The Burger Court Opinion Writing Database

Hobby v. United States

468 U.S. 339 (1984)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **The Chief Justi**

Circulated: MAY 29 1984

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-2140

WILBUR HOBBY, PETITIONER *v.* UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[May ——, 1984]

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to resolve a conflict among the Circuits as to whether discrimination in the selection of federal grand jury foremen, resulting in the underrepresentation of Negroes and women in that position, requires reversal of the conviction of a white male defendant and dismissal of the indictment against him.

I

Petitioner, a white male, was indicted on one count of conspiring to defraud the United States of funds appropriated under the Comprehensive Employment and Training Act of 1973, 29 U. S. C. §801 *et seq.* (CETA), in violation of 18 U. S. C. §§371 and 665, and three counts of fraudulently obtaining and misapplying CETA grant funds, in violation of 18 U. S. C. §665. Prior to trial in the United States District Court for the Eastern District of North Carolina, petitioner moved for dismissal of the indictment against him "due to improper selection of grand jurors." App. 32. In particular, he alleged that the grand jury selection plan "exclude[d] citizens from service . . . on account of race, color, economic status and occupation, in violation of . . . the Fifth and Sixth Amendments of the United States Constitution." *Id.*, at 33.

At an evidentiary hearing on the motion to dismiss, petitioner introduced the testimony of a statistical social science consultant regarding the characteristics of the persons se-

To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **The Chief Justi**

Circulated: _____

Recirculated: JUN 0 5 19

CHANGES AS MARKED: 3, 10

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-2140

WILBUR HOBBY, PETITIONER *v.* UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[June ——, 1984]

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to resolve a conflict among the Circuits as to whether discrimination in the selection of federal grand jury foremen, resulting in the underrepresentation of Negroes and women in that position, requires reversal of the conviction of a white male defendant and dismissal of the indictment against him.

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At an evidentiary hearing on the motion to dismiss, petitioner introduced the testimony of a statistical social science consultant regarding the characteristics of the persons se-

To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: The Chief Justi

Circulated: _____

Recirculated: JUN 11 1984

STYLISTIC CHANGES THROUGHOUT

CHANGES AS MARKED: 5

(1)

In due course I hope to circulate a dissent in this one

JHM

RECEIVED
SUPREME COURT, U.S.
JUSTICE MARSHALL
'84 JUN 12 A9:39

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-2140

WILBUR HOBBY, PETITIONER *v.* UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[June ——, 1984]

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to resolve a conflict among the Circuits as to whether discrimination in the selection of federal grand jury foremen, resulting in the underrepresentation of Negroes and women in that position, requires reversal of the conviction of a white male defendant and dismissal of the indictment against him.

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Petitioner, a white male, was indicted on one count of conspiring to defraud the United States of funds appropriated under the Comprehensive Employment and Training Act of 1973, 29 U. S. C. § 801 *et seq.* (1976 ed., Supp. V) (CETA), in violation of 18 U. S. C. §§ 371 and 665, and three counts of fraudulently obtaining and misapplying CETA grant funds, in violation of 18 U. S. C. § 665. Prior to trial in the United States District Court for the Eastern District of North Carolina, petitioner moved for dismissal of the indictment against him "due to improper selection of grand jurors." App. 32. In particular, he alleged that the grand jury selection plan "exclude[d] citizens from service . . . on account of race, color, economic status and occupation, in violation of . . . the Fifth and Sixth Amendments of the United States Constitution." *Id.*, at 33.

At an evidentiary hearing on the motion to dismiss, petitioner introduced the testimony of a statistical social science consultant regarding the characteristics of the persons se-

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 25, 1984

MEMORANDUM TO THE CONFERENCE:

Re: Cases Held for No. 82-2140, Hobby v. United States

The following cases have been held for No. 82-2140, Hobby v. United States:

(1) No. 83-681, Dentico v. United States; No. 83-690, Musto v. United States; No. 83-806, D'Agostino v. United States.

Petitioners in these three curve-lined cases, all of whom are male, were indicted for numerous RICO violations. Prior to trial, they moved to dismiss the indictment against them, claiming that blacks, women, and persons under the age of 28 had been underrepresented in the positions of grand jury foreman and deputy foreman in the District of New Jersey. At an evidentiary hearing, petitioners presented statistical evidence regarding the foremen and deputy foremen of the 25 grand juries that had been empaneled in New Jersey from April 1976 to July 1981. During that period, petitioners' evidence suggested, 2 foremen and 2 deputy foremen had been black, and 2 foremen and 2 deputy foremen had been female.

The District Court rejected petitioners' contentions. The District Court first determined that persons under the age of 28 did not constitute a cognizable class and that petitioners' statistical evidence was insufficient to establish a prima facie case of discrimination against blacks. With regard to the allegations of discrimination against women, the District Court found the evidence of discrimination statistically significant; the District Court concluded, however, that such discrimnation was not a sufficient basis for the dismissal of the indictment against petitioners.

On appeal, petitioners pressed only their claim of discrimination against women in federal grand jury foreman selection. The Third Circuit agreed with the District Court that the duties of the federal grand jury foreman are merely ministerial ones, which do not confer the power to control the decisionmaking process of the grand jury. The Court of Appeals concluded that the selection of one member of a properly constituted grand jury does not warrant the dismissal of indictments and affirmed the District Court's denial of petitioners' motion to dismiss.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

April 30, 1984

No. 82-2140

Hobby v. United States

No. 83-558

Irving Independent School
District v. Tatro

Dear Thurgood,

You and I are the only dissenters in the above. Will you take on No. 82-2140, Hobby v. United States? I'll take on No. 83-558, Irving Independent School District v. Tatro.

Sincerely,

Bill

Justice Marshall

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 28, 1984

No. 82-2140

Hobby v. United States

Dear Thurgood,

Please join me in your dissent.

Sincerely,

Bill

Justice Marshall

Copies to the Conference

CHAMBERS OF
JUSTICE BYRON R. WHITE

Supreme Court of the United States
Washington, D. C. 20543

RECEIVED
SUPREME COURT, U.S.
JUSTICE MARSHALL

'84 JUN -5 A11:13

June 5, 1984

Re: 82-2140 Hobby v. United States

Dear Chief,

Please join me.

Sincerely yours,

Byron

The Chief Justice

Copies to the Conference

cpm

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 12, 1984

Re: No. 82-2140-Hobby v. United States

Dear Chief:

In due course I hope to circulate a dissent in this one.

Sincerely,

TM

T.M.

The Chief Justice

cc: The Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Marshal**

Circulated: JUN 27 1984

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-2140

WILBUR HOBBY, PETITIONER *v.* UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[June ——, 1984]

JUSTICE MARSHALL, dissenting.

The majority assumes that a judge of the United States District Court for the Eastern District of North Carolina purposefully discriminated against Negroes and women in selecting the foreman of the grand jury that indicted petitioner. The majority recognizes that such discrimination is unconstitutional. The Court concludes, however, that dismissal of petitioner's indictment is unwarranted because "the impact of a federal grand jury foreman upon the criminal justice system and the rights of persons charged with crime is 'minimal and incidental at best,' " *ante*, at 6 (citation omitted), thereby rendering the relief petitioner requests incommensurate with the injury he received. I dissent because the Court errs in its assessment of (I) the dimensions of the injury to the criminal justice system caused by discrimination in the selection of grand jury foremen, (II) the dimensions of the injury to an individual defendant, and (III) the relative social costs that would likely be imposed by dismissing petitioner's indictment compared to the costs that are likely to be exacted by the Court's resolution of this case.

I

An established principle of this Court's jurisprudence is that the injury caused by race and sex discrimination in the formation of grand and petit juries is measured not only in terms of the actual prejudice caused to individual defendants

pp. 10-11

To: The Chief Justice
Justice Brennan
Justice White
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Marshall

Circulated: _____

Recirculated: JUN 29 198

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-2140

WILBUR HOBBY, PETITIONER *v.* UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[July 3, 1984]

JUSTICE MARSHALL, with whom JUSTICE BRENNAN and JUSTICE STEVENS join, dissenting.

The majority assumes that a judge of the United States District Court for the Eastern District of North Carolina purposefully discriminated against Negroes and women in selecting the foreman of the grand jury that indicted petitioner. The majority recognizes that such discrimination is unconstitutional. The Court concludes, however, that dismissal of petitioner's indictment is unwarranted because "the impact of a federal grand jury foreman upon the criminal justice system and the rights of persons charged with crime is 'minimal and incidental at best,'" *ante*, at 6 (citation omitted), thereby rendering the relief petitioner requests incommensurate with the injury he received. I dissent because the Court errs in its assessment of (I) the dimensions of the injury to the criminal justice system caused by discrimination in the selection of grand jury foremen, (II) the dimensions of the injury to an individual defendant, and (III) the relative social costs that would likely be imposed by dismissing petitioner's indictment compared to the costs that are likely to be exacted by the Court's resolution of this case.

I

An established principle of this Court's jurisprudence is that the injury caused by race and sex discrimination in the formation of grand and petit juries is measured not only in

Supreme Court of the United States
Washington, D. C. 20543

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SUPREME COURT U.S.
JUSTICE MARSHALE

'84 JUN -8 A9:49

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 8, 1984

Re: No. 82-2140, Hobby v. United States

Dear Chief:

Please join me.

Sincerely,

HAB

The Chief Justice

cc: The Conference

June 1, 1984

82-2140 Hobby v. United States

Dear Chief:

There was, of course, no finding that the District Court in this case was guilty of discrimination in selection of grand jury foremen. There is only an allegation, based on statistical evidence, that selection of grand jury foremen in the Eastern District of North Carolina had been discriminatory. There was an evidentiary hearing at which an expert witness reported that none of the 15 grand juries impaneled over a seven-year period had had a Negro or a female foreperson. The DC denied the motion to dismiss.

I agree that, for purpose of our opinion, we must assume there was discrimination over this seven-year period. In fairness to the District Judges, I think we should make clear that there has been no finding of discrimination. We assume it only to reach the constitutional question presented by the motion to dismiss.

This same concern prompts me to suggest that the first full paragraph on p. 10, in which you "admonish" District Judges generally, may well be unjustified. There is no evidence that District Judges in general have been acting discriminatorily in this respect. The fact that this type of claim is made so infrequently supports the view that - at least in the late 20th Century - judges are careful in this respect.

I would not "admonish" District Judges at all. Rather, we could say that we have no reason to believe that judges are insenstive to their duty not to exclude any citizen from grand jury consideration on account of race or sex.

Sincerely,

The Chief Justice

lfp/ss

lfp

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 4, 1984

82-2140 Hobby v. United States

Dear Chief:

Please join me.

Sincerely,

L

The Chief Justice

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 1, 1984

Re: No. 82-2140 Hobby v. United States

Dear Chief:

Please join me.

Sincerely,

WHR

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 13, 1984

Re: 82-2140 - Hobby v. United States

Dear Chief:

I shall await Thurgood's dissent.

Respectfully,

JPS

The Chief Justice

Copies to the Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: Justice Stevens

JUN 27 198

Circulated: _____

Recirculated: _____

82-2140 - Wilbur Hobby v. United States

JUSTICE STEVENS, dissenting.

A rule that forbids discrimination in the selection of a grand jury must be justified primarily by the overriding interest in maintaining the integrity of the judicial process--both the actual fairness of that process and the symbolic values that it it embodies. As I understand the Court's prior cases, it is settled that the process that leads to a State's deprivation of a person's liberty is not "due process" if the selection of the grand jury that indicted the defendant was tainted by racial prejudice. That principle applies to the grand jury foreman, for he performs a function that has both practical and symbolic significance. See Rose v. Mitchell, 443 U.S. 545 (1979). Although I have expressed my doubts concerning the wisdom of applying this principle in certain situations, see id., 593-594 (STEVENS, J., dissenting in part), if we enforce the principle in state proceedings, surely we must insist on adherence to the same standard in the federal judicial system. Accordingly, I join JUSTICE MARSHALL's dissenting opinion.

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: **Justice Stevens**

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Recirculated: JUN 28 198

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-2140

WILBUR HOBBY, PETITIONER *v.* UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[July ——, 1984]

JUSTICE STEVENS, dissenting.

A rule that forbids discrimination in the selection of a grand jury must be justified primarily by the overriding interest in maintaining the integrity of the judicial process—both the actual fairness of that process and the symbolic values that it it embodies. As I understand the Court's prior cases, it is settled that the process that leads to a State's deprivation of a person's liberty is not "due process" if the selection of the grand jury that indicted the defendant was tainted by racial prejudice. That principle applies to the grand jury foreman, for he performs a function that has both practical and symbolic significance. See *Rose* v. *Mitchell*, 443 U. S. 545 (1979). Although I have expressed my doubts concerning the wisdom of applying this principle in certain situations, see *id.*, 593–594 (STEVENS, J., dissenting in part), if we enforce the principle in state proceedings, surely we must insist on adherence to the same standard in the federal judicial system. Accordingly, I join JUSTICE MARSHALL's dissenting opinion.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 29, 1984

MEMORANDUM FOR THE CONFERENCE

Re: 82-2140 - Hobby v. United States

This morning I circulated a second draft of my dissent in Hobby v. United States, 82-2140, but the changes were not marked. Please note that the first and second paragraphs (and appended footnotes) of the second draft are new. The last paragraph is unchanged.

Respectfully,

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: **Justice Stevens**

Circulated: _____

Recirculated: JUN 29 19

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-2140

WILBUR HOBBY, PETITIONER *v.* UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[July ——, 1984]

JUSTICE STEVENS, dissenting.

Today the Court dons its majestic robes, rises to its full height and pronounces a powerful "admonition to District Court judges not to discriminate in the exercise of their appointment powers." *Ante*, at 1. (O'CONNOR, J., concurring). The fury of that admonition extends to judges who use the word "he" when they actually mean "he or she." See *ibid.* What we say about discrimination is, of course, terribly important. But is it more important than what we do about it? Can we really tolerate the practice of discrimination as long as our Rules are amended to employ nomenclature which does not offend modern sensibilities?[1]

[1] The members of this Court must share some of the responsibility for the inertia that causes some outdated verbiage in our Rules to be retained. On April 28, 1983, when Rule 6 (as well as other Federal Rules) was last amended, and issues concerning the phrasing of the Rules were properly before us, none of the members of this Court suggested changing the term "foreman" to "foreperson," and the lone dissenting statement concerning the Rules revisions—which revealed a particularly close scrutiny of the Rules—read, in part, as follows:

"With one minor reservation, I join the Court in its adoption of the proposed amendments. They represent the product of considerable effort by the Advisory Committee, and they will institute desirable reforms. My sole disagreement with the Court's action today lies in its failure to recommend correction of an apparent error in the drafting of Proposed Rule 12.2(e)." 51 U. S.L.W. 4510 (Dissenting statement of JUSTICE O'CONNOR).

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

June 4, 1984

Re: No. 82-2140 Hobby v. United States

Dear Chief,

I join, although I will add a few words of my own about the language of Rule 6(c).

Sincerely,

Sandra

The Chief Justice

Copies to the Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: **Justice O'Conn**

Circulated: _____

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-2140

WILBUR HOBBY, PETITIONER *v.* UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[June ——, 1984]

JUSTICE O'CONNOR, concurring.

I agree with the Court that reversal of petitioner's conviction and dismissal of the indictment would be an inappropriate remedy in this case. Discrimination on the basis of race or gender in the selection of grand jury forepersons by a Federal District Court is clearly prohibited by the Fifth Amendment of the Constitution. Thus, I agree that an admonition to District Court judges not to discriminate in the exercise of their appointment powers under Federal Rule of Criminal Procedure 6(c) is appropriate. But petitioner has not presented a case worthy of the additional harsh remedy he seeks.

I write separately, however, to note the unfortunate language of the very rule the District Court judges are alleged discriminatorily to have applied. Rule 6(c) instructs the court to

> ". . . appoint one of the jurors to be *foreman* and another to be deputy *foreman*. The *foreman* shall have power to administer oaths and affirmations and shall sign all indictments. *He* or another juror designated by *him* shall keep a record of the number of jurors concurring in the finding of every indictment and shall file the record with the clerk of the court, but the record shall not be made public except on order of the court. During the absence of the *foreman*, the deputy *foreman* shall act as *foreman*." (emphasis added).

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

June 30, 1984

Re: No. 82-2140 Hobby v. United States

Dear Chief:

I withdraw my separate concurrence in this case.

Sincerely,

Sandra

Copies to the Conference