ORIGINAL

In the

# Supreme Court of the United States

CITY OF MOBILE, ALABAMA, ET AL.,
APPELLANTS,
V.
WILEY L. BOLDEN, ET AL.,
APPELLEES.

No. 77-1844

ROBERT R. WILLIAMS, ET AL.,
APPELLANTS,
V.
LEILA G. BROWN, ET AL.,
APPELLEES.

No. 78-357

Washington, D. C.
October 29, 1979

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IN THE SUPREME COURT OF THE UNITED STATES

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| CITY OF MOBILE, ALABAMA, ET AL., Appellants, v. WILEY L. BOLDEN, ET AL., Appellees. | No. 77-1844 |
| ROBERT R. WILLIAMS, ET AL., Appellants, v. LEILA G. BROWN, ET AL., Appellees. | No. 78-357 |

Washington, D. C.,

Monday, October 29, 1979.

The above-entitled matters came on for oral argument at 10:04 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

CHARLES S. RHYNE, ESQ.,
1000 Connecticut Avenue, N. W., Washington, D. C. 20036; on behalf of Appellants City of Mobile Et Al.

JAMES U. BLACKSHER, ESQ., 405 Van Antwerp Building, Mobile, Alabama 36601; on behalf of Appellees Bolden Et Al.

JAMES P. TURNER, ESQ., Deputy Assistant Attorney General, Civil Rights Division, Department of Justice, Washington, D. C.; as amicus curiae supporting Appellees.

WILLIAM H. ALLEN, ESQ., Covington & Burling, 888 Sixteenth Street, N. W., Washington, D. C. 20006; on behalf of Appellants Williams Et Al.

ERIC SCHNAPPER, ESQ., 10 Columbus Circle, New York, New York 10019; on behalf of Appellees Brown Et Al.

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# C O N T E N T S



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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in No. 77-1844, City of Mobile v. Bolden, and the consolidated case of Williams v. Brown.

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

ORAL ARGUMENT OF CHARLES S. RHYNE, ESQ.,

ON BEHALF OF THE APPELLANTS, CITY OF MOBILE

MR. RHYNE: Mr. Chief Justice, and may it please the Court:

This case presents a question of whether the Equal Protection Clause of the Fourteenth Amendment requires the abolition of the Mobile commission form of government elected at large.

This is the first case involving a state or a local government where the entire form of government, not just the manner of its election, has been held unconstitutional.

Mobile is one-third black. The District Court held that only the abolition of the commission form of government in its entirety could "provide blacks a realistic opportunity to elect blacks to the city governing board."

The District Court also held that equal opportunity included the election of representatives of their choice. Now, the ultimate issue in this case is whether the only way to satisfy the constitutional requirement of equal protection, equal participation in the voting processes of a government is

by electing a black to the Mobile governing body.

Now, the District Court held that while it was making all of the findings about various subjects that I just mentioned, that blacks did not participate effectively, and we say this is a clearly erroneous error because the record establishes beyond question that in every contested election in the City of Mobile, and the last one was in 1973, the black vote is decisive. In 1973, for example, Commissioner Greenow ran against Mr. Bailey, who had defeated Commissioner Langan, who had been elected and re-elected 16 years with black support. And in the first election he received only 15 percent of the black vote. In the runoff he received 43, and that elected him.

And as we state and quote on pages 9 and 10 of our brief, the judge is questioning Reverend Hope, who is the black president of the Non-Partisan Voters League, and he asked him, "Isn't it a fact that the black vote in the Greenow race was the difference, and in the Mimms race," the other commissioner, and he said, "Yes."

And then in addition to that, I would point out to the Court that Commissioner Doyle had no opposition, but he testified that when he first ran, that he went to the Non-Partisan Voters League, which is the only slating organization in Mobile and it's black, and he was screened by them, and they endorsed him. And each one of these appellants have gone to that league and received its endorsement after being screened

by them. And so the blacks do participate very vigorously in the electoral processes of Mobile.

And so I say that where the elections are non-partisan and where each of the appellants go and seek the black vote, and where it's decisive, it cannot be said to be submerged or diluted.

Now, the Reverend Hope, when he was testifying in his final statement that we quote on page 10, makes just one sentence which I would like to quote to the Court because I think it's important, because he was talking about the fact that he was speaking for the entire League, which is all black and the most important slating organization. He said: "They feel the candidates they have elected" -- now these are the three appellants who are here, and by "they" he means the Non-Partisan Voting League -- "have done a very good job along that line of serving blacks."

And over and over again this record is full of instances in which blacks testified that when they supported these appellants, they went down to City Hall and they asked for what they wanted, and if it was possible in law and money, they got it.

I'm not going to read the long list, but I can say this: Eight, the only eight of the witnesses of the plaintiffs who were asked if they'd been down to City Hall, and under this open door policy that's maintained by these

commissioners who exercise dual functions under the commission form of government, they have both legislative and executive powers, so they can in effect do it all. If they tell one of these blacks, "You're going to get a pavement," "You're going to get this," they get it, because they have the power to do it.

And so the fact that they not only take part in the entire voting process from registration all the way through, but they then in effect collect on their political obligations shows that they play an extremely important part in the political processes of Mobile.

Now, we had one time, in 1973, where three blacks ran, and those three blacks didn't carry the black wards. Now, as Witness Alexander, Dan Alexander who is a witness for the plaintiff, testified in his testimony for the plaintiff, and election for commissioner and an election for the school board are two entirely different things. When you run for the school board, and Dan Alexander is a member of the school board, you talk about what you can do for the school kids, and it's county-wide. When you run for commissioner, you talk about what a good businessman or woman you are, because the commission form of government is supposed to elect businessmen to run cities. That's why it came into existence, and that's why over and over again, when they've had referendums in Mobile -- well, they've had them in 1963 and 1973, according to the record -- the people have overwhelmingly supported this

businessman form of local government.

Now, the Court below held that the intent that was important here was not the intent of the three defendants but the intent of the legislature. Now, the legislature is not a defendant here. No State official is a defendant. And they go on and on and on talking about bills that have gone up to Montgomery to change the form of government, and when you're talking about legislative intent, you're talking about a very nebulous thing. But in their supplemental brief they cited the fact that Senator Buskey, a black Senator, had introduced a bill to give the people of Mobile a chance to vote on another referendum about changing its government, and they go on and on about how the fact that that bill went through the House and then lost in the Senate.

What they don't tell you is this, that that bill reached the Senate on its 28th legislative day. It got its first reading that very day, which is very unprecedented. It got its second reading -- and this is on page 10 and 11 that they discuss this -- its second reading on the 29th legislative day, and then it got lost in the usual pile-up of bills in State legislatures on that last day.

The thing that interests me is that the black Senator from Mobile, according to the journal, had absolutely nothing to say. The bill died.

But again, it was going to give the people of Mobile

a chance to have a referendum.

So I urge upon the Court that the relevant intent that you're going to consider intent is that of the three defendants, the three commissioners that are before you, and you can't find in this record, if you read it from beginning to end, any instance in which they who must have the votes of the black to win have discriminated against the blacks. The black votes are equally counted; they have an open door policy; they see them; and as I say, the only eight witnesses of the plaintiff who were asked testified unequivocally that when they went to City Hall, they saw the appellants and they got what they went for, if it was legally or financially possible.

And so it's not the State intent that's so important here. It is the intent of these three appellants. If it was the State intent, why don't they have the State here? Yet the very basis of the District Court decision and the very basis of the Appellate Court decision is the inference that they draw from the fact that no black, and the District Court repeats this three times, has ever won a seat as commissioner of Mobile. He doesn't add the next part of it, which is that no qualified blacks ever run.

And the other inference they draw is that State inaction is circumstantial evidence of invidious intent against what? These three appellants? What do they have to do with

the State Legislature's intent? And it's the most nebulous, hardest thing to get at in the whole world. It's like asking Barry Goldwater what Senator McGovern's intent was on a bill. I don't believe that the relevant intent is that of the State Legislature, but the relevant intent is that of the appellant commissioners. They're the only defendants, they're the only ones that are before this Court. And so I urge, indeed, that they have never been shown to have a racial purpose, that they have been shown over and over again to be very sensitive to the needs of blacks, and there is no racial purpose that can be attributed to them in any way, or how can they get over and over the endorsement of the blacks, and how can they, when these only three blacks ran, carry even the black wards?

So another point that I would make is that the Court of Appeals held that there was a very, very strong city governmental intent in at-large elections in Mobile because they were brought in to wipe out ward heeling, corrupt government, and that this government has served Mobile well for 68 years, without any charges of corruption or anything else. And that is the good government that they are asking this Court to uphold the abolition of.

Now, the failure of the Court below to find that in this record, over and over again, that the blacks are such an important element of the political processes -- they get on the stand and they brag about how important they are. Wiley

Bolden said sure, they follow the pink sheet. That pink sheet is the one that has the names of the people that the blacks have endorsed. And when the blacks ran, they endorsed some of the blacks, but they also endorsed the whites, and the appellants. So I urge upon you that the intent that is important is the intent of these appellants that they have done absolutely nothing that can be called, on this record, invidious discrimination. No black has ever lost an election in Mobile because of polarized voting, and if you're going to draw inferences, why do you have to stop -- they point to Montgomery, they point to Birmingham where tomorrow we may learn something, because the man who got more votes than I think all three candidates, white candidates, for mayor is up for the final vote. I think he got 30-something-thousand and the other three got 30-something-thousand.

But look at Atlanta. Look at New Orleans. Look at Detroit. Look at Newark. And my prime example of all, because I'm leaving to go out there tomorrow, is Los Angeles.

Look at Bradley. Bradley ran when only 17 percent of the people of Los Angeles were black. He was defeated the first time around, but he pulled himself up and ran again, and he's been elected over and over and over again.

But yet in here they talk about discouragement as being the reason that no qualified black has run in Mobile, even though they have equal opportunity, equal access, equal

everything, and all they need is a qualified candidate.

Now, it's true that on the record there was some dispute about whether qualified blacks could win. The interesting thing to me was, the judge was working over Mr. Langan, who had won for 16 years straight and then the blacks turned against him so he lost. He was trying to get him to say that no black could be elected. He said, "Well, it depends on the person." And that I think is true. I think the color of a man, the color of a woman, doesn't count in politics any more. It's their qualifications. And this commission form of government, above all, emphasizes, as Dan Alexander said, the business capacity of those who want to be commissioners.

Another aspect of this is, there are enormous differences between a city and a State. I don't think that your decisions that relate to State governments really apply here; if you wipe out a multi-member State district, it doesn't change overall the State government. If you wipe out the commission form of government in Mobile, you disestablish the whole government and bring in a whole new government, a mayor and nine councilmen and the councilmen meet once a week and get $50 for a meeting, they can only talk to the mayor, they're not allowed to talk to the employees, and so the blacks really are diluted by that order because now they can go down and see any one of the commissioners and get anything they want,

talk to the head man, because they see them all. And under the Court's order, they have to go down and see the mayor and wait in line, and they don't have the clout under the order that they have now.

So --

QUESTION: Under the remedy decreed by the District Court and affirmed by the Court of Appeals, predictably there would be a minority of Negroes in the City Council, wouldn't there?

MR. RHYNE: It looks like there would be three, yes. And so, now, Reverend Hope, for example, would have one of those who he could go see, and he would go down to City Hall.

QUESTION: They would be a minority?

MR. RHYNE: And so now, as the situation is, according to his testimony, he goes down and sees one of the commissioners directly, and the commissioner can order anything. And so they can do it all. So actually they're being diluted.

Now, the -- we cited in our brief the comments that political scientists have made about this. They say that the form of government, local government, is peculiarly something for the people of the locality. I think I've probably read more charters, and I don't mean to brag about it, than any other man alive, because I've lived my life here. I once went out to Denver and met Quigg Newton and people when they were redoing the Denver thing, and I took a stack of charters. I

can tell you that there is not a single city charter that is identical with any other. They are always adapted to the needs of that locality. And I'm not sure that courts are political scientists enough to tell local governments what kind of government is good for them.

But I come back to the point I mentioned below already, and I want to emphasize it because I think it's important. Here we have a good government being wiped out based on inferences and circumstantial evidence, as against the record of the election of qualified blacks nationwide. To me it just doesn't stand up, and to me, the constitutional requirement is full participation in the political process, not a guarantee of end result.

Now, we talk about proportional representation of a race, and you've said you're never going to grant that. I once went out to Cincinnati and talked to Mayor Seasongood for half a day trying to understand proportional representation. I never did.

QUESTION: You have to run under it to understand it.

MR. RHYNE: I suppose that you did. But all this thousand over ten and all that kind of stuff kind of left me.

So I conclude by simply saying that this case is enormously important not just to Mobile, but to the 67 percent of cities throughout the Nation that elect at large. Look at the New England town meeting.

QUESTION: Mr. Rhyne, before you conclude, earlier in your argument you suggested that the people whose intent would be most relevant would be the intent of the three commissioners.

MR. RHYNE: That's right.

QUESTION: How do you read the District Court findings and the Court of Appeals opinion? Whose intent do you think those courts were talking about? The opinions are a little bit unclear to me.

MR. RHYNE: They were talking about the intent of the legislature.

QUESTION: You think it's definitely the intent of the legislature?

MR. RHYNE: Oh, yes. They pinned everything on the intent of the legislature.

QUESTION: Because some of the material under the Zimmer factors wouldn't really bear on the intent of the legislature very much, and they seem to rely on those factors.

MR. RHYNE: Well, I haven't said anything about some of the Zimmer factors, the service factors. There are other remedies for that, and I just don't think they belong in a voting rights case, and so I haven't gone into that.

But there is no question but what both courts looked to the intent of the legislature, not the intent of these appellants, because if you look to the intent of the three

defendants here, it's overwhelmingly in favor of the blacks. There's nothing on the other side.

QUESTION: Mr. Rhyne, before you sit down, you have indicated in your oral argument and also I think in your brief that it's your position that only the Fourteenth Amendment is involved in this case, and only the Equal Protection Clause of the Fourteenth Amendment.

MR. RHYNE: Yes.

QUESTION: Your brothers talk about the Voting Rights Act of 1965 as well as the Fifteenth Amendment, in addition to the Fourteenth Amendment. I gather you think they are --

MR. RHYNE: Well, with respect to the Voting Rights Act, I think that there has been no change here, and the footnote in Circuit Court of Appeals, Footnote 14, where they say it's problematic, they've never heard of it being applied this way in a dilution case, I don't believe the Voting Rights Act has any application whatever.

QUESTION: Was that included as a ground of the cause of action in the complaint?

MR. RHYNE: It was, and if they didn't like the way it was ruled on there, they could have appealed and didn't, so I don't think it's before this Court.

QUESTION: How about the Fifteenth Amendment?

MR. RHYNE: The Fifteenth Amendment, the District Court really didn't say anything about the Court of Appeals,

said it required intent, so they really brought it down to about the same thing as the Fourteenth Amendment. And again, they didn't appeal from that ruling, so I don't think it's before the Court.

QUESTION: If the judgment can be supported on the basis of either the statute or the Fifteenth Amendment, I suppose they are entitled to support it.

MR. RHYNE: Well, I think that --

QUESTION: On either of those grounds.

MR. RHYNE: My answer would be that it cannot be on the facts in this case.

QUESTION: The decision of the District Court of Appeals, as you understand them, were grounded on the Equal Protection Clause of the Fourteenth Amendment?

MR. RHYNE: That's right, entirely.

MR. CHIEF JUSTICE BURGER: Mr. Blacksher.

ORAL ARGUMENT OF JAMES U. BLACKSHER, ESQ.,

ON BEHALF OF THE APPELLEES, WILEY L. BOLDEN ET AL.

MR. BLACKSHER: Mr. Chief Justice, may it please the Court, there are really only two issues that this Court must address in this case. The first is whether the case should be decided on the basis of the statute, the Voting Rights Act, or whether it should be decided on the basis of the Constitution. And the second issue is whether this Court will affirm and leave undisturbed the findings of two Courts below

that the at-large election system in Mobile, Alabama, is maintained for invidiously discriminatory reasons.

We believe that, particularly in light of decisions of this Court in the last term, Cannon v. University of Chicago in particular, that the conclusion that there is a private cause of action under Section 2 of the Voting Rights Act is inescapable.

Under the factors of Court v. Ashe, there is virtually no difference between the application of that case to Section 2 of the Voting Rights Act and Title 9 of the Education Amendments. That has been briefed and I will not go into it in further detail.

With respect to the findings of fact that there is an invidious purpose in the maintenance of this election system, we believe, as we have said in the supplemental brief, that Columbus and Dayton and indeed, Personnel Administrator of Massachusetts v. Feeney, virtually require this Court, following the same principles, to affirm the findings of the District Court and the Court of Appeals that the at-large election system first put into effect in 1911 has not been changed, notwithstanding attempts to do so, because of, not in spite of but because of, the knowledge that the at-large system prevents blacks from having their electoral choices registered in the election process.

Now, with respect to the remedy --

QUESTION: Mr. Blacksher, before you get to remedy, whose intent are we talking about?

MR. BLACKSHER: We are talking about the legislators' intent. We believe, if we correctly read Washington v. Davis and Arlington v. Metropolitan Housing Authority, if we correctly read those cases, we are talking about the lawmakers' intent. If we are investigating the question of invidious purpose behind particular legislation.

If we are talking about the intent of the people who operate the statute, then we've got what I suppose would be a Yiquo v. Hopkins type of case, in which case we would shift our gaze and scrutiny to the actions of the people who were actually operating the election system.

QUESTION: Mr. Blacksher, forgive me if I have interrupted your answer to Justice Stevens' question. I wasn't sure whether you were finished or not.

If you are right that the judgment should be affirmed here because blacks are not being permitted to have their impact felt in the electoral process, how far out can that line of reasoning be extended under your theory? How many other groups can claim that they were discriminated against by the State Legislature because the State Legislature just didn't happen to like that particular group? I mean Catholics, Jews?

MR. BLACKSHER: I think, Mr. Justice Rehnquist, that that question has to be answered in the context of the Equal

Protection Clause of the Fourteenth Amendment. And this Court first must look to the question whether or not the judgments below must be sustained on the basis of the Voting Rights Act, which specifically addresses race, or the Fifteenth Amendment in the cases decided under it.

I believe that for the purposes of this case it is important to recall that the dilution principle did not arrive constitutionally from the principal of one person, one vote. Racial, the abridgement of voting rights on the basis of race did not derive from the Fourteenth Amendment principles of a full and effective vote in one person, one vote.

QUESTION: Where did it derive from?

MR. BLACKSHER: It derived from the Constitution of the United States, the Fifteenth Amendment and the statutes enacted under it.

What I wanted to point out was that in Reynolds v. Sims, this Court had to look to the Fifteenth Amendment and to the cases decided under it, specifically Lane v. Williams, Wilson, Gomillion v. Lightfoot, Brown v. the Board, to find in the Equal Protection Clause a principle that says that there is a full and effective vote for other classes of people. And it was on the basis of that analogy or that juxtaposition of the Fifteenth Amendment to the Fourteenth that there was ever developed a one person, one vote principle.

In fact, I think it's interesting to note that the

fundamental disagreement that Justice Stewart had with the Reynolds case all through the years has been that it was too simplistic. Sixth Grade arithmetic. And did not take into account the realities of the political process to which the Constitution must address itself.

For example, and I quote here, if the Court will indulge me momentarily, from Justice Stewart's dissent in Lucas v. the Colorado Assembly:

"I could not join in the fabrication of a constitutional mandate which imports and forever freezes one theory of political thought into our Constitution and denies to every State any opportunity for enlightened and progressive innovation in the design of its democratic institutions so as to accommodate within a system of representative government the interests and aspirations of diverse groups of people without subjecting any group or class to absolute domination by geographically concentrated or highly organized majority."

QUESTION: Do you think that helps you?

MR. BLACKSHER: I believe it does, Mr. Justice Stewart, because --

QUESTION: Rather, an expression of unwillingness to join in forcing a State to do anything, isn't it?

MR. BLACKSHER: I confess that in that particular decision, your attention was directed to the prerogatives of the State legislature, not to what the Constitution requires.

QUESTION: Well, I said the Constitution didn't require that.

MR. BLACKSHER: You said the Constitution did not require the imposition of strict population, one person --

QUESTION: You think it follows that the Constitution does require something else?

MR. BLACKSHER: I believe the Constitution does require that the right of persons to vote not be abridged on the basis of race. That much we know.

QUESTION: What part of the Constitution are you relying on when you say that?

MR. BLACKSHER: The Fifteenth Amendment.

QUESTION: This case was decided on the basis of the Fourteenth Amendment, wasn't it?

MR. BLACKSHER: This case was decided on the basis of the Fourteenth and the Fifteenth Amendments in the judgment of the Court of Appeals below, and we relied from the beginning on the Voting Rights Act which was discussed earlier as another statute or as the first cause of action that the Court ought to approach, which of course is decided under the enforcement provision of the Fifteenth Amendment.

QUESTION: Well, the Voting Rights Act, that is the section with which this Court has dealt primarily has to do with a change in the method in some scheme or device, or some change in the method of election.

MR. BLACKSHER: That is Section 5 of the Act.

MR. BLACKSHER: That is Section 5 of the Act.

QUESTION: And you rely on Section 2, is it?

MR. BLACKSHER: We rely on Section 2, which is the general provision of the Voting Rights Act which extends substantive rights to voters.

QUESTION: But doesn't purport to confer any private cause of action, does it?

MR. BLACKSHER: We believe that it does.

QUESTION: But it doesn't explicitly do so, does it?

MR. BLACKSHER: It does not explicitly do so any more than Title 9 of the education amendments did. But all of the elements including an expression of understanding on the part of the Congress that it does confer a private cause of action on private individuals, as expressed in debates on the Floor, as expressed in the enactment of an attorney's fee provision.

QUESTION: The District Court and the Court of Appeals didn't rely on the Voting Rights Act, did it?

MR. BLACKSHER: In its motion to dismiss early in the case, it held that we did have a cause of action. When it wrote, at the end of the case, it did not even address the Voting Rights Act issue.

QUESTION: And the Court of Appeals mentioned it in a footnote, I think.

MR. BLACKSHER: In a footnote it said, we're going to

have to reach the constitutional issue anyway because we've got Nevett v. Sides with us today, and so we're not going to go into what we see as the knotty question of whether there's a private cause of action --

QUESTION: So if we agree that that was a knotty question, I suppose it would be our duty to remand it to the Court of Appeals if we thought that was a dispositive?

MR. BLACKSHER: That is a possibility. In the Beaser case last term, the possibility of remanding it was rejected and the Court went ahead and reached the statutory issue first at this juncture, and we believe that since what we are talking about is not a review of the factual circumstances in light of the statutory standards, it makes little sense for this Court to remand, which is essentially a legal question.

QUESTION: But in any event, Mr. Blacksher, when I interrupted you with my question, you were relying on the Constitution, and it's the Fifteenth Amendment, not the Fourteenth, upon which you rely? Reynolds v. Sims and it's all those related cases that involve the Fourteenth Amendment.

MR. BLACKSHER: I was responding to Justice Rehnquist in this vein: We have understood --

QUESTION: -- and that was a Fourteenth Amendment case?

MR. BLACKSHER: It was, and we rely on the Fourteenth

Amendment as well as the Fifteenth Amendment and the Voting Rights Act.

QUESTION: But what result do you get in reliance on the amendments you've recited to Justice Stewart and the statutes in respect to -- my question is to who, other than blacks, can make this same claim, that although they're allowed to vote, their representation is diluted because of the way the districting goes, even though one man, one vote is complied with?

I take it from your referral to Yiquo that Asian Americans could rely on it.

MR. BLACKSHER: We certainly believe they could, if they can show that they've been treated the way the black folks have been treated in Mobile.

QUESTION: And that's a statutory showing?

MR. BLACKSHER: That would be our understanding of the Reynolds principle under the Fourteenth Amendment. But the point I was trying to make, and I confess I got into it a little bit obliquely, is this:

We understand the argument of the appellants in this case to be that if this Court determines that the election system in Mobile satisfies the one person, one vote principle, you ought to let it alone, that there ought not be any further Federal inquiry or intervention into the actual workings of the political process to determine whether or not blacks'

rights are nevertheless being abridged. And I am simply pointing out that that's letting the tail wag the constitutional dog; that if there is a one person, one vote principle, it is because the Constitution spoke first to the equal rights and to the voting rights of black people. And whatever rights other groups may have under the Fourteenth Amendment principles developed under Reynolds, surely the important rights of blacks which the Civil War Amendment was designed to protect cannot be forgotten in the shuffle.

QUESTION: Do you think those rights are denied when you have an at-large election for the governor of the State of Alabama, for example?

MR. BLACKSHER: No, sir, because the governor is one office and it is not a representative office in the nature of a legislature, for one --

QUESTION: Well, these people have legislative duties, but they also have executive and administrative duties, as I understand it. This is not a pure legislature; this is not representative democracy.

MR. BLACKSHER: Mr. Justice Stewart, we are not attacking majority rule. We are simply seeking on behalf of the black people of Mobile the opportunity to participate --

QUESTION: How about in the State of Alabama generally, when they elect the governor?

MR. BLACKSHER: I beg your pardon, sir?

QUESTION: What proportion of the State of Alabama are Negro voters?

MR. BLACKSHER: Approximately 30 percent or 35 percent.

QUESTION: Has there ever been a Negro governor of Alabama?

MR. BLACKSHER: There has never been a black governor.

QUESTION: Wouldn't the same constitutional claim be assertable in that situation?

MR. BLACKSHER: We say it does not. As I say, it has to do with the nature of the body that we're talking about. Where more than one person is elected for the purpose of representing diverse interests in the community, to use your language, there would be no need to have three commissioners for the city commission.

QUESTION: Well, each has a different set of duties, doesn't he? Isn't one finance and the other safety, or something or the other?

MR. BLACKSHER: He does by virtue of statute. At one time, before 1965, there was not a statutory requirement that they divide up those duties. That was something that was put into the law in 1965. It's something, by the way, that the 1979 bill that Mr. Rhyne was talking about would have taken out. It would have allowed the --

QUESTION: It is true now, isn't it?

MR. BLACKSHER: It is true now.

QUESTION: And he's the executive of the City of Mobile?

MR. BLACKSHER: That's correct.

QUESTION: Who is? That's a question.

MR. BLACKSHER: The three commissioners and the mayor. The --

QUESTION: That's what I thought.

MR. BLACKSHER: -- mayor is the nominal chief executive of the city, and that's a rotating position among the three commissioners.

QUESTION: But the three commissioners have the executive power, do they not?

MR. BLACKSHER: They have the executive power, they have the legislative power, they have the administrative power, and to some extent the judicial power, although we have a municipal court that exercises most of the judicial power of the city.

QUESTION: How do you distinguish the executive functions of the commissioners, and particularly of the one who is the mayor, and the executive functions of the governor of the State?

MR. BLACKSHER: I don't think there is any need to distinguish those executive functions, Mr. Chief Justice

Burger. I believe that, with respect to the executive functions, there's no reason to say that blacks must have an equal opportunity to elect a person in every executive office or every executive department. What they are entitled to is a right to share fairly and effectively in the administrative and legislative group determinations that government carries out in Mobile.

I would like to point out --

QUESTION: What percentage -- does this record show what percentage of the Negro voters actually vote?

MR. BLACKSHER: The latest turnout figures thatwe were able to come up with would indicate that black voter registration was around 65 percent and that black turnout was something like -- well, is about the same as whites in elections where there were black candidates and less than whites, and when it was a good as the white turnout it was around 36 to 40 percent.

QUESTION: But if abl of the Negroes registered and all of them voted, isn't it likely that they could on this record elect at least one commissioner?

MR. BLACKSHER: Not in this case. That was a fact that the court found for the plaintiffs.

QUESTION: I know they found it, but did they find it with respect to that proposition that if every Negro eligible to register did register and every registered Negro voter

voted, did they make a finding on that?

MR. BLACKSHER: Although it was not cast in those terms, the court's language can be read to include that implication which was discussed during the trial. I think the court says there is no reasonable opportunity for blacks to have their choices elected in the at-large system. It is not necessary, however, and the court did not rule --

QUESTION: Well, does that finding by inference that you suggest stand up under a mathematical analysis?

MR. BLACKSHER: It has to. Blacks are 35 percent of the population of Mobile. They are less than that of the voting age population of Mobile. I think it is closer to 30 percent or 32 percent. And if they were registered at the same rate as whites, they would still be a political minority in the community by a substantial margin. They are not close to being a majority.

QUESTION: How about the Catholics in Mobile, is there anything in this record to show how many there are?

MR. BLACKSHER: There was plenty of evidence in the record to show that there was not poliarization of electoral processes along religious lines or along ethnic lines in Mobile, Alabama, that the only discernible poliarization from a social standpoint was along the lines

of race.

QUESTION: Mr. Blacksher, if we just for the moment confine ourselves to the Fourteenth Amendment again, I understand your separate argument on the Voting Rights Act and the Fifteenth Amendment. I would like to pursue the thought Mr. Justice Rehnquist and I suggested earlier about -- you would say the same theory would apply to Catholics, a religious or an ethnic group as well as to blacks. What about a political group such as Republicans?

MR. BLACKSHER: I was asked that question I believe at the first argument, Mr. Justice Stevens, and I replied that it would be the same. I believe that political groups probably would be protected, although I think there is a difference in that -- as I have said before, I think politics is the vehicle or the forum through which we operate the political process, that it is a volitional choice which party you are in, and that may cause some differences, differences which I simply have not explored and which I don't think the Court needs to at this point, certainly --

QUESTION: Well, do you think if a city has got -- if the Republicans and the Democrats are segregated by area in a city, do you think a city may draw their electoral districts based on those lines so as to clearly

predetermine who is going to win?

MR. BLACKSHER: I believe that a city can draw their district lines any way that they fairly choose so long as it cannot be demonstrated that the particular ethnic or political group you are talking about has been systematically excluded from the particular process.

QUESTION: Let's assume that there has never been a Republican elected in Mobile in history. I suppose that is true, isn't it?

MR. BLACKSHER: Oh, no, Mobile is growing more Republican.

QUESTION: Let's suppose that it had been, a history like that, and there was proof that the at-large system was maintained to maintain the Democratic majority and Democratic control. Now, under the Fourteenth Amendment, you would say you would come out the same way here?

MR. BLACKSHER: I believe that it is possible to if you can show --

QUESTION: I know it is possible, but how about you?

MR. BLACKSHER: Well, I believe that we have to refer back to White v. Regester for the realm of possibilities.

QUESTION: Well, would you be making this same argument here or wouldn't you?

MR. BLACKSHER: As I just said, I may or I may not. I don't know whether the difference in political concerns makes the kind of difference that distinguishes from ethnic or of religious or in this case racial classifications, and I am just not prepared to take a final position on that.

QUESTION: Well, it depends a lot I suppose on -- whether you are not depends on how strong your Fourteenth Amendment argument is as distinguished from your Fifteenth and your Voting Rights Act.

MR. BLACKSHER: Well, the thrust of my argument today has been that I think that the Voting Rights Act and Fifteenth Amendment arguments are clearly the strongest because of their constitutional mandate, because we are not dealing with a political theory that we are made out of whole cloth, we are dealing with constitutional commands.

QUESTION: And also I suppose in the Voting Rights Act because you claim it covers effect as well as purpose.

MR. BLACKSHER: We don't think you have to reach that question if you affirm the findings of purpose.

QUESTION: I know, but you wouldn't need to affirm that, you could assume it if you take the Voting Rights Act.

MR. BLACKSHER: We assume what, may it please

the Court?

QUESTION: That there is purpose rather than effect.

MR. BLACKSHER: We do not assume that there is purpose rather than effect. We think we have proved it.

QUESTION: I know you do, but if we weren't convinced on purpose, you would say, well, nevertheless there is effect.

MR. BLACKSHER: We would.

QUESTION: Yes.

MR. BLACKSHER: I would like to leave by referring again to White v. Regester because the facts in this case were so much stronger than those in White with respect to showing that there was a systematic denial and abridgement and submergence of the black voting rights interests in Mobile, Alabama than there were in Dallas and --

QUESTION: Didn't White v. Regester involve legislative districts, representative democracy?

MR. BLACKSHER: The state

QUESTION: Not the executive and legislative and administrative government of a municipality, did they?

MR. BLACKSHER: But the principle of White --

QUESTION: Isn't that one of the issues here suggested by Mr. Justice Rehnquist's concurring opinion in Wise v. Lipscomb?

MR. BLACKSHER: That's correct. We --

QUESTION: You haven't talked about that at all.

MR. BLACKSHER: I would mention it. I would say that I think that the issue is foreclosed by some earlier opinions. I think Allen v. State Board of Elections, Perkins v. Matthews, City of Petersberg, City of Richmond, Beer v. United States, United States v. Sheffield --

QUESTION: You are mixing up a lot of -- Beer was a Voting Rights Act case, not a constitutional case.

MR. BLACKSHER: All of the cases I cited were Voting Rights Cases --

QUESTION: All of those and they came out of the statute.

MR. BLACKSHER: Which recognize that dilution was a wrong for which there was a federal remedy of --

QUESTION: Because the statute covers political subdivisions.

MR. BLACKSHER: Avery v. Midland County extended the one person-one vote principle to the local level --

QUESTION: But that was a constitutional case.

MR. BLACKSHER: That's correct, and that was what Justice Stewart was I think getting to --

QUESTION: That's right.

MR. BLACKSHER: -- where is the constitutional precedent for extending dilution or White v. Regester to

the local level. And that gets back I guess to what I was saying earlier. How can you extend one person-one vote to the local level and say that it is a more fundamental principle than the right of blacks not to have their voting rights abridged, which is what the constitutional mandate is in the first place.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Turner.

ORAL ARGUMENT OF JAMES P. TURNER, ESQ.,

AS AMICUS CURIAE, SUPPORTING APPELLEES

MR. TURNER: Mr. Chief Justice, and may it please the Court --

QUESTION: Mr. Turner, before you commence, I would be interested in knowing what groups you think are encompassed by the term "race" in the Fifteenth Amendment.

MR. TURNER: Well, that is a question on which the Court has thus far given us very little guidance; certainly the purpose, the original purpose of the Fifteenth Amendment was to secure the franchise for newly freed black citizens.

QUESTION: Clearly.

MR. TURNER: So that is clearly covered. It is also on occasion been applied in other circumstances to other ethnic minorities.

QUESTION: Does it include Mexican-Americans?

MR. TURNER: I would, yes, sir.

QUESTION: And I think your colleague would include Orientals. What about Indians?

MR. TURNER: I think they would be covered as well, sir.

QUESTION: And Puerto Ricans?

MR. TURNER: Yes, sir.

QUESTION: What about Socialists?

MR. TURNER: I have no opinion about Socialists, Mr. Justice Powell.

QUESTION: Well, would it, Mr. Turner, include any national group that was the subject of or object of determination of discrimination?

MR. TURNER: I really think, Mr. Justice Rehnquist, that we ought to approach questions under the Fifteenth Amendment as we do in other areas on a case-by-case basis. And what we have here is a case involving blacks. What we have in the United Jewish Organization is a case involving Jews and in each one you are going to be able to make an assessment of the factual situation, you are going to be able to compare the legislative history and the constitutional history and make a coherent judgment.

QUESTION: But you had no trouble saying that

Hispanic Americans would be included.

MR. TURNER: None at all.

QUESTION: What leads you to be able to answer that question so easily and yet shy away from any expansion into other national origin areas?

MR. TURNER: Because I think that one of the touchstones that I get out of this Court's opinions on the Fifteenth Amendment is that it is directed towards the protection of the suffrage rights of traditionally discriminated against groups, and I think that includes Hispanics, and includes Puerto Ricans, it may in cases include Asian-Americans.

QUESTION: Could it ever include whites?

MR. TURNER: Surely, as the Court at least in majority seemed to say in United Jewish Organization.

QUESTION: How about Mormans?

MR. TURNER: That would be a religious group and I know of no basis under the Fifteenth Amendment directly to cover Mormans, although if there were compelling circumstances and they were a discriminated against group, it strikes me that the Court might well entertain the argument although I don't know how it would come out.

The one underlying concern that I think many people have about this case is its scope. There are lots of large elections in this country, there are lots of

different minorities, as we have just gone through, and the question I think suggests itself of whether by affirming the decisions below, the Court would be taking a giant step towards requiring constitutional reform of hundreds of cities.

Now, if I make no other point today, I want to argue that on this record the electoral practices in Mobile are in a special category. These cases do not present the normal operation of your regular garden variety at-large election system that all of us are familiar with and which have produced competent governments across the land.

QUESTION: Mr. Turner, you speak for the United States here, for the Department of Justice. Now, over recent years the federal government has engaged in a great many activities, legislative, executive and otherwise to insure the rights of minorities to have housing and in an integrated way with all other people. Is that not right?

MR. TURNER: We have made in my department every effort to enforce the Fair Housing Act which so far we have regarded as a freedom of choice statute.

QUESTION: Now if you succeed in that enterprise widely, then district elections won't help very much, will they?

MR. TURNER: Not if we succeeded at the measure

of success that is not so great at this point or foreseeable --

QUESTION: Well, not that it is right now, but if you succeed, if your objective is a sound objective, and Congrsss has decided that it is, how do you reconcile that with the insistence on a program that will furnish an incentive for people of a particular category to live in enclaves, whether they be Indians, Puerto Ricans, Orientals, Spanish sur-named people, whatever? How do you reconcile those two things?

MR. TURNER: I think that as long as you have a situation as in Mobile, where at-large systems are used racially to dilute minority votes, there will be no progress away from block voting. And when minorities are able to elect members of the government, our experience is that the stigma that once attached to race quickly dissolves. Birmingham is an example, as Mr. Rhyne mentioned. Tomorrow a black councilman, not a private citizen but a councilman is in the runoff for mayor. While there is no record of the facts there, the participation -- his particiulation in local government certainly was of assistance in getting him into the runoff.

So I think at this stage in the history, where there are ghettos and where there are separate residences, and the record here shows that you couldn't divide Mobile

into three districts without one of them being majority black, it is that kind of housing segregation we are talking about, and no effort by my department to enforce the Fair Housing Act is going to change that in the next few years.

So Mobile it seems to me is not a situation like Marion County, Indiana in the Chavis case where blacks just got on the wrong side in elections and therefore lost. Here the blacks have formed a political group, the Nonpartisan Voters League, and repeatedly have attempted to form coalitions with like-minded white voters, but it has been repeatedly unsuccessful.

My time is very short, but I would like to point out a couple of things to you. Mr. Rhyne has spoken about the powers of the league's endorsement. This endorsement is made on a pink sample ballot and it is true that many candidates seek this support, but it is not described how the league has to withhold release of that endorsement, keep it secret until sometimes within hours of the poll operations. State Senator Eddington, a white Senator, testified that he has twenty years experience in Mobile politics. He says it has to be held up before the election because those who don't get the endorsement want to get copies and spread them out to other areas in Mobile County to use against the candidates that were endorsed. The

result is that black supported candidates frequently get into the runoff --

QUESTION: Is there anything in the state law or federal law that would prohibit that process of circulating it in other districts?

MR. TURNER: No. What we are trying to find out, it seems to me, is whether Mobile is a situation like Marion County, Indiana, where blacks were Democrats and they lost elections and they came to this Court complaining that they lost more elections than they should and they didn't have enough representation and the Court said that's tough because you've made political choices and you had a fair chance.

Now, if Mobile was like that, we wouldn't be here, but the two courts below have said it isn't like that and I am trying to point out the basis for their reasoning. So when you get to the runoff election and there is a black supported candidate whose pick endorsement has been made known now, there is no way to hide it any longer and that is where you get what one expert called the "kiss of death." The record has several examples, but let me just give you one.

If you will turn to page 593 in Volume II of the appendix in the Mobile case, that is No. 77-1844 -- the numbers are at the bottom --

QUESTION: Page 590 --

MR. TURNER: Page 593, Your Honor, Volume II. The numbers are at the bottom.

QUESTION: Volume II seems to begin with page 821.

MR. TURNER: The numbers are at the bottom, Your Honor.

QUESTION: Oh.

MR. TURNER: There was a Mobile person, Mrs. Gerre Koffler, a white resident, who decided to run for the school board in 1972 because she wanted to see if there was some way we could make the April Supreme Court decision work in Mobile, that is your decision in Davis. She obtained the league's endorsement, she got into the runoff, and if you look at page 593 you will see the kind of ad that came out after the endorsement was made public. It shows a picture of a black leader, John LaFlore, it shows the white candidate, it alleges such scurrilous things as "she has entertained blacks in her home, she has been seen and photographed in company of blacks," but it also shows the exact vote she got in each black ward --

QUESTION: I gather Gerre Koffler is a female, you call her she.

MR. TURNER: Yes, Your Honor.

QUESTION: Has there ever been a woman commissioner?

MR. TURNER: I am unaware of that, Your Honor. I am sure local counsel would be able to enlighten you on that.

QUESTION: Are woman a minority or a majority of voters in Mobile?

MR. TURNER: I'm not sure whether they are a majority or a minority. I believe by most accounts they are a slight preponderance.

QUESTION: Of the population generally?

MR. TURNER: Yes, sir.

QUESTION: But you don't know about the voters in Mobile?

MR. TURNER: Right, Your Honor.

QUESTION: District elections wouldn't help that situation, would it? Women don't tend to live in particular enclaves or ghettos.

MR. TURNER: Not in my experience.

If you turn to page 595, you will see a similar ad run in the same runoff election against another white candidate whose black support had been revealed by the primary election, and it is the same story, the "kiss of death" is right there. So it is not just this kind of racial voting. There is more in this record. There are other aspects in Mobile that are unique, is the at-large elected -- in one at-large legislative election, white

Democrats and Republicans agreed --

QUESTION: May I ask you a question that always puzzles me in these cases. I don't know who sponsored these ads, but no doubt a group of people who were against having blacks be elected to public office. Whose intent is really most important here? I suppose you can always find in a community some very strong anti-black sentiment, maybe in the legislature, maybe in the city council. What group of people if any should we focus on in the intent issue?

MR. TURNER: Well, it is a very troublesome thing, and I think it may depend on which amendment you want to talk about. Intent is very nebulous, especially in a case like this.

QUESTION: What do you understand it to mean or what do you understand the court below to have held on the intent issue?

MR. TURNER: I understand that as in Norwood v. Harrison, where Mississippi since 1940 had maintained a textbook program and then when desegregation of schools came, that program mushroomed to provide books to the private schools. It was the evolution, the changing circumstances that eroded what had been a perfectly proper state purpose into an illegitimate unconstitutional one by the decision of this Court.

So if you are talking about that kind of change, that kind of evolutionary change, it is very hard to --

QUESTION: Here we are talking about a refusal to make a chance.

MR. TURNER: Right.

QUESTION: And in this kind of case, whose intent should we look at?

MR. TURNER: Well, it is the same thing in Norwood, I submit. But here if you go in the Fourteenth Amendment, I say you look at the legislative intent.

QUESTION: The state legislature?

MR. TURNER: The state legislature.

QUESTION: Then each of these pamphlets here are not relevant on that intent issue.

MR. TURNER: No. Now, if --

QUESTION: Does it have any relevance at all to the case?

MR. TURNER: If you go on the Fifteenth Amendment in the case, Your Honor, we have outlined in the brief how this Court's precedents, especially Terry v. Adams, have held that by a state adopting private purposeful discrimination --

QUESTION: Let me put the question this way: If it is the legislative intent that is controlling, suppose everybody in Mobile wanted to have blacks fairly represented

into three districts without one of them being majority black, it is that kind of housing segregation we are talking about, and no effort by my department to enforce the Fair Housing Act is going to change that in the next few years.

So Mobile it seems to me is not a situation like Marion County, Indiana in the Chavis case where blacks just got on the wrong side in elections and therefore lost. Here the blacks have formed a political group, the Nonpartisan Voters League, and repeatedly have attempted to form coalitions with like-minded white voters, but it has been repeatedly unsuccessful.

My time is very short, but I would like to point out a couple of things to you. Mr. Rhyne has spoken about the powers of the league's endorsement. This endorsement is made on a pink sample ballot and it is true that many candidates seek this support, but it is not described how the league has to withhold release of that endorsement, keep it secret until sometimes within hours of the poll operations. State Senator Eddington, a white Senator, testified that he has twenty years experience in Mobile politics. He says it has to be held up before the election because those who don't get the endorsement want to get copies and spread them out to other areas in Mobile County to use against the candidates that were endorsed. The

and was giving them excellent services and were promptly prosecuting people who burned crosses and everything was going along fine, if you had a majority of the state legislature who said we don't want any blacks in the government in Mobile, would it be the same case?

MR. TURNER: I'm not sure, certainly not under the Fifteenth Amendment because it is our submission that under the Fifteenth Amendment that there is certainly state involvement in running elections and in running at-large elections in Mobile, and there certainly is private discrimination, just like there was in the Jay Bird Club, and by the state magnifying and making use and making effective that private discrimination, it is the same principle as Terry v. Adams that would apply. So you use the private discrimination that is implemented by state procedures.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Turner.

Mr. Rhyne.

ORAL ARGUMENT OF CHARLES S. RHYNE, ESQ.,

ON BEHALF OF APPELLANTS (MOBILE) -- REBUTTAL

MR. RHYNE: If the Court please, I only have two comments and then, unless the Court has some questions, I have no further argument.

I am really amazed at the government of the

United States trying to use a school board race exhibit on 593, a county commission race on 595 against the city.

I pointed out in my argument that the two are entirely different, and I think that this shows how weak their case is if they would stoop that low.

Now, I would be glad to answer any questions the Court has, but my time is just about up.

QUESTION: Well, those exhibits, Mr. Rhyne, do show that apparently there was some evidence that there was black voting on racial lines there, doesn't it?

MR. RHYNE: Well --

QUESTION: I suppose if there was black voting on the school board or on the county election, it is reasonable to infer that there would be black voting on the other kinds of --

MR. RHYNE: But the school board is county-wide and the county is county-wide. It is an entirely different constituency, as Mr. Alexander pointed out in the record, from the constituency in the city. So to try to --

QUESTION: Well, there is some overlap, isn't there?

MR. RHYNE: Oh, there is some overlap, sure. I wouldn't deny that for one minute.

QUESTION: Do you challenge the District Court finding that there was racial block voting within the

jurisdiction we are talking about?

MR. RHYNE: I would say I do. It is lessening, according to expert Boyles and that more and more throughout the South as well as in Mobile race is not a factor in all elections.

QUESTION: Whoever put out these pamphlets apparently thought it was.

MR. RHYNE: Well, I think that those pamphlets were used in a different race for difference purposes and had nothing to do with the city.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Rhyne.

Mr. Allen, you may proceed whenever you're ready.

ORAL ARGUMENT OF WILLIAM H. ALLEN, ESQ.,

ON BEHALF OF APPELLANTS WILLIAMS ET AL.

MR. ALLEN: Mr. Chief Justice, and may it please the Court:

This case concerns the legality of the way the commissioners, the school commissioners of Mobile County are elected.

Mobile County encompasses the City of Mobile and a rather large surrounding area which includes some other smaller cities. Overall, the population of the county is divided racially in about the same proportions as the city. Blacks make up 32 percent of the county's population

and I think 24 percent of its voters.

Mobile County's school system was the first to be established in Alabama in 1826, seven years after statehood. Since that time probably, and at least since 1836, when a new statute governing the school system was enacted, the members of the governing body of the school system have been elected from the county at large. The current statute under which they have been elected, it was enacted in 1919, provides for the at-large election of five commissioners. They are elected in partisan elections held in even numbered years for six-year staggered terms.

As a board, the commissioners are responsible for the overall direction and management of the Mobile County schools. They hire a superintendent who is responsible under their direction for the day-to-day management. Now, certain salient points appear from the findings below or the undisputed evidence of record concerning the school board's elections and their relation to the black population of the county.

First, the system of at-large elections for Mobile County school board members was not created for any racially discriminatory reasons. As I have already indicated, the system has deep roots in the history of Alabama and of Mobile in particular. It was first established in 1836, no later, at a time when blacks did not vote and the

last reestablished in 1919 at a time when blacks were still effectively disfranchised.

Second, the second salient point is notwistanding the history of racial discrimination in Alabama and Mobile, there are today no barriers, no barriers formal or informal to black participation in Mobile County's political process. Blacks are free to register and vote and they do vote nearly in proportion to their proportion of the voting age population. Their votes are sought for. The only significant candidate endorsing body that appears to operate countwydie in Mobile County is what you have heard about, that is the Nonpartisan Voters League.

QUESTION: Is that the same league that we heard about in the opening case?

MR. ALLEN: Yes, it operates in the county --

QUESTION: And city --

MR. ALLEN: -- and the city as well, yes.

QUESTION: It is not two different organizations.

MR. ALLEN: No, the same organization. They are predominantly black, true, and there is no comparable white group, no backstage or even front-stage slating organization of the kind that the Court may have been concerned with in some other cases, no slating really in that sense.

QUESTION: Is there anything in the record that shows who pays for all of this advertising of political

stuff?

MR. ALLEN: I'm sorry, Your Honor?

QUESTION: Is there anything in the record that shows who pays for these advertisements and other things that normally help in political campaigns?

MR. ALLEN: There is not, Your Honor. One can infer that the advertisements were paid for by the candidate running against the candidate who is disfavored in those ads, if that is what Your Honor means.

QUESTION: No, I think I know enough about politics that money doesn't come out of the clear blue sky.

MR. ALLEN: There is no record evidence about the --

QUESTION: So I am still in the same place.

MR. ALLEN: Yes. In any event, in that regard, anyone is free to run for office and the fact is that a school board campaign does not cost very much. Up until very recently, the school board members have not been paid at all and they are still paid rather nominally. So a typical campaign budget runs no more than $2,000, $3,000 to $5,000, according to the record.

QUESTION: How many members of the school board?

MR. ALLEN: There are five members.

QUESTION: And are they elected to staggered terms?

MR. ALLEN: They are elected for six-year staggered terms, two, two, and one system.

QUESTION: Is it a per diem compensation they get or --

MR. ALLEN: It is a per meeting compensation.

QUESTION: Per meeting.

MR. ALLEN: Yes. Yes. Now, the third salient point -- and I have to acknowledge this for the record of this case, whatever may be the case in the city's case -- there does appear to be racial polarization in voting.

Four black candidates ran in the Democratic Primary for the school board between 1962 and 1974. Each of them reached the runoff election, although each was a first-time candidate for public office. Each was defeated in a runoff against a white opponent.

Now, on the basis substantially of what I have recited plus a few more rather tangential items, the District Court concluded that the at-large manner of electing Mobile County school commissioners violates the Fourteenth and perhaps the Fifteenth Amendments. The District Court made its analysis of this issue within the framework of the so-called Zimmer factors, factors that the Court of Appeals had professed to distill from this Court's opinions.

The Court of Appeals performed that distillation

in a case called Zimmer v. McKeithen before Washington v. Davis was decided, and they were obviously -- the Zimmer factors were intended to measure the discriminatory effects of an at-large system.

The District Court's ultimate conclusion in this case was that the plaintiffs had met their burden by showing an aggregate of the factors catalogued in Zimmer. The Court of Appeals affirmed in a very short per curiam opinion without hearing argument and referring merely to a prior decision in the City of Mobile's case.

The District Court's remedy for the constitutional violation it found was to create five districts, two of which are preponderantly black in population. The Court of Appeals also affirmed this remedy, the judgment was not stayed, elections were held and the two predominantly black districts in 1978, the two black candidates were elected to the board and now sit.

I am not going to dwell this morning on the District Court's Zimmer analysis in what we conceive to be its flaws which are thoroughly explored in our briefs. If the plaintiffs continue to defend that analysis either as it was actually engaged in by the District Court or as it was transmuted by the Court of Appeals by other cases into the equivalent of a finding of purpose rather than effect, they do so I think very faintly at this stage.

What the plaintiffs essentially rely on in this Court is something different, a passage, one passage of the District Court's opinion that is wholly removed from the analysis on which it purported to base its opinion. That is a passage in which the court does indeed talk about a present purpose to discriminate. Now let me take up the District Court's opinion.

It first made findings of fact arranged under each of the Zimmer headings. These are at pages 9 to 22 of the appendix. And then it turned to the conclusions of law. The passage on which the plaintiffs rely appears in a section of the conclusions of law where the court was addressing itself for nine pages to the impact of Washington v. Davis in vote dilution cases. It asked whether Washington v. Davis was dispositive of this case so as to preclude application of the Zimmer factors.

Now, at page 34 it made a comment about a --

QUESTION: Page 34 of what?

MR. ALLEN: Page 34 of our appendix, 34a of the appendix.

QUESTION: Thank you.

MR. ALLEN: It talked about a present purpose to dilute the black vote. Now, I submit that that is not a finding of a present purpose to discriminate. The plaintiffs have tried to make of it a finding, have talked

even about the two court rules and urged deference to that finding, but it isn't a finding, isn't even really a legal conclusion. It is sort of conjecture on the part of the District Court at the best and really more likely a statement of a discarded alternative legal theory for deciding the case. Because what the court finally says down near the bottom of page 34 is that more basic and fundamental than any of the above approaches is that, and then it goes on and I suggest says that Washington v. Davis established no new purpose test so far as voting dilution cases are concerned, and that was the answer to the question that had posed itself at the beginning of this part of its opinion and --

QUESTION: Mr. Allen, taking that page of the appendix to which you are addressing, the last sentence in the paragraph in the middle of the page, the court says there is a "current" condition of dilution of the black vote resulting from intentional state legislative inaction which is as effectual as the intentional state action referred to in Keyes.

QUESTION: May I interrupt to say I am lost. I have 34b but I --

MR. ALLEN: Of the appendix, I'm sorry, Your Honor, of the appendix.

QUESTION: 34a of the appendix?

MR. ALLEN: 34a of the appendix. I'm very sorry.

QUESTION: And it begins at the top of the page, "This is not to say," quoting?

MR. ALLEN: Yes.

QUESTION: All right.

MR. ALLEN: Yes, Your Honor.

QUESTION: All right. Thank you.

MR. ALLEN: Okay.

QUESTION: Wouldn't you at least concede that that is a finding of intentional state legislative inaction? You may feel that is not the same thing as intentional action.

MR. ALLEN: I suggest, Your Honor, the point I sought to make was that I do not consider that a -- I do consider it indeed a statement of whatever is said there. It is not I suggest a finding in any customary sense of that. He had made his findings of fact elsewhere and he really had not addressed himself at any length to what might underlie a finding of current intentional state inaction.

But I will go on and say that we can suppose that this passage really did mean to conclude far more than it seems to have on its face, that the at-large elections involves a present purpose to discriminate through state inaction.

Now, the further question is what record facts are there that might support such a conclusion. The court mentioned one specific fact on the preceding page, and there it said -- and these are its words approximately -- whenever a redistricting bill of any type is proposed by a member of the Mobile County legislative delegation, a major concern is centered around how many if any blacks would be elected. He does say that.

Now, the fact is that in spite of that concern, or perhaps even because of it, the legislature in 1975 did enact districting legislation for the Mobile County school system. That legislation was voided on the suit of the school board because of a defect in notice that rendered it invalid under the state constitution.

Now, the plaintiffs seek to make a great deal of this invalidation, and I think what they would have this Court rule is that the districting legislation and its invalidation somehow constitute evidence of a present purpose to discriminate. The least that can be said in response to that, Your Honors, is that the District Court did not so treat it and made no such finding. And I would suggest further that the federal judicial inquiry that might even yield such a finding nwould be an undertaking of extreme delicacy.

I submit that this Court should not be asked to

make the sort of judgment on the Alabama legislature that appellees state or imply on the basis of nothing more than what appears in this record. So when the specifics are out of the way that the District Court cited, and if we forget the 1975 enactment that on its face looks the other way, what we have at the very most, at the very most is state legislative inaction that maintains a non-racially motivated at-large voting system and an awareness on the part of at least some legislators of the disparate racial effects of that system.

Now, I submit that to make a finding or to draw a conclusion of a present purpose to discriminate on the basis of this perpetuation arguably of discriminatory effects through inaction is exactly what this Court rejected last term in Personnel Administrator v. Feeney, and indeedin the Feeney case there was more than mere inaction.

The Massachusetts Veterans Preference law had been amended from time to time and effectively reenacted, and the Court did not blink at saying that there must have been full awareness on the part of the general court that the legislation was keeping a disproportionate number of women out of the higher levels of the civil service, but that wasn't enough. That wasn't enough. To have made it enough would have undermined the rule of

constitutional law with which the Court began its analysis in Feeney, and that rule stated, even in the paradigm case of race, that is what the Court said, even if a neutral law has a disproportionately adverse effect, it is unconstitutional under the Equal Prote-tion Clause only if that impact can be traced to a discriminatory purpose.

Now, let me stop there for a moment and just say a word about the Fifteenth Amendment. The Court of Appeals held in the companion cases -- one doesn't know what the court may have meant to hold in our case because its opinion is not at all revealing, but in the companion cases, the Court of Appeals held that the Fifteenth Amendment imposes the same purpose requirement, and we have urged in our briefs -- I will not expand upon the points now but I think they are adequately made there -- that the Court of Appeals wa- quite right that one does not escape the problem that is posed under the Fourteenth Amendment in this case by turning to the Fifteenth Amendment.

QUESTION: Assuming there were a private cause of action in the Voting Rights Act, what do you say about the Voting Rights Act?

MR. ALLEN: I was just about to turn to that, Your Honor, and I would say further two things under the Voting Rights Act. One, the argument that is made here is

made most belatedly. To be sure, the Voting Rights Act has been in the case. Section 2 of the Voting Rights Act has been in the case from the beginning. It has never been suggested until we reached this Court that it might have a different content from the Fifteenth Amendment. And what the government says in its amicus brief about section 2 of the Voting Rights Act, it seems to me to capsule what it is and why it also does not offer a way out of what may be the problem posed by this case.

In a footnote on page 84 of its brief, the government says section 2 represents Congress' rearticulation of the Fifteenth Amendment, and that is what it amounts to. It is not section 5. It does not read the same way as section 5.

QUESTION: Yes, but the government doesn't think necessarily that purpose is essential in the Fifteenth Amendment.

MR. ALLEN: The government does --

QUESTION: So you are not really making much of a point.

MR. ALLEN: Oh, I understand that but independent of what the government says, we believe that the legislative history does indeed show that --

QUESTION: Let me go at this in two steps.

MR. ALLEN: Yes.

QUESTION: One, do you think the argument is available in this Court by an appellee that the Voting Rights Act is an issue here and should be disposed of first

MR. ALLEN: Yes.

QUESTION: -- and that the Voting Rights Act covers effect as well as purpose?

MR. ALLEN: I will answer the first part of the question. I say I think the issue is here. Whether the Court would wish to remand for development of the point is a separate subject.

QUESTION: So the issue of the Voting Rights Act is fairly here?

MR. ALLEN: Yes.

QUESTION: How about the issue of the Voting Rights Act covering effect as well as purpose?

MR. ALLEN: Do I think that is a legitimate issue here?

QUESTION: Yes.

MR. ALLEN: Yes, I think that is all the more reason for a remand were the Court not to think that on its face section 2 is a mere restatement of the Fifteenth Amendment, yes.

QUESTION: And do you think that, as you understand our cases, we should dealing with the Voting Rights

Act first --

MR. ALLEN: I think that --

QUESTION: -- in any opinion that we write in this case at least either on the merits or at least put the issue aside?

MR. ALLEN: I think it would be fair to put the issue aside. I think it would also be fair -- I happen to believe on the merits that the Voting Act meaning issue is not a difficult one and that it does come down to meaning the same thing as whatever Your Honors think the Fifteenth Amendment means.

QUESTION: Is your response to Justice White's question predicated in any way on an assumption that there is or is not a private cause of action under --

MR. ALLEN: Well, if he asked me to make that assumption --

QUESTION: I'm sorry, I misunderstood.

MR. ALLEN: --has to be hurdled in getting to section 2 of the Voting Rights Act, to be sure, and we have urged in our reply brief at some length why it should not be read as creating private cause of action. It has never been so read to this time that I am aware of.

Let me return to Feeney and make one final point in respect to that opinion as it bears on our case. The Court there spoke of the impact of veterans preference

on women as essentially an unavoidable consequence of a legislative policy that has always been deemed to be legitimate.

So far as the legitimacy of state policy is concerned, if veterans preference is a legitimate legislative policy, then surely the policy of at-large municipal elections, the policy that antedates the Constitution still prevails in hundreds, even scores of communities throughout the country, is a legitimate policy.

And as for the inevitability of the adverse consequences of pursuing the policy, one can hope that the unfortunate consequences of at-large elections are not unavoidable or inevitable --

QUESTION: I take it it is pretty fairly your position that a municipal at-large election or a -- for the purposes of state legislatures, a county-wide at-large election or a multi-number district, electoral district for the election of, say, ten state representatives, neither of those arrangements at-large is shown to be unconstitutional if you have also a very clear proof of voting on racial lines.

MR. ALLEN: Even though one has that proof --

QUESTION: Even though -- let's say anybody in his right mind would say yes, there is pretty clearly racial lines --

MR. ALLEN. No --

QUESTION: Putting those two together, it doesn't euqal --

MR. ALLEN: -- it does not add up to the constitutional or statutory violation on which this case is based. Yes, that is exactly our point, Your Honor. We believe that that is the beginning point of analysis. The problem arises when somebody gets exorcised and brings a lawsuit when he sees an at-large system of elections and what can be termed racially polarized or block voting. The inquiry proceeds from that point, the inquiry proceeds from that point, it doesn't end there, and our concern here is that we think the District Court essentially ended its inquiry there.

QUESTION: Let's proceed one step further beyond the assumptions Mr. Justice White made. Assume the record does demonstrate and there is an appropriate finding of a present intent to maintain the system in order to prevent black participation in the school board. Would that constitute a constitutional violation when the original law was lawful when adopted? What is your view on that?

MR. ALLEN: All I can say in answer to that, Your Honor, is that if there were indeed the basis for and the kind of finding that I would hope this Court would insist upon, the kind of record that I hope this Court would insist

upon to find a present intent of a legislature, then I would have a hard time distinguishing that case from the case in which the statute in its inception was racially discriminatory.

MR. CHIEF JUSTICE: Thank you.

Mr. Schnapper, you may proceed.

ORAL ARGUMENT OF ERIC SCHNAPPER, ESQ.,

ON BEHALF OF APPELLEES BROWN ET AL.

MR. SCHNAPPER: Mr. Chief Justice, and may it please the Court:

Before turning to the substantive issues presented by the case, I think it might be useful to lay out some of the procedural problems about the way the Court will choose to address the variety of issues presented here. Some of them have come up before and some of them have not.

One issue which Mr. Allen raised and which has been raised by earlier questions is whether or not to deal with the statutory question that is I think unquestionably presented by the case.

The Court has for many years maintained a policy which it has attempted to persuade the lower courts to follow of deciding statutory issues first and only reaching constitutional issues if necessary.

As this case and Beezer and Bakke all illustrate,

the lower courts have not been assiduous in attending to that rule, and the question before the Court is how the Court is to act when the lower court has not followed your preferred procedure.

I think that there are three options, one of which should not be taken. The one that should not be taken is the option taken in Arlington Heights, which is to decide the constitutional question and remand for decision on the statutory question. As you may remember, after ruling for the defendants on the constitutional question in that case, an opinion which provoked some dissents and made a lot of law that may or may not have been necessary, on remand the Court of Appeals reached the statutory issue, ruled for the plaintiff, and this Court denied cert. So that entire opinion, with all its ramifications, and we deal with many of them today, was unnecessary.

I think that following that course would be unwise not only because it leads you into deciding unnecessary issues but because it doesn't -- I would lead the Courts of Appeals by example, and that was not the kind of example I think you wanted to give them. I think the two options you have are, first, and I think this is the proper option, to do what you dod in Bakke, to decide the statutory issue first, reach the constitutional issue if

necessary, or you could wipe the whole case out and send it back and tell the Court of Appeals to do it right the first time.

QUESTION: Of course, your first option which you say you prefer is going to lead to some undesirable practices, too, on the part of people who have lost on a constitutional question in a lower court because they can just look through the statute books and if they can find a statute that they say, gee, the others I might have won on this statute, therefore it was unnecessary to reach the constitutional question, they will have a built-in argument for at least a remand.

MR. SCHNAPPER: I think they've got to look through a different volume. They've got to look through the appendix and take a look at the complaint.

QUESTION: Yes.

MR. SCHNAPPER: If it is in the complaint, that is one thing. I would --

QUESTION: But under notice of pleading under the Federal Rules of Civil Procedure, you don't have to state the statute you rely on, all you have to do is plead alleged facts sufficient to support a claim for relief.

MR. SCHNAPPER: But the practice of this Court has generally not been to permit litigants to raise issues which in no way have been raised below. So I think it

would be perfectly proper, and I think consistent with the past practices of the Court that if a litigant wanted to raise a statutory issue which had in no way been raised by the complaint or briefs below, to preclude them from doing that.

QUESTION: You don't go so far as to say that the parties must raise a possible statutory issue along with a constitutional issue?

MR. SCHNAPPER: I would say --

QUESTION: Suppose the parties constructed their case as a constitutional case, if they want to, can't they?

MR. SCHNAPPER: Well, I would think that would be terribly unwise and I --

QUESTION: Well, it may be unwise but they may. I suppose your answer might be that even if they do, perhaps here the court would have, if they come from federal courts, I suppose this Court would have the power to insert another issue into it, but you wouldn't say it was error for lower courts to decide the constitutional issue if the parties had never raised anything but the constitutional issue.

MR. SCHNAPPER: I would say it was an error on the part of the Court of Appeals to have done that. I think it would have been entirely within the discretion of the court to refuse to entertain a new statutory claim in

the first instance here. On the other hand, quite frankly, there have been cases where you have chosen to entertain new statutory issues for reasons having to do with subsequent developments and also some -- I wouldn't want to suggest that you lock yourself into a ritual that you will never do that. I think you ought to retain the power to go either way.

QUESTION: What if in Arlington Heights the defendants there had said we simply want a decision on the constitutional question, we are willing to assume the complaint states a claim for relief under the federal statute and all we want to litigate is the constitutional question, what should the District Court --

MR. SCHNAPPER: Then I would have denied cert, because it was a defendant's cert petition. They won below, and you can't file --

QUESTION: Well, what should the District Court have done in deciding the thing in the first instance?

MR. SCHNAPPER: Well, if the defendants had wanted to come in and concede the existence of a statutory claim and asked for a decision on the constitutional claim, I assume the District Court would have accepted their concession, ruled for the plaintiffs, and that would have been the end of it.

QUESTION: So it could not then go to the

constitutional case?

MR. SCHNAPPER: Well, I can't imagine why a district judge facing a concession of liability under statute would decide a constitutional issue as well.

QUESTION: Well, what if the defendant said, let's assume for the sake of argument, we don't concede but we think the most important thing here is the constitutional question?

MR. SCHNAPPER: No district judge it seems to me would act properly to let the defendant control the order of decisions and to ignore the policies of this Court to decide statutory issues first.

QUESTION: I agree but I think there are a lot of district judges that don't.

MR. SCHNAPPER: Well, I think there are, too, and there are some Courts of Appeals judges who don't and it is upon that point that I began my suggestion that you deal with this the way you wanted the Court of Appeals and the District Court to deal with it, and that is to decide the statutory issue first.

The second problem pertains to something quite related to this, and that is the question of whether new issues can be raised for the first time here on appeal, and we've got two things that seem to be in that posture. The first one is the question of whether or not White v.

Regester and the doctrine therein applies to municipal governments.

This case is in precisely the same posture as Wise v. Lipscomb, it was never raised below in the District Court or the Court of Appeals. The policy of this Court is not to permit things to be raised at the last moment and we think you should adhere to that.

On my reading of the record, the same thing is true about whether or not there is a private cause of action under section 2. As you recall, with the exception of Mr. Justice Stewart, most members of the Court were of the view in Bakke that that issue not having been raised below could not be raised in that particular case at first instance here. And we think that the question of whether there is a private cause of action under the Voting Rights Act is in that posture, in the same posture that the private cause of action under Title 6 was in Bakke. I say that without meaning to signal any lack of confidence in our argument that there is a private cause of action, but again as a procedural matter the Court has practices which would be applicable to dealing with it.

QUESTION: Wait a minute. I don't understand what you are saying. First of all, I didn't understand the reference to me. I think it was intended to be with reference to Mr. Justice White, but that is neither here

nor there in the Bakke case.

What I don't understand here is what you have just told us about whether or not the private right of action under Title 2, section 2 exists. As I understand it, the District Court in this case didn't rest at all on the statute. Is that correct?

MR. SCHNAPPER: Right, just like the trial court in Bakke didn't rest on the statute.

QUESTION: And the Court of Appeals relegated the issue to a footnote, is that also correct?

MR. SCHNAPPER: That's right.

QUESTION: And what does the footnote say?

MR. SCHNAPPER: As I recall, they didn't think a whole lot of the argument, but if I remember there is a companion case --

QUESTION: Well, one of the reasons they didn't want --

MR. SCHNAPPER: -- which explains why they did not seek to --

QUESTION: One of the reasons they did not hold onto the argument was they might have thought offhand, my golly, there is no private right of action under section 2.

MR. SCHNAPPER: Well, I don't think you could read that into it.

QUESTION: No.

MR. SCHNAPPER: I am trying to give you an agenda of the problems in the case and that is one of the issues you are going to have to sort out. I think --

QUESTION: Well, certainly section 2 is not dispositive and couldn't be here if there is no private right of action under section 2.

MR. SCHNAPPER: And if --

QUESTION: Isn't that true?

MR. SCHNAPPER: Yes, that'r gith. That's right, no question about it.

Third, there is a problem raised in both of the cases here about what was referred to loosely as the two-court rule. With regard to what particular cases, I think particularly Justice Stevens' questions have pointed out, we maintain that there is a finding of intentional discrimination, and Mr. Allen tskes the position that if there is such a finding it isn't justified on this record.

If the Court were sitting or you were riding circuit, of course we would be in a very different posture than we are in now, but the normal practice of this Court and a salutary practice at that is not to get into factual issues of that sort when they have been resolved by the lower courts.

The factual record on which the District Court finding is based is much more substantial than Mr. Allen

suggests. There was first direct testimony by members of the legislature as to the motives of the legislature in dealinw with redistricting legislation, there was a long history of racial discrimination in Alabama; including a number of cases in which multi-member districting plans adopted by the state legislature had been held by federal courts in other cases to have been racially motivated. And the discriminatory impact of this system among blacks was not only -- is not only pronounced, it was known to everybody in the state and the school board at the time.

So this case presented all the kinds of evidence which Arlington Heights suggested were relevant to this kind of inquiry, and we think the District judge had no choice but to reach the conclusion that he did.

Finally, there is a problem here that really fairly characterizes the problem of stare decisus, and it goes particularly to whether White v. Regester is good law. The briefs deal with this in somewhat greater length and the arguments have until now.

I think the --

QUESTION: Which do you mean, still in existence or good?

MR. SCHNAPPER: Pardon me?

QUESTION: Which do you mean, still in existence?

MR. SCHNAPPER: I think it is both of those things.

As we have noted in our brief, White v. Regester was based on a series of decisions before then, it has been cited with approval in half a dozen decisions since White, some of them after Washington v. Davis. White itself was a unanimous decision and a decision only six years ago, and we think the Court should not entertain a general practice of reopening recent constitutional decisions and this one we suggest was in any event quite properly decided.

We also note that the argument against for overturning White is really to legs. One of them is that Washington v. Davis has somehow or other changed the underlying law in this area. We have suggested in our briefs that Washington v. Davis and White v. Regester deal with two different branches of equal protection law, that Washington v. Davis is concerned with the branch of equal protection law forbidding racial classifications, whereas White v. Regester is part of the Reynolds v. Sims branch of equal protection law concerning special protections for particularly important and fundamental rights.

The other basis of the attack on White, and one which I think has been recurrent in questions before the Court today, is whether White makes any sense, and I think our arguments about wouldn't this all go away if blacks lived everywhere and can't blacks be elected in Los Angeles

and the like, all of which on the merits are unpersuasive. In the final analysis, they are arguments that White v. Regester was wrongly decided, and we think that the Court ought not be entertaining that. I think you should start with White v. Regester and we think it would be dispositive to this litigation.

I would like to turn to another issue that arose earlier. When we were here in the spring, Mr. Justice Rehnquist asked whether -- he raised the following question -- we were discussing apparently inconsistent statements about the Voting Rights Act. Attorney General Katzenbach was quoted by our side as stating that section 2 of the Voting Rights Act encompassed the purpose or effect standard. Mr. Justice Rehnquist noted that Senator Dirksen had made a remark about section 2 almost meaning the same thing as the Fifteenth Amendment, and I would like to return to that because I think it is important, particularly in view of my position that the statutory issue ought to be decided first.

If you will revert to the Dirksen quote, you will notice that it doesn't happen on the floor of the Senate, it happens during a hearing, indeed the very hearing, almost at the very hour when Katzenbach testified. Dirksen was one of the members of the Senate Judiciary Committee and was, according to the transcript, in the room

at the beginning of the hearing.

Dirksen sat there while Katzenbach said section 2 means purpose or effect. A few pages later, Senator Dirksen says section 2 means almost the same thing as the Fifteenth Amendment.

Now, either of those people -- one has to try to reconcile those statements and, of course, one could reconcile them by accepting our view of the Fifteenth Amendment. But I think that the government's footnote and Justice Stevens' opinion in Bakke suggest a more sensible resolution, which is to say that those two statements were regarded by their spokesmen as consistent with one another because Congress at that point in time regarded section 2 as incorporating the purpose or effect standard which they thought was in the Fifteenth Amendment. And there is a passage, Justice Stevens, in your opinion in Bakke which describes Title VI in the same kind of way, but suggests that Title VI has independent force and it doesn't merely incorporate whatever the Fourteenth Amendment should be held to mean by this Court.

Without wanting to reopen the particular issues that were in Bakke, I think that method of analysis, however persuasive, in Bakke is the correct method of analysis here.

The second thing that comes out when you re-read

that passage is the context in which it was made. As you will doubtless recall, one of the primary arguments that was made against the Voting Rights Act was that it was regional in nature, that it singled out a group of southern states for treatment different than the treatment that was being afforded to the rest of the country.

Senator Dirksen, in making that remark about section 2, makes it -- in the context of a paragraph in which he says look at section 2, section 2 covers Texas -- as you recall, Texas was a big bone of contention because the President was from Texas and it wasn't covered -- section 2 covers Texas, so Texas is covered by the Voting Rights Act, too.

Now, if section 2 is merely the Fifteenth Amendment and a purpose standard, then that statement makes no sense at all. But if it --

QUESTION: The Fifteenth Amendment covers Texas. What do you mean by that?

MR. SCHNAPPER: The dispute was about why the Voting Rights Act didn't --

QUESTION: Section 2 covers each of the fifty states, and so does the Fifteenth Amendment.

MR. SCHNAPPER: But the criticism that was being made about the Voting Rights Act was that section 5 didn't apply to all states.

QUESTION: Yes.

MR. SCHNAPPER: And in response to that, Dirksen said, ah, yes, but section 2 does so the act applies all over. Now, if section 2 had no substantice force at all, if it set a different standard in section 5, a lower standard, the only purpose would give you a cause of action, then it was -- and that was the same standard as the Fifteenth Amendment -- then to say that section 2 covers Texas, so the act applies there was rather unpersuasive, because section 2 wasn't --

QUESTION: It was true, that section 2 covers every state, whatever it means.

MR. SCHNAPPER: But it didn't make sense as an argument unless it meant the same --

QUESTION: And the Fifteenth Amendment covers every state, whatever it means.

MR. SCHNAPPER: But as an argument to convince other members of the committee --

QUESTION: It was a little rhetoric perhaps.

MR. SCHNAPPER: -- well, as rhetoric to convince other members of the committee that the act was equally applicable to all states, that only makes sense if the substantive meaning of section 2 was the same as the substantive meaning of the provisions which applied to the southern states.

And as we have noted in our brief, the history of the Voting Rights Act reflects great sensitivity on the part of the Court to the possibility of a regional rule. We don't think that it was the intent of Congress except in the very narrow area which we have noted, having to do with literacy tests, to create a situation in which the same sort of districting system would be illegal in Prince Edward County, Virginia and legal in Prince George's County, Maryland, and we don't think Congress should have presumed to have made that kind of distinction unless it is crystal clear that it did.

So that we find that the Dirksen statement is consistent with the Katzenbach statement and with our view of the law.

In addition, Justice Stevens, you asked earlier what the relevance of intent was and it is a rather complicated problem which I would like to deal with very, very briefly. It is complicated because it is relevant to a whole host of issues. This is a case which presents --

QUESTION: I will ask you another question at the same time, while you --

MR. SCHNAPPER: Surely.

QUESTION: Do you think intent was an essential part of the holding in White v. Regester? Do you think the Court relied there on impact --

MR. SCHNAPPER: Absolutely not. It was entirely irrelevant. As we have laid out in our brief, this Court has three times described the rule in White as a rule that means that in these terms is designedly or otherwise diluting the black vote. Whitcomb began with a statement that it was conceded that there was no discriminatory intent and then went on to write for four or five pages. So I think it is crystal clear that intent was no part of White v. Regester.

With regard to the relevance of intent here, this is a case, as we noted in the spring, that raises five or six different legal theories and intent is of different relevance to various of them. With regard to our claim that this election system is intentionally maintained to prevent the election of blacks, the relevant discriminatory intent is the intent of a people who make laws. I phrase it that way because the practical political control of the legislative process is rather complicated and involves primarily the legislative delegation to a significant extent, in this case the school board itself, so I don't phrase it in terms of the legislature, but I think that is consistent with the way you were phrasing the question earlier.

With regard to our claim under White v. Regester, it is our position that racial discrimination by the

elected officials is of some relevance to proving the cause of action which we think we have proved here. We don't think it is of much importance as Zimmer v. McKeithen does. We think that racial discrimination by the all-white elected government tends to confirm our claim that they are essentially elected solely by the whites and are solely responsive to the whites in town.

With regard to our Fifteenth Amendment claim, in arguing that the Fifteenth Amendment covers discriminatory effect, we resorted in particular to the legislative history of the Fifteenth Amendment, pointing out that the framers of that amendment were concerned to protect not the right of blacks to put X's on pieces of paper but to give blacks a right that would allow them to protect themselves from racial discrimination by state and local governments, particularly at the end of reconstruction which everybody by 1869 or 1870 knew was inevitable.

If we are correct in that construction of the Fifteenth Amendment, then it would demonstrate the particular relevance of the effect meaning of the Fifteenth Amendment that the right to vote such as it exists in Mobile for blacks is clearly not carrying out the effect of Congress, the intent of Congress.

QUESTION: Is that view of the Fifteenth Amendment consistent with the court opinion in Vermillion v.

Lightfoot?

MR. SCHNAPPER: I think Vermillion is fairly described as opaque. One must recall that at the time of Vermillion there were decisions of this Court, a line of decisions which continued up until Palmer v. Thompson and O'Brien v. United States, which suggested that an inquiry into the intent of legislatures were impermissible. So that as of the date of Vermillion, opinions were being phrased rather carefully so they didn't exactly find intent and they didn't exactly find purpose, they were just sort of outraged and said you couldn't do it, and I think Vermillion is in that posture.

QUESTION: Wasn't there a great deal of emphasis in the Vermillion opinion, which I have not read recently, upon the fact that this particular -- the city boundaries in that case could only have been attributable to an intent to disenfranchise non-whites?

MR. SCHNAPPER: I couldn't read Vermillion in that way.

QUESTION: You do not?

MR. SCHNAPPER: I don't read Vermillion in that way. I mean I think that was the intent involved, but I think that the opinion is phrased to avoid making that kind of statement. It would at the time have been quite arguably improper to make, to put that kind of conclusion

of law in an opinion.

MR. CHIEF JUSTICE BURGER: Your time has expired now, Mr. Schnapper.

MR. SCHNAPPER: Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Allen, I think we can hear you out before we rise for lunch.

ORAL ARGUMENT OF WILLIAM H. ALLEN, ESQ.,

ON BEHALF OF APPELLANTS WILLIAMS ET AL--REBUTTAL

MR. ALLEN: I think I only have one point and that is that I hope it is not we who are being accused of thinking that White v. Regester represents something less than good law.

The fact is that the opening of the analysis in White v. Regester begins this way: We have entertained claims that multi-member districts are being used invidiously to cancel out or minimize the voting strengths of racial groups. To sustain such proof, it is not enough that the racial group has not had legislative seats in proportion to its voting potential.

The plaintiffs' burden -- paraphrasing now -- is to produce evidence that would support findings that the political processes leading to nomination and election are not equally open to participation by the groups in question, and that we submit is what was lacking on the proofs offered in the school district's case here.

QUESTION: Do you think that is equivalent to purpose or not?

MR. ALLEN: Excuse me? I think that what was -- that the circumstances which that general rule was applied in White v. Regester was the equivalent of a purpose to exclude from participation, yes, Your Honor.

QUESTION: I take it from what you answered me before, when you were up before, that if it were satisfactorily shown that a multi-member district was adopted or that if it was refused to dissolve it for the purpose of maintaining the effects of racial block voting, that you would have a tough time defending --

MR. ALLEN: I would have a tough time -- we have -- I should say this much about White v. Regester. We have indeed urged, although the --

QUESTION: Because you can have all the legislative purpose you want, but if the racial block voting suddenly falls apart and they start voting on the merits --

MR. ALLEN: Then you have not affected the discrimination.

QUESTION: Yes.

MR. ALLEN: That is quite true. One would have to find that. One would have to find that the group claiming to be disadvantaged was indeed disadvantaged, to be sure. But where all one has is the block voting and a

statute neutral in its inception, then it is our position that that is what is not enough.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 12:00 o'clock noon, the cases in the above-entitled matters were submitted.)

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