ORIGINAL

In the

Supreme Court of the United States

CITY OF MOBILE, ALABAMA, ET AL.,

Appellants,

v. No. 77-1844

WILEY L. BOLDEN, ET AL.,

Appellees.

and

ROBERT R. WILLIAMS, ET AL.,

Appellants,

v. No. 78-357

LEILA G. BROWN, ET AL.,

Appellees.

Washington, D. C.
March 19, 1979

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IN THE SUPREME COURT OF THE UNITED STATES

CITY OF MOBILE, ALABAMA, ET AL., Appellants, v. WILEY L. BOLDEN, ET AL., Appellees and ROBERT R. WILLIAMS, ET AL., Appellants v. LEILA G. BROWN, ET AL., AAppellees.	No. 77-1844 No. 78-357

Monday, March 19, 1979
Washington, D.C.

The above-entitled matter came on for argument at 11:07 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM BRENNAN, Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES

CHARLES S. RHYNE, ESQ., 1000 Connecticut Avenue, N.W., Suite 800, Washington, D.C. 20036; on behalf of the appellants in No. 77-1844.

JAMES U. BLACKSHER, ESQ., 1407 Davis Avenue, Mobile, Alabama 36603; on behalf of the appellees in No. 77-1844.

JAMES P. TURNER, ESQ., Civil Rights Division, Department of Justice, Washington, D.C. 20530; as amicus curiae supporting appellees.

WILLIAM H. ALLEN, ESQ., Washington, D.C.; on behalf of the appellants in No. 78-357.

ERIC SCHNAPPER, ESQ., Suite 2030, 10 Columbus Circle, New York, New York; on behalf of the appellees in No. 77-357

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C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 77-1844 and 78-357, consolidated, City of Mobile against Bolden and Williams against Brown.

I think we may proceed now, whenever you're ready, Mr. Rhyne.

ORAL-ARGUMENT OF CHARLES S. RHYNE, ESQ., ON BEHALF OF THE APPELLANTS

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

The issue in the case that I present to you is whether Mobile's election system under which it elects its Commissioners in at-large elections is constitutional.

Now Mobile is a city of 190,000 people. One-third of them are black. There has never been a black commissioner elected. And I think that the ultimate issue that is presented to this Court in this case is whether or not these blacks, who are the plaintiffs in this case, are deprived of the equal protection of the laws.

Are they deprived of equal access and equal participation in the election system of Mobile, as they allege in their complaint?

QUESTION: Can you tell me, Mr. Rhyne, I know the commissioner form of municipal government is a very common one, but it's one with which I have only a passing familiarity.

Commissioners have both executive and legislative powers? That's really the big distinction between the commission form of government and say the mayor-council. Each commissioner is elected as the finance commissioner, the safety commissioner or the public works commissioner --

QUESTION: Well, that specialization has been true only fairly recently. The commission form of government as I remember it from reading the briefs began in Mobile in 1911, was it?

MR. RHYNE: Yes, it did.

QUESTION: And the specialization, at least professionally, the specialization, is more recent, isn't it?

MR. RHYNE: I believe that as a matter of fact the specialization insofar as prescribed by law was laid out in 1965. But Mr. Justice Stewart, I think it has always --

QUESTION: There's always been de facto specialization?

MR. RHYNE: Yes. Anyone who ran for the commission said, "I'm running for the finance post, because I'm an expert in finance." "I'm running for the police --" or safety "--post because I'm an expert in police," or "I'm running for the public works department because I am an expert in that."

I guess the big difference between the commission form, which is more like the city manager form than any other kind --

QUESTION: Well, and yet it's unlike it, too.

MR. RHYNE: It is.

QUESTION: But am I then correct in understanding that all of the legislative power, and all of the executive power of the municipality reside in these three commissioners?

MR.RHYNE: That is true. That is true. They --

QUESTION: Both powers?

MR. RHYNE: All of the power.

QUESTION: If it were a city manager form of government, of course the city manager is exclusively an executive.

MR. RHYNE: Yes, that's right.

QUESTION: And the council is the legislature.

MR. RHYNE: That is right. When I was saying that when they do the administrative executive work, they're more like city managers.

QUESTION: But they also enact the ordinances, do they?

MR. RHYNE: They also enact the ordinances. But the people know which of the three are responsible for reach of the functions of the city. And as of necessity, this form of government, which began around the turn of the century, was elected to wipe out the corruption -- mayor-alderman form that was causing a lot of problems at that time.

It gives each commissioner absolute responsibility to each voter.

QUESTION: Mr. Rhyne, you've just explained that the people run on a place basis here in Mobile. Now it seems to me that I grew up in a place where we had the commission form of government, but each one was appointed by the mayor to the public works or public safety or what it was.

But here the candidates run for a specific position?

MR. RHYNE: Yes, Your Honor, that's true. I think one of the really great things about the field of municipal government -- and I've been in it since 1937 -- is, every city's different when you come right down to it. You can't say that one city is precisely like another, I don't care how you go about it and how you describe it.

QUESTION: Isn't there a common denominator in terms of having them exercise, as Mr. Justice Stewart suggested both executive and legislative functions?

MR. RHYNE: Yes.

QUESTION: That's the common denominator of the commission form, isn't it?

MR. RHYNE: Yes. Yes, it is. And they have to adopt the policies and then carry them out.

But I think the major thing is that the people know when they vote for them that they're voting for this man because he's an expert in finance, and this man, he's an expert in police safety, and this man because he's an expert in public works.

And regardless of whether or not they run as such, as they did not prior to 1965, it was always understood that this man was running for this post and that man was running for that post.

QUESTION: May I ask another question?

Do they run as a trio on a ticket? I know it's a non-partisan election; at least that's what I understand from the briefs.

MR. RHYNE: That's right. It is a non-partisan election.

QUESTION: First of all, what is the term of a commissioner?

MR. RHYNE: Four years.

QUESTION: And are they all elected at the same time?

MR. RHYNE: Yes, they are.

QUESTION: And do they run as a slate of three?

MR. RHYNE: No, no. There is no primary; it's a non-partisan election; and there are no impediments to anyone registering. Anyone qualifying for being a candidate for any one of the places, even though they're not an expert in finance or an expert in one of the others. And there's no question but what there's equal participation in the electoral process, and that the votes are counted equally.

QUESTION: And have Negroes been -- they have run?

MR. RHYNE: Yes. Now, Negroes have run. Three Negroes ran in 1963.

QUESTION: They ran or they stood for election?

MR. RHYNE: Mr. Justice Marshall, I would say in the South they stood for election; and you're right. They stood for election in 1973, but as the district court pointed out, they were young, inexperienced, and ran rather limited campaigns and didn't even carry the black wards.

Now --

QUESTION: Do they have some prerequisites for getting on the ballot?

MR. RHYNE: None whatever.

QUESTION: There isn't a filing fee? I suppose --

MR. RHYNE: There was a minor --

QUESTION: But there's not a signature requirement? There must be.

MR. RHYNE: Now, Mr. Ehrendale is here. He's the great expert that tried to make an expert out of me.

QUESTION: Well is there a signature --

MR. RHYNE: But I'm saying there isn't --

QUESTION: There is no signature requirement of any substance?

MR. RHYNE: No; absolutely not. So anybody can run.

Now this is the first case that I know of that has come before this Court that really squarely involves at-large

elections at the municipal level.

QUESTION: Well, Mr. Rhyne, before you go on with that, you might just tell me why you thought it was important to say that these commissioners, either formally or informally, stood for election for certain positions.

MR. RHYNE: Yes.

QUESTION: Now, let's just assume that they didn't. Would your case be different? Suppose they just ran -- all they ran was for three commissioners, and no one ever knew what they were running for except they were running for commissioners; and they had the full legislative power.

It might so happen that after they were elected one would assume this kind of an executive responsibility, and one of them would assume another. But suppose they just ran, and when they ran no one understood anything other than that they were running for three commissioners exercising legislative power.

Would your case be different or not?

MR. RHYNE: That's a pretty hard question, but I would say that my case would not be different. Because in every commission form of government that I know of, the people always know who that commissioner is running for and who they're voting for.

Now you've had some -- a lot of experience in Cincinnati with proportional representation in voting and such. But I say, coming back to my point that this is the first case

before this Court involving at-large elections. We have 67 percent of the cities --

QUESTION: Well, I take it that your case would be the same if there were just at-large elections for city councilmen?

MR. RHYNE: I would agree, except I think here you have a special reason, because the people can better hold these commissioners responsible for their actions because they know who takes the actions.

QUESTION: So you do want us to confine our decision to -- or to address the commission form of government?

MR. RHYNE: Yes.

QUESTION: A commission form of government where you run for a spot?

MR. RHYNE: Yes; yes.

QUESTION: A city council, generally speaking, has only legislative power?

MR. RHYNE: That is right.

QUESTION: It is not executive power.

MR. RHYNE: That is right. And --

QUESTION: Mr. Rhyne --

MR. RHYNE: -- you have a city manager, you have a mayor that runs the overall.

QUESTION: Mr. Rhyne, I want to suggest to you that the commission form of government as you describe it in Mobile

is certainly very different from the commission form of government as we knew it in New Jersey. My father was for 13 years a member of the city commission of Newark. And there, you had as many as 80 candidates. And the first 5 were elected. And then the 5 of them -- by majority vote -- decided which would be the director of public safety, which would be director of public affairs, and so forth.

And one did not run because he was supposed to be an expert in any particular field.

MR. RHYNE: Now, you're speaking of a county, are you not?

QUESTION: No, I'm not. I'm speaking of the City of Newark.

We had the commission form of government in New Jersey for some 25 years in most of the major cities -- had the commission form.

QUESTION: Well, that takes me back.

[Laughter.]

QUESTION: It was the mayor who made the assignment of the places. So there are, as you pointed out, variations. But I join Mr. Justice White in asking whether your case would be the same without a place test -- standing for a place?

MR. RHYNE: Well, I think that on reconsideration I would say it would be the same. I think the election at-large is the important thing here. And it is true, though, that there is a tremendous battle about the qualifications of the

various commissioners. Because I, too, Mr. Justice Brennan, and my father ran -- and it's too long ago, I don't remember how many candidates. But this was county and not city. And so --

QUESTION: I thought you had indicated before that the distinguishing factor perhaps was that these people exercise both legislative and executive functions.

MR. RHYNE: That's right.

QUESTION: And that that differed -- that distinguishe it from --

MR. RHYNE: From the usual mayor-council form of government. That is very --

QUESTION: What about the police -- what about the police jury of Texas and Louisiana? The county police juries?

MR. RHYNE: Mr. Justice --

QUESTION: Everything's different all over the world.

MR. RHYNE: That's right.

QUESTION: And the judge is a layman in Texas.

MR. RHYNE: And the judge is a layman in Missouri--

QUESTION: In the jury -- the police jury.

MR. RHYNE: -- where President Truman was.

QUESTION: That's right.

MR. RHYNE: And the judge is a layman in Illinois.

But let me get back to this fact: One of the most interesting things to me is that these plaintiffs have brought this suit; they have 35 percent black; but never has a qualified

black run for office in Mobile.

Now if there's any one thing that this Court can judicially notice, and as Mr. Justice Marshall knows better than anybody else, it's this: When I first started representing cities in 1937, there wasn't a single black that I know of on any city council and certainly no black mayors. Today we have a tremendous number.

QUESTION: Well, Mr. Rhyne, how can you know whether a particular individual, black or white, is quote qualified close quote?

MR. RHYNE: Well, he has to state his qualifications, and the people vote for him on the basis of his qualifications. He puts forth these qualifications inthe race.

QUESTION: Well, if I might be anecdotal too, I grew up in Milwaukee. We had a city council of 23 members. 1 of them were tavern keepers.

[Laughter.]

MR. RHYNE: Well -- the city council of Milwaukee doesn't really run the city. The mayor, who was Mayor Holmes ? probably then, and a city manager generally run the city.

But the thing is that there you've got Mayor Bradley running out in Los Angeles in a city that is 17 percent black. He ran once, he was defeated. He ran the next time and got elected, and he's got elected over and over again.

And I say around this nation -- and we cite them on

pages 11 and 12 of our brief -- a good many illustrations: Raleigh, North Carolina, 22 percent black; black mayor. Got a black mayor of Atlanta, black mayor of New Orleans, black mayor of Newark, black mayor of Oakland; I could name a hundred of them almost because I work with them almost daily.

And I'm saying that we've reached a point in our nation where the color of a man's skin in the political area doesn't count as much as his ability to prove that he can do the job.

QUESTION: Well, why is it that he hasn't won in Mobile? Are they all stupid in Mobile?

MR. RHYNE: Now Mr. Justice Marshall -- you probably knew John LaFlore? very well. He's one of the ablest Americans who ever lived. I'm sorry -- he was a plaintiff here -- he's dead.

Now I would be awfully hard to convince that if John LaFlore ran with 35 percent black, that he wouldn't get enough white votes to win.

And my statement to you is --

QUESTION: He was a postal carrier.

MR. RHYNE: Pardon?

QUESTION: He was a mail carrier.

MR. RHYNE: Well, he was a brillant man.

QUESTION: Well, he wasn't a politician, he was a mail carrier.

MR. RHYNE: But he's a politician too, and you know it.

QUESTION: Yeah, well that's parttime politician.

MR. RHYNE: Well --

QUESTION: Why don't you name some of those young lawyers down in Mobile?

MR. RHYNE: He organized the only slating organization that existed in Mobile, the non-partisan voters league, which is black.

QUESTION: Well, if the qualification factor is relevant here at all --

MR. RHYNE: I think it's very relevant.

QUESTION: -- the only evidence of qualification is that the three Negroes who ran, you said, according to this record, did not carry the Negro --

MR. RHYNE: Wards.

QUESTION: -- voting wards. Isn't that about all we can deal with on qualifications?

MR. RHYNE: Well, Your Honor, I think it shows the sophistication of the voters today, and I think it also shows that the voters are looking at the qualifications of the candidates rather than the color of their skin.

QUESTION: Mr. Rhyne --

MR. RHYNE: Or they would have gotten 35 percent of the vote.

QUESTION: -- the difficulty in this case though -- I know that you talk about the rest of the country, but in this case the district court's findings are, as I remember them, that the color of a man's skin is of critical importance.

QUESTION: Quote, the kiss of death, end quote.

QUESTION: Then we have to look at Mobile rather than Oakland or Cleveland or --

MR. RHYNE: Well, I read the kiss of death, Mr. Justice Marshall. And I read what the judge said about polarization.

QUESTION: But do we accept those findings or do we not for purposes of our decision?

MR. RHYNE: I say that the findings are based on minute evidence. Because the expert testified that polarization was lessening all the time. And there were witnesses who testified that a black man would have a reasonable opportunity to win.

QUESTION: Do we accept those findings for purposes of our decision, or do we -- do you ask us to re-examine them?

MR. RHYNE: I ask you to re-examine them because --

QUESTION: Is it critical to your case that we re-examine them?

MR. RHYNE: Not particularly. I think that what you have here is a legal conclusion rather than a fact. Because what did the court do?

In a voting rights case, you've got to find some barrier, some obstacle. Now, in Mobile, you have full access, full participation by blacks.

QUESTION: Yes, but Mr. Justice Stevens points out that the district court says you may have complete access until the voters get into the voting booth. And then there's voting on the basis of color, and no black has ever been elected.

MR. RHYNE: Well --

QUESTION: Now let's just assume that's so.

MR. RHYNE: That is true.

QUESTION: So let's just assume that that is -- just accept those findings. And you say -- and you say -- what do you say to that?

MR. RHYNE: I say to that thatthe evidence is that polarization is growing less and less all the time, and that this Court must pay some attention to the fact --

QUESTION: Yes,but what if we accept the finding --

MR. RHYNE: -- that blacks throughout the nation --

QUESTION: -- what if we accept the finding that there is racial voting at the polls?

QUESTION: Mr. Rhyne, on your polarization is changing, what about the Klan getting 1,500 members a week in Alabama? The Klu Klux Klan I'm talking about, you know; KKK.

MR. RHYNE: Yeah, I've heard of it.

QUESTION: 1,500 members a week in Alabama in the

last few months.

MR. RHYNE: I don't follow its activities quite as close, I'm afraid.

QUESTION: Well, it's in the newspapers.

MR. RHYNE: Well --

QUESTION: Local ones.

MR. RHYNE: -- iI would say that the Klu Klux Klan, as far as I know of it, is a fading factor in the South, just as polarization of the black vote is fading.

QUESTION: I thought your argument, Mr. Rhyne, was that even accepting polarization, nothing in either the Fourteenth or Fifteen Amendment requires that this at-large form of election, which has been the form adopted by Mobile since the year 1911 to be altered.

MR. RHYNE: Well --

QUESTION: Even accepting that Negroes vote as Negroes and that white voters vote as white people.

MR. RHYNE: My position --

QUESTION: That there's nothing in the constitution, the Fourteenth Amendment or the Fifteenth Amendment or any other part of it that requires Alabama to change its system of voting?

MR. RHYNE: That is right.

I think as long as they have equal access and equal participation and their votes are counted equally, that's all

the constitution requires. And they have that.

QUESTION: There's no one-man-one-vote problem here under the Fourteenth Amendment.

MR. RHYNE: No; they're all equal.

QUESTION: And there's deprivation of anybody's voting under the Fifteenth Amendment, based on his race or color.

MR. RHYNE: That is right. Because the testimony is this that black vote is decisive. All of the candidates for commissioner campaigned very hard for the black votes. On page 141, 142, 143 you have Rev. Hope say that he feels -- he's head of the Non-Partisan Voters League -- he feels that the three white candidates -- three white commissioners who now occupy those offices -- treat the blacks very well.

And we have over and over again the fact that these commissioners have the open door policy, they see the blacks, they try to take care of their problems.

Sure they can't take care of all -- all cities have problems.

QUESTION: Again, Mr. Rhyne, did not the district court find that the blacks were not getting the same services from their government that the whites were? Isn't that the district court's finding?

MR. RHYNE: Well, the finding on services, there are other remedies for that.

QUESTION: I understand. I'm not saying you necessarily --

MR. RHYNE: Not to tamper with the voting.

QUESTION: Don't we have to deal with the findings of the district court, rather than changing conditions that you've described were taking place today? Or do we?

What -- normally, we deal with the findings that the district court made, and we've got to live with them.

MR. RHYNE: I don't think you can decide this case in a vacuum. I think you have to look at the entirety of the picture, what's going on in the world today. I think that in this instance, where there is no impediment in the voting process whatever -- everybody can register and everybody can run --

QUESTION: Do you think the Gomillion case would have been decided differently if there had been a showing that there was no impediment to the voting process?

MR. RHYNE: Well, the Gomillion case is entirely different from this. The Gomillion case was an out-and-out discriminatory action. We've got no discrimination here.

QUESTION: Suppose this was out-and-out in the sense that the legislature and the Commissioners said, "The reason we want to maintain our plans, our commission form of government, is, we do not want blacks to be in -- elected as commissioners?"

Would it be a different case?

MR. RHYNE: It could be, but you don't have that here. You don't have any intentional discrimination. You have absolute equality of voters, in the voting process.

QUESTION: Well, based on the findings of the district court, at some point in the process you have a deliberate discrimination in the voting booth.

I'm not suggesting -- I'm just --

MR. RHYNE: Mr. Justice White, there was no such finding.

QUESTION: Well, I'll call it polarization, then. Racial voting, whatever you want to call it.

MR. RHYNE: Well, even on that I'll say that the testimony was -- by the expert, Voiles -- that polarization is lessening.

And the government, in its brief, concedes that race was not an issue in the 1973 election, which was the last election.

Now, what the court did -- the district court did -- it couldn't find an obstacle, it couldn't find any impediment, and found that everybody had an unfettered right to vote. What it did was, and I quote the court -- the court concluded that an at-large system is an effective barrier to blacks seeking public life.

Well, that simply isn't true.

QUESTION: Well, does not the record here -- is not the record here that the three Negro candidates didn't carry the Negro wards, in conflict to some extent with the district court's finding?

MR. RHYNE: Absolutely. And then the Court of Appeals went a step further and said that that existing -- that that so-called barrier to blacks seeking public life establishes the element of intent.

Now, I think that this case is enormously important because having found that the system itself was the barrier, all the court could do but abolish it. And what did they do? They wrote an entire new city charter, with the mayor and nine city councilmen, because they said that the only way -- and I quote the district court again -- that you can provide blacks with a realistic opportunity to elect blacks to the city governing body is to wipe out the existing government and put in a mayor-council plan with single-member districts.

Now I don't think this Court's in the business of fixing elections or guaranteeing that a person is going to be able to vote and put in office a man of his own color. They have an equal right to an equal shot, one-man-one-vote.

QUESTION: Mr. Rhyne, I suppose it's only -- it's just the residential pattern that would allow -- that would afford the kind of a remedy that the district court gave here. If blacks and whites were equally distributed --

QUESTION: Geographically.

QUESTION: -- around the City of Mobile, and yet the same results had occurred down in the past that there weren't any blacks elected, the only remedy would be a system of racial proportionate representation.

The single-member district remedy would only work because of residential patterns, I take it?

MR. RHYNE: I think the vicious part -- you're right -- the vicious part of its decision is that it more or less freezes segregation.

QUESTION: You mean residential segregation?

MR. RHYNE: Yes. If you're going to chop up Mobile into nine single-member districts, and the blacks start moving out of the district, they lose control of it.

So I think that's really to me, we've reached the point, I say, when color shouldn't count. And it hasn't counted throughout the nation.

And I think this Court should say so, that you're not going to provide proportional representation by race. You never have. In decision after decision you've said no.

Equal votes, yes. Equal access, yes. Equal participation, yes. But not proportional representation by race.

QUESTION: In fact proportaionl representation -- that is the Harris system of proportional representation -- has existed I think only in two municipalities in the United

States: New York City for awhile, and Cincinnatti, Ohio, for a longer period. And that was attacked as being unconstitutional at one stage.

MR. RHYNE: Yes. And it didn't work very well either place.

QUESTION: Well, one could argue about that.

MR. RHYNE: All right. But Maury Seitzengood? who put it in in Cincinnati told me it wasn't working very good, and so you got rid of it.

But I'm saying that proportional representation by race is not guaranteed --

QUESTION: Well, we know what was wrong with it in New York.

QUESTION: Yes.

QUESTION: The communists got elected everytime.

MR. RHYNE: I didn't quite understand you, Mr. Justice --

QUESTION: In New York, the communists got elected every time.

QUESTION: In Cincinnati, I got elected.

[Laughter.]

MR. RHYNE: You know, I thought in working on this case, really, one of the most interesting things was the footnote that Mr. Justice White wrote in Whitcomb v. Chavis where he points out that a white man won in a black ward and

a black man won in a white ward. And I hope that I live to see the day where that is America.

Because if you start carving up cities just because you've got to guarantee black seats on the governing board, you're going to have to carve up an awful lot of cities.

MR. CHIEF JUSTICE BURGER: Mr. Blacksher.

ORAL ARGUMENT OF JAMES U. BLACKSHER, ESQ.,

ON BEHALF OF THE APPELLEES.

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

I would like to begin by responding, if I may, to some of the questions concerning the Commission form of government in Mobile.

Briefly, the history of commission government in Mobile as Mr. Justice Stewart pointed out, it began in 1911. The original statute did not require, but did authorize, the commissioners, once they were elected, to divide up the executive functions among themselves. And it certainly was the practice and custom in Mobile, almost from the beginning, for the commissioners to do this.

In fact, it is not a matter of record in this case, but there was a lawsuit in the 1920's by some politicians who were unhappy that the Commission had adopted that course, rather than acting as a board of directors in common.

QUESTION: You mean that after the election they then decided which one was to take what?

MR. BLACKSHER: That's correct. And in 1939, it's further my understanding, that the law was explicitly changed to provide for one place to be the mayor in advance of the -- in advance of the election; and the two associate commissioners would be assigned executive functions after the election.

That plan also ran into some technical problems in the Alabama state courts, and it ended up in 1965, the first time the executive functions of the three commissioners were designated by law before they ran.

We would like to point out that the plaintiffs in this case never objected to the retention of a commission form of government which permitted the use of single-member districts. It was the position of the defendant city in this case, from the time it filed its answer to its arguments and pre-trial motions, the pre-trial document, pre-trial briefs and on into the Court of Appeals, that the assignment of executive functions to the three commissioners foreclosed -- absolutely foreclosed -- any remedy in this case.

That, in fact, I think was the keystone of their defense. Based on their representations, which can also be found, by the way, in their answer on page 33 of the -- of the appendix, that in order for single-member districts to be provided in Mobile, a change in the form of government would have to come about.

The Court, acting in its equitable discretion, when

it was forced to give an order of its own, when the City of Mobile and the State of Alabama, after the Court's invitation, to supply some legislative response to the infirmities of the at-large election system, then the court, taking the advice of the defendants themselves, changed to an optional form of government, which is provided in the State of Alabama by other statutes.

The State of Alabama has several optional forms of municipal government, including the now-ancient mayor-aldermanic form of government which Mobile was using back in 1900; including a new mayor-council -- a newer mayor-council form that was devised specifically for Mobile in 1963; and including the special legislation that governs Montgomery, for example, and Birmingham, which have adopted the so-called strong mayor that everyone at this trial agrees was preferable to the weak mayor where the council could interfere in the day-to-day business of the executive.

But to repeat: It is true that the plaintiffs in the end, when asked to propose a remedy, suggested a change to a mayor-council, only because the defendants were urging that any other -- any other use of a form of government in the context of single-member districts would be inequitable and inappropriate in Mobile.

The Court's remedy leaves open to the State of Alabama the option of adopting by legislation a Commission

form of government that does permit of the use of single-member districts; that is still open to Alabama if it wishes to use it.

But there has been no movement on the part of anyone in the legislature or in city government to see or to bring about such a change.

QUESTIN: Could the City do it unilaterally, or does it take State legislative action?

MR. BLACKSHER: The City took the position from the beginning that it lacked -- entirely lacked any authority to change its election system or its form of government. And that in fact we had to look to the legislature of Alabama for our remedy.

It filed a motion to strike our prayer for relief that a -- that the election system be changed to single-member districts, because they lacked the authority to provide that relief.

QUESTION: Well, is it your position that the discrimination in this case was effected in the voting booth? Is that where the --

MR. BLACKSHER: Not exactly, Mr. Justice White. We do not take the position that voters are somehow practicing a prohibited -- constutionally prohibited form of discrimination when they vote along racial lines.

What our position is, is that given that situation,

a situation which, by the way, has been reinforced by 100 years of official state action --

QUESTION: A city should not provide the kind of system that makes effective that kind of voting; is that it?

MR. BLACKSHER: That's absolutely correct.

In Mobile I doubt that one could devise an electoral form that more carefully and distinctly focused the --

QUESTION: So you say --

MR. BLACKSHER: -- electoral power --

QUESTION: -- at large voting is just -- in a city, say, is out -- is unconstitutional if over a period of time a -- a substantial black -- or some other minority -- a group, is without representation; and that the court finds that there's discriminatory voting.

MR. BLACKSHER: Polarized voting. We do not even say that every at-large system, under those circumstances, would have the prescribed effect.

After all, as someone here pointed out, there -- in a true at-large system -- in a true at-large system, as in this case, the top three vote getters would be elected, and you can have plurality victories.

And it may have been that under such a system blacks in Mobile representing 33 percent of the population would have had the clout --

QUESTION: Well, what would you do in this case if

blacks and whites had been equally distributed throughout the city? What would have been your remedy?

MR. BLACKSHER: We -- Mr. Justice White, you're correct that we would have had no remedy through the districting formula.

And in the first instance, we think that it's unrealistice to consider such a possibility. Hence if, in fact, blacks and whites were residentially homogenized throughout the entire district it is unlikely that the social phenomenon of polarized, racial voting would have occurred in the first instance.

But if it did occur in that circumstance, I think it's clear that the election form -- at-large voting -- would not be the specific cause of the dilution of their vote.

QUESTION: What inferences --

MR. BLACKSHER: Changing the districts would not provide them such a remedy.

That issue, of course, is not presented here. As the evidence was -- and the court found -- that Mobile was one of the most racially segregated cities in the country.

QUESTION: What inferences should be drawn, if any, from the fact that if you had districts representation here, the three Negro candidates who ran would not have been elected in their own predominantly Negro districts?

MR. BLACKSHER: Yes, sir, that was a factual issue that was debated at great length in the trial court. And all of the facts indicated in the trial court finding, and the Court of Appeals affirmed its finding, that it was only -- it was an indication that no well-known, well-financed black candidate was even going to attempt a race in the City of Mobile, where all of the politicians, including the defendants, conceded that it took $30- to $50,000 to wage a successful campaign; when all of the black politicians including the Non-Partisan Voters League, represented to the Court that they would not even attempt to launch a black candidate, given the pattern of racially polarized voting.

This was a situation where the one champion of black interests in the City of Mobile, a white commissioner named Joe Langen, had been defeated by that same racially polarized voting.

His situation provided the centerpiece of the evidence, I think, in this case. And blacks in this case did not contend that they had a right to have a districting remedy that would permit them to elect blacks. They wished to elect a candidate of their choice.

They weren't -- the evidence indicates they were not even permitted by the white majority to elect a white candidate who was at all connected with or in any way --

QUESTION: Well, how were they prevented from doing

it?

MR. BLACKSHER: I beg your pardon, sir?

QUESTION: You said the Negroes weren't allowed to elect the man of their own choice. And my question was: How were they denied that right?

MR. BLACKSHER: They were denied that right by the black voting white majority operating in an at-large election system that involved a majority vote requirement --

QUESTION: Well, I understand from Mr. Rhyne that -- maybe you can help -- he wants to know the constitutional provision that prevents white people from voting for white people, and Negro or black people from voting for black people.

MR. BLACKSHER: There is no such constitutional provision, may it please the Court.

QUESTION: I thought so. So you agree with him on that?

MR. BLACKSHER: We certainly do; always have.

QUESTION: But you do say that given the fact of polarization, as it's been referred to generally in the case, it does not require a finding ofintent in the structuring of the governmental unit to discriminate?

MR. BLACKSHER: That is the position we take. The Court of Appeals took the position that under the equal protection cause of action, such a finding of intent was required; at least the majority opinion did. And although it did -- it did sort of indicate that the intent would not be

required under a -- well, I'm sorry, the majority did hold as well that the Fifteenth Amendment would require a showing of intent.

But it is our position, Mr. Justice Rehnquist, that neither the Fourteenth Amendment, the Fifteenth Amendment, certainly not the Voting Rights Act, requires that a districting system, which operates to minimize or cancel out the voting strength of a protected minority requires a demonstration that that electoral wsystem was motivated in the first instance, or at any point in time, by an invidious motive.

QUESTION: How about election for the Governor of Alabama?

MR. BLACKSHER: Your Honor, the governor of Alabama is an executive function; it is one office; he must run --

QUESTION: Well, all the executive power of the government of Mobile is lodged in these three Commissioners, I understand.

MR. BLACKSHER: That's correct.

QUESTION: To that extent, there's no difference.

MR. BLACKSHER: That's correct, except athat what we don't foreclose is the possibility that the commission system could have been retained where all three would have elected -- wuwould have exercised the executive power, and still have been elected in single-member districts, and

without violating the Voting Rights or equal protection clause of any of the citizens of Mobile who elected them from single-member districts.

We say that that certainly is an option which is pursued in other cities; has not been challenged, and was not directly challenged in this case.

QUESTION: You think the constitution -- ultimately what you're saying is, if I understand it, is that the constitution requires that one of these three commissioners be a Negro?

MR. BLACKSHER: No, Mr. Justice Burger, we're not.

QUESTION: Well, that's the thrust of your argument, isn't it?

MR. BLACKSHER: It is -- we're saying that the constitution requires that in a situation where there's bloc voting as powerful and as rigid as it is in Mobile, the constitution requires that an electoral system be provided which gives blacks an opportunity to have their preferences registered inthe elections.

QUESTION: Well, my --

MR. BLACKSHER: And their preferences may or may not be a black candidate.

QUESTION: Voters don't always -- and many times, I'm sure you've shared this experience with me and with many others of our fellow citizens -- your preference hasn't been

nominated by either party, or by any party.

MR. BLACKSHER: That's correct.

QUESTION: So you're voting not between first choices of yours.

MR. BLACKSHER: Not -- every voter doesn't have a right, of course, to have his preference registered on every occasion. But the concept of dilution grew out of this Court's one-person-one-vote line of cases.

QUESTION: Yet that's not involved here, is it?

MR. BLACKSHER: The mathematical concept of one-person-one-vote is not.

QUESTION: But that's what that concept was in Reynolds v. Sims.

MR. BLACKSHER: That is not what Fortson v. Dorsey and --

QUESTION: No, I know. But the original one-person-one-vote was purely a mathematical concept, wasn't it?

MR. BLACKSHER: The specific concept in Reynolds was a mathematical concept.

QUESTION: Exclusively.

MR. BLACKSHER: But the language of Reynolds is much broader than that, may it please the Court. And it talks about the right of every American citizen to have a full undiluted equally weighted vote.

And from the beginning of that line of cases, this

Court has recognized --

MR. BLACKSHER: Well, now -- go ahead; excuse me.

MR. BLACKSHER: -- has recognized that in laying down the rules, that such a dilution or debasement of a person's vote could occur by a geographical apportionment scheme; by mathematics, as you say. That in providing a remedy for that, a State or local government could go to an at-large election system.

QUESTION: Well, before you get to the question of remedy, let's talk about a question of constitutional violation.

Do -- you say it does not have to be by intent, I take it?

MR. BLACKSHER: That is our position; that's correct.

QUESTION: Now supposing that Mobile instead of being roughly 65-35, was 85-15, and they had had a long standing three commissioners at-large system.

And -- could the district court then tell them that they had to go fromthree commissioners to five commissioners, because even three commissioners split up geographicall would not enable the Negro population to have a representative on the council?

MR. BLACKSHER: If the system operated, given all the premises of the hypothetical question, that there was

rigidly polarized voting which strictly precluded now on every occasion consistently over a period of time the preferences of the 15 percent black minority from being registered inthe at-large system, then there would be functionally no difference from a districting system in which blacks were in one district, had no representatives, and whites were in one district that had all of the representatives; that's our position.

QUESTION: And you'd make the same argument about Catholics, or Jews, or any other identifiable groups that lived on some areas, I suppose? Italians, Poles --

MR. BLACKSHER: We don't attempt to make that argument here, Mr. Justice White. But the argument might be made --

QUESTION: Well, it sounds to me like you're making it.

MR. BLACKSHER: The argument might be made under the precedents this Court has established, if it could be shown by Catholics -- and I would point out that in our experience it has not been as a matter of fact possible to show this -- that Catholics consistently voted as a bloc -- or rather that the majority of non-Catholics consistently voted as a bloc -- to defeat Catholic candidates over a period of time.

QUESTION: Well, what's the factual answer to my question? That isn't what I asked you.

MR. BLACKSHER: Well, whether or not the case applies to Catholics or Poles or other groups which simply of course requires additional consideration of other factors.

But there can be no doubt that the Fourteenth and Fifteenth Amendment was passed primarily to protect the voting rights of blacks.

QUESTION: The Fifteenth says so.

MR. BLACKSHER: The Fifteenth Amendment is explicit on that point.

QUESTION: Let me come back to a point I suggested to you before about the fact that the two Negro candidates couldn't even carry their own districts. And you responded by saying -- at least as I understand it -- that the Negro leaders in the community knew that it was futility to run and so they didn't bother putting up good candidates.

But that's a good deal of speculation. That's really not hard evidence.

QUESTION: Your whole argument's about bloc voting. Bloc voting are undermined by this reality that's in the record, that the Negroes didn't vote for Negro candidates.

MR. BLACKSHER: Mr. Chief Justice, there was plenty of evidence in the record of where blacks had run in the City of Mobile for other governments, such as the school board, the legislature, had attempted time and again to seek

election, and had been defeated by a solid bloc vote by the majority of whites, as well as otherwhite candidates both in the city commission elections and in school board elections.

QUESTION: Well, who has the case or controversy with whom here?

MR. BLACKSHER: The case or controversy is between the plaintiff clients, the black citizens of Mobile, and the State of Alabama, operating through its agency, the state of Mobile.

QUESTION: What case or controversy does the named -- do the named plaintiffs have with the City of Mobile?

MR. BLACKSHER: The case in controversy involves the lawfulness and the constitutionality --

QUESTION: Have they ever run? Have they ever run or wanted to run?

MR. BLACKSHER: The evidence was that they have frequently run in the past; had expressed a desire to run in the future --

QUESTION: These named plaintiffs?

MR. BLACKSHER: John LaFlore, for one, ran for the state legislature as soon as the Federal court in Montgomery provided single-member districts that provided him a reasonable opportunity to be elected.

May it please the Court, I would like to point out that contrary to Mr. Rhyne's opening statement, that this

case is strictly an equal protection case; that there are at least four independent legal theories supporting the judgment below.

The Court is confronted with the findings of fact of two courts below, that Mobile's at-large election system has not only the effect but the purpose, the motive, of descriminating against black voters.

Based on these findings, this Court can affirm the judgments below first on the Voting Rights Act of 1965, which explicitly prohibits any election laws which have the purpose or effect of abridging blacks' voting rights; secondly, on the Fourteenth Amendment cause of action growing out of White v. Regester, Whitcomb v. Chavis -- and I would like to point out to this Court, stopping there momentarily, that the evidence in this case is even stronger in all the critical aspects than was the evidence in White v. Regester.

Thirdly, the constitutional prohibition against any state law that has -- that is supported by a racial -- invidious racial motive. And fourth, the Fifteenth Amendment, which provides and proscribes any state law which has either the purpose or effect of abridging the voting rights of blacks.

I think that --

QUESTION: Mr. Blacksher, supposing in Chicago the city council decided they didn't want anymore Republicans. And they passed an at-large system there which would have effectively excluded Republicans from the city council. And

I suppose the Republicans are a group that are entitled to equal protection.

Under your theory, would that be unconstitutional?

MR. BLACKSHER: Your Honor, we simply don't take a position on whether or not Republicans are protected. I -- in thinking about that question, it certainly occurs to me first of all that political parties are vehicles that we have in this society as a convenient means for carrying on the political dialogue itself.

QUESTION: The significant thing about them, I suppose, is, they vote as blocs.

MR. BLACKSHER: They vote as blocs, that is correct. But the question is whether they -- whether the vote against them is invidious in nature.

QUESTION: Well, that's because we don't want the members of this bloc in our legislature; does that make it invidious.

MR. BLACKSHER: Not -- no, sir; certainly not on its face.

QUESTION: Well, then are you saying that a political party, if it's frankly a political party like the Republicans, are not entitled -- they can be subjected to discrimination simply because they're Republicans?

MR. BLACKSHER: I'm saying -- I'm trying to avoid taking a position one way or another, simply because it involves clearly different kinds of issues which require

thorough exploration.

QUESTION: Would this case be different if the -- if all the black citizens in Mobile organized a political party called the Black Political Action Group, or something like that?

MR. BLACKSHER: It would be different if it showed that the bloc voting was on the basis of the ideas and the positions -- the ideologies, that were espoused by this particular organization, which crossed racial lines.

The constitution forbids invidious discrimination on the basis of race. The Voting Rights Act forbids invidious discrimination on the basis of race.

QUESTION: I thought you said bloc voting was all right on race.

MR. BLACKSHER: With respect to the constitutional rights of citizens of this country to vote in a bloc fashion, of course. The question is whether the state can reinforce and guarantee the defeat of the minority through a particular election form, which is done in this case.

QUESTION: Oh, you don't agree with Mr. Rhyne anymore?

MR. BLACKSHER: I -- there's been very little that we've agreed on in the course of this litigation, Mr. Justice Marshall.

I would like to close by pointing out that after the White and Whitcomb cases, and the Voting Rights Act may have

been analyzed to death, but that the issue from my clients' standpoint very simply is whether or not they will be permitted to enter at last the mainstream of politics in the City of Mobile.

If this Court stands by its prior precedents in White, in Whitcomb, if it observes the Congressional intent behind the Votings Rights Act, if it observes the precedent it established in Gomillion v. Lightfoot and Arlington Heights regarding a racially motivated state law; then given the findings of fact made by two concurrent courts below, the judgments below must be affirmed.

QUESTION: Well, do you have that finding by the district court? Look at page 32b of the jurisdictional statement.

I thought that Judge Pittman came right up to the hurdle andthen kind of backed off of it, saying that Washington v. Davis hadn't changed the dilution cases, and it wasn't -- no intent was required there, and so we didn't find it.

See the top of page 32b there.

MR. BLACKSHER: What the argument -- I think it's important to note, Mr. Justice Rehnquist, that the argument that the court is rejecting here is the argument that the defendant city depended on throughout trial, and that is, that the plaintiffs had to show intent in the origination, in the enactment of the statute.

You'll notice that the court says that Washington v. Davis did not establish a new Supreme Court purpose test that requires initial discriminatory intent.

The preceding paragraph contains the finding that there is a current condition of dilution of the black vote resulting from intentional state legislative inaction.

Now, we fought through the lower courts -- both the district court and the Court of Appeals -- this argument that if we couldn't prove that in 1911 there was a racial motive involved, then we were out of court. And that is an issue that the district court was addressing in that passage.

MR. CHIEF JUSTICE BURGER: Mr. Turner -- we will resume at 1:00 o'clock at this point.

[Whereupon, at 12:00 o'clock noon, the luncheon recess was taken.]

AFTERNOON SESSION

[1:01 p.m.]

MR. CHIEF JUSTICE BURGER: Will you be continuing, or will you be reserving any time you have left?

Mr. Turner, I guess it would appear that you are on deck.

ORAL ARGUMENT OF JAMES P. TURNER, ESQ.,

ON BEHALF OF THE DEPARTMENT OF JUSTICE AS

AMICUS CURIAE SUPPORTING APPELLEES

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

We appear as amicus to urge the Court to affirm the judgments below in both numbers 77-1844 and 78-357, which will be argued next.

Although there are slight differences in the legal analyses which are apparent, I believe, from the briefs, we concur fully with the appellees that the maintenence of the at-large voting system for Mobile City commission and school commission, in the circumstances of these cases, violates the equal protection clause; and alternatively and independently, the Fifteenth Amendment.

On the Fourteenth Amendment equal protection clause, our analysis is like that of the Court of Appeals and accepts the fact that Washington v. Davis requires aggrieved parties to make a prima facie showing that the challenged system is purposefully discriminatory.

Our submission is that the exhaustive records in these cases demonstrate such purposeful discrimination;that the careful factual findings made by the district court and thoroughly reviewed by the Court of Appeals should be given great deference; and that the at-large election system cannot be sustained in these circumstances because it impairs if not submerges meaningful access to the political process on the basis of race.

The starting point of our analysis is White V. Regester and its antecedent, Whitcomb v. Chavis. Our reading of White is that the ultimate inquiry is whether black citizens of Mobile City and county have been excluded from meaningful access tothe political process because of their race.

In White v. Regester, with all of the justices joining us to this point, the Court reiterated several factors alluded to in Whitcomb, and in judging whether the at-large scheme at issue has bee purposefully operated and maintained, it is our view that reference to these factors, set forth in White v. Regester, supplies the purpose evidence that Washington v. Davis requires.

QUESTION: How many municipalities in the country, if you know approximately, have at-large system of voting for their municipal governments?

MR. TURNER: I don't know, Mr. Justice --

QUESTION: Most of them do, don't they?

MR. TURNER: I believe it to be a substantial number.

QUESTION: A majority?

MR. TURNER: I don't know on that.

The factual inquiry suggested in White v. Regester --

QUESTION: Well, it may -- before you go on to that --

MR. TURNER: Yes, sir.

QUESTION: -- it's more likely than not, isn't it, that where the function is legislative and executive, that is, to have the commissioners or councilmen assigned to be the chief executive of a particular department, that that's a very, very large number of municipal governments today, is it not?

MR. TURNER: I think only a minority have what would be comparable to Mobile's commission system. Most of those that have that commission system, where legislative and executive functions are combined into one body, most of those are elected at large.

However, there is a small number of those that are elected from districts and then assigned after election, as Mobile's former practice was, to particular executive responsibilities.

The first criteria, then, under White v. Regester is that there be a present disparate effect. The at-large system in these cases has produced no black elected officials; certainly hno one contends that this is the end of the inquiry,

but it is the beginning. The exclusion of one-third of all of Mobile residents from representation and public office is consistent with the discriminatory purpose.

Second, White v. Regester category of factual inquiry is the history of racial discrimination in the jurisdiction, of such a nature, I would take it, from Washington v. Davis, that it suggests purposeful action.

This record documents a history of opposition to effective black exercise of the franchise that is both long and strong. And we've set out as much as we could in our brief some details of that history.

The high rights include that right up until the time of trial, a single Mobile state senator had vetoed consideration of single-member districts for the city.

Another high right is that the state legislature, which would have to approve any changes in local government such as this, was singularly unresponsive. In 1970, for example, when already --

QUESTION: Well, there are Negroes in the state legislature.

MR. TURNER: There are now, yes, sir.

QUESTION: They've been there.

MR. TURNER: And I haven't --

QUESTION: Fred Gray's been there at least a dozen years.

MR. TURNER: Yes, sir, but I believe he was among

the first. And we're talking about a history of much longer than Mr. Gray's incumbency.

QUESTION: Mr. Turner, does the government think that the Fifth Circuit opinion in Zimmer v. McKeithen remains good law?

MR. TURNER: Our appraisal of the Zimmer case would run something like this: I'm not sure that everyone of those factors has to be shown in a dilution case. However, they do, in Zimmer, set forth the kind of intense scrutiny that you have to undergo in a dilution case.

We think that White v. Regester, and the three general criteria that I'm going through, is a much more workable and useful approach.

QUESTION: Of course, workableness and usefulness aren't usually thought of as being necessarily constitutional factors. If you say something is more workable and more useful, does that mean you don't think Zimmer is any longer good law?

MR. TURNER: To the extent that it is inconsistent, and I think that it is in places, with the White v. Regester criteria that I'm going through, it would not, in my judgment, be good law.

The -- as late as 1970 in the Alabama legislature, after all barriers to black voting in Alabama had been dealt with by Federal court orders, there was one that remained, and that was the use of multi-member districts. And the

Alabama district court, in Sims v. Amos, finally had to adopt single member districts for the Alabama legislature. And that's about the time that Mr. Grayand some of his associates became representatives.

The third White v. Regester criteria is the unresponsiveness of the elected officials to minority constituents. The question here, I take it, is what officials do after election, and not what they promise at campaign time.

Again, the details set forth in our brief show a pervasive lack of response to or interest in issues of concern to Mobileans. No matter which level of elected officials you study, there is apparent evidence of unresponsiveness.

QUESTION: Of course, the White and Whitcomb cases involved legislative apportionment, or reapportionment.

MR. TURNER: Yes, sir.

QUESTION: I.e., they involved the context of representative democracy in the legislative area. And at least arguably, this system is more like a statewide election of a governor. Quite a different context, at least arguably.

It's not all that clear that the concepts of the White and Whitcomb cases are freely translatable into this situation.

MR. TURNER: Well, I can certainly agree with you as to the city case that it does have the additional element of the executive branch elections. And one would have to make that translation.

With respect to the school board case -- and I realize you haven't heard arguments on the facts yet --

QUESTION: No.

MR. TURNER: But you'll see there that it's pretty much a garden variety case.

QUESTION: More like the Hadley, which of course was --

MR. TURNER: Yes, sir. That the school board hadd the standard powers --

QUESTION: Except with the White against Regester and Whitcomb against Chavis, our cases have dealt with the one-man-one-person-one-vote concept, which isn't -- no basis of the attack here is on that basis, is it?

MR. TURNER: That's correct, Mr. Justice.

QUESTION: Would you think anyone would have the complaint -- Mr. Justice Stewart's point or fully with his hypothetical -- the governor, the lieutenant governor, the attorney general being regarded as three of the most important positions in the state government, surely, all elected at-large as I suppose they are everywhere, where they are elected, doesn't it produce the same impact in a statewide situation?

MR. TURNER: Well, I would argue not, Mr. Chief Justice. The --

QUESTION: Why not?

MR. TURNER: -- commission form --

QUESTION: Suppose the southern third of a state is all people of Spanish surnames, and one of first- or second-generation Mexican-Americans. They aren't going -- on theories that have beenadvanced here today -- they aren't going to have much chance of electing a governor, or lieutenant governor, or an attorney general.

MR. TURNER: That's correct, if there were bloc voting on the basis of race.

But again, here, there is a legislative element to these provisions. Local government is, at least historically, at least --

QUESTION: Of course, a governor has some legislative functions when he can veto a bill; that gives him --

MR. TURNER: Well, that's right. I guess we could divide the President up into five or six different offices, if we followed that to its logical extreme. But I think we need not do it here.

We conclude, in short, that all ofthe factors mentioned in White v. Regester have been satisfied by the findings below, affirmed by the Court of Appeals. We urge that you give great deference to them, and turn to the Fifteenth Amendment.

If our conclusion is right, that the at-large system in Mobile has given white voters the means to abolish or abridge the effective black electoral participation because

of race, it necessarily follows that that violates the Fifteenth Amendment.

But a second part of our submission here is that independently the Fifteenth Amendment provides a basis for affirming the judgment.

Now, we get that out of the white primary cases. We say that in the Terry v. Adams, the Jaybird Club was a discriminatory private organization, but because the state magnified that discrimination, and made it meaningful in elections, that this Court turned it down and said that that violated the Fifteenth Amendment.

In many ways, the Fifteenth Amendment is a much cleaner and more direct way of dealing with this question.

QUESTION: I don't think there's a single word in any of those white primary cases that applies to a city. I have serious doubt. They were limited to United States Senators; am I right?

MR. TURNER: I believe the Terry v. Adams was a county political organization. It endorses --

QUESTION: But the elections complained about was a national election, wasn't it?

MR. TURNER: My recollection is that they endorsed candidates regularly in the Jaybird Club, which was an all-white club --

QUESTION: That's right. But --

MR. TURNER: -- for local elections.

QUESTION: And the United States Senate wasn't involved?

MR. TURNER: I'm sure if you say it was, Mr. Justice, you have more experience than I. But the case will speak for itself.

QUESTION: Mr. Turner, do you draw any distinction between the two cases that are before us, the one involving the commissioners and the one involving the school board?

MR. TURNER: No, sir; I think the same constitutional amendments apply.

QUESTION: None whatsoever?

MR. TURNER: There is the distinction that Mr. Justice Stewart pointed out, which I acknowledge but do not accept as having constitutional significance.

This is a classical -- in my judgment -- equity case. The record shows -- and I urge you to read the record, because it's very revealing -- that in all forms of political activity in Mobile, Mobile city, Mobile county, Mobile county commission, race is never very far from the surface.

White voters, the majority, set aside, under this record, all other considerations when race is injected either in the form of a candidate or his or her supporters; not only are blacks unable to win, but the whites they support get the kiss of death, and the only way blacks have political

influence is to bargain it away. And I think the Fifteenth and Fourteenth Amendment guarantee them more than that kind of closet courtship.

QUESTION: You haven't mentioned the Voting Rights Act as your -- as your predecessor counsel did. Do you think that's involved here at all? The Voting Rights Act of 1965?

MR. TURNER: The -- Section 2 of the 1965 Voting Rights Act, in terms very much like the Fifteenth Amendment, proscribes discrimination in voting on the basis of race.

Our original perception was that while certainly Section 2 would be violated if the Fifteenth Amendment was violated, that you don't save much constitutional energy by addressing Section 2.

Appellees will argue that that's incorrect, and certainly if they're right, you ought to certainly take a close look at whether Section 2is broader and gives more remedies than the Fifteenth Amendment.

QUESTION: Was this 1965 legislative change, which formalized the specialization among the commissioners, submitted to the attorney general under the Voting Rights Act?

MR. TURNER: It was, Mr. Justice, and we entered an objection to that. And it cannot legally at this time be implemented.

QUESTION: What happened? I mean, you honored an objection to it, and that made it invalid, didn't it?

MR. TURNER: That's right. All the proposed change was in Act 823 was to make formal the pressures which Mr. Rhyne has described to you --

QUESTION: Yes.

MR. TURNER: -- and other counsel spoke about.

Because of our belief, and our determination under the Voting Rights Act, that this would lock-in the commission system and the at-large voting that went with it, we could not bepersuaded that the burden of proof had been carried by the submitting authority, and we entered an objection.

QUESTION: So the attorney general entered an objection?

MR. TURNER: Right.

QUESTION: Which invalidated, or at least, suspended the operation of that legislation, didn't it?

MR. TURNER: In contemplation of law, yes. Mobile does not have a specialized commissioners who run for special offices.

QUESTION: De jure.

MR. TURNER: De jure offices, yes, sir.

QUESTION: Mr. Turner, do you agree with one of the earlier observations that if the residential pattern of Mobile was totally integrated -- totally integrated -- there

would be a dilution of the voting strengths that's being argued for here today of Negroes?

MR. TURNER: I agree with the answer that was given, that that circumstance is so likely to be remote, or so unlikely to exist, that it's hard to frame an answer.

QUESTION: That's the objective -- that's certainly the objective, is it not, to produce that kind of city?

MR. TURNER: Oh, that would be greatly welcome.

QUESTION: Well, then, doesn't this -- doesn't the contrary -- isn't it a corollary that the result you're arguing for would encourage the maintenance of ghettos in order to maintain voting strength?

MR. TURNER: It's really an academic question, Mr. Chief Justice, in Mobile. The district court found, quoting from a defendant's study, by one of the universities, that Mobile was so residentially segregated that they couldn't divided it into three districts without one of them being in the majority black.

It's that kind of intensity of neighborhood discrimination that we're talking about. And that's why it's so awkward for me to try to answer a question postulated on the grounds that everything is salt and pepper. It isn't, and the status --

QUESTION: And your predecessor, if I understand, to the fact that if there were in fact complete dispersal,

racial dispersal, into all the geographic areas of the city, it would be highly unlikely that there would be bloc voting?

MR. TURNER: That's correct.

QUESTION: The two go together.

MR. TURNER: I would associate myself with that response.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Rhyne, you have two minutes left.

REBUTTAL ARGUMENT OF CHARLES S. RHYNE, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. RHYNE: Mr. Chief Justice, I wasn't sure that I had any minutes left, but let me answer one question from Mr. Justice Stewart.

According to the municipal yearbook, and I guess it's fairly accurate, 67 percent of all the cities have elections at-large.

Now, the government here, in its brief, says the measure of the effect of an electoral system is not the -- proportional representation, but fair representation. And I say to this Court that as they review the record in this case, they're going to find that blacks have been fairly represented in Mobile.

We quote, on pages 10 and -- I guess 9 and 10, Rev. Hope, who heads the Non-Partisan Voters League, and he

says that the current commissioners fairly represent the blacks in Mobile.

And for 16 years there was a commissioner, Mr. Langen, who was noted for the fact that he represented the blacks. I don't think that the blacks orwere indeed -- their support -- the kiss of death. He was there an awful long time.

Now, in conclusion, I believe very strongly in the right to vote -- in an equal vote. And I believe that's what Mobile provides here. It provides equal access to the voting system; equal participation in that system; and an equal count of those votes.

I think that's all the constitution requires. And polarization is the only thing they've offered here to prove invidious discrimination; and I don't think that's enough.

MR. CHIEF JUSTICE BURGER: Mr. Allen.

ORAL ARGUMENT OF WILLIAM H. ALLEN, ESQ.,

ON BEHALF OF APPELLANTS IN NO. 78-357

MR. ALLEN: Thank you, Your Honor.

Mr. Chief Justice, may it please the Court:

My part of these proceedings concerns the constitutionality of the way Mobile county's school commissioners are elected. And since no later than 1836 these commissioners, the members of the Mobile County School Board, if you will, have been elected by the voters of the county

at large.

They were so elected when this action was brought by black residents of the county, complaining that this at-large electoral system unconstitutionally diluted their voting power.

As you have heard, blacks make up about a third of the population of Mobile County; slightly greater proportion of the population of the city itself, but it's around a third of the entire county.

The district court sustained the plaintiff's complaint, and the Court of Appeals summarily caffirmed.

The issue that is posed by that decision is whether an at-large method of election in a school district that has a significant black minority is unconstitutional merely because there is racially polarized voting, and black minority candidates have not been elected to the board, however deeply rooted the at-large election method may be in history and non-racial policy.

I hope in describing the proceedings and the decisions below to demonstrate that the case poses the issue just that baldly. Then I'll try to explain why the resolution of that issue by the district court and the Court of Appeals is inconsistent withthe Fourteenth and Fifteenth Amendments, and with this Court's decisions construing them.

First, the facts, and how they give rise to the

issue as stated.

The long-standing commitment of Alabama to the at-large elections of the members of the governing body of the Mobile County schools is undoubted. The Mobile public school system was established in 1826, 28 years before a statewide system of schools, public schools, was established in Alabama.

Either that original enabling act in 1826, which seems to be ambiguous, or if not that, then a replacement statute that was enacted in 1836, established a system of at-large election that has prevailed continuously since.

As your Honors may have learned from the perusal of the briefs, the statute that provided for single-member districts was enacted in 1975, but was voided because of a technical defect in the giving of notice.

The original provision for the at-large election of Mobile County school commissioners in the early 1800's and the enactment in 1919 of the at-large election legislation that governs today were not motivated by any consideration of the impact that at-large voting might have on black residents.

QUESTION: Suppose at the time of -- whether it would be 1836 or later -- only white people voted; only white people were elected to the school board; and only white students went to the schools.

MR. ALLEN: And no one thought of the possibility

that blacks might vote, at that time, 1836. At -- in 1919, when the present enabling statute was enacted, blacks had been effectively disenfranchised in Alabama by the constitution of 1901, a situation that prevailed until about the time of the Second World War, and shortly thereafter.

Now there's another key fact that appears from the record. Notwithstanding the history, of which we're all aware, and to which government counsel referred, of racial discrimination in many, many aspects of the life of Alabama, there are today no formal or informal barriers to full participation by black residents in the political process in Mobile County, including, in particular, school board elections.

Blacks are able freely to register and to vote. They participate in both parties in the partisan process that leads to the election of school board members. Any candidate who's interested in running for the school board may do so. And it doesn't cost much to run for the school board.

QUESTION: Is there any controversy in this case about what you just told us?

MR. ALLEN: Up to this point, I am paraphrasing findings of the district court. I am paraphrasing findings -- he did not advert to this other possible obstacle, the campaign costs. But in fact there's testimony that it costs no more than $5,000 -- more usually about $2,000 -- to mount a perfectly effective campaign.

QUESTION: They're non-paying jobs.

MR. ALLEN: They're non-paying jobs; have been up --

QUESTION: Until recently.

MR. ALLEN: -- until very recently.

QUESTION: These members perform no executive functions at all?

MR. ALLEN: Well --

QUESTION: Do they?

MR. ALLEN: -- the school board is like any other traditional American school board: It sets policy and it hires an executive, it hires a school superintendent. He's not elected separately. So that executive responsibility utlimately is lodged in these school board members.

And I take it -- and this is highly personal knowledge from acquaintanceship with neighbors -- that school board members are held very closely accountable for what goes on in schools by the -- by parents and others who are interested in it.

QUESTION: Does the board have any independent taxing power?

MR. ALLEN: That I do not know.

No; the answer to that is no.

QUESTION: Some states, they do; some don't.

MR. ALLEN: That's correct. Yes. No, this board apparently --

QUESTION: So what are the functions of the members

of the school board?

MR. ALLEN: To set and make policy about the schools; to decide on school construction; to hire the superintendent, certainly; and ultimately, I would guess, to decide on hirings, if it's a typical school board.

QUESTION: Well, that's my question. Does it select textbooks and those things, or is that done at the state level?

MR. ALLEN: It does select textbooks.

QUESTION: Could -- and does it -- I suppose it promulgates rules and regulations, but except in that sense doesn't have legislative power.

MR. ALLEN: Legislative power, I"m not sure what that means in this context.

QUESTION: Well, I"m not either.

MR. ALLEN: But it does -- whatever policy is to be made, it makes. If that is what legislation is --

QUESTION: It's mainly in policymaking and administrative sort of -- body.

MR. ALLEN: Yes; it combines the two parts. I'm sorry -- I'm afraid this was all taken much for granted, and doesn't appear in the record.

QUESTION: Yes.

MR. ALLEN: I apologize. But --

QUESTION: Well, it may not be important; but it may.

MR. ALLEN: -- that is approximately the situation.

Let me go on. In addition, another fact that appears, there's no white-oriented slating organization operating in Mobile County.

Mobile County -- the school elections, I should emphasize, are different from the city elections inthat they are partisan. But the fact is that the only effective political endorsing organization is the Non-Partisan Voters League, which is a predominantly black organization.

QUESTION: They're partisan -- they're Republican and Democrat? Or are they partisan --

MR. ALLEN: Yes -- no.

QUESTION: -- in some local --

MR. ALLEN: No, they are partisan Republican and Democrat, which I think has traditionally meant Democrat. The primary and the runoff of primary elections are the decisive elections, it appears.

QUESTION: Yet the municipal elections that we just heard about are non-partisan?

MR. ALLEN: They are non-partisan. They are non-partisan.

Now as I've indicated -- what I've recited heretofore are findings made by Judge Pittman and accepted by the Court of Appeals.

Judge Pittman also found that there was racially polarized voting in Mobile County. And he said further that

this tendency to vote according to race made it difficult for a black person, a member of this minority, to be elected to the school board in an at-large election.

In fact, four black candidates ran for the school board between 1962 and 1974. Each of them was running for office for the first time; each of them reached the runoff; none was elected.

Judge Pittman looked at these facts in the course of an analysis of the case that he felt himself compelled to follow because of the Court of Appeals decisions in Zimmer v. McKeithen and other cases that had followed Zimmer which have made the Zimmer factors decisive in Fifth Circuit voting dilution cases.

You can't really understand what happened below without knowing something about these Zimmer factors. And the first Zimmer factor that Judge Pittman analyzed relates to minority access to this slating or candidate-selection process.

He made a finding, nominally a finding, that blacks were denied equal access to the slating or candidate selection process -- I'm quoting there. But this finding was obviously a mere function of his view that potential black candidates were discouraged from running because of the history of losing elections.

And the candidates lost those elections because they were members of a racial minority in a community in which there was racially polarized voting.

I submit that in truth that is to say nothing more than that racially polarized voting has prevailed in Mobile County. That is all that that lack of access conclusion -- I will not dignify it by calling it a finding by the district court -- amounts to.

QUESTION: The slating is a sort of nomination --

MR. ALLEN: Nomination --

QUESTION: -- by an organized group of candidates, whom in turn that group supports then; is that it?

MR. ALLEN: That's right.

But what the district judge was saying was, he had found initially that there is nothing to prevent anybody from running in the Democratic primary. One is freely able to run -- and there's no organization that controls who has access to the primary.

QUESTION: It just so happened that there weren't any Negroes in the Democratic party.

MR. ALLEN: I'm sorry, Your Honor?

QUESTION: Wasn't he relying on the fact that it just so happened that there weren't any Negroes in any Democratic party?

MR. ALLEN: They ran in primaries, Your Honor. They had not been selected.

QUESTION: That's right.

MR. ALLEN: They had not been selected in the primaries. That's what he was relying on.

QUESTION: And it was the Democratic party that controlled --

MR. ALLEN: He was --

QUESTION: Well, when did a Republican ever get elected?

MR. ALLEN: No, not at all. Not at all.

QUESTION: All right.

MR. ALLEN: It was a Democratic primary.

QUESTION: That's what he was talking about, wasn't it?

MR. ALLEN: Oh, yes, Your HOnor. But he was talking about the habit of Democratic voters of voting according to race. That's all he was talking about there.

QUESTION: In the primary.

MR. ALLEN: In the primaries, yes.

QUESTION: And the winner of the primary would be the slated candidate, right, the nominated candidate.

MR. ALLEN: Would be the party candidate.

QUESTION: Who would be supported by the party.

MR. ALLEN: As I understand, the slating criterion as derived from White against Regester has to do with an earlier stage in the process where a group was put up with some sort of sanction in the Democratic Party.

QUESTION: Well, I gather in that setting it was the equivalent --

MR. ALLEN: Yes.

QUESTION: -- to nomination --

MR. ALLEN: Yes.

QUESTION: -- by an organized group.

MR. ALLEN: That's correct.

QUESTION: Mr. Allen,-I have joined opinions which have referred to the term "slating," and I must confess I am not entirely sure what it means.

Could you give me your understanding of it?

MR. ALLEN: My understanding of it is, an organization within the Democratic Party, the leadership, if one will, puts up a slate of candidates in the primary, and that slate -- either nobody runs against them, or they always win.

QUESTION: That --

MR. ALLEN: That's my understanding from White against Regester, Your HOnor.

QUESTION: Does that happen in this context here?

MR. ALLEN: No, it does not.

QUESTION: It's just the nomination -- you run in the primary.

MR. ALLEN: You run in the primary.

QUESTION: For nomination to election to the school board.

MR. ALLEN: And --

QUESTION: And if you win the primary, then your party, presumably, supports you.

MR. ALLEN: And you win the election, as has been true up to now.

QUESTION: If you're a Democrat.

MR. ALLEN: If you're a Democrat.

QUESTION: Well, suppose in Mobile it's run the way it is, but in an adjoining city, Democrats always win the general elections, but the candidates who get put up are chosen by the Democratic party in its own little conclaves, at a convention, or in a backroom somewhere. And it's freely conceded that in the choosing of the Democratic candidates in the general election that there is racial voting?

MR. ALLEN: Racial voting, nothing more than that, or --

QUESTION: Well, just that the people -- the people who are getting together -- the Democratic party who are getting together in the back room, there are plenty of Negroes there, but there are more whites?

MR. ALLEN: Yes.

QUESTION: And in the back room, they all -- they have a show of hands, and they make nominations, and some win, some lose. And all these whites win and the blacks lose.

And then that party comes out with this -- if you want to call it -- this slate of white candidates.

MR. ALLEN: That --

QUESTION: Would that be the same answer?

MR. ALLEN: I guess, Your Honor, it would depend -- I have not thought precisely about that -- but it would

depend, I take it, on whether one were at the poll of a real election, or at the poll of the backroom deal that determines the election --

QUESTION: No, the only people who are going to be --

MR. ALLEN: -- and effects exclusion.

QUESTION: -- the only people who go into a Democratic primary are the registered Democrats. And the only people in the backroom in the adjoining city are the Democrats who choose candidates.

MR. ALLEN: Well, are some of the registered Democrats. I suggest that may make a difference, Your Honor. I suggest that may make a difference. That here, where one has -- has unquestioned access to a very formal method of choosing candidates that amounts -- that amounts in this community to election --

QUESTION: The Negro has access to that slate in Mobile?

MR. ALLEN: The Negroes are able to run in the Democratic primary without --

QUESTION: That's as off from my question as right from left. I'm talking about the slate. The group that is put up. The group that is always elected.

The Negroes in Mobile have never gotten on that, have they?

MR. ALLEN: They have not won a primary runoff election; that is absolutely true, Your Honor.

QUESTION: No, no, no, sir, please. Have they ever been on the slate?

MR. ALLEN: They have never been the Democratic nominee. None of them has been the Democratic nominee.

QUESTION: And that's what the judge meant by the slate, didn't he?

MR. ALLEN: If he meant anything by "the slate," that had to be what he meant, and he meant, again, that it was a result of people's action in the polling booths, that blacks were not able to be the Democratic nominee.

QUESTION: Did -- did the polling booth pick the slate?

MR. ALLEN: Yes, yes, Your Honor. The Democratic primary.

QUESTION: At the polling booth?

MR. ALLEN: Yes.

QUESTION: You mean to tell me that the slate isn't picked by a group of people in the Democratic -- well, isn't that then, the Democratic Party in Mobile is different from any other Democratic Party?

MR. ALLEN: Well, Your Honor, that is what this record shows, is that it was a free and formal primary election.

QUESTION: But has there ever been -- has there ever been a Negro on the ballot in the general election?

MR. ALLEN: In the general election? In an at-large election? I just don't know whether other parties, the Republicans, have put up any. It was taken for granted on this record that the Democratic nomination amounted to election.

QUESTION: There's never been a Democratic candidate who's a Negro in the general election.

MR. ALLEN: For the school board; that is correct, Your Honor.

No, they ran four times -- different black candidates ran four times in the period we're concerned with; each of them got to the runoff; each of them was -- failed of nomination.

QUESTION: Mr. Allen, let me be sure I understand it. As I understand your point, there is no slate-making committee within the --

MR. ALLEN: No.

QUESTION: And therefore what you're saying is that anytime a Democratic is a candidate for the nomination of his party, he's just decided to run himself?

MR. ALLEN: That's correct, Your Honor; exactly correct.

QUESTION: It is an unusual situation.

MR. ALLEN: It's a non-paying job. Anybody can -- apparently five, six, eight people run each time for each of these positions. And --

QUESTION: But it is true that the judge knew more about it than you or I?

MR. ALLEN: The judge knew more about it than you or I, but --

QUESTION: All right.

MR. ALLEN: -- I really think I'm faithfully rendering what the judge said, Your Honor. I mean, the --

QUESTION: The usual reasons, or at least what are thought to be the usual reasons for people running for public office that pays $30-, $40,000 a year, or even $25,000, aren't present inthe school board election?

MR. ALLEN: No; no. That's correct.

QUESTION: I mean, it's just work and public service.

MR. ALLEN: Public service, whatever motivates people to undertake --

QUESTION: Dedication.

MR. ALLEN: --public service; that's correct, Your Honor. Yes.

The -- I will skip over for a moment a couple of the Zimmer factors that the district judge looked to, and just state that his overall conclusion was quite predictable. He paraphrased passages from some of this Court's voting dilution opinions, and then he concluded that the plaintiffs had met their burden by showing an aggregate of the factors

catalogued in Zimmer.

And the court's remedy for this constitutional violation it therefore found was also predictable. Judge Pittman professed not to endorse quota voting, or quota elections; but he adopted a plan that was designed -- these are his words -- to provide balcks a realistic opportunity to elect blacks to the board of school commissioners.

In fact, two of the five single-member districts that he created would have weighted -- would have weighted black populations of more than 55 percent, and the remaining three districts would have weighted black populations of less than 14 percent.

The Court of Appeals affirmed this decision according to the Zimmer factors. It said that the district court had applied the proper standards, and that his findings were not clearly erroneous, and it cited just one case, the decision of a different panel of the Court of Appeals, in the City of Mobile's case.

Now a good deal of argument has gone on about exactly what the Court of Appeals thereby decided, and whether in particular the Court of Appeals decided, and whether it is necessary, to make out a violation of the equal protection clause and of Fifteenth Amendment, to show purposeful discrimination on the part of the State.

The correctness of that view, which I think clearly

is correct, that purposefulness is required, is contested.

So let me turn first, by way of analysis of that, to a couple of points that I think cannot be contested. One is that no one has asserted, or even suggested, that the at-large system here was conceived in racial animus, with a deliberate purpose of discriminating against blacks, or submerging the votes of blacks.

A second is that the district court made its decision on the basis of an understanding that the Court of Appeals' Zimmer factors capture the effects of an at-large system on minority voters and candidates, not on the understanding that those factors go to an intent to discriminate.

At that point we get into more contentious ground. At one point in his opinion -- Mr. Justice Rehnquist referred to the parallel point in his opinion in the City of Mobile's case -- at one point in his opinion, removed from his Zimmer analysis, Judge Pittman said that it was possible to perceive a present purpose to dilute black votes based on legislative inaction, based on the failure of the legislature to do anything about this at-large system that had been created so many years before.

I can think that the person reading that passage, at page 34A of the appendix in our case, will agree that this is no finding, no finding of a present purpose oto discriminate,

even though that's how the plaintiffs now like to describe it. It's in a section entitled conclusions of law. It's not preceded by any factual analysis. It's exactly the same language that's used in the different -- factually different City of Mobile case. It simply, I think, fairly cannot be considered a finding to which any deference is owed.

QUESTION: Page 34A, not of the jurisdictional statement, but of the --

MR. ALLEN: Of the appendix.

QUESTION: Of the appendix. And what is it, the middle paragraph?

MR. ALLEN: Yes, the middle paragraph, or the last two paragraphs, Your Honor.

QUESTION: Thank you.

QUESTION: Mr. Allen, I suppose your answer to a question Mr. Justice Black asked in the other case might be somewhat different than the one that was given.

I take it you take it there's a difference between this case and the other case. Or maybe you don't.

MR. ALLEN: In what respect, Your HOnor? There are differences --

QUESTION: Well, let me ask you: Do you think there are differences?

MR. ALLEN: There are differences.

QUESTION: That have any significance on the outcome?

MR. ALLEN: No.

QUESTION: If we decide one one way, do you think they both should go the same way?

MR. ALLEN: Yes, I'm persuaded of that. Yes, Your Honor.

QUESTION: Well, then, if there's evidence to support the finding that there was a deliberate maintenance of the at-large system in the other case, what is the relevance of the absence of such evidence in this case?

MR. ALLEN: I didn't suggest that there was -- I'm sorry. I can understand Your Honor's question now.

QUESTION: What is the --

MR. ALLEN: I did not mean to suggest the presence of such evidence. I merely meant that there was no real factual analysis that preceded --

QUESTION: But there was in the other case.

MR. ALLEN: point in either case.

QUESTION: But there was in the other case.

MR. ALLEN: No --

QUESTION: There were bills proposed that were not adopted, and that sort of thing. But there was not that --

MR. ALLEN: There was not that same type of thing here, that's quite right, Your Honor. So to that extent, it may be different. But --

QUESTION: In other words, if this finding were supported by evidence, would that make your legal con-

clusion any different?

MR. ALLEN: If there were some evidence that the legislature had deliberately acted lately to ratify or otherwise to confirm --

QUESTION: Well, let's take a hard case. Suppose somebody said let's have a -- you know, change the system so there would be some type of proportional representation. And everybody said, well, let's not do that; then you might get some blacks on the school board.

Would the case be different?

MR. ALLEN: I can imagine a case of that sort being different. I think it is --

QUESTION: And arguably the other case --

MR. ALLEN: -- a dangerous inquiry to get into, Your Honor.

QUESTION: But arguably the other case is more like that than this one.

MR. ALLEN: Well, it may -- I'm just not that well versed in the legislative goings on in the other case to know that. But I did not mean to imply that in what I said in comparing the two.

The -- I was at the point where we were talking about whether a present purpose to discriminate was found here. And in its opinion, in the City of Mobile's case, which was cited in this case as decisional authority, the Court of Appeals was more specific.

It said, in that case, that when you've aggregated these Zimmer factors, and they add up to voting dilution, then at least when the dilution is long-standing, there is -- the requisite intent if the legislative body has not acted to change the situation. That is substantially the reasoning of the Court of Appeals, if I understand them.

But that sort of intent, I submit, is a construct; it's artificial. It's the same as saying, really, that the Zimmer factors themselves are enough if the system of at-large elections is old enough to permit --

QUESTION: I take it that one of the operative facts in the exclusion or the failure of Negroes to be nominated, or to be elected, one of the operative facts is the bloc voting.

MR. ALLEN: That is all, I submit, Your Honor.

QUESTION: Yes, but you accept that?

MR. ALLEN: Oh, yes. Oh, yes. There seems to be evidence of bloc voting.

QUESTION: So to -- so there is -- certainly there is purposeful exclusion of Negroes from office. But I suppose your answer to that is, well, the state's just not responsible for that.

MR. ALLEN: The state is not responsible. I think none of this Court's decisions comprehends a state action, the action of voters exercising their franchise.

QUESTION: Because there's no question whatsoever, I take it, from the arguments of anybody, that as far -- that at some point in this process there's purposeful exclusion; it's just a question of by whom.

MR. ALLEN: By whom, and it's by individual voters voting their will.

73 QUESTION: Then Wrightman against Smoky might become relevant.

MR. ALLEN: Well, it's -- I suggest not, Your Honor.

QUESTION: You hope.

QUESTION: Well, of course the Fifteenth Amendment doesn't require state action.

MR. ALLEN: It says -- well, it requires action by the state or the United States, Your Honor.

QUESTION: Fifteenth?

MR. ALLEN: It says, "...shall not be abridged..." -- "...denied or abridged by the United States or any state..." --

QUESTION: Any state.

MR. ALLEN: -- "...on account of race, color or creed."

QUESTION: As close as you can get to state action, I take it, is that here's a state -- or a city that provides a primary mechanism for the selection of candidates, and permits -- and within that system, deliberate discrimination goes on by the people who enter the ballot box.

MR. ALLEN: They seem to vote according to race in at least some races; that is correct, Your Honor. Yes, that is what it amounts to.

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

Mr. Schnapper?

ORAL ARGUMENT OF ERIC SCHNAPPER, ESQ.,

ON BEHALF OF APPELLEES IN NO. 78-357

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

These two cases raise a variety of different issues, and I thought it might be useful to briefly sketch out what they are.

First, there is a statutory claim in these cases, which as the Chief Justice noted in the last argument, ordinarily is a claim thatis resolved prior to decision on any constitutional claims.

We allege that under Section 2 of the Voting Rights Act, the at-large elections used in these cases violates Section 2. And we rely in particular on a statement by Attorney General Katzenbach, which is quoted by this Court in footnote 31 in Allen, which says that Section 2 covers purpose or effect. That it has -- I would paraphrase that -- the same meaning that Section 5 does, but with a different burden of proof.

Second, there is a constitutional claim under

White against Regester. Now, with regard to that, we are in agreement with the government that we seek only to apply decisions of this Court in White, and before and after it, which I think are fairly well established.

We are in disagreement with the government, which reads some intent requirement into White. We see not intent requirement in White, and we set out at length in our briefs why.

Third, we claim that in these cases the systems of election are maintained because of a deliberate decision to keep blacks from public office. We maintain that the hypothetical posed by Justice Stevens is in fact the case.

QUESTION: Who? Decision by whom?

MR. SCHNAPPER: Pardon me?

QUESTION: Who has continued to keep them from voting? The city? The state?

MR. SCHNAPPER: Well, our answer would be slightly different in the two cases. I mean I -- we would say the state in the constitutional sense. But I think it's more complex than that.

QUESTION: Well, who was maintaining this discrimination?

MR. SCHNAPPER: In the case, in the city case, the -- as Mr. Justice Stevens, there's direct testimony by members of legislature who were there at the time the decisions were

made not to authorize single-member districts, that that decision mwas made for racial reasons. And they were made essentially by the members of the legislature from Mobile; that's the way the legislature operates.

QUESTION: And Mobile controls the legislature?

MR. SCHNAPPER: Well, that seems to be the -- an important part of the analysis of the school board case. It's not critical to the analysis of the city case.

In the school board case, we have a rather complicated series of facts which are set out in our brief involving the introduction and passage of deliberately defective legislation, in the legislature, in order to prevent the federal litigation from going forward.

And we -- that becomes, I think, the operative decision. And as a practical matter, those decisions were made by the defendant school board members.

And it was their contention below, and I think correctly, that they were calling the shots in the legislature about what was being introduced and passed.

QUESTION: Of course, ultimately it's the voters, isn't it? Except for this so-called bloc voting, there's nothing the legislature could do in the state capitol, or the city or the school board could do which could prevent Negroes being elected?

MR. SCHNAPPER: Well, I don't want to recount the

history of discriminatory devices that have existed in Alabama over the years.

QUESTION: But ultimately it's the voters.

MR. SCHNAPPER: But I think -- I think this intentional scheme todiscriminate on the part of the state wouldn't work if you didn't also have bloc voting.

QUESTION: You have to, and that's within the voluntary control of each individual voter.

MR. SCHNAPPER: Mr. Justice Stewart, I think that if we are right, and Mr. Justice Stevens' hypothetical is the case, namely, that this election system is being maintained for the express purpose of keeping blacks from being elected, the purpose on the part of the officials of the State of Alabama, that that violates the Fourteenth and Fifteenth Amendments of the constitution.

Nothing in the decisions of this Court suggest that a motive to -- a racial motive which is not benign in nature, but here clearly vicious, can somehow or other be sanctioned because it only works because of private discrimination as well.

I think that it would be analogous to a situation where, for example, the state -- as happened in 1903 -- expressly authorized the state parties to exclude voters on the basis of race; and the parties did that. I mean it was-- there was action which was less state action than the actions

of the legislature, although it may be for constitutional purposes, that was also state action or part of it.

But I don't think that that part of the causal mechanism is of any relevance. I think the state action from a hostile racial motive, that violates the Fourteenth and Fifteenth Amendments, and that would be the end of the case.

In addition --

QUESTION: You then, I take it, relate the historic hostile motive of what existed back in 1826 and 1836 to a hostile motive today, because the legislature did not change the structure to meet a different kind of discrimination?

MR. SCHNAPPER: We have a situation here exactly like Arlington Heights. In Arlington Heights, there had been a zoning classification, the Court's opinion showeth not when in origin. But a dispute arose as to the decision of Arlington Heights not to change its zoning classification.

And the Court held -- and I think properly -- that if that refusal to change had been racially motivated, the zoning would have been unconstitutional. And it was ofno importance when or how that zoning classification had come into existence. And that's our contention here.

We'd just ask you in that regard to follow Arlington Heights.

QUESTION: How many legislators do you need to maintain your point? A majority?

MR. SCHNAPPER: I think the question would be who the people were who were actually making the decisions. If the legislature effectively delegates control over this to a single legislator, as indeed exists in Alabama --

QUESTION: To one legislator?

MR. SCHNAPPER: The way the system works is, a bill of this sort -- a bill affecting this situation, a bill affecting only Mobile, would have to be approved by the legislative delegation from Mobile.

And the courtesy rule in the Senate is that that -- that any single member of the State Senate can veto a Mobile bill. And that's precisely what happened. So it was one Senator.

The question isn't one of numbers; the question is who is making the decision on behalf of the state.

QUESTION: So you can say that the whole legislature, all Alabama, including Fred Gray, is guilty of racial prejudice; is that right?

MR. SCHNAPPER: Well, I wouldn't characterize it in that way.

QUESTION: Well, I wouldn't think you could.

MR SCHNAPPER: But the -- Your Honor, if the State of Alabama, and the legislature delegates the authority for making the decision to one member of the legislature, and the district court found that that was the case -- and it's not a

finding that was contested -- then the motives of the person that makes that decision is the operative motive for the State of Alabama. And I --

QUESTION: And we're bound by that?

MR. SCHNAPPER: And I think you're bound by that.

QUESTION: In other words, when the legislature as a whole, in your hypothetical -- your explanation -- delegated that power to one man, they in advance adopted the action he was taking, and the motives that motivated him?

MR. SCHNAPPER: Well, they could have changed their mind, but they didn't.

It seems to me no other conceivable rule is possible. I mean, otherwise you could simply nullify the Fourteenth Amendment by systematically referring any legislation that you wanted to undertake with a discriminatory motive to a single legislator who would then act from racial motives, and then you come in to defend a suit and say, "Well, you know, it was only Senator So-and-so, and the rest of us never even thought about it."

I mean, that would be just, I think, a rule that would be an invitation to an evasion of theconstitutional commands in this area.

Finally, I was just trying to sketch out here what the arguments were presented by the case, there is a claim under the Fifteenth Amendment. And as I think Mr. Turner

noted, that is somewhat narrower in its impact than our claim under White against Regester, because of course it would be limited to racial issues.

Both the government and we contend that the Fifteenth Amendment is not limited to instances of discriminatory purpose. I think we have a somewhat different approach to it.

We rely particularly on the legislative history of the Fifteenth Amendment, and the concern on the part of Congress, by adopting the Fifteenth Amendment, to insure that blacks were armed with an effective franchise by which they could protect themselves against government discrimination.

We think the record shows clearly that they don't have that in this case.

The government advances an argument I think closer to that suggested by Mr. Justice White, to wit, that we have something here akin to the Terry v. Adams, and as I think you were articulating it, of a Democratic party has picked its candidates on the basis of race, and has -- and that decision is effectively state action, because it controls the coutcome of the elections.

QUESTION: But is there any issue here as to -- is there any claim that the party primary, the Democratic primary, is not a free and open primary?

MR. SCHNAPPER: No. It is as free and open as the primary in Bexar County, Texas, which this Court unanimously

held violated White against Regester and --

QUESTION: But there's slating there, if I'm not mistaken.

MR. SCHNAPPER: No, no, not in Bexar County; only in Dallas County.

QUESTION: B-e-x-a-r?

MR. SCHNAPPER: B-e-x-a-r, right.

QUESTION: I always have trouble --

MR. SCHNAPPER: You pronounce it "Bayer" -- what?

QUESTION: San Antonio.

MR. SCHNAPPER: San Antonio, yes.

[Laughter.]

MR. SCHNAPPER: There's an express finding of fact that there isn't slating in that ccase, and I think that's quite clear.

QUESTION: And there wasn't here?

MR. SCHNAPPER: There was slating in Dallas, there was not slating in Bexar County, there is not slating here.

QUESTION: There is just a nomination by a party primary, in which any qualified Democrat can vote --

MR. SCHNAPPER: That's an accurate description.

QUESTION: -- regardless of his race.

MR. SCHNAPPER: Yes.

QUESTION: And that's all conceded, isn't it?

MR. SCHNAPPER: Yes, I think we're in agreement as to that.

QUESTION: There's no secret inside group that slates?

MR. SCHNAPPER: No, no there's not.

QUESTION: Or no claim that there is?

MR. SCHNAPPER: No claim of any. Well, there's a little claim of that on the part of the other side, but they certainly can present that on their own.

QUESTION: Well, is there any way to get on the general election ballot except by the primary?

MR. SCHNAPPER: In the case of -- in the case of the school board, I don't believe so. My understanding is that it's just an ordinary primary; you've got to be nominated by one of the parties. And nomination by the Democratic Party is equivalent to election.

QUESTION: What happens after the Democratic primaries for the school board?

MR. SCHNAPPER: Well, there's a general election, but it's often uncontested. It was uncontested this year.

QUESTION: Well, if it is contested, how do you contest it?

MR. SCHNAPPER: You get the nomination of the Republican party.

QUESTION: What about the non-partisan party?

MR. SCHNAPPER: The Non-Partisan Voters League isn't a party. It was a private organization that endorsed people.

QUESTION: Can they get somebody on there?

MR. SCHNAPPER: What? Only if they can get a party to nominate them. They're like the AF of L or any public interest group.

QUESTION: It has to be a party, though?

MR. SCHNAPPER: It has to be a party.

Well, those are the four claims before the Court, and --

QUESTION: Is there any mechanism for being nominated by a petition after the primary or --

MR. SCHNAPPER: The record doesn't reflect any. There may be a procedure of that sort. It was not part of the case as it was litigated below. It's not --

QUESTION: Mr. Schnapper, you haven't quite explained on your theory why you think the Fifteenth Amendment -- the Fifteenth Amendment claim is any different from the Fourteenth Amendment claim.

MR. SCHNAPPER: Oh, I'd be delighted to do that.

QUESTION: With respect to how the state is involved.

MR. SCHNAPPER: Oh, I'm sorry.

QUESTION: Because the state -- the denial of the right to vote still has to be by the state.

MR. SCHNAPPER: That's right.

QUESTION: So tell me how the state is involved in

the Fifteenth Amendment violation?

MR. SCHNAPPER: Well, our claim is that the Fifteenth Amendment prohibits the state from adopting election systems which have a discriminatory effect. And this, we claim, is such a system.

That doctrine is somewhat different than the doctrine we find in White against Regester for a variety of reasons, not the least of which is that it is -- White is limited to the problem of at-large election systems. The Fifteenth Amendment would cover any particular -- any election law. But on the other hand, the Fifteenth Amendment is limited to questions of race.

QUESTION: You don't mean adopted; you mean maintained, don't you?

MR. SCHNAPPER: For purposes of my mode of argument, I would say adopted or maintained, yes.

With regard to the Fifteenth Amendment, we place particular emphasis on the phrase -- on the first use of the phrase, "abridge" in the language of the Fifteenth Amendment.

If you will recall the history of the times when the Fifteenth Amendment was adopted, there was nothing then to which that could have corresponded. The South was under the control of the Union Army, and blacks were free to vote everywhere.

The concern -- I think we think that Congress, in

adding the word "abridged," was not merely that when the whites came back into power after reconstruction, they would strip blacks of the right to vote at all, but that new forms of discrimination, new devices might be adopted that had these kinds of impacts.

I know, Justice White, that there was I think an understandable concern in Washington against Davis about the ramifications of having an effect rule under the Fourteenth Amendment. Because it would call into question a wide variety of governmental programs: Housing, taxes, and all sorts of things.

We think those problems aren't raised by the effect rule we urge under the Fifteenth Amendment. It's our -- obviously, its scope would be limited to claims of discrimination in voting. And we think it appropriate that voting -- that blacks be protected in voting to a greater degree than others.

QUESTION: You say the state is sufficiently involved if it maintains a system which permits individual discrimination at thepolls?

MR. SCHNAPPER: Yes. Yes, that's right.

QUESTION: That's it, isn't it?

MR. SCHNAPPER: That is it. That is it. The role of the state is in creating and maintaining the at-large system.

Now, I'd like to turn at this point -- well, there's

one other point which I think does separate us from the appellants in both these cases.

I think we have a very different view of what the role of the appellate courts are in resolving these cases. I think it -- I -- listening to their argument, I had the sense that we were back in the trial court, and you were sitting nisi prius, or perhaps riding circuit, as occurred in the old days.

I think as Justice Stevens pointed out that the role of the Court is more limited; that absent some sort of palpable error, which I don't think is present here, the findings of the trial court really do have to be accepted.

And in our view, they're sufficient to mandate judgment for us.

QUESTION: What if we concluded that the trial court did not find that there was an intent to discriminate, and that the Court of Appeals concluded that there was an intent to discriminate?

Now, is that a two-court finding that we ought to affirm?

MR. SCHNAPPER: If you hold -- let me make sure I've got this right -- that the district court didn't find intent --

QUESTION: Right.

MR. SHCNAPPER: -- but that the Court of Appeals did find intent?

QUESTION: Right.

MR. SCHNAPPER: I don't -- well, that's not under the two-court rule.

I think, in all candor, that the practice of the Court in that situation -- is to come very close to putting itself in the shoes ofthe Court of Appeals. So I don't think --

QUESTION: There is a problem --

MR. SCHNAPPER: -- the same deference would exist if it were merely a Court of Appeals finding of intent.

QUESTION: There is a problem here in what standards are applied, isn't there? Because Washington against Davis came down after this litigation had started. And as I understand it, the Nevett foursome, or whatever it was, was decided at an intermediate stage of this litigation, so that you have a little bit of a shifting of legal standards.

MR. SCHNAPPER: Washington against Davis was decided before the cases went to trial. And so at the time the cases went to trial, there was already a dispute between the parties as towhether you needed intent under the Fourteenth Amendment.

We maintain there, as we do know, that the equal protection clause has two distinct branches.

QUESTION: I had thought the litigation was eight or nine years old?

MR. SCHNAPPER: No, surprisingly enough, this case

is only four years old.

QUESTION: Bearing in mind --

[Laughter.]

QUESTION:- -- that this is a direct appeal, what is it that we are limited from changing under your concept of the two-court rule?

MR. SCHNAPPER: Well, I think the ordinary practice of the Court --

QUESTION: Well, isn't the first thing we have to pass on the constitutionality; the first thing we have to pass on on a direct appeal, don't we? And certainly we don't have to follow the two-court rule on constitutionality, do we?

MR. SCHNAPPER: Well, that's several questions. Let me try to answer them all.

QUESTION: I mean, don't put us out of business.

MR. SCHNAPPER: First, I think that the first question you probably ought to reach, consistent with the general practice of the court, would be the statutory issue. And I say that not because we prefer to win on one theory or another --

QUESTION: This is a direct appeal.

MR. SCHNAPPER: It is a direct appeal. But I think that what's normal --

QUESTION: And what is before us on a direct appeal? The constitutionality of a statute.

MR. SCHNAPPER: Well, I think we are entitled, as we are in any case, to urge, in support of the decision below, any ground that was raised below.

QUESTION: Oh, sure, but I don't think you --

MR. SCHNAPPER: And the statutory ground was raised below.

QUESTION: I don't think you had the right to prevent us from considering the constitutionality of the statute that's involved.

MR. SCHNAPPER: We have no right to do that, and no intention of trying to do that.

QUESTION: Well, I misunderstood you. I'm sorry I misunderstood you.

MR. SCHNAPPER: I meant only to recall to you the normal practise of the court, which is to decide statutory issues first.

We have no preference on that. If you want to decide the most sweeping constitutional issues, then the narrow constitutional issues, then the statutory issues --

QUESTION: As long as we decide for you?

MR. SCHNAPPER: That's our position.

[Laughter.]

MR. SCHNAPPER: That's our position.

But I think you had another question, I don't think I fully answered it.

QUESTION: On the two-court --

QUESTION: If I did, I've forgotten it already.

MR. SCHNAPPER: Right. I think --

QUESTION: Around the third corner, I forgot it.

MR. SCHNAPPER: My -- our position would be that that two-court rule is as applicable here as always. The two-court rule does not preclude you from deciding constitutional issues; it only suggests that with regard to specific factual matters, that you generally uphold the findings of the two courts below unless there's an unusual circumstance.

QUESTION: Unless they're wrong.

QUESTION: Mr. Schnapper, can I ask you a question?

MR. SCHNAPPER: Yes.

QUESTION: Your opponent, Mr. Allen, has said that when you really analyze the facts, what the case boils down to is bloc voting plus an at-large system plus a minority of blacks in the voting population.

And in your brief you emphasize those very facts --

MR. SCHNAPPER: Yes.

QUESTION: -- in distinguishing other cases. Do you think those facts are enough?

MR. SCHNAPPER: It is our contention they are indeed enough. And they are enough under White against Regester, under Section 2 of the Voting Rights Act, and under the

Fifteenth Amendment, although for somewhat different reasons, because the rationales of each one of those rules are different.

With regard to that, I think perhaps I should answer a question that Mr. Justice Rehnquist asked earlier about Zimmer v. McKeithen. The -- both parties in the Courts of Appeals relied on Zimmer v. McKeithen, and you will find in the brief for the school board, a statement which says they think Zimmer v. McKeithen is correct.

I think we were all obligated to act within the context of Zimmer in the Courts of Appeal. I think here it is indeed argued that Zimmer was too restricted in its japplication of White against Regester, and that -- that less proof is required than is elaborated in Zimmer.

And we also are in disagreement with the part of Nevett v. Sides, which was subsequent, which holds that intent is in fact necessary under White or Zimmer, and we've laid out the reasons for that contention in our brief.

Your Honor, I'd like to touch very briefly on our claim under the Voting Rights Act, which we think is the issue with which the Court ought to begin.

We've noted that the legislative history on this matter, such as it is, is quite clear; that Attorney General Katzenbach testified on the very issue of whether or not the statute covered purpose and effect, and said that it did.

We think, therefore, that the substantive standard under the Voting Rights Act -- under Section 2 -- is exactly the same as the substantive standard under Section 5. Which is to say that if theelection law permits white voters to nullify the electoral preferences of blacks, that it falls under the Voting Rights Act.

The difference -- the only difference that we see between Section 5 and Section 2 is procedural, that the burden of proof is on the state under Section 5; the burden of proof is on the plaintiff under Section 2.

QUESTION: Well, your opponent cites Senator Dirksen's statement that Section 2 is just a restatement of the Fifteenth Amendment.

MR. SCHNAPPER: Well, I think it's almost. I think the word "almost" appears in there.

I think that -- that the value of that is a little hard to know. Because I think nobody at that point necessarily knew what the Fifteenth Amendment meant.

QUESTION: But Attorney General Katzenbach did.

MR. SCHNAPPER: And he said purpose or effect. He was quite clear about that.

QUESTION: Who passes laws, the Attorney General or the Congress?

MR. SCHNAPPER: Current wisdom is the Congress does.

QUESTION: The theory.

QUESTION: But not a single Senator.

MR. SCHNAPPER: Not in this Senate. Not in this Senate.

If we're right in our contention that the standard under Section 2 and Section 5 are the same, then I think the result of the case will be clear.

I think if Alabama had attempted to switch to this system from a single-member system, there'd be no question that they couldn't do it, and we think Section 2 invalidates it for that reason.

MR. CHIEF JUSTICE BURGER: Thank you gentlemen.

The case is submitted.

[Whereupon, at 2:16 o'clock, p.m., the case in the above-entitled matter was submitted.]