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PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-2140

TITLE WILBUR HOBBY, Petitioner v. UNITED STATES

PLACE Washington, D. C.

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IN THE SUPREME COURT OF THE UNITED STATES

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WILEUR HOBBY, :

Petitioner, :

v. : No. 82-2140

UNITED STATES :

- -x

Washington, D.C.

Wednesday, April 25, 1984

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:05-o'clock a.m.

APPEARANCES:

DANIEL H. POLLITT, ESQ., Chapel Hill, North Carolina; of the Petitioner.

JOSHUA I. SCHWARTZ, ESQ. Office of the Solicitor General, U.S. Department of Justice; on behalf of the Respondent.

C C N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We'll hear arguments first this morning in Hobby v. the United States.

Mr. Pollitt.

MR. POLLITT: Mr. Chief Justice, thank you, sir.

ORAL ARGUMENT OF DANIEL H. POLLITT, ESQ.

ON BEHALF OF THE PETITIONER

MR. POLLITT: May it please the Court, this case involves the appointment of white males only as foremanships of federal grand juries in the Eastern District of North Carolina. The appointments were made by Article III federal district court judges. The discrimination continued unabated for 15 consecutive grand juries, from 1974 through 1981. There were 15 foremanships selected by the judges, all white males, no blacks, and no women.

The testimony also shows that the odds of this happening by chance are 1 in 10,000. The government does not deny this pattern of discrimination in favor of white males against blacks and women, nor does the government deny that this discrimination is wrong, that it is unlawful.

In response to our petition for certiorari, the government said that it would take steps to have the

U.S. Attorneys call the attention of the courts to the importance of nondiscriminatory foreperson selection procedures.

QUESTION: Would you agree, Mr. Pollitt, that the -- a key question, if not the key question in this case is, assuming the truth of all that, which we accept because it's agreed to, its impact on this particular case is the Gorton thing, isn't it?

MR. POLLITT: Sir, it was below. But I think that it is no longer the important thing. I would like to focus on the judges who made these appointments, rather than on the forepersons who exercised the various powers.

We do think that this is much like Rose v. Mitchell in regard to the powers exercised by the forepersons of the federal grand juries. But what we urge here is the exercise of the supervisory power of this Court over the lower federal judges, and we think that is the critical issue, if Your Chief Justice please. And I would like to address that, if I may.

This Court does have supervisory power, the grandaddy --

QUESTION: You aren't pressing a constitutional issue, then?

MR. POLLITT: No, sir. We don't think that's

necessary. We'll relate to the constitutional issue --

QUESTION: Well, what if we didn't agree with your supervisory argument? What then?

MR. POLLITT: Well, then we'd go back to the constitutional issues, Your Honor, please.

QUESTION: Are you going to argue those?

MR. POLLITT: I will argue them only in the context -- for example, the Rose v. Mitchell and the equal protection cases under the Fourteenth Amendment, and what I refer to myself as the Heard v. Hodges situation. Herd was a restrictive covenant case out of the District of Columbia. The companion case was Shelley v. Kramer. In Shelley, this Court held that the Fourteenth Amendment equal protection clause precluded the state court judges from executing and enforcing the restrictive covenants.

Then came Heard, which was the District of Columbia judges, and this Court under its supervisory power held that if it was unconstitutional for the state court judges to do it under the equal protection clause, the exercise of this Court's supervisory power was called for to stop the federal judges from doing the very same thing.

QUESTION: Mr. Pollitt, was that really what you'd call an exercise of the supervisory power? I had

always thought that was more associated with the enforcement of criminal law. I always thought Heard v. Hodge was saying that a federal court of equity should not enforce a covenant that the Fourteenth Amendment prohibited a state court from enforcing.

MR. POLLITT: You're correct, Mr. Rehnquist. That's what the -- Mr. Justice Rehnquist -- that's what the Court did hold, sir.

But I refer to it in the theory that the supervisory power, going back to McNabb, and most recently, what has to do with the administration of federal criminal justice for a twofold purpose, as this Court recently held, which is to deter illegality. And I don't think there's any question that discrimination in the appointment of persons to --

QUESTION: Well, are you going to explain why this petitioner has standing to require us to either decide the supervisory or the constitutional?

MR. POLLITT: Yes. Well, that's why I preferred to stay with the supervisory power, because there's no problem withstanding under the supervisory power, if Your Honor please. The three cases of Glasser, Thiel, and Ballard were supervisory powers affecting, concerning the appointments to federal juries. And in each of those, the persons who protested

were not members of the class that was excluded.

And as this Court said in Ballard, Mrs. Ballard and her son had standing to protest the exclusion of women because the injury is not limited to the defendant. There is injury to the jury system, to the law as an institution, to the community at large, to the democratic idea reflected in the processes of our Court.

So if we stick here with the supervisory power, we can eliminate all questions of standing, which is what I would --

QUESTION: Mr. Pollitt, you're not arguing a due process violation, then, I take it.

MR. POLLITT: I beg your pardon?

QUESTION: You're not arguing a due process violation, then?

MR. POLLITT: No, ma'am. What we argue here is that it is wrong, it is illegal for federal district judges to discriminate on the basis of race and gender, and that this Court has authority under its supervisory power to call a halt. And we think that is so for five interrelated reasons, if Your Honors please. And the first reason is the Rose v. Mitchell reason; that discrimination on the basis of race, as Mr. Justice Blackmum wrote for the Court, is odious in all respects,

and is especially pernicious in the administration of justice. And so that's what we have here in the federal system.

And our second interrelated reason for applying the supervisory power is that the federal judges had authority to make these appointments under Federal Rule of Criminal Procedure 6(c). The Federal Rules of Criminal Procedure are promulgated by this Court, so it is this Court which authorized the federal district judges to make these appointments, and we submit that the federal district courts are abusing the authority given by this Court when they discriminate on the basis of race and gender, and that this Court -- it is doubly appropriate for this Court to stop the federal judges from exercising the power which this Court gave it.

QUESTION: Mr. Pollitt, do you think this Court, if it were to exercise supervisory power over the federal judges, would have several options of how to do that? Does it necessarily involve setting aside a verdict?

MR. POLLITT: We think that that is the only way to do it. Yes, Justice --

QUESTION: You mean they would not get the message otherwise?

MR. POLLITT: We think that the message which would go out otherwise would be extremely garbled, and it might be hard to understand, and we think that --

QUESTION: Even if it were clearly expressed?

MR. POLLITT: If Your Honor, please, if I may elaborate slightly in my argument here, this is the lack of prejudice type of theory which was advanced by Justice Jackson in Cassell v. Texas back in 1950, and repeated in Rose v. Mitchell by Mr. Justice Potter Stewart, with Mr. Justice Rehnquist agreeing with Mr. Stewart, but no one else has advanced it since 1880.

This goes back to Virginia v. Rives where the Court held that the appropriate remedy is to dismiss the indictment and then possibly start all over again.

There's a cost. No gainsaying that there's a cost. The cost is that you have to get a correct grand jury, take the case to the grand jury, and spend some money and some time to do it right. Against that, if Your Honors please, we have the decision by Mr. Justice Blackmun in Rose. The other value is to stop racial discrimination. That goes to the heart of the Civil War Amendments, and this Court in Rose thought that was a -- carried much greater weight than the administrative expense.

QUESTION: Mr. Pollitt, if we expressed what

you're asking, in as clear terms as it would expressed in a rule adopted by the traditional procedure, do you think that the federal judges of this country would not follow that rule?

MR. POLLITT: No, I don't think that, Your Honor. I think that the federal judges read this Court's opinions and would obey them and comply with them. On the other hand, if I may augment a little bit more, Your Honor, Cassell v. Texas and Rose v. Mitchell were state cases, and Mr. Justice Stewart wrote in his dissent, in his concurring with the judgment opinion in Rose, that the states are not required to have a grand jury, and therefore fault with the grand jury might be a harmless error.

That's not true in the federal system. The Fifth Amendment begins with a grand jury clause. No person shall be held for capital or infamous offense except upon presentment or indictment by a grand jury. And I don't think that you can just have an end run around the Fifth Amendment, whereas you don't have that problem in the state cases.

And furthermore, finally, if I may, there's a statute. There's a statute which outlines a procedure in this type of situation, and it requires that the motions be made in a timely fashion, that there be a

hearing, and if the judge decides that there is a fault, then the statute says that the judge shall dismiss the indictment. So that is the public policy of this country as expressed by the Congress.

And so -- I hope I didn't go too long, Justice O'Connor, to answer your question. But I think there are a number of reasons why it's important to stick with the 100 year tradition which began in the Rives case.

I was outlining the various reasons why I think this Court should apply its supervisory power, and the first one is that the practice below is odious. It pollutes the streams of justice. And the second is Federal Rule of Criminal Procedure. The authority comes under the -- to make the appointment -- stems from this Court through the Federal Rules. And the third is the statutory reason. The federal laws, Section 243, reconstruction law, says that it is a crime for anyone, federal or state, to discriminate on the basis of race or color in the appointment of jurors.

And in Peters v. Kiff, Mr. Justice White, three members of the Court, held that a white defendant in the Georgia courts could protest the exclusion of blacks to augment and implement the public policy as expressed in 243. And we suggest that 243 is still on

the books; it has been augmented in 1968 by the Jury Service and Selection Act, and the policy of the United States, as expressed in these two federal laws, is that there not be any discrimination, and to implement, as Mr. Justice White thought appropriate in Peters v. Kiff, to implement that policy this Court should exercise its exclusionary power.

QUESTION: Mr. Pollitt, is it clear there's a violation of 243? That really, mainly goes at the composition of the grand jury itself, doesn't it?

MR. POLLITT: 243, Your Honor, says that it is a crime to discriminate on the basis of race or color in the appointment of jurors.

QUESTION: But that didn't -- you're not alleging that happened. As I understand it, the appointment of the jury was free of discrimination.

MR. POLLITT: Yes, sir. That has to do with jurors in --

QUESTION: -- as to which one will be foreman, or foreperson, rather. And that is not, as I understand it, necessarily covered by 243, or is it?

MR. POLLITT: Well, it's not on its face. Neither 243 nor the Jury Service and Selection Act mention foremen. They talk about the jurors in 243 and the Jury Selection Act. They talk about the obligation

and the opportunity of all citizens to serve as jurors. They do not say as foreperson of jurors. So on its face, no; the answer is no, it does not.

However, the spirit there, Your Honor, is to preclude discrimination in the stream of justice, and that's what we have here. We have racial and sexual discrimination in the administration of criminal justice by federal judges. This isn't jury commissioners. These are the federal judges themselves who are making these appointments. So we think that adds a new dimension to the other cases.

QUESTION: One other reason that concerned me about your reliance on 243, I suppose there's an element of intent required to prove violation of that statute.

MR. POLLITT: We don't think that anyone -- so far as I know, and I've researched it -- my research may be faulty, but I think in ex parte Virginia, the Virginia judge was the last person indicted under 243. So there's no case law on it, and we don't --

QUESTION: But I wonder, in order for you to prevail, are you requiring us to hold, in effect, that these judges committed a crime?

MR. POLLITT: No, sir. No, sir. No, I wouldn't ask that at all.

I would just ask that a reason for exercise of

the supervisory power is to reinforce the public policy as expressed by the Congress 100 years apart in two different statutes.

QUESTION: What you're chiefly concerned with is that the judges get this message, I'm sure. Isn't that the case?

MR. POLLITT: What I'm chiefly concerned with, Your Honor, is Wilbur Hobby, my client. And I think that he has an opportunity here to serve a great public cause, as he has been doing all his adult life. But I think that there is no conflict between the interests of Wilbur Hobby --

QUESTION: You think he might get a favorable verdict if he -- if the foreman of the jury were properly designated.

MR. POLLITT: I think it might make a difference, Your Honor. Yes, sir. Wilbur Hobby is president of the AFL/CIO in North Carolina and has been a very active person on behalf of civil rights and women's rights for a number of years. And the program -- I don't want to depart too much from my argument -- but this was a CETA case, and the CETA program in issue was training young people for jobs, and they were all black. And so I think that it might make a difference, Your Honor.

QUESTION: Mr. Pollitt, would the statute of limitations have run on the offense in the event that the indictment were dismissed?

MR. POLLITT: I would not think so, Your Honor.

QUESTION: Do you know whether it has or not?

MR. POLLITT: I would think this appeal would stay the statute running of limitations.

Finally, Your Honors, I'd like to -- the Fifth Amendment is another reason. The Fifth Amendment in the Constitution does require a grand jury, and the ACLU amicus brief points out that a grand jury is not just any collection of 16 to 23 individuals; that there is a content to the concept of grand jury, and at least since 1868 and the Fourteenth Amendment, that concept includes a body of persons from which no one is excluded because of their race or color.

And so for those reasons, we believe that this Court should find it, or hopefully will find it appropriate to exercise their supervisory power and to reverse the conviction, and then leave it up to the United States Attorney on whether or not he'll continue with this case by seeking a new indictment.

If there are no questions --

QUESTION: May I ask, before you sit down, in the Rose v. Mitchell context, where we're reviewing a

state court, a state's conviction, there really is no possible way in which this Court could correct the problem unless it reversed convictions.

But in the federal system, if we're talking about supervisory power, there at least is a different form of remedy that's available through the Judicial Councils of the circuits and the like. Would you address yourself to the question, whether we should consider some other remedy that's less drastic than the one you propose?

MR. POLLITT: Well, if Your Honors please, I don't know of any alternative remedy. I've read the government's brief and I know of their proposal, but I don't think that there's any reason to depart from the 100 year tradition and the expressed statement of Congress on the proper procedure here. And the government suggests that if this Court rules for Wilbur Hobby, that there'll be -- federal judges will be lined up in the docks while the crooks guffaw, while their mouthpieces harass the judges. I don't see that at all.

I would think that one simple decision from this Court saying that you can't do this, and that they won't do it anymore. That's what I think. So I don't see this chamber of horrors which the government presented here.

And again, I would say that the Constitution requires an indictment. No person shall be held to answer for any capital or infamous crime except upon presentment or indictment of a grand jury. And it's essential to protect the integrity of the grand jury, and the way to do it is the tried and true method used for 100 years and rejected in Cassell when it was raised, rejected when it was raised again in Rose v. Mitchell, and I know that those were state cases and I think that adds to the strength here of using the supervisory power instead of going to the Constitution.

QUESTION: Professor, what if we -- I know you don't agree with the Court of Appeals in this respect, but what if we did -- that the foreperson's job is really just ministerial? Then it may still be that there shouldn't be discrimination in their selection.

But if we agreed that it's just ministerial, in which event there wouldn't be any real threat to the soundness of the conviction, would we really set aside the --

MR. POLLITT: Well, if Your Honors please, in the Fourth Circuit, it was argued 6(c), and the Fourth Circuit looked at 6(c) and 6(c) looks like the foreperson is ministerial. Section 6(c) has three functions. The foreman adminsters the oaths, he signs

the indictments, and he keeps a tally of the votes. But if you go beyond 6(c), which we do in our brief, and we go to the handbook prepared by the Judicial Conference, and that sets forth a number of other functions.

First of all, the foreperson is selected by the federal judge in open court in the presence of everyone else, so he gets a certain honor and glamour from the appointment. And then, during the ensuing 18 months, if anyone on the grand jury wants to be excused, they go to the foreman. The foreman has the power -- they have to go to the foreman to be excused.

And then if they want to communicate with the judge or with the U.S. Attorney, they do it through the foreman. And then the foreman has the gavel. The foreman asks the first question after the U.S. Attorney is through, and then he recognizes the others, and when he thinks there's enough, he hits the gavel. And then when all the witnesses are gone and they start their deliberations, again the foreperson initiates the discussion. He has the gavel, and he controls it.

QUESTION: Where was this trial?

MR. POLLITT: It was -- the trial was in Raleigh, North Carolina, if Your Honor please.

QUESTION: Because there's a difference between the grand jury in a rural area and in a city

area.

MR. POLLITT: Well, where the Eastern District -- the grand jury is drawn from the Eastern District, which stretches to the ocean at Wilmington.

QUESTION: In a rural area, it's a great big thing. In a city it's --

MR. POLLITT: Yes, sir. Well, the grand jury came -- the grand jury wheel was drawn from the entire district, not just from the city of Raleigh.

QUESTION: You're talking about the foreman being a person that everybody looks up to. That's true in the rural area, but I doubt if you'd find anybody in New York City who knows who the foreman of the grand jury is.

MR. POLLITT: Well, I really don't -- can't answer that, Your Honor. I think that in Raleigh, North Carolina, they know who the foreperson is.

And my final thing which is -- may not be important --

QUESTION: I'm sorry I got you off it.

MR. POLLITT: Oh, no, sir. I appreciate your question, because it gives me a chance to respond, that unlike New York, in North Carolina the foreman does have the bible. He has not only the gavel, he has the bible, and he administers the oath, and that's no little thing

in North Carolina, Your Honor.

I'd like to reserve the balance of my time.

CHIEF JUSTICE BURGER: Mr Schwartz.

ORAL ARGUMENT OF JOSHUA I. SCHWARTZ, ESQ.

ON BEHALF OF THE RESPONDENT

MR. SCHWARTZ: Thank you, Mr. Chief Justice, and may it please the Court, the question in this case is whether a white male defendant is entitled to seek dismissal of the indictment returned against him by a validly-constituted federal grand jury by alleging that a pattern of discrimination against women and blacks in the selection of grand jury forepersons from among the members of the grand juries exists in the particular judicial district in which he was indicted.

The issue before the Court pertains only to the remedies and rights available to a criminal defendant in the particular situation, for it is common ground among the parties that purposeful discrimination in foreperson selection is unlawful; it is prohibited by the Fourteenth Amendment, or the Fifth Amendment in a federal case.

Any such discrimination violates the rights of grand jurors who suffer discrimination in connection with their opportunity to serve as foreperson.

Our submission, however, is that the

distinctive interests of criminal defendants that have been recognized by the Court in the jury selection cases on which petitioner relies simply are not implicated by the narrowly focused form of discrimination alleged in this particular setting.

The decision of the Court of Appeals which accords with those of the Third Circuit and the Ninth Circuit on this question, thus, is not as petitioner would have it, a radical departure from this Court's teaching in the jury selection cases; rather, we urge that consistent and careful application of the reasoning of this Court's decisions, beginning with Strauder v. West Virginia, running through Peters v. Kiff, and Taylor v. Louisiana, through Rose v. Mitchell, and Duren v. Missouri, leads to the conclusion that there is, in fact, no basis for the dismissal of petitioner's indictment.

I'd like to turn, if I might, to the supervisory power argument, because it seems to have assumed the central presence in petitoner's argument, at least in this Court. We do not agree that supervisory power, that reliance on supervisory power means the abandonment of all analysis of the effective interests of a criminal defendant, or of all standing requirements. It is true that in this Court's

supervisory power decisions in jury selection, the Court recognized, before it did under constitutional grounds, that there are some interests of a criminal defendant beyond those of a black defendant not to be indicted by a grand jury from which the members of his race have been excluded.

But the Court's opinion, for instance, in Ballard v. United States, points to distinctive interests that are implicated, the interests of a defendant subsequently put on a constitutional foundation in the Sixth Amendment in having a jury drawn from a fair cross-section of the community, or by a process that does not rule out any significant segment of the community that is qualified to serve.

We, therefore, do not agree that you can simply discard all analysis or all consideration of the defendant's rights and the defendant's interest by placing the label "supervisory power" on the Court's decision. Therefore, we are essentially obliged to turn to analysis of the interests of defendants which the Court has recognized under one theory or another in the different lines of cases which petitioner has invoked, to look at these cases and to see whether these interests of a criminal defendant are meaningfully or at all implicated here. And we submit that they are not.

But before I turn to that, I'd like to talk a minute about the petitioner's proposal, which is that the Court reverse his conviction, direct that his indictment be dismissed, and that the court start over -- the lower court to be directed to start over and do it again, do it right.

In this context, where we're talking only about the selection of the grand jury foreperson, that's a rather ambiguous prescription. It appears, although I'm not certain about this, that starting over and doing it right, might result in another grand jury with a white male foreperson, in which case it is doubtful indeed what has been accomplished.

On the other hand, if the petitioner's proposal is that the case be remanded with instructions to appoint a black female foreperson, that would be quite a depature from any remedy previously provided by this Court, and it would be at odds with the Court's repeated holdings that no defendant has any right to a grand -- to a petty jury of any particular description. We think it clear that no defendant has any right to a particular grand jury foreperson of a particular race or sex.

And for those reasons, we do think it is appropriate to look to the other kinds of remedies that

might be available if the Court deems it appropriate as a supervisory authority.

QUESTION: Well, what if we disagree with the Court of Appeals as to the significance of a grand jury foreperson? Suppose we thought that the foreperson was just as important as the foreperson was in Rose v. Mitchell?

MR. SCHWARTZ: Well --

QUESTION: And in Rose v. Mitchell, what did we --

MR. SCHWARTZ: The Court as a whole did not really decide. They merely assumed the importance of the foreperson. You and Justice Stevens concluded that in that particular situation --

QUESTION: Well, then I'll put it another way. Suppose we disagree with the Court of Appeals as to the importance of a foreperson?

MR. SCHWARTZ: We do not believe that this Court is required -- that is really the central question in the case, because the question whether the foreperson's job is important or unimportant is not one that exists that in a vaccum. The dimension of importance is the dimension that exists in light of the interests of a criminal defendant that have been recognized in the due process and equal protection cases.

Simply because a foreperson is important is not enough. For instance --

QUESTION: Well, what would the -- what do you suppose the Court would have done in Rose if they had thought the case had been made, the discrimination case had been made? I thought the discussion of the majority there indicated that the indictment would have been dismissed.

MR. SCHWARTZ: Well, there are two points. First of all --

QUESTION: Do you agree with that or not?

MR. SCHWARTZ: I don't really agree with that, Justice White.

QUESTION: I guess you can't.

MR. SCHWARTZ: Well, perhaps I could, because there is a factual difference between the system involved in Rose. In the Tennessee system, like many state systems, the foreman of the grand jury was chosen by a process independent of the selection of the grand jury and was tacked on to the grand jury.

The Sixth Circuit's opinion in Mitchell v. Rose essentially took the point of view that you couldn't draw the line. They said a grand jury that was 12/13 constitutionally constituted wasn't good enough. And perhaps there is something to be said for the view

that it's uncomfortable to draw a line to say what little segment of the grand jury could be improperly chosen.

But here we're talking about a grand jury that was 100 percent properly chosen, so this case could be distinguished from any suggestion in Rose v. Mitchell on that basis.

QUESTION: What would the word "foreman" mean to a blue collar worker that was on the jury?

MR. SCHWARTZ: Well, I --

QUESTION: Could it mean "boss"?

MR. SCHWARTZ: I don't think it would mean "boss" in the sense that you must do what this man says.

QUESTION: Could it mean authority?

MR. SCHWARTZ: There might be some suggestion of authority.

QUESTION: Could it mean more authority than an ordinary member?

MR. SCHWARTZ: Grand jurors are also instructed, Your Honor, that they each have a vote, and whatever informal influence there might be, there's no reason to believe that grand jurors have the perception that they are subordinate to the foreperson in the sense that washes out the significance of their vote.

QUESTION: Well, isn't he more important to

everybcdy in that room than everybody else? Otherwise, why was he appointed? Was the judge just wasting his time? Cr dces the jury get the impression that the judge says this man, fcr some reason, is more important?

MR. SCHWARTZ: Justice Marshall, the judge is not wasting his time. The foreperson has tasks to carry out, but thcse tasks, tc the extent they are distinctive, do not relate to the central function cf the grand jury which --

QUESTICN: What if he were say I appoint ycu as a teller, I appoint you as a vote person? He doesn't; he says I appoint ycu as a fcreman, which means a boss.

MR. SCHWARTZ: We don't think that the label itself is sufficient tc establish that, especially because of the other gaps in the argument that the appcintment of a fcreperson confers some -- infringes n a defendant's rights. And sc perhaps I'd best turr to those rights of the defendants, which we think explain the varicus lines cf cases pertaining tc jury discrimination.

Because we dc not believe that the supervisory power analysis enables the Court to simply disregard the questicn of the defendant's interests, we are obliged to look at the various lines cf decisicns, equal prctectic

and due process, that the Court has decided.

We'll start with equal protection, because that's where the petitioner started. The petitioner in his brief relied first on the line of cases starting with Strauder v. West Virginia, the 100-year-old tradition that petitioner invokes, that holds that a defendant may not be indicted or convicted by a jury from which members of his race have been excluded.

The petitioner is a white male, and we don't believe he's well-situated to advance the particular claim of injury that we understand to be the basis for the equal protection jury selection cases. Strauder tells us that the exclusion of blacks from a jury is a brand of inferiority upon that race which interferes with the opportunity for equal administration of justice.

A white male simply does not suffer that brand. Wilbur Hobby cannot claim that he has been branded as inferior in this manner; in fact, the petitioner doesn't seem to claim that that was his injury, and he seems to acknowledge that he lacks standing to claim an equal protection violation. But he does say that the equal protection cases set a tone which is relevant for this Court's consideration of this case. And in one respect, we can agree with that, because the analysis we advocate entails no retreat from

this Court's traditional abhorrence for racial discrimination or for any other form of unlawful discrimination in jury selection or the administration of justice.

But it does -- we do ask the Court to recognize that the right of criminal defendants to secure dismissal of their indictments from the equal protection cases has never rested sufficiently upon abhorrence for racial discrimination, but upon the critical element that some interest of the defendant is implicted. Absent that, we do not believe the equal protection analysis or the values that I'm informed can aid the petitioner here.

There is another line of cases, to be sure, which dispenses with the so-called same class standing requirement. Petitioner has also invoked Justice Marshall's opinion in Peters v. Kiff and the fair cross-section doctrine established in the Sixth Amendment petty jury selection cases. And we assume that, notwithstanding his race and sex, petitioner has standing to press such claims based on underrepresentation of women and blacks in the selection of a foreperson.

Nevertheless, we do not believe that the authorities petitioner cites in this connection support

his claim that his indictment should be dismissed if discrimination in foreperson selection were proven.

The point is that discrimination in the selection of a foreperson simply would not affect the defendant's right to a competent tribunal drawn from a fair cross-section of the community.

Pursuant to the Federal Rules of Criminal Procedure, Rule 6(c), the grand jury foreperson in the federal system is, as I've said, simply selected from among the members of the grand jury. And we think it significant that the net effect is that any discrimination that might exist simply does not implicate or affect the constitution of the tribunal, so that the concern for narrowing the range of human values and perceptions that are brought to bear upon a defendant's case that was expressed first in Ballard v. United States, and subsequently in the fair cross-section cases, simply has no basis here. There was no narrowing here. There was a proper grand jury, and there's no reason to think that whatever benefit a defendant such as petitioner might derive from that was lost here because of the identity of the foreperson.

And we think this kind of suggestion is especially unrealistic with regard to a federal grand jury, because Congress has provided through the Jury

Selection and Service Act, a powerful protection for these particular rights of defendants. The Jury Selection and Service Act requires that federal grand juries be drawn at random from a fair cross-section of the community, and the statute provides detailed -- a detailed mechanism by which the grand jury selection shall be carried out.

Very little is left to chance, because of the additional fact that there are not peremptory challenges on grand juries. In the federal system the grand jury has a very powerful guarantee of representing the community. The statute in this respect appears to be quite a bit stronger perhaps than any analogy to the Sixth Amendment right to a fair cross-section might be.

By contrast to this, no single individual, no foreperson, could possibly be the representative of the community. The concept of fair cross-section just isn't very meaningful when we're talking about --

QUESTION: You keep saying "foreperson." Does your rules, then, say "foreperson"?

MR. SCHWARTZ: Justice Marshall, my rules say "foreman," and --

QUESTION: I didn't say your rules -- rules of the court in this case.

MR. SCHWARTZ: The Federal Rules of Criminal

Prccedure use the wcrd "foreman."

QUESTION: Fcreman. Well, why do you say "foreperson"?

MR. SCHWARTZ: I say "foreperson" --

QUESTICN: Are ycu trying to say that ycu've already agreed that the other side is right?

MR. SCHWARTZ: Nc. I'm trying to say that --

QUESTION: I just wondered.

MR. SCHWARTZ: To the extent that we use that terminclcgy, Justice Marshall, it does reflect that we do not assume that there is any reason that a foreman of a grand jury should be a man. And that is part of the government's position, and I reflect it by my usage. The term "foreman" means the same thing to me. If I say "fcreman," I wculd alsc mean that the pcst is nct by law to be reserved for any particular class. "Foreperson" is a ccnvenient reminder of that fact.

If the fair cross-section doctrine were to be extended to the designation of a foreperson, that would really fly in the face of the limits the Ccurt has previously drawn in other ccntexts where the fair crcss-section doctrine has been used. Taylor v. Louisiana teaches that the fair cross-section rule fcr petty juries applies lists from which juries are drawn, but not to the actual petty jury panels. And we think

it would leap-frog over that limitation to require a fair cross-section as to the actual grand jury forepersons.

We would also point out, to return -- I'd like to return for a minute to the equal protection analysis which informs the case to some degree. Here's another reason why discrimination in the selection of forepersons is to be distinguished from other forms of discrimination that might be claimed in jury selection.

Unlike other kinds of patent discrimination of any race or significant population group from service on grand juries or petty juries, there is simply very little reason to believe that any stigma or second-class citizenship status could be attached to a defendant in the eyes of a grand jury because of the discrimination in the foreperson selection. The simple fact is that if you're going to have a foreperson and you're going to select him from among the members of the grand jury, you've got to single out one individual. Whatever race or sex that individual is, it's difficult to believe that a jury would draw any inference that the United States tolerates racial discrimination and condones second-class treatment for a member of a particular race or sex simply because of the selection of one individual.

Of course, petitioner claims that there's a

pattern of underrepresentation that has existed over time. But it is simply unrealistic to suppose that --

QUESTION: Mr. Schwartz, supposing the judge asked the bailiff right before the selection to "Give me the names of all the white male people on the jury; I want to go about picking the foreman." Would that present any problem?

MR. SCHWARTZ: Justice Stevens, our answer would depend on -- I'll ask you for --

QUESTION: And he further said, "I like to pick white males. I think they ought to be the foremen. They represent leadership under my standards," or something like that.

MR. SCHWARTZ: In our view, several things would make a difference. If he said that in the presence of the grand jury --

QUESTION: Right.

MR. SCHWARTZ: -- we would certainly think that a black defendant would have an equal protection claim, just as if totally without regard to the selection of a foreperson at all, the judge made any other remark that indicated a view that blacks had lesser rights. Any form of it that might thereby bias the jury's deliberations or suggest that the defendant of that race or sex is to be accorded less respect --

QUESTION: But don't we have to assume, for purposes of analyzing the issue -- I know you don't agree it's that blatant -- but you're claiming there's no remedy for this sort of thing. Shouldn't we take the case as though the judge did something just that blatant, and then say well, is there any reason we should be concerned about it?

MR. SCHWARTZ: Well, I'm not sure we can make that assumption, since there's no claim that anything of that nature happened here. But we would say that there is one exception perhaps to our general rule. That is in the case of blatant discrimination, where a member of the group that has suffered that discrimination can show it. Then the equal protection theory might work, and we think it's appropriate for the Court to treat such a case when it arises.

It seems to us stretching quite a bit to make this case into that case, and because the theory the petitioner argues is not that theory, we're uncomfortable in excluding that possibility.

QUESTION: Do you advance or any reason, or do you suggest that there is any reason why it should not be made clear that race or sex is not to be taken into account in a negative way in the selection of the foreman of the grand jury?

MR. SCHWARTZ: No. We do not believe that there is any reason. Our submission is -- and it is, in our view, that it should not be. It is our view that it is not necessary or appropriate to reverse a conviction and dismiss an indictment to do that. And if I may --

QUESTION: Well, I wasn't addressing whether the indictment should be dismissed. I'm simply addressing the supervisory aspect that your friend has advanced as one solution to this problem.

MR. SCHWARTZ: We would suggest that there is a unique aspect to this case, because it comes from the federal courts, unlike the state courts. The court -- this Court and the other judicial bodies, the Judicial Conference and the Judicial Councils, have authority that they would not have with respect to a state case that came here.

There would be no difficulty from our point of view -- I mean you suggested that the rule could be plainly stated, and we agree that it could be. Rule 6(c) could be amended to state, in the language I borrowed from the Jury Selection and Service Act. One additional sentence would do the job. It could say, "No grand juror shall be excluded from designation as foreman on account of race, color, religion, sex, national origin, or economic status." And I've chosen

these categories, simply because those are the ones in the Jury Selection and Service Act.

I do not think that the district judges could possibly miss that message, and that could be regarded as an exercise of supervisory authority and a perfectly appropriate one.

QUESTION: We could amend the rules? We, this Court, could amend the rules?

MR. SCHWARTZ: Under the Rules Enabling Act, the Court has the power to promulgate the rules and pass them onto Congress. The Judicial Conference and its standing committees have the power to make recommendations. And, in fact, the Judicial Conference through its committees has the power to undertake fact-finding and investigation to determine whether this problem, a problem of --

QUESTION: Do you realize that we are not members of the Judicial Conference?

MR. SCHWARTZ: Excuse me, Your Honor?

QUESTION: The only member of the Judicial Conference is the Chief Justice. This Court is not a member of it.

MR. SCHWARTZ: I understand. But the Court does serve a function in the --

QUESTION: Well, what could this Court do,

other than what the appellant suggests in order to do what you say you want done?

MR. SCHWARTZ: It seems to me that an opinion from this Court which indicated that although the remedy sought was not appropriate, the Court was in agreement with the view that I stated from a proposed rule would -- it's difficult for me to believe that the desired result would not be immediately forthcoming, either in terms of amendment of the rules or action by the Judicial Council or simply by conforming from the district courts.

We would note that the Court of Appeals' opinion in this case reflects that subsequent to the indictment of this petitioner, the pattern of nonselection of blacks and women in the Eastern District of North Carolina has been abandoned. There is no vested interest in the perpetuation of this discrimination that we perceive.

We believe this is uniquely a problem that, when called to the attention of the district judges, will vanish. Sunlight will make it go away. And should these remedies --

QUESTION: Supposing the rule were amended exactly as you propose, and then the same facts occurred in the next six grand juries in some district, and then

the defendant made precisely the same argument that's made in this case. What should be done with it?

MR. SCHWARTZ: Well, Justice Stevens, I'd say at the outset there would be all kinds of questions as to the amount of time that had passed. Six grand juries would probably not be enough to establish a predicate of discrimination.

But, assuming your hypothetical --

QUESTION: That he said in this grand jury there was discrimination in selecting the foreman. What would the judge have to -- in violation of the new rule that you have just promulgated?

MR. SCHWARTZ: We would still submit that the mechanism we have described through the Judicial Councils would provide a remedy for investigating the situation. The Judicial Council is empowered to hold hearings to --

QUESTION: Well, if you're going to fall back on the Judicial Council, there really is no need to amend the rule in the meantime, is there? You might as well just fall back on that right away.

MR. SCHWARTZ: Justice Stevens, either approach might be sufficient. It might be appropriate to amend the rule, because that would send the clearest signal the Judicial Council still have enforcement

power. That's relevant, and could be relevant whether there be initiators or not.

QUESTION: Well, stop right there. The Judicial Council does have authority to enforce such a rule. They could direct that any judge who didn't follow the rules should no longer be permitted to deal with grand juries.

MR. SCHWARTZ: I've said nothing to suggest that I disagree with that, Your Honor.

QUESTION: Well, isn't there another matter? I'm sure you must be aware that not often, but sometimes, this Court has directly made recommendations to the Judicial Conference and its advisory committees with respect to what rules should be adopted or changed.

MR. SCHWARTZ: Yes, Your Honor.

QUESTION: Not through an opinion of the Court, but simply by direct communication.

MR. SCHWARTZ: It seems to us that there are ample channels available. There's really no mistake about the message. In fact, I would suspect that irrespective of how this case is decided, the fact that it has been decided will, to a considerable degree, serve to eradicate any problem that exists in this area because it will focus the attention of the district courts upon their practices and cause the judges to

examine what those practices have been.

Petitioner has dismissed the alternative remedies we have discussed as untested. But petitioner does not suggest that they have been tried and found wanting in any respect, or otherwise defective or insufficient. Under the circumstances, and given that the remedy the petitioner describes is strong medicine, after all, we think it wholly unwarranted, we believe that the dismissal of petitioner's indictment is inappropriate.

Dismissal of petitioner's indictment is not necessary, in short, to address any infringement of petitioner's rights. It is not necessary to maintain the integrity of the judicial process. It's not necessary to maintain the confidence of the public in the administration of justice, and might even cause to call in question the public's confidence, and therefore there is simply no basis in law for awarding petitioner that remedy. The judgment of the Court of Appeals should accordingly be affirmed.

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

MR. POLLITT: Yes, sir. I have --

CHIEF JUSTICE BURGER: You have about seven minutes remaining -- nine minutes remaining.

MR. POLLITT: I certainly won't take that much time, Your Honor, I hope.

ORAL ARGUMENT OF DANIEL H. POLLITT, ESQ.

ON BEHALF OF THE PETITIONER -- REBUTTAL

MR. POLLITT: I'd just like to call this Court's attention to our brief again about the importance of the foreperson, where we discuss the testimony of the 20 district judges who had appointed forepersons of the grand jury, and they all said that they looked for strong people who could keep 23 grand jurors in line, and they also looked for strong people because it's the foreperson who stands between the government and an indictment. So the 20 judges are in agreement that the foreperson is not a cipher or a clerk.

QUESTION: I am sure you would not intend to suggest that those 20 judges, if this Court speaks, will not comply with what this Court says.

MR. POLLITT: Oh, no. Not at all. Not at all, Your Honor.

I'd like to point out that slightly over 100 years ago, in Neal v. Delaware, this Court held that it was a violent presumption which could not be accepted that all members of the black race in Delaware were utterly disqualified to sit as jurors by want of intelligence, experience, and moral integrity.

Today, if Your Honors please, it is still a violent presumption which cannot be accepted, that all blacks and women called for grand jury service in the Eastern District of North Carolina are utterly disqualified to hold the leadership positions by want of intelligence, experience, or moral integrity.

Your Honors, this is a very important case or it would not be here. It involves racial discrimination in the administration of justice. And I would like to close by reminding this Court that, from Rose v. Mitchell, discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice. And from Smith v. Texas, in the words of Mr. Justice Black, "Discrimination in the grand jury system is at war with our basic concepts of a democratic society and a representative government."

And that is what is at issue here today, if Your Honors please. Now, the remedy we seek may be strong medicine, but unfortunately, the disease of racism is still rampant today in certain quarters, and we think that the remedy we call for is traditional and highly appropriate. And I thank you very much for the opportunity to present our cause here today.

CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted, and we'll hear arguments next in

United States v. Karc.

(Whereupon, at 10:57 a.m. the case in the above-entitled matter was submitted.)

CERTIFICATION

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#82-2140 - WILBUR HOBBY, Petitioner v. UNITED STATES

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