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Challenging the Social Composition of Federal Juries in Colorado

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CHALLENGING THE SOCIAL COMPOSITION OF FEDERAL JURIES IN COLORADO

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The scope of this article deals with the protection afforded parties in challenging the social composition of both grand and petit juries. Perhaps the basis of social composition has been less frequently used as a grounds for challenging petit juries because the historical aspect of the grand jury system in Anglo-American law was a reaction against the Star Chamber system which had discriminated against political and religious dissenters in England. The application of the law pertaining to social composition is the same, however, to both grand and petit or trial juries. This is not so in the case or individual composition for while in the instance of a petit jury a juror may be challenged for cause for many individual reasons, such as for example relationship with one of the parties, challenges of grand jurors on an individual basis are practicably not available except as provided by statute.[1] This article deals specifically with the topic as applied to Federal Courts although for the most part it could have a more general application, particularly in those states which have not abolished the grand jury system.

Malus Animus as to exclusion or inclusion of particular social groups has been the historical test of challenge as to social composition but as to what extent the Courts have and will imply this state of mind from objective data has been the topic of much conjecture among members of the legal profession. A recent Warren Supreme Court decision [2] has brought forth a new interest in the subject, and here in Colorado, although such challenges have been rare, attempts at challenges have been made in two very recent criminal cases which have not been finally decided. The challnge by its very nature requires a formidable attempt because of the difficulty of proof. It is hoped that this article will serve, not to predict, but rather to point out some of the significant factors to be considered.

I. Applicable Statutory Law

A. *Qualification of Jurors*

Before 1948 the qualifications for jurors in Federal Courts depended entirely upon state laws, but on June 25, 1948, the judiciary procedure code was revised to prescribe uniform standards according to federal law.[3] To qualify, the juror must: (1) be a citizen of 21 years of age, residing within the judicial district, (2) not have been convicted of a state or federal crime punishable by imprisonment for more than one year, (3) be able to read, write, speak and understand the English language, (4) be *sui juris* and physically able to render efficient jury service, and (5) be

[1] See topic I, A, *infra*.
[2] Hernandez v. Texas, 347 U.S. 475, 74 S. Ct. Adv. 667 (1954).
[3] Title 28, U.S.C.A., Sec. 1861.

competent to serve by the law of the state in which the district court is held. The Colorado statute pertaining to jury qualification has almost identical provisions which require citizenship of the state, a twenty-one year minimum age limit, absence of a felony conviction and a mere speaking knowledge and understanding of the English language.[4] Of course certain professions and trades are and may be exempted by the judge for reasons of hardship and impropriety as is customary and as is set forth in similar statutes by all states and the federal government.

B. *Manner of Selection of Jurors*

Early statutes authorized federal courts in impaneling juries to follow the laws and usages of the state in which the court was located,[5] but since the Act of Congress of March 3, 1911, no particular method of selection has been prescribed by federal statutes in a precise manner.[6] Because no concrete definitive statutory procedure for selecting juries is to be found in the sections dealing with the entire matter of juries which are in title 28, U.S.C.A., sec. 1861 et seq., complete administrative discretion is placed in the hands of the jury officials. Therein lies a fertile field of potential error. It creates a federal problem, the momentum of which is increasing in intensity as attested to by the volume of applicable decisions in recent years. It must be kept in mind that the fact that current procedures for the selection of panels are of long standing and are sanctioned by the District Judges, and that jury officials act with patently the best of motives in following these procedures will not prevent their invalidity on a challenge to the array.

The rules of the United States District Court for the District of Colorado, and more specifically rule 18 pertaining to jurors, selection and service, do not narrow the limits of the wide administrative discretion of the officials. They merely state that the names of jurors be selected as provided in the act of Congress of March 3, 1911, which has been substantially incorporated into the present act. In all circuits the officials who select the jurors are the clerk of the court or his deputy, and a jury commissioner who shall be a good citizen residing in the district, and a well known member of the principal political party in the district, opposing to that which the Clerk, or his deputy then acting, may belong.[7] In The United States District Court for the District of Colorado both grand and petit juries are drawn from the same list; there is no system regulating the times when the names for the list shall be secured, but the list is replenished from time to time; the list is composed of names from 17 counties surrounding Denver, pre-

[4] Colo. Stat. Ann., Chap. 95, Sec. 1 (1935).

[5] Act. Cong. 1879, c. 52, Sec. 2.

[6] Jurors must be returned from such parts of the district as the court may direct, so as to be most favorable to an impartial trial, and so as not to incur an unnecessary expense, or unduly burden the citizens of any part of the district with such service. 28 U.S.C.A., Sec. 413.

[7] Title 28, U.S.C.A., Sec. 1864.

dominantly from counties which are north of Denver; names are obtained without system from clerks of state district courts from their jury lists and acquaintances or from postmasters or other leading citizens if clerks of courts are not available; names are supposed to be secured proportionally from areas (counties) according to population; telephone books are not resorted to because of change of address, deaths, etc.—an exception is Denver where occasionally Denver telephone books are used; a good portion of Denver County names are secured from a perusal of jury payrolls from the District Courts for the City of Denver; after sufficient names are secured questionnaires are sent by mail to each name and upon return of the questionnaires, qualified jurors are selected from answers elicited by the questionnaire and put into the box from which the panels are drawn; names are also selected from latest naturalization lists.[8]

II. Applicable Decisions

Although no particular method of selection has been prescribed by the statutes, judicial decisions have established the constitutional principles that in selecting names of citizens qualified for jury service, there must be no discrimination against or exclusion from service of jurors otherwise qualified to serve, by reason of race or economic status. These decisions are fortified by some federal statutes which have as yet not been utilized to the fullest potential by those who would seek for fairer social composition.[9]

Correlating with these unanimous decisions which will be discussed presently is the power of the Supreme Court to keep a fatherly look over all procedure in the Federal Courts. The early cases dealing with improperly drawn juries were state cases and the peg used by the Supreme Court to hang its hat on was the due process clause of the fourteenth amendment of the federal constitution, requiring under the sixth amendment that jury panels in all criminal cases, including those tried in state courts, be impartial and reasonably competent. But with the increasing amount of awareness of federal jury inequities it is important to note that the Court said in *Fay v. New York*:[10]

> Over Federal proceedings we may exercise a supervisory power with greater freedom to reflect our notions of public policy than we may constitutionally exert over

[8] This information was stated to the author in an interview with G. Walter Bowman, Clerk for The United States District Court for The District of Colorado.

[9] The Judiciary Code under Title 28, Sec. 1863, provides that no citizen shall be excluded from service as grand or petit juror in any federal court on account of race or color. Other statutes such as the Civil Rights Act under Title 42, Sec. 1981 et seq., authorize civil suits against any official for depriving any persons of any civil rights under color of a statute, custom or usage of any state. The criminal code under Title 42, Secs. 242 and 243, makes such act a crime. Notable, however, is the lack of emphasis in all of these statutes on the rights of those persons in a separate class by reason of economic status.

[10] 332 U.S. 261 at page 287.

> proceedings in state courts, when these expressions of policy are not necessarily embodied in the concept of due process.

In holding that the test for an improperly drawn jury is that it is impaneled with an actual intent and design to discriminate, most of the decisions have refuted the claim that proportional representation according to classes is a necessary prerequisite of a properly drawn jury, although allowing for the requirement that a jury must represent a cross section of the people.[11] The courts from time to time have passed upon voluminous factual reports and tables offered by petitioners through statisticians, attempting to prove discrimination by objective data because of absence of subjective testimony tending to indicate intent or design and have repeatedly held in opinions based more upon questions of fact than mixed law and fact that such data was insufficient to prove discrimination.[12] As a result, a very knotty situation has arisen because intent or design or prejudice is an intangible thing to prove. There is always at least the danger of prejudice in the exclusion or limitation situation, and because of this, even if no prejudice is shown, this hidden danger should be sufficient reason for condemning the exclusion or limitation. Mr. Justice Murphy indicated the same in *Glasser v. U.S.*[13] where speaking for the Court, he said:

> In all cases the constitutional safeguards are to be jealously preserved for the benefit of the accused, but especially is this true where the scales of justice may be delicately poised between guilt and innocence. Then error, which under some circumstances would not be ground for reversal, cannot be brushed aside as immaterial, since there is a real chance that it might have provided the slight impetus which swings the scales toward guilt.

And in *McNabb v. U.S.*,[14] the Court said through Mr. Justice Frankfurter:

> . . . Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing by reason which are summarized as "due process of law" . . .

III. What Has Constituted Proof of Discrimination

A. *Proportional Representation*

On the question of what constitutes sufficient proof of de-

[11] See for example Dennis v. U.S., 183 F. (2d) 201.
[12] *Ibid.*
[13] 315 U.S. 60 (1942).
[14] 218 U.S. 332, 63 S. Ct. 608.

liberate discrimination, no two cases of course are exactly alike. They hold generally that mere lack of proportional representation is not grounds, but by way of reasoning base conclusions that prejudice exists primarily on such evidence. Thus in *International Longshoreman's & Warehouse Union v. Ackerman,*[15] a case decided in Hawaii, the District Court stated in its opinion that, "it had permitted enough evidence to come into the record to demonstrate the erroneous method employed in selecting the 1947 Maui County jury."

> There was evidence which we believe to be credible and from which we find that 84% of the persons who were selected and listed for grand jury service in 1947 came from the ranks of the employer-entrepreneur group and their salaried (non-labor) employees. The record demonstrates also that other groups in the community, including labor, had approximately but a 16% representation on the 1947 grand jury list.

A close examination of the cases reveals that the Supreme Court has definitely evolved its attitude into the appreciation of the fact that prejudice can be implied from objective data although seldom if ever has it so explicitly stated.

An historical prospect of the development of such an attitude begins with *Neal v. Delaware* [16] and spotlights a body of legal reasoning whose impact upon criminal trials and convictions of Negroes is having repercussions throughout the Southern states today. *Neal v. Delaware* was decided in 1880. This case did not concern a question of systematic limitation, but a case of absolute and purposed exclusion. The Negro defendant charging discriminatory action on the part of the jury commissioners brought in testimony to show that though the Negro population exceeded more than 26,000 in a total population of less than 150,000, no Negro had ever been summoned as a juror. Other testimony showed that there were Negroes qualified to serve as jurors. Such testimony *alone* was found by the Supreme Court to make out a *prima facie* case of discrimination. The *Neal* case established through the voice of the Supreme Court the mandate that systematic exclusion of a class or race is reversible error and has been followed and supported by many decisions in various jurisdictions. A landmark case in accord with this decision is *Smith v. Texas,*[17] but the percentage of Negroes qualified for jury service and the amount of exclusion from juries were not nearly so favorable to the defendant. Testimony of the Negro defendant's witnesses showed that Negroes constituted over twelve percent of the population and ten percent of the qualified jurors of Harris County. From 1931 to 1938 five Negroes had served on grand juries. The Court approved the Texas statutory scheme for selecting jurors and recog-

[15] 82 F. Supp. 65.
[16] 103 U.S. 370.
[17] 311 U.S. 128 (1940).

nized that the evil lay in the manner in which it was administered becuase of the great amount of discretion placed in the officers who administered it.

As seen in the *Neal* case it has been well established by the Supreme Court that a total exclusion of a minority is *prima facie* proof of discrimination, but when the issue moves out of the clear realm of absolute into the shadow-zones of degrees, we find the decisions of the Court have somewhat clouded the law. But the *Smith* case still stands in its recognition of the problem as a matter of law in which intent can be implied in the limitation situation. The Court said in the *Smith* case speaking through Mr. Justice Black:

> The state argues that the testimony of the commissioners themselves shows that there was no arbitrary or systematic exclusion. And it is true that two of the three commissioners who drew the September, 1938 panel testified to that effect . . . this is, at best, the testimony of two individuals who participated in drawing one out of the thirty-two jury panels discussed in the record. But even if their testimony were to be given the greatest possible effect, and their situation considered typical of the ninety-four commissioners who did not testify, we would still feel compelled to reverse the decision below . . . if there has been discrimination, whether accomplished *ingeniously* or *ingenuously,* the conviction cannot stand. (Italics supplied.)

Cassell v. Texas,[18] which was a natural outgrowth of the *Smith* case, went somewhat further in that it intimated that the social composition of jury panels according to distinctive classes should not even be a factor in their selection. This case reversed a conviction of a Negro defendant for murder beause the Supreme Court found discrimination had been practiced in the selection of grand juries in Dallas County, Texas. For a considerable period of time covering the impaneling of twenty-one grand juries, selection had been purposely limited to not more than one Negro participant in any given grand jury. The Court conceded that on the basis of eligibility, the limitation found was not such as to deprive the race of proportional representation on the grand juries functioning during the period under consideration. However, the Court found a discernable limitation in that, " . . . chance alone could not account for the regularity of the recurrent appearance of only one and no more Negroes on any one of the series of grand juries."

Many of the Supreme Court cases finding proof of discrimination have emphasized the period of time in which no (or very few) members of the class discriminated against have served on juries. In the case of *Patton v. Mississippi,*[19] the Court held that

[18] 339 U.S. 282 (1947).
[19] 332 U.S. 463 (1947).

the fact that no Negro had served on a criminal court grand or petit jury for 30 years, although there were Negoes qualified, created a strong presumption that Negroes were discriminated against on account of color or race, and that the state must justify the exclusion as having been brought about by some other reason. Other cases in which the Supreme Court, reversing the conviction, has stressed the length of time during which no Negroes had served are: *Hill v. Texas*, 316 U.S. 400 (1942) (Sixteen years); *Pierre v. La.*, 306 U.S. 354 (1939) (Forty years); *Hale v. Ky.*, 303 U.S. (1938) (thirty years); *Norris v. Alabama*, 294 U.S. 587 (1935) (A long number of years). Of course the real question involved concerns the practice that produced the particular jury indicting or trying the defendant, but past practice is considered relevant unless the prosecution shows that old jury selection practices have been abandoned. If it can be shown that a residual of improperly selected names from past practice remain in the present list, the Court will take this into consideration.[20] To prove discrimination it is important to show not only that no member of the excluded class has served for a considerable period, but also that there has been a number of such persons qualified to serve as jurors. In these cases, figures as to population of the class discriminated against in proportion to the total population, are not in themselves relevant except as they may help in determining the matter which is relevant, namely, the proportion of the class eligible for jury service to all those persons who are eligible.

In *U.S. v. Dennis*,[21] *U.S. v. Fujimoto*,[22] *U.S. v. Frankfield*,[23] *U.S. v. Mesarosh*,[24] and *U.S. v. Flynn*,[25] motions challenging the jury system were entered and denied. In these cases statistical data was examined by the Court; it was found that certain classes, both racial *and* economic, were not proportionally represented and it was found also that in the first step of the selection process names were secured from various private sources. Nevertheless, the Court in each instance held that there was no intentional and systematic discrimination. In reality it appears as if present day courts are reluctant to extend the doctrines enumerated by the *Smith* and *Cassell* cases to the recognition that classes other than racial exist and can be discriminated against not only by ingeniousness but by ingenuousness. This was indicated in the case of *Fay v. New York*[26] which did not involve a challenge to the jury on the grounds of racial discrimination but on economic discrimination. The court stated in referring to the federal statute making it a crime for any state or federal officer to exclude jurors on the ground of race or color only and indicated the relationship between the 14th amendment and the statute:

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[20] See U.S. v. Flynn, 106 F. Supp. 966.
[21] 183 F. (2d) 201 (1950).
[22] 105 F. Supp. 727 (1952).
[23] 101 F. Supp. 449 (1952).
[24] 13 F.R.D. 180 (1952).
[25] Note 19, *supra*.
[26] 332 U.S. 261.

> For us the majestic generalities of the Fourteenth Amendment are thus reduced to a concrete statutory command when cases involve race or color which is wanting in every other case of alleged discrimination.

This was the Supreme Court's way of limiting the effect of the *Smith* and *Cassell* cases, but it is submitted that such reasoning should not apply to federal court cases because of the Supreme Court's supervisory powers over them. As Mr. Justice Frankfurter said in *Thiel v. Southern Pacific Co.*:[27]

> The process of justice must of course not be tainted by property prejudice any more than by race or religious prejudice . . . This duty is formulated by the judicial oath, to "administer justice without respect to persons, and do equal right to the poor and the rich."

In this case five of the twelve jurors were of the employee class, but the jury officials testified that they deliberately and intentionally excluded from the jury lists all persons who work for a daily wage. The basis for this exclusion given by the officials was that the jury service imposed a financial hardship on daily wage earners in that their daily wage was greater than their per diem compensation for jury service. The Supreme Court held that the intentional exclusion of daily wage earners as a class invalidated the panel. This case is a clear mandate from the Supreme Court to Federal jury officials not to exclude anyone from selection for a jury panel merely because he or she is a member of an economic or social class on the ground of hardship. The Court also stated a proposition which has been followed in most courts in that discrimination is a grounds for challenge irrespective of any prejudice to the particular party to the action setting forth the challenge:

> On that basis it becomes unnecessary to determine whether the petitioner was in any way prejudiced by the wrongful exclusion or whether he was one of the excluded class . . . it is likewise immaterial that the jury which actually decided the factual issue in the case was found to contain at least five members of the laboring class. The evil lies in the admitted wholesale exclusion of a large class of wage earners in disregard of the high standards of jury selection.

The *Thiel* case is distinguishable from the *Dennis, Frankfield, Mesarosh, Fujimoto, Flynn* and *Fay* decisions because its direct testimony showed the discrimination as well as the objective data. However, a very important unanimous decision was rendered on May 3, 1954, by the Supreme Court in an opinion by Chief Justice Warren that is indicative of a favorable trend toward recognizing the true problem in challenging the impartiality of juries. *Her-*

[27] 328 U.S. 217.

nandez v. Texas [28] decided two very important points which have been stumbling blocks heretofore: (1) The recognition of people of Mexican ethnic origin as a separate class to be contemplated by the due process clause of the constitution as well as comprising a class for purposes of deciding a fair social composition of juries, and (2) patently contradicting the well established rule that proportional representation is not needed for impartiality and that intent must be proved, the Court stated that it was not necessary to establish such proof by direct testimony of officials (which was lacking in the case), "but if data itself is sufficient, the result bespeaks discrimination, whether or not it was a conscious decision on the part of any individual jury commissioner." An interesting aspect of the case was the Chief Justice's determination of how the existence of a separate class is to be proved. Quoting from the opinion:

> One method by which this may be demonstrated is by showing the attitude of the community. Here the testimony of responsible officials and citizens contained the admission that residents of the community distinguished between "white" and "Mexican." The participation of persons of Mexican descent in business and community groups was shown to be slight. Until very recent times, children of Mexican descent were required to attend a segregated school for the first four grades. At least one restaurant in town prominently displayed a sign announcing "No Mexicans Served." On the courthouse grounds at the time of the hearing, there were two men's toilets, one unmarked and the other marked "Colored Men" and "Hombres Aqui" (Men Here). No substantial evidence was offered to rebut the logical inference to be drawn from these facts, and it must be concluded that petitioner succeeded in his proof.

B. *Source of Selection*

Under the requirement that a jury should be a body truly representative of the community and not the organ of any special group or class, the source of selection question was raised by the defendant in *Glasser v. U.S.*,[29] a case involving a conspiracy to defraud the government by means of bribery of federal officials dealing with bootleggers. Shortly before the case was tried, an Illinois statute giving the right to women to serve as jurors was passed. In order to conform to this statute, names of women were taken by the officials from a list furnished by the Illinois League of Women Voters, and prepared exclusively from its membership. Mr. Justice Murphy delivered the opinion of the Court and said:

> The deliberate selection of jurors from the membership of particular private organizations definitely does

[28] 347 U.S. 475.
[29] 315 U.S. 86, 62 S. Ct. 472.

> not conform to the traditional requirements of jury trial. No matter how high principled and imbued with a desire to inculcate public virtue such organizations may be, the dangers inherent in such a method of selection are the more real when the members of those organizations from training or otherwise acquire a bias in favor of the prosecution. The jury selected from the membership of such an organization is then not only the organ of a special class, but, in addition, it is also openly partisan. If such practices are to be encountered, the hard won right of trial by jury becomes a thing of doubtful value, lacking one of the essential characteristics that have made it a cherished feature of our institutions.

The Court did not include this issue as a grounds for its reversal as the defendant merely offered proof by means of an affidavit, which the prosecution had not stipulated would be satisfactory as proof, but there is no doubt that substantial proof of private sources of selection is grounds for reversal for discrimination as to social composition of juries.

In the *Dennis* [30] case, Judge L. Hand decided, in holding valid the so-called "blue ribbon jury" and distinguishing the situation from that in the *Glasser* case, that the *Glasser* case did not condemn the practice of accepting suggestions from *various* private groups such as the Federal Grand Jury Association.[31] What it did condemn, according to the opinion, was calling from any one group. The Court also stated that it was not proved that enough of the proffered list remained as of the trial date to invalidate as a whole and that even counting all of those names that could possibly have been used from the proffered list, the jurors who qualified out of them were "too little to deserve notice." The petitioners challenging the jury also raised three other points: (1) territorial predilection for the wealthier districts, (2) classification in the panels according to occupations showed predominance of employer as contrasted to employee groups, (3) conduct of jury officials tending to show discrimination by the presence of the letter "C" on all cards of Negroes on the list. The Court dismissed (1) by reasoning in essence that "nobody contends that the list must be a sample of the whole community . . . the law excludes those who do not satisfy the very modest financial minimums . . . and those who cannot pass on examination as to intelligence, character and general information" (New York State requirements) and indicated in not so many words that it was

[30] 183 F. (2d) 201.

[31] Among organizations who submitted lists to the officials was the Federal Grand Jury Association, a voluntary association of present or former grand jurors. Its officers compiled lists of prospective jurors from WHO'S WHO IN NEW YORK, WHO'S WHO IN ENGINEERING, THE SOCIAL REGISTER, the alumni directories of Princeton, Harvard, Yale and Dartmouth, POOR'S REGISTER OF EXECUTIVES, THE DIRECTORY OF DIRECTORS, and volunteers recommended by the Association.

of the opinion that perhaps lower income groups for practical purposes didn't meet this standard It also reiterated the established rule that cross sectional representation does not mean proportional representation as to classes. It dealt with (2) by stating that classifications as to occupations are arbitrary and do not conform to the Census and cited the *Fay* case for authority. It dealt with (3) by saying that there was no proof of intent in denominating the cards of Negroes with a "C" and stated that "only a jaundiced mind can suppose that a public official in New York, having no personal stake in the event, would hazard the risk of detection for the sake of venting his bias against the race generally."

U.S. v. Flynn[32] was decided four years after the *Dennis* case and similar objections to the jury were raised in what was the second Foley Square, Smith Act, conspiracy to overthrow the government case. During the four year period, the method of selection had been obviously undertaken to be improved by the officials as a result of the *Dennis* case challenges and it was admitted that since November 1, 1949, the voting lists were the only source of new names and that a "punch system" for choosing names from the voting lists was inaugurated. In a very detailed opinion the court discussed various objective statistical data presented by the defendants and set forth some very interesting charts in the appendix, but the decision denies the connection between mathematically incorrect proportional representation and discrimination.

C. *Conduct of Official Tending to Show Discrimination*

Many decisions have involved overt acts by jury officials which in some instances have indicated discrimination. As has been shown by the *Dennis* case, such overt acts do not necessarily convince the Court of intent but in some cases they do such as *Avery v. State of Georgia*[33] where the jury box contained names of prospective white jurors printed on white tickets and names of prospective Negro jurors printed on yellow tickets. Without a single Negro being selected, it established a *prima facie* case of discrimination.

Conduct involves also the use of questionnaires in the officials' second and final step in the selection process. An unsuccessful challenge to the array was made in the *Mesarosh* case on the grounds that the use of the questionnaire constituted a pre-trial investigation and surveillance of prospective jurors which was condemned by the Supreme Court of the United States in *Sinclair v. U.S.*[34] How far the Supreme Court would extend the application of the rule is open to question because in the *Sinclair* case the jurors were shadowed by private detectives. The content of the prospective juror questionnaire was also challenged in the *Mesar-*

[32] 106 F. Supp. 966.
[33] 73 S. Ct. 89.
[34] 279 U.S. 749, 49 S. Ct. 471 (1929).

osh case for improper questions which would tend to show discrimination. The Court only discussed one of these which was "Are you opposed to the American form of Government?" In dismissing this and other questions as not improper, the Court held that to be discriminatory there would have to be evidence in the record indicating that the officials paid specific attention to the particular question at issue, but the Court did not overturn the general rule that intentional exclusion from a grand jury of all persons belonging to the same political party or faction as the defendant in a prosecution arising out of a political controversy is a denial of the defendant's constitutional rights.[35] Although the Court didn't discuss such a possibility, the issue could be raised that questions of this type are unconstitutional under the Fifth Amendment in violation of protection against self-incrimination.

D. *Delegation of Authority*

Two interesting cases were decided in the federal courts when the procedure for selecting jurors for the United States District Court for the Western District of Missouri was challenged in *Walker v. U.S.*[36] and *U.S. v. Shannaburger*.[37] Form letters were sent by the clerk and jury commissioner to persons throughout the district whom they considered "reliable" requesting the names, occupations, and addresses of citizens of their acquaintance. Included in the letter was a statement that:

> . . . it is the desire of the judge of this district to obtain for jury service the best men in the community, men of intelligence, unquestioned integrity, and who represent the best interest of the community. We do not want men for this service simply because they have nothing else to do, and who would like to spend the time and procure the pay for coming to court. We want men of business affairs . . .

The panels in both instances were challenged on two grounds. First, that the letters indicated a purpose to discriminate against wage earners and unemployed persons and, second, that the officials delegated their authority unlawfully to third parties. The Courts answered the first contention by construing the letter merely to request not the exclusion of wage earners and the inclusion only of capitalists, but the exclusion of hangers-on and loafers. To the second contention, both courts stated in effect that the delegation was not unlawful because the officers had the final choice and the manner of acquiring information was for them to determine in the interests of practicality. The *Glasser* case could be authority against such reasoning for the proposition that

[35] See 82 L. Ed. 1058.
[36] 93 F. (2d) 383 (1937).
[37] 19 F. Supp. 975 (1937).

the delegation was improper on grounds that the sources of supply were limited.[38]

As discussed in the *Shannaburger* case a suggestion in regard to what should be the proper procedure in selecting names is that the lists should in the first instance eminate from compilations performed by the officials from voting lists or similar lists giving a cross-section of the community and from them, questionnaires could then be sent out to every name on said list. Such procedure would require a nominal amount of additional effort and expense and in the long run make for a more fair selection.[39]

In conclusion it is well to note that all the cases recognize that the challenger has the burden of proving inpropriety.[40] This means that the challenger must do more than allege discrimination or even offer affidavits of discrimination. It must be proven by evidence. In *Neal v. Delaware* [41] the prosecution had consented to use of defendant's affidavit as evidence so in this case the conviction was reversed on the basis of this affidavit, but lacking such consent the affidavit is not proof.[42] Nevertheless, if a defendant offers relevant evidence to prove discrimination in support of his motion to quash an indictment or challenge to the jury panels and the trial court refuses to allow such proof, the Supreme Court will reverse the defendants' conviction.[43]

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[38] In accord, see In Re Petition for Special Grand Jury D.C. Pa., 50 F. (2d) 973 (1931).

[39] In accord with the proposition that the selection of jurors is a non-delegable administrative duty see Dow v. Carnegie, Ill. Steel Corp., 100 F. Supp. 494, and U.S. v. Local 369, Int. Fishermen & Allied Workers, 70 F. Supp. 782.

[40] Fay v. N.Y., 332 U. S. 261 *supra* and cases cited at 284-5.

[41] Note 14, *supra.*

[42] Martin v. Texas, 200 U.S. 316; Brownfield v. S. C., 189 U.S. 426; Tarrance v. Florida, 188 U.S. 519; Smith v. Mississippi, 162 U.S. 592.

[43] Dow v. U.S. Steel Corp, C.A. Pa., 195 F. (2d) 478 (1952).

OPEN LETTER

Mr. Louis G. Isaacson, President,
Denver Bar Association,
E & C Building,
Denver, Colorado.

Dear Mr. President:

Your legislative committee begs leave to report to you and the Board of Trustees of the Denver Bar Association as follows:

Your committee has always felt that it had a two-fold obligation: (1) to draft, analyze and support legislation which was of interest only to attorneys at law in order to make more certain the tools with which lawyers work; (2) perhaps of even greater importance is our obligation to protect, if possible, the rights of the general public—the layman next door—the little man who cannot afford expensive lobbyists. By performing the second function above-recited, it is our opinion that the bar association can perform a real function on behalf of the public. The bar association has always been recognized as the champion of the American way of life.

It is in this regard, that Senate Bill No. 75 by Senator Miller is called to your attention. Senate Bill No. 75 is an act to control the distribution and sale of psittacine birds and to control the spread of psittacosis.

In the opinion of your committee, the definitions of psittacine birds and of psittacosis are not inclusive and, after a great deal of study, your committee raises a question in that we feel that the bill is intended to affect those birds which for a large period of time have nested on the outskirts of the City and County of Denver. As the urban areas grew and annexed additional territory, the rural birds living in such annexed territory became psittafied birds.

The definition of psittacine birds includes Mexican doubleheads, African greys and other birds of the order psittaciformes. We are informed that other birds of the order psittaciformes include the full-breasted push-over, the extra-marital lark and the strumpeter's swan. This being true, we think that there are some parts of the proposed bill which are commendable on behalf of the general public. For example, such birds are required to wear a seamless leg band. We feel, however, that subsection 2 of page 3, affecting the importation of such birds may be in contravention of the Mann Act. Lines 20 through 23 on page 3 of the printed bill provide that zoological parks may hold such birds for trade. The section of the bill which gives us the greatest concern is section 66-21-12 (page 7 of the printed bill) which makes the breeding of such birds unlawful.

The legislative committee feels that it is our obligation to call this bill to the attention of the bar association. We await further instructions from you.

Respectfully,

DONALD M. LESHER