Supreme Court of the United States

OCTOBER TERM, 1969

In the Matter of:

CALVIN TURNER, et al.,

Appellants,

vs.

W. W. FOUCHE, et al.,

Appellees

Docket No. 23

Place Washington, D. C.

Date October 20, 1969

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C O N T E N T S

BENHAM

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1969

CALVIN TURNER, ET AL., Appellants		
vs	)	No. 23
W. W. FOUCHE, ET AL., Appellees		

The above-entitled matter came on for argument at 1:30 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice

APPEARANCES:

MICHAEL MELTSNER, ESQ.
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P R O C E E D I N G S

MR. CHIEF JUSTICE: Number 23, Turner against Fouche. And Number 30 will follow that immediately.

Mr. Meltsner, you may proceed whenever you are ready.

ORAL ARGUMENT ON BEHALF OF APPELLANTS

MR. MELTSNER: Mr. Chief Justice, and may it please the Court, this case is here on appeal from a final judgment of the statutory three-judge court convened in the Southern District of Georgia. It was brought in 1967 by Negro Appellants as a class action challenged violations of the 13th 14th and 15th Amendments by Georgia statutes in State Constitutional provisions, which set up an interlocking system of jury and school board selection, and also to enjoin racial discrimination in the enforcement of these statutes by Appellee officials in Tolliver County, Georgia.

Appellants made three claims in this court, that the Georgia statute which authorizes jury commissions to exclude persons from service they deem not intelligent and upright is void for want of standards; secondly, that the District Court failed to grant adequate relief to reform racial selection of jurors and school board members; and third, that a restriction that school board members be freeholders or real property owners, violates the equal protection clause.

The Georgia system for jury and school board selection which is at the center of this case, begins when a

Superior Court Judge is elected by the voters of multi-county circuits. In this case, Tolliver County is one of six counties which vote to elect Superior Court Judges for the Tombs Circuit. The judge then selects six citizens in each county to serve as jury commissioners. These commissioners, in turn, select juries from the official registered voter list by disqualifying persons from the list who they do not believe are intelligent and upright and also by disqualifying persons who are not the right age and haven't resided in the county for the right period of time and for other similar reasons. They then reduce the number remaining randomly in order to get a workable number and place that number on a traverse jury list. From the traverse list they select not more than two-fifths constitute the grand jury list. From this list the Superior Court Judge selects names which ultimately constitute the county grand jury.

Q The judge himself performs that last function?

A That's correct. He chooses 32 names from the grand jury list and calls the persons into court, hears excuses and then takes the first 23 names remaining on the list.

Q And the judge himself selects the 32 from how many, two-fifths of the whole?

A Not more than two-fifthe; they number about 130 in this county.

Q And he selects those subjectively, or does he

pick them from random selection?

A He takes them from a box randomly. He picks 32 names; the sheriff goes out, calls those 32 into court. The judge then hears excuses

Q Yes, I understand that part of it, but I --

A And then he takes the first 23 names which constitute the grand jury.

Now, the grand jury, among its functions, elects the five-man county school board when vacancies occur, from the freeholders in the county. And the school board is responsible for the management and operation of the schools in the county.

Q What is the term of this grand jury? How long does it stay in existence?

A It's about six months, I think, the term of court; each grand jury.

Q And what is the term of the members of the school board selected by the grand jury?

A Five years.

Q So the grand jury performs the function whenever there happens to be a vacancy.

A Whenever there happens to be a vacancy. Now, if there is a death or resignation the school board will pick an interim candidate which the next grand jury will then act and is free to select whoever it wants for the position. If there is a vacancy due to the end of the term the grand jury

preceding the vacancy will make the decision.

But, prior to the institution of this litigation in 1967, no Negro had ever been selected to serve as a jury commissioner by the Superior Court of Georgia. Because black people are 60 percent of the population in this county and 50 percent of the voters, only a small number of their number were on the jury list. No county grand jury had ever selected a black school board member, although since 1965 the schools were totally black. Whites having fled, rather than desegregate their schools to a hurriedly set up private school in the county or to adjoining counties.

Indeed, until the District Court acted in an earlier case involving several of the parties in 1965, by setting up a receivership over the public schools in the county, public funds were used to transport the whites out of the county to other schools.

Q Has there ever been a nonwhite Superior Court Judge?

A The record only shows the race of the judge now in office as white. Now, I think it is assumed by all the parties and the District Court that there never had been one, at least in the preceding 80 years.

After taking evidence, the District Court informed the jury commissioners and school board members that there was racial discrimination in the selection of the jury and that the

exclusions of blacks from the school board could not continue. The Court ordered the defendants to make an attempt to remedy the situation and suggested that two blacks be put on the school board prior to a reconvening of the court, a month later.

The jury commissioners during this period, re-compiled the jury list, placing additional Negroes on it and a new grand jury was selected. However, the commissioners excluded 171 Negroes and only 7 whites because they failed to meet the statutory requirement that jurors be intelligent and upright.

The new grand jury made two appointments to the school board. One was a white man and one was a black man. The black man chosen had a third grade education, no children in the school and he was selected without the public notice which is required by Georgia Law.

On the basis of the recomposition of the jury list, addition of one Negro to the school board and its view as to the constitutional questions presented, the District Court did enjoin interracial exclusion in the selection of the grand jury and denied further relief.

Appellant's first contention in this Court is that Section 59-106 Georgia Code, violates the 14th Amendment by authorizing jury commissioners to exclude they deem to be not upright and intelligent.

Now, certainly these terms, or the synonyms used by Georgia officials to characterize their meaning, with words like understanding or honesty, are words which have no commonly accepted meaning. They are matters of personal judgment unless they are applied to some objective standard as they are not in Georgia.

There were several consequences to their use which supports Appellant's contention they violate the 14th Amendment when placed in the hands of the men who select eligible jurors.

The first is that they make the right to participate in the institutionsof government depend on the will, whim, or caprice of a public official. The court has condemned placing such discretion in the hands of voting registrars. As jury co-missioners exercise a similar function, there is no reason why a different rule should apply.

Secondly, because men cannot agree to the meaning of these terms, their application to particular individuals, they almost command arbitrary, erratic and inconsistent judgments between individuals. Thus, at the outset the use of these terms, it seems to me are basically inconsistent with the notion of due process of law; that law rather than men will govern whether or not one can exercise a right.

Q Have other states got these broad provisions of this kind? I saw somewhere in the paper in the jurisdictional

statement there are 21-odd states that have these sweeping statutes.

A Twenty-one, plys Georgia, makes 22.

Q Not only in the South, but --

A Of the 22 states listed in the jurisdictional statement, seven are in the South.

Q Counsel, you suggest that these words -- I think you put it command confusion. Do you think they are any less broad than the term "unreasonable," for example, in the Fourth Amendment in relation to searches?

A Well, I think the language is often vague and undefined and certainly the word "reasonable" in the Fourth Amendment is a vague word. But its function is totally different from the function of these words. Its function is to guide the Court in its decisions of cases and it is construed by the Court in accordance with history and its own decision.

Q Then how about the situation when a trial judge instructs a jury on a reasonable man standard. Now, the explicit purpose of that instruction is to afford guidelines to the jury. Is that guideline any less difficult than the on we are confronted with here?

A Well, I think there is always going to be a certain amount of discretion in the administration of the law, but in phrasing the constitutionality of it, one has to look at the function involved and the necessity of the particular

bit of discretion. Here there is absolutely no necessity. Congress has passed a perfectly satisfactory jury selection statute which doesnaway with the arbitrariness and discrimination, which this is -- this form of statute has.

Secondly, a jury deciding a negligence case, for example, is not selecting among individuals in the community. It is perhaps exercising an ad hoc judgment which, in certain circumstances the law allows. The question is whether the results that this record shows and the capacity this Court has already condemned in many, many other areas, are necessary. And I submit that they are not here and there is no state interest involved in allowing the jury commissioners this much discretion to select among individuals at their will.

Q Suppose the last three or four years, the record in this case now shows that due to a change and attitude, and a change in heart, the selection of these people was made on -- as a result of about 45-55 in one term and 55-45 the next time, and was roughly, over a long period of time, balanced in the way that reflected, or very nearly approximately, the population balance of the community. Would your quarrel still then be withthe statutes?

A Oh, yes. I think the error in this statute -- the infixmity in this statute is the arbitrary power which it confers. Now, the evidence of racial discrimination which this record has in abundance. For example, the exclusion of 171

of 178 persons of the Negro race under this standard is evidence of this capacity for abuse, quite strongly, I think. Our quarrel would still exist with the statute because the problem of the statute is that it makes almost impossible the selection between individuals which is not erratic and which does not depend on the will of the selecting official.

Now, I think that another thing that one might consider here is that is totally impossible to review and appriase and evaluate the decisions made by these jury commissioners. We can disagree with they said, oh, 171 of these 178 persons lacked -- that can't be. But one can't get in there and prove that; one can't evaluate it; one can't review it, and that is a function which this Court has always apparently employed, the vagueness analysis to permit. Unless there is some specificity, there is absolutely no way for the Federal Courts to determine whether or not the statutes, in fact, is used to discriminate. Because it obviously has this opportunity for discrimination. The jury commissioner need only pretend that the Negro is of poor character, little intelligence to mask this discrimination. And, therefore, it is not surprising that 171 of these persons were black.

Q But in my hypothetical -- if the figures were as I suggested in this hypothetical situation, would you still have the basis for complaint?

A Well, I would -- I don't think that's this case.

I would say this: that clearly the other jurisdictions which have these statutes, might, by administrative action, or by judicial construction apply to the jury selection the sort of standards and confining discretion which would make them nonarbitrary. But our quarrel is with this statute on its face.

There is one more point I think think ought to be stressed here and that is that frequently a well-intentioned and sincere jury commissioner is offered little guidance by these terms, other than a vague sense that we shc ld select the best people around, and it's all too likely that people select persons who are most like himself. Persons who are like those he encounters in social gatherings and quite unconsciously in certain places, exclude blacks, who he does not come in contact with.

Q Would it help, do you think, to take these adjectives out? And that wouldn't give him any more or stricter standards, would it?

A It would certainly remove from him the capacity to disqualify persons on the basis of his subjective will, his subjective understanding of these elusive concepts.

Q I should think with no standards at all there would be certainly as much capacity for anybody to exercise his power in a discriminatory fashion.

A Well, on -- I think as the statute is written,

this is clearly a disqualification of voters who are, at the beginning deemed eligible. And that is exactly the way it applied in this particular county. What the jury commissioners do is they take the voter list and they sit around and they go over every name in the voter list and they say, "Is he upright and intelligent?" And they cut out a certain number of persons in that way.

If the authority was removed then eligible voters would be the basic source, still. They would then be able to removepersons who were insane asylums, who were not of the proper age, who were not residing in the county, and so forth, and they would then have the source.

Q What then? Ihave a little difficulty seeing why if the statute which now reads: "shall compile and maintain a revised jury list of intelligent and upright citizens of the county to serve as jurors," why, if it were revised to read: "maintain and revise a jury list of citizens of the county to serve as jurors," there would not be at least equal capacity for a jury commissioner to discriminate unfairly on the basis of race?

A I think, if I understand your question, Mr. Justice Stewart, your question is that if this language was declared void, there would still be some general, free-ranging discretion on the part of the jury commissioners?

Q I should think even more so, if anything.

A Well, I would agree that they would still have the capacity to administrate, as anyone administering a system does. But the basis on which they have justified this particular discrimination on which jury officials constantly do so, would be removed. As I read the statute, in light of their practice, they would have to take any persons who were voters, whowere not excluded for specific reasons, and in effect, that is what we ask this Court to so hold, that this is too subjective, arbitrary and erratic a way of selecting jurors.

The State may come back and pick another system which is more specific; it may not.

Q What you're arguing is that constitutionally there has to be simply objective standards and give no room for discretion at all.

A More objective than they are.

Q And you are arguing this, as I get your brief, in the context of what the practices have beenin this section of the country; is that it?

A That is correct.

Q That brings me back to my hypothetical. Let me alter it a little bit and suppose the record showed that in recent years, since there was a change of heart and attitude, that 70 percent of the persons selected by this jury commission had been Negro, and only 30 percent whites. On what basis

would you attack the statute?

A Well, I think that before one would find consistent results of that statute with a statute of this kind, there would have to be brought into it some form of objective line-drawing standards.

Q But what would be your complaint in that factual setting?

A Then, perhaps as a litigant, I would have no complaint, but in this case andother cases of this sort, the complaint is there is an inherent capacity for arbitrariness.

Q Doesn't that bring us back to just what you had discussed with Mr. Justice Stewart and Mr. Justice Harlan, that it's the practice, not the statute, that's the vice here? With what's being done, not what could be done, which is important?

A My position is that in this case both are important; both are here and that the Court should decide this case. But I must take the position that the vice of this statute has nothing to do with results. The result clearly confirms the vice which we see in it.

Q Would you say that again? This act has nothing to do with the results, did you say?

A The infirmity in this statute is in its grant of arbitrary power, just as in the licensing of --

Q Supposing you -- I think among that list of

states that you've got in your jurisdictional statement, I think Wisconsin is one of them. I think I am right, or Arizona, I know is.

Do you think you could make this argument in the context of litigation there?

A I think that a litigant in a class excluded would be able to make that argument; yes, I certainly do.

But, I wish to come back to the State of Georgia, because there's another aspect of the jury commission which I think the Court ought to consider. Not only is jury selection involved here, but the grand jury has been given a political function, and so the operation of this statute is to exclude blacks from selecting public officials. It's not just the jury system involved here, it's excluding black people in this county from choosing the school board.

And so, as important as participating in the administration of justice is, we have even moreimportant rights at stake here.

My second claim -- the second claim that we wish to present to the Court is that the District Court did not adequately reform the system of jury and school board selection. Now, certainly if the Court strikes down the broad discretion which Georgia law grants the jury commissioners, that will, no doubt make far more likely non-racial jury and school board selection but they still need more equitable relief to

eliminate the effect of past discrimination, and to make it unlikely to recur in the future.

Initially, the present school board still has on it a person selected by the grand jury which, by themselves, was unconstitutionally selected, and one step we think that the District Court should be required to take on remand, is to vacate the membership of the board in order to end the effects of past discrimination and make a break with the past.

More fundamentally, to make sure that discrimination does not occur, at a minimum the District Court should appoint black jury commissioners as was sought in the complaint. The commissioners play a critical role in this process and a small amount of discrimination in the future would tip control gradually to whites.

They have discriminated in the past; there has never been a black jury commissioner and the whole process works over the issue which blacks in this county have an enormous interest. Whites, on the other hand, have no interest comparable in educational quality.

I think it's little like the voter registration, if I can use that -- the Voting Rights Act of 1965, if I can use that analogy, where the statute provided that under certain circumstances the courts might appoint voting registrars to administer even a nondiscretionary system of voting registration. The record in this case and the activities of Appellee

officials here makes similar relief, at a minimum, necessary.

Q Are the only standards for selection in Georgia these words you used in your question?

A Yes, "upright" and "intelligent?"

Q Yes.

A The only other standard aside from age and residence is that any residents -- is that idiots and lunatics are excluded.

Q Are what?

A Idiots and lunatics are excluded; that's the only other standard.

Q Outside of that the only standard is that they must be upright?

A Upright and intelligent.

Q And intelligent.

A Right.

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

MR. CHIEF JUSTICE BURGER: Mr. Evans.

ORAL ARGUMENT OF ALFRED L. EVANS, JR.,

ASSISTANT ATTORNEY GENERAL OF GEORGIA,

ON BEHALF OF APPELLEES

MR. EVANS: Mr. Chief Justice Burger, and may it please the Court: There is no question but that Georgia's jury selection statute is capable of being improperly administered. There in no question but that in Tolliver County,

Georgia, it has been miadministered. What is in question is whether Georgia, or for that matter, any other state, may prescribe jury qualifications which call for an exercise of judgment on the part of the public board or public officials responsible for composing that jury list.

This is the true question before the Court for two simple reasons: First of all, it is self-evident that whenever law requires judgments be exercised, there is the possibility they may be exercised improperly, or wrongfully.

Secondly, bec of the capacity, and people being as they are, we can anticipate that from time to time statutes providing for the exercise of judgment will be administered improperly.

Now, of course, the question of jury qualifications goes to the very heart of the concept of trial by jury, a concept which this Court, just a little more than a year ago, in Duncan versus Louisiana, declared to be "fundamental to the American scheme of justice."

State legislatures, including Georgia's General Assembly, have quite generally supposed that the right to trial by jury means trial by jurors who are, first of all, possessed of intelligence sufficient to understand the matters they may be called upon to judge.

And secondly, that they shall have such moral character as will enhance the possibility of a fair verdict.

Some example of the character qualifications of the various states are included at Pages 12 and 13 of Appellant's jurisdictional statement. We think the bulk of these statutes are essentialy indistinguishable from Georgia's.

Maine, for example, provides qualifications as follows: "Good moral character; of approved integrity; of sound judgment and well-informed."

In New York its "of good character, of approved integrity and sound judgment."

In Michigan: "Of good character; approved integrity; of sound judgment and well-informed." Nebraska also uses "intelligence, of fair character, of approved integrity and well-informed."

Now, this Court in the past has always adhered to the view that such character and intelligence qualifications are at the very least, consistent with, if not required, by the Constitution. Over 100 years ago in Strauder vs West Virginis, this Court pointed out that the 14th Amendment was never intended to prevent a state from prescribing such qualifications of age and educational qualifications, as well. More recently, in Brown versus Allen, this Court, after observing that states should decide for themselves the matter of the quality of the juries, stated that the Court ought not to impose on states its conception of the proper source of jury lists so long as the source reasonably reflects a cross-section of the

population suitable in character and intelligence for this civic duty.

In rejecting the same sort of attack as Appellants make here, the Supreme Court of Georgia, only this year, relied upon Brown versus Allen in the case of Sullivan versus State and it said that in using the words "suitable and intelligent," that is the words of this Court, "the Supreme Court must necessarily have had reference to good character, honorable and just persons.

The Supreme Court of Georgia continued that in using the words "suitable" and "intelligence" for that civic duty, this Court must have meant persons sufficiently intelligent to serve as jurors.

Now, we recognize, of course, that the law also requires the jury to reflect its community. I read from the Georgia statute which is currently in effect and was in effect at the time of this trial. "In composing such lists the commissioners shall select a fairly representative cross-section of the intelligent and upright citizens of the county from official registered voters lists." And the statute goes on: "If at any time it appears to the jury commissioners that the jury list so composed is not a fair and representative cross-section of the intelligent and upright citizens of the county, they shall supplement such list by going out into the county and personally acquainting themselves with other citizens

of the county including intelligent and upright citizens of any significantly identifiable group in the county which may not be fairly representative thereon."

We think it's quite clear from this statute that this entire thrust is to avoid discrimination based on race or economic status.

Q This is a rather recent statute as presently worded; is it not?

A No, sir; it is in part. There was a change from the list from which the -- the list from which the jury list was derived had been the tax list. Now, it is the voter's list, and this was changed --

Q After our position in Whitus against Georgia.

A In Whitus and also Avery versus Georgia, to meet the criticisms of this Court.

Q How about the sentence, the long sentence you just read to us -- I won't repeat it, but it's on --"any time that it appears to the jury commissioners that the jury list so composed is not fairly representiative and so on." Is that new?

A I believe that particular -- that is an addition; yes, sir.

Q I figured.

A In any event, we think that qualifications as to character and intelligence are essential to the proper

functioning of the jury system. We think that such qualifications are at least, consistently, if not required by the Constitution -- and I am referring specifically to the Sixth and Seventh Amendments.

We think it would be a mistake to throw these qualifications out merely because they have a capacity to be wrongfully employed. We think that the courts of the Fifth Circuit have been handling matters of maladministration quite correctly, and we think this is the proper approach to questions of wrongful administration of statutes which we think are quite clear and equitable on their face.

Q How have they been handling them? You say they have been satisfactory?

A Well, in the case at hand the Court directed a revision of the jury list.

Q What?

A The Court directed that the jury list be reconstituted. It was reconstituted. But, the Fifth Circuit, which I am sure Mr. Justice Black is aware, in LaBatt and Rabinowitz, has consistently stricken the administration statute without becoming really involved in the facial validity of the statute.

Q How are your jury commissioners selected?

A The jury commissioners of Georgia are appointed by a judge. The jury commissioners then use the voter's list

as the principal source for names which end up on jury lists.

Q Can you suggest any manner or any description that--of what is the duty of the jury commissioners that could be any more definite than that that could be handled?

A I think it is very hard, Your Honor. I have not seen a statute, and I include the Federal statutes, which is not capable of being abused. Now, I think the Federal statute, for example, uses such words as "incapable of rendering satisfactory jury service." If a person was bent to discrimination he obviously could seize upon the word "satisfactory."

We have an inherent vagueness in the English language. Words cannot reach the exactitude of mathematical equations. We think that actually, words such as "intelligent" and "character," are reasonably clear. Certainly clear enough for a civil statute. After all, in criminal cases we permit a person to be hanged or set free upon evidence of his reputation in the community. This is a vague thing,"reputation in the community," but is admissible evidence in many instances in a capital felony.

Q Mr. Evans, doesn't the Federal statute also require that there be a cross-section of the community?

A I don't know if it's in the statute itself; I think this would follow by the random approach used.

Q It is there. There is an effort to be sure that everybody in the community is collected?

A Yes, Mr. Justice Marshall, as is included in the Georgia statute.

Q But the Georgia statute didn't put that in; that's a legislative matter for Georgia.

A Mr. Justice Marshall, I beg do disagree; the Georgia statute does have a provision in there providing for inclusion of a broad cross-section of the community.

Q Right, but I mean you said it didn't come from the Federal statute; that's what I wanted to know.

A It might be in other statutes, but it is not in the statute spelling out cross-section.

Q I see. I just wanted to know for a matter of the record.

Q Is it possible to draw a statute that will enable people who are mistreated in this way, as they evidently are in this county, to protect their interests? Or can it be done by statute? Must it be done by providing proof that a remedy is declared here the results such as are pictured in this record?

A Mr. Justice Black, I believe it, in fact, has been done by the Supreme Court of Georgia in the Sullivan decision, where it gave a bit more interpretation to the word "intelligent." It stated that intelligence in the context of selecting jurors meant capacity to understand the matters which they may be called upon to judge. That is, of course,

more definite in the statute. The Court has filled in the gap here.

Q I presume the word "upright," would, in your judgment, be tantamount to the statement:"citizens of integrity," and so forth?

A Yes, sir, it would be character reputation. As I said, we use the law to allow evidence into court to determine whether a man shall be hanged or set free based upon reputation in the community. If we can hang a person, I think we can also decide whether or not he shall be eligible to serve on a jury on the same criteria -- reputation in the community. Inthe case at hand there was testimony that they consulted with the sheriff to see whether or not the individuals under consideration had a criminal record. They do not limit themselves to this. It was based upon general reputation in the community.

Q Is that your contention, that assuming all to be true what you said here, about the disproportionate number of colored people, that are on the jury, there is no judicial remedy, and that this case should be dismissed, or that the case should be tried?

A Well, sir, I think the Court fashioned an appropriate remedy. The jury list was reconstituted; the -- it was primarily drawn by lot after the initial elimination to various qualifications. Now, much was made of the 17

persons disqualified because they lacked the requisite intelligence or character. This 179 persons amounted to only 8 percent of the total number of names considered, so it wasn't a case of where they just wholesalely eliminated great numbers of people.

Q What was the remedy the judge ordered?

A The recomposition of the jurylist.

Q Has that been done?

A Yes, sir; it has been done. And the first act I might add, of the newly constituted grand jury was to appoint a black man to the school board. That was the first act done by the new reconstituted grand jury.

Q That's one black man on the school board.

A Yes, sir.

Q What does that do with refernce to the juries hereafter? What does the Order of the Court do with reference to juries?

A It enjoins the jury commissioners from racially discriminating in their application of Georgia statutes. It enjoins racial discrimination.

Q- And did it make findings that the disproportion that had heretofore existed, did constitute racial discrimination?

A Yes, sir.

I might mention that this came up in a rather unusual

way. The Court held a hearing in the nature of a pretrial hearing. From the Bench it observed that the plaintiffs feel the Appellants have laid out a bona facie case of racial discrimination, it recessed the hearing and advised the Counsel for the county defendants to consult with his clients and advise them as to the fact that the Court believed that the jury list was malconstituted. At that time the judge, the State Judge of the Superior Court, on his own motion, dismissed both the traverse and the grand jury and ordered the jury commissioners to reconstitute -- in other words, make up a brand new jury list.

Q A complete new jury list?

A Yes; complete, traverse and grand jury. This was the remedy granted by the trial court -- three-judge court.

Q And did he order -- I believe you said he ordered that the grand jury be selected by lot?

A No, sir; he did not order that. This is the way the jury commissioners went about it. The first thing they did was they took every name on the registered voter's list, which was something over 2,000. They then disqualified certain members because of age, the fact that they were out of the county most of the time, for various reasons they disqualified certain number of the citizens. Out of the number which remained after the disqualifications, they still had far too many

names. They put them in alphabetical order and selected every other one. At this point they looked to see what the racial composition was and at this point, as Judge Barrett observed from the bench, there was only a difference of 40 names between the list as it came out and a 50-50 breakdown. In other words, it was fairly close.

Then they drew lots. They put all of the names into the jury box and then by lot drew out the requisite number of names for the jury list and also the grand jury list.

Q Well, it's apparent that at least partial relief has been granted.

A Yes, sir.

Q What is the attempt now being made on the judgment of the court charging it with being inadequate?

A Judge, I have a certain difficulty in understanding exactly what the Appellants are driving at. Apparently they think that the entire membership of the board should be dismissed or somehow cast out of office and have all new members appointed. That is --

Q You mean of the jury board?

A No, sir; I was speaking of the board of education.

Q Board of education.

A That is the argument, as I understand it. And I don't think that --

Q Why the board of education?

A This case actually arose over the composition of the board of education. The fact that you have all black school systems administered by all white board of education. This, actually, was the problem which gave rise to the entire litigation.

Q Is that before us now?

A No, sir; I don't really believe it is, other than possibly as to the request for additional or other remedy -- another remedy. The Appellants do say that they are dissatisfied with the remedy granted by the District Court. We think the remedy was adequate.

Q Well, the freeholder standard is unconstitutional.

A I was -- Mr. Justice Douglas, I was just now coming to the freeholder point.

There are two points I would like to make --

Q But am I not correct, Mr. Evans, what the Appellants are asking us to do is to strike down this group of statutes because only in that way, as I understand it, can you get what they regard as a constitutionally-established board of education.

A As I read their brief, they have -- are more or less asking for a suspension of Georgia statutes in Tolliver County. As I read it they have abandoned their attack on the

various statutes --

Q Yes, but don't they want the jury statutes declared unconstitutional?

A The jury statutes.

Q Yes. But, this to effect a new composition of the boards of education; isn't that right?

A No, sir; I don't think that's correct.

Q Well, perhaps I had better wait until they get up on this.

A The boards of education, of course, is selected for a five-year term and just removing the present grand jury will not affect these officers.

Q Well, perhaps I should wait until Mr. Maltsner gets up.

Q I suppose it did strike down or did strike down as unconstitutional the requirements for school board members to be freeholders; what would that do?

A I think not a thing, Mr. Justice Black; not a thing. I had not yet come to the freeholder point, but I shall address myself to that point.

First of all, I will just touch in this. We do not think this question is properly before the Court. The principle plaintiff, Calvin Turner, in fact, was a freeholder -- is a freeholder. The evidence shows that great numbers of the black citizens of Tolliver County are, in fact, freeholders.

They did subsequently permit an intervention of a person who --

Q What percentage?

A Sir?

Q What percentage are freeholders?

A I don't know, but the word in court was "great." Great numbers is what the court used.

The court observed from the bench that there was no question here as to the requirement discriminating against black citizens.

I have two points on the freeholder. First we find that is not before the Court. There is not a shred of evidence in the record to show that anyone, much less these plaintiffs have been denied a position on the board of education because of the freeholder requirements.

Secondly, of course, we think that if we get to the merits of the problem, we think that the law is that there is nothing improper about a freeholder requirement for public office. This Court has so held twice -- they are rather old decisions. The first was Strauder versus Virginia and the second was Vaught versus Wisconsin and in each case the Court has held that there was nothing improper about a freeholder requirement for a public official.

Q Does your State Law define that term with any precision? Freeholder?

A Mr. Justice Black, as I point out in my brief,

I believe the requirement could be met by the purchase of one square inch of realty. I don't believe there is any standard as far as the amount of realty one must own to be a freeholder.

Q Does that require the ownership of real estate?

A Yes, sir; it does. A freeholder is one who owns real estate. The statute does require a board member to be a freeholder.

Q Now, suppose that's done; suppose that's stricken down, and they are not required to be freeholders. What's left here that we can do?

A Mr. Justice Black, I really don't think that striking the freeholder would have any bearing on this particular case.

Q I don't see that it has so much, but -- from what you say about it. But, if that was stricken, what would be the situation then, with reference to the other complaints?

A I presume -- I cannot speak for Appellants -- I presume their other complaints would continue. Their essential complaint, as I see it, is the attack upon the "upright, intelligent" qualification for jurors. As I see it, that was the principal question before the Court today.

Q Of course, they do not claim, do they, that they should not be upright and intelligent?

A Well, sir, they obviously do not maintain they should not be, but they say that the standard is too vague.

We can only submit we think it's a rather clear standard. In fact, sometimes I think when you consider constitutional attacks of vagueness on a word like "intelligent" or "upright," in the contextof a juror, I think that one would have to, perhaps, be a lawyer not to understand it. It's a word that's been commonly used for at least a hundred years in Georgia and it's never even been attacked until recently. It's a word that is easily understood. In Yerby and Cameron, this Court upheld in a criminal statute where the standard is higher, upheld unreasonable interference. Well, that can be a vague phrase, too. This involved in a picketing case and demonstrations on the street. This Court said it was perfectly free to phrase unreasonable interference.

It seems to me that in the context of jury selection I think that words like "reasonable" and "upright," are not difficult words. It's the simple reputation in the community as far as the character qualification; as far as intelligence, it is as the Georgia Supreme Court declared, as the Chairman of the Jury Commission has declared, it is the capacity to understand what is going on in court. We think this is essential to the operation of the jury system.

Q Is the State of Georgia defending the use of the word "freeholder" in its statute; defending the right of Georgia to require that they be freeholders?

A Yes, sir; we think that that is a constitutional

standard. I emphasize that word, because I do think it is -- to be perfectly candid, I think it is open to question as to its wisdom.

I might add that very recently I recommended to the Georgia Constitutional Convention Committee that it be deleted. I personally didn't like it. But I do think it is not unreasonable if the Court would like a reason I could point out that members of the board of education had a great deal to do with fixing the tax rate. It is not beyond the realm of reason to say that it might be desirable to have persons who are directly affected by property taxes; it is not beyond the realm of reason to feel that they might be, perhaps, a little bit more prudent in the expenditure of public funds.

We think that in voting rights cases such as Harper, Cipriano and Kramer are not appropo. The reason they are not appropo is clearly the State, as the Federal Government, can prescribe different and higher standards for the holding of public office than for a voter.

Q Is a voter required to be a freeholder?

A No, sir.

Q When you link the prudence factor that you mentioned to the fact that these men on the board fixing the taxes are fixing taxes for the support of almost all black schools, then that assumes another dimension; would you not agree? Potential for carrying prudence too far.

A Mr. Justice Burger, this probably would be a danger. I would point out that the record in this particular case shows that between the time that the white pupils left the school system and the time of litigation, the pupil expenditures went up; not down.

Q Well, that was perhaps because there were many fewer pupils.

A I'm talking about --

Q I say, there might have been a lesser amount of total dollars, divided among fewer pupils.

A As a matter of fact, pupil expenditure did go up, not down. They did not reduce the taxes.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Evans. Mr. Meltsner you have about three minutes left.

REBUTTAL ARGUMENT BY MICHAEL MELTSNER

ON BEHALF OF APPELLANTS

MR. MELTSNER: Inthe very short time that is left I am going to try and deal with two or three of these issues first.

Mr. Justice Brennan, assuming that the Court eliminates the capacity for discrimination and the upright and intelligence --

Q Strikes that down.

A Yes. We have concluded that the most appropriate remedy is for the District Court to try and make their system

selection which is ingrained in State Law work. And we think --

Q I can't hear you.

A I am sorry. We think that if this statute is knocked down by the Court; if our challenge is successful, that the most appropriate way for the District Court to assure that the system of school board selection and jury selection works, is to appoint black jury commissioners. Put them in this process, because a very small amount of discrimination on the part of the commissioners would tip the balance in the grand jury which selects the --

Q Well, tell me, Mr. Meltsner, I notice that your complaint asks and on the premise that the statute was struck down, that you wanted membership on the board of education and jury commission to be declared vacant, a receiver be appointed to operate the public schools and the selection of a constitutionally acceptable board and a special mass to select members of the grand and petit juries and that ancillary damages be awarded. Do you still ask for all that relief?

A Well, we do not ask this court for ancillary damages, but all that relief may be appropriate in the District Court to devise a system which will assure fair selection here.

Q You don't think a mere declaratory judgment would be enough?

A Absolutely not. After it was declared -- after

there was a declaratory judgment, 96 percent of the persons excluded under statutory tests were black. Declaratory judgment is not going to work.

Now, with respect to Mr. Justice Douglas's question as to the freeholder. There is just something I wish to bring to the Court's attention at this point, because I just discovered it, really. And that is that Georgia has two other ways of selecting school boards. One is a local law may be passed and a referendum take place. Another is that area school boards may be created. The constitutional provisions which provide these systems of selection, say nothing about freeholders. They delegate to the voters of the particular communities the power to set qualifications. Thus, there can't be very much of a state interest involved here.

Finally, just one more point here. Mr. Justice Stewart, these statutes, with the exception of the cross-section of the community language are all reconstruction statutes.

Q Well, I'm talking about that language.

A I see.

I just wish to make it perfectly clear that we do not disagree has an interest in intelligent and upright jurors. We merely assert that the test involved in this statute is not the way to achieve that end. It grants too much discretion and invites racial discrimination.

Q Well, would you consider that if you prevail on your facial attack here that the statutes in these 21 other states would have to go, too?

A I think some of them definitely will, but I think in most of them -- my own experience is that in most of them they are administrative procedures grafted onto them, which make the selection much fairer. But certainly, many of these statutes will have to go.

MR. MELTSNER: I thank you.

MR. CHIEF JUSTICE BURGER: Mr. Meltsner, thank you for your submission and Mr. Evans, thank you for your submission, and the case is submitted.

(Whereupon, at 2:30 o'clock p.m. the Court was adjourned, to reconvene at 10:00 o'clock a.m. on Tuesday, October 21, 1969)