OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: JOHN W. MARTIN, ET AL., Petitioners V. ROBERT K. WILKS, ET AL.;
PERSONNEL BOARD OF JEFFERSON COUNTY, ALABAMA, ET AL., Petitioners V. ROBERT K. WILKS, ET AL.;
and
RICHARD ARRINGTON, JR., ET AL., Petitioners V. ROBERT K. WILKS, ET AL.

CASE NO: 87-1614; 87-1639; 87-1668

PLACE: WASHINGTON, D.C.

DATE: January 18, 1989

PAGES: 1 - 58

ALDERSON REPORTING COMPANY
20 F Street, N.W.
Washington, D. C. 20001
(202) 628-9300

IN THE SUPREME COURT OF THE UNITED STATES

JOHN W. MARTIN, ET AL.,
Petitioners
v. : No. 87-1614
ROBERT K. WILKS, ET AL.;

PERSONNEL BOARD OF JEFFERSON COUNTY, ALABAMA, ET AL.,
Petitioners
v. : No. 87-1639
ROBERT K. WILKS, ET AL.;

RICHARD ARRINGTON, JR., ET AL.,
Petitioners
v. : No. 87-1668
ROBERT K. WILKS, ET AL.

Washington, D.C.

January 18, 1989

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:05 a.m.

APPEARANCES:

JAMES P. ALEXANDER, ESQ., Birmingham, Alabama; on behalf

of the Petitioners Personnel Board of Jefferson County, Alabama, et al., and Richard Arrington, Jr., et al.

ROBERT D. JOFFE, ESQ., New York, New York; on behalf of the Petitioners John W. Martin, et al.

RAYMOND P. FITZPATRICK, JR., ESQ., Birmingham, Alabama; on behalf of the private Respondents.

THOMAS W. MERRILL, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the federal Respondent.

C O N T E N T S

P R O C E E D I N G S

(10:05 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in No. 87-1614, Martin against Wilks and companion cases. Mr. Alexander, you may proceed.

ORAL ARGUMENT OF JAMES P. ALEXANDER

ON BEHALF OF THE PETITIONERS

PERSONNEL BOARD OF JEFFERSON COUNTY, ET AL.,

AND ARRINGTON, ET AL.

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

Petitioners divide their argument this morning. I will address the facts and circumstances why respondents, in fairness and equity, are precluded from relitigating the validity of consent decrees providing race conscious relief entered after seven years of contested litigation.

Respondents are precluded for two reasons. First, they knowingly sat on the by -- sidelines of this litigation for seven years without either intervening or otherwise claiming an interest in the case.

Thereafter, they were afforded an opportunity at a fairness hearing to contest the issue of race conscious relief, and they had a full and fair opportunity to do so on that occasion.

We argue for the following rule in the nature of collateral estoppel where the lawfulness of remedial race relief has been determined, where non-minority employees have had a meaningful opportunity to participate in that determination, then they cannot thereafter repeatedly relitigate that issue in separate cases.

We believe that the rule we propose adequately accommodates the interest of non-parties; conserves judicial resources; and certainly, in Title VII litigation, provides an opportunity for the prompt settlement that Congress has mandated where possible.

No better illustration of the difficulties of a contrary role exists than this very case. In accepting the invitation of the United States to settle this case in 1981, the city of Birmingham, Alabama, agreed to comprehensive consent decrees to conclude seven years of litigation.

In terminating --

QUESTION: Had -- had the people who sought to intervene there, were they named in that action?

MR. ALEXANDER: I'm sorry, Your Honor. The people who sought to intervene --

QUESTION: The people who sought intervention, had they been named as defendants in the action?

MR. ALEXANDER: They had not, Your Honor.

QUESTION: Do you know why they weren't named?

MR. ALEXANDER: Certainly at the time the litigation was filed by the United States, the United States didn't name -- they certainly did not have the view that they were necessary or indispensable parties for purposes of providing relief under Rule 19.

Thereafter, we were aware, of course, that the same individuals who subsequently did try to intervene unsuccessfully at a later point were interested in the litigation from the outset, participated certainly by consulting with our co-defendant, the personnel board, through a period of two trials, one in 1976, one in 1979, without ever intervening.

QUESTION: Well, you know, some of our cases, like Justice Brandeis' opinion, I think, in Chase National Bank against the City of Norwalk, there isn't any duty to intervene in a case.

MR. ALEXANDER: Well --

QUESTION: Are you trying -- are you suggesting a special rule for this type of case? You're suggesting that case is wrongly decided?

MR. ALEXANDER: I'm suggesting that case was decided under the old rule and may not be fully

applicable now. Certainly --

QUESTION: Well, what -- what has changed that would make that case inapplicable?

MR. ALEXANDER: Well, it seems to me, Your Honor, that -- that in the Penn-Central case, this Court with respect to the Burough of Moosic clearly determined that they had an obligation to intervene in the pending litigation in New York.

And when they failed to do so, they were precluded, and we think properly so, from relitigating issues that were fairly subject to litigation in the earlier case.

QUESTION: Well, that was quite a different case from this, though.

MR. ALEXANDER: Well, Your Honor, I think they're perhaps closer than you may think.

This has been a complicated case. Certainly we don't say we're the Penn-Central merger. But there are a lot of competing interests, and over 2,500 white employees in the City of Birmingham.

Under Rule 19 as we read it, certainly we don't fall under clause (1), and I think the reason we don't fall under clause (1) is we're not performing a contract. Complete relief could have been afforded without the participation of the white employees.

Clause (2), as I read it --

QUESTION: Well, is -- is that a fact, could complete relief have been afforded without --

MR. ALEXANDER: Yes, sir. And, and, and, Your Honor, in the words of the Court's opinion in Local 93, the consent decree to which the city agreed at the invitation of the United States imposed no obligation or duty on the white respondents.

QUESTION: Well, but it -- it certainly was going to have an effect on their careers in city government, wasn't it?

MR. ALEXANDER: Certainly to the extent that promotions in the city of Birmingham were no longer the exclusive preserve of whites, their interests were implicated.

I think that under the provisions of Rule 24 they would have been in a position to try to have that interest protected.

QUESTION: It's more than just that promotions are no longer the exclusive preserve of whites, it's -- it's that a certain number of blacks have to be favored under the consent decree, and that a white is not entitled to a promotion simply by reason of his color, under the consent decree.

And, and you don't think that's the kind of

thing that requires that the individual had a chance to -- in the case that he's appeared in have a chance to refute that?

MR. ALEXANDER: I think, Your Honor, if he elects to contest his interest, he has an avenue under Rule 24 to do so.

I think there are many white employees who recognize the somewhat egregious history in my city, take the position that some remedial relief is appropriate to deal with us.

In the city of Birmingham, Alabama --

QUESTION: Well, that's fine, but you could have joined them. I mean, the usual rule is, if you want to take away something from somebody you join them in a lawsuit.

You're saying that you can take it away from them unless they take the initiative and join the lawsuit. That's two contradictory --

MR. ALEXANDER: Respectfully, Your Honor, if they are the beneficiaries of past discrimination, as I believe them fairly to be, I don't know of any of the cases of this Court that say they must be joined as a party in the action.

QUESTION: That's how you would distinguish this from our other cases, that these people are

beneficiaries of past discrimination?

MR. ALEXANDER: Certainly they are. I don't know that that's the only distinction and I'm not --

QUESTION: That -- that's been adjudicated -- has that been adjudicated as to each of these individual --

MR. ALEXANDER: Not as to each of these individuals, but Justice Scalia --

QUESTION: But we're talking about individual rights that are being affected here.

MR. ALEXANDER: We are, but we're talking about it in an incredibly unusual situation.

This case experienced an adversarial trial in 1976. The trial court concluded that the entry-level test discriminated against black candidates for both police and fire. Race conscious relief was afforded on that occasion. Thereafter, that relief was affirmed by the Court of Appeals and cert to that court was denied.

A second trial was had in 1979. At that trial, promotional practices were in issue, practices varying across the city of Birmingham's various departments. There simply was an egregious history of discrimination.

QUESTION: So you answer Justice Scalia's question by saying, oh, they're beneficiaries of past

discrimination, and thereby solve the problem by claiming that they are somehow the beneficiaries of a particular kind of benefit, but that seems to me precisely the kind of thing that ought to be tried.

If your answer to the question, well, why shouldn't they get their day in court, is, oh well, because they are in a special class, it seems to me that's precisely what they want to try.

MR. ALEXANDER: Justice Kennedy, they could have had their day in court. They were interested from the outset, there were no blacks in supervisory positions --

QUESTION: Do you say that because of their attorney, or were these -- each of these persons represented by this attorney in 1974?

MR. ALEXANDER: No, Your Honor, I cannot say that. I do say that each of the respondents in the Wilks case were members of the BFA.

The BFA began monitoring this litigation in 1974 on an active basis. Surely any --

QUESTION: Were most members of the fire department members of the union?

MR. ALEXANDER: Most white members of the fire department were members of the BFA.

QUESTION: In your --

MR. ALEXANDER: The BFA --

QUESTION: In your view, was it appropriate for the trial court to deny the motion to intervene at the fairness hearing?

MR. ALEXANDER: Your Honor, that -- the motion to intervene was made after the conclusion of the fairness hearing, in the first instance.

QUESTION: Well, the day after?

MR. ALEXANDER: In the second instance --

QUESTION: Was it the day after?

MR. ALEXANDER: The day after. And -- and it was, in fact, denied at the time the court approved the relief in question.

QUESTION: And in your view that's a proper order?

MR. ALEXANDER: In my view, Your Honor, that is a proper order. I would call your attention --

QUESTION: So that the duty to intervene arises at some time before the fairness hearing begins?

MR. ALEXANDER: Two responses. One, in the Eleventh Circuit, the McLucas case, takes the position that it could be an abuse of discretion not to permit intervention prior to that time.

Item two, the trial court determined that intervention was untimely. That particular decision was

appealed to the Eleventh Circuit, which agreed with the decision of the trial court, and cert was not sought.

QUESTION: Well, I'm trying to fix the point at which a firefighter, say, who comes into the fire department, for six months or so, and hears about a lawsuit, suddenly has to go join it. When -- when does he have to join it?

MR. ALEXANDER: I think he must go as soon as he believes that his interest is implicated. I think that that -- the facts in that calculus will necessarily vary from case to case.

QUESTION: Well, under your view, I, I suppose many of us would be -- have our interests affected by lawsuits and we'd have to read the newspapers every day to see what lawsuits have been filed?

MR. ALEXANDER: Certainly if your union, Your Honor, is following a case, actively working with one party, making a report to its membership, and if you're in Birmingham, Alabama, where many of our institutions have been restructured over the past 20 years, it is not a leap of faith to understand that when you are in a fire department with no black firemen, as was the case prior to 1968, that a federal court may well, whether by consent or by litigated judgment, impose goals to remedy the effects of past discrimination, as we believe was

done properly here.

QUESTION: We're talking about a rule that has to apply to a lot of cases, however, and you're urging upon us, in the interest of judicial efficiency, that we have to get into, on a case by case basis, this, it seems to me, very difficult issue of whether a person has had sufficient notice that his or her rights are about to be affected, whereas the opposite rule, which has been our traditional rule, is quite simply, if you want to cut off somebody's rights, join them in the lawsuit. You don't have to go into a lot of inquiry about how much notice somebody had, when did he have the notice, and so forth. You want to affect them? Join them.

QUESTION: Mr. Alexander, were these people charged with any violations of law, or was any relief sought against any of them?

MR. ALEXANDER: When you say these people, Your Honor --

QUESTION: The people that Justice Scalia just referred to.

MR. ALEXANDER: The --

QUESTION: Were any of the white firemen charged with violating the law?

MR. ALEXANDER: No, sir.

QUESTION: Or was relief requested against them?

MR. ALEXANDER: Relief has not been requested against the white firemen in any case.

QUESTION: I see.

MR. ALEXANDER: If I may respond, Justice Scalia, to your question or comment, it seems to me that the alternative of the rule we propose is simply a sanctioning of the sandbagging that occurred in this very case.

It is not in the interests of white employees, I suppose ever, to share their promotional benefits and rights with blacks. They can sit on the sidelines knowing that they can bring a collateral attack, knowing that they can in effect interfere with the process, and leave the city in a position where it cannot undertake to remedy what is clearly a very serious legal problem in terms of its own operations.

QUESTION: Well, the city could have brought in these people.

MR. ALEXANDER: Yes, sir. I did not send out the invitations to the dance. I was invited by the United States. They sued me in the first instance; they proposed that I settle. They never suggested anything else. Thank you.

QUESTION: Thank you, Mr. Alexander. Mr. Joffe?

ORAL ARGUMENT OF ROBERT D. JOFFE

ON BEHALF OF THE PETITIONERS MARTIN, ET AL.

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

I would like to make three points today. First, due process does not require allowing respondents a separate proceeding to attack the decree.

Second, the Wilks Respondents should have intervened. Joinder is not required for finality. And third, they did in fact have their collateral attack below.

This Court has held in a series of cases from Weber to Johnson that, in appropriate situations, affirmative action is lawful. The issue today is when those determinations are final.

We argued for a rule that allows for closure once there has been judicial determination and a meaningful opportunity to participate. Under Respondent's rule, that would not happen.

For example, in the two years prior to July of 1987, there were 654 consent decrees entered in employment civil rights cases. That doesn't count litigated decrees.

Everyone, or virtually every one of those decrees would be subject to attack by white employees who were not joined in those cases, let alone the hundreds of cases that occurred before then.

QUESTION: Do you have any statistics on how many employment actions were filed?

MR. JOFFE: I don't, Your Honor.

QUESTION: In that same period?

MR. JOFFE: The 654 is the number that resulted in consent decrees. In addition, there were others --

QUESTION: Because merely because an action is filed doesn't mean that a consent decree is going to follow.

MR. JOFFE: No, Your Honor. But those 600 --

QUESTION: In fact, I would speculate -- and it's sheer speculation -- that it's probably a factor of something like 50 to one.

MR. JOFFE: Well, if the rule that Respondents urged was adopted in those other 49 cases for each of the one, massive numbers of whites would have to joined as parties, and all the problems of joinder, which I hope to get into, would be added to those other thousands and thousands of cases.

QUESTION: But isn't it a corollary to that

that if your rule is adopted, interested employees would have to join each of the 49 suits on the grounds that they might lead to a consent decree? That's just the flip side of the coin, isn't it?

MR. JOFFE: I think the problems of intervention are far less than the problems of joinder. Let me turn to that.

QUESTION: Excuse me. That -- that joinder would only be necessary in those massive numbers of cases that you say where the relief ultimately desired is the extraordinary relief of race conscious relief. Right?

MR. JOFFE: I think in most --

QUESTION: In all of the other cases, if there's not going to be any race conscious relief, there'd be no need of joinder.

MR. JOFFE: I think in most of those employment civil rights cases, there is race conscious relief, Your Honor.

I think, the point is that, when you have intervention, only one person need intervene. And unless the others sitting on the sidelines think that person isn't doing an adequate job they don't have to come into the litigation.

The problems of joinder are enormous. First

there's the question who to sue. If you're going to sue all the white employees in the city of Birmingham, who do you name as their representative?

Some of the whites don't want to be in the litigation because they have no objection to the result. Of the -- of the whites who wish to object to the result, they're going to throw up every procedural hurdle you can imagine.

They're going to say the representative is inadequate; they're going to drag their feet. Unless this Court holds that non-opt out defendant classes can be allowed in this case, people will opt out, and you won't have the result.

What essentially has been going on in this case for 14 years, the record and procedural history indicate, is guerilla -- something between guerilla warfare and massive resistance to affirmative action in Birmingham.

This is not a case where people were unaware of what was going on. In response to Chief Justice Rehnquist's question about the Chase case, in Chase there was no evidence that the mortgagee knew that the case against the mortgager was proceeding.

In this situation, it's far different. This was a well-publicized suit --

QUESTION: But certainly notice -- notice, in the sense of knowledge, has never been thought to be an adequate substitute for service, if you're trying to get jurisdiction over somebody.

MR. JOFFE: Well, I think, Your Honor, there may be three points to make in response to that.

First, I think this record demonstrates notice, and in the Szukhent case --

QUESTION: But my point was that knowledge and notice have never been thought as a substitute for, for service.

MR. JOFFE: Well, knowledge -- knowledge forms the prerequisite in estoppel cases, or waiver cases. Essentially this is an application of the equitable doctrine of waiver.

QUESTION: Well, can you cite some case from this Court which has applied the equitable doctrine of waiver to someone against whom relief was granted, it was not made a party to the action?

MR. JOFFE: Your Honor, the --

QUESTION: Can you?

MR. JOFFE: I can't. But in this case relief was not granted against the whites. They were adversely affected, but there are many cases where one can be adversely affected. The Penn Central case is one

example, the Provident Tradesmens case shows that is not unique.

There are other cases where people are affected by a decision. And if they fail to intervene, they can't later say that they didn't have the opportunity. It is the opportunity to be heard which due process requires, not actually the hearing.

QUESTION: But this -- the problem here, to my mind, is not due process but simply the rules. Do the rules say that you must alert yourself to actions that are going on and intervene? Or do the rules require that parties to be affected by a judgment should be joined?

MR. JOFFE: We're not urging that people must alert themselves. We're saying, on the facts of cases like this, the people were alerted. And that's the difference.

QUESTION: What is it that they were alerted to? I mean, if I know that A is suing B, and that the subject of the suit is, A is saying that B should take some money out of my pocket and give it to A, then I might have notice that -- that I should join that suit.

But if all I know is that A is suing B and some subject of the suit may somehow remotely affect me, that's something different. Now, what did these people

know? All they knew is that there was litigation going on, a possible settlement in question, that might affect their rights.

Did they know for sure that their rights were going to be affected by a race conscious remedy at the time when you say they should have intervened?

MR. JOFFE: The Eleventh Circuit said, in the joint appendix at page 772 to 773, that the BFA knew of the litigation and its potential adverse effect from the time it was commenced in 1974.

QUESTION: Potential adverse effect. I'm talking about an individual white fireman who knows the suit is going on, does he have clear notice at that point that what you're talking about here is preventing you from being promoted?

MR. JOFFE: In 1977, Your Honor, in this -- in that proceeding, the court entered race conscious relief. He issued an order against the city which resulted in white firemen for the first time having a real number of blacks in the fire department. There was then a second trial at which evidence of promotional discrimination was entered.

It defies imagination to believe that the white firemen, who were fighting this affirmative action tooth and nail, which the BFA was doing, didn't know

that they were potentially adversely affected.

And the proof of the pudding is they came in and they objected to the consent decree. They made every objection to that consent decree at the fairness hearing that they make now.

They filed their briefs in timely fashion under the notice of the application. They just did not intervene in timely fashion. We're urging for a rule that gets people to make their objections at one time, and not save them for later.

In the words of this Court, in Wainwright v. Sykes, paraphrasing this Court in Wainwright v. Sykes, the fairness hearing should be the main event, not a tryout on the road.

And that is what we are urging. Otherwise, all the existing decrees will be opened up, and in future cases all the procedural tangles of massive joinder against defendant classes will take place.

I would like to turn to the fact that in this case they did have their collateral attack, in this very case below. The judge said, he was going to try the issue of prior discrimination, prior to the hearing. They argued in their pre-trial brief that the decrees were illegal.

QUESTION: (Inaudible) parties at this time?

MR. JOFFE: Yes, in this case, in this Title VII case which they brought, they were parties.

They argued that the decrees were illegal, they put in all the evidence that they wanted on trammeling. The judge didn't deny any of their evidence. They argued in summation that the decrees were illegal.

QUESTION: But did they get the normal sort of trial on that issue that you would if it hadn't, in the judge's view, been tried before?

MR. JOFFE: The judge let them put in whatever they wanted. There was no ruling of excluding any evidence on the issue of trammeling --

QUESTION: But what was the basis for the judge's decision in the case?

MR. JOFFE: He had made several decisions. One is that the city was not compelled to -- I'm sorry, that the city was compelled under the decree to hire and promote blacks, but second, he found the decree lawful under Weber.

He made five findings that I refer the Court to. At 85(a) in the appendix to the petition at page 12, he said they have demonstrated no facts demonstrating that the previous conclusions of the court were in error.

Paragraph 13, he says, there was serious underrepresentation of blacks. Paragraph 14, he says, the whites' rights were not trammeled. Paragraph 151 of page 106, he said, under all the relevant case law of the Eleventh Circuit and the Supreme Court, the decree is a proper remedial device.

In their appeal to the Eleventh Circuit, they argued the decrees were illegal. Never until this Court did they raise for the first time that they didn't have their collateral attack.

QUESTION: Well, I thought the district court held that the Plaintiff's claims were impermissible collateral attacks --

MR. JOFFE: He did, Your Honor.

QUESTION: On the consent decrees. I mean, that was my understanding of the ruling.

MR. JOFFE: He -- he issued several rulings. And I believe they were alternative rulings.

QUESTION: Well, to the extent that he, the judge, determined they were impermissible attacks. I guess that's the issue we have here, isn't it?

MR. JOFFE: That's the issue in which the Court granted cert, but I would think, Your Honor, now that --

QUESTION: Well, I mean, it's entirely

possible, if not likely, that the Respondents would lose on the merits, if their claims were ever heard.

MR. JOFFE: Your Honor --

QUESTION: But I guess that's not our concern here.

MR. JOFFE: Your Honor, I believe they were heard on the merits. The findings I refer to and that are referred to in our brief demonstrate they were heard. They did lose on the merits. The Eleventh Circuit, for whatever reasons, overlooked that, and that the court cannot find against us, unless it finds that collateral attacks are allowed, and that there was no trial on the merits.

Or put another way, if you find that there was a trial on the merits, you need never reach the other issue.

I'd like to reserve what remains of my time for rebuttal.

QUESTION: Very well, Mr. Joffe. Mr. Fitzpatrick, we'll hear now from you.

ORAL ARGUMENT OF RAYMOND P. FITZPATRICK, JR.

ON BEHALF OF THE PRIVATE RESPONDENTS

MR. FITZPATRICK: Thank you, Mr. Chief Justice, and may it please the Court:

The issue before the Court today is whether a

district court should hear the Title VII and equal protection claims of Plaintiffs who were denied promotions on the basis of their race when their employer simply alleges that the challenged actions were taken pursuant to a court-approved consent decree.

We believe it is improper to allow an employer to bargain away the Title VII and constitutional rights of non-parties and bind them to their settlement. This is especially true in the context of this case, where intervention was sought before entry of the consent decree and denied.

Through their joint invocation of the timeliness provisions of Rule 24, as well as the so-called no-collateral attack doctrine, the Petitioners have effectively insulated their decrees and their conduct from the scrutiny of adversarial litigation brought by the people who have in fact been denied promotions, and thereby denied the Respondents a day in court.

I want to address, if I may, Justice O'Connor's question right up front, with respect to whether or not we had that collateral attack.

When the district court heard the motions to dismiss on May 14, 1984, it set out the issues, and that is cited in our brief and is in the joint appendix.

But it, at that time, at the motion to dismiss stage, adopted the no-collateral attack position and held that the only way that we could prevail would be to prove that the city was not in fact following the consent decree, pursuant to the provisions of paragraph two of the decree, which we believe provides a caveat to the terms of the decree.

Again, in its February 1985 interim order on motions for partial summary judgment, the court again repeated that its earlier discussions with counsel on what it believed the trial issues were, and the fact that we could not collaterally attack -- the word "collateral" isn't even appropriate, because we were not parties. We could not attack actions taken pursuant to the decree.

The court carefully limited all of the pre-trial preparation, culled our witness list, and directed the preparation for trial, and the Eleventh Circuit recognized all of this and noted it in its decision. And in its final order, which was drafted by the Petitioners, the court made passing references to its prior positions that the decree is lawful.

At any rate, we believe that the Respondents should not be bound by the decrees which were entered in this case, because they were not parties nor privies to

parties to the decree parties, both --

QUESTION: Mr. Fitzpatrick, can I ask a kind of basic question here?

MR. FITZPATRICK: Yes, Justice.

QUESTION: Supposing instead of a settlement this case had been tried, and there were findings of fact of discrimination, and then the court made it clear that after appropriate hearings and plenty of time to study it, the court was going to enter a remedial decree that would affect whites as well as blacks. And then you had a chance to come in and you did exactly what happened here right on the eve of it, you either did or did not intervene.

Would that make any difference whether it was a litigated decree or a consent decree?

MR. FITZPATRICK: The question of whether or not there was a litigated decree or not, in my view, if non-parties had filed separate litigation subsequent to entry of that decree, after having been denied promotion, I would think the District Court might take into account the prior findings and -- but still allow the Respondents to prove --

QUESTION: Well, that might go to whether he'd grant relief or not. But say he granted just relief that's way off the wall, he just said no whites can ever

be hired here for the next six years, or something like that, wouldn't you have the same standing -- pardon me?

MR. FITZPATRICK: Excuse me, Justice.

QUESTION: I'm just -- I'm just -- really I'm trying to get, with what I'm trying to think through is whether the fact that it's a consent decree has any bearing one way or another on your right to say, I want to attack that decree because I wasn't a party to it, and I'm not bound by it.

MR. FITZPATRICK: In the view of the Eleventh Circuit, which I believe is the correct view, that would make no difference whether it was a litigated decree or not. And I think that's consistent with the Chase National Bank v. City of Norwalk rule.

QUESTION: So, really, the question isn't whether your clients are bound by the decree, the question is whether the decree is a defense to the litigation.

MR. FITZPATRICK: Yes --

QUESTION: And in that connection --

MR. FITZPATRICK: That is the defense which the Petitioners have -- have alleged, and they believe it is a complete defense.

QUESTION: And of course, it may or may not be, but you at least, you have standing to say it's an

invalid decree; it might have been entered fraudulently or all sorts of reasons. But you're just claiming -- at this point all you want is standing to challenge it, is that right?

MR. FITZPATRICK: We want the opportunity to go to court and prove that under Title VII in the equal protection clause, the conduct of the city of Birmingham is outside the parameters of valid affirmative action as recognized by this Court in Johnson and Wygant.

That is what the Eleventh Circuit remanded the case to the District Court for.

QUESTION: Well, you're not just asking for standing, you're asking us to rule on what the standards should be on deciding whether the decree is valid, is a defense of the litigation --

MR. FITZPATRICK: No, that is not an issue upon which certiorari was granted, although that was raised by the Petitioners. Cert was denied on that issue.

The -- the Eleventh Circuit in this case first held that the decree should not be binding upon the Respondents who were non-parties to the decree.

QUESTION: Right. And you say that's the same whether it's a consent decree or litigated decree?

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

QUESTION: Right. And, of course, then the merits would also be the same whether it's a consent decree or litigated decree?

MR. FITZPATRICK: When you say -- you mean in our challenge --

QUESTION: Yes.

MR. FITZPATRICK: In our subsequent challenge, yes, we believe we should be able to attack the city's conduct, even though it's taken pursuant to a consent decree or, in the case of a litigated decree, if -- if we have been denied promotions pursuant to a -- to a court order, which is beyond the remedial authority of that court -- and of course there are some differences between what is permissible in the realm of voluntary action and remedial action under 706(g).

The -- but if those actions were taken outside the court's remedial authority in a litigated case, then I believe the non-parties ought to be able to say, no, this is wrong.

QUESTION: I understand.

QUESTION: You're not asserting necessarily, and it's not before us here, whether the city might not have some sort of defense to certain kinds of relief, if it was acting in reliance upon the judicial decree.

I suppose you would categorically say that the

city cannot keep doing the bad thing, but -- but whether it's liable to damages for the past doing of it might be a different question, no?

MR. FITZPATRICK: We believe -- when the first of challenge promotions was made in this case, we sought preliminary relief. The district court denied that relief and we appealed to the Eleventh Circuit. That appeal was consolidated with the appeal from the intervention proceedings.

The Eleventh Circuit said that there should be no irreparable injury because make whole relief was available to any non-minority employees who were improperly denied promotions.

We believe that the appropriate remedy in this case would be make whole relief in the form of preferential promotions or seniority or back pay. Whether the city was following a decree is -- might be liable as to whether or not the city could be liable for, say, punitive damages under Section 1983. That -- it might be relevant in that situation.

But simply because they were following a consent decree does not in our view provide some limits on the availability of make whole relief. As the Court recognized in the W.R. Grace case, the city has voluntarily placed itself in a dilemma of its own

making.

And in Grace the employees were entitled to recover their back pay, even though the employer in Grace was acting pursuant to a conciliation agreement which had been ordered enforced by a district court. So --

QUESTION: Surely for that purpose, to go back to Justice Stevens' line of questioning, there would be a difference between a consent decree and simply a court determination, because there the city wouldn't be the architect of its own violation, if it was -- if it was simply hit with a judgment that required it to do certain things.

MR. FITZPATRICK: Yes, I -- I see your point there, Justice. If the city was not the architect of its --

QUESTION: Well, of course, you assume the party settling a case is an architect of the settlement. Sometimes he has to negotiate with his adversaries.

MR. FITZPATRICK: Well, the city, in the words of the mayor in his deposition, made the best business deal it had ever made when it settled this case for $265,000.

QUESTION: Are you claiming it was a collusive

settlement?

MR. FITZPATRICK: No, sir. I'm not claiming it's a collusive settlement. I'm saying that the city was eager to make the settlement.

QUESTION: Well, there are a lot of people who have been eager to settle lawsuits once they get the evidence before the judge.

MR. FITZPATRICK: Yes, sir. But I --

QUESTION: When they know -- when they think they're going to lose, especially.

MR. FITZPATRICK: Yes, we've all settled cases.

QUESTION: Mr. Fitzpatrick, this -- this litigation involved promotion practices of the city, I take it. What we're dealing --

MR. FITZPATRICK: The original --

QUESTION: Yes, the original action involved hiring.

MR. FITZPATRICK: Let, let -- yes.

QUESTION: Now, who has to be joined in your view in a hiring suit?

MR. FITZPATRICK: In a hiring case. That is a good question. In a hiring case, the -- of course, if a hiring quota or goal is ordered, of course the -- it -- one cannot be certain who the remedy will affect down

the line. It will affect the public at large or the --

QUESTION: So who has to be joined, in your view, in a hiring action?

MR. FITZPATRICK: Who has to be joined -- I would think it would be appropriate to join a defendant class of applicants, of current applicants perhaps, to the city.

The personnel board which administers the examinations continuously gives examinations and maintains a register of eligibles, and it would be easy for the existing parties --

QUESTION: Just people on the eligibility list.

MR. FITZPATRICK: I would think that they would be adequate representatives for the interests of those who might apply to the city of Birmingham, and therefore might be subject to the relief which --

QUESTION: In a class action?

MR. FITZPATRICK: Through a defendant class. Justice O'Connor's question, as I understood it, asked me for a vehicle upon which potential applicants to the city might be bound by a decree and, in my view, a possible vehicle for achieving that goal would be through a defendant class of the persons on the register of eligibility, who would then be adequate

representatives for the potential new hires of the city.

QUESTION: Well, during the period '74-'77, were there any employment suits brought against the city other than this one that involved this department?

MR. FITZPATRICK: Not to my knowledge, Justice Kennedy, although -- let me, if I may, I think it was within the parameter of Justice O'Connor's question, briefly state that the suits which were brought in '74 and '75 were very broad pattern and practice suits, not only against the city of Birmingham, but against the Jefferson County personnel board and some 20 or 25 other municipalities in the Jefferson County area.

It alleged -- this was not a fire department suit. The fire department was just one of many, many departments whose employment practices might have been at issue.

In fact, during that period of 1976 through '79, the suit was primarily concerned with police officer hiring and firefighter hiring. And to the knowledge of the firefighters, the only thing that this suit was about was just a hiring case involving entry-level firefighters.

QUESTION: How many -- how many of the Plaintiffs in this case were represented by counsel

during those years?

MR. FITZPATRICK: During the hearings? The Respondents were not represented at the hearing.

QUESTION: I know. But did they have lawyers or not?

MR. FITZPATRICK: No, sir. The Respondents -- the Respondents only sought legal counsel after they were in fact denied promotions.

QUESTION: Well, who was -- it was said that some of the Respondents were consulting with the city people?

MR. FITZPATRICK: No. Your Honor, the association, the firefighters' association, which is not a collective bargaining agent, was aware of the pendency of the lawsuit --

QUESTION: Well, was there any evidence that any of these individuals, the Respondents, were aware?

MR. FITZPATRICK: No, sir. There is no such evidence. And --

QUESTION: Were these Respondents members of that association?

MR. FITZPATRICK: The Respondents are all members of the association. At least one of the Respondents was not even employed by the city of Birmingham at the time the suits were filed.

The association, though, in our view, is not an adequate representative --

QUESTION: Well, did the association notify its members or anything, call their attention to this --

MR. FITZPATRICK: I don't believe that -- that is not record evidence, but I don't believe the association went out and notified all its members that the litigation was pending and --

QUESTION: Well I -- I understood from your colleagues on the other side that these Respondents were aware of the litigation --

MR. FITZPATRICK: No, sir. Your Honor, the Respondents were not -- the individual Respondents who are before this Court today were not aware of the litigation.

The evidence is that the firefighters' association and the union president had knowledge of the pendency of that litigation which he understood to be a hiring case.

In fact, during the 1979 trial, no fire department promotional examination was attacked. The trial in '79 which concerned promotional practices was primarily concerned with examinations for promotions in other departments.

The -- the trial did involve some promotional

devices, screening devices, that were also employed in the fire department, but the principal focus of that trial was on the validity of certain examinations.

QUESTION: When -- when would it have become clear that the fire department was implicated in the suit?

MR. FITZPATRICK: That fire department promotions were implicated in this suit?

QUESTION: Yes.

MR. FITZPATRICK: It only -- the only -- the first time that any fire department promotions were specifically mentioned was in the consent decree itself.

In fact, the fire chief himself so testified, that he did not know fire -- fire department promotions were implicated in the litigation until a consent decree was entered, and he was given the charge of enforcing it in the fire department. The --

QUESTION: Was any of this in the newspapers?

MR. FITZPATRICK: Apparently there were some newspaper stories about the filing of this litigation. Yes, sir.

QUESTION: You mean this is apparent, you don't think so.

MR. FITZPATRICK: The -- the Petitioners have

cited newspaper articles in their brief, but --

QUESTION: (Inaudible) involved the whole area all around Birmingham, right?

MR. FITZPATRICK: Yes, sir. It involved the greater Jefferson County area.

QUESTION: And yet the newspapers didn't mention it?

MR. FITZPATRICK: No, I didn't say that, Justice Marshall.

QUESTION: But that was my question.

MR. FITZPATRICK: It's my understanding that the Petitioners have cited newspaper articles in their briefs, and I will take their word for it that their briefs are accurate, although I have not gone back and read those old articles.

QUESTION: And that your people can read.

MR. FITZPATRICK: Yes, my firefighters, I believe, can read.

QUESTION: But they don't know anything about it?

MR. FITZPATRICK: Well, we do not believe that a story in the newspaper is an appropriate vehicle upon which to --

QUESTION: I didn't say that. I didn't say that -- you said they didn't know about it.

MR. FITZPATRICK: They said that they did not know about the particular fact that they were looking for promotional goals in the Birmingham fire and rescue service.

QUESTION: But they did know that there was a case pending, which affected the department they were working in.

MR. FITZPATRICK: There was a case pending which challenged employment practices in the Jefferson County area.

QUESTION: Where they work.

MR. FITZPATRICK: Where they work. And they basically thought it was a hiring case, which is where most of the focus was during the mid-1970s.

The -- in our view, the need to carefully police affirmative action plans would be -- would be furthered by allowing suits such as those by Respondents to go forward.

The Court recognized in Fullilove that simply because the Court was approving the set-aside in the context of that case, that it did not preclude further challenges based on specific applications of the set-aside.

And we believe that in the context of this case, the policing of affirmative action plans would be

furthered by allowing suits such as these to be heard, especially under the facts of this case where the city has been following a 50 percent quota with only a 13 percent qualified black applicant pool for promotion.

No consideration was given by the city to the relative qualifications of competing black and white candidates. Race was not a plus factor, it was the only factor. And we believe the merits of the case to be heard in the district court are very strong. The --

QUESTION: Mr. Fitzpatrick, coming back to your earlier answer, that your clients did not know of the fact that promotions were at issue in this litigation. Is that a matter of record or is this just your personal assurance today?

MR. FITZPATRICK: That -- that is my personal assurance today. That matter was not a matter of record. It was not --

QUESTION: But isn't it your legal position, Mr. Fitzpatrick, but even if they knew it wouldn't make any difference, because they didn't have any duty to act unless they were served with process?

MR. FITZPATRICK: Correct. It is the court, in the Mullane, in the Tulsa, and in the other cases which look at adequacy of notice, does not look at what notice was received but rather what notice was given.

In the Tulsa case last term, the Court stated that actual notice is such -- individual notice by mail or such other means as is certain to ensure actual notice.

And the burden to give notice upon known interested parties is on the Petitioners in the context of this case, who are the existing parties to the litigation, who certainly could have given notice to their existing employees.

QUESTION: Well, that's not all you insist upon, not just notice, not just notice that there's this lawsuit pending. You want them joined. I mean, notice that you are hereby going to be bound by the result of this suit, unless -- unless you --

MR. FITZPATRICK: Absolutely, Justice. We believe that the mandatory joinder theory is wrong.

But even if the Court went to that sort of a theory that there was no adequate notice in the context of this case, but that is correct. We reject and we do not believe that the Court need reach the question of whether notice was given here because there was no duty to intervene, and the mandatory intervention theory should not be accepted. I see my light is on.

QUESTION: Thank you, Mr. Fitzpatrick. Mr. Merrill, we'll hear now from you.

ORAL ARGUMENT OF THOMAS W. MERRILL

ON BEHALF OF THE FEDERAL RESPONDENT

MR. MERRILL: Thank you, Mr. Chief Justice, and may it please the Court,

Petitioners maintain that Respondents are bound by a consent decree that was entered in a case in which they were not parties, in which they were not in privy with any party. That proposition is, to say the least, striking.

QUESTION: May I interrupt right out the outset, Mr. Merrill, because I'd be interested in your views.

We use the word "bound" by the decree. In your judgment does that mean the same thing as whether the decree could constitute a defense to a Title VII action?

MR. MERRILL: Justice Stevens, I think that the way in which the issue should properly arise in the lawsuits that Respondents have filed would be framed in terms of the McDonnell Douglas and Burdine standard that this Court has laid out.

The Respondents would have to show -- establish a prima facie case of discrimination, then I assume that the city would impose the decree as a defense.

QUESTION: Correct.

MR. MERRILL: And at that point, the answer to that defense would be that the decree is either unlawful or else that the city is acting outside the terms of the decree and that the decree is no defense --

QUESTION: But that's quite a different issue than whether the outsiders are bound by the decree. They're not affirmatively obligated to do anything as parties to the decree.

MR. MERRILL: No, they're not bound to do anything under the decree, but they are bound in a collateral -- the Petitioners claim is that of collateral estoppel.

QUESTION: They're not bound, they're just -- there's a defense to their lawsuit out there, which is in the fact that the city has relied on a decree.

And I suppose the defense, as one of the other lawyers suggested, is precisely the same whether it's a litigated decree or a consent decree, as long as it's a bona fide judicial decree.

MR. MERRILL: I would agree with that, Justice Stevens.

QUESTION: So we're really not -- and the question really isn't whether they're bound, the question is whether or not they can challenge the decree

in order to anticipate, to defeat this defense.

MR. MERRILL: It's an issue of res judicata or collateral estoppel, if you will, as to whether or not the validity of the decree is something as to which the Respondents are collaterally estopped from attacking.

Now, a litigated decree would be different, I think, in that it would have some stare decisis effect, at least in the Northern District of Alabama. But in either case, whether it's litigated or consent decree, our position would be that there can be -- collateral estoppel cannot be imposed on someone who is not a party or not privy to the case in which the decree was entered.

QUESTION: Mr. Merrill, the federal government supported the entry of the consent decree in this case. Right?

MR. MERRILL: That's correct. We did. And we have not subsequently sought to attack the decree, at least as the decree is written on its face.

QUESTION: So, indeed, it might constitute a valid defense if suit were permitted by the Respondents.

MR. MERRILL: I don't follow your question.

QUESTION: Well, it relates to what Justice Stevens was just asking. Suppose these Respondents are

allowed now to file their suit and be heard, I assume the government might think the defense is valid, that the consent decree provides a valid defense.

MR. MERRILL: The government is obligated by the terms of the decree to defend the decree -- excuse me, defend the decree, and we would not take the position that the decree itself is invalid. I don't think it's open to us to take that position, as signatories to the consent decree.

QUESTION: Who do you think has to be named in a hiring suit?

MR. MERRILL: Well, that raises an important point that I did want to address, Justice O'Connor.

The case has been argued this morning, I think, on an implicit assumption that it's an unqualified good thing to try to get everybody who has any type of interest, however remotely affected, involved in one piece of litigation, and therefore that the relevant choices are this mandatory intervention rule or some kind of mandatory joinder rule.

I think that that assumption is open to very serious question. I would caution the Court against endorsing some kind of rule of even mandatory joinder, let alone mandatory intervention in handling Title VII disputes.

At the outset -- you can think about the possibilities, the contingencies that face someone like -- like the individual Respondents at the outset of a lawsuit of this nature.

It's not clear whether or not the Plaintiffs, the original Plaintiffs that is, will prevail. If they do prevail it's not clear what type of relief will be ordered.

If there's a consent decree, it's not clear that the consent decree is necessarily going to include numerical relief of the nature that it did here. Even if the consent decree contains that type of relief, it's not particularly clear whether any of the Respondents will seek promotions or be eligible for promotions, and it's not clear if they seek promotions whether they'll be promoted or not be promoted.

And finally, even if they're not promoted, it's not clear that they would feel sufficiently aggrieved by that decision to want to file a lawsuit. And I think the Court should be cautious about endorsing any type of rule that sort of forces Title VII cases to consider non-right, if you will, contentions as a necessary requirement of litigating those particular lawsuits.

QUESTION: So what should the rule be? How

would you apply Rule 19 in this context?

MR. MERRILL: Well, I think Rule 19 comes to bear by -- comes into play by its terms. When you reach a point where there are identifiable parties who are -- who have a significant risk that they will be adversely affected by the particular case. At that point in time, then, Rule 19 requires that those parties be joined.

I think -- I think there's an important distinction here between parties who have a cause of action and parties who don't have a cause of action. The Respondents in this particular case at the time of their consent decree did not even have a cause of action, because they had not been denied promotions.

And I think that someone who doesn't even have a cause of action is probably not the type of person as to which there should be some mandatory rule of joinder, let alone mandatory intervention.

And I think that's the basis on which, for example, the Penn Central case can be distinguished. In the Penn Central case you had somebody who not only had a cause of action but who had gone so far as to file a lawsuit.

It was in a different court. And then they sat by while all the other parties went ahead and adjudicated their claims in a different court. That's a

far different situation than what you have here, where the claim is that someone who's bound -- someone who doesn't even have a matured cause of action is bound by a consent decree entered into somebody else's case.

The fundamental point here, and I think it's one that the Petitioners have consistently glossed over, is that given the strong background of due process that suggests that a party cannot be bound to a case in which they're not a party -- a person can't be bound in a case when they're not a party, not privy -- one would expect if there was to be an exception to that that you would find it in a statute of Congress or in one of the federal rules of civil procedure, and provisions, for example, regarding notice --

QUESTION: Mr. Merrill, I thought we'd agreed these parties aren't bound. There's no question of being bound by the decree. It's a question of whether this is a defense to their lawsuit.

MR. MERRILL: Well, I'm using that as a shorthand for whether or not collateral estoppel applies --

QUESTION: But it's quite -- it's quite a different -- I mean, it's a shorthand, but you're mixing up two very fundamentally different concepts.

Because there's no requirement that somebody

get notice if they want -- well, there's a big difference between being bound and just wanting to bring a lawsuit.

MR. MERRILL: Well, if the issue -- technically you're right. The issue is collateral estoppel, and excuse me if I've --

QUESTION: See, and that's part of the confusion with the court of appeals' opinion. They sometimes use the word "bound" and then at the end they ask whether the decree can be used as a defense. And they're very different concepts.

MR. MERRILL: The issue is whetner or not the decree is a defense as to which these Respondents have nothing to say in response.

QUESTION: Do you think it's that big a difference, Mr. Merrill? I mean, if two people are litigating over which of the two of them owns my house, I guess I am not bound by that in the sense that it doesn't make me do anything if it comes out wrong.

But I'd feel pretty bad if I were if I were obliged to live by whatever the outcome is. Don't you think there's a substantial difference between whether I'm bound in the sense that I have to do something or whether I'm just bound in the sense that whatever the Court says is the law as to be. (Inaudible) if I were

you.

MR. MERRILL: I think the issue here is collateral estoppel, and I think the issue is an important one, Justice Scalia.

Let me just say something very quickly about the notice issue, because I tnink the Petitioners' propositlon that somehow the intervene or be bound rule satisfies due process glosses over some very important points.

First of all, this Court has held in Mullane and related cases not that subjective knowledge is required but that reasonable means must be undertaken in order to assure actual knowledge. And no claim can be made that reasonable means in the Mullane sense were undertaken here in order to provide notice to these particular Respondents.

There was publication notice in the newspaper; the publication notice dian't mention the fact that promotions were at issue. It did not mention the fact that there were a numerical -- numerical relief was contemplated by the consent decree.

Furthermore, one would think that under the intervene or be bound rule that the relevant thing that the Respondents would have to have notice of was the fact that if they don't intervene they will -- excuse

me, be subject to their collateral estoppel -- would be subject to a collateral estoppel contention or that they will be unable to attack the terms of the consent decree.

And there was never any suggestion that that type of notice was provided to the individual Respondents in this particular case.

I think it's -- one instructive way to think about this proposed rule, this collateral attack rule, is to compare it to the class action procedures of Rule 23.

Petitioners' argument would in effect transform a class action, Title VII class action, into a double class action. Not only would you have the named and defined class that receives all the procedural protections of Rule 23, but in addition you would have an undefined class with no representative party representing that class, no inquiry into the adequacy of representation, and none of the other protections of notice by Rule 23.

And that class would nevertheless also be subject -- or would be unable in the future, to collaterally attack certain provisions of the case that were entered into. Thank you.

QUESTION: Thank you, Mr. Merrill. Mr. Joffe,

you have three minutes remaining.

REBUTTAL ARGUMENT OF ROBERT D. JOFFE

MR. JOFFE: The notion that this notice was inadequate comes pretty poorly from the mouth of the United States government which drafted the notice.

Mullane and Tulsa do not seem to me to apply here. They deal with the constitutionality of a statute on its face which is intended to apply to all situations, and not with a situation where due process was met in this situation.

There's no question Oklahoma could have provided for due process to be determined on a case by case basis. They instead chose a statute and they chose an inadequate statute.

In Mullane and Tulsa, the parties did not have notice. It's a very different situation than this one --

QUESTION: Yes, but let me ask you a question. Supposing that your opponents wanted to attack this decree as having been fraudulently entered into, that there was a bribe changed hand or something like that, you'd agree there was standing to do that, wouldn't you?

MR. JOFFE: Absolutely. Although I think, Your Honor, they should go back to the consent decree court for that, not filing a separate lawsuit, but

certainly that could be raised.

QUESTION: So it really isn't a question of standing at all or a question of being bound, it's a question of whether it's a good defense, a particular decree.

MR. JOFFE: It's a -- that is a question to the damage action. With respect to prospective relief, it's a somewhat different question, and it's a question whether in their separate Title VII case, as opposed to going back into the decree court seeking to intervene on changed circumstances of fact or law. It's a question of whether in this case they can relitigate that.

There's no question but that they could have intervened in that proceeding, whether their cause of action had arisen or not. They could have --

QUESTION: Maybe it's not just a matter of relitigation. Maybe they have a higher burden. But even if -- you would say that under no circumstances, if there had been no hearing, no matter how wild the decree was, that they couldn't say that this decree violates some standard?

MR. JOFFE: If there had been no hearing and notice, I would agree, they could certainly come in and bring their Title VII --

QUESTION: Well, maybe the fact that there was

a hearing and notice is a defense to their claim rather than one that stops them at the threshold.

MR. JOFFE: It's both a defense to their damage claim and it's a reason why they shouldn't be able to relitigate this issue. They, in effect, waived their rights.

And essentially, they didn't -- they either waived their rights if they didn't appear at that hearing or they appeared at their hearing through the proxy, the BFA, which was fighting affirmative action tooth and nail and made every argument at that hearing that they -- every substantive argument that they've made throughout the course of this litigation. They were not deprived of anything, Your Honor.

As far as whether the denial of intervention was somehow unfair, in NAACP v. New York, this Court affirmed the trial court's denial of information on the basis of a single article in the New York Times, and a 15-day delay.

The delay was m ore -- shorter, the notice far more ephemeral than what sat here. And moreover, they could have, of course, applied for cert to this Court from the Eleventh Circuit's affirmance of the denial of certiorari. They chose not, they chose to gamble on the uncertain state of the law and pursue this other

lawsuit.

The rule which they urge would mean that decrees -- consent decree cases and litigated cases could be attacked in separate proceedings by whoever was affected by them, not matter how much notice they had, how much opportunity they had to be heard. Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Joffe. The case is submitted.

(Whereupon, at 11:05 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:

NO. 87-1614 - JOHN W. MARTIN, ET AL. Petitioners V. ROBERT K. WILKS, ET AL.;
NO. 87-1639 - PERSONNEL BOARD OF JEFFERSON COUNTY, ALABAMA, ET AL., Petitioners V. ROBERT K. WILKS, ET AL.; and
NO. 87-1668 - RICHARD ARRINGTON, JR., ET AL., Petitioners V. ROBERT K. WILKS, ET AL.

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

BY Judy Freilicher

(REPORTER)