no safety problem with hair, there's no uniformity problem. We're reacting to a

situation, a hair situation, --

QUESTION: Well, of course, maybe the reaction was based on the fact that the policemen follow the general sartorial trend of society. In 1960 you wouldn't have needed a regulation like this, because no policeman would have wanted his hair the way your clients do.

MR. WEXLER: Yes.

QUESTION: And in 1840 or 1830, the early date you were talking about, they didn't have electric razors or safety razors; it was a common custom for a great many people to wear beards and --

MR. WEXLER: And to this day it's still a common custom for many people to wear beards.

QUESTION: Yes; some people.

MR. WEXLER: Yes.

And in a certain way --

QUESTION: But we're not talking about people generally, we're talking about policemen here.

MR. WEXLER: Well, why are policemen -- well, that's which this question is.

QUESTION: That's why we're here.

MR. WEXLER: I'm sorry.

Well, I think I will conclude with just saying what Thomas Jefferson said: No man should be judged by the cut of his hair.

Thank you.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Sweeney?

REBUTTAL ARGUMENT OF PATRICK A. SWEENEY, ESQ.,
ON BEHALF OF THE PETITIONER

MR. SWEENEY: Just a few quick ones.

I think this Court realizes that we're not here talking about the hair of individuals, we're talking about the length of hair of police officers.

It's the Police Commissioner's contention that personal right, if it be a right, of their police officers, under that decision of Greenwald v. Frank, is offset by the powerful countervailing interest of the police department and the general public.

Certainly the State courts share equal responsibility with the federal courts on the enforcement of federal rights. Under the principles of comity, that is the decision which should have been followed. And if it is a right within the Fourteenth Amendment, the burden of proof would certainly sustain, and the --

QUESTION: Well, I must say, Mr. Sweeney, reading this opinion of the Court of Appeals, in which particularly, "personal liberty is not composed simply and only of freedoms held to be fundamental" -- implying that this is not a fundamental right --

MR. SWEENEY: Correct.

QUESTION: -- "that includes the freedom to make and act on less significant personal decisions without arbitrary government interference." And then going on to say, "limitation of such a right requires some showing" -- some showing, not compelling, or not any other standard.

MR. SWEENEY: That's correct.

QUESTION: -- "some showing of public need."

MR. SWEENEY: Not only --

QUESTION: In other words, what Judge Mishler must have held -- am I right -- was that there was no showing of any kind that that --

MR. SWEENEY: That's what he held.

QUESTION: And your suggestion is that there is public need -- for what?

MR. SWEENEY: For uniformity of appearance and for safety of the police officer, which, in turn, is safety of the general public.

Thank you.

QUESTION: And the uniformity of appearance would be what? For purposes so that the citizen could identify a policeman?

MR. SWEENEY: That's correct. And, as they say in New York City, police for the would-be perpetrators; the criminals. So they can identify police also.

The prevention of crime.

QUESTION: And a policeman with a goatee wouldn't be identifiable as a policeman?

MR. SWEENEY: No, I think if you're going to get into the reasonableness of the regulation, then you're always going to have a problem. For instance, if the hair is a little bit over the ears, is that a problem, too?

I think you have to leave that to the discretion of the Police Commissioner. Let him set reasonable standards. If they are unreasonable -- and I think he could promulgate, even if this Court held that he had such a right, there's a possibility that some place in this country a police commissioner could make an unreasonable regulation.

But I think a court would strike that down, for that reason, as being unreasonable.

QUESTION: You are saying some regulations could be unreasonable?

MR. SWEENEY: Certainly.

QUESTION: Such as shaving the head?

MR. SWEENEY: Certainly.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 1:39 o'clock, p.m., the case in the above-entitled matter was submitted.]