In the

Supreme Court of the United States

MAYOR OF THE CITY OF PHILADELPHIA, ET AL.,

Petitioners,

vs

EDUCATIONAL EQUALITY, ET AL.,

Respondents.

No. 72-1264

Washington, D. C.
December 10, 1973

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Washington, D. C.
Monday, December 10, 1973

The above-entitled matter came on for argument at 10:04 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
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

JOHN MATTIONI, ESQ., Deputy City Solicitor, Philadelphia, Pennsylvania; for the Petitioners.

EDWIN D. WOLF, ESQ., One North Thirteenth Street, Philadelphia, Pennsylvania; for the Respondents.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first in 72-1264, Mayor of Philadelphia v. Educational Equality League.

Mr. Mattioni?

ORAL ARGUMENT OF JOHN MATTIONI, ESQ.,

ON BEHALF OF PETITIONERS

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

This matter arises out of an action commenced in the United States District Court for the Eastern District of Pennsylvania, wherein the respondents sued the Mayor of the City of Philadelphia, then James H. J. Tate, and the members of the Educational Nominating Panel. The allegations made contended that appointments to that panel discriminated on the basis of race and therefore it was requested that the appointments made by the Mayor be stricken as invalidly made under the Constitution.

In order to fully understand what the case is all about, it is necessary to understand something about the educational home-rule charter provisions of the City of Philadelphia and the method of selecting and appointing members of the School Board.

In 1965, the electors of the City of Philadelphia adopted a new home-rule charter establishing home rule and

a home-rule school district. This was as a result of a commission appointed by Mayor Tate which studied the problem and the nature of the school district some years before the City of Philadelphia having obtained almost complete home rule in all other aspects.

The Legislature of the Commonwealth of Pennsylvania had authorized now, something new, home rule for the school district of Philadelphia as well.

A commission was appointed and, because of various problems, came up with what essentially is experimental -- was experimental in nature and also represented something of a compromise. The method of selecting members of the School Board which is not in issue in this matter before the Court, was determined essentially as follows:

The Mayor of the City of Philadelphia would appoint 13 members of the Educational Nominating Panel. Those 13 members would in turn for each vacancy on the board recommend initially three and, if the mayor requested, an additional three persons from which the Mayor could make the appointments to the Board of Education.

The 13 of -- of the 13, 9 were required to be appointed from certain classes of organizations within the City of Philadelphia. They were supposed to be city-wide in scope and representative of such groups as the labor, commercial interests, intergroup relations, parent-teachers associations, public

education representatives, general community organizations of citizens, organizations for the purpose of improvement of local government, higher education in the form of someone who is the head of a higher education institution in the City of Philadelphia, and a group concerned with the physical resources of the city.

Q Were these groups indicated by name or by category?

MR. MATTIONI: By category, Your Honor. They were not -- the charter did not specifically say Group X must be the one from which appointments were made., but rather said, for example, with respect to labor organizations, a council or other organization of labor organizations in the city. And it did not say that it had to be a particular one. The framers of the charter, being aware and being concerned with the fact that if you specified a particular organization now, that might go out of existence in the future, or it might become invalid in the sense that although still in existence it might shrink in size and not be city-wide.

Q Mr. Mattioni, perhaps you have covered this. I want to be sure. There is no attack made here on the composition of the school board itself as distinguished from the panel?

MR. MATTIONI: That is correct, Mr. Justice Blackmun. The attack here is solely on the appointments made to the

Educational Nominating Panel, not to any appointments made to the School Board or the School District of the City of Philadelphia.

Furthermore, there is no attack made on the charter scheme for appointments to the Board of Education, nor any attack made on the validity of the nine categories, and then after those nine there is four that -- four appointments in essence at large by the Mayor, where he has total discretion in terms of those four.

As I say, I believe that this is essentially an experimental type concept, at least until this attack it seemed to work reasonably well.

The heart or guts of the whole procedure was that you wanted to have on this panel persons who represented in essence all of the various kinds of problems that a school board and a school district could come -- would have to deal with during the course of its existence. For example, as we all know, in large urban school districts now, and indeed in many of the smaller ones, there are frequently substantial labor-management relations problems. Of course, in Philadelphia, where we do not escape this, in the last couple of years we have been subjected to rather extended and protracted labor disputes with school teachers and labor disputes with other support personnel in the school district.

The school board has to contend with economic problems

of rather major proportion. And again the purpose of the charter was to make sure that we had represented on the nominating panel people who could screen applicants and possible nominees for the school board to insure that they met at least minimally all of the necessary requirements. And the concept was to have people on the nominating panel who had expertise in their particular areas, as for example an organization dealing with inter-group relations, because it is quite clear that urban school districts have substantial race relations problems and other problems of a similar nature. And I think this is brought out by the fact that the head of the charter commission wrote -- and it is quoted in respondents' brief -- the panel's composition should be so arranged in the charter that it can always constitute a balanced representation or cross-section of the entire community, all of the community's ethnic, racial, economic, geographic elements and segments.

And the point here, and the reason why I am dwelling on this is, it is important to understand that this charter and this charter's scheme was intended to be representative in a very much broader sense than simply on the basis of black and white. Respondents would have it that the only consideration is representation on the basis of black and white.

I believe this is further borne out by the fact that we are here dealing with the fourth largest city in the United States, a city with a population of approximately two million

people, a city which has in its populace persons from all kinds and all manner of racial and ethnic backgrounds. For example, there are large concentrations of Italian-Americans, Russian-Americans, German-Americans, there is a large concentration of blacks, and of course blacks, like all other people, can't be put into a bowl and mixed up, these are diverse peoples. If nothing else, they can be divided into two broad general categories, blacks who were in Philadelphia for hundreds of years, who predated even the Constitution of the United States, and those who are of very recent migration from areas in the South.

But in addition to that, in addition to the variations in population, Philadelphia is a large industrial city. It has heavy industry, oil refineries, smelting industries, it is a large commercial center, it has banks and brokerage houses and stock exchanges, it has large commercial areas in retail sales and the like. It is a major port facility in the United States. It is probably the third or fourth largest port in the United States in terms of tonnage. And Philadelphia, perhaps more important than all of these things, is known as a residential city. And, of course, it is a city with problems, very substantial problems. But those problems are being dealt with here notwithstanding all of that.

Respondents came into court alleging that Mayor Tate was guilty of discrimination on the basis of race in making his appointments to this Educational Nominating Panel. This was

by the respondents almost entirely on a strictly statistical basis. But at no time in the court below did the respondents ever prove that the statistics upon which they relied had any statistical significance. Not only did they not prove statistical significance, but they never prove the practical and actual significance in an ordinary, every day sense.

What they did prove was that in 1971 Mayor Tate appointed two blacks out of 13 members to the nominating panel, that from 1965 through the appointments made by -- in 1971, blacks appointed to the nominating panel on the basis of an average of two out of 13 or, in percentages, approximately 15.4 percent.

They also attempted to prove discrimination in appointments to the nominating panel on the basis of alleged discrimination by Mayor Tate in his appointments to city government, and that was purported to be done by establishing from the records produced by the City of Philadelphia that of all of the persons appointed -- not necessarily by the Mayor, but employed by the City of Philadelphia, earning $24,000 or more, that only approximately 9 or 12 percent -- and the particular percentage escapes me at the moment -- were black, as opposed to a population of 33 percent black, and that in the boards and commissions, the Mayor appointed 12 percent blacks as opposed to the same population of 33 percent.

The respondents went further than that and said that

because the population of the school district in terms of its pupils was approximately 65 percent black, that this necessitated some additional consideration of race, I believe in this instance a new category never before sanctioned by any court, referenced to the school population as opposed to the city population, a person who should be considered as eligible for nomination -- appointment to the nominating panel.

Counting this, the petitioners submitted evidence -- first of all took the position that there was no statistical significance proved, and second of all submitted evidence that the Mayor's appointments to various positions in city government insofar as the relationship between black and white was concerned was substantially better than private industry in the same city, substantially better than national averages in the United States, substantially better than other governmental agencies.

More importantly, petitioners put in evidence which was not contradicted in any way, shape or form, that the city of Philadelphia's work force is 41 percent black, as opposed to 33 percent in the population; that 24 percent of the middle management was black, that somewhere between 9 and 12 percent of upper management was black.

Now, from this, of course, the respondents would derive some kind of discriminatory pattern. However, it was further established that under then Mayor Tate's regime, as

chief executive officer of the City of Philadelphia, the pattern of employment of blacks in all levels, in the lowest levels, in middle management and upper management, had increased substantially over the eight or nine or ten years that he had been in office, that he had continually taken pains to insure that qualified blacks were continuously appointed and promoted and reappointed and repromoted as fast as could be done under the circumstances, and without infringing upon the rights of any other person or persons in the community.

The only complaint in essence that respondents have is that in their view it wasn't done fast enough and because there was some alleged statistical under-representation of blacks, that all of a sudden this had to prove racial discrimination on the part of Mayor Tate. But quite the contrary is true when considered in complete context.

Respondents went one step further. They said that they proved actual discrimination on the part of Mayor Tate in his appointments, and this goes back then to the question of what that evidence was. And bearing in mind that the District Court judge who heard the evidence refused to find actual discrimination, the Court of Appeals, on the other hand, found that there was evidence of actual discrimination which was not rebutted on the record.

We believe that the Court of Appeals clearly violated rule 52(a) of the Federal Rules of Civil Procedure because the

finding or the refusal to find discrimination by the District Court judge was not clearly erroneous and was in fact supported by substantial evidence in the record. The only evidence of alleged actual discrimination was the testimony of W. Wilson Goode, who said that in 1969, two years before the actions of which complaint is now made, Mayor Tate had publicly said -- at the time the Mayor made a public statement that he was not going to appoint any more Negroes to the board because in his feeling they had adequate representation and that he was going to appoint someone from the nominees to the Board of Education.

Well, I submit that that is rather thin ice upon which to bottom a finding of actual discriminatory intent on the part of the chief executive officer of the City of Philadelphia. Not only is that rather thin evidence, but it was clearly refuted in evidence by the person who had been instrumental in making the appointments, acting as an aide to Mayor Tate. He specifically said that Mayor Tate was an old war horse politician and that he took into account all of the necessary things in his -- one of his primary criteria in making appointments was to be sure that everybody had adequate representation on these kinds of boards or commissions, including the nominating panel.

And of course, in the final analysis, the question really comes down to looking at the Educational Nominating Panel itself, considering what its purpose was, considering

what it was intended to do, intended to achieve, and how it was intended to achieve it, a finding of discrimination, whether inferentially based on statistics, of which the significance was never proved, or based upon the meager testimony of W. Wilson Goode, which was contradicted and which was not accepted by the trial judge who heard the testimony, is grossly unfair to the Mayor of the City of Philadelphia.

Indeed, it does more harm to the City of Philadelphia than good in every way, shape and form that could be imagined or considered.

The respondents placed particular emphasis on several decisions of this Court, and I believe that they rely most strenuously upon Calvin Turner v. Fouche, a decision by this honorable court in January of 1970.

The difficulty I believe with that, in placing reliance upon that case, which must of course be read in tandem with Carter v. Jury Commissioner of Green County, is that there the issue involved appointments to a jury panel, a grand jury panel which in turn then appointed the school board. And the evidence showed rather clearly and dramatically that discrimination was involved in the selection of grand jurors by the jury commissioners. Now, the jury commissioners in that case stand essentially on a footing, on the same footing with the Educational Nominating Panel in this case. Interestingly enough, the plaintiffs in that case wanted to set aside the

appointment of the jury commissioners, and this Court refused to set aside that appointment, notwithstanding that all of the jury commissioners were white, and notwithstanding it was proved that they were guilty of discrimination.

In the matter before the Court now, there is not one iota of evidence to establish that the Educational Nominating Panel, the very panel which is being attacked by the respondents, acted in any way in a discriminatory manner in making his recommendations for appointment to the Mayor. There isn't even a contention made here that the Mayor discriminated in making his appointments to the School Board. That is the board which is charged with the responsibility of running the school system, not the Educational Nominating Panel. It was simply an instrument to aid the Mayor in making nominations to the School Board.

Of course, the reason why no contention was made to that effect is rather clear. At the present time, 33 percent of the School Board is black, and at the time that this case was in suit, 24 percent was black, and the School Board has never been eithout black representation, nor has the Educational Nominating Panel been without black representation.

Indeed, if the criteria sought to be established by respondents were accepted by this Court, we would have an almost insurmountable problem because every recognizable ethnic minority, every recognizable minority of any kind, be it Asiatic, be it Italian-American, be it Russian-American, black

American, would have the same right to proportional representation on this panel. But this is a panel of 13 members, and that is an impossibility.

Respondents' witnesses testified, for example, that the Puerto Rican-Americans in the City of Philadelphia were absolutely entitled to representation on this panel. But the problem with that is that on a proportional basis they couldn't be entitled to representation because they represent less than three percent of the population of the City of Philadelphia, and one person on the Educational Nominating Panel represents eight percent, so that they don't even have enough to say that we are entitled to half of one person on the panel. And if we were to accept that proposition, then no person who was Puerto Rican could ever be appointed to the panel because he is not entitled to his proportion on that panel. No person of Chinese-American extraction in the City of Philadelphia could ever be entitled to such representation because although we have a strong and viable Chinese-American community in Philadelphia, it is small, and it is too small to be entitled to a proportionate share on this panel.

And so under those circumstances it would represent a gross inequity to all other minorities, and indeed to those who might be considered as a majority, if there is one, in any urban center in the United States today.

Q Mr. Mattioni, let me get this evidence in focus.

Is it correct to say that -- well, I ask, is there any evidence other than the statistical material, the newspaper comment, and the Deputy Mayor's alleged lack of knowledge that supports the decision of the Third Circuit here?

MR. MATTIONI: I believe there is not, Your Honor. I believe, however, that respondents could point to one other piece of evidence, and that is the fact that the School Board of the City of Philadelphia is under an order to desegregate the school system of the City of Philadelphia. However, that doesn't really bear on the Nominating Panel, because the Nominating Panel has absolutely no responsibility with respect to running the School Board.

Q One other question. Is there any allegation of discrimination here that is not directed personally to Mayor Tate as distinguished from the current Mayor?

MR. MATTIONI: I believe there is not, Your Honor.

Q And yet you have injunctive relief granted.

MR. MATTIONI: Well, the Court of Appeals indicated that an injunction should be entered against the present Mayor because Anthony Zecca, the Deputy Mayor to James Tate, is still on the staff of Mayor Rizzo. Of course, his position on that staff is substantially different. That is the only nexus or connection. Other than that, there is none.

Q Is there any indication that the Deputy Mayor who is held over exercises independent judgment free from the

Mayor's supervision?

MR. MATTIONI: Absolutely none, Your Honor.

Of course, one thing I have not touched upon which also should be kept in mind by this Court is the fact that we are here dealing with the appointments by the chief executive officer of the City of Philadelphia. Of course, at first blush one might say, well, what has that got to do with all of this? I mean, after all, he is not the President of the United States. But it has this much at least to do with it: He is the chief executive officer, he is clearly the representative of the executive branch of government, and he -- we are here dealing within the context of the appointments to be made, a clear question of executive discretion in the appointment power of the Mayor of the City of Philadelphia.

Now, the Court of Appeals took the position that petitioners had argued that if we could only refrain from interference with appointments of the Mayor or chief executive in terms of appointments that are close and personal, in other words I think they were suggesting that only those personal staff members of the chief executive officer were considered, were entitled to any kind of protection.

We submit to this Court that that is not an appropriate method of approaching the problem at all. In a long line of cases in this Court, appointments of executive officers of the President of the United States have been protected again

and again and again and again. This Court has determined quite clearly that where the President of the United States exercises discretionary power committed to him, that courts either should not interfere or certainly should be loathe to interfere except on the weightiest of evidence.

The Mayor of the City of Philadelphia is not the President of the United States, but he is an executive officer. Of course, we do have other problems here. We have problems of the federal-state relationship, which we have not briefed because I don't think those are really terribly important here, but they have to be kept in focus as well. And we are now talking about a man who was charged by the people who elected him with exercising his discretion in making the very appointments that are here under attack. And we submit very respectfully that it would be totally inappropriate, it was totally inappropriate for the District Court to even consider the matter. It was inappropriate for the Court of Appeals not only to consider the matter --

Q Are you talking about the cases where federal courts have ordered cities to employ a certain number of policemen of a certain race? You have forgotten those, haven't you?

MR. MATTIONI: I have not forgotten them, Mr. Justice Marshall. Indeed --

Q Well, you said there was a long line of cases on one side. There is a long line on the other side, too, isn't

there?

MR. MATTIONI: I submit, Mr. Justice --

Q And you do admit that the Mayor is bound by the Constitution, so why try to get too much out of it?

MR. MATTIONI: Well, except for one thing, Mr. Justice Marshall. The cases you are talking about did not really and truly involve discretion at all. When you are hiring supposedly on an objective basis, on a basis where people come in, they take a test and either they pass it or fail it, they take a physical exam, they pass or fail, there is no discretion.

Q You mean that the Mayor of the City of Philadelphis can say I am not going to hire a Negro under any circumstances and nothing can be done about it?

MR. MATTIONI: Of course, factually that did not occur here, Mr. Justice.

Q Well, why try to go too far?

MR. MATTIONI: I believe that nevertheless, it is necessary --

Q Why don't you rely on the fact that you say it wasn't proved in this case, without saying that he is exempt from being looked into?

MR. MATTIONI: I think, Mr. Justice, that even if --

Q Do you say that the Mayor cannot be questioned by a federal court?

MR. MATTIONI: I believe that in a case of this type

he should not be.

Q Let me get it straight. The Mayor could announce openly that he is not considering for the Nominating Panel any Negroes.

MR. MATTIONI: If he did he would hardly be reelected in Philadelphia.

Q That isn't what I ask you, is it?

MR. MATTIONI: I know, and I --

Q Well, how about that? How about under the 14th Amendment, would the Mayor be subject to any kind of legal redress?

MR. MATTIONI: I submit that he would not, Mr. Justice, and the reason for that is this --

Q Does your case depend on that?

MR. MATTIONI: Sir?

Q Does your case depend on that?

MR. MATTIONI: No, it does not, because I don't believe that anything like that has been proved. On the other hand, I believe that, if nothing else, sir, what must be kept in mind here is this, that this is the chief executive officer of the City of Philadelphia and I certainly --

Q Would you take the same --

MR. MATTIONI: -- of that fact is necessary which requires a court to at least step back and say, well, before I am going to get involved in this case, there has got to be some

weighty evidence establishing allegations of actual discrimination.

Q Would you take the same position if the Mayor was appointing the School Board members directly and he announced that he was not considering any Negroes for the School Board?

MR. MATTIONI: I believe I would, Mr. Justice, for this reason --

Q And judges and anybody that he had a part in appointing?

MR. MATTIONI: Yes, Mr. Justice, and the reason for that is simple. This is still a tripartite form of government and if we are to have faith in the electors of our country and in our cities and the whole works, if we are going to have any faith in that system at all, we have got to trust to the good judgment of the electors that if we have somebody who acts in that gross a fashion that he will be turned out of office, post haste.

Q Are you aware that this Court has ruled against governors of states?

MR. MATTIONI: Yes, Mr. Justice Marshall.

Q Well, would you say the mayor has got more than the governor has?

MR. MATTIONI: In different context, the mayor is fully subject to every order of this Court, and this Court has

full authority, but I am saying in this kind of context this Court should not --

Q Well, what do you mean, this kind of context?

MR. MATTIONI: In this context, where we are dealing with a question of executive discretion as opposed to other types. If the Mayor, for example, got up and said I am not going to obey --

Q Do you consider calling out the National Guard in the same category?

MR. MATTIONI: It depends on the circumstances, Mr. Justice.

Q Well, in Constantine this Court didn't have any trouble questioning the governor about that.

MR. MATTIONI: But again, Mr. Justice, I think it depends on the particular facts in a given case.

Q Your difference is this is Philadelphia.

MR. MATTIONI: No, not that, Mr. Justice.

MR. CHIEF JUSTICE BURGER: Mr. Wolf?

ORAL ARGUMENT OF EDWIN D. WOLF, ESQ.,

ON BEHALF OF RESPONDENTS

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

It is a great honor for any lawyer to appear here. I am pleased that I am here younger than my grandfather, who didn't appear here until he was 80, and my father hasn't

appeared here at all.

I represent the respondents in this case. In a way, you see in me a stand-in for the United States Court of Appeals for the Third Circuit, for it is their decision and their opinion that I am here defending. My clients therefore come before this Court not as plaintiffs, which they were below, but as parties who were found by the Court of Appeals to have proved their complaint of a violation of the 14th Amendment.

I make this point at the outset because our argument today is that the issue before this Court is whether there is anything in the decision of the Court of Appeals that warrants this Court's attention. The essence of our argument is that there is nothing, that the Court of Appeals dealt thoroughly and carefully with the unique facts situation, applied its earlier decisions and the decisions of this Court in an unexceptional manner and neither developed nor applied a legal principle that warrants the attention of this Court.

The underlying facts of the case have been stated by the petitioner. I would like to add just a couple of points. First of all, with regard to the purpose of the panel, the defendants below introduced a substantial amount of material which purported to represent the legislative history of the composition and the establishment of the Educational Home Rule Charter.

One element that they did not mention that emerges

from these documents is that there was a good deal of discussion below before the enactment of the charter about the question of whether the School Board should be elected or whether it should be appointed. There was substantial support for the election proposition. The compromise that resulted was this nominating panel. And particularly in Exhibit D-7-X is a statement by the Chairman of the panel, a leading industrialist in the city, that the panel was supposed to be a counterpart of popular election. I think that notion is important in considering exactly what the concept of representation means.

Q You mean the selection of the panel or the function of the panel after it was selected?

MR. WOLF: The function of the panel after it was selected. The panel was supposed to play the role of an election in a democratic system.

Q Would you say there is quite a difference in the two?

MR. WOLF: Oh, yes. Oh, yes. Because, as was pointed out in response to Mr. Justice Blackmun's question, we are not attacking the action of the panel.

Q How many Catholics, for example, are there on this nominating panel at the time of this litigation?

MR. WOLF: I don't know exactly. I think there were probably two or three, as best I can tell. We didn't inquire as to religious affiliation at the trial, so it is hard for me

to tell. I know that --

Q Well, don't you think that is of any importance?

MR. WOLF: Well, I think that in this case we were trying to establish only that there was exclusion from consideration of qualified blacks to the panel, and I think that that is an important notion about our case. We have never maintained that blacks are entitled to any particular proportion on the panel. We are not -- the Court of Appeals did not hold that, the Court of Appeals did not order proportional representation as a remedy.

Q Do you know what proportion of Catholics live in the City of Philadelphia?

MR. WOLF: Yes, I know that there are more Catholics than there are blacks. I think it is about 40 percent. However --

Q But they have only two members on the panel, did you say?

MR. WOLF: There are not very many Catholics who are in the public schools because there is a substantial archdiocese school district in Philadelphia.

Q Well, would that in turn make a difference in your mind?

MR. WOLF: No, because, again, we are not talking about whether everybody is represented. We are talking about whether there was an a priori exclusion of blacks from

legitimate consideration as members of the panel.

Q You don't know whether there was any such exclusionary attitude with respect to other minorities?

MR. WOLF: No, we did not inquire into that. And our clients would not have had standing to raise that argument. Of course, maybe they would have. I don't know whether they are Catholic. I didn't inquire into that, because the issue that we are concerned with is the exclusion of blacks from consideration.

The first element of proof that we developed was the composition of the nominating panels. In 1965, there were 10 whites and 3 blacks. In 1967, there were 11 whites and 2 blacks. In 1969, there were 12 whites and 1 black. And in 1971, initially there were 12 whites and 1 black, and subsequently one of the whites indicated to the Mayor that he was no longer the chief executive of an organization and he was replaced by a black.

This three, two, one, two pattern, I would suggest, and was found by the Court of Appeals not to be conclusive proof of racial discrimination, but was considered by the Court of Appeals to be evidence that was consistent with an inference of racial discrimination.

The second thing that we proved that the District Court found as a fact, and the Court of Appeals accepted as a fact, was that there were black organizations that met the

standards set forth in eight of the nine categories in the charter document.

We also proved, and the District Court found as a fact, and the Circuit Court accepted as a fact, that the person who in fact put together the list of names, the Deputy Mayor, Mr. Zecca, did not know of many of these black organizations. These are findings of facts 16 and 17 in the District Court's opinion.

We subsequently proved a pattern of under-representation of blacks in other appointments by the Mayor. We did not prove discrimination. We did not go into that issue. What we did prove, however, was numerical under-representation. And I think if you look at the appendix, pages 5 to 23, and you see -- you can see in a very graphic way the -- what I would regard as a litany of exclusion. You have lists --

Q What pages?

MR. WOLF: Pages 5 to 23 in the appendix, Mr. Justice Stewart.

Q Thank you.

MR. WOLF: -- particularly with regard to the boards, commissions and authorities of the City of Philadelphia, beginning on page 17. If you look at the third column, and you see the number of black persons, on most of these there is either zero or one. That is a litany of tokenism, I think. And although we did not set out to prove --

Q What does this have to do -- would you relate that to the panel problem that we are dealing with? Do you mean this shows an attitude on the part of the Mayor or someone?

MR. WOLF: Well, Mr. Chief Justice, I think that the principal issue in this case is how do you prove a case of racial discrimination. Last term, in McDonnell-Douglas v. Green, Mr. Justice Powell set out in some detail the order of proof and the method of proof in a case of racial discrimination. And one of the things that he said was that when you have a respondent or a defendant or an employer coming forward to say that he had valid reasons not to hire or to have taken the personnel action in question, that you could look at other employment patterns by the same person to determine whether his defense was pretectual -- is the word that Mr. Justice Powell used. And, of course, this is what the lower federal courts have been doing ever since Title VII of the Civil Rights Act of 1964 was enacted.

The question of the general employment pattern, although not determinative, is relevant as a matter of a prima facie case. And it was for that reason that we introduced that evidence. And in the District Court's opinion, some of that was the subject of a finding of fact, 17 to 19. There was a reference to some of this evidence.

The Court of Appeals did not refer to it, although, on the other hand, the Court of Appeals did say that it was

considering the record as a whole.

The final evidence that we introduced was testimony by one of the plaintiffs, Wilson Goode, and I think that testimony is important not only for the purpose that it was cited by the Court of Appeals, but also to give this Court an idea of what was going on, what the black community was feeling about this Educational Nominating Panel, and what their response was to this particular pattern of appointment. And in that context, what happened in 1969 does become important and does reflect on 1971. And, as the Court of Appeals said, it is consistent with an inference of discrimination. Again, it does not prove that in 1971 the Mayor discriminated, but it is evidence --

Q Is that a correct standard of review for a Court of Appeals, reviewing findings of the District Court?

MR. WOLF: Yes, because the --

Q Well, can the Court of Appeals reverse if they find that contrary conclusions of that of the District Court is a permissible conclusion?

MR. WOLF: Well, in this context, they can because the issue is not a factual inference to be drawn but a legal inference to be drawn. And the legal inference is was there sufficient evidence in the record to establish a prima facie case. If there was sufficient evidence to establish a prima facie case, then the burden shifts. This also was made clear in McDonnell-Douglas v. Green last term. And that is why the

question of the Court of Appeals was the right question. And I think that they were correct in concluding that a prima facie case of racial discrimination was made out, because a prima facie case is not conclusive proof.

When I was an Assistant District Attorney in Philadelphia, a prima -- in trying criminal cases, a prima facie case was merely the establishment on the one side of the elements necessary to make out an offense. It was not the determination beyond a reasonable doubt or beyond any kind of doubt. It was simply the establishment on the record of elements with which, if unrebutted, would be sufficient to make out a prima facie case. That is a question of law, and that is the question that the Court of Appeals addressed. And it is the question on which it reversed the District Court.

Mr. Goode's testimony discussed the efforts of the black community to convince the Mayor to appoint additional blacks to the Nominating Panel and to the School Board. He recounted that in 1969 the efforts of the black community had had an effect on the then existing Nominating Panel, and that the Nominating Panel had submitted two out of three -- in submitting three names for a vacancy that came out, submitted two black names. And he also testified that the Mayor became angry at this and made a public statement that he was not going to appoint any additional blacks to the panel -- to the School Board.

And I think it is important that this testimony is not, Mr. Justice Blackmun, based only a newspaper article. The newspaper article was shown to Mr. Zecca in his cross-examination to see what his response was. But Mr. Goode did not testify from the newspaper article. In fact, the newspaper article itself stated that it was based on statements that the Mayor made on television and, although Mr. Goode did not testify to this, and perhaps this was an omission of mine, he did see it on television. He was not cross-examined by the City Solicitor to determine whether his information was hear-say, and the record only shows that he testified that he knew that the Mayor made this statement.

The questioning of Mr. Zecca in this regard brought forth only that Mr. Zecca did not recall the incident. That was on page 66 and again on page 93 of the appendix. Mr. Zecca was asked, "Do you recall?" And he said, "No, I don't recall."

Well, those I think are the principal facts. With respect to the facts in defense that the city developed, I think it is important to note that Mr. Farmer, who was the Chairman of the Philadelphia Commission on Human Relations, did testify that there were 41 percent blacks in the Philadelphia City Government. I had always assumed at trial, beginning at trial and until I received the reply brief from the city, that the Mayor did have something to do with the personnel practices of the city, but according to the reply brief apparently the

personnel director is independent of the Mayor. And in looking at the charter, I found that that is true. So I am not sure that the 41 percent city employment does prove anything about the Mayor.

On the other hand, the testimony of Mr. Farmer showed that he -- neither he nor anyone on his staff knew that there was a drastic reduction in black employment in the Philadelphia Police Department, which was shown in another action in Federal District Court, brought by the Commonwealth of Pennsylvania, alleging employment discrimination in the police department. That is on page 110 of the appendix.

And Mr. Farmer, in his capacity as the chief city officer responsible for discrimination in employment in the city, simply didn't know that this had occurred in the Philadelphia Police Department.

Well, to go back to what the Court of Appeals did: The Court of Appeals reviewed these facts and stated with regard to them that they were consistent with a finding of racial discrimination, and then applied the standard developed in the jury cases of how do you prove racial discrimination. And they said the way you prove racial discrimination is first of all you get a -- you find an under-representation of blacks, second of all, you find an opportunity for discrimination, and then that is enough to make out a prima facie case. And if there is no rebuttal or at least no rebuttal of any legal

weight, then you conclude that the case has been made out.

Now, again, I think that what we are always concerned with is what is the record in the case. What is the evidence that was before the court. Now, it may be that if Mayor Tate had testified, he could have satisfied everybody. He could have satisfied the District Court, the Court of Appeals, this Court. He might even have been able to satisfy the plaintiffs in the case that he did not discriminate. But he didn't testify. And the Court of Appeals made this point in its opinion. It said the Mayor didn't testify, and so we don't really know. But what we do know is what the evidence is on the record.

Q Do you think Mayor Rizzo ought to have a chance to testify before an injunction is entered against him?

MR. WOLF: Absolutely. Absolutely. And I think the Court of Appeals also made that clear.

Q But the injunction was directed to issue against him.

MR. WOLF: Well, I think the Court of Appeals -- the Court of Appeals began its discussion of remedy by saying it is for the District Court to determine the precise nature of the relief. It did, however, suggest that prospective relief is appropriate.

Q You say then that without further proceedings, an injunction should not issue against Mayor Rizzo?

MR. WOLF: Yes, that would be my position. But, on the other hand, I think as --

Q That isn't the Court of Appeals position, is it?

MR. WOLF: Well, the Court of Appeals I think was speaking to the proposition stated by Mr. Justice White most recently in Alexander v. Louisiana, quoting Louisiana v. United States, with regard to the obligation of a federal court not only to declare racial discrimination when it sees it, but also to grant effective relief to see that its effects are eliminated and that it does not recur in the future. That is the question that will be before the District Court. And I cannot tell you right now whether I think an injunction should issue against Mayor Rizzo, or if, if it should, what its terms should be.

Q I thought the Court of Appeals rather emphasized the fact that the Deputy Mayor remained the same person.

MR. WOLF: Well, the Court of Appeals said, in Footnote 21, on page 49 of the petition for certiorari, which is the point that I was just making, nevertheless on this record Mr. Zecca continues as a Deputy Mayor. And since this court finds that plaintiffs have shown on this record discrimination in regard to the present panel, the federal courts must assure that the appointment of the 1973 panel is free from taint.

And I think that in this whole discussion of remedy, which appears in really only one paragraph, on pages 48 and 49 of the petition, that there is an emphasis on the fact that

they are dealing with a record. For example, the last sentence in Footnote 21 says, also we repeat that the defendant Mayor never testified and the court passes no personal judgment on him.

Q Well, you suggest in any event we read the Court of Appeals opinion as though it did not direct the District Court to issue an injunction against the Mayor?

MR. WOLF: I think that's true. I would, as a practical matter, I would take that position --

Q And that if the Mayor did absolutely nothing on remand and injunction should not issue until the other side notices some further proceedings?

MR. WOLF: I am not sure that I -- the Mayor has already appointed a 1973 panel.

Q Yes, but the Mayor -- but with respect to whether an injunction should issue against him or not, the burden is not on the Mayor to go in and have some injunction vacated?

MR. WOLF: No, no. No, and that is one of the problems with this case. There is no order of the District Court to review. There is a suggestion of some of the considerations that the District Court should keep in mind when it comes to entering an order.

Q So I take it then you really -- it sounds to me as though you would really be satisfied if whatever part of this judgment was declaratory was affirmed?

MR. WOLF: Well, I think that I would not read --

Q With respect to the Mayor.

MR. WOLF: I think that the appropriate disposition of this case, as far as I am concerned, is to remand it to the District Court for further proceedings to determine the precise nature of the relief to which plaintiffs are entitled.

Q Do you think there is still the case of controversy there?

MR. WOLF: Oh, yes.

Q Between Mayor Rizzo and the plaintiffs?

MR. WOLF: Oh, yes, there is definitely a case in controversy. Of course, as cases go up on appeal, the underlying facts change, and the city government went on.

Q Yes.

MR. WOLF: We initially sought to enjoin any action by the panel, but we were denied that relief and the panel did act. It did submit names to the Mayor, the Mayor did appoint members to the School Board for a six-year term, and they are presently sitting.

Q I suppose that if this suit were brought, had been brought for the first time now, after a new Mayor had been elected, and all you attack was the activities of Mayor Tate and introduced no more evidence and purportedly introduced no more evidence than you introduced in this case, you might have some trouble about having a case of controversy.

MR. WOLF: No, because there are people sitting on the School Board as a result of the activities of the 1971 panel. And like in Turner v. Fouche, on remand, the remedy is to remove them.

Q Well, that isn't what you -- you aren't suggesting that the School Board members be removed, are you, in this case?

MR. WOLF: That is a possible remedy on remand, and the Court of Appeals again said in its amendment to the opinion, which was filed in February, at our request, on remand the District Court -- this is on page 53 of the petition for certiorari -- the District Court should consider the continuing effectiveness of appointments to the board made after August 1971 on the basis of all the facts which may be developed at the hearing on such remand.

Now, it is entirely possible that the District Court, in its exercise of equitable discretion, could conclude that it will not remove these members of the School Board, for one reason or another. On the other hand, it clearly is open to it to do so. And by analogy to Turner v. Fouche, where the order entered by the District Court on remand was in fact to remove the School Board members who had been appointed as a result of the unconstitutional process, that would be a possible remedy here. And I think that as far as my clients are concerned, if we are successful here, and if the case is remanded to the

District Court for the entry of an order, we will conduct some discovery and we will take testimony and then we will have to decide as a matter of the public interest what remedy we desire to seek.

Q Mr. Wolf, supposing that after the 1976 presidential election, whoever is then President-Elect is asked whether he plans to appoint a Catholic to the Cabinet, and his response is no, I don't, I didn't get any support from Catholics in this election and I really have no intention of considering them for a Cabinet post. Would you think then that a representative group of Catholics could go into some federal court and under the equal protection component of the due process clause of the Fifth Amendment and get some sort of an injunction at least requiring him to consider Catholics?

MR. WOLF: Well, I think that you are asking two questions there. One is whether they would have a right to attempt to prove that Catholics were excluded a priori from consideration, and, second, whether they would succeed.

Q By hypothesis, I give you the fact that the President-Elect himself states that they are excluded.

MR. WOLF: Well, I suspect that with regard to a Presidential appointment to the Cabinet that the President would introduce or at least there would be argument regarding the confidential personal nature of the relationship between the President and a Cabinet member, regarding the political

nature of the appointment, that is that the appointee is to carry out the President's policy. And that becomes relevant as a matter of rebutting the prima facie case. If you are asking me whether a President or any other appointing authority, having made that statement, offers no defense or no explanation, whether that would constitute a violation of either the Fifth or Fourteenth Amendments equal protection clause, I would say yes. And I would say that relief could be granted.

But I think, as I said, that the issue in this case and in that case would be not the right and not the power of the federal court but whether the plaintiffs made out their case. And that goes to the simple legal question of what constitutes a prima facie case of racial discrimination and what constitutes an adequate rebuttal to a prima facie case of racial discrimination.

Q Well, would it be different if the Mayor of Philadelphia announced that he just wasn't considering any members of a particular political party for a position on the School Board?

MR. WOLF: No, I don't think the equal protection clause protects members of a political party as opposed to another. After all, the 14th Amendment says -- talks about race.

Q It talks about equal protection. But you may discriminate against somebody, the Mayor may discriminate

against somebody on the grounds of his political beliefs.

MR. WOLF: I think that is right, but I don't really think that that was -- I don't think that is what was intended under the --

Q It is not only under the equal protection area but the First Amendment area.

MR. WOLF: That's right.

Q Justice White's question. And yet you argue or at least concede the validity of that sort of discrimination, do you?

MR. WOLF: Well, I think that, first of all, it is really not involved in this case.

Q Well, it may be, in analyzing this case. It may well be.

MR. WOLF: I think that the equal protection clause would apply, and I think again in that situation, what you have is an overwhelming defense, overwhelming explanation, that is we are in a political situation, we are making political appointments, and this person is not of the same political party as I am and therefore that is all the reason in the world not to appoint him.

Q What if the political party were the lily white party?

MR. WOLF: Well, I think that you begin to get into Mr. Justice Powell's word of "pretextual."

Q No, no. Nothing pretectual, nothing undercover about it.

MR. WOLF: Well, what I mean is that you --

Q The political party would be an all-white party.

MR. WOLF: What I mean is that you begin to get to the question of whether saying that he is not going to appoint any members of that political party is a pretext for not appointing any blacks. And if you find that is a pretext, then I think that it is subject to the 14th Amendment or the Fifth Amendment, depending on which it is.

Q Well, to pursue that line for a moment, even though it may take us quite far, suppose the Mayor, having -- a mayor, having been elected, has an analysis made of the precints and wards from which his support came and he announced that since he only had 10 percent support in the Negro voting districts of the city, he was going to appoint only 10 percent Negroes, not exceeding 10 percent to the panel, the nominating panel. Now, that is a political decision, isn't it?

MR. WOLF: That's right. That's right. I think that that would not be valid. I think it would not be valid because it is an a priori limitation that is exclusion from consideration of members of a particular race.

Q Well, how do you distinguish it from the response you gave to Mr. Justice Stewart, that it is a decision baed on political support? Says he, I am going to have people

appointed within my appointing power who have supported me.

MR. WOLF: Well, I think that is a tough case. I think it is a lot tougher than the one we have here. And I think that --

Q Is there just something about the difficulty of having judges make these philosophical analyses?

MR. WOLF: Oh, there is no question that determining whether a case has been made out is always a difficult one. And the thing that you have to look at is -- under the law, is first of all whether the plaintiffs have presented evidence which, if unrebutted, would establish a case of discrimination, and, second, whether the defendant has brought forth evidence in mitigation.

The real problem with this case, frankly, I think, is that the District Court said on a couple of occasions, remember, if the plaintiffs bring forth the prima facie case, you have got to rebut it. And it was only after the conclusion of plaintiffs' case, as a matter of fact, the following day, that defendants indicated that they did want to put on some testimony, and we did it about a week later. But I think that here there really wasn't the kind of political evidence that the two hypothetical situations you have given me would suggest. I think the Mayor could have come in and said I am only gong to put on this panel people who supported me in elections. But he didn't say that, and I think if he had we might have had a

more difficult case.

Q Mr. Wolf, what worries me is, up until just a few minutes ago, I understood you were not after the School Board members at all.

MR. WOLF: That's right.

Q And now you are.

MR. WOLF: No, no. No, no. I am only after the panel members. I am only saying that the --

Q I thought you said when you went back to the lower court --

MR. WOLF: Oh, that is the matter of relief, Mr. Justice Marshall, only a question of what relief --

Q Well, isn't that matter before us?

MR. WOLF: Well, I don't think so, because the question of relief is always a matter --

Q Well, do you want us to rule blindly on this?

MR. WOLF: Excuse me?

Q Do you want us to just ignore what you said?

MR. WOLF: No. I think the case should be sent back because --

Q So that you can attack the School Board members.

MR. WOLF: No, because there is no relief that has been entered here. There is no relief -- the District Court has not exercised its discretion --

Q I understand that, but I understood you to say

that when you went back, you more than likely would ask that those people that were put on in '71 be removed.

MR. WOLF: That's right, and the reason is because the process by which they were appointed violated the Constitution. And if the process violates the Constitution, then under Louisiana v. United States --

Q We have to ignore what you said that they aren't involved. They are.

MR. WOLF: Well, when I said they were not involved, what I said was there is no attack on the racial composition of the School Board. There is no attack on the --

Q Well, why do you want them taken off?

MR. WOLF: Because the procedure, the process whereby they were appointed was constitutionally invalid.

Q Even if they were Negroes, they have to go?

MR. WOLF: Even if they were Negroes, because the process was unconstitutional. That is why we have constantly tried to make clear that we are not in any way attacking the actions of the panel. We are only attacking the process whereby the panel was appointed, and we maintain that that was done in a racially discriminatory manner.

Q Mr. Wolf, let me ask you one final question, that you may or may not be in a position to respond to. I noticed in Footnote 21 that you referred to on page 49, the Court of Appeals has the statement, in about the center, "This

Court finds that plaintiffs have shown on this record" -- and so forth. I notice in several other places in its opinion, it uses the term "finds" or "found." Judges, when they use that term ordinarily mean they are finding a fact. Do you consider that an appropriate function for the Court of Appeals?

MR. WOLF: I don't think they were finding a fact. I think that they were relying on the findings of fact in the court below with the one exception of Mr. Goode's testimony.

Q You think they were just using this term inadvertently and inartfully?

MR. WOLF: Yes, because you also find conclusions of law, I think. Or I guess you make conclusions of law, don't you, as opposed to findings of fact.

Q Well, when judges use those terms, I think they use them more carefully normally.

MR. WOLF: Well, I think though that the question of whether a particular set of evidence makes out a case of racial discrimination is a conclusion of law, and that kind of conclusion of law is appropriate for a court of appeals to draw.

Thank you very much.

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

Thank you, gentlemen. The case is submitted.

[Whereupon, at 11:07 o'clock a.m., the case was submitted.]

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