

Supreme Court of the United States

OCTOBER TERM, 1969

Supreme Court, U. S.
OCT 28 1969

In the Matter of:

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 :
 WILLIE CARTER, SR., ET AL. :
 :
 Appellants, :
 :
 vs. :
 :
 JURY COMMISSION OF GREENE COUNTY, :
 ALABAMA, ET AL. :
 :
 Appellees, :
 :
 -----X

Docket No. 30

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SUPREME COURT, U.S.
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ORAL ARGUMENT OF:

PAGE

NORMAN C. AMAKER, Esquire
on behalf of Appellants

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LESLIE HALL, Assistant Attorney General
of Alabama
on behalf of Appellees

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REBUTTAL ARGUMENT:

NORMAN C. AMAKER, Esquire
on behalf of Appellants

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P R O C E E D I N G S

1
2 MR. CHIEF JUSTICE BURGER: Number 30, Willie Carter,
3 Senior, and others against the Jury Commission of Greene County,
4 Alabama, and others.

5 Mr. Amaker.

6 ORAL ARGUMENT OF NORMAN C. AMAKER, ESQ.

7 ON BEHALF OF APPELLANTS

8 MR. AMAKER: Mr. Chief Justice, and may it please
9 the Court: This case arising from Greene County, Alabama, is
10 on appeal from a three-judge Court from the Northern District
11 of Alabama.

12 Like the Turner case showed at the close of yester-
13 day's session, concerning Georgia's jury selection law, the
14 issue posed is that of the Constitutional validity under the
15 14th Amendment of Alabama's statute which vests successive
16 discretion in jury officials in that state in the selection of
17 jurors.

18 Our submission is that the use of statutes such as
19 these in those states like Alabama, which have a demonstrated
20 history of discrimination against black people in the jury
21 selection process, is the major cause of the continual
22 phenomenon of the racial exclusion of blacks from the oppor-
23 tunity for jury service in state courts. That's a phenomenon
24 which is all too commonplace, as this Court's experience in
25 jury discrimination cases for the past 90 years attests.

1 Q Suppose we didn't have this past history of
2 discrimination, would you still say the statute was unconsti-
3 tutional?

4 A If you didn't have that history of discrimina-
5 tion I would say that the statute is susceptible of abuse, and
6 therefore if a different kind of demonstrated injury were
7 made to appear, that the Court would have to hold the statute
8 unconstitutional.

9 Q Well, let me sharpen the question, then.
10 Supposing there was no evidence, that it had been affirmatively
11 demonstrated that there was no history of discrimination,
12 what would you say about the statute?

13 A I would say that the statute is vague, and
14 lacking in standards and susceptible of abuse. I would say
15 that the Court would not -- the issue of whether the statute
16 was constitutional would not be present because there would be
17 no history of the application of the vague standards to a
18 situation in which one could demonstrate that constitutional
19 rights had been violated.

20 That's not this case. All of the vagueness cases in
21 this Court: free expression area and the criminal area, are
22 cases in which some litigant came to the Court and said that
23 because of the vague standards which give excessive discretion
24 to officials, my constitutional rights have been violated.
25 Until a case of that kind reaches this Court and it reaches

1 this Court in this case and in Georgia and it has not, as for
2 example, Wisconsin or Maine, the kinds of questions we were
3 discussing yesterday, the Court obviously has no occasion to
4 declare the unconstitutionality of the statute. But that has
5 been the consistent pattern of litigation and decision-making
6 in this Court.

7 Q Then it is the statute as applied that you
8 think is the complaint; isn't it?

9 A Only in the very narrow sense. If what you
10 are talking about is the manner in which the jury officials
11 have used their discretion, which is what the issue here is
12 concerned about -- now, that's a different question from the
13 way the District Court addressed the question. They simply
14 said: "If we issue an injunction which tells these jury
15 officials that they are no longer to discriminate, that's
16 sufficient." Well, I say that does not deal with the problem
17 of discretion; that does not deal with the capability for
18 discrimination that the statute invites, and therefore the
19 only way that you can deal with that is to deal with the
20 source of the problem which is a statutory standard itself.
21 That's exactly what this Court did in some of the cases that we
22 cited in our brief involving discrimination against Blacks in
23 voting. That's what this Court has done in all the vagueness
24 cases that have come before it. This is by now, no novel
25 doctrine in this Court.

1 Now, in challenging this -- in this case, therefore,
2 Alabama's jury selection statutes, I stress at the outset, the
3 firm belief that this long-standing problem of racial dis-
4 crimination in jury selection will not be solved unless the
5 Court will respond to this challenge by voiding the provisions
6 of the statute involved here and requiring the use of fairly-
7 administered, objective standards for determining what persons
8 shall be listed on the rolls of the prospective jurors of the
9 state.

10 Q What would you consider as objective standards?

11 A One suggestion -- I think it's exemplary only,
12 of the kind that the Congress enacted in dealing with this
13 same problem in the context of a Federal jury selection system.
14 After the key-man system had been exposed as an apparatus
15 whereby discrimination would be practiced against groups and
16 the groups involved there were principally Negroes, in the
17 Federal system, the Congress responded to that challenge by
18 enacting the Jury Selection and Service Act of 1968.

19 Q Am I right that Congress was asked to enact
20 those same standards for the selection of state jurors?

21 A It -- there were two bills. They were both part
22 There were two bills, both part of the 1966 civil rights
23 package. Now, the bill with respect to Federal juryselection
24 was taken out and enacted last year. The bill that was pro-
25 posed in 1966 passed the House. Now, there was in that bill,

1 Section 203, (a) and (b), which together gave to the District
2 Courts the judgment of whether they could require objective
3 criteria in the state jury selection process. So, it is
4 pretty clear that there were thoughts --

5 Q Did that bill suggest what the criteria would
6 be?

7 A The Federal Act does and the --

8 Q I mean the one was related to the selection of
9 juries in the states.

10 A So far as I know, Mr. Justice Brennan, it did
11 not state what they should be. The Federal Act stated the
12 very simple ones of age, residency, absence of a felony
13 conviction, and the simple ability to read and write the
14 English language, as determined -- again objectively, not
15 subjectively, as determined by a person's ability to fill out
16 a juror qualification form.

17 Now, that is the system that is, in fact, in opera-
18 tion throughout the Federal system. As I indicated in my reply
19 brief in this case, District Courts throughout the country,
20 who have been faced with suits of the kind that this is, an
21 affirmative action suit injunctively, have directed or
22 suggested to state officials that they ought to take a look at
23 what the Congress did with respect to that Federal statute, as
24 a means of remedying the problem.

25 What that means to me is that it is pretty clear

1 that 90 years of litigation and the repeated admonition to
2 jury officials that they must reform their system, really
3 hasn't worked. And the only kind of reform that is an
4 essential step is to deal with the source of the problem,
5 which is the discretion-vesting statutes like the one involved
6 in this case.

7 Q Do you think that's the source of the problem
8 or do you think the source of the problem is simply an unre-
9 constructed intention to discriminate on the basis of those
10 who were given the job of picking juries?

11 A Well, it's pretty clear, Mr. Justice Stewart,
12 that that's true, but the question that you have to ask is
13 what can you do; what can you deal with; what can a Court
14 deal with; how do you remedy the problem? I don't think that
15 it's possible for this or any other Court to remedy that
16 problem by an injunction which says, "Administer the statute
17 fairly." The Court has done that consistently for 90 years.
18 What it can do consistent with the decisions of this Court
19 under the vagueness doctrine, is to deal with the state en-
20 actment which permits those unreconstructed attitudes to be
21 effective.

22 Q Now, in this case, and I am just looking at a
23 paragraph in your own brief on Page 10, in which you summarize
24 the injunction that was granted. "It was against systematic
25 exclusion of Negroes from the jury rolls of Greene County and

1 also an order requiring that a new jury roll showing the race,
2 and, if available, the age of each juror be filed with the
3 Court within 60 days and a report showing the procedure used
4 in compiling it."

5 Now, isn't that the way to get at this, rather than
6 to excise a couple of adjectives from the statute?

7 A No; that isn't the way to get at it. If that
8 were the way to get at it, Mr. Justice Stewart, you would not
9 have the constant reappearance of these jury discrimination
10 cases in this Court and in courts throughout the nation, and
11 when I am talking about the nation, I am talking about the
12 courts in that southern tier of states where the problem has
13 persisted. And just excising the language isn't effective.
14 What you have to do is to require that there be objective
15 standards. It doesn't strike me that that is such a tremen-
16 dous problem. There are 22 states, to be sure, which have
17 similar language --

18 Q You mean that we should write the --

19 A Oh, I don't think so; I think that the Court
20 can say -- one of the District Judges in one of the cases we
21 cited here, simply said, "We suggest to you that you use
22 objective criteria and to help you, we refer you to what the
23 Congress did in the selection of jury -- in the Jury Selection
24 Service Act." I don't think that there would be really anything
25

1 wrong with the Court indicating what kind of objective
2 criteria would be desirable. But I think it's important for
3 the Court to indicate that there must be some kind of objec-
4 tive criteria.

5 Of the States in in Union, though there may be 22
6 which have this kind of vague language, you can document that
7 in a number of them it has been used and employed for a dis-
8 criminatory purpose and that's why the case is here, but that
9 still leaves a majority of the states that have not found it
10 necessary to operate a fair jury selection system by using
11 language of this sort.

12 My own submission is that when you have language of
13 this sort and you put that you give the discretion to persons
14 who are reconstructed in their attitudes and who are also
15 white, in a community like Greene County where you have a
16 Black majority, that you get the kinds of results that are
17 shown on this record; and those results have been documented
18 for several years. There was a prior case in the District
19 Court showing what happened and there was a -- relief there
20 and that didn't work.

21 Now, when you issue an injunction to jury officials
22 you are really telling them to do better. It seems to me that
23 that has been the decision-making process in this Court for
24 decades.

25 Q Are there some states which have more precise

1 standards but which still practice discrimination in this
2 regard?

3 A There may be, Mr. Chief Justice. I don't know
4 about the case. What I do know is that the cases which have
5 come to this Court and the cases in which this issue has nor-
6 mally been raised, are cases which have -- cases of states
7 which have standards like these.

8 Q Well, are all the southern states using vague
9 standards? Are some of the 22 -- including the southern states?

10 A Well, not all of the 22 -- I think that seven
11 were southern states -- that's one out of three. If, by
12 defining southern states you are talking about 11 or 12 --
13 that's still a majority.

14 The question, it seems to me is really not how many
15 states are or are not employing language of this kind, it's
16 the abuse-creating mechanism that language of this kind gives.
17 And again, I will resort to what this Court has done in the
18 vagueness cases traditionally. That's exactly what was done
19 in the United States versus Louisiana and some of the other
20 cases that we have cited here.

21 There is a second issue that's presented here, and
22 that is whether the District Court in this case and on this
23 record should be upheld in refusing what we think is an
24 essential element of relief to which Appellants are entitled
25 in this county with its history of racial exclusion of Blacks

1 from the opportunity of jury service, that is the vacation of
2 the all white jury commission of Greene County, Alabama, which
3 has a --

4 Q You say the jury commissioners are appointed by
5 the Governor?

6 A They are appointed by the Governor, who was
7 named in the complaint as a defendant.

8 Q Unlike yesterday's case where they were
9 appointed by the Superior Court Judge.

10 A Right.

11 Q And what's your suggestion as to the remedy that
12 should be accorded in the event that we agreed with you on the
13 merits at this point?

14 A Well, I start from the proposition that the
15 District Court had a record of discriminatory action over a
16 long period of time taken by jury officials, all of whom are
17 white.

18 I look at the statement in Louisiana v United States,
19 which indicates that the District Court when dealing with this
20 problem of racial discrimination, has the duty to render a
21 decree that will give effectiverelief. Now, it is true that
22 on our first submission an essential first step is to get rid
23 of the vague standards and to require objective criteria. But
24 it is also pretty clear that there may well be a time lag
25 between the time that that relief becomes effective and that

1 in any event, there is a practical impossibility to excise
2 all discretion from the administration of laws. On that
3 basis, then, it seems to me that in a community, the vast
4 majority of whose citizens are black, where you can demon-
5 strate that white officials have consistently discriminated,
6 and there is no easier demonstration to make than on this
7 record, that as an essential item of relief, the District
8 Court in order to give the complete relief to which the
9 parties here are entitled, should have required the appoint-
10 ment of some black members to the jury commission.

11 Q As I understand, Mr. Amaker, there are three
12 jury commissioners in each county?

13 A That is correct.

14 Q Appointed by the Governor?

15 A Appointed by the Governor for indefinite
16 periods of time.

17 Q And your suggestion is that the Governor of the
18 state should be required to appoint what, at least one of the
19 three, or two out of three, or should he be required to
20 appoint jury commissioners which reflect so far as possible
21 the percentage of population of each county or --

22 A Well, I don't think that you have to go that
23 far. What the Court has before it is the situation in Greene
24 County. The District Court could state, as a matter of its
25 discretionary relief, it could state that at least one. It

1 could perhaps even order an election and in a county like
2 Greene now with blacks on the voting rolls in abundance for
3 the first time, that were put there in the last couple of
4 years, it is very probable. It had some options.

5 Q Then, of course, you are saying it would also
6 invalidate the state law that confers upon the Governor the
7 power to appoint jury commissioners. Are you suggesting that?

8 A I'm not suggesting that. I am suggesting --

9 Q Well, if there was an election, then this would
10 be in violation of the state law which provides that the
11 Governor should appoint the jury commissioners.

12 A Well, I'm simply saying that the course of
13 conduct of all white jury commissions in this county has
14 already violated the Constitution, and therefore, as a matter
15 of relief, I see nothing wrong with the District Court stating
16 that in order to cope with that we are going to require you,
17 in this county at least, to appoint commissions in a different
18 way. And this Court has never indicated that under the
19 supremacy cause, state laws and regulations, once they were
20 demonstrated to have played a part in the violation of a
21 constitutional right could not be enjoined or that the Court
22 could not, as a court of equity, give the kinds of relief to
23 which the Court deemed the parties were entitled.

24 Q Well, then, you are suggesting that at least in
25 respect to Greene County, the law of Alabama that confers upon

1 the Governor the power and the duty to appoint jury commis-
2 sioners is invalid?

3 A That's right. That was the claim of the
4 District Court and that is the claim that we urge here.

5 There is another point which I think I should
6 address myself to. That is the District Court's view in its
7 Opinion that it could not void the vague statutory standards
8 because this Court had never held this criteria to be void for
9 vagueness. And it cited for that proposition, Cassell versus
10 Texas, which is one of a group of five cases involving the
11 Texas Grand Jury system from -- decided in this court from
12 1940 to 1954. And it cited also, an old 1910 case called
13 Franklin v. South Carolina. Now, there is an argument
14 addressed to both of these in our brief. The submission is
15 one that the Cassell case -- in that case the issue was never
16 raised and the Court without inquiring, indicated that the
17 Texas statutory scheme was all right.

18 The Frankling case, it seems to me, is a case which
19 has now really been eroded entirely by the later development
20 of the vagueness doctrine in this Court, has no continuing
21 validity and neither of these cases, it seems to me should be
22 used to prevent the Court from granting the relief that we
23 urge here.

24 If there are no further questions, I will reserve
25 the remaining time for rebuttal.

1 MR. CHIEF JUSTICE BURGER: Mr. Hall, you may proceed
2 whenever you are ready.

3 ORAL ARGUMENT OF LESLIE HALL, ASSISTANT
4 ATTORNEY GENERAL OF THE STATE OF ALABAMA,
5 ON BEHALF OF APPELLEES

6 MR. HALL: Mr. Chief Justice and Members of the Court.
7 I think I should first address myself to a little problem that
8 came up yesterday afternoon and that was in the Georgia case.
9 There was a question about what a freeholder was. Now, the
10 Alabama statute differs considerably from the Georgia case.

11 In the first place you don't have to be a registered
12 voter in order to be on the -- put on the jury rolls. The
13 Alabama statute provides that you can --

14 Q You can be a householder.

15 A A householder or a freeholder; right. That
16 doesn't mean you have to own property. It means that you can
17 even live in a house and be a tenant. The Alabama statute is
18 much more liberal as far as qualifications of persons who are
19 put on the jury rolls.

20 I'd like to point out to the Court what the District
21 Court said on Page 364 of the Opinion. "Alabama is the most
22 enlightened of the states in requiring that broadly inclusive
23 community lists be consulted and that all eligible persons be
24 shown on the rolls."

25 Now, Mr. Amaker has made quite a point here about

1 Greene County. Greene County, I have to admit, has had a whole
2 lot of problems. There is no question about that. But, on the
3 other hand, we come around to this point and that is the point
4 that it is not incumbent upon this Court or any other court to
5 say to the Governor of Alabama who he should appoint as members
6 of the jury commission.

7 I think it's quite obvious and quite clear to this
8 Court and to almost any court in the land that we have three
9 judges down there, Judge Gotwell, Justice Grooms and Justice
10 Allgood, who are very competent, capable and they knew what
11 they were doing when they set forth the guidelines for the jury
12 commission of Greene County to do something about it.

13 Now, we turn right around to this other point again.
14 Mr. Amaker suggests that this Court dictate to the Governor of
15 Alabama who he should appoint as members of the jury commis-
16 sion. Now, that almost is like dictating to the President of
17 the United States who he should appoint to some official
18 position. I don't think that makes sense. I don't think this
19 Court has the authority to do it and I don't think any court
20 in the land has the authority to say to the chief executive
21 of the state or to the President of the United States or any
22 other executive body, who he should appoint.

23 Q How does a Court reach then, and afford a remedy to
24 the situation that you seem to concede exists in Greene County?

25 A Let's assume for the moment that you are correct

1 in your assumption, it would not be feasible, if for no other
2 reason, for the Court to say who should be appointed a jury
3 commissioner.

4 Q What is the Court to do when it finds that over
5 a long period of time a population which is represented
6 equally, let us say, turns up with no people of one group on
7 the jury list, or very few of them; do you suggest that's
8 beyond the reach of the Court?

9 A I don't think it's the prerogative of the
10 Court to say who should be appointed as jury commissioners.

11 Q Now, I'm talking about the selection of jurors
12 after laying aside the question of the jury commissioners'
13 appointment. If the juries turn up as all white in Greene
14 County or any other county, for a long period of time are you
15 suggesting that nothing can be done about it?

16 A We have 57 counties in the State of Alabama,
17 Your Honor.

18 Q Yes, but we're only dealing with Greene County
19 today.

20 A Yes, sir. And if this Court involves the scope
21 of the thing to say that Greene County can do this and that,
22 couldn't that apply to all 57 counties; I don't know? But the
23 only thing I know is to cite the Swain case and Mr. Justice
24 White wrote the opinion in the case, that there has to be a
25 broad representation; isn't that correct, sir?

1 Q You may be correct.

2 A Yes.

3 Q I suppose an answer to the Chief Justice's
4 question is that the way to get at it is the way that this
5 District Court got at it. This Court in its Opinion, said
6 that there had been a declaratory judgment put down in 1967
7 and that that had not remedied the situation that they had
8 continued to be recalcitrant and that now the time had come
9 for an injunction and this Court issued an injunction which
10 was specific and stringent, and I suppose your answer is that
11 the way to get at it is the way the District Court got at it,
12 rather than to enjoin the Governor of the State as to who
13 should be appointed as jury commissioners. Isn't that the
14 answer?

15 A I would feel that way; yes, sir. I don't think
16 this Court has the power to do it.

17 Q Do what?

18 A To issue an injunction to the Governor of the
19 State of Alabama to tell him to appoint one Nigra, two Nigras
20 -- black people; pardon me, or three on the commission.

21 Q Certainly the Federal Court not only has the
22 power but the duty, doesn't it, under the Constitution, the
23 14th Amendment of the Constitution, to see to it that there is
24 no racial discrimination in the selection of jurors in Greene
25 County or any other county in any State of the Union?

1 A Yes, sir. I think it's quite clear that
2 Alabama declares it has a situation, but we haven't thoroughly
3 solved it.

4 Q Well, do you think that the Order which has now
5 been entered by the District Judge will produce a solution
6 that's a reasonable one?

7 A Well, we've got three very competent judges
8 down there, and I think that it probably will solve it. I
9 don't know why they are appealing that portion of it anyway.
10 The only thing I wonder about is why they are appealing from
11 the other point.

12 Q Why they what? I didn't get that.

13 A Sir.

14 Q What did you say in the last part of your state-
15 ment? The only thing you wondered about was why --

16 A Well, I was wondering why they appealed from
17 the -- they got a favorable decision in the first part of it
18 and now they want us to just change the whole situation and
19 have a court decree that the Governor has got to do this, that
20 and the other and I don't think so.

21 Q It's probably not in the record, but what's
22 happened in relation to the remedying of the situation since
23 this decree was issued; can you tell me? In your county.
24 Are there more Negroes on the jury list?

25 A Yes, sir; considerably more. In fact, I tried

1 a case over there not too long ago in connection with the
2 District Attorney and there were now turned up more Nigras
3 than they were whites.

4 Q Has this injunction been complied with -- I'm
5 referring to the language appearing on 27-A of the jurisdic-
6 tional statemen which said: "Defendants are ordered to take
7 prompt action to compile a jury list for Greene County,
8 Alabama in accordance with the constitutional principles set
9 out in this judgment: They are ordered to file with this
10 Court within 60 days the jury list as so compiled." Now, has
11 that been done?

12 A Yes, sir.

13 Q That, of course, wouldn't be in the record?

14 A It wouldn't be in the record; no.

15 Q There is no appeal on that?

16 A No, sir.

17 MR. CHIEF JUSTICE BURGER: Very well, do you have
18 anything further, Counsel?

19 A Sir?

20 MR. CHIEF JUSTICE BURGER: Do you have anything
21 further to present to the Court?

22 A I think that's it.

23 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Hall.

24 Mr. Amaker, do you have rebuttal?

25 MR. AMAKER: Mr. Chief Justice, in response to Mr.

1 Justice Stewart's inquiry as to what occurred. The District
2 Court required the filing of a report as indicated in this
3 opinion within 60 days. That report was filed in November of
4 last year. The report is in the exhibits that are on file in
5 the Clerk's office. I looked at it yesterday. There is no
6 numerical compilation. Scanning it indicates that there are
7 approximately 50 percent blacks on that list. I don't know
8 which way the balance is tipped.

9
10 Q There are racial designations on the list, are
11 there?

12 A They were required and they are -- now, whether
13 the District -- whether the jury commissioners will consis-
14 tently do that, I don't know. Prior to that injunction there
15 were no racial designations.

16 Q Well, I mean I -- just to assume a particular-
17 ized reasoning, I suppose that a complaint could be made of the
18 fact that there were racial designations?

19 A Well, I think that the particularized reason
20 appears on this record.

21 Q Right. In according to this injunction to meet
22 this problem.

23 A But I understand that was the same thing that
24 Congress did, you know, in the Jury Act and in both the juries
25 because the problem we have had in these racial discrimination

1 cases over the years, Mr. Justice Stewart, is that you haven't
2 been able to find out very often -- you have been able to,
3 but not without a considerable amount of difficulty, what the
4 racial breakdown was. Now, the Congress recognized that, that
5 it was important to -- in order to demonstrate racial discrim-
6 ination that what the numbers were. But, let me just --

7 Q May I ask you: are you familiar -- in the last
8 election, how many colored people were elected to county
9 office.

10 A The very last one, the one that was held in
11 Greene County?

12 Q Yes.

13 A There are at least three or four. This is
14 after this Court's decision in Hadnott v. Amos.

15 Q Yes. Serving now.

16 A There are about three or four. I'm not
17 entirely sure what the offices are, Mr. Justice Black. They
18 are on the county commission and I think that's a three or
19 four-man commission. They are on that county commission.

20 Q As I recall it, some of the key offices of the
21 county -- I mean by key offices they could be helpful in
22 bringing about an elimination of discrimination -- some of the
23 key officers of the county were elected that were colored;
24 were they not?

25 A There were some Blacks elected; yes, after

1 this Court's order in Hadnott.

2 Q Of course, because it had not been that way
3 before. Not before the recent opinion that attempted to
4 provide methods to see that each race had its proper right to
5 vote.

6 A Well that was true in that voting context.
7 That's really a part of submission with respect to the jury
8 commission that's in our brief here, that the Civil Rights
9 Commission's Report after -- documented the alienation of
10 Blacks throughout the South generally and in Alabama and Greene
11 County, particularly and we indicated that one of the ways
12 to cure that is since jury service is kind of a trend of
13 voting service in terms of the general impact upon the public
14 life of the community, that it's extremely important, par-
15 ticularly in a county like this was in the voting situation, to
16 have Black people serving on the jury commission.

17 Q It's important to have people that can vote.

18 A Oh, of course. But the jury commission at this
19 point is not an elective office, as a general proposition. I
20 am simply saying that on this record --

21 Q We must recall that if we could take out of the
22 state the power to select officials in any way they choose,
23 either by election or by appointment, that that would cut
24 against either one when the time arose. Then the courts could
25 take the power instead of the legislative bodies.

1 A I don't think the submission is nearly that
2 broad, Mr. Justice Black. In the --

3 Q It is a rather unique thing to suggest that
4 the courts of the nation have a right to change the legisla-
5 tion in the state and say that instead of having appointments
6 they should have elections. It might be wise -- I'm not saying
7 it wouldn't -- but it might be rather unique in the history of
8 our government, wouldn't it?

9 A Well, I think it has occurred on occasion and
10 the decisions of this Court reflect those occasions, Louisiana
11 v. United States, for example, was a case in which the District
12 Court and this Court later affirmed a decree by that Court
13 requiring the registrars not to use a citizenship test, which
14 because of its discriminatory impact on the right of Negroes
15 to vote, and that's one example.

16 Q That's not an example of changing a law in
17 reference to the selection of officers, saying how they shall
18 be selected and invalidating a law which provides for appoint-
19 ment of certain people,--

20 A I don't see that as an invalidation of the law.
21 Because I see that only as a remedial aspect of the Court's
22 equity powers that once you have a demonstrated constitutional
23 violation --

24 Q We are up against a real practical situation.
25 You don't see that if we were to hold that the Governor cannot

1 appoint, as the State Law provides, that that would be inter-
2 fering with the election laws of the state?

3 A Well, I don't see that. It's not an election
4 law and --

5 Q It's an election law that he can appoint --
6 I mean it is a selection of officers that he shall appoint.

7 A But what I address the question of how do you
8 deal with this terribly intractable problem of racial dis-
9 crimination when the Governor has consistently appointed only
10 white jury commissioners and those jury commissioners have
11 consistently discriminated against Blacks and I think our
12 Constitution can reach that and I think that this Court can
13 say that as a matter of remedy in this situation, without
14 invalidating that law as a general proposition --

15 Q Why wouldn't it invalidate it?

16 A I think if the invalidation occurs, Mr. Justice
17 Black, it occurs only in those, to use our term, unique
18 situations in which it is clearly demonstrated, as it is in
19 this case, that this kind of wide range and deep-seated
20 discrimination has flourished.

21 Last year, for example, as a matter of remedy with
22 respect to the teacher integration in the Montgomery case, this
23 Court upheld the decree whereby a District Judge decided that
24 the way to get at this problem because other methods had not
25 solved the problem, but the way to get at the problem was to

1 require a mathematical ration in the schools.

2 I'm simply saying of course it's a unique proposi-
3 tion but there are certain circumstances when the constitu-
4 tional violation is so bold, where this Court in the past has
5 responded with that kind of relief and --

6 Q I do not recall that it's been done to this
7 extent. It's essential both -- as much to your people as it
8 is to the white people that we preserve the ancient landmarks
9 of the government and not depart completely from the idea of
10 -- that they can elect their officials or appoint them in the
11 manner provided by law.

12 Someone suggested to me sometime ago that the way to
13 prevent unfair trials in the South was to take defendants from
14 down there -- white defendants and take them up and try them
15 in Harlem. And they stated it honestly with the belief that
16 that was the best way to do it. OF course it's an exaggeration
17 to say that this is the same, but I think, rather that Greene
18 County, they have made tremendous -- almost miraculous progress
19 over there in the rights of the people to vote and select their
20 own officers.

21 A They haven't made that progress without a con-
22 certed, judicial effort and litigation after litigation after
23 litigation, and this case is an example.

24 Q I don't recall that we took away from the state
25 its right to appoint jury commissioners and demand that the

1 Governor appoint a man of a certain kind to the jury commis-
2 sion.

3 A Well, it certainly seems that just as the
4 citiznes of Greene County are entitled to elect the persons
5 that they choose, the jury commission which performs a very
6 important public function, in that community, they are en-
7 titled also to have some representation of their group on that
8 commission.

9 Q No one can disagree with you, I don't think.
10 A fair and equal government on that basis means that they are
11 entitled to it, but the question is -- I'm asking you because
12 you and your group are as much interested in carrying on the
13 laws that are fairly administered so that you don't break down
14 the great structure of our democratic government by saying that
15 the courts can require a certain people or great number of a
16 race be appointed to office by the appointed power, any more
17 than we could say they must elect them.

18 Of course, we can hold that they must adopt policies.
19 I'm not arguing against your point, that you do have a very
20 righteous cause of complaint in connection with this county,
21 but I am trying to point out that we have reached it hereto-
22 fore and made miraculous progress -- almost miraculous progress
23 as a man who lived in Alabama knows, almost the miraculous
24 progress that has been made in Greene County without destroying
25 any of the ancient landmarks of the country.

1 A My time is up, Mr. Justice Black and I can only
2 say that it has taken very, very many decades and it is not
3 our judgment that that is a miraculous record.

4 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Amaker.
5 Thank you, Mr. Hall for your submissions. The case is sub-
6 mitted.

7 (Whereupon, at 10:50 o'clock a.m. the argument in the
8 above-entitled matter was concluded)

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