

In the
Supreme Court of the United States

WINFIELD DUNN, GOVERNOR OF THE
STATE OF TENNESSEE, ET AL

Appellants

v.

JAMES F. BLUMSTEIN

Appellee

LIBRARY
Supreme Court, U. S.
NOV 24 1971
C'
No. 70-13

Washington, D. C.
November 16, 1971

Pages 1 thru 44

RECEIVED
SUPREME COURT, U.S.
MARSHAL'S OFFICE
NOV 24 3 30 PM '71

HOOVER REPORTING COMPANY, INC.

Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

-----X
: WINFIELD DUNN, GOVERNOR OF THE :
: STATE OF TENNESSEE, ET AL :
: :
: Appellants :
: :
: v. : No. 70-13
: :
: JAMES F. BLUMSTEIN :
: :
: Appellee :
-----X

Washington, D. C.
Tuesday, November 16, 1971

The above-entitled matter came on for argument at
11:06 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

ROBERT H. ROBERTS, Assistant Attorney General
Supreme Court Building
Nashville, Tennessee 37219 for Appellants

JAMES F. BLUMSTEIN, the School of Law,
Vanderbilt University, 21st Avenue, South,
Nashville, Tennessee 37203 pro se

C O N T E N T S

<u>ORAL ARGUMENT BY:</u>	<u>PAGE</u>
ROBERT H. ROBERTS, ESQ., for Appellants	3
JAMES F. BLUMSTEIN, ESQ., pro se	20
 <u>REBUTTAL ARGUMENT BY:</u>	
ROBERT H. ROBERTS, ESQ., for Appellants	41

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Dunn against Blumstein.

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

ORAL ARGUMENT OF ROBERT H. ROBERTS, ESQ.,
ON BEHALF OF THE APPELLANTS, WINFIELD DUNN, ET AL

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

This is an appeal from a Three Judge District Court in the Middle District of Tennessee at Nashville, which struck down the durational residency requirements for voting, as provided by the State Constitution, and implemented by statutes of the legislature.

The time fixed in Tennessee for durational residency requirements was one year in the state, and three months in the county before the person offers himself to vote. Now, the question presented is whether or not such Constitutional and statutory provisions violate the Equal Protection Clause of the 14th Amendment of the United States Constitution, and whether or not, in determining this, the doctrine of "irrational or unreasonable" or the "Compelling State Interest" doctrine is to be made applicable in this kind of a case and for the determination of this case.

At the time this case was decided by the District

Court, and so far as this Counsel has any way of ascertaining now, thirty-three states and three territories have durational residency requirements of at least the one year, as is the case in Tennessee. Fifteen states had a six months residency requirement, which is double the county residence requirement provided for in the State of Tennessee. The remaining two states had, respectfully, one ninety days and the other, three months, durational residency requirement.

Q Mr. Roberts, have there been any studies made on widespread or even a national basis to determine how long it takes to crank up registrations and that sort of thing, and to check out to be sure that the voter isn't voting in two states?

MR. ROBERTS: No, sir, not to my knowledge. If Your Honor please, that's where we think that the District Court erred in trying to make such a determination based on the registration cut-off line of thirty days which applies in Tennessee and in most of the states that have registration laws. But it's our insistence that the Court was in error there because that cut-off period is designed specifically, and it is very clearly shown in the law, to be for the purpose of permitting the county election officials the necessary time to make the administration acts that they are required to.

For example, they have to take the master

registration list, and then break that down precinct by precinct, and make duplicates of it to go out to the precinct. They've got to run their advertisements in the paper, notices of the election, select all of the judges and officers to hold the elections at the precinct level, and it's a countless number of things. Nowhere during that period of time can the Election Commission in Tennessee, and I think it's generally true everywhere else, use that period of time to purge an ineligible voter.

Therefore, the durational residency requirement is necessary, we feel, in order to give some time for which the Election Commission can get rid of any ineligible voters, purge them, as the case might be, and then the thirty-day registration cut-off only for administrative period and things alone, because somewhere, there's got to be a period of time when the voter knows that he is going to be entitled to go to the polls and vote, and that is what we think the thirty days is for. Now, so far as --

Q What's been the experience with those administrative problems in connection with the new Federal statute on election of President and other Federal elections?

MR. ROBERTS: If the Court please, we haven't had a Presidential Election since then. We don't know yet quite how it's going to work out, and I don't think that --

Q That's thirty days, isn't it?

MR. ROBERTS: Sir?

Q Thirty days residence?

MR. ROBERTS: Yes, sir. Thirty days registration out-off.

Q I gather Tennessee is going to have to accommodate itself to that for the forthcoming Presidential Election, isn't it?

MR. ROBERTS: Yes, sir. Well, Tennessee, if Your Honor please, already had done this before the 1970 Voting Rights Act was passed. That is one of the things that I wanted to point out to the Court.

There are other ways of doing it besides, in effect, reinterpreting the 14th Amendment in order to bring it about. In Tennessee, anybody that moves from, well, within a precinct or anywhere else in the state, has ninety days in which to qualify himself in the new area, or, until that period of time, he can go back and vote where he had always voted, either in person or by absentee ballot. He is never disenfranchised.

Well, the same is true so far as the year and the state is concerned, and by act of legislature, even before the 1970 Voting Rights Act, we provided that, in Tennessee, any person leaving that state would maintain his domicile -- which in Tennessee is the same as legal residence -- he would maintain the domicile until such time as he acquired a new

one, no matter what state he went to. And we think that that is a sensible way of doing it so that you are protecting the people that usually would have the most interest.

It takes some little time. I think the Court can take notice of the fact that a person who has lived a number of years in a county, and then he moves, it's a little while that he would prefer to be identified back where he had been for any period of time, as opposed to immediately entering into the political arena in a new -- aah -- new place.

Q Does Tennessee have criminal penalties for voting in Tennessee and voting somewhere else, if it could be accomplished?

MR. ROBERTS: Yes, sir, we do. The problem with this, though, if you are going to confine it to the registration deadlines, for example, is determining whether or not the person really is a bona fide resident of the state. Now, the District Court, in striking down the year in the state and three months in the county, did indicate that they felt that the thirty-day registration deadline was sufficient to accomplish this, and it has been argued in the Opposing Counsels' brief that anybody that would go into the Registrar's Office and be willing to make an oath that he's a bona fide resident would also be willing to make an oath as well about anything else that would be necessary to do this, but that doesn't follow, because it's a nebulous sort of

thing. The matter of whether a person is a bona fide resident is almost decided on the matter of intent. Now, he could very well leave --

Q Is Tennessee preparing some sort of procedure to deal with this problem in next year's Presidential Election?

MR. ROBERTS: Yes, sir, as I --

Q I mean, do they -- as I gather, you are going to have to permit everybody to vote who has been thirty days a resident of Tennessee?

MR. ROBERTS: Yes, sir, if this Court upholds the Lower Court's decision, that would be true.

Q No, no, I'm speaking only of the Presidential Election, and am I not correct that that statute -- which we sustained, I think, last year, did we not? -- now says you must let, every state must let everyone vote who has been thirty days a resident of the state, in the Presidential Election?

MR. ROBERTS: Yes, sir.

Q So I gather you are going to have to accommodate, Tennessee's going to have to accommodate its whole system --

MR. ROBERTS: Yes, sir, that's --

Q -- in that requirement. Have you any plans underway for doing that?

MR. ROBERTS: Yes, sir, they are already registering them, you see, under this Three Judge Court order down

there, after the thirty days, if they've been there over thirty days and have satisfied the requirements of being a bona fide resident. Now -- so we've already had an election -- since --

Q Since the --

MR. ROBERTS: -- since this was changed, yes, sir. The November general election of last year.

Q And did that create any difficulties?

MR. ROBERTS: No, sir. We have no way of knowing how many fraudulent votes are cast. We have this problem in Tennessee. It's a little different from most states in that we are bounded by eight states, three of our large metropolitan areas are on the state lines. In the case of Memphis, which is our largest metropolitan area, three states bound one that one county, Arkansas, Mississippi and Missouri.

Now, ever since the reapportionment decisions and the breakdown within the county of legislative seats, for example, took place, the county has divided into these various legislative seats based on population, of course, and it would take a very few votes to change the outcome of an election in many of these. Five House seat changes in Tennessee would change the complete complexion of the legislature itself, for that matter.

The possibility of colonization is just too great a risk, we feel, to go through just to insure somebody the

right to vote in one election, at the very most, before he would have otherwise become qualified to do so.

Now, when you start trying to determine who is going to draw that line, all you have to do is just look at what's happened in the U. S. District Courts already in regard to it to see that the Court's in no position to do it. The people, acting through their Constitution, we feel, are in a position to do it.

Now, since this Court spoke on the question, there's at least twelve Federal District Court decisions. Four of them sustained the full year's ugh -- residency period. That was Ohio, Illinois, Arizona and Washington. Three found the one-year residency requirement unconstitutional, but upheld shorter periods. For example, in the Burg case, which is out in Massachusetts, the first one of them, I believe, that was decided, the court there held that six months in the county -- double our county residence requirement -- was fine, and said that there had been no showing of a compelling state interest to justify the additional six months in the state and that that, therefore, was discriminatory against someone that might live just across the state line, but had moved in and been there more than six months.

So that's the situations you had. In fact, one of the amazing things about this case when it was heard in Nashville was the fact that the -- right from the bench, the

Court, for all practical purposes, discounted the three months question and just about ruled from the bench that they weren't concerned at all with the three months. They couldn't see anything wrong with it. They were only concerned with whether this year was too long or not, and then, to our amazement, when we get to the opinion, they struck down not only the one year, but the three months in the county provision, which could not be discriminatory at any -- viewed in any light.

Q And that is because, Mr. Roberts, under existing Tennessee law, you can move into another county and still vote in the old county? Is that it?

MR. ROBERTS: Yes, sir, until such time as you get reregistered. In other words, there is no such thing as cutting a person off from being able to vote. We've got -- The purge is required to take place ninety days before an election. You've also got the three months -- or ninety days, roughly -- to change from one precinct to another, or from one county to another, and you can still vote back in the other one. Now, you can go ahead and register in the new county as soon as you get there, as long as it would be three months before there would be an election, but --

Q And then you'd have to vote in the new county?

MR. ROBERTS: Yes, sir, after the ninety days --

Q If you moved -- if a man moved from Shelby

County to Jackson County in Tennessee, say, he could continue to vote in Shelby County so long as he hadn't registered in Jackson County for a period of at least ninety days?

MR. ROBERTS: Yes, sir. In other words, until such time as he would have been eligible in the new county to vote there.

Q To be eligible to register?

MR. ROBERTS: Yes, sir. So he's never really cut off.

Q And this is -- that is existing Tennessee law of longstanding --

MR. ROBERTS: Yes, sir.

Q -- long before this Court decision, you mean.

MR. ROBERTS: Yes, yes, sir.

Q And then you also said that a man can move away from the State of Tennessee, and continue to vote in Tennessee for how long?

MR. ROBERTS: Until such time as he establishes domicile in the new state and becomes eligible to vote there.

Q And becomes eligible to vote there.

MR. ROBERTS: Yes, sir.

Q By registering, or --

MR. ROBERTS: Yes, sir, whatever their procedure. You see, there are a few states that don't have registration laws.

Q You're not talking simply about absentee ballots, are you?

MR. ROBERTS: No, sir. They could come back and do it in person or by absentee under our law. They could return to Tennessee for it.

Q But a man can move -- let's say his company sends him to Missouri, and he doesn't know how long he is going to stay there, and so he is living in an apartment, or a motel, and doesn't plan to make that his home. He can continue to vote in Tennessee even though he is physically out of the state and has been for a period of weeks or months?

MR. ROBERTS: Yes, sir. I'm an example of the inside of the state -- intrastate situation of that kind. I've been in Nashville now seventeen years, and I still vote in the Cumberland Mountains of Pickett County. It's still my home. It's where I think of as my home, and where I expect to return. And so long as that is established, the laws in Tennessee permit that, voting that way.

Q Yes, because that is -- that's different, though, from what you told me about changing your home from Pickett County to Nashville. If you changed your home, you could vote in Pickett County only until you'd registered in Nashville, isn't that right?

MR. ROBERTS: Yes, sir, if I'd -- but I --

Q If you didn't make Pickett County your home?

MR. ROBERTS: Yes, sir.

Q If you'd moved, moved your domicile from Pickett County to -- what's the county at Nashville?

MR. ROBERTS: Davidson.

Q Davidson County, you could continue to vote in Pickett County for ninety days until you became eligible and registered to vote in Davidson County.

MR. ROBERTS: Yes, sir.

Q Even though you had moved, which you tell us you have not.

MR. ROBERTS: Yes, sir.

Now, we -- traditionally, the purposes of a residency requirement as set out in most all legal publications, and the one I have selected to use here is from Am. Jur.. This is the reason for it, to:

Insure the purity of the ballot box through proper legislation, by protection against fraud through colonization and inability to identify persons offering to vote, and

2) to afford some surety that the voter has, in fact, become a member of the community and that as such, he has a common interest in all matters pertaining to its government and, therefore, is likely to exercise his right more intelligently.

Now, those are the reasons we say that there is a need for it. Then it boils down to how much time, and how

is the state going to show if we used the "compelling state interest" doctrine, how is the state going to possibly show that thirty-one days is proper as opposed to forty-five days or sixty days? We just insist that it is a thing that can't be done, and it's been recognized by this Court, on all previous occasions, that this is a proper regulation by the state, and the state residency -- duration of residency requirements has been upheld by this Court in cases heretofore, in every instance that it has been challenged.

Now, the first case, for example, in 1904, Pope versus Williams, coming out of Maryland, where they had a six months in the county, and a year in the state, which is longer than Tennessee's duration of residency requirement, this Court upheld those requirements, and, in doing so, stated that at that time, they had registration already in Maryland. They took notice, this Court did, of the fact that they had registration there and said, "While we might personally feel that the one year is too long now, in view of having registration, at the same time, we cannot say that this is a function of the Court, to take it away -- the decision away from the state of Maryland and its people, in deciding this."

Q Do you feel that Pope against Williams will be overruled if this case is affirmed?

MR. ROBERTS: Yes, sir, and so would Dreudring

versus Devlin 1964 case would necessarily be overruled if this case is affirmed. They are the two that get directly, and both of them, incidentally, are from the State of Maryland, where the one year in state and six months in county was involved. Now, in addition to that --

Q What if the state said you had to be a resident of the state for thirty years, and a resident of the county for fifteen years before you were eligible to vote? Don't you think that might be the business of the courts and --

MR. ROBERTS: Yes, sir, under the --

Q -- subject to Constitutional adjudication?

MR. ROBERTS: Yes, sir, and this Court has said repeatedly in the past that they used the "unreasonable or irresponsible" rule in determining it. Well, if that's done, I don't think that -- surely the one year in the state or at least the three months in the county could be considered to be --

Q Let's consider to justify a long, long period like that, we could just say, "We only want oldtimers around here to vote."

MR. ROBERTS: One year is a -- is more difficult, of course, to justify than three months, I would agree, but at the same time, I think it is a question of who is to make that determination. As we have found here, the courts in trying to make it, they went in every direction. The twelve

different U. S. District Courts that have tried to decide this, none of them have agreed on what it is, or what it ought to be, not a single one, except for the four that said the courts had no business in it in the first place, and upheld the state durational residency requirements.

Q Tennessee itself has decided that thirty days is sufficient for registration purposes, hasn't it, through its own legislature?

MR. ROBERTS: Yes, sir, for registration. That's the cutoff for registration, but the purpose, that's what I was attempting to explain awhile ago, the purpose for having that cutoff was not the same purpose that you obtain from having a durational residency requirement, because that is to check the eligibility of the voters. If, in that last thirty days, while you are trying to get an election ready to go with all the appointment of the officials, the ballots prepared, the machines serviced, and everything like that, if the election commissioners attempted to, at that time, try to get into the eligibility of the voters, many, many voters would probably get disenfranchised because they'd have no opportunity to overcome it before the election, so that this matter -- excuse me, sir.

Q I was going to ask, is Mr. Blumstein attacking the thirty day provision also, as well as the three months provision here?

MR. ROBERTS: No, sir, the District Court recognized that thirty days was all right, but they didn't --

Q He can't very well attack it, because he brought a suit within the thirty days of his assuming his residency.

MR. ROBERTS: Yes, sir.

Q All right.

MR. ROBERTS: We would respectfully insist that the-- all of the previous cases are on the Appellants' side in this matter, not only of the cases that I have cited, where this Court dealt directly with the proposition, but also in interpreting provisions under the 10th Amendment, and in other cases, this Court has used the durational residency requirement, or residency power of a state for voting as examples of state power that is still left to it.

Now, that was true in Kramer versus Union Free School District, just as late as 1969. The only thing that the U. S. District Court could have gotten their key from was when this Court granted or noted probable jurisdiction in Hall versus Beals coming out of Colorado, which later was dismissed as being moot.

Now, there's no other law that the Court -- that the District Courts could be using other than that. They are second-guessing this Court, and that's all -- all the basis or authority that they could have for holding the way they

have in this case.

I just want to say one other thing, and then I'm going to close, and that is, in 1970, Mr. Chief Justice in Walz versus Tax Commissioner of the City of New York quoted from an old -- the old Jackman case, where Mr. Justice Holmes said, "If a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it."

We think that's what you have here. You have all of the states fixing residential -- residency requirements, and it's been that way for a long time, and it's not -- it's not just antiquated provisions. In the case of Tennessee, I did want to point this out, that Adversary Counsel insists, and the Court has even hinted toward it in their opinion, that the registration laws took the place of the residency requirements in Tennessee, and that was its stated purpose, and that that was a later law. Well, that's not true.

In 1953 is when the people had a chance to relook at the durational residency requirements in Tennessee and their Constitution, and they did retain the one year in the state, but it was at that time that the six months in the county was lowered to three months. So that it is not an antiquated provision, and it's one that clearly shows that the people there went, in their Constitution, some protection against voter fraud, and that they put it in there after they

had registration. There could be no serious argument that the registration law and the thirty day cutoff there did a -- does away with any purpose to be served by durational residency requirement, because that just isn't the case.

I might have just a short rebuttal.

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

Mr. Blumstein.

ORAL ARGUMENT OF JAMES F. BLUMSTEIN, ESQ.,

ON BEHALF OF COMMON CAUSE, AMICUS CURIAE,

AND HIMSELF, APPELLEE.

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

I think it is important to understand, as a first measure that this case does not involve the question of residency. There is no question in this case that I am a bona fide resident of the state. The state has conceded this throughout, and the District Court found this as a fact.

There is no question that I meet the standards of domicile that Tennessee imposes as its standard of residence. So the state's argument entirely has been pitched to the fact that there is a question of residency here.

This is not a question of residency. This is a question of an additional, separate factor, and that is, a calendar waiting period beyond the bona fide residency criteria. There is currently in Tennessee -- the Law

Revision Commission of Tennessee is currently under a mandate of the legislature to revise the election code, and a specific section of that tentative draft, the revision, goes to the question of defining bona fide residence. Tennessee is now planning to adopt the standards of New Mexico, setting out several indicia and criteria of determining bona fide residence. The duration of residence is a separate category. It is not within one of these factors. So I just want to make that perfectly clear at the outset.

Q But, by the same token, I gather, Mr. Blumstein, you are not asserting that a state is Constitutionally required to let every single resident who is qualified by age vote, are you? Because a person can become a resident, under the law, in less than twenty-four hours, and be in the state with no intention to live elsewhere, and that can happen within a matter of hours. Are you contending that the Constitution requires the state to permit every resident of Tennessee who is eighteen years old or over, and otherwise qualified, to vote?

MR. BLUMSTEIN: Mr. Justice Stewart, there are several points that I can make in response to that. First, there is a thirty day cutoff period for registration.

Q There is, but I am asking you -- there is, as a matter of state statute --

MR. BLUMSTEIN: Yes, sir.

Q -- but I am asking you about what your Constitutional claim is.

MR. BLUMSTEIN: If a person comes into the State of Tennessee, and establishes domicile, according to the relevant Tennessee standards, you'd look at whether he has become a domicile for tax purposes, you'd look at whether he becomes a domicile for purposes of his driver's license, his automobile registration, and so forth. If he meets those criteria, these are separate independent criteria that the Election Commission and the county registrars are entitled to investigate.

If, after their investigation at the time of registration, it is their conclusion that the new resident is a bona fide resident, then it is my contention that there is a discrimination that this Court must then review under the "compelling interest" standard. Just showing of the discrimination, Your Honor, is not the answer to the Constitutional question. At that point, it triggers a strict Constitutional standard of review, and then we must go into the policy questions that the state articulates to support this discrimination.

So my answer to your question, then, is, yes, it does trigger strict review, and no, the state has not made --

Q I didn't ask you what kind of review it triggered. I asked you whether your claim is that the state

is compelled to permit every bona fide resident of Tennessee who is over eighteen years old to vote --

MR. BLUMSTEIN: Unless it's --

Q And I point out that, as a matter of law, quite apart from these evidentiary indicia -- driver's licenses and taxes and so on -- as a matter of well-established law, a person can become a resident of the state, a new resident of the state, in a matter of minutes.

MR. BLUMSTEIN: Yes, sir. Under those circumstances, unless the state can show a compelling reason to discriminate against this bona fide resident, it is the Constitutional obligation of the state to allow him to vote.

Now, there are -- there are other classes of people, perhaps, in certain situations that maybe be able -- the state may be able to discriminate against, as far as the franchise is concerned. For example, many states discriminate against felons who have already been convicted and, even though they are bona fide residents, they may be eliminated from the franchise. But that is not the case here, Your Honor. These are not a class of insane, committed people, or felons. These are qualified voters in every other respect, except as far as duration of residence is concerned.

Q On your theory, a man could move into Tennessee in the morning, get off the plane, and go and buy a house that afternoon which he might readily do, and present

himself in the afternoon at 5:00 o'clock at the polling booth and insist on voting. Is that right?

MR. BLUMSTEIN: Yes, Your Honor, that is correct. Under existing Tennessee law, to take your hypothetical a step further, if a person were to move to the state -- suppose somebody in my situation, who is an academic, move to the state, buy a house, and then go on a sabbatical leave for the first year of his tenure at a university, for example, never appear in the state, never have anything to do whatsoever with the politics of the state, go to Russia, go anywhere, and come back one year later precisely, having no contact whatsoever with the state, and he'd be allowed to vote, because he'd be a domiciliary.

Q Do you think Tennessee could, by its Constitution, fix voting age at age twenty-five for everyone, under the Fourteenth Amendment and the Federal Constitution?

MR. BLUMSTEIN: Well, that specifically I believe would be --

Q Except for national elections. I am talking about local elections. Could Tennessee fix the voting age at age twenty-five?

MR. BLUMSTEIN: I believe, Your Honor, that would be covered by the most recent Twenty-sixth Amendment, which stipulates eighteen years old.

Q Well, it's --

MR. BLUMSTEIN: For all elections.

Q I was just asking your response on it.

MR. BLUMSTEIN: Well, I think it would be specifically barred by the Twenty-sixth Amendment from doing that.

Q In state and local elections?

MR. BLUMSTEIN: My understanding is that the Twenty-sixth Amendment covers both, Your Honor, that this Court's opinion in United States against Arizona, Oregon against Mitchell covered -- was restricted only to federal elections, but the Twenty-sixth Amendment specifically covers all elections. So this --

Q Prior to the Twenty-sixth Amendment, could the State of Tennessee have made that choice?

MR. BLUMSTEIN: Under this Court's opinion in Oregon against Mitchell, I think it certainly could. It would face a penalty, however, Your Honor, under Section II of the Fourteenth Amendment, which establishes a twenty-one year age requirement. It would then lose the *al quod* share of its representation in Congress.

Q That's the penalty that's applied.

MR. BLUMSTEIN: Yes, Your Honor, yes, that's right.

Q Well, now, do I understand from your answer to Justice Stewart's question that you are attacking the thirty day provision?

MR. BLUMSTEIN: No, Your Honor, Justice Blackmun,

there is -- the thirty-day provision is not discriminatory. This applies equally to all residents of the state. The only issue under attack here is the discriminatory aspect. So there is no -- this is an administrative period that the state has said is necessary to prepare voter lists and do other administrative matters prior to an election. It was this thirty-day period, by the way, that the District Court relied upon to deny the preliminary injunction in this case.

The hearing occurred on July the 30th in the District Court, and the primary election was set for August the 6th. It was only one week later. And the Court refused to interfere, not because it said the thirty days -- the three month period was reasonable, but because they thought it would be judicially improper.

Q I'm sorry, but I understood your answer to one of the questions was that if you moved into Tennessee today, and bought a house, you could present yourself at the polling place and vote at 5:00 p.m.

MR. BLUMSTEIN: Provided that you were within -- the thirty day -- provided the registration books were open, which only occurs more than thirty days before the election. What I'm -- Mr. Justice Blackmun, the position that Appellee is taking is that new residents must be permitted to register under the same standards, and under the same criteria as long-time residents. If a long-time resident happens to delay his

attempt to register beyond the thirty-day period, then he is disfranchised, too, and we are not asking for any greater or special treatment for new residents. All that Appellee is seeking is that new residents be treated the same as long-time residents.

Q Then your answer is that he can't present himself at 5:00 p.m. on the day he moved into the state?

MR. BLUMSTEIN: Not if it is within that thirty-day period, no, sir.

Q You're not claiming that the thirty-day period is Constitutionally invalid?

MR. BLUMSTEIN: No, sir, that is -- that remains after this case. I think I may point out to the Court that that is an obvious loophole in Appellant's theory. If the state, for example, were legislatively to argue that thirty-five or forty days were the appropriate period, and this were to apply equally to all new residents and old residents alike, this would be, if you will, a backdoor way of achieving some of the same objectives. I think that, administratively, this would cause chaos because of the thirty-day period Congress has set in the 1970 Voting Rights Act, but I think that it is clear, and I think I made that point in the brief that this is a potential loophole that's not involved in this case.

Q Does Tennessee have permanent registration, or

does a person have to register for each election, or does he have to register only if he misses a couple of elections, or how does it work?

MR. BLUMSTEIN: No, there is permanent registration, but there are provisions for purging if you don't vote in certain -- for a certain number of years.

Q A certain number of consecutive elections.

MR. BLUMSTEIN: Yes, sir.

At this point, I think it would be relevant to talk about what the discrimination is. I've talked about discrimination between new and old residents. Well, the state has painted Tennessee as a homogeneous community, and Nashville, Davidson County, as a homogeneous community that's stable all the time. Well, this flies in the face of census statistics. Americans are extremely mobile people. Over the course of a very few years, the entire character of a community may change. Communities are in no sense stable in the United States.

Each year, for example, more than thirteen million people move from one county to another, and of those, more than seven million move from one state to another. This represents an annual interstate migration almost the size of the City of New York. Moreover, of those, almost four million, five hundred thousand people of voting age, adults, who move from one state to another, are disfranchised.

In addition, census figures estimate that the total disfranchisement from these residency periods is five million, five hundred ninety thousand people, throughout the United States. This is a staggering figure, and it represents about 7.7 percent of the total vote cast in the 1968 Presidential Election.

Q Does that figure include an assumption against fact, that everybody votes?

MR. BLUMSTEIN: Your Honor, is it the 7.7 figure?

Q Yes.

MR. BLUMSTEIN: That was a percent of the actual vote cast.

Q Well, I'm talking about the people that moved from state to state.

MR. BLUMSTEIN: No, Your Honor, that does make that assumption. The census refines that figure in a questionnaire they asked people who were potentially disfranchised, who were not eligible to vote because of these durational residency requirements, and census figures show that three million and twenty-two thousand of those numbers would have, according to the questionnaire, would have participated in the election. The figure is smaller when you only look at those who would have participated.

Q Well, could I go a little smaller than that, that some people wouldn't admit that they wouldn't vote?

What I'm saying is, why stretch those figures so far?

MR. BLUMSTEIN: Well, it is possible, Your Honor, as the Amicus points out, that this might -- that it might overstate the actual disfranchisement of those who would vote. However, I would like to point out in this regard, one of the characteristics of the class of new residents are that they typically have higher education levels. They tend to have finished high school more frequently than the normal -- than the rest of the population, and that they tend to have been at least to some college to a significant degree more than the rest of the population.

There is also evidence to show, Your Honor, that people who have higher degrees of education, who typically find themselves in white collar and professional occupations tend to participate more frequently in the election process, and, therefore, I think, the figure is not as overstated as it might seem on its face. The new residents, I think, typically do participate, as a group, more, because of these characteristics.

Q Mr. Blumstein --

MR. BLUMSTEIN: Yes, sir.

Q You're all registered now, and ready to go, aren't you, in Tennessee?

MR. BLUMSTEIN: Yes, Your Honor. The District Court order was handed down on September 9th, 1970, and

since that time two general elections and one primary election have been held in the State of Tennessee. It might be interesting to add that Tennessee was a major political battleground in 1970, where former Senator Gore was defeated by the incumbent Senator Brock. This was an election of nationwide significance, and since this decision was one of the earliest handed down by the District Courts involving durational residency, there was no question that it got widespread dissemination among all the neighboring states and Tennessee, and there was ample opportunity for colonization and the other fraudulent devices that the state refers to, and there was no evidence whatsoever that was reported to me of any problems in this regard.

To be sure, the Registrar of Davidson County did make the statement that she'd have to insert a bicycle rack in front of her county courthouse, but this is the kind of armchair assertion that's not backed up by any data at all.

There was no evidence whatsoever of fraud, there were no -- there was no data that the state has brought to bear on this question.

In discussing the Constitutional claim, it is essential to look at the alternatives that the state has in order to prevent fraud, since we seem to have focused on fraud. The voter registration system was not -- the state-wide voter registration -- did not come into being in

Tennessee until 1951. The express purpose of voter registration as stated in the statute is to protect the purity of the ballot. The District Court found this as a fact. There is no interest that the state is protecting by duration of residency that cannot be protected in determining bona fide residency at the time of registration. There is no additional protection that the period of durational residency provides at all, and the state, just this morning, in fact, in discussing the need to purge voters and so forth, does not go to the question of why, at the time of registration, the state cannot make a determination of bona fide residence. This is the role of registration.

In fact, there are figures to indicate that the system of voter registration itself has raised a great obstacle to voter turnout. The voter turnout in the last three Presidential Elections didn't match at all what voter turnout was prior to voter registration laws being enacted, and there's a study that shows, in the 1880's and 1890's, voter participation was at a much higher level than voter participation is now.

Now, Appellee does not argue that voter registration is an impermissible bar on the franchise, but what Appellee does assert is that the only justification for this disfranchisement is that it does prevent voter fraud, but that that is a significant enough price to pay for prevention of fraud,

and that there is no need to have an additional penalty imposed, and that is the durational residency provisions. Moreover, there are --

Q You would let the state, in terms of the interests that it asserts, put on a thirty-day requirement?

MR. BLUMSTEIN: Your Honor, I think that there has been some confusion generated about that, and I'd like to set the record clear. There is no --

Q Mr. Blumstein, you agree that the -- that a man must be a resident of the state for at least thirty days before he can vote.

MR. BLUMSTEIN: Before he can vote, but not before he can register, yes, sir.

Q I understand that, but I just asked you, he has to be -- now, the only reason that the state can do that, I suppose, is in terms of the interest that you've just been talking about.

MR. BLUMSTEIN: Yes, sir.

Q And you say those interests are good for thirty days, but no longer. Is that right?

MR. BLUMSTEIN: Your Honor, there is no discrimination in that --

Q And if compelling it for thirty days, those interests are compelling, for any longer, they are not compelling?

MR. BLUMSTEIN: They are also, if it please Your Honor, they are also not discriminatory. They apply equally to long-time residents and to new residents alike.

Q I understand. I understand that. But you are just saying that -- you are saying that if the state attempted to put on any longer period that you'd have to be resident, you would say it's a violation of the equal protection.

MR. BLUMSTEIN: No, I think that would be different case, Your Honor. It would have to be analyzed under different Constitutional theory, because it would be applicable to new residents and old residents.

Q I don't see how you can say that the thirty-day provision applies equally to long-time residents and new residents. It's a matter of degree, but certainly it discriminates against people who've been residents of the state only twenty-nine days, doesn't it? Or anything less than that.

MR. BLUMSTEIN: Or it discriminates against all those who have not attempted to register at that point.

Q Well, a person who is in the state twenty-nine and a half days or less may attempt as hard as he wants, to register, but he can't. So it does discriminate against him, doesn't it?

MR. BLUMSTEIN: Yes, sir, to that extent --

Q A new resident.

MR. BLUMSTEIN: -- to that extent, it does discriminate against him.

Q So it is a matter of degree, as the questions of my brother White implied, isn't it?

MR. BLUMSTEIN: To that extent, yes, sir, it is.

Mr. Roberts, in his argument, mentioned the concept of line drawing and whether this was an appropriate judicial function. In this case, there was -- the District Court did not attempt to draw lines to a permissible duration of residency period. It said that this was an impermissible imposition, regardless of how long the line was, provided that it discriminated in the way that we were talking about, Mr. Justice Stewart.

As far as colonization argument is concerned, the state protects its interests against fraud in several ways -- as far as -- in criminal penalties. There is a specific provision of the Tennessee Code, Section 2-2209, which makes colonization a criminal penalty, a felony, and imposes a minimum term of two years and a maximum term of five years for bringing in voters from out of state. There are similar provisions, Tennessee Code 2-1614 makes it a felony to vote when not legally entitled, and there are other provisions of the Tennessee Code which make it a misdemeanor to vote when not legally entitled to vote.

Moreover, there are -- the possibility of purge, as Mr. Roberts has mentioned, is another way of assuring this interest that the state has in maintaining the purity of the election. Also, Tennessee provides for a challenge system at the polls for people who are not bona fide residents. This is another way that the state's interest can be protected in this way.

In short, these durational residency requirements add nothing, nothing in a significant way towards improving the state's purity of the election system.

Q At this point, what are you asking us to do with Pope against Williams?

MR. BLUMSTEIN: Your Honor, I think candidly Pope against Williams, the reasoning in Pope against Williams, would have to be overruled in this case. But I think that there are certain factual distinctions in Pope against Williams that are germane. First, in Pope, Mr. Pope himself --

Q But you're going to overrule it anyway?

MR. BLUMSTEIN: Your Honor, the reasoning of that case, I think, is no longer applicable in this case. I believe, if it please the Court, that there are certain factual distinctions which also help distinguish the case.

Q Well, what I'm asking you is, do you want us to distinguish it or to overrule it, either one?

MR. BLUMSTEIN: I think, Your Honor, despite the

factual distinctions, candidly, it must be overruled. I was just pointing out that there are factual distinctions.

Q Well, there always are. There are never two cases alike, but I wanted to pin down your approach on Pope v. Williams, whether you felt it could stand to be distinguished because of the popularity of different approaches in the past, or whether it should go into discard. And I take it it is the latter that you are asking us to do.

MR. BLUMSTEIN: Yes, Your Honor, I think so.

Q All right.

MR. BLUMSTEIN: But, if I may beg your indulgence, I think that the factual distinction is worth at least mentioning at this point.

Mr. Pope was a resident of the State of Maryland for beyond, for more than the duration of residency provision. He was a resident for more than a year, and what he was challenging was the specific statute that required him to state his intent to become a resident one year in advance. I just think that factual distinction is worth making at this point.

The state has, in its brief, also asserted another interest, and this is in knowledgeability, learning about the local community. I think that the point that I raised before about the domicile requirement is worth mentioning here. There is no requirement, for example, in Tennessee,

that you physically be present in the state during the period of this duration of residency. There is no requirement that you physically reside. It's just that you establish your intent to remain indefinitely, and set up the indicia of domicile.

Q You've used both terms, "domicile," and "residence." Are you drawing any technical distinction between the two?

MR. BLUMSTEIN: No, sir, that's a slip on my part. The Tennessee courts have defined them as the same.

Q Well, what you're challenging is the right of Tennessee to say that they want people who are politically mature in relationship to the issues and the candidates. Is that it?

MR. BLUMSTEIN: Yes, sir. Tennessee is arguing that this period, this one year and the three month period is necessary for becoming knowledgeable about the candidates. I think it is interesting to note in this regard, sir, that the figures that Amicus Curiae brought to bear out Common Cause in the case, and I think it's recognized that the California case, in striking down its duration of residency noted that the campaigns typically now are conducted through the media, and the data that Common Cause showed -- that within the last thirty days, candidates spent from between seventy to eighty-five percent of their dollar for advertising, within this

last thirty day period.

Q Is that true on bond issues, for example?

MR. BLUMSTEIN: The data do not show --

Q Constitutional Amendments, and things of that kind?

MR. BLUMSTEIN: Sir, the data do not show, one way or another.

Q I suppose we could take judicial notice that money is not spent that way, generally speaking, on bond issue problems that are submitted to the voters. Would you agree with that?

MR. BLUMSTEIN: I'm not sure that I understand Your Honor's point.

Q Well, you were placing a great deal of weight on someone making a survey that most of the money that a candidate spends is spent in the last thirty days, on television, et cetera. I was simply asking whether the same thing is true with respect to a bond issue which is being submitted to the voters.

MR. BLUMSTEIN: Oh, as far as ascertaining the relevant factors behind the bond issue, again, I think that there's no indication why a long-time resident is necessarily more knowledgeable about the factors involved than someone who is a new resident, although I don't have any figures about the advertising expenditures.

In sum, the state has not shown that its interest in this case is compelling that durational residency requirements are required to prevent fraud or to insure knowledgeability. The case falls comfortably within the rationale that this Court has articulated in the Kramer case and within the Shapiro against Thompson case as far as interstate travel is concerned. Both of those fundamental rights are infringed in this case, and, therefore, the strict standard of review is triggered. Under this strict standard of review, the state has not met its burden of showing that its interests are compelling.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Blumstein.

Mr. Roberts, I think we won't ask you to split your rebuttal. You will have six minutes after lunch.

(Whereupon, at 11:58 a.m., the Court was recessed, to reconvene at 1:00 p.m., the same day.)

AFTERNOON SESSION

(1:00 p.m.)

MR. CHIEF JUSTICE BURGER: Mr. Roberts, you have six minutes for rebuttal.

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

One of the things that I wish to point out is the distinction that Adversary Counsel has attempted to make between the time elements of durational residence and saying that, thirty days, there would be no discrimination, but somehow or other reading into it that ninety days in the county would be.

I submit that there is no discrimination there as found in the Burg case coming out of Massachusetts. This would be applicable to everybody. There is no discrimination at all in it; anybody whether he'd lived in the state before or not, after three months in the county where he proposes to vote, would be entitled to do so.

Now, a little better case could be made out in behalf of what he has alleged in regard to the one year in the state, because there you could be discriminated against just by virtue of the fact that you lived across the state line, or even though you worked back and forth during the year, and then moved in for the three months preceding an election and satisfied the county requirement, but would not

have satisfied the state requirement.

Now, there was one other thing that I did wish to point out to the Court, and that is the obvious intent of Congress in this matter. As the Court is aware, the 1970 Voting Rights Act Amendment originally contained a provision that would have abolished the durational residency requirements in all elections.

It was Congress' decision to remove that. They rejected this proposal. Yet, despite that, somehow or other, our District Court, in its opinion, has read into that an interpretation that Congress really is supporting the proposition of abolishing residence requirements, when, actually, they had it in their Bill and then took it out on their own.

At page 9 of his brief, the Appellee, in discussing whether or not the voter waiting period is beneficial in weeding out ineligible voters, concludes that anyone who is willing to swear falsely that he is an eligible voter would just as readily swear falsely that he had been in the state a year, and in the county three months.

Well, that just doesn't necessarily follow at all. The second oath could be proven much more easily than the other one. All of the precinct workers at an election are local to the voting precinct, the judges, and the officers, and all, are local people. For purposes of identity, they can challenge any voter that comes up, even on election day,

if they have an opportunity to know that that person hasn't been in the community that long. They can challenge him, and the election commission decides itself, then, whether he really is entitled to cast that ballot, but there's no other way except for having a time element involved in a community, I submit, that for local people to be able to pull out the illegal voter.

Now, this could be a very serious thing in connection with the question of mobility. That's a two-edged sword, not only is there a lot more people moving intrastate and interstate as a result of the type of society that we now have, but that also goes the other way, too, and it offers an opportunity for a type of fraud that heretofore couldn't have existed. I submit that Mr. Ed. Crump in his day in my state would have had a field day out of a thirty-day cutoff deadline and no other residence requirements for voters. That's just the way it works.

I had the opportunity, a few years ago, to be state election coordinator in my home state, and while that, I organized a statewide association of county election commissioners, and I heard every kind of complaint, and I submit that if there is any way of stealing the elections, somebody has got a way figured out how to do it, and every time we open a gate like this and let fraud get into our elections, then the republican form of government that our

Article IV, Section 4 of our Constitution guarantees no longer will be applicable to us.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Roberts.

Mr. Blumstein.

The case is submitted.

(Whereupon, at 1:06 p.m., the case was submitted.)