

In the

Supreme Court of the United States

Town Of Lockport, New York, Et Al.,

Appellants,

v.

Citizens For Community Action At The
Local Level. Inc, Et Al.,

Appellees.

and

John J. Ghezzi., Secretary of State
of the State of New York, Et Al.,

Appellees.

No. 75-1157

December 1, 1976
December 2, 1976

Pages 1 thru 57

Duplication or copying of this transcript
by photographic, electrostatic or other
facsimile means is prohibited under the
order form agreement.

HOOVER REPORTING COMPANY, INC.

Official Reporters
Washington, D. C.

546-6666

IN THE SUPREME COURT OF THE UNITED STATES

-----X
TOWN OF LOCKPORT, NEW YORK, ET AL., :
Appellants, :
 :
v. : No. 75-1157
 :
CITIZENS FOR COMMUNITY ACTION AT THE :
LOCAL LEVEL, INC, ET AL., :
Appellees, :
and :
JOHN J. GHEZZI,, Secretary of State :
of the State of New York, ET AL., :
Appellees. :
 :
-----X

Washington, D. C.,

Monday, December 1, 1976

The above-entitled matter came on for argument at
2:29 o'clock, p.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:

VICTOR T. FUZAK, ESQ., 1800 One M & T Plaza,
Buffalo, New York, on behalf of the Appellants.

JOHN J. PHELAN, 2300 Erie County Savings Bank
Building, Two Main Place, Buffalo, New York,
on behalf of the Appellees.

MILES A. LANCE, Assistant County Attorney,
Niagra County, New York; on behalf of the Appellees.

C O N T E N T S

<u>ORAL ARGUMENT OF:</u>	<u>PAGE</u>
VICTOR T. FUZAK, ESQ., for the Appellants	3
JOHN J. PHELAN, ESQ., for the Appellees	30
MILES A. LANCE, ESQ., for the Appellees	50

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Town of Lockport against Citizens for Community Action at the Local Level and others.

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

ORAL ARGUMENT OF VICTOR T. FUZAK, ESQ.,

ON BEHALF OF THE APPELLANTS.

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

This is an appeal from a judgement of a three judge District Court sitting for the Western District of New York. That Court ruled that provisions of the New York State constitution and of the New York State Municipal Home Rule Law, relating to the procedures to be followed in connection with the effectuation of changes in the form or structure of county governments, were unconstitutional as being in violation of the equal protection clause of the Fourteenth Amendment.

The provisions in question set forth the procedures which are to be followed in the event that the people of a particular county wish to change the form of their government.

The traditional form of county government in New York State is a legislative form. That was the form in Niagara County with which this case is concerned.

The constitutional and statutory provisions provide as follows: if the citizens wish to change the form of their government in any respect, or to transfer functions of government between towns, villages or the county, they can only do so if the county legislature adopts a local law presenting those changes or providing for those changes. Then that local law must be put to referendum of the citizens of the county as a whole. And then in order to have the local law take effect and become the law of the county, that local law must obtain the majority of the vote cast by the voters residing in the cities of the county, and it also must obtain the majority of the votes cast by the voters residing in the towns of the county, both taken as separate units.

And whether or not a particular proposal obtains a majority of all the votes in the county, taken as a single unit, is not determinative of the issue.

The District Court held, in this case, that those provisions violated the equal protection clause in view of the fact that they denied the citizens of the county the rights of the one person, one vote doctrine.

I might recite very briefly, if I may, the facts of the case, to put the matter into perspective. In 1972 the Niagara County Legislature adopted a proposed local law which would effectuate a new charter form of government for the Niagara County residents.

That new charter form of government would have changed the county form of government from a legislative form to a combined executive and legislative form. It would have created the new positions, elected positions, of county executive and other subsidiary county officials.

It adopted that local law, and it put the local law to referendum in November of 1972. At that referendum, the voters of the towns, residing in the towns of the county, did not approve the proposed changes by a majority. They disapproved of those changes.

The voters who resided in the cities of the county, on the other hand, by a majority approved the proposed changes.

QUESTION: Mr. Fuzak?

MR. FUZAK: Yes, sir.

QUESTION: In New York, are towns simply geographical areas, or are they small cities?

MR. FUZAK: Well, they're not small cities. They have different functions and they have different powers. But they do have internal government structures. The town will have a supervisor, the town will have a town board. And much like a city would have a mayor and a city council and that type of things.

QUESTION: But the whole state isn't divided into towns, then, the way some New England states are?

MR. FUZAK: Yes, I think in point of fact, it is.

The whole state is divided initially -- the major superstructure is the county. And then from there you go to the city and the town, which have different rights and powers and so on. And inclusive in the towns very frequently are villages, which was the case here as well.

QUESTION: But does the county -- here what was involved was a new county charter?

MR. FUZAK: Yes, sir, Mr. Justice.

QUESTION: Now, would the provisions of the county charter be equally applicable throughout the county?

MR. FUZAK: Yes, sir, that's right.

QUESTION: With respect to everybody, that's right.

MR. FUZAK: Yes, sir, that's right.

QUESTION: Inside towns and outside towns?

MR. FUZAK: Inside towns, inside cities, everyone residing within that county would --

QUESTION: Are subject to everything that's in the charter?

MR. FUZAK: Precisely right, yes, sir.

QUESTION: How many towns are there, do you think, in this County?

MR. FUZAK: Twelve.

QUESTION: And how many cities?

MR. FUZAK: Three.

QUESTION: I gather that the aggregate -- in other

words, it must be a majority of the aggregates of city people and the aggregate of county voters.

MR. FUZAK: Each taken as separate units.

QUESTION: Yes.

MR. FUZAK: That's correct.

QUESTION: And there was a majority of the aggregate city but not of the aggregate county?

MR. FUZAK: Correct, and there was a majority --

QUESTION: Even though there may be 12 towns, and maybe 9 of them, the majority there may have voted in favor, but the total was not a majority in favor.

MR. FUZAK: That's correct. What you suggest is conceivable. I don't exactly know how the voting went, but that is correct.

What happened in the 1972 referendum was, that if you took all the votes and put them into one basket, there was a majority in favor of the adoption of this new county charter. The proportion was 52% to 48%. They did it on that basis. But they did not get the complementary votes that are required by the constitution and by the municipal home rule law.

QUESTION: And the county is either city or town, there's nothing -- no part of the county that's neither city or town, is that correct?

MR. FUZAK: The county -- that's correct, sir. And included in the towns, there will be villages, and there are

villages.

QUESTION: Well, the town is what we call a township, I guess.

MR. FUZAK: Yes, sir, that's correct, sir.

So as a consequence of that failure to obtain approval, the County of Niagara commenced a suit in the District Court, seeking a declaration by the District Court that those provisions of the state constitution and the municipal home rule law were indeed unconstitutional on these grounds, that they denied the one person, one vote rule under the equal protection clause.

The County of Niagara purported to bring that suit on behalf of all of its citizens within the county. The defendant in that suit was the state of New York.

The District Court found that there was no substantial federal question, refused to empanel a three judge court, and dismissed the complaint.

That judgement became final.

Thereafter, these individual defendants in this action, which the Citizens for Community Action at the Local Level, the acronym for which is CALL, began this action, seeking precisely the same declaration of unconstitutionality and precisely the same relief. And that case proceeded, now naming the County of Niagra as a defendant, or those officials of the County who had officials acts to do in connection with

the certification of this proposed charter, and also the officials of the State of New York, who also had to do things to make the proposed charter the local law of the county.

There were no hearings in that proceeding, no proof was adduced. Instead, cross motions were made for summary judgement.

QUESTION: This wasn't a three judge court, was it?

MR. FUZAK: Now, a three judge court was empaneled in this instance, yes sir. And cross motions for summary judgement were made.

QUESTION: Was there any reference in the course of, apparently, three judge court, of the previous action in which a single judge had not even found it substantial enough to ask for the conventional three judge court?

MR. FUZAK: Yes, sir. The county of Niagra, and the State of New York both assert it as affirmative defenses in their answers, the defense of res judicata, based on that ground. There was no particular reference in anything that I'm aware of in connection with the empanelling of the three judge court to that previous determination.

QUESTION: Of course that would be part of the res judicata. The single judge found it so insubstantial as not to even warrant a request for the conventional three judge court.

MR. FUZAK: Right, sir.

So a three judge court was empaneled, and these cross motions for summary judgement were made. No proof was adduced, and no testimony was taken.

QUESTION: Affidavits?

MR. FUZAK: Some affidavits, your honor. The moving papers on both motions, I think, would have to be characterized as extraordinarily sparse under the circumstances. There was no -- incisive review of the reasons for the passage of the constitutional provisions or anything of that nature in those papers.

While the court was considering those motions for summary judgement, the county legislature went ahead and adopted a new charter, or attempted to draft a new charter, in 1974. And before the decision on this case, the summary judgement motions.

In November of 1974, the County Legislature put a new charter and a different charter up for referendum to the voters of the County, which by its own terms, would supersede any previous charter or any previous form of government for the county. And that was put to referendum in the same fashion.

QUESTION: And the form of that government, did that differ from the '72 proposal?

MR. FUZAK: It differed in certain respects, your honor, but not materially. There were some changes in it, I think made in order to accomodate some objections by people

in the towns, that kind of thing.

QUESTION: But basically it would have been an executive --

MR. FUZAK: Correct, sir. Correct. And essentially the same result, and almost by the same percentages or proportions. Again, there was about a 52% total in favor, if you took all of the citizens and put them into one basket, and 48% opposed. But the citizens of the towns again rejected the proposed changes in their form of government, the form of county government.

QUESTION: Are the differences relevant to this decision in this case at all?

MR. FUZAK: No, I don't think we can say that they are, your honor. There are some different positions involved in the two charters, but I think for all intents and purposes we ought to regard them here as being equivalent in their scope and in their application and function.

QUESTION: That is, of the two charters?

MR. FUZAK: That's right, sir. That's right.

After the November, 1972 --

QUESTION: And of the two votes, regardless of the percentages or the precise numbers, the same -- factually, the two votes are identical?

MR. FUZAK: The same result. Exactly right, sir. The voters of the town did not give it majority approval,

the voters of the city did.

QUESTION: And there was an overall majority?

MR. FUZAK: There was an overall majority.

And again, in that situation, the question came as to whether that charter could be implemented. And application was made, the decision of the Court on the first charter, the 1972 charter, came down shortly after the 1974 referendum with respect to the 1974 charter. The Niagara County people made an application to the Court to have its judgement applied not to the 1972 charter, which was the subject matter of the previous action or of the existing action, but to have it apply instead to the 1974 charter.

The Court refused to do that, apparently on the grounds that it did not have jurisdiction over the '74 charter, which was not a subject of the lawsuit.

So a judgement was entered in 1975 declaring the 1972 charter to be the law of the land on the grounds that the New York State constitution was unconstitutional and the municipal home rule law was unconstitutional, and that since, in spite of the fact that there were no statutory provisions to support this kind of approach, that since there had been an overall majority, that therefore these changes that were proposed could take effect. And so the January, 1975 judgement said the 1972 charter is the law of the land.

The Attorney General had indicated that he was going to appeal from that judgement. Shortly before the time to appeal expired, he made an announcement that he was not going to carry forward the appeal, and so the town of Lockport supported by the other towns of the county, made an application for intervention which was granted for the purpose of prosecuting this appeal, and that's why we're here today.

After that, after the appeal was filed, the state and county officials purported to put into effect the 1974 charter, and not the 1972 charter as was provided in the original judgement and order of the court. We raised questions of mootness on the grounds that the subject matter of the original action had been destroyed by the subsequent conduct of the parties litigant. That matter was up before the Court on our original jurisdictional statement. The case was remanded to the District Court. The original judgement was vacated. The case was remanded to the District Court for further proceedings in light of the 1974 charter referendum.

And another proceeding was had -- again, no proof -- but counsel were summoned to the District Court. The District Court found that there was no mootness. The District Court denied an application by the CALL of plaintiffs here. They had made an application to make sure that the case did in fact have jurisdiction over the 1974 charter, to amend their complaint so as to raise the questions of constitutionality

as to the '74 charter, which would have been fine, we would have had a trial and we could have gone through the whole thing.

But that was denied as well, and the Court found no mootness.

252

QUESTION: Leave to amend was denied?

MR. FUZAK: That's right, sir. The Court found, in effect, that it was empowered to make its previous judgement, which related to the '72 charter, applied to the '74 charter.

QUESTION: And did it?

MR. FUZAK: It did do so, sir.

QUESTION: Entered a new judgement, did it?

MR. FUZAK: It entered a new judgement in October -- in December of 1975.

QUESTION: So there's no mootness problem in this case now?

MR. FUZAK: Well, we claim there is a mootness problem, and we raise that on this appeal.

QUESTION: Even with respect -- even after the remand?

QUESTION: And then after the change of the judgement?

MR. FUZAK: Yes, sir. Because we -- our position on that is, that prior to that happening, the actions of these parties litigant in fact destroyed the subject matter of the original lawsuit, which was the '72 charter. The '74

charter was never considered in the lawsuit at all. The record had been closed, and the matter had gone to appeal --

QUESTION: But the Court has now -- so you must say the Court was in error in having its judgement apply to the '74?

MR. FUZAK: Yes, sir, I do.

QUESTION: As long as you accept that, it's not moot.

MR. FUZAK: No.

QUESTION: Well, at the most, you could claim that the court did follow procedures that were unusual, if not irregular.

MR. FUZAK: Yes, sir, I do.

QUESTION: But they did -- we do have a decision before us affecting the 1974 charter.

MR. FUZAK: Exactly right, sir.

QUESTION: Which is the existing charter.

MR. FUZAK: That's right.

QUESTION: Well, isn't your complaint with respect to that really that the New York officials, without any federal court order, had already put into effect the 1974 charter?

MR. FUZAK: Yes, sir.

QUESTION: And therefore there was no need to litigate with respect to that, since the plaintiffs had already

obtained what they wanted, putting that charter into effect.

MR. FUZAK: Yes, sir. That put us in a very peculiar position because --

QUESTION: I can imagine.

MR. FUZAK: -- we then had to take some action to protect our rights with respect to the '74 charter, and that's why we were required to start an action in state court, under Article 78 of our Civil Practice Law --

QUESTION: I suppose you would have some relief if we reversed the District Court?

MR. FUZAK: Yes, sir, we certainly would.

QUESTION: You're saying, there's simply no predicate for the order relating to the 1974 charter.

MR. FUZAK: Yes, sir, that's what I'm saying.

QUESTION: There's nothing. Therefore, it's an utterly improper order.

MR. FUZAK: Correct, sir. What happened, in point of fact, was, that when the matter was remanded to the Court, the Court on its own motion brought in the 1974 charter and made it an exhibit in the proceeding and so on, and then proceeded from that standpoint to include it in the case, and to act on the '74 charter, amend the original judgement to make it apply to the '74 charter.

QUESTION: On the reasoning of its original judgement.

MR. FUZAK: Correct, sir. Exactly on the same reasoning.

QUESTION: And you've already conceded the two charters are -- for this -- purposes of this case, are identical?

MR. FUZAK: Essentially -- quite right, Mr. Justice.

The issue here, as we see it, is whether or not the equal protection clause -- among these issues -- there are issues of mootness and there are other issues concerning the relief that was granted by the Court, but I would like to address myself principally to the constitutional question of whether or not the equal protection clause can require or does require a state to afford its citizens the right to determine by an election process compatible with the one person, one vote concept or doctrine, the form or structure of subordinate government instrumentalities within the state.

And the appellants' position is, that the state is not required to do that by any provision of the constitution, and that the intervention of the federal judiciary in this instance would be improper and was improper. And we say that for this reason: because what is at stake here is very clearly and purely state action within the proper sphere of state action, that is, the establishment, the modification, the repeal, the amendment, the abolishment of the state's

own internal government structure.

QUESTION: So you think that you could provide that in a referendum on an amendment of a county charter that the people in the town get two votes and the people outside the town get one vote?

MR. FUZAK: I think there are, as there are in all these cases, there are points that you reach where the situation is so apparently irrational that it calls for and would require and would merit some judicial intervention.

I do not think, however, that the automatic application of the one person, one vote doctrine is proper in any sense.

QUESTION: And you would say that -- suppose the county charter provided for the maximum mill levy. Just suppose that. And there was a proposal that was subject to referendum that the mill levy would be raised. And you would say this provision in New York, the way it is, would be proper, namely, that the people in the cities -- people in the towns would have to have a majority in order to approve the --

MR. FUZAK: Yes, sir.

QUESTION: Even though the provision applied to everybody equally?

MR. FUZAK: Yes, sir, I would, for this reason: because unlike the other cases where this Court has applied the one person, one vote doctrine, this case deals strictly and solely and purely with a question of the establishment or

change of the structure or form of internal state government.

The other cases, as you all recall, of course, dealt with questions of representation, whether or not someone was being deprived of his equal vote in terms of representation.

QUESTION: Just awhile ago you answered me and said it would even apply to a mill levy change. That isn't a structure.

MR. FUZAK: No. Well, I'm sorry your honor. That is a different thing. You're talking about a taxation matter.

QUESTION: Yes.

MR. FUZAK: I'm sorry, I misunderstood you. I didn't hear you properly. No, that's a different thing. That would not apply in that situation. Because --

QUESTION: You would think that everybody would have to have an equal chance at defeating that law.

MR. FUZAK: No, that would not be an appropriate part of the charter, that would not be an appropriate thing for the local law to include as part of the structure of government. That would be an action that would have to be taken by the appropriate representatives within the government after it was formed. I don't --

QUESTION: Well, some charters set maximum I hate to tell you, but they do.

MR. FUZAK: Well, that is not in this case. That is not an issue in this case. And the only -- what is

involved here --

QUESTION: All you're talking about is the structure, then, of the --

MR. FUZAK: Exactly right. And that's all that was done in this case, and as a matter of fact, that's all that the constitution or the municipal home rule allows the counties to do is change their structures in accordance with this complementary majority vote rule. So I don't think we can get involved in the kind of problem you raise, Mr. Justice White.

QUESTION: So the kinds of things that the New York law permits to be done are those that the Court was talking about in Hunter against Pittsburgh?

MR. FUZAK: Yes, sir, that's right. This case in no way involves any claim by anyone -- nor can it -- that anyone is being deprived of an equal vote in terms of the selection of governmental representatives. Because whether there is a county charter, or whether there is not a county charter, there is an appropriately constitutional republican form of government for the county. And there is no claim here of any discrimination in that sense.

And of course most of the cases that the Court has applied the one person, one vote rule to, involve exactly that point. There's a matter of representation, the matter of apportionment, districting, and that type of thing.

This case does not involve that.

QUESTION: Do you feel that Gordon against Lance gives you any support?

MR. FUZAK: Yes, sir, I very definitely do, because I think the Court there found that it was within the political practice, political judgement, in effect, of the state, to make a determination that instead of having a simple majority to approve additional municipal bond indebtedness, there should be a requirement of a 60% majority. And the Court said that was perfectly all right. Because in certain circumstances and situations the one person, one vote rule does not apply.

And I think that's very clear from the development of the cases, because the Court has refused to have an automatic application of that rule. And that's exactly what happened in this case, I'm afraid. Because I'm afraid the District Court in rendering its judgement made an assumption that there was an automatic application of the one person, one vote doctrine.

And I take issue with that because I don't think that's an appropriate assumption. I don't think it's appropriate constitutionally, and I don't think it's appropriate on the basis of the cases that this Court has decided in which the Court has refused to apply it, like Wells versus Edwards when you're talking about the election

of the judiciary and things of that nature.

QUESTION: Originally -- that doctrine originally arose, of course, in terms of what's called representative democracy in the legislative area. And then it was expanded to include what?

MR. FUZAK: It was expanded to some extent to include elections involving the incurring of public debt, largely.

QUESTION: Kolodziejski against Phoenix?

MR. FUZAK: Phoenix, City of Phoenix versus Kolodziejski, the city of Cipriana versus City of Hooma, and that line of cases.

QUESTION: And then also in that school district.

MR. FUZAK: The Kramer against the Union Free School District where there was an election of a representative -- State of New York -- but where there was an election of a representative board. And again, I think the overtones there were that the board that was being elected was fulfilling the functions of representatives of the people, and that -- I think it clearly fell within the Avery line of cases, Reynolds versus Sims, Baker-Carr, and so on.

QUESTION: And of course Avery involved a town.

MR. FUZAK: Yes, sir.

QUESTION: Or county.

MR. FUZAK: County.

QUESTION: And Hadley against the Junior College, or whatever it was.

MR. FUZAK: Hadley against the junior college was another case involving, I believe, it escapes me at the moment, I'm sorry to say --

15
QUESTION: Up in Kansas or --

MR. FUZAK: The junior college, yes. But that line of--

QUESTION: Now that went pretty far away from legislative apportionment, didn't it?

MR. FUZAK: The Hadley case?

QUESTION: Yes.

MR. FUZAK: Well, it did to an extent, your honor. And so do, in fact, the cases where the one person, one vote principle has been applied when the subject matter of the elective process is the incurring of public debts. That is also somewhat removed from the election of representatives, and yet not quite. Because they are both exercises of governmental functions after the --

QUESTION: Rather than the structure of the governmental entity itself.

MR. FUZAK: Quite right.

QUESTION: Hadley and Cramer were both elections to representative bodies, albeit of lesser stature than state legislatures.

MR. FUZAK: Yes, sir, that's correct. And the Court

has found --

QUESTION: Your whole point, as I understand it, is simply that we do not have here anything that smacks in the slightest of a choice of representatives.

MR. FUZAK: That's correct.

QUESTION: This is just whether or not the county may or may not have a particular structure of government.

MR. FUZAK: That is right.

QUESTION: And whether it can say, even though there is a majority overall, if there's not a majority of the aggregate of the voters of the townships, then the county may not have that new form.

MR. FUZAK: Whether the state has that sovereign authority to do that in terms of setting up its own form of government --

QUESTION: Well, apart from that. The whole theory, as I understand it, of Reynolds and Sims and that whole line of cases simply is inapplicable.

MR. FUZAK: Exactly right, sir.

QUESTION: And is it clear, may I ask, that the new charter or charters affect the towns quite differently from the way they affect the cities?

MR. FUZAK: I don't think that's exactly the case. I think as a practical matter, that's true, because of the difference in the authorities which are granted by state law

to the towns and the cities. I think as a practical matter when you superimpose an executive branch onto a county government, the normal result is that the executive branch assumes powers and does things that might normally not have been done by the legislative branch when it was acting in another fashion.

QUESTION: At all.

MR. FUZAK: No. There is no -- Mr. Justice Stevens, to answer your question, there is no transfer of functions as between any of the subsidiary forms of government involved in this particular charter. But the difficulty is that the holding of unconstitutionality is indiscriminate. It holds the entire provision of the state constitution, and the entire section of the municipal home rule unconstitutional. And that means as well the complementary majority requirement if you are, in fact, going to transfer functions from the town to the village or from the village to the town, or the county to the town, and so on, which is, of course, a matter of real substance and real importance.

QUESTION: But in this case, that fact -- it was not present?

MR. FUZAK: That fact was not -- is not --

QUESTION: So there's no real rationale behind this, in this case? Is that it?

MR. FUZAK: Behind what, sir?

QUESTION: Behind requiring a majority of both the town and the majority of the cities separately.

MR. FUZAK: No, I think there's a rationale behind it, your honor.

QUESTION: What is it?

MR. FUZAK: The rationale is, that I think people have, in different areas of a particular county, have different interests and different requirements in terms of their county government. And I think that the county government as it exists today, or as it existed before they put this charter into effect, was a functioning county government with proper representation of all the people involved, nothing wrong with it whatsoever. And now you impose an entire new superstructure of an executive branch on it, the natural, normal result is an extension of the powers of the county, an extension of the exercise of the powers of the county, and an intrusion in to the exercise of powers by the --

QUESTION: Even though, under the new county charter, as you said earlier in your argument, the provisions will apply equally to everyone?

MR. FUZAK: They apply equally to --

QUESTION: I mean, everyone is subject to them to the same extent?

MR. FUZAK: That's right. Except insofar as cities and towns do have, by state law -- general state law --

somewhat different authorities and powers.

QUESTION: Well, is it possible that if this is a valid system, that the cities might override township interests because of the kind of representation they get in county government?

MR. FUZAK: Yes, in point of fact what we have here in Niagara County, the situation is that there happen to be some more residents in the three cities than there are in the towns of the counties. But that is not true in 53 of the other 57 counties of the state that are covered by these provisions. In those 53 counties, the opposite is true. There are more people living in the towns than are living in the cities, and if there is this claimed discrimination, it rests in favor of the city dweller rather than the town dweller.

I think the reason we can't get into it very deeply is because there's no record on it, frankly. But I think the reason this was adopted by the people, as part of their constitution, was, to afford some kind of detente between the different kinds of people. And we saw that in the Dusch case and some others that this Court has handled.

QUESTION: Do town functions -- what are town functions in New York? Is there any law enforcement function? Do you have JP's that are elected on a township basis?

MR. FUZAK: Yes, sir, yes, sir. They have JP's,

they have a town board, they have a supervisor --

QUESTION: Do they have constables?

MR. FUZAK: They have constables, they have -- they have general governmental functions.

QUESTION: Now, is it possible that if a county developed an executive -- what, do you have a sheriff? Is he the basic county law enforcement?

MR. FUZAK: There is a county sheriff, that's correct.

QUESTION: Now, if the sheriff's department expands a great deal, might the need or use of the town constable be diminished?

MR. FUZAK: Exactly right. And the same would be true in other areas of services to people as well.

QUESTION: Then you might (inaudible) county constabulary

MR. FUZAK: Yes, yes.

QUESTION: So it is possible that the status quo might be more greatly altered with respect to the towns than with respect to the cities?

MR. FUZAK: Yes, I think that's correct sir as a practical matter. I think that is correct as a practical matter.

The other aspect of the matter, of course, that provides great concern to the towns is, that if this provision is ruled unconstitutional, as the District Court has done --

and I say indiscriminately -- it would mean, under the District Court's ruling, that if a simply majority of the people in the county wanted to effect changes in the county structure to transfer functions from the cities to the towns, or from the counties to the towns, or vice versa, that could be done, and the townspeople would not have the separate, independent voice that they have in questions involving annexation or things of that nature, which have found to have been perfectly proper and appropriate.

QUESTION: Are your school districts in New York entirely separate from the towns and cities?

MR. FUZAK: Yes, sir.

QUESTION: They're not coincidental in boundary or anything?

MR. FUZAK: No, they are not. The cities have their own school systems, the towns are often included in union free school districts, a number of them in one district, that type of thing. But there is a separation as between the cities and the towns.

QUESTION: I was going to inquire whether there could be any adverse tax consequences to the residences of the towns? Could the counties impose taxes on people who reside in the towns that cannot be imposed at present?

MR. FUZAK: No, I don't believe that's true. I think that the power of taxation is the same in either event.

QUESTION: Right.

MR. FUZAK: Essentially, whether it's the legislative form or the executive form that we have under consideration here.

MR. CHIEF JUSTICE BURGER: We'll resume at this point tomorrow morning at 10:00 o'clock, gentlemen.

[Whereupon, the Court recessed until 10:00 o'clock, a.m., December 2, 1976.]