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CONSTITUTIONAL LAW-FOURTEENTH AMENDMENT-DISCRIMINATION IN SELECTION OF GRAND JURORS

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CONSTITUTIONAL LAW—FOURTEENTH AMENDMENT—DISCRIMINATION IN SELECTION OF GRAND JURORS—Defendant's conviction of murder was affirmed by the Texas Court of Criminal Appeals, which rejected defendant's claim that discrimination in selection of the indicting grand jury had violated his constitutional rights. Defendant pointed out that the Negro proportion of grand jurors had uniformly been less than the ratio of Negroes to the total population of the county, and that on the past twenty-one lists the commissioners had consistently limited the number of Negroes to not more than one on each grand jury. On certiorari to the United States Supreme Court, *held,* reversed. Limitation of the number of Negroes on a grand jury to the approximate proportion of Negroes in the county eligible for grand jury service would constitute unconstitutional discrimination in violation of the rights of a member of that race against whom an indictment was returned by the grand jury so selected, since the accused is entitled to have charges against him considered by a grand jury in the selection of which there is neither inclusion nor exclusion because of race. Intentional exclusion proved by the statements of the commissioners that they chose for service only those whom they knew and that they knew no eligible Negroes was the actual discrimination on which the unconstitutionality was based. *Cassell v. Texas,* 339 U.S. 282, 70 S.Ct. 629 (1950).

The principal case is the third in a group of Supreme Court decisions dealing with alleged discrimination in the selection of grand jurors in Texas. In the *Hill* case[1] the Court unanimously held that a case of prima facie discrimination was established by the proof of the fact that no Negroes had ever served on a Dallas County grand jury plus the fact that the commissioners admittedly had made no effort to determine whether there were any eligible Negroes. Two years later in the *Akins* case,[2] the defendant contended that the commissioners deliberately limited Negroes in grand jury service to one on each grand jury. The majority of the Court thought the evidence did not show such deliberate limitation. Justice Reed, therefore, avoided the question of whether purposeful limitation of Negroes selected for grand jury service to the approximate proportion of Negroes eligible for such service in the county would be unconstitutional under the Fourteenth Amendment.[3] In the principal case, defendant contended that in his county the *Akins* decision had been interpreted to allow limitation of the number of Negroes on each grand jury in approximate proportion to the number of Negroes eligible for service. Justice Reed, therefore, discusses at some length the question left unanswered in the *Akins* case. The Court thought that such limitation was as much discrimination as complete exclusion of Negroes from grand jury service, and that, since it would be impossible to meet such a proportionate requirement for all races and nationalities present in the ancestry of

[1] Hill v. Texas, 316 U.S. 400, 62 S.Ct. 1159 (1942).

[2] Akins v. Texas, 325 U.S. 398, 65 S.Ct. 1276 (1945).

[3] Id. at 407. The Court stated that fairness in the selection of jurymen had never been held to require proportional representation of races upon a jury, citing Virginia v. Rives, 100 U.S. 313 (1879); Thomas v. Texas, 212 U.S. 278, 29 S.Ct. 393 (1909).

Americans, it would be manifestly unfair so to limit one race.[4] In a vehement dissent in the principal case, Justice Jackson points out what he deems the lack of logic in the majority opinion. While agreeing that the Court must enforce racial equality in the judicial system, Justice Jackson believes that no conviction should be set aside for errors not affecting substantial rights of the accused. Justice Jackson's position is that a substantial right is involved, but that it is a right of the Negroes excluded from jury service, not of the accused.[5] He dismisses as untenable the two reasons usually advanced for giving this right to the accused, viz., that this is the only practical way to enforce the right and that the accused would otherwise suffer lack of due process, and points out that there are both civil and criminal penalties provided by statute against those who so discriminate.[6] These have been largely neglected since 1878,[7] but could be invoked by Negroes excluded from grand jury service. Furthermore, it is difficult for Justice Jackson to see how there can be a violation of due process merely because of discrimination in the selection of the grand jury which indicts an accused, if he is tried and convicted by a trial jury selected without discrimination.[8] Although one cannot but agree with Justice Reed that a purposeful limitation of Negroes allowed to serve on a grand jury to the proportion of eligible Negroes in the county is discrimination against the race and should not be tolerated, Justice Jackson's opinion seems much more sound in its contention that the right to be selected for grand jury service without regard to race belongs to the excluded Negroes, not to the accused.

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[4] Justice Reed here speaks in terms of discrimination against members of the Negro race, rather than against the accused. This is in accord with the reasoning of the dissent that the right to have grand jurors selected without regard to race belongs to Negroes excluded from jury service. Justice Reed, however, illogically uses this reasoning to sustain the position that the right belongs to the accused. Principal case at 631-632.

[5] Principal case at 638.

[6] 18 U.S.C. (1947) §243; 8 U.S.C. (1947) §43.

[7] Ex parte Commonwealth of Virginia, 100 U.S. 339 (1879).

[8] Justice Clark agreed with Justice Jackson that discrimination in the selection of grand jurymen did not justify reversal of a conviction, but he concurred with Justice Reed's opinion because he thought it was better that the Court follow a settled course.