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In the

Supreme Court of the United States

E. C. DOTHARD ET AL.,

APPELLANTS.

V.

BRENDA M. MIETH, ET AL.,

APPELLEES.

No. 76-422

Washington, D. C.
April 19, 1977

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IN THE SUPREME COURT OF THE UNITED STATES

E. C. DOTHARD, ET AL., Appellants,	:	
v.	:	No. 76-422
BRENDA M. MIETH, ET AL., Appellees.	:	

Washington, D. C.,

Tuesday, April 19, 1977.

The above-entitled matter came on for argument at 1:00 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:

G. DANIEL EVANS, ESQ., Assistant Attorney General of Alabama, Montgomery, Alabama; on behalf of the Appellants.

MS. PAMELA S. HOROWITZ, ESQ., 1011 S. Hull Street, Montgomery, Alabama 36104; on behalf of the Appellees.

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Dothard v. Mieth.

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

ORAL ARGUMENT OF G. DANIEL EVANS, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. EVANS: Mr. Chief Justice, and may it please the Court: My name is Danny Evans. I am Assistant Attorney General for the State of Alabama, counsel for the appellants. My co-counsel with me today is Mr. Eric Bowen, also of our Attorney General's Office.

The facts of the case are basically these: This case presents an appeal from a three-judge ruling of the Middle District of Alabama striking down both a state statute and an administrative regulation.

The case started as two consolidated class actions, both challenging different areas of Alabama law on constitutional grounds as well as statutory grounds under Title VII. This appeal pertains only to the part of the order which struck down a height-weight requirement and a prison regulation. The class that is affected by this order challenged a five-foot-two, 120-pound minimum height-weight requirement that is included in an Alabama statute for law enforcement officers. Included under that statute are prison guards.

The Act also challenged, although the plaintiff

representative was not an employee, an administrative regulation of the Alabama Board of Corrections which prevented guards of the opposite sex from working in contact positions within penitentiaries in Alabama with inmates of the opposite sex.

The court below found in regard to the statute that the height-weight minimums on the basis of 1960 statistical survey had a disproportionate impact on women, and in that regard and on that basis solely they found that it be prima facie discriminatory under Title VII and enjoined its further application.

In regard to the regulation, the court made no finding of a prima facie showing of discrimination but merely presented it to be discriminatory and evidently explicitly due to its application of the bona fide occupational qualification defense.

QUESTION: You don't have the state trooper cases?

MR. EVANS: No, we do not.

QUESTION: Only the correction officer?

MR. EVANS: That's right, Your Honor.

QUESTION: Do these statistics that you refer to, taking into account the eligible females and eligible males, are they restricted to eligibles in the sense of being in the labor market or just women generally and men generally?

MR. EVANS: That's all, Your Honor, just exactly that,

and that is one of the grievances we bring to this Court, is that the Court look to nearly 14-year-old statistics representing women between the ages of 18 and 79 in Alabama. Now, certainly they could have taken judicial notice of those facts. There was no restriction -- and you will find this on page 32 of the jurisdictional statement -- there is no restriction as to the number of age brackets that would even be considered for the job or the number of people which were actually in the labor market itself, and certainly there was no finding as to actual applicants, as this Court stated should be in Albemarle.

Now, there are several issues before the Court by this appeal but, due to time limitation, I intend to address only three. From notification of the clerk last Thursday, he indicated that the Court would be interested in hearing a jurisdictional issue on the province of this appeal at the outset. Now, certainly the Court knows that probable jurisdiction was noted on November 29th, but since that time the AFL-CIO filed an amicus brief challenging some aspects of jurisdiction, and we are prepared to argue that today.

The second issue that we contend should be addressed by the Court is the applicability of Title VII to the states. In addition to that issue, we intend to argue the correct interpretation of the bona fide occupational qualifications.

QUESTION: With respect to what kind of a job here? What job is at issue here?

MR. EVANS: A prison guard in an all-male prison or all-female prison with the guard of the opposite sex.

QUESTION: And nothing with the highway patrol?

MR. EVANS: No, Your Honor. This appeal pertains only to the prison guard classification.

QUESTION: And what is the issue there, height and weight or --

MR. EVANS: There are two issues in --

QUESTION: Are they both here?

MR. EVANS: Yes, Your Honor.

Returning to the first issue of jurisdiction and the province of this appeal, the appellants contend, of course, that the Court noted probable jurisdiction properly on November 29th. The grievance of the AFL-CIO as amix is that, basically, since Title VII was used as the grounds for part of the order, and since it could have been used under their assumptions for the entirety of the order, then the case should not properly be here as no constitutional finding was made by the court below.

At the outset, we would point out a few facts of the case. The complaint, the consolidated class action, challenged Alabama statutes and regulations on statutory and constitutional grounds. Every statute that was brought in was challenged on constitutional grounds.

The three-judge court order that pertained to the highway troopers, which is not before us, was based solely on

constitutional grounds. It was a complete 1983 action, having nothing to do with Title VII.

QUESTION: As a matter of fact, I gather the plaintiff there could not have brought a statutory action? Of course, you never exhausted first before the commission --

MR. EVANS: That seems to be indicated by the record, yes, Your Honor.

QUESTION: Well, it had to be just a constitutional case?

MR. EVANS: That's correct.

QUESTION: But that is now out of this?

MR. EVANS: That is out of it.

QUESTION: That is not before us.

MR. EVANS: That was before the court when its decision to convene a three-judge panel was made. Also, in pertaining to this appeal, the regulation which was enjoined was enjoined on both Title VII and constitutional grounds. And the statute which was enjoined had a constitutional allegation to it, and we feel that the court met that allegation. Now, from these facts --

QUESTION: The decision with respect to the statute was purely based upon Title VII, was it not?

MR. EVANS: That's correct, Your Honor.

QUESTION: And the decision with respect to the prison guard regulation was based on both?

MR. EVANS: That's correct, Your Honor.

QUESTION: And the AFL-CIO amicus brief is that a fortiori it was a Title VII case --

MR. EVANS: That's correct, Your Honor.

QUESTION: -- in light of Washington v. Davis and other cases, if it didn't violate Title VII it couldn't possibly violate the Constitution?

MR. EVANS: In effect, Your Honor, that is their argument, that the Title VII allegation makes insubstantial the allegation of constitutionality. Now, we feel --

QUESTION: And that makes it unnecessary.

MR. EVANS: Now, we feel that for several reasons, including our challenge to the constitutionality of application to the states of Title VII. We feel that that is inappropriate logic, especially dealing with the province of an appeal. And previous cases of this Court have held that if substantial constitutional questions are alleged in the complaint, that a three-judge court should be convened. Furthermore --

QUESTION: I don't think anybody, including any amicus, is saying that the convention of the three-judge court was inappropriate.

MR. EVANS: I certainly hope not, Your Honor. We contend that it was not.

QUESTION: But that doesn't go to the question really of jurisdiction.

MR. EVANS: Well, the following facts I believe do: The merits of the claim were reached in this case, too. In fact, one of the statutes was enjoined explicitly on the basis of constitutionality as well as a statutory question, and we feel it would be improper for the Court to ignore that determination. We also feel that it would be improper for the Court to feel that a Title VII allegation makes insubstantial an allegation of denial of equal protection.

This Court recently in Filbrick v. Glogic found that even if a court is properly convened and reaches the merits of the case, even if the final ruling is based totally on statutory grounds, then that case should be on direct appeal to this Court, and we feel that it does properly lie here.

The allegation that Title VII makes insubstantial the constitutional allegation we feel is remiss with many interpretations of the three-judge appeal. Hagans v. Lavine, a recent case by this Court, indicated that that would be the most judicial efficient method of dealing with it; If a statutory and constitutional claim are presented, for the single judge to take the statutory claim, decide it, then take the constitutional claim if necessary and convene a three-judge court.

Now, there are several problems we see with that type of method, but at the outset I would point out in this particular case, dealing with equal protection and dealing with a Title VII equal employment claim, the gravamen of the

complaint in each is identical. The method of proof in both will be very similar. The judicial efficiency therefore in that regard would be almost nil of requiring that one judge determine a statutory claim and then possibly changing the route of an appeal for one party and then reconvening a three-judge panel.

QUESTION: Well, the point is that the plaintiff prevails upon the statutory claim, the constitutional claim is never reached and the three-judge court is never convened under the preferable procedure.

MR. EVANS: One blatant flaw we see in that, Your Honor is that if the plaintiff does prevail on the statutory claim and the constitutional claim is never met, then the defendant, if he should appeal, has to go through the Circuit Court of Appeals.

QUESTION: That's right.

MR. EVANS: If the plaintiff does in fact fail on the statutory claim, the court finds that the constitutional questions are still viable, convenes a three-judge court and a direct appeal lies to this Court.

QUESTION: Correct.

MR. EVANS: So by joining an allegation of constitutionality and a statutory claim, the plaintiff is assured of a direct appeal to this Court, whereas the defendant would not be, and we feel that that would be a denial of equal protection

to the defendant and certainly an improvident interpretation of section 1253.

QUESTION: Well, the plaintiff isn't assured of a direct appeal to this Court if even on the constitutional claim the injunction is denied on some basis other than the merits of the claim.

MR. EVANS: That's correct, Your Honor.

QUESTION: So there is no appeal then. That is under --

MR. EVANS: If the merits are met, its standing is proper, and so forth, it would lie here.

QUESTION: Yes.

MR. EVANS: We feel, however, though, that there are constitutional challenge to Title VII and its application to the state is of significance in reaching the merits of even the insubstantial-substantial argument regarding Title VII and the Fourteenth Amendment.

QUESTION: Is that constitutional argument as to Title VII? I guess this is on National City grounds. Was that made below?

MR. EVANS: No, Your Honor, it was not. It was not made below nor was it included specifically in our jurisdictional statement.

QUESTION: Well, I don't see how that handles your argument that there is still appeal ability here?

MR. EVANS: For the simple fact that --

QUESTION: That issue was never tendered and never decided?

MR. EVANS: We feel that the issue should be decided by this Court for the simple fact that it has crucial bearing on the subject matter of jurisdiction of this case and certainly if it is unconstitutional, as we contend that it is, then it would destroy any insubstantial argument of the constitutional claim.

Turning to that allegation --

QUESTION: You haven't argued Filbrick v. Glogic.

MR. EVANS: Well, Your Honor, in a footnote in Filbrick v. Glogic, the Court, I think through Justice Rhenquist specifically stated that they would not consider Locomotive Engineers V. Chicago Rock Island Line, where it was specifically held --

QUESTION: Isn't that footnote the strongest precedent you have?

MR. EVANS: Yes, Your Honor, and we contend that that does support the jurisdiction here. We feel that that does support the jurisdiction. But turning to the constitutional question, which I feel is properly before the Court, it is basically our argument that the 1972 amendments of Title VII pose an unconstitutional abridgement of states' rights under the Tenth Amendment, as well as an unwarranted extension of the

congressional power.

At the outset, Title VII was justified on the Commerce Clause, as the Court I am certain is familiar with. In 1972, there was a postscript application to include all state activities within its coverage. There was no definition that the state activities much touched commerce, even in the most incidental fashion. All state activities --

QUESTION: Counsel, wouldn't you at least have to counter claim in the District Court in order to raise that sort of a constitutional question, when the plaintiff is challenging the constitutionality of your own statute?

MR. EVANS: Your Honor, we raise it here on the basis of subject matter jurisdiction, and certainly the proper claim for --

QUESTION: Well, how do you spell that out? You say you raise that as a matter of subject matter jurisdiction.

MR. EVANS: Well, certainly if Title VII is to be used as the basis for declaring unconstitutional a statute and a regulation of the state --

QUESTION: No, not declaring unconstitutional.

MR. EVANS: Declaring violative, excuse me, Your Honor. If it is to be used as that basis, certainly its constitutionality must be established, and if it is not then the court is without jurisdiction to --

QUESTION: Well, I understood you to say that as a

defendant in the District Court, and you never did.

MR. EVANS: We certainly challenged the subject matter jurisdiction and, of course, as I am sure you are aware, that can be raised at any point.

QUESTION: But you say subject matter jurisdiction, I don't get your jump from the unconstitutionality, your claim of unconstitutionality of Title VII to subject matter jurisdiction.

MR. EVANS: It is our contention, basically, Your Honor, that if the court below was to use a vehicle of Title VII to declare unconstitutionality or to declare violative a state statute and regulation of Alabama, it would be without subject matter jurisdiction to do that if that statutory vehicle, i.e. Title VII, was itself unconstitutional.

QUESTION: That is not a matter of jurisdiction --

QUESTION: They still have alleged a claim under 1331 and 3143 that your statute and regulation violate the equal protection clause.

MR. EVANS: Yes, Your Honor, and we feel that those claims on the basis of fact should be denied, too. But here the statute was declared unconstitutional specifically on the basis of Title VII.

QUESTION: Well, that is basically what a supremacy clause?

MR. EVANS: Yes, Your Honor. But we urge that if that

is to be upheld, the constitutionality of Title VII must also be examined to find out if the court had subject matter jurisdiction to entertain that allegation.

QUESTION: Well, if I may say so, perhaps I am obtuse on this but it seems to me that was a matter of defense for you to assert in the District Court that the claim was that your practices violated Title VII, put to one side for the moment the claim that they were unconstitutional, but that your statute and regulation violated Title VII. And if you want to say in defense of that that Title VII is unconstitutional, that is for you to say in defense on the merits, but it has nothing to do -- and then it is up to the court to decide it, the District Court, in the first instance -- it has nothing to do with the jurisdiction of the District Court, does it?

MR. EVANS: It would have nothing to do with the jurisdiction of the District Court pertaining to the constitutional claim, I agree, Your Honor.

QUESTION: No, no, to this Title VII claim. You are asking the District Court to hold that Title VII is unconstitutional as applied to you. That is something for you to assert in defense on the merits of the claim against you.

MR. EVANS: Well, Your Honor --

QUESTION: It has nothing to do with the jurisdiction of the court.

MR. EVANS: -- we feel that it would in the fact that

the court would be without jurisdiction to even entertain those allegations if in fact --

QUESTION: Do you think that this Court, for example, is without jurisdiction to hold something is unconstitutional?

MR. EVANS: No, Your Honor, I certainly do not.

QUESTION: Well, what does it have to do with the jurisdiction of the court?

MR. EVANS: By the simple fact that the allegations and the basis of the ruling of the District Court were based on that atatute.

QUESTION: Yes, and --

QUESTION: But all statutes of Congress are presumed constitutional --

MR. EVANS: They certainly are.

QUESTION: -- and if you haven't challenged them at all in the District Court, I wouldn't spend a lot of time arguing a point like that up here, if I were you.

MR. EVANS: Well, Your Honor, I will certainly proceed with other arguments in that case. But we do earnestly contend that that is a viable issue before the Court and that it has been briefed and the Solicitor General has been notified of it.

QUESTION: You have only got 13 minutes to discuss the merits of the case.

MR. EVANS: I will proceed directly there, Your Honor.

The third issue which I intended to address today

deals with the province of a finding of a bona fide occupational qualification for contact positions within penitentiaries only in Alabama.

At the outset, as we have just argued, we feel that Title VII is inapplicable. However, the factual considerations that would uphold it under equal protection analysis and under Title VII we feel would justify it as a bona fide occupational qualification.

The court below found it violative of both equal protection and Title VII. Nevertheless, even if this Court should find that Title VII is applicable and should also find, as the court below evidently assumed, that it is prima facie discriminatory, we feel that the facts below justify the defense of a bona fide occupational qualification.

We don't urge a broad reading of this statute. Many of the amicus have challenged that. We don't urge that it face the very purpose of the statute, and we don't challenge the good intent of the Congress in this regard. But if the bona fide occupational qualification is to be given anything more than an imaginery existence, certainly the facts of this case warrant it. The facts surrounding the regulation are these:

The regulation was promulgated by the Board of Corrections of Alabama only after the solicited advice of the General Counsel for the EEOC. It is not arbitrary. It doesn't

just leave it up to open discretion. It sets forth several criteria to be used in determining whether a contact position within a penitentiary should be subject to requiring a guard of a like sex with inmates. It is limited only to contact positions and limited only to penitentiaries. Alabama penitentiaries are unique in themselves, as I am sure are all penitentiaries within each state, and certainly --

QUESTION: What is a contact position?

MR. EVANS: A contact position in Alabama, Your Honor, within the brief on page 50 they are laid out. They have five criteria that deal with the position, that define it as the regulation did, basically whether they would be in direct contact with the inmates of the opposite sex without anyone else around and requiring invasions of privacy, no other protection, and so forth.

Now, in reference to the justifiability of this particular regulation, we point out some peculiarities about Alabama's system. The penitentiaries in Alabama are open dormitory. They are not single-cell occupied. They have open communal toilets, to allow open view into the penitentiaries by the patrolling guards. We have multiple offenders only in Alabama penitentiaries. We have other facilities that house first offenders and youths.

Twenty percent of the population are sex offenders. We have farming operations at at least two of the four

facilities that require extensive strip searching and hat searching, and guards are used interchangeably in all the positions in the prisons, for several reasons, to promote their familiarity with institutions and also because of a shorgage of manpower.

Now, the State of Alabama is not intending any type of discrimination toward women in regard to its use of females or of males in contact positions. The state has been using women in minimum security institutions since 1974. They have used them in work release centers, in youth facilities, and we have encountered several difficulties in those facilities, but nevertheless the overriding considerations of equal employment opportunity, we have used them in those facilities.

The Board of Corrections, it is our contention, in promulgating Regulation 204, deals with real concepts. They can't assume that inmates within the State of Alabama penitentiaries view every individual along equal protection lines. They are dealing with the stereotypes that are perceived by the inmates within Alabama. They have certain goals. They must make sure the institutions are secure. They must make sure they have control of it. They must make sure that the inmates are safe and that their employees are safe. And these require realistic appraisals of the facts before them.

And we feel that the record below dealing with Commissioner Locke's deposition, who is Commissioner of our

Board of Corrections, recognizing the sexual stereotypes, the innate attraction of multiple offenders who have been long incarcerated to a female's presence, or vice versa, are necessary and realistic concerns, and that these certainly justify the regulation.

The evidence that was proposed to the contrary below does little we feel to impeach that. The experts that testified, starting with Mr. Nelson -- Mr. Nelson is the Director of a minimum security institution in Chicago. Now, that institution houses persons with less than a year to serve. He has been using women there for six months. They are single cell -- it is a single-cell institution, the toilets are not communal, they are divided off, and the inmate/staff ration is considerably less. They have -- but primarily it is the fact of the type of institution that we are dealing with.

Now, from his six months appraisal, he said they have been good. But he admitted that the federal system, of which he is a part, does not use women in the penitentiaries in contact positions, and for obvious reasons that we feel are adequately proposed today.

Mr. Sarver, the other expert before the court below, had never supervised women in any penitentiary, although he had been warden of two. He had never known of any such situation of women being in contact positions in penitentiaries, but nevertheless he was sure that they would be very capable and

would add to the normalization of the prison system. Well, we feel that this is simply not credible evidence to impeach the correctly promulgated regulation of the state.

QUESTION: The whole issue on the merits of the Title VII issue is whether or not this is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business or enterprise, isn't it?

MR. EVANS: Dealing with Regulation 204, it is, Your Honor.

QUESTION: That is the entire issue on the merits of the --

MR. EVANS: Regulation and the --

QUESTION: -- and of the Title VII claim?

MR. EVANS: It is, Your Honor.

QUESTION: Except there is a height and weight thing under the statute, isn't there?

MR. EVANS: That is correct. The regulation was struck down --

QUESTION: To whom does the regulation apply?

MR. EVANS: It applies to prison employees, the guards --

QUESTION: It applies to people, anybody who wants to be selected off of the register has to satisfy it?

MR. EVANS: Well, Your Honor, it --

QUESTION: Well, aren't these assignments made from

the trainee register?

MR. EVANS: The assigmments as a corrections counselor, this regulsation was to certify correctional counselors in those positions.

QUESTION: And so to certify them they come off the trainee register?

MR. EVANS: Initially it did, Your Honor, but that has been changed.

QUESTION: Well, how do you get on the trainee register?

MR. EVANS: The trainee register has -- you have to satisfy the height and weight requirements, and that is the difference.

QUESTION: The regulation deals very frankly with sex, with gender, if you will --

MR. EVANS: It is a combination of --

QUESTION: -- the height and weight requirement?

MR. EVANS: That's right.

QUESTION: This is frankly a gender based distinction.

MR. EVANS: It deals with a combination of sex, that is exactly right, Your Honor.

QUESTION: It distinguishes between females and males as such?

MR. EVANS: Exactly, Your Honor, and we feel the court below ignored the factual differences of the institution

and of the institutions that the experts testified about. And the fact that Alabama uses women in its minimum security institutions and has longer than any institution that was proposed by the plaintiffs, should not be found as an inconsistent position with recognizing the factual difference between a minimum security work release center and a penitentiary for multiple offenders.

QUESTION: Well, were any of these plaintiffs in this case on the register?

MR. EVANS: No, Your Honor. I didn't handle the case at trial but I would challenge here if I felt it would preserve the standing of them to even challenge Regulation 204.

QUESTION: Well, they have to get on the register before they are ever even eligible to be selected for a counselor?

MR. EVANS: Exactly, Your Honor.

QUESTION: And to get on the register they have to satisfy height and weight requirements?

MR. EVANS: Exactly, Your Honor.

QUESTION: And how do you ever reach the Title VII case then without -- until you decide whether the height/weight issue is -- you have to decide that first, don't you?

MR. EVANS: To decide their standing, probably not, Your Honor, because a person is not an employee and I wouldn't think would have standing in any case to challenge that

regulation.

QUESTION: Wouldn't that regulation mean that the height/weight implicitly inherently involve sex discrimination because of the generality of men are bigger than the generality of women?

MR. EVANS: That's it, Your Honor. That is exactly right.

QUESTION: But if you could withhold the height and weight requirements, wouldn't that be the end of the case as to these particular plaintiffs, because if they couldn't have met the height and weight requirements they could never have gotten on the trainee register and therefore they never would have had to have confront the sexually described classification?

MR. EVANS: We contend it would, Your Honor.

QUESTION: Then we would be holding that the height/-weight requirements are appropriate standards for prison guards --

MR. EVANS: Yes, Your Honor.

QUESTION: -- without respect to sex, if we pursued what Justice Rehnquist is suggesting, is that so?

MR. EVANS: Yes, Your Honor, I think it would.

If it please the Court, I will reserve the remainder of my time for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well.

Ms. Horowitz.

ORAL ARGUMENT OF PAMELA S. HOROWITZ, ESQ.,

ON BEHALF OF THE APPELLEES

MS. HOROWITZ: Mr. Chief Justice, and may it please the Court: I am Pae la Horowitz, counsel for appehlee Dianne Rawlinson.

As the Court has requested, I will initially address the jurisdictional point raised by one of the amicus briefs. The appellees' position is simply that under its prior holding in Locomotive Engineers v. Chicago, Rhode Island, and Pacific Railroad, this Court clearly has jurisdiction of this appeal under 1253; and as recently as 1975 in Filbrook v. Glogic, this Court refused to reconsider the Engineers doctrine, and I would submit that there is no reason for that doctrine to be reconsidered now.

Turning if I may then to the merits of the Title VII issues in this case, there are two Title VII questions. The first involves the validity of height and weight requirements for employment as a prison guard in the Alabama system. The second involves the validity of an administrative regulation which in effect provides that only like sex guards shall work in the state's prisons.

QUESTION: Do you represent a single individual plaintiff, do you?

MS. HOROWITZ: She represents a class, Your Honor, which was certified as all women who are employed,might be

employed, or are applicants for employment with the Board of Corrections.

QUESTION: Who are under a certain height and under a certain weight? Is that in the class?

MS. HOROWITZ: No, Your HOnor.

QUESTION: Well, it would have to be, woudln't it, otherwise they would have no claim?

MS. HOROWITZ: Well, the individual plaintiff in this case did not meet the weight requirement.

QUESTION: Right, and the class she represents therefore, I would suppose, would not meet either the weight or the height requirement, one or the other, or else they would be a class without a grievance?

MS. HOROWITZ: Well, she -- I would submit that she clearly has --

QUESTION: Well, what was the class that was certified?

MS. HOROWITZ: As I stated to you, that was how the court certified.

QUESTION: How?

MS. HOROWITZ: As all women who are employed, might be employed, or are applicants for employment with the Board of Corrections for the job of prison guard.

QUESTION: Well, many such women would not be affected by the height and weight statute.

MS. HOROWITZ: That's true.

QUESTION: And how could they be members of the class?

MS. HOROWITZ: Well, they are members of the class for purposes of challenging Regulation 204, because they are clearly affected by the administrative regulation which excludes women from working in the male facilities.

QUESTION: If they never got on the roll -- if, as my brothers have pointed out, the height and weight requirement is valid, then your named plaintiff never gets on the roll and is never in a position to challenge the regulation, right?

MS. HOROWITZ: That's correct, Your Honor.

QUESTION: I take it that your point about the women is that if women who are six feet tall and 150 pounds can't qualify for the inside so-called contact positions, that is really a subclass, is it, of your general class?

MS. HOROWITZ: Yes, I would say that they are a class of women that are clearly included in the class as it was certified by the District Court, and that --

QUESTION: All females would have -- all women would have been in a position to challenge the regulation?

MS. HOROWITZ: That's correct, Your Honor. Now, with respect to the validity of the height and weight requirement, it is appellees' position that, as a facially neutral job qualification, the height and weight requirement is governed by

this Court's decision in Griggs v. Duke Power Co. and the rationale of that case was correctly applied by the District Court in the case sub judice. The allocation of the burden under Griggs in cases where you are dealing with a facially neutral job qualification is the plaintiff bears the initial burden of proving upon the facia case by showing that the job qualification in issue has a substantial disparate impact on women.

QUESTION: Ms. Horowitz, before you go on, which subsection of 2000e-2(a) were you claiming under in your Title VII claim, section 1 about failure -- if you will turn to page 61 of the appellants' brief, you are probably so familiar with them that you don't have to, but subsection 1 talks about failing or refusing to hire, and subsection 2 talks about limiting, segregating, or classifying.

MS. HOROWITZ: Subsection 1, Your Honor, is relied on for purposes of the height and weight requirement, and subsection 2 for purposes of the Regulation 204.

QUESTION: They are case in somewhat different language, aren't they?

MS. HOROWITZ: Yes, I agree, they are.

QUESTION: Subsection 2 more resembles the language of the section that was involved in Griggs, than subsection 1?

MS. HOROWITZ: But I don't think there is anything in the rationale of Griggs that would limit it to cases brought

under subsection 2.

QUESTION: You are referring to the rationale rather than the holding?

MS. HOROWITZ: Pardon me?

QUESTION: I say you are referring to the rationale rather than the holding?

MS. HOROWITZ: Correct. I think that the import of Griggs is that Title VII looks to the consequences of employment practices and not to the motivation, and so that Griggs becomes the appropriate analysis whenever you have a showing that a facially neutral job qualification has a disparate impact on a protected class. And in this case the plaintiff made that showing, since the statistics indicate that when combined the height and weight requirements disqualify 41 percent of the women as opposed to less than 1 percent of the men.

QUESTION: Well, when we say women, women who are looking for these jobs or just women in Alabama as a class?

MS. HOROWITZ: Your Honor, the court below relied on the statistics which are national statistics of women 18 to 79. There are --

QUESTION: All women between 18 and 79 are not in the job market, are they?

MS. HOROWITZ: That's true, Your Honor, and I would concede that there is nothing in the statistical evidence presented to the court below to show the actual effect on

applicants of the height and weight requirement, but --

QUESTION: Why wasn't that evidence presented? It is certainly available somewhere.

MS. HOROWITZ: Well, I would submit, Your Honor, that it is not easily available and that it should not be required as part of the plaintiffs' evidentiary burden under Title VII, because this is a height and weight requirement, I would submit, as a self-defining qualification, and it discriminates, its evil is not only in the fact that it discriminates against anybody who applies and is rejected for being under the minimum, but it discriminates against all those who know of the minimums and do not apply because they do not meet them. It is unlike a test or an interview or those kinds of job qualifications where a potential applicant cannot know whether or not he will be -- he or she will be disqualified until he or she actually undertakes the test or the interview.

QUESTION: Ms. Horowitz, what worried me about this case is if Alabama wanted to discriminate against women, they did it, they said no woman could be hired, so what good is the weight and height there?

MS. HOROWITZ: Well, because the regulation --

QUESTION: Why would they waste that? They have already said they can't have a woman --

MS. HOROWITZ: But the regulation which says that women cannot be hired applies to the all-male penitentiaries in

the state. They were hiring only since 1954 -- 1974, excuse me.

QUESTION: Yes, but that is what worried me, when you combine the two. I mean when they -- as I understand the statute, when Alabama wanted to say we won't hire women, they said "we won't hire women."

MS. HOROWITZ: With respect to the four male penitentiaries.

QUESTION: Well, they knew how to say it? They knew how to say it?

MS. HOROWITZ: That is correct, Your Honor, but I think it is also interesting to point out that Regulation 204 was promulgated while this law suit was pending.

QUESTION: Don't you think they can say they can put in a weihg and a height restriction of some sort?

MS. HOROWITZ: Not when it shown to have a disparate impact on a protected class under Title VII unless they show it to be job related.

QUESTION: Well, could they say that they will not hire anybody weighing more than 400 pounds?

MS. HOROWITZ: I think that they can have -- that nothing in the court's decision --

QUESTION: There is nothing wrong with that.

MS. HOROWITZ: I think nothing in the court's decision prohibits them from having proportional height and weight

requirements.

QUESTION: Could they also say we won't hire anybody over the age of 55? With the approval of this Court, they can say that, can't they?

MS. HOROWITZ: I would say they can and they do.

QUESTION: This Court said so.

MS. HOROWITZ: But when the burden shifted in this case to the state to prove that the height and weight requirements were job related, I would submit that the state not only failed to carry its burden of showing that any height and weight requirements were related to the efficient performance of the duties of a prison guard, but they certainly failed to prove that these particular height and weight requirements had any relation to the duties of a prison guard. They admitted that there was no meaningful study conducted prior to the application of the particular requirements of five-two and 120 --

QUESTION: Do you think the Court could not take judicial notice of the proposition that height, weight, size as a direct relationship to performing a function of a prison guard?

MS. HOROWITZ: I think that that is permissible and that that is basically what the District Court said, because the District Court said that --

QUESTION: This Court can do it, too, can't it?

MS. HOROWITZ: Yes, Mr. Chief Justice, but I think

that the conclusion that you reach is the same because, as the District Court did it, even assuming that height and weight do have some relationship to strength and that strength is a facet of effective job performance as a prison guard, there is absolutely no proof that anybody below the arbitrarily defined level of five-two and 120 pounds is unable to perform.

QUESTION: Well, isn't that traditional and usual line-drawing process to which we have said many, many times that any such line invariably excludes some that might well be included and includes some that might properly be excluded?

MS. HOROWITZ: I don't think, Mr. Chief Justice, that this Court has permitted that in Title VII cases. In Griggs this Court said that in going after --

QUESTION: Well, that had nothing to do with --

MS. HOROWITZ: -- arbitrary and unnecessary barriers to discrimination.

QUESTION: Griggs had nothing to do with this kind of job requirement. What if they had said 100 pounds and four-feet-eight, that would be all right, would it?

MS. HOROWITZ: Depending on the proof that they offered.

QUESTION: Well, I am speaking --

MS. HOROWITZ: The burden is on the state --

QUESTION: I am speaking of the regulation. In the first instance, the state needs no proof. It can be a subjective

decision based upon general experience. And suppose they said four-feet-eight and 100 pounds, would you have any quarrel with that?

MS. HOROWITZ: It would depend on what kind of proof the state introduced.

QUESTION: No, they made a regulation, no proof involved. You don't need any proof to make a regulation.

MS. HOROWITZ: I wouldn't have any quarrel under this case.

QUESTION: That is what I am talking about. You wouldn't have any quarrel, so the issue resolves itself to allowing what you don't like as comparing to allowing what you would find acceptable. It is on the wrong line, that is your case, isn't it?

MS. HOROWITZ: They have drawn an arbitrary line.

QUESTION: Well, four-feet-eight and 100 pounds would be just as arbitrary, wouldn't it?

MS. HOROWITZ: Well, I am not conceding to you that that would be permissible. I am only saying that it would not necessarily be precluded by the Court's decision to strike down five-two, 120.

QUESTION: Let's pursue your other proposition. The four-feet-eight and 100 pounds would not exclude all the women that you have been concerned about?

MS. HOROWITZ: Well, then you never reach the question

if you cannot show the disparity, that that burden is on the plaintiff, and if there is no disparate impact on a protected class then there is no discrimination.

QUESTION: That brings us around the circle again. The state can draw a line, four-feet-eight and 100 pounds would be tolerable a line, but five-feet-two, is it, five-feet-two and 120 is an unacceptable line because of its exclusionary operative effect?

MS. HOROWITZ: That's correct, Your Honor.

QUESTION: Ms. Horowitz, can you give me the name of any police force or prison guard system in the country that doesn't have a weight and height requirement?

MS. HOROWITZ: Yes, Your Honor, the evidence in this case shows that the federal prison system uses no height and weight requirements.

QUESTION: I meant state. I thought I said state.

MS. HOROWITZ: Among state systems, I do not know, but it is my understanding from the amicus brief filed by California that California does not.

QUESTION: I was just wondering how many police systems we will upset if we go along with you.

MS. HOROWITZ: Well, I would concede to this Court that the use of height and weight minimums are quite common among law enforcement agencies, but I don't think that that is a permissible ground for upholding them under Title VII.

QUESTION: Well, I just want to know what we are dealing with.

MS. HOROWITZ: But it is my understanding that there are a number of law enforcement -- the vast majority of law enforcement agencies do use minimum height and weight requirements, and there is at the present time I believe a lot of litigation, pending litigation dealing with the validity of such minimums.

QUESTION: Did you undertake to show how many inside guards in contact positions in the federal system were under 120 and five-feet-two or four, whatever it is?

MS. HOROWITZ: Not in the entire system, no, Your Honor, but --

QUESTION: Wouldn't that have been quite relevant if you now stand on it?

MS. HOROWITZ: I don't think so, Your Honor, because we did not rely on the failure of other systems to use -- to not use height and weight requirements in proving our case to the court below, and that is not necessary to an affirmance of that court's holding.

QUESTION: Ms. Horowitz, I am correct, am I not, that both the height and weight requirements, that was struck down under Title VII?

MS. HOROWITZ: That's correct, Mr. Justice Brennan.

QUESTION: And the other issue was also a Title VII

issue, namely bona fide occupational qualification, is that so?

MS. HOROWITZ: That's correct.

QUESTION: The only issues we have, both of them are Title VII issues?

MS. HOROWITZ: That's right.

QUESTION: No constitutional issue at all?

MS. HOROWITZ: That's right.

QUESTION: Who was it that wanted to be a prison guard, what name?

MS. HOROWITZ: Rawlinson.

QUESTION: Rawlinson.

MS. HOROWITZ: Yes.

QUESTION: And she was the one who was excluded because of height and weight and contact -- and she is the one who has perfected the procedural steps?

MS. HOROWITZ: That's correct.

QUESTION: And Mrs. Mieth has perfected them?

MS. HOROWITZ: No. Her claim -- she was suing the Department of Public Safety for a trooper position, and she comes under the constitutional claims only.

QUESTION: Her case is not here?

MS. HOROWITZ: That's correct. This is only Title VII, which brings us to --

QUESTION: But she also applied? Maybe this is where I am confused. She wanted to be either a state trooper

or a corrections officer, is that it?

MS. HOROWITZ: No. Mieth wanted to be a state trooper; Rawlinson wanted to be a correctional officer.

QUESTION: Well, the one who wanted to be a state trooper is no longer in the case at all?

MS. HOROWITZ: Right. The Department of Safety chose not to appeal.

QUESTION: We have only one named plaintiff left?

MS. HOROWITZ: That is correct, Mr. Justice Brennan.

QUESTION: And that is who?

MS. HOROWITZ: Dianne Rawlinson.

QUESTION: So the docket says Mieth --

MS. HOROWITZ: So the name of the case is --

QUESTION: -- but Mieth is not in it now?

MS. HOROWITZ: That is correct.

Turning to the merits of the other Title VII claim in the case, that is whether Regulation 204 comes within the BFOQ defense, it is appellee's position that, since it is clear that all of the indicia of the proper construction of the BFOQ defense point to the fact that it is an exception which is to be narrowly construed, I would propose to this Court that the standard which should be formulated to determine the applicability of the defense is whether the classification seeks a permissible objective and whether it is necessary to the achievement of that objective.

Congress used the word "necessary" in defining a BFOQ, i.e., that which is reasonably necessary to the effective operation of a business or enterprise, and I think that this standard is the appropriate one for allowing the employer to come within the exception when the evidence warrants it, but making sure that the exception is not allowed to swallow the rule.

Now, applying that standard to the facts in this case, I would submit to the Court that the District Court was clearly correct in refusing to apply the BFOQ defense. The first justification advanced by the state in support of Regulation 204 was that women would be unable to safely and efficiently perform the duties of a prison guard.

Now, that is clearly a permissible objective. In other words, the plaintiff does not argue that it is permissible for the State of Alabama to want to have a safe and efficient work force in its prisons. The question then becomes whether or not Regulation 204 is necessary to the achievement of that objective.

QUESTION: This has to be addressed in the context of this type of penitentiary, all male, housing only multiple offenders, is that right?

MS. HOROWITZ: That's correct. I would --

QUESTION: And there are inmates sent there for sex-related offenses?

MS. HOROWITZ: I don't think that that is proved, but I would concede --

QUESTION: I thought that --

QUESTION: That was in the record.

MS. HOROWITZ: I think it is in the opinion as the state alleged that 20 percent of the offenders are sex offenders, but I wouldn't quibble over it because I don't think --

QUESTION: Certainly some are?

MS. HOROWITZ: I would concede that some are, and I don't think it makes a difference to the determination.

QUESTION: What percentage, if this record shows it, are in these institutions for crimes of violence?

MS. HOROWITZ: I don't think the record shows the percentage, but it is clear that a number of them are, if not the majority.

QUESTION: The majority. It is true of most state prisons in the country, isn't it?

MS. HOROWITZ: But I would submit that the burden was on the state to offer factual objective data that women could not perform in this kind of prison setting, and that that proof is simply not in this record.

There is a reliance on sexual stereotypes, which is clearly not permissible under Title VII, in an effort to come within the BFOQ defense. There is --

QUESTION: Wasn't the reliance rather on the prisoners'

sexual stereotypes?

MS. HOROWITZ: There were allegations to that effect, Your Honor.

QUESTION: Well, wasn't that the reliance on the BFOQ defense, that the prisoners would have this image about female custodians?

MS. HOROWITZ: Well, I think it was also clear from the testimony that the prison administrators who testified in this case agreed that women were innately incapable of -- I mean that the Commissioner of Prisons testified that women are sex objects.

QUESTION: That in the view of incarcerated adult male prisoners, who are all guilty of multiple offenses, that -- wasn't the BFOQ defense premised upon the attitude of those prisoners toward women guards?

MS. HOROWITZ: Well, I would submit, Your Honor, that that was only a part of the argument.

QUESTION: Well, was it a part or not?

MS. HOROWITZ: Yes, it was a part, but I donit think that what the state attempted to rely on --

QUESTION: I thought it did in its argument, and then, of course, you countered with the cases saying that custom or stereotypes cannot be relied upon in the Steward and stewardess cases. I was going to ask you if this isn't a little different from custom, if this is the nature of an incarcerated human

being?

MS. HOROWITZ: Yes, I would not analogize it to custom or preference.

QUESTION: You do that in your brief.

MS. HOROWITZ: I think that -- well, that was not my intention, if that is how it was read.

QUESTION: I am glad you --

MS. HOROWITZ: The way I would handle custom or preferences under the formulation I suggested to the Court to deal with the BFOQ defense, that being whether the classification seeks a permissible objective, that if the defense is customer preferences, that is not a permissible objective under Title VII and you don't go beyond that point. But I am not attempting to analogize prisoners to customers by any means. I think that that comes in in the -- in terms of dealing with the justification advanced by the state dealing with the privacy needs of the prisoners.

If I may just summarize again the evidence presented on the question of whether or not women can safely and efficiently perform these jobs, it is appellees' intention that the state did not offer any factual data to establish that women in fact cannot perform, that they relied in no small measure on sexual stereotypes, that the evidence established and the District Court found that women were working satisfactorily in contact positions in the non-penitentiaries, that this District

Court was unusually familiar with conditions in the Alabama penitentiaries because Judge Johnson, one of the members of the three-judge court, had just handed down a ruling dealing with conditions in these prisons, and that this three-judge court unanimously found that the evidence just was not there that women could not perform, and that that requires an affirmance.

And even though the burden was clearly on the defendants to prove women could not perform, it is also to be noted that the plaintiff introduced expert testimony from prison administrators that women were performing in this capacity elsewhere and in a satisfactory manner.

QUESTION: In multiple offender institutions?

MS. HOROWITZ: Yes, Mr. Justice Marshall --

QUESTION: I thought the Chicago man was a first term prisoner?

MS. HOROWITZ: No, Your Honor. The record reflects in his testimony, it is a maximum security prison and he has sex offenders and those who have committed violent crimes, as well as --

QUESTION: My word was multiple. Does he have multiple offenders?

MS. HOROWITZ: I believe that is what his testimony reflects, yes.

QUESTION: Then the Attorney General is wrong?

MS. HOROWITZ: Yes.

QUESTION: Well, we will check the record and see.

QUESTION: We have the amicus brief from California here, too.

QUESTION: Yes, that's correct.

QUESTION: Was there a BFOQ defense asserted to the statutory -- the attack on the statute as contrasted with regulation?

MS. HOROWITZ: The height and weight requirements?

QUESTION: The height and weight requirements.

MS. HOROWITZ: No, Your Honor. The justification attempted there was the relationship that the height and weight minimums bare to strength, but there was no assertion of BFOQ as an affirmance defense.

QUESTION: There was not?

MS. HOROWITZ: No. And it is the position of the appellee that the District Court proceeded correctly because I would submit to this Court that when you are dealing with a facially neutral job qualification, Griggs is the standard. When you are dealing with gender based discrimination such as we find in Regulation 204, then the BFOQ defense is the standard. If it is not pleaded, since the burden is on the defendant, that ends the case.

QUESTION: I see.

MS. HOROWITZ: If I may quickly also address the

second justification advanced by the state in support of Regulation 204 which was the privacy needs of prisoners, again I submit to this Court that the proper question to be asked is whether Regulation 204 is necessary to the achievement of the stated objective. Again, I would concede it is permissible, that there are privacy needs which the prison administrators rightly should concern themselves with.

Our position, however, is that the state failed to prove that Regulation 204 was necessary to the achievement of this objective because the evidence is clear that the sexual aspects of the job which are basically strip searches can be separated from the non-sexual aspects, and the state attempted to offer no reason at all why it could not achieve its objective as the District Court suggested, that is by selective work responsibilities as opposed to the total exclusion of women.

Indeed, we are dealing primarily with the four male penitentiaries and the evidence reflected that in two of these facilities no systematic strip searches are conducted, and in the other two less than 25 percent of the work force is involved in systematic strip searches.

QUESTION: Are there women prisons in the state?

MS. HOROWITZ: There is one woman's prison, Your Honor, which is --

QUESTION: Do they employ all female guards?

MS. HOROWITZ: There are not any male guards in contact positions. There are males in non-contact positions. But since there is only one prison, it employes 6 percent of the work force, and when you are dealing with the four male penitentiaries you are talking about 77 percent of the work force.

QUESTION: Did I understand you correctly to suggest that the height-weight restriction is not justifiable as a bona fide work qualification?

MS. HOROWITZ: I would --

QUESTION: Or is that issue here, is it open?

MS. HOROWITZ: It is not here, and I would submit that the height --

QUESTION: It isn't even open?

MS. HOROWITZ: -- that facially neutral job qualifications are not to be judged by the BFOQ exception, that the test --

QUESTION: Well, that defense was not asserted, was it?

MS. HOROWITZ: No, it was not asserted.

QUESTION: Well, what are they to be justified by?

MS. HOROWITZ: By the Griggs test, job relatedness.

QUESTION: Well, you emphasize the searching problem. That is only one element. There is the problem of patrolling a dormitory type of institution, where there are open doors and

people moving around constantly. That is a far more important factor than the search problem that you mentioned.

MS. HOROWITZ: Well, I would submit, Your Honor, that since we are talking about the BFOQ defense, that the burden was on the state to show that there were other sexual aspects of the job that could not be separated, and in the non-penitentiaries --

QUESTION: Well, isn't that judicially noticeable when you heard the recitation of the facts?

MS. HOROWITZ: I don't think it is, Your Honor, when the facts include the evidence that in the non-penitentiaries Alabama is employing women in contact positions and the only restriction that they have placed on the women is that they not conduct strip searches, they are patrolling, they are conducting bathroom inspections, and I don't see how the state can admit on the one hand to evidence showing that women do that work in non-penitentiaries and then come back and somehow say, well, they can't do it in penitentiaries. So that would be my reason for saying that the only thing this Court needs concern itself with with respect to the privacy issue, is the systematic strip searches, and that the evidence in this case clearly indicates they can be handled as the District Court ruled they should be, and that this is the proper standard under the BFOQ defense.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Evans, do you have anything further?

ORAL ARGUMENT OF G. DANIEL EVANS, ESQ.,

ON BEHALF OF THE APPELLANTS -- REBUTTAL

MR. EVANS: May it please the Court, I have a few things to state. I didn't mean to imply, Justice Marshall, that the prison in Chicago is a first offender institution. It is multiple offender. What I stated I believe was that they all have less than a year to serve, and it is single cell, and so forth.

The state did try to make selective work responsibilities. That was the whole promulgation, the whole reason behind Regulation 204, is to assign women in male prisons where they could be used and still meet the needs of the state, and to assign males in women prisoners where they could be used.

Now, we use them in the youth centers and in the work release centers. At our youth centers, the boys are first offenders, non-violent inmates, have got less than ten years to serve, and they are gone to school during the day. At the work release centers, all the inmates are gone during the day to jobs. There is certainly no patrolling situation like there is in the penitentiaries.

I would like to address briefly the prima facie showing against the statute of -- the height and weight statute. The only thing that was shown in this case was some Census

figures that were taken in 1960 of women between the ages of 18 and 79. There was no attempt whatsoever to show women in the Alabama work force that were eligible for employment as prison guards, no attempt whatsoever. And we feel that the court have taken judicial notice of this, and this is certainly not sufficient to show and to challenge a state statute as being prima facie discriminatory.

In Griggs, the court did find that a statistical disparity plus a past practice of overt racial discrimination made out a case of prima facie -- a prima facie case of discrimination. We don't have any past practice here. We don't have any overt discrimination in the past. There is nothing shown but some Census figures, and we certainly contend that the Griggs decision is limited by those circumstances.

QUESTION: How long has sthis statute been on the books?

MR. EVANS: Since 1971, Your Honor.

QUESTION: 1971.

MR. EVANS: Yes, sir.

QUESTION: So for at least six years, up until now, anybody under five-feet-three in height and 120 pounds in weight would know that there is no point in applying, wouldn't they?

MR. EVANS: Well, Your Honor, we contend that they are not that widely known because obviously the plaintiff

represented in this case had a master's degree in criminal psychology and proposed to have some law enforcement experience and had no idea that there was such a height-weight minimum.

Justice Marshall questioned earlier about the widespread use of these things. A Law Review article which we cite in the brief, they have done some investigation of that and found that 47 of the 50 largest police forces in the country do use those, and we are not aware of any state trooper force in the country that does not use some type of height-weight requirements.

As far as drawing the line, which I believe Mr. Chief Justice mentioned earlier, this job is not like an airline job where you could tell if a person is so many inches long they can reach the pedals and the controls. This is a job which has a peculiar function. The duties are unpredictable, there is high risk involved, and there is a maximum amount of state responsibility both to the inmates as well as to the population which surrounds the prisons. And to hold the state to such a rigid standard or to a mathematical certainty to have to say that a person five-two, 120 pounds can always do the job, whereas a person five-two, 115 pounds can never do the job, we feel is certainly unjustified and a derrogation of the Tenth Amendment powers.

QUESTION: Mr. Evans, I assume that in Alabama the guards inside do not have weapons?

MR. EVANS: That's correct, Your Honor.

QUESTION: The only thing they have is their brawn?

MR. EVANS: They carry nightstricks or --

QUESTION: That's all.

MR. EVANS: That's all, Your Honor. And, of course, they are a minority.

My time is expired. I thank you.

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

[Whereupon, at 2:01 o'clock p.m., the case in the above-entitled matter was submitted.]

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