OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. No. 85-93 & 85-428

TITLE P. E. BAZEMORE, ET AL., Petitioners V. WILLIAM C. FRIDAY, ET AL., and UNITED STATES, ET AL., Petitioners V. WILLIAM C. FRIDAY, ET AL.

PLACE Washington, D. C.

DATE April 22, 1986

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ALDERSON REPORTING
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IN THE SUPREME COURT OF THE UNITED STATES

P. E. BAZEMORE, ET. AL., :

Petitioners, :

V. : No. 85-93

WILLIAM C. FRIDAY, ET AL.; and :

UNITED STATES, ET AL., :

Petitioners, :

V. : No. 85-428

WILLIAM C. FRIDAY, ET AL. :

Washington, D.C.

Tuesday, April 22, 1986

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:09 o'clock a.m.

APPEARANCES:

CAROLYN B. KUHL, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the petitioners in No. 85-428.

ERIC SCHNAPPER, ESQ., New York, New York; on behalf of the petitioners in No. 85-93.

HOWARD E. MANNING, JR., ESQ., Raleigh, North Carolina; on behalf of the respondents.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments first this morning in Bazemore against Friday.

Ms. Kuhl, you may proceed whenever you are ready.

ORAL ARGUMENT OF CAROLYN B. KUHL, ESQ.,

ON BEHALF OF THE PETITIONERS IN NO. 85-428

MS. KUHL: Thank you, Mr. Chief Justice, and may it please the Court, I would like to address in my argument this morning three of the issues raised in this case, but first I would like to articulate briefly our position with respect to each.

The first issue concerns the intentionally discriminatory pay disparity between black and white Agricultural Service agents which originated pre-Title 7 and continued after the effective date of Title 7. Both courts below agreed on the existence of these disparities, but the Court of Appeals held that because the difference in pay originated before Title 7, the current pay practice was not actionable. It is our position that a current practice of intentionally paying blacks less than whites on the basis of race cannot be immunized by the fact that the practice began before Title 7's effective date.

The second issue concerns use of the

statistics in Title 7 disparate treatment cases. The issue framed by the private petitioners is whether a statistical analysis must take into account every conceivable nonracial variable before the statistics may be considered probative. We don not believe that a plaintiff's statistical proof must account for every conceivable factor that might bear on salary.

Indeed, a statistician would tell us that that is not possible, but we do take the position that the plaintiff here has met the burden of proof by a preponderance of the evidence in proving discrimination on the statistics presented in this case. In contrast to petitioners, however, we argue that in order to raise an inference of intentional discrimination, it is necessary for the statistical analysis to eliminate the most common nondiscriminatory reason for the disparate treatment, leaving racial disrcimination as a logical inference, and we also believe that the plaintiffs must offer statistics raising that inference as part of his prima facie case in accordance with the order of proof set forth in McDonnell-Douglas.

Finally, the third issue concerns disestablishment of the pre-Act segregated system of operating 4H and Extension Homemaker Clubs. Private petitioners now seem to be arguing that the courts below

erred in not addressing whether there was current discrimination in recruitment for membership in the clubs. This is essentially a fact-found question, and although we believe that recruitment was addresesd by the courts below, we would have no objection to a remand on that liability issue.

However, in their petition, the private petitioners seem to state a different legal issue, that is whether as a mater of law respondend should be held to have failed to disestablish a formerly segregated system when some all white and some all black clubs continue to exist. On this legal issue, we believe that the court below was clearly correct. A state that has ensured that all of its practices relating to admissions are truly race neutral need not eliminate an open admission membership system that would otherwise be the norm in order to assure a particular racial mix.

To return then in somewhat more detail to the first issue, the continuing race-based salary disparity, it is important to note that pre-1965 the entire Agricultural Extension Service was operated on a de jure segregated basis. Both the District Court and the Court of Appeals found that agents working in this system were paid different depending on whether they worked in the black branch or in the white branch.

Both the District Court and the Court of Appeals also found that this pay disparity was intentionally continued by the service and persisted after 1972, when Title 7 became applicable to the states. The error of the Court of Appeals was in excusing this post-Act discrimination on the basis that it originated in the pre 1965 de jure period, but the Court of Appeals analysis, we think, misreads this Court's decisions in Evans and in Hazelwood, and misconstrues the nature of the violation proof.

The wrong alleged here is not that the service failed to correct the effects of pre-Act discrimination. The wrong here is rather a current post-Act practice of paying blacks less than whites. As was stated in Evans, the question is really whether a present violation exists. An employer is entitled to treat pre-Act discriminatory practices as to which the time -- either pre-Act practice or practice as to which the time has run, as if it was totally legal.

Thus, in Evans the firing of the stewardess was merely considered an unfortunate event in history, but here we have something entirely different from a pre-Act promotion or hiring decision or firing decision. What we have here is a present violation of the sort that was lacking in Evans. The violation here

rests solely -- does not rest solely on pre-Act conduct. Rather, there is a purposeful post-Act practice of paying blacks less than whites.

On the second issue of the statistical proof of discrimination in the agent's salaries, we have shown in our brief that the statistics offered in this case were sufficient to meet the plaintiff's burden of showing purposeful discrimination.

QUESTION: Ms. Kuhl, when this case was tried, it was bench tried, was it not?

MS. KUHL: I believe that's correct.

QUESTION: And did the District Court actually exclude statistical evidence, or did it just find it unpersuasive?

MS. KUHL: The District Court allowed in the statistical evidence, but it seriously misunderstood and misanalyzed what was in the statistical evidence. For example, the court, the District Court said there was no statistical evidence with regard to performance of the agents.

QUESTION: Well, this is just a question of whether its finding then was clearly erroneous, I suppose.

MS. KUHL: I believe that is right, although we -- I think it is a mixed question of fact and law,

and we think that --

QUESTION: Why do you think it is a mixed question of fact and law?

MS. KUHL: Well, because I think that the use, the appropriate use of statistics is -- and whether the burdens have been met and the allocation of the burdens is really a question of fact in the district, but if it is considered a question of law, our view is that the court below --

QUESTION: Well, why should it be considered a question of law? Why isn't it a question of fact just because you say?

MS. KUHL: Well, I think that it is, and particularly in this case, where the District Court seemed to misunderstand the use of statistical evidence, and the Court of Appeals also seemed to misunderstand the use of statistical evidence.

QUESTION: Is there some great legal principle controlling statistical evidence that doesn't control other kinds of evidence? I mean, presumably there is some good statistical evidence, some that is moderately persuasive, and some perhaps that is so bad it shouldn't be persuasive at all. Why treat statistics differently than other kinds of evidence?

MS. KUHL: Well, indeed, that is our

submission, that statistics should be treated the same as the order of proof in a McDonnell-Douglas type of situation. We think that the private petitioners' criticism of the test that we suggest, placing a burden, a prima facie burden on the plaintiffs to create an inference of intentional discrimination, we think that the private petitioners misperceive what we are really asking here. We are asking no more, and it is no more complicated than what happens in the McDonnell-Douglas type of situation where the plaintiff has to show that he met the qualifications of the job and the defendant may then go back and say, yes, but someone else was more qualified.

QUESTION: Yes, but to get by the initial showing you have to accept these statistics.

MS. KUHL: I am not sure I understand your question, Justice White.

QUESTION: Well, following up Justice Rehnquist's question, don't you have to say that the District Court's view of the statistics was clearly erroneous for you to prevail?

MS. KUHL: Well, I think that we meet that burden here. I think that we meet that burden here.

QUESTION: So that is the question? Was its finding about the statistics clearly erroneous?

MS. KUHL: Well, it would still be my view that it is a mixed question of fact and law in this case, that we do meet the --

QUESTION: Well, now you have answered the question differently at least twice. Is it a question of fact or not?

MS. KUHL: I think it is a mixed question of fact and law, but I think we also meet the clearly erroneous --

QUESTION: What is the legal question?

MS. KUHL: I think the legal question is the appropriate allocation of the burden of proof here, but we have briefed the case also as though it could be considered a question of fact.

With respect to the desegregation of the 4H and Extension Homemaker Clubs, the main point that we wish to make is this. This Court has never held that the traditional free choice of non-state actors must be eliminated before a system can be found to be desegregated. Even in Green versus the School Board in the school desegregation context, the Court explicitly left open the prospect that a free choice plan might sometimes be appropriate. The Court held that the free choice plan in the context of that case was, however, a contrived way of doing business with no legitimate

rationale.

In contrast here the norm, the normal way of operating these 4H clubs is by an open membership system. It is further important to understand here that the District Court has found no discrimination in services or membership with respect to the clubs as of the time of trial. Indeed, the Court expressly found that any racial imbalance existing among clubs was the product of exclusively and wholly voluntary choice of private individuals, that is, of non-state acters.

The private petitioners argue that freedom of choice with respect to club membership has not been the norm in the 4H system because whites were required to attend white clubs and blacks were required to attend black clubs, but that misperceives how one determines what the norm would have been. In any de jure segregated system there is assignment on the basis of race during the de jure period, but the issue is, what happens with respect to, say, whites among whites and blacks among blacks.

Thus, in a situation with respect to, say, parks or seats on a bus or indeed colleges, the norm is a free choice admission program, and in those situations we believe that disestablishment certainly can be found even though free choice has been preserved.

I have nothing further unless the Court has any further questions.

CHIEF JUSTICE BURGER: Mr. Schnapper.

ORAL ARGUMENT OF ERIC SCHNAPPER, ESQ.,

ON BEHALF OF THE PETITIONERS IN NO. 85-93

MR. SCHNAPPER: Mr. Chief Justice, and may it please the Court, I would like to address my comments first to the second issue in our petition, the statistical evidence problem, and I would like to begin by responding to the questions that Justice Rehnquist and Justice White asked of my colleague regarding the nature of the issue before the Court.

It is our contention that the issue here is an entirely legal question. The Court of Appeals and the District Court have somewhat different theories, and the legal issues that they raise are therefore distinct. In the Court of Appeals, the Court of Appeals held that statistical proof was in its words "unacceptable as evidence of discrimination," and that was as a matter of law, unless, and again I quote, "all measurable variables thought to have an effect" were included.

In other words, in a case where there was evidence, as here, that blacks and whites in the same job were getting different salaries, and further evidence that that couldn't be explained by differences

in experience or education of job performance. In the Court of Appeals view, as a matter of law, that evidence was simply insignificant, and the District Court could not have made a finding of discrimination on it even if it had wanted to.

On the contrary, on the Court of Appeals' view, this case should have been dismissed --

QUESTION: There is still the question of what inference should be drawn from the facts.

MR. SCHNAPPER: As I read the Court of Appeals' opinion, unless all measurable variables are included --

QUESTION: Nevertheless, nevertheless, that is a question of what conclusion may be drawn from the facts that were before the Court.

MR. SCHNAPPER: But a rule of law that a certain inference is impermissible is a rule of law even though it concerns the drawing of inference. It is just like the order of proof set forth in McDonnell-Douglas is a rule of law. The District Court had a somewhat different theory. The District Court at Page 133 -- excuse me, in its opinion made a finding that the plaintiffs had established a prima facie case. Our disagreement with the District Court, and I think indeed a disagreement between the District Court's opinion and

those of this Court concerns how to rebut a prima facie case of discrimination.

On the District Court's view, a defendant can rebut proof of salary discrimination merely by offering evidence that additional factors go into its salary determinations which were not included in its analysis. The District Court clearly held, and I think this is inconsistent with this Court's previous decisions, that a defendant is under no obligation to adduce any evidence that these factors in any way correlated with race.

QUESTION: Mr. Schnapper, why isn't this case really more to be judged in the light of Akins versus Postal Service, rather than McDonnell-Douglas, since all the proof was in? I mean, the District Court was simply making findings as to whether the plaintiffs had carried their ultimate burden of proof of showing discrimination.

MR. SCHNAPPER: Well, it is our position that the District Court's view as to what a plaintiff had to do was wrong as a matter of law. The District Court's view was that if plaintiff was required to do more than show that there were differences in the average salaries of blacks and whites even when controlled for education and a number of other factors, the District Court's view

was that we had to control for everything, and even for a number of issues which the District Court frankly said it was impossible to control. If that is the standard, it simply would be impossible to use statistical evidence under any circumstances.

This isn't a case in the District Court in which the District Court said, look, given how much you did do, and given the evidence on the other side, on balance I am persuaded that there was no discrimination. This is a case in which the District Court said simply the fact that the defendant can think up something else that you might have done in your statistics, even though there is no claim that it would have changed the result, that is dispositive.

QUESTION: Well, his finding on that score may have been clearly erroneous. Perhaps the evidence is so clear that although there may be some evidence to support it, that an appellate court is convinced a mistake has been made, but I don't see why that turns the whole question of use of statistics into inevitably a question of law.

MR. SCHNAPPER: Well, the burden set out in McDonnell-Douglas, when a defendant comes forth and tries to rebut statistical evidence, is that it has to offer evidence which it believed would constitute a

non-racial explanation.

Now, that requires, as I read McDonnell-Douglas, two things. First of all --

QUESTION: Let me ask you again, Mr. Schnapper. Since all of this material did go to the finder of fact, and he ultimately resolved the case, think McDonnell-Douglas deals with what you do to get through finally to having the finder of fact decide it. Once you get to the finder of fact, it is simply a question of who has carried the ultimate burden of persuasion, isn't it?

MR. SCHNAPPER: Well, we don't think that what the defendant did in this case met the minimal standards that McDonnell-Douglas sets. This is --

QUESTION: The ultimate issue is whether or not there was discrimination, isn't it?

MR. SCHNAPPER: That is correct, Mr. Justice Rehnquist. But it is our contention that there is some minimal amount of evidence that has to be reduced to rebut a prima facie case, and that the minimum simply wasn't met here.

QUESTION: But you are not talking about prima facie cases any more when you go to the finder of fact and the finder of fact makes a determination. You are talking about, did the plaintiff carry the burden of

proof on this issue. Maybe the District Court was wrong, but that is simply a question of being clearly erroneous.

MR. SCHNAPPER: Mr. Justice Rehnquist, I don't think one can read this record as one in which the District Court saw evidence on the other side and then waited and made a judgment on the merits. This is a case in which the District Court believed that the plaintiff's burden was to eliminate every possible non-racial explanation, and if it didn't meet that burden, the plaintiff should lose.

I mean, the decision ought to have been a factual one, but that is simply not what happened here. The District Court required us to do something which McDonnell-Douglas and all the cases and decisions of this Court say we are not obligated to do. I recognize that in your concurring opinion, as I recall, in Dothard versus Rawlinson, you indicated a particular willingness to refer to the District Court's views with regard to the weight of statistical evidence, and there certainly would be cases in which that was appropriate, but this is not that kind of a case.

This isn't a situation in which the District -- in which there was conflicting statistical evidence and the District Court ruled in favor of the

defendants. This is a case in which all the statistical evidence was on one side, and the District Court said, well, yes, but it could have been better, and it was very good, but it wasn't perfect, and if it isn't perfect, you lose, and it seems to me that the Court has repeatedly held that you don't have to do that as a matter of law.

QUESTION: Did the court in effect grant a directed verdict for the defendant? Is that your position, that what the court did was simply in effect give a directed verdict or a summary judgment?

MR. SCHNAPPER: I think it was close to that. I mean, the case did go to the end of trial. It did not stop in the middle. But this is not a situation in which there was a balancing of the evidence. The District Court simply said that the kind of evidence that the plaintiff had introduced simply was insufficient to meet its burden under any circumstances, because it had, for example, because the plaintiff had failed to include its analysis.

QUESTION: Well, they said it was insufficient. It sounds like a weight of the evidence problem. That is what makes it so hard to understand.

MR. SCHNAPPER: Justice O'Connor, the District Court held that statistical evidence which fails to

include unmeasurable variables is insufficient as a matter of law to prove discrimination. Now, it is impossible to include unmeasurable variables. The District Court clearly requires to do something which it acknowleged was impossible to do. Now, I don't know that that can be reasonably characterized as going to the weight of the evidence. It simply set a standard that was unmeetable.

I think the manner in which this issue arose throws considerable light on the nature of the question. Initially the plaintiffs made clear that they had evidence that the average salaries of blacks and whites in the same job were different. The defendant undertook to meet what we all understood to be the defendant's burden, that is, to come forward with evidence which tended to show that some legitimate non-racial factor could have explained it, and they retained a statistician, and they said, look, we think there are three factors which would explain why blacks earn less than whites. We think it is job experience, we think it is education, and we think it is sex, and they said, go recalculate the numbers. We believe it is going to show that when you take those three things into account there is no disparity.

Well, the statistician did exactly the

calculation that I think Dothard and Hazelwood and all this Court's cases require and came back and said, you are wrong. The evidence in fact is that when you look at these factors it doesn't eliminate disparity. Indeed, in some cases it increases the disparity -- through the defendants, rather than attempting once again to offer evidence of a factor that might have explained away the discrimination of the differences in salaries.

The defendants took a completely different attack. They said, well, we can think of nine other factors that might have explained this, but we aren't going to show you any evidence that in fact it did explain it. We are, for example, to focus on the issue of particular importance to the Court of Appeals, but also emphasized in the District Court.

The defendants argued, it is possible that the reason blacks earn less than whites is because blacks are concentrated in the poor paying counties in the state, and the District Court said, well, since that is a possibility, the plaintiffs are going to lose. Defendants never introduced any evidence that blacks were in fact concentrated in the poorer counties in the state.

Indeed, the evidence is quite clearly to the

contrary, but it was the District Court's view and the Court of Appeals' view that the fact that some other factor which never had been dealt with, hadn't been dealt with, was dispositive in and of itself, without regard to there being any evidence or any claim that that factor had an explanatory power.

To take a simpler example closer to the original facts in McDonnell-Douglas against Green, imagine a case in which a plaintiff introduced evidence according to McDonnell-Douglas that she had applied for a job as a teacher, that she was qualified, that she had been turned down, and that the defendants had then gone on to fill the job with a man. That would clearly lead to the plaintiff's initial burden under McDonnell-Douglas.

What the defendants did in this case was to offer a defense limited to the following evidence. We prefer people who specialize in romance languages, but no evidence that the plaintiff individual didn't in fact herself specialize in romance languages. As we understand McDonnell-Douglas, the minimal amount of evidence require to rebut a prima facie case is not only that there is a racially neutral policy, but that the racially neutral policy had explanatory power, that it indeed could have accounted for the disparities. That

is precisely what the defendants very deliberately did not attempt to show here. And at least in a number of these instances the reason they didn't attempt to show it is clear, because the evidence was quite the contrary.

QUESTION: I take it you and the Solicitor General do not agree on what factors have to be brought in by a plaintiff to meet the statistical evidence burden that you say exists.

MR. SCHNAPPER: There is a difference between our views and that of the solicitor. It is an important one, although in a sense a narrow one. We are of the view suggested by Mr. Justice Rehnquist in his question and in Akins itself that the Court ought to shy away from setting rigid mechanical standards as to just what ought to be in a prima facie case. The government has offered a fairly elaborate seven-part standard that has to be met by statistics in a discrimination case.

Their standard hinges on the distinction between major variables and additional variables, and depending on whether a variable is major or additional, the plaintiff or the defendant has to adduce the relevant evidence, and cases will be won or lost depending on how a court classifies the variable.

We think that the teaching of Akins is that

the Court should not use that sort of approach. We think the various factors identified by the government ought to be considered by a lower court or by this Court in weighing evidence of statistics, but that the Court should not try to formulate a mechanical standard as to just precisely what has to be in a plaintiff's prima facie case.

We don't think that the government standard is particularly workable. I don't understand the difference between a major variable and an additional variable. It is clear that on the government's theory, whether we win or lose this case depends on whether certain variables not in the analysis were major or additional.

Skill, differences in skill, for example. The government, I think, if I understand the view correctly, regards that as merely an additional variable, not a major variable. It is not included in the statistical analysis. The argument for the state is that in the government's terms that is a major variable. The government's brief doesn't explain how one distinguishes the two types of variables, and we would urge the Court not to adopt that kind of distinction.

I would like to reserve the balance of my time.

CHIEF JUSTICE BURGER: Mr. Manning.

ORAL ARGUMENT OF HOWARD E. MANNING, JR., ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. MANNING: Mr. Chief Justice, and may it please the Court, this morning I feel like I am watching my own autopsy, because as the lawyer who tried the case, working 14 hours a day, day and night, weekends, and being in that courtroom, I am not hearing the same case that we tried in 1981 and 1982. All we are hearing are legal theories that are not related to the facts that the trial judge, Frank Dupree, found after hearing all of the evidence.

There is one thing about this case, Members of the Court, that we have hammered all the way through, and it is the truth, and it is the fact. North Carolina is a state of 100 counties. The Extension Service has a branch in each one of those counties. That is indisputed. It is uncontroverted, and it is in evidence.

The facts in this case dealing with salary, which the petitioners and the government as so interested in, go to the salaries of individual agents in each county. The biggest fallacy that you will hear and read in their briefs and hear in rebuttal is that it is the same job. It is not the same job. It is not a

similar job situation.

The record shows, take, for example, the record which showed that an agent in the mountains of North Carolina, where there is no golden leaf tobacco, where there are poor people, where they scratch a living out in the soil, where the county tax base is poor. The evidence shows that that agent who goes out and teaches the farmers, because that is what an extension agent does, they are teachers, but they teach to an unstructured group, when they go out and teach to the farmers in that county, those people are hired because they are trained and educated in truck farming or apple growing or something else.

When you go to North Carolina's tobacco belt in the big counties down there, they want agents that are trained in tobacco. They want them that are trained in soybeans. When you go to Charlotte and those areas of the state, Union County, where Mr. Bazemore is from, where they have livestock, they want an agent like Mr. Bazemore, who is trained and knew about pig farming, and knew about animal husbandry.

It is this type of employment that we are talking about that requires special qualifications. It is not blue collar work. They are college-educated, and most of them have master's degrees, and each one of them

are hired in their particular county based upon the needs of that particular county and their educational background. It is just like hiring a tax specialist to come to work in a law firm, or a litigation specialist. It depends on what the needs of each of the 100 counties are.

Now, we are not going to -- one other thing I would say, that much, that is the facts. If you look at the facts, you will see that the jobs are not similar, and once you understand that principle, their arguments are bouncing off the beautiful walls in here, because Judge Dupree and we knew it, and we told him that those are what the facts are, and they just have disregarded it.

They disregarded it this morning in their argument. They disregarded it in their briefs, because we are not dealing with similar jobs. The way their statistical case and their case fell apart is that they didn't take this into account. They came in and Judge Dupree let in all the evidence. He didn't keep anything out. All the statistical regressions, all of these averages that everybody put in comparing black and white, all of this came in. But they didn't take into account that you can't compare the agent in Ash County, North Carolina, a poor county in North Carolina who is

doing apples, and who is teaching people in Appalachia how to truck farm more effectively, you can't compare his job or the economic conditions in which he is paid with that of the chief tobacco agent in Wilson County, North Carolina, where the tobacco crop brings in millions of dollars a year.

QUESTION: Mr. Manning, I thought from reading the Court of Appeals opinion and the District Court that these salary disparities the court said could have originated from one of two sources. What, the quadrant? What did they call it? The --

MR. MANNING: Quartile.

QUESTION: The quartile. Or, or a hangover from -- or a hangover from intential disparities before 1965.

MR. MANNING: That is what the Court of Appeals said.

QUESTION: Yes.

MR. MANNING: The Court of Appeals went on.

QUESTION: And let me just ask you, suppose the Court of Appeals said that it was just irrelevant if these disparities were just continuations of intentional discrimination that occurred before 1965. That is what it said, isn't it?

MR. MANNING: The Court of Appeals said that

they could not -- that was not a present violation.

QUESTION: And do you agree with that?

MR. MANNING: I would agree with that.

QUESTION: Or do you agree with -- do you think -- the United States says that if after 1965 the disparities were discontinued, they just went right on as disparities, they originated before the Act, but they were continued afterwards. They say that that is current intentional discrimination. Do you agree with that?

MR. MANNING: In theory, Justice White, we would have to agree with that, but that --

QUESTION: Well, the Court of Appeals didn't agree with that.

MR. MANNING: No, they did not agree with that.

QUESTION: And it seems to me they seem to say that these disparities might in part be attributable to that, but even if it was, that is just too bad.

MR. MANNING: Well, let me address the facts in answer to your question, because I am glad you asked it. The Court of Appeals decision -- let's go back to the District Court.

QUESTION: All right.

MR. MANNING: I prepared and we prepared in

our brief, taking just the point that you mentioned, the question goes back to the facts. They see it, and this is a good time for me to discuss what the salaries are composed of, because this will answer a lot of questions if you think about it.

The salaries of any agent come from four sources. The first is state and federal funding. The second is the county salary portion, which makes the whole. The only way that a salary -- then there is the merit salary increase, whether it comes from the state or federal on odd years or whenever it comes, or the county merit increase. Those are the three -- four sources of funding from the time you start.

Each one of those was found by the District Court and again by the Fourth Circuit, those sources, to be either uniformly applied, no discrimination at all, never has been any in this application, and the performance system which determined the merit pay was found to be nondiscriminatory. Now I am going back, all right, to pre-'65.

We prepared this chart. If what the petitioners say is true, i.e., that we were paying all of the blacks less money before 1965 deliberately, which we contend was not the case, there were average differences between black and white salaries. If that

were the case, if that were the case, you would not have the result seven years later that is shown here. That is just not what the evidence showed, and Judge Dupree saw that evidence. He didn't find that --

QUESTION: Did the judge find that there never had been any intentional discrimination? Or did he say that there was before '65?

MR. MANNING: He found that before '65 there was a de jure, a segregated system, and we can't --

QUESTION: Do you agree with that?

MR. MANNING: That is the way it was. Yes, sir. But after that --

QUESTION: All right. The day after, the day after the Act became effective in 1965, and these disparities continued, there was still intentional discrimination, right?

MR. MANNING: I disagree, because what you --

QUESTION: Well, the day before the Act there was intentional discrimination, and the day after there wasn't?

MR. MANNING: Well, I disagree. The salaries, you have to -- you are getting back and taking me away from the fact that these people, whether they were there before '65 or after '65, were not doing the same jobs. In other words, when they came into effect in 1965, they

were not -- the service knew there were disparities, and worked at doing that, but everybody had disparities.

If you will look at the evidence --

QUESTION: Well, it sounds to me like you are making an argument there never was intentional discrimination.

MR. MANNING: I am not making that argument that there wasn't, because --

QUESTION: I think you --

MR. MANNING: -- before '65 it was a two-way system. Yes, sir.

QUESTION: Thank you.

MR. MANNING: But the next point that I would make in connection with that and in answer to that as to whether that continued in salaries or not is to look at the chart which we attached to the appendix to our brief. If that theory was true, and it continued, and we say it did not, then there would be a market, and this is Appendix Exhibit A, there would be -- the pre-'65 blacks and the pre-'65 whites would be spread like this.

If you will take a look at that chart, which is everybody who was there in 1965 and there in '72, you will find all over the board, from the bottom to the top, whites and blacks are dispersed. There were 42

black agents who were there and there were 65 white agents there, and if you will take a look at it, you will see.

The point I am making is that from 1965, when the law took effect, the Extension Service, and both courts so found, operated on a non-discriminatory basis, and that is what Judge Dupree found as a matter of fact. He did not find a prima facie case on the evidence that came in. Judge Dupree said that a careful weighing and assessment of the plaintiff's statistical and non-statistical evidence led the court to conclude that the plaintiffs had probably made out a prima facie case with respect to defendants' promotion and salary practice, and the analysis of the court proceeded on this assumption.

While not conceding that the plaintiffs have made a prima facie case, the defendant Extension Service assumed the burden, which we did, of articulating plausible reasons for its action, and its evidence, which the court, the trial court found convincing, has been set forth therein. The plaintiffs failed to adduce evidence that our reasons, defendants' reasons were pretextual, and their case failed. That is what happened here.

QUESTION: Did the District Court -- did the

Court of Appeals accept this finding of the District Court? If it did, why did it go on to say that it was permissible as a post-Act consequence of a pre-Act situation?

MR. MANNING: I didn't write the opinion. I wouldn't have written it that way. I don't know why they said it, but I can give you my best explanation. They were doing the same analysis on where the money comes from. If you will read that portion of their opinion, what they were saying was this. There can be no discrimination in across-the-board wages that the state gives. There was none.

There was none in the county across-the-board wages, which is the way most employees in government service get paid. The only two places that there could have possibly been any discrimination, and what they were saying in 1972 was, if there was a lingering effect, i.e., what Justice White had said, a lingering effect of what was there, salaries of pre-'65 hires who were there in '72, and then they said the other one is the performance or the merit pay system, which is the quartile system, which we use because our employees don't do the same jobs, and they said it in that context.

They then said that they did not feel that

under Evans or under Hazelwood, that under those conditions, that those, if there were lingering effects, that they were presently actionable. I personally would agree with that assessment. I don't know how the Court is going to agree with it. I would say seven years later that that is how they -- that is the context in which they discussed it, which leads into our point that we have tried to make and Judge Dupree saw. The manner in which our agents are paid comes from a system which -- and not appeal, and not before this Court, which is found to be in all facets, in hiring, in promotion, in in-house education, to be non-discriminatory.

The Extension Service, members of the Court, if you read in this entire opinion, and what they didn't appeal from was found to be non-discriminatory completely in its employment practices, and when you look at the -- going to the variable question that Mr. Schnapper was talking about a minute ago, that these were imaginary things that Judge Dupree rejected, what I have just told you is hardly imaginary. It is in evidence, and it is the fact. Those were not included in their statistical case, nor did they ever take them into account.

The other thing that I think which shows the Court immediately that what we are saying about our

services, it is not uniform from county to county, is the extension chairmen's salaries, all of whom are the head person in the county, and that is found in the joint appendix on page 165 for three years. The range in salaries of the top person in that county is between $2,000 and $5,000 a year, and everybody under him or her is going to be -- is not going to be paid any more regardless of what kind of job they do or regardless of their specialty, and this is the point.

North Carolina's situation is not a factory setting, like a wiget factory, nor is it everybody examining tax forms. The other thing that is different, that is a major factor that Judge Dupree pointed out in balancing the regression and not swallowing all of these comparisons that everybody put forth to him, were that the county salaries, percentage of state and county, varied with each county.

For example, if Justice White and I started out at the same time out of law school or out of the ag school with the same degree, and we both got a salary of $10,000 a year to start, and he went into a county that had a 70 percent county -- state supplement of his salary, and mine was 40, and that example is in our brief, at the end of the first year, if he got a 5 percent state raise, he would have gotten a $350 raise,

I would have gotten a $200 raise, and that happens every year in 100 counties, and affects all employees. It has nothing to do with race. That is what Judge Dupree and the trial court saw.

Now, moving to the question which is one of the issues raised this morning, is that the county extension chairmanships, and this goes to the head person in the county, and I just briefly would say, because it hasn't been argued, but I want to make the point that both courts were correct there. There were 23 individual cases on that issue, five futility applicants and 18 actual black plaintiffs who were present in court, whose cases were put on very ably by Mr. Reblin, who is here this morning, put on very ably, and we answered every charge, and Judge Dupree in his opinion on the individual claims found that we had offered a legitimate nondiscriminatory reason for each and every single case. That is a factual case. He decided it on the facts. It was not found to be erroneous by the Court of Appeals, and these arguments about General Telephone and these other cases, they shouldn't be here, because that case was decided on the facts, and nobody has said that Judge Dupree is clearly erroneous.

With respect to the club issue, there is one,

Members of the Court, that is astounding to hear what I have heard this morning. The Extension Service, as Justice White pointed out, was in fact segregated prior to 1965. At the end of 1965, and when it came into effect, they set about to integrate that service and its programs. The 4H Clubs and the Homemaker Extension Clubs are viable, educational, voluntary groups run by volunteers and assisted by extension workers in every single county.

Mr. Schnapper's brief asserts that there was intentional discrimination in recruitment, and the government pointed out in their brief there is no evidence of that. We tried this case for ten weeks. If you look at the fact that extension programs like this are not static, and the membership changes all the time, we have run through 100,000 kids a year and volunteers in that program since 1965. Among those, 40,000 or whatever the numbers show are black, black male and female volunteers that come to those clubs, who organize those clubs, and black children and white children, and if you look at our figures, we integrated.

The one thing that the plaintiffs never brought forward out of the hundreds of thousands of participants in North Carolina, male, female, and those who were children in '55 who are adults now, was that

there was any evidence that they were ever rejected from membership in a club, that they ever felt the least discrimination in engaging in programs.

QUESTION: Mr. Manning, since 1965, have there been any single race clubs formed in racially mixed communities? Does the record show that?

MR. MANNING: The record does show that.

QUESTION: And your comment on that is?

MR. MANNING: My comment on that is that they are formed in racially mixed communties, one race in North Carolina. They are static, and they are reborn, and they are formed that way. They are formed that way in the other states in the country, and the record shows that. The point that I would make to Your Honor is this. Those people who are organizing those clubs, the black volunteers or the white volunteers, do not deny membership nor do they discriminate in membership nor do they exclude anyone. Anyone is available to join, and I think --

QUESTION: Do they encourage the joinder of persons of the opposite race, the other race, any other race?

MR. MANNING: Yes, that is what the policy of the extension service is. That is what the volunteers who are trained by the Extension Service are told to do.

QUESTION: With no effect?

MR. MANNING: Well, there is an effect. The effect is, as you can see by, and I will turn to the page, to the exhibits on Pages Joint Appendix 160 through 219 -- I mean, on Page 173 and on Page 174, the effect of this is, and I think I need to point this out, the community clubs that the plaintiffs, the petitioners are complaining about make up the smallest segment of the 4H program. Above that, if you will take a look at the record in this case, and membership, you will point out that black membership and white membership in all of the clubs, including those, has grown.

QUESTION: I missed those last words.

MR. MANNING: Has grown, has gotten, instead of -- in other words, I am arguing negative evidence. There is no evidence at all that anyone was excluded, and yet the program, the positive evidence is that this program has continued to grow in enrollment, in black and white volunteers. The camps are integrated.

QUESTION: Does the evidence --

MR. MANNING: Yes, ma'am.

QUESTION: -- show us how many of the clubs have mixed races in them and how many do not?

MR. MANNING: Yes.

QUESTION: And where is that?

MR. MANNING: Page 178.

QUESTION: 178?

MR. MANNING: Of the joint appendix. There are several exhibits.

QUESTION: Well, 178 tells us the number of single racial clubs in mixed communities. Does it tell us the number of mixed racial clubs in mixed communities, or are there any?

MR. MANNING: There are, and I cannot in the joint appendix -- it is in the record. There are --

QUESTION: This is what I have been trying to get you to say for the last five minutes.

MR. MANNING: Yes, sir. There are and have been a growth. It is in the record, and I cannot put my hand on that, on the joint appendix, but there are mixed race clubs, both racial clubs in mixed communities, and I do not have --

QUESTION: And it is in the joint appendix some place?

MR. MANNING: It is in the joint appendix at Page 134. Right here. On Page 134. It gives the enrollments at least through '77 showing the number of 4H units integrated in mixed communities, and that is the second column down. I would point out --

QUESTION: So as of -- if I am reading it

correctly, as of 1977 56 percent of the 4H units in mixed communities were in fact integrated?

MR. MANNING: Yes.

QUESTION: And it has gone up from 39 percent.

MR. MANNING: Yes. I would point out this additional point, that above the focus has been microcosmed by the petitioners in this case on just this, but the community clubs are a small segment. In addition to the community clubs are what are known as special interest groups, which are formed, for example, to do model airplanes or to do something, and they are integrated in this, but what I would say is, there is just no evidence. They put on no evidence and there is no evidence that anybody came forward and said we feel that we have been discriminated against. We didn't join because we didn't want to. There is no evidence of that at all.

QUESTION: Was evidence put in about an effort being made --

MR. MANNING: Yes.

QUESTION: -- on the part of the Extension Service to attract integrated units?

MR. MANNING: The effort -- there is a lot of evidence that is put in on that issue, and it is hotly

-- that was, to be frank with you, it was a hotly -- how we accomplished it, and what the plaintiffs wanted us to do was the thrust of this. There was a guideline called all reasonable efforts, and I won't duck this one, which was not a -- it was not a regulation, but it was a printed guideline which they wanted to go out and say, you had to knock on every door in every neighborhood to recruit individuals. The service did not do that. The service encouraged it, and I think it is the growth in the program and the absence of anybody coming forward and saying they in any way felt discriminated against, didn't join for any reason, we feel that we did all reasonable efforts short of doing that which was a suggestion that --

QUESTION: Mr. Manning, what is the relationship between the State of North Carolina and the 4H Clubs?

MR. MANNING: Justice Powell, the relationship is that the 4H Clubs are voluntary organizations that have an Extension Service agent who is a 4H agent, who would furnish them materials, who will train their volunteer leaders, who will give them pamphlets and programs on how to do something, and then the volunteer and the boys and girls in the program will take the ball and run with it.

QUESTION: Does the state finance it in any way?

MR. MANNING: The state finances the 4H agents.

QUESTION: Yes, but in any other way?

MR. MANNING: But it is my understanding they don't finance the clubs other than they would get materials. Most of the funds come from volunteer time and volunteer contributions, although obviously your pamphlets on how to grow corn or do this model would --

QUESTION: Are people free to organize clubs themselves?

MR. MANNING: Yes, they are, and they always have been.

QUESTION: Are most of them organized without inspiration or leadership or direction from the state?

MR. MANNING: Yes, they are organized by volunteers who want to help the children and who are trained by the Extension Service workers in how to effectuate the program.

QUESTION: Aren't the extension workers required to supervising, to organizing, and do everything they can to help them?

MR. MANNING: No, sir. And the reason --

QUESTION: What are they there for?

MR. MANNING: Well, there are not enough extension workers -- well, my answer to the question is this way, Justice Marshall. There are not enough extension workers to deal with 40,000 children.

QUESTION: The number that they have, don't they spend full time on the 4H Clubs?

MR. MANNING: Those that are in a county which is big enough to afford a full-time 4H agent. In many counties, the person has 4H responsibilities who also has corn or soybeans or something else. In other words, it is not a full-time position unless the county has enough money to afford that particular type of agent, and they are -- they go out and they will assist the volunteers in organizing but not go out and organize them themselves. No, sir, they don't have the resources to do that. There are not enough of them.

QUESTION: How many counties had the full-time, approximately?

MR. MANNING: I would say now the big ones probably at least 30 of the 100 counties would have the full-time, and I am not speaking from any real knowleige, just from knowleige of the case.

QUESTION: Are you saying it is not a state function?

MR. MANNING: It is not -- the 4H program is

under the auspices of the Extension Service, but it is a voluntary program which is not regulated.

QUESTION: Like the white primary?

MR. MANNING: It is not like the white primary at all.

QUESTION: Is any child or young person compelled to go to these programs?

MR. MANNING: No.

QUESTION: All voluntary?

MR. MANNING: All volunteer.

QUESTION: Are there any other teachers except the agents provided by the state?

MR. MANNING: No, the agent is provided by the state, and he trains the volunteers, or would come in and give a program to the club, but he doesn't run the clubs.

QUESTION: There is no compulsion to join?

MR. MANNING: There is no compulsion to join at all.

QUESTION: If you join, you can leave the next day?

MR. MANNING: You could leave the next day. And these clubs are not fixed in stone.

That is all the time I have.

CHIEF JUSTICE BURGER: Do you have anything

further, Mr. Schnapper? You have two minutes remaining.

ORAL ARGUMENT OF ERIC SCHNAPPER, ESQ.,

ON BEHALF OF THE PETITIONERS

IN NO. 85-93 - REBUTTAL

MR. SCHNAPPER: We are in pretty much agreement with the government that there really aren't factual findings with regard to the 4H Club issue. I would like to just briefly respond to some factual questions the Court raised about this. First, with regard to the size of the state involvement in this club, there was testimony at Page 4,956 of the transcript that the equivalent of 122 full-time state employees worked on 4H and Extension Homemaker matters. Secondly, at Page 5,069, there is testimony that the budget for these activities totals approximately $5 million a year.

With regard to efforts to assure that new 4H Club and Extension Homemaker Clubs are integrated, Mr. Manning said that there was indeed such an effort. I believe that is incorrect. If you look at Page 1,823 of the Court of Appeals transcript, you will see an express proposal to require that when someone comes in with a new club in an integrated community and the club is all black or all white, that the organizer be directed to go out and try to recruit members of the other race.

If you look at Page 1,827, you will note it says deleted from the 1974 Civil Rights Initiatives. That proposal was deliberately and expressly rejected by the service, and they have expressly decided not to do exactly what the court asked if they were doing.

There is indeed, as I think Mr. Justice Blackmun inquired, have been an increase in the number of single race club in mixed communities. If you look at Pages 103 and 134 of the joint appendix, you will that the total number of single race clubs in integrated communities has indeed gone up from year to year since 1965.

We agree with the government that the recruiting --

QUESTION: May I just interrupt there? Hasn't the percentage gone the other way?

MR. SCHNAPPER: The percentage -- well, with regard to the 4H Clubs, the percentage has gone down only because the number of integrated clubs has gone up. The number of segregated clubs --

QUESTION: Well, the total number of clubs has gone up.

MR. SCHNAPPER: That's right, but the number of single race clubs has not changed. Well, it has gone down 2 percent in eight years. It was, I think, 890 and

it is now 880.

QUESTION: But the trend, even though it was very modest, the trend was in the other direction, at least on a percentage basis.

MR. SCHNAPPER: Well, that is right. I mean, we agree on what the facts are. With regard to the Extension Homemaker Clubs, there has been no such trend, well, to speak of. The latest data is 98 percent of all the Extension Homemaker Clubs in the state are either all black or all white. There is something less than 200 blacks in the entire state that belong to a club that has a white member in it.

Now, I suppose technically that is progress. They have made 2 percent in a number of years, and at that rate, I suppose, in a very, very long period of time there might be substantial progress, but I don't think that's the kind of progress that Mr. Justice Stevens had in mind when he asked the question.

QUESTION: You say there are only 200 blacks in integrated clubs in the whole state?

MR. SCHNAPPER: In the Extension Homemaker Clubs, the data is at Page -- well, at Page 103 it says there are only 22 integrated clubs of about 1,800. Later in the record at 107 it says the number of members of integrated -- the number of non-white members of

integrated clubs is in the righthand column, about the middle of the page, is 197.

As I said, the government has suggested that we need to have a remand with regard to the recruiting problem because the lower courts simply failed to address it. The lower courts accepted the view that Mr. Manning has put forth today that the only obligation that the state had in this area was to assure that if a black actually found his way or her way to a club and applied, that he or she was not rejected.

Because of that, the Court of Appeals and the lower courts simply thought there was no reason to decide whether there was discrimination in recruiting or to decide whether there were in fact continuing effects that date from the original de jure system, and there simply aren't findings on either of those issues. We would ask the Court to sustain our views that there is such an obligation, and that discrimination in recruiting is illegal, and remand the case for appropriate relief.

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

(Whereupon, at 11:08 o'clock a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#85-93 - P.E. BAZEMORE, ET AL., Petitioners V. WILLIAM C. FRIDAY, ET AL., and

#85-428 - UNITED STATES, ET AL., Petitioners V. WILLIAM C. FRIDAY, ET AL.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)