In the

Supreme Court of the United States

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WALTER E. WASHINGTON, etc., et al.,

Petitioners,

v.

ALFRED E. DAVIS, et al.,

Respondents.

No. 74-1492

Washington, D. C.
March 1, 1976

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v.	:	No. 74-1492
ALFRED E. DAVIS, et al., Respondents.	:	

Washington, D.C.
Monday, March 1, 1976

The above-entitled matter came on for argument at 10:00 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
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
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

DAVID P. SUTTON, Assistant Corporation Counsel. District of Columbia, District Building, Washington, D.C. 20004; for the Petitioners.

MARK L. EVANS, Assistant to the Solicitor General, Department of Justice, Washington, D.C. 20530; for the Federal Respondents.

RICHARD B. SOBOL, Esq., 1520 New Hampshire Avenue, N.W., Washington, D. C. 20036; for Respondents Davis, et al.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in No. 74-1492, Washington against Davis.

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

ORAL ARGUMENT OF DAVID P. SUTTON, ESQ.,

ON BEHALF OF THE PETITIONERS

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

At its threshold this case presents two highly important societal values--the right of a community to be free from discrimination in public employment and the right of a commmunity to a competent police force. It is our position that both of these values may be rationally upheld in this case.

Such a prelude necessarily leads to a statement of the basic issues involved. At the time the certiorari petition came before this Court, the issues were two in number. First, whether the Metropolitan Police Department's Test 21, its entrance test, has an adverse racial impact. And, secondly, whether that test is rationally related to one's ability to be trained as a policeman.

Late in the proceedings before this Court, the Federal Government has injected a third issue into the case, and that is whether or not this Court may adequately deal with the case on the existing summary judgment record which

came to it, as opposed to remanding the case to the district court so that we may begin all over again.

I would like to take up these issues individually. In essence, our position is that Test 21 does not have a racially disproportionate impact. In any event, it is job related. And that a remand, as suggested by the Federal Government, would serve no useful purpose and would indeed subvert the interests of judicial economy. I will turn briefly to the impact issue.

We do not ask this Court to single out any one factor in dealing with the impact issue. It is our position that there are four factors or four equal employment badges of credibility which conclusively negate an adverse impact, and that these factors may find support in this Court's decision.

First, vigorous minority recruitment. There is no question that since Chief Wilson took office in 1969, the department has vigorously, aggressively, unwaveringly sought to recruit blacks into the department and has succeeded.

Let us talk about the applicant pool. In this Court's most recent decision on the subject, Albemarle Paper Co. v. Moody, this Court spoke in terms of a test which has a racial pattern significantly different from that of the pool of applicants. For the two most recent years for which statistics are available, 1970 and 1971, 53 percent of all

the applicants were black, and 43 percent of all the new policemen were black. We have a ten percent under-representation. We submit this does not indicate an adverse impact, but we do not ask the Court to stop here. We have two more badges of credibility.

First, we may fairly compare those in the 20 to 29 age category hired by the department, the eligibles, 44 percent between 1969 and the time the Court ruled.

Q That is a total of 44 percent of all the applicants of all races were hired?

MR. SUTTON: No, 44 percent of all the applicants were black.

Q I see.

MR. SUTTON: Fifty-four percent. But this must be compared, Your Honor, Mr. Justice Stewart, with the blacks in the standard metropolitan statistical area, which is considerably lesser than the 50-mile radius from which the department recruits. The SMSA or Stantadrd Metropolitan Statistical Area figures applicable to this age group in 1970, the time this case was pending, were 24 percent; so, we double that.

But again we do not ask the Court to stop there. I would like to borrow on this Court's very language in Griggs--and this I think is perhaps one of the most important impact tests. In Griggs this Court emphasized that the question is

not one of intentional discrimination; it's a question of a practice which is neutral on its face but which has the effect of locking in or freezing a racially unacceptable status quo. It is for that reason that the Court said in Griggs that under the Civil Rights Act practices, procedures or tests neutral on their face and even neutral in terms of intent cannot be maintained if they operate to freeze the statis quo of prior discriminatory employment practices.

How about a test that does the opposite? The record does show in this case that in 1965, which coincidentally was the effective date of the Civil Rights Acts, Title VII, the department's black component was 17 percent. The record showed that that component spiraled overwhelmingly. The record shows, for example, that between 1967 and 1970, the black component of the department increased 228 percent. The white component, 47 percent.

Recent statistics which are in a report prepared by the District Human Rights Office, which will soon be available--it is on the Mayor's desk right now--shows that presently the department's black component is 41.2 percent. This is the opposite of status quo freezing. Instead of locking in a discriminatory practice of yesteryear, this dissipates any taint that could arguably exist between what went on in the past and what went on now. We do not ask the Court to consider any one of these factors. We ask the Court

to consider the totality of the factors, and we respectfully submit that if the Court does this, the Court will find that no adverse impact exists.

I would now like to turn to job relatedness, and I would like to spend as much time as I can on the late contention of the federal respondents that this Court cannot deal with the matter on the existing record for want of available psychological data.

First of all, again we begin with the Albemarle pronouncement. This Court in Albemarle said that in essence it will consider two factors on job relatedness, that job relatedness is a contextual matter. It must be considered in the context of the employer's operation, first of all, and, secondly, in the history of the testing program.

Let us rake the employer's operation, which necessarily requires that we focus on a policeman's job. What kind of job are we talking about? The policeman of today is not the village constable of yesteryear. He lives and performs in an age of evolving legal concepts. He must necessarily have some kind of knowledge or familiarity with the laws of arrest, stop and frisk, search and seizure; this is the age of Miranda v. Arizona and Terry v. Ohio.

Then too the policeman must have some kind of basic understanding of the components or constituent elements of the

various criminal offenses with which he will be concerned when he walks his beat. He must be reasonably skilled in report writing. In the language of the dissenting judge in the court below, he must be articulate. In the language of this Court in Albemarle, he must have job specific ability.

The department's training curriculum, which is before this Court, discusses all these areas as matter which recruits should be exposed to--arrest, search, seizure, et cetera, et cetera. And for that reason we respectfully submit it is designed to impart the kind of job-specific ability that this Court referred to in the Albemarle case.

Obviously one needs verbal ability to understand these materials, to understand the law of arrest, search, and seizure. It is undisputed that Test 21 is a straightforward test of verbal ability. The test requires a job-specific ability that is training related on its face as Judge Robb so held. We could stop there, if we wanted to, but we do not have to because we have considerably more than that.

I would now like to turn to the second contextual criterion.

Q What did the majority hold about Test 21? You are talking about the dissenting opinion. What did the majority opinion hold?

MR. SUTTON: They said in essence, as we see it, that it does not predict trainability. They took question

or issue with its cutoff score of 40, and they stressed the fact that since nobody failed recruit school, we could not use it.

I think that this comes in rather nicely with the history of the testing program and that will tell us an awful lot with respect to the fairness or--

Q Is the test geared to policemen? No, it is not. Right?

MR. SUTTON: It is not geared to policemen, Mr. Justice Marshall, but it is particularly suited to policemen because it is geared to the high school graduate. And respondents concede that a high school education is sufficient, is required, to be a policeman. Authoritative study throughout the country, including the President's Crime Commission, take a similar position. While it is generally geared to any job which in turn requires a high school education, we respectfully submit it is peculiarly suitable to this job. When studies galore insist upon a policeman having not a high school education but more--some people would say a college degree--we do not have to go that far in this case.

Q Mr. Sutton, the Court would never get to this question if you are right in your first point; is that not correct?

MR. SUTTON: That is correct, Mr. Justice Stewart.

Q If there is no adverse racial impact, then any inquiry into the job relatedness of the tests is never reached.

MR. SUTTON: That is correct, although we would welcome a holding of job relatedness, we can understand why the Court might not want to make one.

Q If the Court does agree with you on your first argument, that is the end of the case. Is it not?

MR. SUTTON: I submit that it is.

Q Under our decisions construing the statute, it is. Is it not?

MR. SUTTON: Yes, Your Honor.

Turning to the history, this test with a cutoff score of 40 correct out of 80, which is a 50 percent passing score really, has been in existence for over 20 years. It was not ushered in on the effective date of the 1965 Civil Rights Act like the test in Griggs v. Duke Power Co. in which there was almost intentional discrimination. The study was conducted in 1967. It was not conducted as a last ditch effort to avoid back pay when the specter of back pay was raised on the eve of trial as was the study conducted in Albemarle Paper Company and which the federal respondents seem to think is the controlling precedent in the context of remand. Unlike the study in Albemarle, it did not involve whites only; it involved members of both races. The record shows that there

is an across-the-board relationship for both races between test scores and recruit school averages. And hence it predicts trainability.

It was not based on subjective supervisorial ratings as was the situation in Albemarle. It was based upon objective criteria. It was based upon test-to-test correlation which even the American Psychological Association recognizes as acceptable.

Q Does not everybody pass recruit school? Is that not indicated somewhere in the record?

MR. SUTTON: Your Honor, the record indicates that everybody does ultimately pass recruit school, but everybody does not pass recruit school tests.

At page 102 of the Appendix, Futransky shows that he considered the fact that some fail. At pages 181 and 182 of the Appendix, it is pointed out that the Futransky study was based on the first taking of the test. If we were to consider this as an adverse factor, it would give the department a disincentive for working with people who otherwise would not make recruit school. It is a neutral factor at best--I mean, at worst. At best the positive factor would show an employer's sensitivity to members of both races.

But the point that I really want to make is that the federal respondents' contention that this case should be remanded--because I think it involves a matter that strikes

at the very heart of what this type of litigation is all about--involves an important policy question concerning the extent to which this Court and other federal courts should rely upon psychological data in decision making.

What they say, first of all, is that whether or not there is a relationship or a nexus between the content of the recruit school curriculum and a policeman's job is a matter which should be decided by psychologists. Until such time as the psychological record is built up, this Court is incapable of dealing with the matter on the existing record. We respectfully submit that this contention is baseless and will lead to all kinds of difficulty. This Court has imposed many of the requirements for a policeman's job throughout the years. This Court has written the description for the job, in a manner of speaking. This Court's expertise on the question of whether a recruit school curriculum is related to a police officer's job we submit is entitled to more credence than a ton of psychological studies.

Q Are we arguing as to whether it is a question for this Court as opposed to the district or this Court as opposed to psychologists or the district court as opposed to psychologists? I presume it is basically a fact question, is it not?

MR. SUTTON: I think it is a question of rational basis, Your Honor. I think it is a question of a narrow

standard of review. This Court can view the recruit school cirriculum, apply it to what it knows about a policeman's job and standards as a rational relationship. The question of whether there is a connection between what a recruit learns at recruit school and what he does on the job is a legal one, not a psychological one. I think the same would hold true of a bar examination, for example. If this Court had before it a bar examination and the question was whether because less blacks pass it it is related to the practice of law, I do not think this Court would want to remand--or I would hope or submit that this Court would not want to remand a case like for psychological proof as to whether the bar exam relates to the job of a lawyer.

Q It seems to me you can make your point, we can agree, without feeling that this Court is the forum in first instance that ought to make these decisions as opposed to the district court.

MR. SUTTON: But federal counsel would have the district court put the District to its psychological proof to have a balancing of the evidence test, to have psychologists take the stand and testify as to what a policeman's job is like. We submit there is no need for that.

Q I think you would argue on better ground if you said it is because it is a question of fact for the district court, not because it is a question of rational basis for

this Court.

MR. SUTTON: I would even be reluctant to say that, Your Honor. I do not feel that in this area we need to have questions of fact in the sense that we have to put on evidence on both sides of the scale and build up a massive record. I think it would subvert the interests of judicial economy. I think though there must be some jobs where we could just introduce job descriptions and training curricula and provide a sufficient basis for summary judgment ruling.

Q Are you suggesting that a district judge of the United States District Court who is dealing with search and seizure and Fourth and Fifth Amendment and Terry Case and Miranda is better able to make an evaluation of what it takes to make a policeman than some clinical psychologist is able to make?

MR. SUTTON: That is exactly my position, Your Honor. And I only add to that that if we can take a contrary position with respect to policemen, how far are we going to carry this? Are we going to apply it to claims examiners who deal with welfare regulations, training program in the context of what these regulations are about, administrative law judges, bar examinations? But I want to emphasize at the same time we are not suggesting that this Court lay down a rule for all seasons. We ask this Court for a very narrow rule; at least in so far as this job is concerned, the

standard of review should be narrow. There are many private jobs that this Court does not have much knowledge of because of the complex society in which we live, and we submit that the employer should be put to his psychological proof. He should call in psychological testimony--jobs involving textile mills, if you will; jobs such as those involved in the Albemarle Paper Company. I think that that question can be fleshed out with the passage of time or we take each job as it comes. I wish to emphasize there are many jobs where the employer should be put to a psychological proof.

Q Do you assume we know what goes on in the police academy?

MR. SUTTON: Your Honor, we have the curriculum before the Court. The curriculum shows what is taught there. And this Court knows that what is taught there ties in with what a policeman does because this Court constantly reviews matters.

Q Do you know of any of us that have been to a police academy?

MR. SUTTON: Perhaps you have not, Your Honor.

Q I have but do you know many others that have?

MR. SUTTON: No, Your Honor.

Q There is one, there is two. There is two out of nine. That is a good batting average, I guess.

Q Not here in the District.

Q And mine is not here in the District either.

Q Mr. Sutton, before you go on, this suit was brought in 1970, alleging violations of the Fifth Amendment, the equal protection aspect of the Fifth Amendment, and 1981. You seem to be arguing the case on the assumption that Title VII applies. Was the complaint ever amended?

MR. SUTTON: No, Your Honor, it was not. But the district court made Title VII applicable by analogy, in the equal protection kind of way, and we think that is fair. We think that the public employers should certainly--maybe not minutely meet all the Title VII standards but should substantially comply with Title VII, even the District was not included within Title VII at the time.

Q Do you think the standards applicable under the Equal Protection Clause are identical to the standards applicable under Title VII?

A I do not think they are, Your Honor.

Q Do you think all you have to show under the Equal Protection Clause would be a discriminatory impact?

A I would say they are pretty close, though. And I think that the question is probably academic because we've gone further in this case than any Title VII private employee would go.

Q In other words, you are making no distinction between Equal Protection and Title VII in this case?

MR. SUTTON: No, Your Honor, because quite frankly we think the substance of Title VII has been complied with. The Civil Service Commission has issued regulations pursuant to Title VII. We are now involved in Title VII. It now does apply. So, for all practical purposes in the future we are involved. But I would make this distinction. In connection with the guidelines, the Chief Justice pointed out in Albemarle that the guidelines are not regulations promulgated pursuant to the Administrative Procedure Act and hence they differ in that respect.

Now, these regulations that the Civil Service Commission has promulgated were, and they should be entitled to more weight than the guidelines, and they specifically validate this test.

The only other point I would make before sitting down is that the federal respondents make a second point, that unless this Court has the recruit school examinations that were given in 1963--and that is when they were given--or evidentiary explication of the contents of those examinations, there are no criteria in the measurements and sence the Court is incapable of dealing with the case on the existing record before it. We make no bone about it. We do not have those examinations. They are not available. Nor can the contents of the examinations be reconstructed. But this point was never raised in the district court. This point was not

raised by the federal respondents. We submit that a presumption of regularity should apply, particularly since we know from the D.C. Crime Commission's report that the professors or instructors that prepare the examination were generally competent, they did a good job. There is nothing suspicious or unusual in this case which suggests that the examinations were not calculated to assess mastery of what was taught. And we think if at this late date the Court should accept the federal respondents contention and penalize the employer when those who challenge the test could care less about the exams--they were content to focus their whole argument on whether the test predicts job performance--that this would be to unjustly penalize the Civil Service Commission and the District of Columbia. Essentially it is a question of laches and the presumption of regularity.

Nobody can take issue with the notion that we live in an age in which an evolving body of law has made a policeman's job more complex. We submit then that it is only fair that a modern day police department be permitted to ensure that those recruits that it would hire have the necessary degree of verbal ability to learn the basic tools of the police trade.

We submit that the Metropolitan Police Department has done this while at the same time boasting an equal employment opportunity record which is one of the very best

in the nation if not the best in the nation. As Judge Gesell said, the Metropolitan Police Department has been a clear example of bridging racial barriers.

We ask this Court to reverse the judgment of the Circuit Court of Appeals. More than that, we ask this Court to permit the summary judgment ruling of the district court to stand. And I shall save the rest of my time for rebuttal if the Court has no further questions.

Q Before you do, Mr. Sutton, will you address yourself to the second paragraph on 4(a) of your petition of the Court's opinion in which it points out the number who failed Test 21. I thought this case was about Test 21.

MR. SUTTON: Your Honor, there is no question--and we do not hide the fact--that considerably more blacks failed Test 21 than passed it. We submit that that is a factor to be considered in conjunction with other factors.

Q Is that not enough to trigger?

MR. SUTTON: We submit that that is not enough to shift the burden of proof. This Court in the Albemarle case put the question more so on the basis of overall hiring results rather than on the basis of test results.

Q Does that not put any responsibility on you?

MR. SUTTON: I think it is a factor.

Q It does put responsibility on you, and I want to ask you: Have you met it other than the generalization

this is the greatest police department in the country?

MR. SUTTON: If Your Honor's question is to put responsibility upon us, if Your Honor's question is, Does that ipso facto shift the burden of showing--

Q Yes.

MR. SUTTON: My answer is no.

Q What does it do, nothing?

MR. SUTTON: No. It is a factor to be considered by the Court in connection with many other factors.

Q Does that not give you a burden of moving forward?

MR. SUTTON: We submit that it does not. It would perhaps if we did not have the other badges of credibility that are depicted by this record.

Q Such as this is the greatest police department in the country?

MR. SUTTON: No.

Q You do not want me to give any weight to that now, do you?

MR. SUTTON: Aggressive recruitment?

Q No. I mean, you say this is the greatest thing, like somebody saying this is the greatest police department. There are a lot of people who dispute that.

Q I did not understand him to say it was the greatest police department but that you had the best record on

racial matters of any metropolitan police department in the country.

MR. SUTTON: Yes, Mr. Chief Justice.

Q And who said that?

MR. SUTTON: Judge Gesell said that it has been a nationwide model for bridging racial barriers.

Q And what facts were in the record on that?

MR. SUTTON: There was a New York Times article which compares with other departments, Your Honor.

Q The New York Times is an authority for what? All the news that is fit to print.

MR. SUTTON: There are many other cases, Your Honor, that show worse track records, and counsel has cited a plethora of these cases in his brief. I never read a case that shows a police department with a better equal employment record. If there is one, maybe counsel can tell this Court about it. If there is one, we would respectfully submit there would not be very many.

Q Then I ask you another question. Is the fact that this is the best make it automatically exempt from inquisition?

MR. SUTTON: No, Your Honor. We must rely upon the totality--

Q Whether or not it applies under Article VII?

MR. SUTTON: No, Your Honor, we must--

Q That is this case.

MR. SUTTON: Right. We must rely upon the totality of these statistical data. But I think it should be counterbalanced with this Court's pronouncement in one of its cases, statistics tell much and courts listen. We submit there are overwhelming statistical data in this record which apart from the statement of having a good track record, will negate the adverse impact, and we say this notwithstanding the pass/fail rate.

Q Mr. Sutton, could I ask just one question: If you assume that the burden shifted by showing the racial impact, what do you understand that the defendant's burden is?

MR. SUTTON: Your Honor, I understand, first of all, it is very light because job relatedness is a contextual consideration, and there is a Harvard Law Review article on this we cite in our brief which dovetails nicely with Albemarle. One of the factors that should lighten the employer's burden is the insubstantility of the impact, if impact there be.

Q I am not sure you are answering my question. Assume there is a shift in the burden.

MR. SUTTON: Right.

Q What do you understand that the defendants must prove in order to shoulder their burden?

MR. SUTTON: That Test 21 is related to one's ability to be trained as a policeman.

Q Do you contend that you have met that burden if you prove that the test establishes verbal ability?

MR. SUTTON: We do, Your Honor.

Q And so your position is that the record shows that the verbal ability is established and verbal ability is a component of job performance?

MR. SUTTON: No. Verbal ability is needed to succeed in the police training academy.

Q Is it also needed in order to be an adequate police officer?

MR. SUTTON: It is, Your Honor.

Q Is that your position?

MR. SUTTON: That is our position, but we do not--

Q In other words, you say if the record establishes that the test is a measure of verbal ability, you win?

MR. SUTTON: Right. We are not asking the Court to go so far as to say that verbal ability relates to the job after recruit school, although we think it does, as Judge Robb said. We think we can structure a much narrower rule.

Q Do you think that independently you should prevail because in terms of actual hiring your recruitment program produces a police force that racially mirrors the community in terms of division between the blacks and whites?

MR. SUTTON: I think we should. If you view the community as the District of Columbia itself, perhaps it might be one thing. But if you view the community in terms of the standard metropolitan statistical area and the District by statute--a person does not have to live in the District to be a Metropolitan Police officer. He can live within a 20-mile radius. Your Honor's question--

Q Let us assume that twice as many blacks as whites pass the test but you nevertheless hired in proportion to racial composition of the community. Do you think that--

MR. SUTTON: No, that would be wrong. That would be a quota system. That would be improper.

Q Do you think the quota system violates Title VII?

MR. SUTTON: The legislative history appears to indicate that, Your Honor.

Q Either way?

MR. SUTTON: I would say so, yes. But, on the other hand, if it turns out that way--

Q Do you think this is a Title VII case?

MR. SUTTON: I think that Title VII has to be dealt with in this case. I do not think it can be brushed aside. At the time the case was tried, Title VII was not applicable to the District. But the equal protection concept was. And this would certainly bring in your Title VII criteria.

Q Do you think the case would have been tried differently if the rules that are now applicable had been in force at the time the case was tried?

MR. SUTTON: No, Your Honor, I do not.

Q So you think the rules are the same now as they were then?

MR. SUTTON: I do, Your Honor, yes.

Q Even though Title VII was not applicable?

MR. SUTTON: If the Civil Service regulations were on the books at the time this case was tried, the test would have passed muster. The test passes muster under EEOC guidelines. Of course, we realize that they have not been adopted in their totality by this Court. But it meets most of the features of the guidelines.

Q When did Title VII become applicable to the District, 1972?

MR. SUTTON: 1972, Mr. Justice Rehnquist, yes, sir.

Q Let me ask one question because your opposition does not stress it. Is it not true that of those passing the test, a larger percentage of Negroes was hired than of whites? Of those passing the test.

MR. SUTTON: I would have to say no. But I would say locally a larger number of Negroes was hired than whites over the nine months period that is referred to in the affidavit of the department's administrative services officer.

I would have to say no. A larger percentage of Negroes was not hired, but a larger number was locally. And we refer to the affidavit of the department's administrative services officer contained at pages 66 and 80 of the Appendix.

We point out--it just relates locally now--during the final six months of 1969 as Chief Wilson took office and during the first three months of 1970--let us take the latter, the first nine months of 1970. I think it was 504 blacks and 401 whites.

Q Were hired?

MR. SUTTON: Were hired, yes. But more blacks failed the test. There is no dispute about that.

Q I know, but Mr. Justice Blackmun's question was the percentage of those passing.

MR. SUTTON: Perhaps that is so.

Q That is his question.

Q My question is, taking now just those who pass and the hires from that pool of passers, is not the percentage of Negroes hired greater than the percentage of--

MR. SUTTON: I have got your question now. Test passers as distinguished from test takers, right.

Q Yes, indeed.

MR. SUTTON: Right.

Q And your opponent makes no mention of this--

MR. SUTTON: No.

Q --as I read his brief, anywhere. He concentrates entirely on those taking the test, not on those who pass it.

MR. SUTTON: In the language of the Sixth Circuit in the Smith case, which I understand is now pending before this Court, the impact should be on overall hiring results, not on test results considered in isolation.

Q A while ago you said that--or did you say this?--of you take racial components into consideration in choosing from the eligible pool, it violates Title VII.

MR. SUTTON: No, it does not violate Title VII.

Q You mean quotas do but that does not.

MR. SUTTON: If it turns out in a way that there are more blacks working for the department.

Q So, let us suppose that 500 blacks pass the test and 500 whites pass the test, and you hire 400 blacks and 100 whites. Is that consistent with Title VII?

MR. SUTTON: You have another problem here. You have a merit system. You have a system where the persons with the highest scores get the job. That does not enter into consideration here because at the time this test was given everybody--

Q I am willing to posit that everybody had 91. And you end up with 400 blacks and 100 whites.

MR. SUTTON: Under those circumstances, it probably

would be a quota system. It would be improper under Title VII.

Q But would that do any more than prompt a scrutiny of the underlying factors?

MR. SUTTON: No.

Q You say it does not dictate a per se conclusion one way the other other.

MR. SUTTON: No.

Q It is not proof of anything. It merely suggests the Court should look at it or someone should look at it.

MR. SUTTON: Right.

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

Mr. Evans.

ORAL ARGUMENT OF MARK L. EVANS, ESQ.,

ON BEHALF OF THE FEDERAL RESPONDENTS

Q Mr. Evans, before you commence, I would like to go back to the question I asked. How did Title VII get into this case, and do you think it is properly here?

MR. EVANS: Mr. Justice Powell, I think that in essence the standards are the same under Title VII as they are under the equal protection concept.

Q May I ask you a question there. Let us assume this were an equal protection case and nothing else, when would the burden shift?

MR. EVANS: I think at the same point.

Q All you would have to prove under straight equal protection analysis is that mathematically more whites were passing this test than blacks?

MR. EVANS: I think the same analysis that this Court adopted in Griggs under Title VII ought properly--

Q Griggs was not an Equal Protection case.

MR. EVANS: That is right, it was a Title VII case, but I believe that the--

Q What about Geduldig, that was an Equal Protection case; what standard was applied in that case?

MR. EVANS: There is some question as to whether there was a discrimination found in that case or not.

Q But you are saying that all one has to show in an Equal Protection case is a mathematical impact that can be construed as discriminatory?

MR. EVANS: I am not sure I would be prepared to generalize quite so far, Mr. Justice Powell, but I think in the context of the testing challenge, it is reasonable to make the same analysis that the Court made under Title VII. I mean, the basic standard is the same. Title VII prohibits discrimination on the basis of race, sex, color, and religion.

Q Mr. Evans, in Jefferson v. Hackney we said that statistics standing alone were not sufficient.

MR. EVANS: Not sufficient for--

Q Not sufficient to make out an Equal Protection Claim in the absence of a finding of intent to discriminate.

Q That may be a little different question. Let us assume that the burden shifted. What would the other side have to prove, no intent? That is really the question as between Title VII and the Equal Protection Clause. Is it enough to prove an Equal Protection violation if there is no intent but there is an unequal impact? I guess you think that it is.

MR. EVANS: I think that is right.

Q Mr. Justice Rehnquist just cited you a case. What do you say about that?

MR. EVANS: I frankly have not addressed myself to this question because it has not been--

Q Why is it important? I mean, Title VII is applicable now to the District, is it not?

MR. EVANS: That is right. And for the future, Title VII standards govern for all public employers.

Q So, it might be quite important in another context, but it is at least arguable here that we should apply a Title VII standard?

MR. EVANS: That is the way I thought about the case and I guess the way the parties have approached it, that this is basically a Title VII case. While I have not thought through all the ramifications of applying a standard Griggs

analysis to a case which was brought at the time when Title VII was not yet applicable to the District, given the nature of the issue for the future, I think it is appropriate for the Court to treat it that way since the parties have been prepared to treat it that way.

Q Was the complaint based wholly on the Equal Protection Clause of the Constitution?

MR. EVANS: I believe it was, yes.

Q Wholly on that and 1981.

MR. EVANS: 1981.

Q But subsantively upon the Equal Protection component of the Fifth Amendment and not at all upon statute?

MR. EVANS: That is correct.

Q Was the complaint ever amended?

MR. EVANS: I do not believe it was. I should add that there is one other complicating factor. And that is that there is a statute which can be read as requiring the Civil Service Commission to ensure that all of its tests are job related regardless of any adverse impact. The application of that statute to this case was viewed by the Court of Appeals as not presented by this case, and it may well be that the same job relatedness burden would fall upon the defendants in this case in any event as a public employer.

Q If there is a statute requiring the commission to be sure that all of its tests are job related tests. Unless

there is an attack upon that, cannot one assume that the commissioners have followed the law? Does that not help the defendants in this case?

MR. EVANS: I think there is an attack on it, at least to the point of shifting the burden to the defendants to come forward with some proof. The presumption can only be carried so far. Where the plaintiffs have established a dramatic adverse racial impact of the test, I think it is fair to impose upon the defendants the burden of at least presenting evidence showing that indeed the burden of proving job relatedness has been met.

Q Mr. Evans, could I ask you the same question I asked your opponent: Just precisely what is the burden? Do you contend they have failed to prove that the test establishes verbal ability or that verbal ability is not a component of the policeman's job?

MR. EVANS: The analysis does not really focus so much, Mr. Justice Stevens, on verbal ability. It is true that this test was designed--Test 21 was designed--by the Civil Service Commission as a test of verbal ability.

Q You question that it does establish verbal ability?

MR. EVANS: I do not know one way or the other because this record does not clearly answer it. The studies that were conducted as to the validity of the test did not go

to whether or not it adequately measures verbal ability as a trait. What it went to was the question whether on the hypothesis it measured verbal ability--and there is some evidence that it does but not definitive--on the hypothesis that it measured verbal ability, whether scores on that test were reasonably predictive of scores on the recruit school examinations.

Q Assume they were not for a moment. I would just like to think the thing through a little bit. Assume that there is an expert who testifies without contradiction that this test does establish verbal ability. What would your position be with regard to the question of whether that is a job-related characteristic of the test of a policeman?

MR. EVANS: That would require a professional--a different kind of professional--

Q It would take a professional to tell us whether or not reading ability is a component of successful performance as a policeman?

MR. EVANS: It could be, or successful performance of the training school.

Q Suppose we put the training school completely to one side--I think the Court of Appeals' problem is we focused on the training school instead of the ultimate job. Do you take issue with the suggestion in Judge Robb's dissent that one should know that a police officer must know how to read

with sufficient skill to handle search warrants and things like that.

MR. EVANS: It is fine as a general proposition, but professionals in the field have been quick to warn lay persons in making the kinds of judgments that I think Judge Robb made, which is basically a lay judgment resting perhaps on an accurate notion and perhaps not.

Q I am not trying to debate the issue. Your position is that there must be proof in the record that reading ability has some relationship to the job of a police officer before a court could accept that conclusion?

MR. EVANS: I think that is correct. But I want to emphasize that this case does not hinge on such a showing. There is not adequate evidence as to that in this record, but that is not what was shouldered by the defendants in this case. They were not trying to demonstrate that (a) the police officers had to have verbal ability and (b) that this tset is an adequate measure of verbal ability. They were hypothesizing that verbal ability would likely be something needed to succeed in a training school. Then they were finding out whether, on the basis of that hypothesis, scores on the entry test were reasonably predictive of scores in training so that one could say, as I believe the evidence demonstrates, that the higher one's scores on the entry test, the more likely he is to achieve satisfactory scores on the recruit

school test. That is called a criterion-related validity study under the technical jargon, and it is quite different in concept and in form from what we are talking about, a verbal ability test which would be studied under a construct validity model, by which you determine what traits are needed for the job and whether the particular test is a reasonable measure of that trait.

Q Would you agree that if a test established the qualification for one of several traits that would be required for a job, it can nevertheless be job related?

MR. EVANS: Yes. The issue is not wholly free of ambiguity. But I believe it is fair to say that if a test was designed and used to measure the capacity of a particular person--the ability of a particular applicant to do something, a trait or what is called a construct, that if there was proof that this test adequately measured--was an adequately designed test to measure that trait, and if there was some proof in the record, maybe or maybe not psychological but probably psychologica in nature, to suggest that that trait was an important part of the job, that would I think establish job relatedness.

In our view, there are two things missing from the record that makes it difficult to answer the question whether this test is job related under the model of validation that was used by the psychologist here. What is missing is that

it has been shown there is a correlation between the scores on the entry test and scores on the recruit school examination. What is not apparent from the record is whether and to what extent there is any reasonable relationship between the recruit school examinations and the recruit school curriculum. That is, do these examinations or did these examinations adequately measure mastery of the training school curriculum?

Mr. Sutton has pointed out that these examinations as they were used in 1963 at least may not be available anymore. That is not to say that some subsequent examinations might not serve the purpose for this case. But, in any event, there ought to be an opportunity to explore this question because without it, it is very difficult to determine whether you are measuring a correlation between the entry test and some job performance measure or just entry test and some abstraction.

And the second thing that is missing--

Q Is there not any presumption at all in the case of an employer that if he puts on a school and gives you a test at the end of the school that the test is apt to be based on what is taught in the school?

MR. EVANS: I think that that is the kind of presumption that the defendants were operating under at the time of the trial in this case, and it may well have been appropriate at the time. And what has caused us to look at the

matter again is that standards have been in a state of evolution since the time the trial was conducted and, more significantly, since the time the study was conducted, which was before Griggs and before Title VII was extended to the--

Q What has evolved with respect to that particular point?

MR. EVANS: I can give you a very specific example on that point because the applicable professional standards, which are ideals and not necessarily the minimum that must be accomplished but the ideas to strive for.

Q Where do these come from?

MR. EVANS: These are published by the American Psychological Association.

Q What legal status do they have?

MR. EVANS: For one thing, they are referred and in effect incorporated by reference by the EEOC guidelines. I mean, they are generally looked to as the source for what the governing professional standards are to determine whether a validity study is an adequate one to show what it is intended to show. And these standards have changed quite significantly since 1966, which was the prior version cited by the Court in Albemarle. And on that particular point, there was nothing in the 1966 standards relating to whether or not the criterion measure--that is, the training school exams--were related significantly to the criterion, namely, training success.

It this document it becomes apparent that the professional consensus now is that that is a relevant inquiry in determining job relatedness, and this evolution has been--

Q What is to prevent the psychologists from changing their mind tomorrow as they have been known to do?

MR. EVANS: There is nothing to prevent it. Indeed, they say in their document quite clearly they have not written these standards to be used as law, that there is a growing profession. Indeed, it is in its infancy. And there may be changes of mind. The only point of relying upon them is as a guide really just as the agencies themselves formulate guidelines which themselves change.

Q Mr. Evans, I am somewhat puzzled by your position. Let me see if I can clarify at least my understanding of it. Is it the position of the United States Department of Justice in this case or generally that verbal ability is not a key imperative for the function of a policeman, particularly on a metropolitan police force, when he must understand--as the arguments just last week before this Court in two cases were made that he must understand the Boyd case, that he must understand the Weeks case, he must understand Miranda, he must understand Terry and the nuances of all of those cases--is it the position of the Department of Justice that you need a psychologist to tell you whether verbal skills are related to that process?

MR. EVANS: I think one can hypothesize fairly that that is a substantial part of a police officer's job.

Q Hypothesize?

MR. EVANS: It is, after all, an assumption that we are making. It is not something that we know. We have not, I assume, studied--

Q He must make out applications for warrants, must he not? And then it was argued to us only last week that if the judge in issuing the warrant makes a mistake, that he ought to be skillful enough to recognize that the judge has made a mistake in issuing the warrant and not execute the warrant.

MR. EVANS: Let me assume for a moment that it is an important and substantial part of a police officer's job. The study that was presented in this case to support the job relatedness of Test 21 was not designed to show the extent to which Test 21 measured verbal ability. That was not the model by which the validation was undertaken. It was undertaken under this other model which I have mentioned, the criterion related validity.

There is some statement in the expert affidavits in the case that Test 21 does measure verbal ability and that verbal ability is needed to pass the training school. But that is not what was attempted to be shouldered by the professional validation studies submitted to this Court, and

I do not think it is fair to infer from the evidence before the Court that the test has been shown job related by a professionally acceptable method as to the verbal ability aspect of it.

Q mr. Evans, you said there were two things missing from the petitioners' case, that you stated the second--

MR. EVANS: I do not think I did. The second is that, assuming for a moment that there is a basis for relating the recruit school examination scores to the content of the training program, that one measures the other, there is not adequate evidence in the record, in our view, to relate the recruit school curriculum to the job of a police officer. Again, I think non-professionals can find it easy to make assumptions by looking at the curriculum itself and then assuming what we all know a little bit about to be a police officer's job. But the fact of the matter is that there ought to be something in the evidence showing what it is police officer's do once they get out of training school in order to justify the use of this training school as the measure of the criterion for justifying the entry test.

Q Would that have to be shown by the testimony of a professional psychologist?

MR. EVANS: I do not think so, Mr. Justice Rehnquist. I think it may in certain cases. But I think there

is no reason to establish that as an automatic rule. I think in a case like this, for example, it may be perfectly adequate to have police officers in a supervisory capacity come in and testify--but it is a question of fact--testify as to what a police officer does and then compare that with the curriculum. In some cases it is going to be necessary to have what the psychologists call a job analysis in a more technical field perhaps to decide what it is that the person is really doing on the job. But whether it is required in this case or not, it seems to me, is itself a question that ought to be resolved by the district court.

Q Mr. Evans, have you read the questions in Test 21 in the record?

MR. EVANS: I have read many of them.

Q Do you regard them as very difficult? Could you answer 50 percent of them?

MR. EVANS: Could I?

Q Yes.

MR. EVANS: I did not take the test, Mr. Justice Blackmun. I hope I could. They are not all that difficult. They are designed to be high school level. They are designed to measure what a high school graduate is likely to be able to answer.

Q Some of those questions, I do not see how you could even mark them.

MR. EVANS: What I was about to say, some of them are not so easy to understand or the answer is not altogether clear.

Q Question eight, for example, on page 24(a).

Q Perhaps that is why the passing mark is quite low.

MR. EVANS: Let me state again, although I hesitate to admonish the Court or suggest to the Court again that psychologists would frown on what we are doing here. This is called, in the psychological jargon, a study of face validity. That is, you look at the test and you decide on the basis of looking at it whether it measures something important or whether it is a good test for the purpose in which it is used.

Everybody in the profession at least--and I think everybody in this case--agrees that that is not an appropriate inquiry, that the ippropriate inquiry is a professional one. And indeed I think this Court's decision in Albemarle makes clear that job relatedness depends on a showing based on professionally acceptable methods and face validity; that is, looking at the face of the test is not such a method.

Q Mr. Evans, could I ask you one other question. You are here as attorney for the Civil Service Commission, as I understand.

MR. EVANS: That is right.

Q And you are identifying some shortcomings in

the defendant's proof. Are you in effect asking for a remand so that your client can put in the evidence that you say is missing? Are you in effect representing that that evidence is available?

MR. EVANS: No. As we say in the brief, Mr. Justice Stevens, it is not altogether clear whether the evidence is available or has been retained or can be reconstructed. Mr. Sutton has said today that the tests that were used as a basis--

Q You are here on behalf of a litigant. And on behalf of that litigant you want it remanded?

MR. EVANS: I think the case ought to be remanded and an inquiry should be made as to whether there is evidence that can be presented on these issues. If there is not--

Q You have not made that inquiry yet, I take it.

MR. EVANS: Pardon me?

Q You have not made that inquiry yet?

MR. EVANS: In part the inquiry depends on what the District has available. But my--

Q You are sort of arguing in the abstract here.

MR. EVANS: I am sorry?

Q You are sort of arguing in the abstract here.

MR. EVANS: I think--as I was going to say, I think the inquiry should be made as to whether the evidence exists. If it does not exist, I think there is a further inquiry to

be made whether the plaintiffs in this case or the plaintiffs' failure to specifically raise these particular weaknesses that we have identified at any time in the district court contributed to the non-existence of the evidence at this point and if so--

Q They also moved for a summary judgment, did they not?

MR. EVANS: They did.

There are times I think even when both parties believe summary judgment is appropriate that it turns out not to be appropriate.

Q Has anyone but you raised this issue here previously, what you are now arguing?

MR. EVANS: These particular weaknesses?

Q Yes.

MR. EVANS: Aside from the Court of Appeals in some respects, no.

Q So, you have raised weaknesses in your own case--

MR. EVANS: That is correct.

Q --and suggest that someone else should remedy them.

MR. EVANS: It is weaknesses in the joint case put on by the defendants in the district court in light of what we think are the current standards, and another inquiry in the

district court might quite properly be whether, even if the evidence today or the evidence in the district court turns out not to be sufficient under the standards we have articulated as what we think to be the current standards, whether it might have been satisfactory under the standards that existed then. As I have said, there is reason to believe that standards have evolved substantially.

Q From where you now stand, how do you answer Mr. Sutton's story about your not doing anything about saving judicial time? You do not even know what you want.

MR. EVANS: I think I have articulated that we are not clear what evidence is available, but there are matters for inquiry, I think, appropriately in the district court even if there is no evidence available, and that is, Where does the brunt of that failure fall at this point?

It seems to me the problem is this--

Q How can the brunt fall on the petitioners? It cannot fall on them.

MR. EVANS: It can if my--

Q If the point has not been raised until now.

MR. EVANS: But who did not raise it?

Q You. [Laughter] Am I right?

MR.EVANS: The petitioners do have some burden in litigation.

Q So, you want a plague on both houses.

MR. EVANS: I think there are several alternatives. One is to do what I think would be inappropriate, which is to say, "Here the applicable standards. Let us look at the proof. The proof does not meet them. Therefore, summary judgment in favor of the Court of Appeals decision is affirmed; that is, summary judgment in favor of the plaintiffs.

The other alternative is to say, "The plaintiffs never raised this issue in the district court. Therefore, the absence of these relevant materials in the evidence today--too bad. Summary judgment in favor of the defendants."

I am suggesting an alternative which would send it back to the district court.

Q Could we not, on the basis of your argument, say that the plaintiff did not need his burden of proof?

MR. EVANS: The plaintiff?

Q Yes. Could we not from what you are now saying?

MR. EVANS: I think that the plaintiffs met their threshold burden of establishing adverse racial impact. Arguably the defendants met their burden of proving job relatedness by submitting what we think now is partial evidence and with a general statement by its experts that this met applicable standards and proved job relatedness. In the absence then of a specific attack by the plaintiffs on the weaknesses that we now feel we are vulnerable on, perhaps they should bear the burden at having failed to raise the

weaknesses that we now perceive in the evidence that we presented.

Q How can the petitioners be required to produce something that nobody asked them to produce up until now?

MR. EVANS: The same can be asked of the defendants. How could the defendants have been asked to produce evidence on matters that nobody identified as being an issue.

Q He is not arguing that.

Q The defendants are the petitioners.

MR. EVANS: No--I am sorry. I am sorry. I meant the respondents.

Q The defendants are the petitioners.

MR. EVANS: Yes.

Q And we never get to any of this stuff, do we, unless we agree with you that the plaintiffs proved an adverse racial impact, we never get to any of it?

MR. EVANS: That is correct. Our position is, as I have indicated--

Q I know your position. You are conceding that you lost that part of the case?

MR. EVANS: That is right.

Q And you do here represent the Civil Service Commission and only the Civil Service Commission today?

MR. EVANS: That is right.

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

Mr. Sobol.

ORAL ARGUMENT OF RICHARD. B. SOBOL, ESQ.,

ON BEHALF OF RESPONDENTS DAVIS, ET AL.

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

I would like to start with Justice Powell's inquiry concerning the basis of the suit and to clarify one or two misconceptions that have crept in.

There were three bases for this action, as alleged in the complaint which appears on page 24 of the printed Appendix. The action was based on the Fifth Amendment to the United States Constitution and the Equal Protection requirements implicit therein. It was based on Section 1981 of Title 42 which, as far as I understand it, is not a procedural statute but is a substantive statute creating a private right of action against racial discrimination and employment. It is unlike 1983 in that regard as the opinions of this Court in, for example, D.C. v. Carter make clear.

And, third, it was based on the District of Columbia Code 1-320 which prohibits racial discrimination in employment in the District of Columbia. And there was jurisdiction alleged for each of these bases of action.

So, in essence, the way the case reaches the Court, this Court, the issue is not the bald issue of whether Title

VII standards are the same as constitutional standards. It is whether the composite of Section 1981 of Title 42, the prohibition against racial discrimination in employment in the D.C. Code and the Fifth Amendment together represent a lower standard than the Title VII standard, and I would submit that is not the case, that the courts have treated 1981 as equivalent, at the least, to Title VII in its prohibition against racial discrimination in employment.

But moving to the constitutional issue, I would say this, that the test creates a classification between those who pass it and those who do not. At the very minimum, the issue is whether there is a rational basis for that classification, and we take the position that there is no difference between the question of whether a classification is rational and whether a test is related to a job. It is essentially the same question. We do not need in this case to get into the details of the EEOC guidelines. That is not an issue. We simply say there is a requirement under any of these bases of authority that the defendants make a showing at least of rationality. Rationality for the use of an employment test would mean that the test has some relationship to the job in some respect, and it is our position that that showing has not been made here.

Q Mr. Sobol, your prayer in the district court was basically for declaratory judgment, was it not?

MR. SOBOL: No, sir, for declaratory judgment and injunction and back pay.

Q Certainly so far as declaratory judgment and injunction are concerned, that has never been issued by the district court in your favor, at any rate, since 1972 Title VII has applied.

MR. SOBOL: Yes, sir.

Q Any declaratory judgment that you would now get or injunctive relief that you would now get would have to be based on Title VII, would it not?

MR. SOBOL: Not necessarily. There is a problem of simply amending to allege a Title VII action because you cannot be in court under Title VII unless you exhaust your administrative remedies and get the appropriate action by the administrative tribunal. So, it is not a simple matter of moving in the district court to amend it. At least it is a question whether that is possible; and whether this case could ever be turned into a strictly speaking Title VII case I think is questionable.

Q But what useful purpose or indeed what case or controversy would the district court be deciding if it were now to enter a declaratory judgment or an injunction one way or the other in this case, based on the law that governed in the District of Columbia before 1972?

MR. SOBOL: This law still governs. It is a question

of another piece of law also governs. The plaintiffs brought this action before Title VII applied to the District. It alleged three grounds of substantive right. Those grounds are all still fully applicable, and they rely on them.

Q One of them is the constitutional ground.

MR. SOBOL: One of them is the constitutional ground.

Q What do you think the Court of Appeals used as its basis for decision?

MR. SOBOL: The Court of Appeals cited in its opinion the constitutional ground and 1981.

Q And it decided on both grounds, do you not think?

MR. SOBOL: Yes, sir. I think it made no distinction in the substantive standards, Mr. Justice White, and I think it decided on the grounds that were before it. Yes, sir.

Q Mr. Sobol, I understand you to say that you think the rational basis test is the appropriate one and that there must therefore be a rational relationship between the test and the job. Who has the burden of showing that in this case?

MR. SOBOL: The defendants.

Q Why?

MR. SOBOL: Because the burden of showing

rationality--your question assumes strictly a constitutional standard, I assume.

Q I thought you just said you did not think this was a Title VII case.

MR. SOBOL: It is not a Title VII case, but it is based on two statutes prohibiting the discrimination in employment in this circumstance and the Constitution.

Q Do you think the standard under 1981 is different from the constitutional standard?

MR. SOBOL: No, sir, I personally do not. But I think that under any of those standards, having shown the adverse impact, the burden of defending the practice, as in any constitutional case, is on the defendant, of making some showing of whatever the applicable standard is, rationality, compelling interest. The burden is on the defendant in making that showing, yes, sir.

Q If it were agreed that this is nothing but a straight Equal Protection constitutional issue, I understand you are saying that if the plaintiff proved a statistical adverse impact, the burden then shifts to the defendant.

MR. SOBOL: Yes, sir.

Q Is there any authority for that?

MR. SOBOL: Yes, sir, there is in the nature--there is no authority in the employment context in this Court, but in footnote 35 of our brief on page 27 I have cited about 15

cases of the Courts of Appeal and the district courts that have directly faced this very question you are asking and have concluded that the standards are the same.

Q That the constitutional standard and the Title VII standard are the same?

MR. SOBOL: Are the same, yes, sir, and these cases appear in footnote 35. I have about 15 different authorities.

Q I knew there were cases in the circuit courts, but is there any decision of this Court that supports your view as to the shifting of the burden of proof in an Equal Protection case merely on the basis of statistical evidence?

MR. SOBOL: Certainly not in the employment context. My understanding of Jefferson v. Hackney, however, was that the Court ruled that there was no necessity to make a showing of compelling interest, but there was an inquiry, based on the statistic, into rationality, and I have always assumed that the burden of establishing rationality for a classification falls on the defendants.

Q Is not any act presumed constitutional and the burden of showing it is unconstitutional falls on him who would attack it. So, is not the proper phrasing of the Equal Protection test that the plaintiff who was challenging the governmental action on Equal Protection has to show that there is no rational connection rather than--it is a legal really, not a factual--

MR. SOBOL: That is not my understanding of the cases. I might be wrong in that regard. It is my understanding that the burden of showing rationality, once the classification was established, is on the defendant.

Q Of course there is a classification in every case.

MR. SOBOL: Yes, sir. But here, to wind up this discussion, whatever may be the correct answer under the constitutional standard, for the Court to make a distinction in this case between Title VII standards and the standards applicable here, it would have to rule that the direct prohibition against racial discrimination and employment in two federal statutes, 1981 and the provision of the D.C. Code that I cited, establish a different standard of racial discrimination in employment than Title VII, and I suggest there is no authority for that. The decisions applying 1981 have made no distinction between its substantive thrust and the substantive thrust of Title VII.

Q We must face the fact that the Court of Appeals did go on constitutional grounds.

MR. SOBOL: I think that you must face the fact that the Court of Appeals relied on both sources of law and made no distinction between them.

Q Is it your impression of the Equal Protection standard that a showing of unequal racial impact is a violation

of equal protection of the law?

MR. SOBOL: I think a practice that has an uneven racial impact has to be, at the very minimum, rational, although there are certainly cases in this Court saying that it has to be more than rational. But without getting into that because we do not need to get into that, I think at the very minimum there has to be rationality to support adverse racial impact under constitutional standards.

Q Is that enough under Title VII?

MR. SOBOL: Yes, I think so. I think what the Court--

Q Just to show some rational explanation is enough under Title VII?

MR. SOBOL: I think what is rational for a test is that the test is related to the job.

Q That is different.

MR. SOBOL: No, I do not think it is different, in my opinion. The rational basis for the use of an employment test is that the employment test assists the employer in choosing employees in some positive way. That is what I think Griggs held. That is what I think the essence of the guidelines are.

Q Mr. Sobol, I wonder if perhaps we are not phrasing the constitutional issue incorrectly. You suggest that the classification is between those who pass and those

who fail. I wonder if you are not really arguing that if one looks closely behind what has happened, that we really have a racial classification, and that is your contention: That the way the test works, it divides the group on account of race rather than simply on account of pass/fail. If that is the question, then our issue is whether it is a racial classification which in turn would decide what kind of burden was involved. I am just wondering if you have not spoken just a little hastily.

MR. SOBOL: I think it can be looked at in terms of either a racial classification or a non-racial classification. It definitely has racial impact. It may not be a racial classification. But whether it is or it is not, rationality must be shown, and we do not think we need more than rationality to prevail.

Q I am just wondering if the question of whether or not it is a racial classification turns on whether or not the test has an independent neutral justification, namely, the job relatedness. In other words, the job relatedness issue may determine how we decide the classification question.

MR. SOBOL: The opinions of this Court do not indicate, as I read them, that--and I am thinking of the California housing case, the name has slipped my mind--do not indicate that a practice having racial impact is a

racial classification. The indications, as I read them, are to the contrary. Mindful of that, we have not argued and have never argued that there is a racial classification in this case which demands strict scrutiny or a compelling interest. We are content to rely on the necessity that there be a rational basis for the use of a test, and I think the only rational basis for the use of a test is that it does the employer some good and that that needs to be proved, and it has not been proved here.

Q Then let me just ask you the one last question, and I will be through. I have asked the others this question, and I would like to be sure that you have addressed it before you sit down. On the question of job relatedness, do you contend that this is not a measure of verbal ability or that verbal ability is not an aspect of the job or neither?

MR. SOBOL: Verbal ability is an aspect of this and almost any other job in the world. I do not know whether this is a proper test of verbal ability. I rely on the necessity that there be some showing, more than just a judge reading the questions and saying, "This looks okay to me." I do not think that is how these cases can be decided any more than Griggs could be decided on that basis.

Q There is clearly a greater correlation between verbal ability for a policeman's job and the jobs involved in

Griggs, I think. Would you not agree with that? I think the assumption there was a total absence of correlation between the particular tests and the particular jobs at stake.

MR. SOBOL: Every Title VII case I have tried, Your Honor, the defendants have brought in experts and have attempted to prove that the jobs are complicated, require the filling out of complicated forms, require the use of complicated machinery, for which there are printed manuals that must be understood. I have never seen a case in which any defendant has ever said that the jobs in question were not complicated and did not require reading and writing of complex material. And it is true here too.

Q When you read the cases, Mr. Sobol, as I suggested to your friend, the Solicitor General, from Boyd and Weeks down to the most recent, do you suggest that verbal skills are not highly important?

MR. SOBOL: Not for one second. What I suggest is that Test 21 has not been shown to be a reliable indicator of whether those verbal skills in the necessary degree are present or not present. And what this Court held in Griggs is that cannot be surmised but it has to be proved. And that is our position here, that there is a method of proving job relatedness with which we have no argument, called construct validation, which involves taking a trait such as verbal ability and doing the appropriate job analysis and the

appropriate study and rendering a report, and the Civil Service Commission regulations accept that and the EEOC regulations accept that, but that has not been done here.

Q Then are we to take it that you are in general agreement with Mr. Sutton's position that verbal skills are crucial to police function?

MR. SOBOL: I think a policeman has to be able to understand written material, speak, make reports to court and make applications for search warrants. I think it is a very important part of the job. I have no question about that. What we do question is whether there is any indication that beyond the existing and unchallenged requirement in this case of a high school education that this test measures something that will assist the display of those skills. That is what we see as the question. We do not dispute for one moment that the requirements to be a policeman are demanding and rigorous and that they should be fulfilled. We do not for one moment think that the application of the Griggs test in any context involves a lowering of standards. That is not what Griggs and Moody were about. There is no effort by this Court to give out jobs to those who are not qualified for them. What the Court has held is that where there is a substantial adverse impact, we are not going to guess as to whether the standard is valid or not valid, but that it raises a requirement to prove that it is valid. If it is valid, if it

measures something important, it can be used. And if it is not, it cannot be used. And I think that there is an underlying current in the briefs in this case that there is something about the Griggs test which requires putting incompetents in jobs, and I think that is the furthest thing from the truth that can possibly be. It is simply a demand that some proof be set forth as to whether the standard applied--here Test 21--is predictive of the ability to perform those verbal skills or not.

Q Let us assume that there was evidence, expert evidence, and the experts said, "This measures it to some extent, but there is a much better test." And they put in the record what they think would be a much better test. But they say, "Obviously any kind of test like this measures verbal skills to some extent, and it measures verbal skills to some extent in connection with a job. This test is job related to an extent, but there is a much better one." What do you think then the result should be?

MR. SOBOL: If there was proof that there was a much better one, that would raise the question of whether it was a less discriminatory alternative as called for by this Court's--

Q I know, but that is not required in just ordinary rational basis equal protection cases, is it?

MR. SOBOL: No, that is true, but I do think it is required under 1981, which I view and I think has viewed--

Q It is required under 1981, you think?

MR. SOBOL: --as comparable to Title VII, that there be no less discriminatory alternative. But in this case the defendants made no effort to base their case on proof of verbal ability being required for a policeman's job. The contention--

Q But you do challenge apparently Judge Gesell's ability or our ability or the Court of Appeals' ability to say that this test obviously measures verbal skills to some extent and to some extent it is job related. You think we have to have some expert?

MR. SOBOL: Yes.

Q What kind of expert?

MR. SOBOL: An expert who is competent to do a validation study of one of the three types that have been recognized by the authorities in the field.

Q What about just an ordinary policeman, a police officer--say he has been in an administrative position for 20 years--you would not accept him? Just an experienced police officer.

MR. SOBOL: On what issue? On whether this test predicts the right measure of verbal ability? No, I would not accept him, and the proof of that is that they are using a cutoff score of 40, which is completely arbitrary. There is no proof that it, rather than 50 or 30 or 35 or 60, is the

appropriate cutoff. It was chosen at random.

Q That does not go to the question of whether it measures the skill. That goes to the question of how much of the skill you want.

MR. SOBOL: How much of the skill is being measured.

Q Those are two different inquiries.

MR. SOBOL:: Yes, it is two different inquiries, but it goes to whether the test is being validly used. If the test being used were the law boards, which also measures verbal ability, and the same passing requirement was imposed, we would say, "Yes, it is measuring verbal ability but much too much verbal ability." And the question is, In view of the adverse racial impact, is that justified? Is it justified to have this additional unnecessary requirement?

The point here is that verbal ability is required, but we do not know how much is required and where Test 21 indicates enough. Perhaps answering a quarter of the questions on Test 21 would indicate sufficient ability.

Q How does that fit into your rationality analysis; assuming that you concede that verbal skills are necessary to perform a policeman's job and assuming it is established to your satisfaction that this test measures verbal skills to some extent along the lines of Justice White's question, what more, in your view, do you need to have to establish rationality from an equal protection analysis?

MR. SOBOL: I think what more you need is a showing that the way the test is being used with the cutoff is having some measurable impact on the skills needed by a policeman. Let me answer your question further.

Q Can we evaluate the test by who passes it and who fails; is that it?

MR. SOBOL: I think the first question is whether it has racial impact, or we would not be here. But going beyond that, it seems to me the question is, you have a high school requirement to be on the police force. As far as any of us know, that is adequate verbal ability to fill out these reports and to understand these cases. The question is whether Test 21 adds anything to that that is valid.

Q Test 21 obviously adds something since many high school diplomates failed it.

MR. SOBOL: That is true, but we do not know whether it is screening out people that cannot perform or not. We have no evidence of whether the people it is screenisg out could or could not perform adequately well as policemen.

Q You mentioned high school graduates. I wanted to ask anyway whether the record in this case shows any correlationbetween the performance on a test and the prior performance in high school. Are the high school grades available, for example?

MR. SOBOL: No, sir, they are not in the record.

Q What about correlation between performance on the test and attendance at particular high schools?

MR. SOBOL: There is nothing on that in the record.

Q There may very well be a difference between the training one receives say at Central High School in Washington and that that one might receive in Wise County, Virginia up in the mountains.

MR. SOBOL: Yes, that is true, and we do not question that the department has a right to give a test if it can make a showing that the test is improving its selection processes. But what is failing here is under any of the alternative methods of making that showing that have been recognized, any proof of that. And I suggest that the questions that are being asked are essentially raising the question of whether we just simply cannot read the test, whether the Court cannot simply just read the test and say yes, it measures verbal ability. But if they administered the crossword puzzle in the Washington Post each morning to the applicants for work on the police force, that would measure verbal ability unquestionably. And yet would that be a valid test? I think the answer has to be the same. It is not simply looking at a test and saying this is verbal, this is not verbal. The important part of Griggs and Moody and the whole development of the law in this area is some proof, not surmise, that that is true, that you have a proper measure of validation, you

have a proper measure that this device is assisting the employer in getting better policemen, better employees, whatever the case may be.

Q What should we do if we decided that the Court of Appeals was wrong on its constitutional ground?

MR. SOBOL: I think the Court is faced with the decision of whether the Court of Appeals was wrong on all of the grounds on which its decision was based.

Q Let us assume that we decided it was wrong on 1981.

MR. SOBOL: And what?

Q On the constitutional ground because Title VII--do you think the Court of Appeals considered Title VII?

MR. SOBOL: Yes, it did consider Title VII. The Court of Appeals cited some cases saying that where there is a change in federal statutorial law during the course of litigation, that change should be applied to pending litigation. And that is cited in the court's opinion.

Q But on that basis, why would it ever have reached the constitutional ground? Why would it not have just dealt with the statutory ground?

MR. SOBOL: I do not believe the court's opinion can be read as specifying which of these grounds it is relying on.

Q You were going to refer to court's opinion?

MR. SOBOL: Yes. It is the end of footnote 2 on page

2-A.

Q What it says: "Congress has since amended Title VII. It reached charges of racial discrimination in Federal employment, and appellants unquestionably are entitled to the benefit of that amendment."

MR. SOBOL: Yes, sir. And I think that in view of that, what Judge Robinson was doing was saying that Title VII is applicable as well as the other basis of authority.

Q But you just told me that he also decided on the constitutional ground.

MR. SOBOL: Yes, I said that, and what I meant is that in his opinion he recited that the complaint was based on the constitutional ground, on 1981, and then he made this additional statement which Justice Brennan just read, holding that the Title VII standards were applicable to this case.

Q Do you think this is just a purely Title VII case as it comes to us from the Court of Appeals without any constitutional overtones?

MR. SOBOL: My trouble honestly with that proposition is the procedural requirements to get into court under Title VII, and this case has not met them. And so it raises the question, in order to make a determination as to whether this statement of Judge Robinson's is correct, it requires this Court to make a determination, given the circumstances of pending litigation--and in fact in this case there were

prior administrative proceedings--whether the Court would dispense in this context with the exhaustion requirements of Title VII and consider this a Title VII case as I think it surely would be if there were no exhaustion requirements under Title VII. I think then the authority cited by Judge Robinson would be squarely on point. The only wrinkle is that there was no charge, there was no final agency action, and there was no resort to court--

Q And it might be that with respect to the amendment, taking Title VII to apply to federal employees, that there may be no right to a trial de novo in a district court. That is a matter we are going to consider later this week.

MR. SOBOL: Yes, sir.

Q So that the scope of the trial might arguably have been wrong.

MR. SOBOL: I believe that issue concerns federal employees and not District of Columbia employees.

Q Perhaps that is correct. Yes, I was thinking of federal courts.

MR. SOBOL: And that issue would not be involved.

Q Mr. Sobol, the D.C. Code, the third basis for your relief, which is not mentioned by Judge Robinson, is that akin to 1981 or akin to Title VII in your case, if there is a difference between the two?

MR. SOBOL: You would have to tell me what you perceive to be the difference because I cannot see one. It is a prohibition against discrimination in District of Columbia government employment. That is what the statute says. Neither 1981 nor Title VII is limited to government employment, but the standard--no racial discrimination in employment--seems to me to be identical in 1981 and Title VII. And Judge Robinson, it seems to me, both made this comment about Title VII being applicable and treated the standards as the same, as has every lower court that has reached this question.

Q Some of the justices were assuming there might be a difference between the constitutional standard and the Title VII standard. I was just asking, if you assumed arguendo that there was such a difference, in which category would you put the D.C. Code?

MR. SOBOL: In the statutory standard because it is a statute which specifically addresses this problem, as does Title VII, and I would be hard put to think of any basis for distinguishing the D.C. Code provision and 1981.

Q So, your view would be, whether we find a difference or not, we still have to face a Title VII type case because of the D.C. Code.

MR. SOBOL: Yes. Yes, exactly.

I would like to briefly point out some other issues

that have been made. On the adverse impact, very briefly, we think this is one of the clearest showings of adverse impact of any case that has been litigated. There is twice the pass rate of whites over blacks on the test. And, more important than that, because there have been indications that this were not true, that two-to-one ratio is exactly reflected in the hire rate. So, 87 percent of the whites and 43 percent of the blacks passed, and 33 percent of the whites and 17 percent of the blacks are hired. So, there is no washout phenomenon here. The impact of the test is fully reflected in the hiring decision.

Q Your hiring figures, however, go to those who apply, not to those who pass.

MR. SOBOL: Exactly, because the issue is the legality of the test.

Q And it is just the reverse when you narrow the pool to those who pass.

MR. SOBOL: I can hardly say it would be just the reverse. There is about a one and a half percentage point difference in the rate of hires. The black rate of hire is 39.8 percent. The white rate of hire is 37.9 percent. It is extremely close and fully explained by the national recruitment effort where in 1970 and 1971 the department went all over the country, got applications from an 88 percent white group, and naturally most of those who applied did not

come to work in the District because it was far from their home. Although there is this very slight difference, I think it is essentially equivalent, and what it shows is that the discriminatory practice here is what is being challenged, and that is Test 21.

Q Mr. Sobol, what is the chronology of the processing or what was, at the time of this trial, the chronology from the time of application to the time of becoming a probationary policeman? On the application, for example, do the statistics here include applicants who are not in fact high school graduates who said no to the question on the form, Did you graduate from high school?

MR. SOBOL: My understanding, Mr. Justice Stewart, is that an applicant is asked if he graduated high school; and if he says no, he is not given an application.

Q Then it is not even an application.

MR. SOBOL: It is not an application. These figures in the record are for high school graduates who completed an application satisfying the high school education requirement.

Q And presumably the other requirements, i.e., What is your age? Fifty-two.

MR. SOBOL: Would not be accepted and would not be administered.

Q What that be an application? What is your age?

Sixteen. Would that be an application?

MR. SOBOL: I do not believe so.

Q But do you know? It seems to me quite important.

MR. SOBOL: It is not in the record. I know from extra record material that the answers I am giving are correct. But there is nothing in the record specifically on the question you are asking.

Q So, these applications, included in these statistics in the record, are all applications from people who are prima facie qualified applicants--high school graduates between 20 and 29?

MR. SOBOL: Yes, sir, that is my understanding.

Q Who have whatever the other requirements are--no serious criminal record or whatever.

MR. SOBOL: But not the mental examination and not the physical examination. My understanding of the chronology is that comes after passing the test. Only test passers are given a physical examination and a mental psychiatric examination.

Q So, to return to my original question--I am sorry I did not let you answer it--what is the chronology? An application--

MR. SOBOL: An applicant walks in, indicates whether or not he meets these minimal age and education

requirements and is on the spot that day administered a test which is scored then.

Q But he is not even given an application form unless his oral response to the inquiry indicates that he is prima facie eligible; is that correct?

MR. SOBOL: Yes, sir. That is my understanding.

Q So then he fills out the application, giving his name, address, age, high school graduate, blah, blah. Then what happens?

MR. SOBOL: He is administered the test right then and there.

Q Then and there?

MR. SOBOL: Yes, sir, and it is scored right then and there.

Q Right there at the counter?

MR. SOBOL: By the examiner, by the police officer in charge of this function. And it is scored right then and there.

Q He is individually given the test?

MR. SOBOL: Yes. Everything I am saying is not in the record, but that is my understanding.

Q I think it is important to understand the statistics.

MR. SOBOL: Yes, I do not question that it is important. It is just not in the record. I want to make that

clear.

Q And the statistics show that if he was a white applicant--of 100 white applicants, how many of them pass the test?

MR. SOBOL: Eighty-seven.

Q And 100 Negro applicants?

MR. SOBOL: Forty-three.

Q And then all of the 87 and all of the 43 then go to a training program?

MR. SOBOL: No. They then have a character investigation and a psychiatric investigation.

Q This comes post test?

MR. SOBOL: Yes.

Q And a physical.

MR. SOBOL: And a physical.

Q Post test. And now what do the statistics show about that? We now have 87 white applicants and 43, is it?

MR. SOBOL: Forty-three, yes.

Q Negro applicants. Then what happens to this group of 87 and 43 between the time of passing the test and taking the training program?

MR. SOBOL: They have these three requirements to meet--the physical, character, and mental.

If they pass--at least at the time this record was

compiled--they were offered a job.

Q How many would be left of the 87?

MR. SOBOL: At the point the job was offered, Mr. Justice Stewart, there are no figures in the record. What we have is acceptances of offers. In other words, those who were hired and went to training school. And the figures I gave Mr. Justice Blackmun are 39 percent of the blacks and 37 percent of the whites--I am rounding it off--were hired, and I am talking about those who pass now.

Q Of those who passed.

MR. SOBOL: Yes.

Q So, that means 37 percent of the whites, 38 or 39 percent of the Negroes presumably then passed the physical and the character and the mental. What is the mental? Is that something additional to these?

MR. SOBOL: Yes. You see a psychiatrist and--

Q It is psychological, not mental, not intellectual.

MR. SOBOL: No, no, it is psychological.

Q Right.

MR. SOBOL: Psychological.

Q Right. And then 37 percent would be something like 35 people out of the 87 and some 18 people out of the 43.

MR. SOBOL: Right. And the exact figures, out of

ever 100 whites that applied, 33 were hired; and out of every hundred blacks that applied, 17 were hired.

Q Thank you very much.

Q Is your next case the bar examination?

MR. SOBOL: I do not have that case. I know that case is coming.

Q And whatever is decided here certainly will bear on that one.

MR. SOBOL: It depends on how the opinion in this case is written. If the opinion is written that there are statutory bases for the claim here, therefore there is no occasion to reach the constitutional question, then it will not bear on that case. And it would seem to me that is the most appropriate basis of deciding this case, given the Court's rule about constitutional decisions. There are plainly statutory bases for the relief here with or without the Title VII component, and I would think that would be the basis on which the case was decided.

Q And other statutes presumably would not apply to a bar association case, would they?

MR. SOBOL: Oh, no, certainly.

Q Because they would not involve employment.

MR. SOBOL: Right. Right.

Q Mr. Sobol, one of the problems here may be that the passing grade is incorrectly set. Does the record tell us

whether the passing grade is determined by the Civil Service Commission or by the police department and whether it is the same or different from the passing grade used when the test is given for other types of jobs?

MR. SOBOL: No. The closest thing on the record on the questions you are asking is that it has been this way for 25 years, and it is supposed to indicate a level of proficiency equal to a high school education, a high school graduation. That is all there is in the record in answer to your question.

Q Thank you.

MR. SOBOL: I would like to very briefly get to a point that really has not been discussed, and that is the issue of whether there has been a validation study here which has indicated that Test 21 is validated against success in training. The Court of Appeals did not decide the question of whether training is an appropriate criterion for the validation of a test, and it is very clear from its opinion it did not. I stress that because there seems to be an invitation tendered by the amicae, if no one else, for the Court to decide broad questions of whether tests can be validated against training. The Court of Appeals found--and I am referring to footnote 59 on page 16-A and 17-A--that there was no showing that Test 21 predicted success in training, and we think that holding is correct and that the abstract

question of whether training is a proper criterion should not be reached. And, very briefly, the reason why the Court of Appeals held I think correctly that there was no such showing is that there is no proof--I will put it differently. Success in training is successful completion of recruit school. That is the only measure of success in training which has ever been used. Every recruit passed recruit school.

The department essentially asked the court to assume that persons who did not achieve a score of 40 on Test 21 could not pass recruit school. But if the cutoff score was 45 or 50, the proof in this case would be identical and the proof I refer to is there would be a correlation between the level of passing score on Test 21 and the level of passing score in recruit school. And the same argument could then be made, that anyone who did not get a 50 could not pass recruit school. And of course we have a record here where thousands upon thousands got between 40 and 50 and went on to recruit school and succeeded. There is no difference between the hypothetical I put and the facts here. There is absolutely no basis for assuming that a person who scored 35 on this test could not succeed in recruit school and succeed as a policeman. And the defendants' expert, Futransky, the one recommendation he made was that the cutoff score was too high, it demanded more than what was necessary to predict

success in recruit school; he recommended that it be lowered. But of course the point he chose, he had no basis for either. And the authorities we have indicated in our brief do indicate that there ought to be a study of this question of where on the scale vetween zero and 80 on Test 21 is there some indication that this is a proper measure and not an excessive measure of the verbal ability needed to perform the task of a policeman.

We ask that the judgment of the Court of Appeals be affirmed. We think there is plenty of room on remand pursuant to the Court of Appeals judgment to explore any issues of later development in this case.

One thing which is a crucial later development is that the defense is moot in that they do not use these recruit school tests, as the affidavits put in by the defendants make perfectly clear. In 1972, the whole system of written tests in recruit school was abandoned, and Chief Murray said in his affidavit that because there was a change in recruit school, he had no basis for making any judgment as to whether Test 21 was valid as against the current training procedure.

That is a very important question in the case since the whole defense is based on correlation with an exam that was abandoned four years ago and is not now used.

Q Then what are we doing talking about the

possibility of a declaratory judgment or injunctive relief?

MR. SOBOL: I think the Court of Appeals judgment said it is not clear on this record whether there should be an injunction or a declaration because the circumstances that are now current were not explored. The Court of Appeals said that as of 1971, based on the evidence that was in existence then and the training program in existence then, Test 21's use was unlawful.

Judge Robinson remanded the case to the district court to explore what other circumstances bear on the propriety of issuing an injunction or not issuing an injunction. My point is that an affirmance of the Court of Appeals decision is not the end of the matter. It is simply an end of the Futransky study and an end of the issue of whether as of 1971 the department had shown the test was valid. Anything later that comes in is open to exploration on remand pursuant to the order of the Court of Appeals.

Q Let me see if I can clarify just one thing that I have touched on and Mr. Justice White touched on. The previous case announced and other cases following--including Albemarle Paper, are consistent with that--that the test must be job related, which obviously means related to the job to be performed. Is it your view that a United States district judge, who is dealing with these matters constantly, looking at a test that measures verbal skills, must have the expert

testimony of a clinical psychologist or an educational psychologist in order to make a judgment about whether that test is related to the job, not whether it is the best test or the perfect test but whether it is related to the job?

MR. SOBOL: Yes, that is my view. That is the defendants' view and the view of all the amicae in the case. This is a very important question as far as testing is concerned, that judgments not be made on face of the test, that there be some indication beyond the appearance of the matter that the test is doing the job it is intended to do, particularly in the face of enormous adverse racial impact. The question is whether the impact can be justified, and it has to be justified, in my opinion, by more than just examination of the face of the test. Thank you.

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

Mr. Sutton.

REBUTTAL ARGUMENT OF DAVID P. SUTTON, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. SUTTON: A few key points, Your Honor. In answer to the most recent question, I respectfully submit that counsel himself expressed a contrary view in an article written by him in the Harvard Law Review. Some tests have an obvious relevance to business needs and can clearly be justified for reasonable use as a criterion for employment decisions. A typist must know how to type and a welder to

weld. A proofreader must be reasonably proficient at proofreading. And to this it might be added, in the language of Judge Gesell, the ability to swing a nightstick no longer measures a policeman's exacting role.

Q Is counsel bound as an advocate by everything he may have said as an author?

MR. SUTTON: No, Your Honor.

Q I would hope not.

MR. SUTTON: But there should be--

Q You are simply saying he was right the first time.

MR. SUTTON: He was right the first time, and we should not discount commonsense in the handling of cases.

Now, another point that is very crucial goes to the question--

Q He makes quite a different point. This is not like the welding test. He says sure, you have got to be able to read but you do not necessarily have to be able to read Shakespeare.

MR. SUTTON: Right.

Q Can we tell by looking at this test whether or not it measures the ability to read Shakespeare or the ability to read search warrants?

MR. SUTTON: Your Honor, all I can say to you there is that the federal government put in an affidavit of a

psychologist which counsel did not dispute--the affidavit of Diane Wilson--which equates the verbal ability of Test 21 with that required to get through recruit school, and that same psychologist analyzed study materials.

But the most important point I would make--and that is in response to your question, Mr. Justice Stevens, and Mr. Justice Powell's question about the correlation between the test and the high school education requirement--counsel did not accurately answer that question.

Futransky himself points out--and again this is an undisputed fact on a summary judgment record--at page 100 of the record, that by setting a standard of 35 right, an additional 15 percent of applicants would be eligible. This standard would still represent the reading level of at least the 11th grade.

However, by fairness and by the same logic, it would represent verbal ability below the high school education level and it would run counterproductive to the high school education requirement, the sufficiency of which counsel concedes. But let us not stop there.

We live at a time when authoritative study throughout the country is saying we should have more than a high school education. And, nonetheless, counsel would lower the cutting score below 40, have the department tap the ocean depths to see what is the most possible workable test score is.

Q When you say high school level, what do you mean, nationwide?

MR. SUTTON: High school level, Your Honor?

Q Yes, sir. In this record, what does it mean? Because you throw it all around.

MR. SUTTON: It means a proper high school education requirement.

Q This area?

MR. SUTTON: In general.

Q Suppose the high schools of this area are very low. Would anything be done about that?

MR. SUTTON: Your Honor, I think that we have to use the term "high school education" in a general sense, as a work of art, the same way that the President's Crime Commission did. When the President's Crime Commission used the term or expression "high school education," it meant a proper high school education with its attendant verbal ability.

Q The problem is we live in an age, if one can believe what he hears and reads, that many high school graduates do not have the equivalent of a high school education.

Q Their ready ability is on a fourth grade level in a county right included in this group.

MR. SUTTON: This may be so, Your Honor, but the

question is, How does this affect the right of the community to a competent police force?

Q Perhaps that is why Test 21 is added to the high school requirement, to see whether they are part of the high school crop who cannot read.

MR. SUTTON: Right. And it has a cutting score of 40. As a practical matter, 40 of 80, a 50 percent grade, is not really asking too much. And in spite of this, Mr. Justice Marshall, the black component of the department has spiraled. And even though this cutting score has remained the same and the passing rate has remained the same--

Q It is even harder than it was in 1866. I do not get anything out of how it has grown. I want to know, is it constitutional now?

MR. SUTTON: Yes, Your Honor.

Q That is all I want to know. I just speak for myself. That is all I want to know.

MR. SUTTON: I made a response to your question: What more do we have besides waving a flag and saying, "Oh, we're a model for recruitment"? We have cold print. We have statistics which show that between 1965, the effective date of the Civil Rights Act, and the present, the department's black component has increased from 17 percent to 41 percent, and we do not think this can be ignored.

The other point I would make is that the federal

respondents try to downplay the verbal ability, but they themselves put in the record all kinds of affidavits saying that verbal ability is a critical factor.

Q Why is this still a live case? Has the department's test changed?

MR. SUTTON: No, Your Honor, it has not. And in response to counsel's assertion that we have an intervening circumstance that would moot the case, we submit that if counsel wants to bring a new action, we can prove that verbal ability is still a critical factor under the department's current training program, and it gives the same test.

Q Is Test 21 still given?

MR. SUTTON: It sure is.

Q But the training program is greatly changed.

MR. SUTTON: The training program is changed. But verbal ability is still a factor.

The only final point I would make, you may recall that in response to questions posed by Mr. Justice White, we discussed this factor of a quota system. While the courts do not impose quota systems, they do impose goals to redress previous racial imbalance. Carter v. Gallagher is a case in point. And this Massachusetts case is a case in point. They said, "To atone for your sins of past discrimination, hire so many blacks until you bring the black component of your department up to a certain level." This is to be distinguished

from quotas, and this has been upheld notwithstanding Title VII.

The question was also asked, What are we going to do here if we remand the case, subject the Metropolitan Police Department to a procedure like that? We have already done it. We hired one black policeman for every white policeman. Fifty-two percent of all officers, under the most recent statistics which we put in our reply brief, are blacks. How then could this case be remanded for us to adhere to a goal in order to redress a past racial imbalance, in order to atone for past sins of racial discrimination? The answer is there are no such sins and that this test produces no adverse impact.

Q What remedy did the injunction anticipate?

MR. SUTTON: It did not say, Your Honor. They wanted to leave that up to Judge Gesell.

Q I take it it anticipated some kind of remedy other than just saying quit giving Test 21.

MR. SUTTON: I would assume so.

Another point about this business of well, it has all been changed by a new recruit program, is that back pay has been sought here. Back pay has been allowed by this Court in Albemarle, and in a case involving the federal government, Chambers v. the United States, the Court of Claims held there could be back pay. Of course Chambers involved potential discrimination. This case does not.

I respectfully submit the case and we ask Your Honors to permit the district court summary judgment ruling to remain undisturbed.

Thank you.

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

[Whereupon, at 11:48 a.m. the case was submitted.]

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