

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
THE SUPREME COURT  
OF THE  
UNITED STATES

CAPTION: ELLIS P. GREGORY, JR., AND

ANTHONY P. NUGENT, JR., JUDGES, Petitioners V.

JOHN D. ASHCROFT, GOVERNOR OF MISSOURI

CASE NO: 90-50

PLACE: Washington, D.C.

DATE: March 18, 1991

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SUPREME COURT, U.S.  
WASHINGTON, D.C. 20543

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - - X  
3 ELLIS P. GREGORY, JR., AND :  
4 ANTHONY P. NUGENT, JR., :  
5 JUDGES, :  
6 Petitioners :  
7 v. : No. 90-50  
8 JOHN D. ASHCROFT, GOVERNOR :  
9 OF MISSOURI :  
10 - - - - - X

11 Washington, D.C.

12 Monday, March 18, 1991

13 The above-entitled matter came on for oral  
14 argument before the Supreme Court of the United States at  
15 11:03 a.m.

16 APPEARANCES:

17 JIM. J. SHOEMAKE, ESQ., St. Louis, Missouri, on behalf of  
18 the Petitioners.

19 JAMES. B. DEUTSCH, ESQ., Deputy Attorney General of  
20 Missouri, Jefferson City, Missouri; on behalf of the  
21 Respondent.

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1 PROCEEDINGS

2 (11:03 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 next in No. 90-50, Ellis P. Gregory and Anthony P. Nugent  
5 v. John D. Ashcroft.

6 Spectators are admonished not to talk. The  
7 Court remains in session.

8 Mr. Shoemaker, you may proceed.

9 ORAL ARGUMENT OF JIM J. SHOEMAKE

10 ON BEHALF OF THE PETITIONERS

11 MR. SHOEMAKE: Thank you, Mr. Chief Justice, and  
12 may it please the Court:

13 We are here on a case determining the validity  
14 of a Missouri mandatory retirement provisions -- provision  
15 for State court judges. The issues that we have briefed  
16 are two. One is whether to those judges in Missouri who  
17 are appointed to office, whether or not they are covered  
18 by the protections of the Age Discrimination in Employment  
19 Act. With regard to judges in Missouri who are elected to  
20 office, we have maintained that the mandatory retirement  
21 age for those judges violates the equal protection  
22 guaranteed by the Fourteenth Amendment.

23 The decision below by the Eighth Circuit was  
24 that with regard to the elect -- with regard to the  
25 appointed judges, they were not covered by the Age

1 Discrimination in Employment Act because the act exempts  
2 appointees at the policy-making level, and the court held  
3 that judges in Missouri are policy makers, and hence not  
4 covered by the act.

5 The Eighth Circuit also ruled that there was a  
6 rational basis for the mandatory retirement of all judges,  
7 and hence did not violate the Fourteenth Amendment.

8 QUESTION: The district court -- the court of  
9 appeals accepted the district court's finding that the  
10 judges were not elected officials in Missouri, did it not?

11 MR. SHOEMAKE: Mr. Chief Justice, the Eighth  
12 Circuit accepted that proposition, but I must say in  
13 fairness there was a sentence which indicated if that  
14 issue had been briefed in the Eighth Circuit, the Eighth  
15 Circuit might have disagreed with that finding.

16 QUESTION: Come out differently.

17 MR. SHOEMAKE: But the district court did find  
18 that the appointed judges were not elected to office, they  
19 are appointed to office. And we submit that is the  
20 correct determination. Missouri --

21 QUESTION: Why -- why do you suppose Congress  
22 would have wanted to exclude from the ADEA elected judges  
23 but not appointed judges?

24 MR. SHOEMAKE: Because I don't believe that  
25 Congress wanted to be looking over the shoulder of the

1 voters to determine the motive or (inaudible) intention of  
2 the elected -- the voters as to what motives they may have  
3 had in voting for elected officials, whether those elected  
4 officials were judges or Governors or legislators.

5 QUESTION: Well, now, Missouri selects its  
6 judges pursuant to constitutional provisions in the State  
7 of Missouri?

8 MR. SHOEMAKE: The -- that is correct.

9 QUESTION: State constitutional provisions.

10 MR. SHOEMAKE: That is correct, Justice  
11 O'Connor, but --

12 QUESTION: And you think it's sufficiently clear  
13 that Congress intended to override these State  
14 constitutional provisions without ever making clear that  
15 intent?

16 MR. SHOEMAKE: I think it is clear that the  
17 Congress intended that the ADA be construed broadly and  
18 that the exceptions be narrowly construed. And I think  
19 that when the ADA was enacted there were 30 States  
20 approximately that appointed judges, and that those  
21 Congressmen and those Senators who voted for that ADA were  
22 fully aware that it may cover the judges. There is  
23 nothing in the legislative history of the ADA itself which  
24 indicates whether the Congress intended or didn't intend  
25 to include or exclude the judges.

1           QUESTION: Well, don't you think that when we  
2 are dealing here with a preemption of a State  
3 constitutional provision of this significance to the  
4 State, that we should look for a clear expression of  
5 intent by Congress, not something that just appears never  
6 to have even been considered?

7           MR. SHOEMAKE: I believe, Justice O'Connor,  
8 there has been such clear intent or expression by the  
9 Congress, because when the act was amended in 1974 it was  
10 amended to specifically apply to States and political  
11 subdivisions as employers. And that would be, in our  
12 view, the State of Missouri is an employer hence covered  
13 by the act, and that a judge is an employee and hence  
14 covered by the protections guaranteed by the ADEA.

15           QUESTION: I thought Justice O'Connor's question  
16 was addressed not to whether the State was covered as an  
17 employer, which it obviously is under, certainly we upheld  
18 that in EEOC against Wyoming, but whether the statute, in  
19 view of the proviso, should be found to reach State court  
20 judges.

21           MR. SHOEMAKE: I believe, Your Honor, that it  
22 should be read to reach State court judges. Again I fall  
23 back on the fact that the statute, remedial as it is, was  
24 to be construed broadly. And clearly, in our view, had  
25 Congress deemed it appropriate to exclude judges, as it

1 excluded elected officials and those on the elected  
2 official's personal staff, it could have done so. And it  
3 did not do so. And yes, Mr. Chief Justice, I am  
4 advocating that the act does include those judges even if  
5 in so construing you may be attempting to override a  
6 constitutional provision of the State of Missouri.

7 In Missouri we have two selection processes for  
8 the judges. The supreme court and the court of appeals  
9 and trial judges -- supreme court and court of appeals are  
10 -- are selected pursuant to the Missouri Non-Partisan  
11 Court Plan, as are all judges in the metropolitan area of  
12 St. Louis and Kansas City. Everywhere else in the State  
13 of Missouri the judges are elected. There is a greater  
14 number of judges who is elected -- who are elected than  
15 those who are appointed.

16 QUESTION: Why is that distinction made, do you  
17 think, Mr. Shoemake?

18 MR. SHOEMAKE: The -- the language when the  
19 Missouri Plan was adopted initially applied to only the  
20 supreme court and the appellate judges, and the purpose  
21 was to remove partisan politics from the selection of  
22 judges. And then there was later an amendment to provide  
23 that same process for selection to the City of St. Louis  
24 and Kansas City, then later to St. Louis County, which is  
25 a contiguous county to the City of St. Louis.



1           And there was some -- the suggestion is there  
2 was some resistance in the rural area where people wanted  
3 their judges to be elected and run for election.

4           And on the election process -- I'm getting a  
5 little ahead of myself -- judges who are elected, they run  
6 in primaries just like any other candidate and then they  
7 run in the general election. Judges who are appointed,  
8 supreme court judges for 12 years and the intermediate  
9 levels down to the associate circuit judge for 4 years,  
10 when their terms are up, or when it's time, they don't run  
11 against anybody. In fact, the Missouri constitution  
12 prohibits appointed judges from engaging in politics in  
13 any manner, holding any office, making any contribution,  
14 or supporting any candidate. And the only question on the  
15 ballot is shall Judge so-and-so be retained in office.

16           QUESTION: Well, in order to have another term  
17 he has to get the votes, doesn't he?

18           MR. SHOEMAKE: He has to get the votes, or he  
19 has to be voted out of office. That is correct.

20           QUESTION: I know, but he is out of office if --  
21 I mean, his term is over.

22           MR. SHOEMAKE: His term and over, and --

23           QUESTION: How does he manage to get another  
24 term?

25           MR. SHOEMAKE: If, if he's not voted to be

1 retained, you mean, Your Honor?

2 QUESTION: Well, how does he get another term?

3 His term is over, how does he get --

4 MR. SHOEMAKE: He's on the ballot. He's on the  
5 ballot. Shall Judge so-and-so be retained, yes or no.

6 QUESTION: So in effect the voters who vote to  
7 retain him say yes, he should have another term.

8 MR. SHOEMAKE: That is correct. But it --

9 QUESTION: Why isn't he elected?

10 MR. SHOEMAKE: The reason he is not elected is  
11 the foundation for the Missouri Plan is that -- first of  
12 all, he's not elected when he gets his office. He is  
13 appointed.

14 QUESTION: That's right.

15 MR. SHOEMAKE: A merit selection commission  
16 appoints -- submits three names to the Governor. The  
17 Governor selects one of them.

18 QUESTION: But the Governor can't give him  
19 another term.

20 MR. SHOEMAKE: No, the Governor cannot give him  
21 another term.

22 QUESTION: The electorate has to give him  
23 another term.

24 MR. SHOEMAKE: But the process, we submit, as we  
25 have in our briefs, of retention or nonretention is like a

1 question on the ballot, and not like one for --

2 QUESTION: Well, anyway, that issue isn't here,  
3 I guess.

4 MR. SHOEMAKE: We submit that issue is not here,  
5 although the State has argued that.

6 QUESTION: Mr. Shoemake, are all three of the  
7 judges involved here, have they been retained or has any  
8 of them been appointed?

9 MR. SHOEMAKE: One has --

10 QUESTION: One has just been appointed and not  
11 stood for retention yet.

12 MR. SHOEMAKE: Oh, these judges? Oh, I see.  
13 No, these judges have been retained.

14 QUESTION: They all have? So we don't have  
15 before us a judge who was just been appointed and not yet  
16 retained?

17 MR. SHOEMAKE: That is correct, Your Honor.

18 QUESTION: But the issue would clearly apply to  
19 them in any event?

20 MR. SHOEMAKE: That is correct, Justice Stevens.  
21 But -- in Missouri, under the Missouri Non-Partisan Court  
22 Plan permits effective date, now some -- there was one  
23 judge who was grandfathered in, but from the effective  
24 date, there has never been a judge who has been failed to  
25 be retained in office. There was one judge in Kansas City

1 who was an elected judge, was grandfathered in, and when  
2 it was time for retention he was not retained. But those  
3 who have been appointed, there is not a single incidence  
4 of any of those judges who have not been retained in  
5 office.

6 We submit that to understand and appreciate the  
7 intent of the Congress in enacting the ADEA, it's best to  
8 look at the legislative history and the discussions that  
9 went on in the amendment to title VII of the Civil Rights  
10 Act, which contains the same language and the same  
11 exemptions about elected officials and so forth. In that  
12 it was clear that what the Congress was intending was to  
13 exempt an elected official and that elected official's  
14 team, his personal staff, his legal advisors, those who  
15 made policy for him. In fact the example is such as  
16 Cabinet officers and persons with comparable  
17 responsibilities in talking about policy making.

18 QUESTION: I was intrigued by that theory. That  
19 would mean that if you have at the State level the  
20 equivalent of independent regulatory agencies that we have  
21 at the Federal level, Nuclear Regulatory Commission,  
22 Federal Communications Commissions, and so forth, whose  
23 people are not Cabinet officers. They are not part of the  
24 President's team. The whole theory of it is that they are  
25 supposed to be independent. You assert that those people

1 would not be covered by this exemption, right? They have  
2 to --

3 MR. SHOEMAKE: I -- that's --

4 QUESTION: They have to be not only appointed by  
5 the elected official, but they have to be subject to his  
6 direction and command.

7 MR. SHOEMAKE: They have to be serving that  
8 officer. In fact --

9 QUESTION: Now why, why would they make that  
10 kind of a distinction? That seemed to me very strange.

11 MR. SHOEMAKE: Well, because they wanted that  
12 elected official to be able to have those persons who were  
13 going to serve him and generate the policy that he stands  
14 for, or attempt to, for which he was elected, to be able  
15 to serve him and be exempt from the act. In fact, in the  
16 National League of Cities, while the language is a little  
17 different, the opinion talks about, in construing those  
18 exemptions, talks about -- the language is serving such an  
19 office holder. Those persons who are exempt are exempt  
20 because they are serving such an office holder. We submit  
21 the judges in Missouri aren't serving the appointing  
22 office holder. They are independent judges, and they  
23 remain independent.

24 And the statutory construction, again, is  
25 borrowed time and time again by the courts from the 1972

1 amendments as it relates to title VII, wherein there the  
2 discussion was what kinds of exemptions were to be  
3 included. And there was only one mention -- there is no  
4 mention in the reports itself or themselves about  
5 exempting judges. The only mention is in some Senate,  
6 Senate debate, one time. Senator Irvin from North  
7 Carolina used the word "judge," at that time describing  
8 the Governor, the chief justice, and at the time he was  
9 doing it all judges in North Carolina were elected. So  
10 there was no mention about appointed judges.

11 The judges, we submit, do not fall within the  
12 exemption of being appointees at the policy-making level.  
13 And my emphasis is on level. We think that's an unnatural  
14 construction of words as they are used in the Federal  
15 system by Congress when it refers to those who are  
16 appointees at the policy-making level.

17 QUESTION: Well, Mr. Shoemake, you said a moment  
18 ago that it covers -- the exemption exempts elected  
19 officials and then it goes on to say any person chosen by  
20 such officer to be on such officer's personal staff, and  
21 then it goes on to say or an appointee on the policy-  
22 making level. Now, that must mean something more than  
23 just an appointee on an elected official's staff or you  
24 wouldn't need it.

25 MR. SHOEMAKE: Well, what I said on the elected

1 official's staff, if I limited it to that I misspoke, Mr.  
2 Chief Justice. What I'm talking about is those who are  
3 normally recognized as persons who make policy. And the  
4 example used was such as Cabinet officers and persons with  
5 comparable responsibilities at the local level. Now, I'm  
6 reading from the conference report on the amendment to  
7 title VII but, again, that language has been used in  
8 construing the ADEA which has the precise same exemptions.

9 QUESTION: But you do agree that the phrase  
10 "appointee on the policy-making level" is independent of  
11 the phrase "a person chosen by such officer to be on such  
12 officer's personal staff"?

13 MR. SHOEMAKE: It's disjunctive, so I think it  
14 would be independent of that phrase, yes, Mr. Chief  
15 Justice.  
16 The judges in Missouri, we submit, as the Second  
17 Circuit found in EEOC v. Vermont, may incidentally make  
18 policy, but their basic function is to decide legal  
19 disputes. They may fill in gaps, they may do other  
20 things, but the judges -- and they regulate the bar, pass  
21 rules for the bar and for the courts, the supreme court  
22 does. But their basic function is to resolve legal  
23 matters. And --

24 QUESTION: Well, I know, but I suppose -- is  
25 there still a common law element in Missouri, isn't there?

1 MR. SHOEMAKE: Yes, there is, Justice White.

2 QUESTION: Judges keep developing the common law  
3 in Missouri?

4 MR. SHOEMAKE: They do keep developing the  
5 common law in Missouri.

6 QUESTION: And they have to, they have to decide  
7 what the rule is to decide a case?

8 MR. SHOEMAKE: They do.

9 QUESTION: And you think that is -- that isn't  
10 making any kind of policy?

11 MR. SHOEMAKE: I don't mean to suggest that,  
12 Justice White. There may be some policy connected with --  
13 but before they engage in that, whatever, there has to be  
14 a case or controversy in front of that court. And  
15 whatever the court does, generally, there may be some  
16 exceptions that I am unaware of, there are going to be  
17 certain parameters in which that court operates, maybe in  
18 the context of the constitution or the common law. But  
19 that's where the court is. It has a context in which it  
20 makes those judgments.

21 QUESTION: Well, I assume the Governor of the  
22 State of Missouri has to obey the State constitution and  
23 the common law, too, doesn't he?

24 MR. SHOEMAKE: That is correct.

25 QUESTION: No official is completely



1 unrestrained from certain minimal rudiments of discretion.

2 MR. SHOEMAKE: I don't mean to suggest he is.

3 But again --

4 QUESTION: Well, then I don't see how your  
5 distinction is persuasive.

6 MR. SHOEMAKE: Well, the distinction is the  
7 judges in Missouri don't make policy, for example, that --  
8 the policy will be that we're only going to allow public  
9 service companies to come for rate increases every 3  
10 years. That's going to be the policy we're going to  
11 develop.

12 QUESTION: So you would say that -- I suppose  
13 you have administrative agencies in the State?

14 MR. SHOEMAKE: We do.

15 QUESTION: And they are authorized by the  
16 legislature to issue regulations --

17 MR. SHOEMAKE: Rules and regulations.

18 QUESTION: -- implementing the statute?

19 MR. SHOEMAKE: That is correct.

20 QUESTION: And those people are appointed?

21 MR. SHOEMAKE: Those people are appointed.

22 QUESTION: Therefore unprotected by the AD -- by  
23 the Age Discrimination Act?

24 MR. SHOEMAKE: It would be our view that those  
25 who are the head of those agencies, such as the Public

1 Service Commission who may generate policy, could well be  
2 unprotected.

3 QUESTION: Well, they're members of the agency  
4 that issue the regulations.

5 MR. SHOEMAKE: If their appointments are for a  
6 number of years, 3 years, 4, then I would have to say yes,  
7 that they are unprotected.

8 QUESTION: Although the judges who review their  
9 issuance of the regulations are not?

10 MR. SHOEMAKE: Those judges who are appointed.  
11 Those judges who are appointed to office.

12 QUESTION: Yes, but Mr. Shoemake, it doesn't say  
13 or an appointee who is a policy maker. It says an  
14 appointee on the policy-making level.

15 MR. SHOEMAKE: That is correct.

16 QUESTION: Does that not mean comparable  
17 responsibility or comparable salary or something of that  
18 kind, rather than that the person must be a policy maker  
19 himself or herself?

20 MR. SHOEMAKE: Well, the plain language of what  
21 Congress meant, as we read it, is they meant on the  
22 policy-making level.

23 QUESTION: Right.

24 MR. SHOEMAKE: And --

25 QUESTION: For example in salary way judges are

1 paid at executive lever -- level 2, 3, or 4, I don't know  
2 what it is, but they often have defined judges by the  
3 level of -- for certain purposes is what I'm trying to  
4 say. Just explain why the word "level" isn't critical in  
5 this case.

6 MR. SHOEMAKE: I think that is the critical  
7 word. The word level is what is critical. I think what  
8 we submit the Court must look to is what did the Congress  
9 mean using the word level, not policy maker, but policy-  
10 making level. And again, harkening to the conference  
11 report on the amendments to title VII, and the only  
12 examples that we've had as to what was meant at the  
13 policy-making level, it said such as Cabinet officers and  
14 other comparable responsibilities at the local level.

15 And we submit that in using that, the Federal  
16 Congress, the Congress, intended it to be those that the  
17 Congress generally recognizes as those who reach a level  
18 where they make policy. And that would be, in our  
19 judgment, those such as the example here, the Cabinet, and  
20 not to the judges. There has never -- there is no -- ever  
21 any example or suggestion given that it would be appointed  
22 judges.

23 QUESTION: Did Missouri at one time have an  
24 exemption from tort liability for charitable institutions,  
25 charities?

1 MR. SHOEMAKE: Yes, it did.

2 QUESTION: And it -- does it still have it?

3 MR. SHOEMAKE: It does not -- under certain  
4 circumstances it does, but generally it does not.

5 QUESTION: Was that result changed by the  
6 Supreme Court of Missouri?

7 MR. SHOEMAKE: It was. As was --

8 QUESTION: You wouldn't think that was policy  
9 making?

10 MR. SHOEMAKE: I think that would be -- the  
11 tougher question of whether that's policy making, I'd have  
12 to say it is, but within the context of a matter of a  
13 dispute that comes before it. I don't think they start  
14 out to say our policy is going to be henceforth as a court  
15 that there is no immunity for charitable institutions. I  
16 think there has to be a case or controversy in which they  
17 discuss prior cases, prior precedent. We've just had the  
18 change in Missouri recently from contributory negligence  
19 as a defense to the one of comparative fault.

20 QUESTION: So -- well, you would say that if an  
21 administrative agency in your State is authorized to issue  
22 regulations interpreting a statute and to -- and to  
23 adjudicate cases based on that regulation, those  
24 regulators are not protected, as you said a minute ago?

25 MR. SHOEMAKE: That would say that those who are

1 appointed --

2 QUESTION: Well, what if they, what if the  
3 agency decides well, regulations are fine but we're going  
4 to operate by adjudication. We're going to announce all  
5 of our rules by adjudication, and we're going to follow  
6 our rules that we announce by adjudication. Just stare  
7 decisis. That's going to be the rule.

8 MR. SHOEMAKE: Um-hum.

9 QUESTION: I suppose you would say that those  
10 regulators are protected or unprotected?

11 MR. SHOEMAKE: I would have to say in my mind,  
12 in my example, they're still unprotected.

13 QUESTION: Unprotected?

14 MR. SHOEMAKE: Unprotected.

15 QUESTION: Because they --

16 MR. SHOEMAKE: Because they make that judgment.  
17 That is their policy. They make that judgment that that's  
18 the way this regulates -- regulating body is going to  
19 operate.

20 QUESTION: But common law, the -- when they  
21 announced the rule in the case they were announcing one  
22 that they were going to apply in all future cases.

23 MR. SHOEMAKE: That is correct. But again, the  
24 difference -- if the regulator, the Public Service  
25 Commission in Missouri which regulates, obviously, the

1 public service company, if it says from now on we're just  
2 going to follow the rules and we're not going to enact --  
3 that have already been established, we're not going to  
4 enact new rules, that, in my judgment that's policy.

5 That's a policy decision that they make. And there's no  
6 case or controversy in front of them at the time. It's  
7 just a judgment that they make as a matter of policy,  
8 those who have been appointed to those policy-making  
9 positions by the Governor.

10 If I may, there are judges in Missouri who are  
11 elected. They are the only officials in the State  
12 government of Missouri who have to mandatorily retire at  
13 70 who are in nonphysically demanding jobs, not  
14 legislators, not the Governor, not the librarian, not the  
15 janitor. Only judges have to retire at 70. And we  
16 recognize this Court's pronouncement that age is not a  
17 suspect class, and that if there is a rational basis for  
18 upholding that classification we lose.

19 We submit to the Court that there is no rational  
20 basis for requiring judges to retire and not requiring any  
21 other employee in the State of Missouri to retire.

22 QUESTION: Well, maybe the people who vote for  
23 other officials have a better knowledge of whether they  
24 are doing a good or bad job, and maybe it's a lot harder  
25 for the voter to know whether a judge is doing a good or

1 bad job because it depends upon interpretation of a lot of  
2 dusty old statutes. Isn't that a rational basis? You can  
3 trust the electorate to know when, when an elected  
4 executive or legislative official can't hack it anymore,  
5 but you really can't trust them to know whether a judge is  
6 doing it.

7 MR. SHOEMAKE: I would not -- that was never an  
8 articulated rational basis for Missouri --

9 QUESTION: Does it have to be an articulated  
10 one?

11 MR. SHOEMAKE: I would -- I don't think we can  
12 guess, Justice Scalia, as to what the rational --

13 QUESTION: Oh, I think we have guessed all the  
14 time.

15 MR. SHOEMAKE: -- as to what -- well, Missouri  
16 has articulated in the supreme court case as to what the  
17 rational bases were. In my -- you asked me, in my  
18 experience, having come from a rural area in Missouri, in  
19 many instances there is no more hotly contested election  
20 than for the circuit judgeships that cover three or four  
21 counties, and what that judge has done and not done is  
22 brought to the public's attention by his opponent time and  
23 time and time -- his or her opponent, time and time again.  
24 So I do believe the electorate is fully informed, maybe  
25 more so than most elections as to what the circuit judges

1 who are elected in Missouri are doing.

2 QUESTION: But now, are those circuit judges, do  
3 you contend they are covered by the ADEA?

4 MR. SHOEMAKE: No, I do not, Mr. Chief Justice.  
5 I was moving on to my equal protection argument that to  
6 require those judges, all judges in Missouri, including  
7 the elected judges, to retire at 70 violates the equal  
8 protection guarantees --

9 QUESTION: Yeah, but how about your response to  
10 Justice Scalia's question with respect to the judges who  
11 would be covered by the ADEA, and so -- the appellate  
12 judges in Missouri?

13 MR. SHOEMAKE: Well --

14 QUESTION: Are those elections hotly contested?

15 MR. SHOEMAKE: It seems to me -- no, they're not  
16 contested at all. Those are appointed. They have no  
17 opponent, they are not contested at all. It's just simply  
18 on the ballot shall Judge so-and-so be retained.

19 QUESTION: Yes, but there may be terrific  
20 campaigns going to, on both sides of the issue, should  
21 this fellow be or this lady be retained or not.

22 MR. SHOEMAKE: There are those --

23 QUESTION: There may be a lot of money spent on  
24 both sides of the case.

25 MR. SHOEMAKE: As existed in California, I



1 recognize those cases. But again, those citizens, instead  
2 of being uninformed, it seems to me --

3 QUESTION: Haven't there been some votes, some  
4 numbers of votes against retention on certain people?

5 MR. SHOEMAKE: There have been substantial  
6 votes. My recollection is in -- is in the St. Louis area  
7 where I live that the retentions range all the way from  
8 60-some percent on up. And there is not --

9 QUESTION: Is that in the record?

10 MR. SHOEMAKE: I beg your pardon?

11 QUESTION: Is that in the record?

12 MR. SHOEMAKE: That is not in the record,  
13 Justice Marshall.

14 QUESTION: It's public information though, I  
15 think.

16 MR. SHOEMAKE: It's public in -- I probably  
17 should have.

18 But with regard to the equal protection  
19 argument, we submit there is no rational basis for  
20 requiring only judges, even those who are elected, to  
21 retire, because one of the rational bases stated is that  
22 the Supreme Court in Missouri, when it wrote the O'Neil  
23 opinion in 1976, said we all recognize that 70 is about an  
24 age -- is about the time when physical and mental  
25 deterioration commences.

1           The studies are all contrary to that as far as  
2   mental abilities are concerned. The announcement that it  
3   made for ease in administering a pension plan doesn't  
4   change that pension plan any different than any other  
5   pension plans for those officials in the State of  
6   Missouri. The articulation that it opens up opportunities  
7   for young members of the bar, no different than opening up  
8   opportunities for other members or for other segments of  
9   the population.

10           QUESTION: Well, isn't there something to be  
11   said, though, for public office, high public office  
12   turning over every so often? And with your other high  
13   public officials in Missouri you have regular, you know,  
14   4-year election. With judges you have a much longer term.

15           MR. SHOEMAKE: With the circuit judges it's a 6-  
16   year election in Missouri, for those who are elected.  
17   Those who are retained as circuit judges, it's 6 years.  
18   Associate judges are 4 years. Justice Gregory is an  
19   associate --

20           QUESTION: How about the appellate judges?

21           MR. SHOEMAKE: 8 and 12, Your Honor. 12 years  
22   for, Mr. Chief Justice, for the supreme court.

23           But that, in my view, that same rationale, that  
24   same argument if advanced would be applicable to the  
25   others, the Governors, the legislators, the Senate, the

1 House, the prosecuting attorney.

2 QUESTION: Well, except they are, they have  
3 shorter terms, certainly, than the appellate judges.

4 MR. SHOEMAKE: Shorter terms than the appellate  
5 judges. Yes, they certainly do. If I may, I would like  
6 to reserve --

7 QUESTION: Well, would you say that, would you  
8 say the Age Discrimination Act is unconstitutional in  
9 exempting elected officials?

10 MR. SHOEMAKE: No. I do not think it's  
11 unconstitutional in exempting elected officials.

12 QUESTION: Well, couldn't you argue there is no  
13 rational basis for exempting them?

14 MR. SHOEMAKE: Well, I don't think so, because I  
15 think that --

16 QUESTION: Well, you just did.

17 MR. SHOEMAKE: I don't recall doing it.

18 QUESTION: Well, you -- you said there is no  
19 rational basis for not protecting these elected judges.

20 MR. SHOEMAKE: Under the equal protection under  
21 the Fourteenth Amendment, yes.

22 QUESTION: Yes.

23 MR. SHOEMAKE: The ADA is a specific -- you mean  
24 is it, would I argue it's unconstitutional for the, that  
25 the ADA exempted elected officials?

1 QUESTION: Yeah.

2 MR. SHOEMAKE: I would not argue that.

3 QUESTION: Not even as applied to judges?

4 MR. SHOEMAKE: I would not.

5 Thank you.

6 QUESTION: Thank you, Mr. Shoemake.

7 Mr. Deutsch, we'll hear now from you.

8 ORAL ARGUMENT OF JAMES B. DEUTSCH

9 ON BEHALF OF THE RESPONDENT

10 MR. DEUTSCH: Mr. Chief Justice, and may it  
11 please the Court:

12 This case contains many interesting issues of  
13 statutory construction and legislative history,  
14 constitutional law. I plan to first address, as my  
15 colleague did, the appointed officials' exemption,  
16 although I will then address the elected officials'  
17 exemption, because we do believe it is properly before the  
18 Court, and I do intend to seek the benefit of that  
19 exemption for the State of Missouri, finally concluding  
20 with the constitutional issues, if I have time.

21 If Missouri's Non-Partisan Court Plan judges are  
22 appointed officials, as the petitioners contend, then they  
23 are most certainly appointed officials on the policy-  
24 making level within the meaning of the ADEA and exempt  
25 from the requirements of ADEA by the language of the act.

1 I will tell you that the language of this  
2 statute is not a masterpiece of legislative draftsmanship.  
3 I do not find it to be clear. However, I do find from the  
4 legislative history that there were at least two  
5 motivating purposes in Congress' mind, and the first of  
6 those was federalism. The first principle that Senator  
7 Irvin had in mind in introducing this amendment was that  
8 he did not want to infringe upon the prerogatives of the  
9 State in the selection of their own government officials,  
10 their own form of government.

11 The second principle was one that has already  
12 been announced, and that is that the Congress realized  
13 that some officials in government had their own cleansing  
14 agent. The ADEA seeks to prohibit the use of age as an  
15 across-the-board method for taking people out of public as  
16 well as private employment.

17 However Congress did understand that, for  
18 instance, elected officials stand before the electorate.  
19 They have their own problems to deal with. They do not  
20 need coverage of the ADEA, and indeed it is unwise, for  
21 many of the reasons that were earlier stated, that they  
22 should do so. The voters are the ones that decide whether  
23 elected officials have done their job and whether they are  
24 competent.

25 These two principles, I think, when read into

1 the statute for an understanding, although still not  
2 creating crystal clarity, I think makes it clear that the  
3 Congress chose broad language. The Congress said  
4 appointed officials on the policy-making level, in  
5 addition to three other exemptions. They chose broad  
6 language, they chose to favor federalism. It is our  
7 argument to this Court that the Court should indulge them  
8 that favoritism towards the Federal system and agree that  
9 all State judges were intended to be exempted by this  
10 particular provision.

11 The -- there appears additionally nothing in the  
12 language of the statute or within the legislative history  
13 which excludes judges, and this goes to the question of a  
14 clear statement. While this may be an unusual case,  
15 perhaps, for the application of a clear statement because  
16 the Congress did say on the one hand it applies, and then  
17 turned around and said but it doesn't apply to certain  
18 people, we do believe that given the interests of  
19 federalism which were certainly in the minds of the Eighth  
20 Circuit court of appeals, clearly in the mind of the First  
21 Circuit court of appeals in EEOC v. Massachusetts, that  
22 the principles of federalism that the Congress had in mind  
23 indicates that any mention of the judiciary in the  
24 language of a statute which otherwise did not deal with  
25 specific officials was probably intentional. It was

1 intended to be broad, intended to be broadly read.

2           Additionally, we would suggest that the  
3 contention that judges are not policy makers be  
4 categorically rejected by this Court. Judges most  
5 certainly are policy makers, at least in the State of  
6 Missouri, which is a common law State. The list of  
7 decisions from our courts that have outlined and defined  
8 the common law and set the policy for the State of  
9 Missouri is endless.

10           And more than that, I think that the rather  
11 disparaging nature of describing judges and their work to  
12 be law in fact computers that simply apply known  
13 principles of law to established fact, is something that  
14 only happens in the easy cases which usually get handled  
15 by two lawyers and their clients, and doesn't even make it  
16 before a court. Courts deal with cases. They deal with  
17 disputes. They deal with real problems. It is  
18 inappropriate to describe a judge on any basis but that of  
19 being a policy maker.

20           I would note that the petitioners, of course --

21           QUESTION: (Inaudible) normally call them law  
22 makers.

23           MR. DEUTSCH: That was one of the terms that  
24 were ascribed to them, and I think that the understanding  
25 that should be made if in fact the Congress had the -- any

1 knowledge --

2 QUESTION: You would describe them as making the  
3 common law, wouldn't you?

4 MR. DEUTSCH: Certainly. They make law, just as  
5 the legislature makes law in --

6 QUESTION: You don't find it under some rock?

7 MR. DEUTSCH: Well, we sometimes wonder, Your  
8 Honor.

9 (Laughter.)

10 MR. DEUTSCH: But it -- in fact, no, the courts  
11 in our State draw upon a long history of common law and  
12 order to shape the common law. In a couple of the  
13 instances that my colleague mentioned, abolishment of  
14 sovereign immunity switching to a comparative fault system  
15 after years of urging our legislature to do so to no  
16 avail, our courts do in fact make policy.

17 But I think that the important thing to  
18 understand is that the petitioners do not seem to describe  
19 adequately the concept of policy making in the State  
20 government context. Everybody in State government, I hope  
21 everyone in the Federal Government, is confined to certain  
22 parameters.

23 The legislature does make the laws, but the  
24 legislature makes the laws consistent with the principles  
25 of the constitutions, both State and Federal. The



1 executive does implement the laws and he certainly has  
2 great policy making potential there, but he has to stay  
3 within the intent of statutes that are enacted by the  
4 legislature and also within the Constitution, and it is  
5 the court's job to make sure that both of the other two  
6 branches stay within their authority.

7           The concept of policy making that I get from the  
8 choice of language by the Congress is an understanding  
9 that policy in the government sense is made by all three  
10 branches of government. It is made together. It sets the  
11 public policy for the State, like Missouri, for all of the  
12 other States. It is not a single well-defined monolithic  
13 duty of one branch. It is something that applies to all  
14 three branches.

15           QUESTION: Mr. Deutsch, you know, we have to  
16 make the best we can of the language that Congress wrote  
17 for us. You say there are three exceptions set forth  
18 there, right? One is any person elected to public office,  
19 right?

20           MR. DEUTSCH: Yes, Your Honor.

21           QUESTION: And then any person chosen by such  
22 officer to be on such officer's personal staff. I guess  
23 four.

24           MR. DEUTSCH: There are four separate  
25 exemptions.

1 QUESTION: Or an appointee on the policy level.  
2 And you say that goes all by itself.

3 MR. DEUTSCH: Well, it -- from the way that the  
4 statute was formed, it clearly was by itself. I agree  
5 that its placement in a list of provisions is somewhat  
6 unusual, but again, it --

7 QUESTION: Well, not if it's disjunctive.

8 MR. DEUTSCH: It is disjunctive, and that was  
9 one of the things pointed out by the First Circuit in EEOC  
10 v. Massachusetts, is that it's perhaps not the most easily  
11 understood statute to be read, but clearly the House added  
12 that last provision, really the third exemption, in a  
13 conference. It was not added by the Senate. All of the  
14 legislative history that has been utilized contained only  
15 the three exemptions for elected officials, for immediate  
16 advisors and personal staff. And all of the debates  
17 concerning that naturally do seem to approach, perhaps,  
18 that particular form, that formulation of an elected  
19 official, his staff, and his Cabinet.

20 We argue, however, that the Congress chose,  
21 together, House and Senate, the appointed official on the  
22 policy-making level. It is broad. It should be  
23 interpreted broadly enough to include officials like  
24 judges. It is not judges, perhaps, that are the only  
25 officials who would fit within there, but clearly judges

1 are policy-making officials and can fit within that  
2 exemption, and in the interest of federalism should.

3 QUESTION: Just refresh my recollection. They  
4 are appointees of the Governor, are they not? Or are they  
5 appointees --

6 MR. DEUTSCH: The Missouri Plan judges are  
7 appointees of the Governor according to the Missouri Plan.

8 QUESTION: Who is an elected official.

9 MR. DEUTSCH: He is an elected official. That's  
10 correct. And that is why I believe that the structure  
11 that it takes on -- we have discussed only judges because  
12 that is what is at issue here.

13 However, I would, I would suggest to the Court  
14 that this exemption does cover the example that was made  
15 earlier, the equivalent of the ICC on the local level is  
16 our Public Service Commission. These are people who are  
17 appointed by the Governor, and yes, they are not  
18 answerable to him. They are not supposed to be. They are  
19 supposed to be independent. They are clearly policy  
20 makers. They are appointed for terms which are taken  
21 beyond any individual Governor.

22 However I think that that is the nature of the  
23 position that was had in mind by the Congress when they  
24 enacted that position. And clearly, when you consider  
25 then Missouri Plan judges, they fit within that same type

1 of a classification of an appointee made by the Governor  
2 for a term which then he will cease to have any control  
3 over.

4 QUESTION: In the last clause of the first  
5 sentence of the statute, do you interpret the phrase "with  
6 respect to the exercise of the constitutional or legal  
7 powers of the office" to modify just immediate advisor?

8 MR. DEUTSCH: I think that that was the  
9 intention. And I think what they're referring there to is  
10 the Cabinet official exemption, the illustration that was  
11 so often used in the Senate that it is still in the  
12 conference report. That it was intended to limit the  
13 reach down through the chain of command, especially with  
14 regard to the elected official, and using the Governor as  
15 an example, to be an immediate advisor under that  
16 particular exemption. I do not believe that it is  
17 necessarily read in conjunction with the separate  
18 exemption for appointed judges.

19 QUESTION: Your interpretation would be more  
20 sustainable if there was a comma after the word "level," I  
21 take it?

22 MR. DEUTSCH: I again will apologize for the  
23 lack of clarity of the statute, Your Honor.

24 QUESTION: Well, sometimes the elimination of a  
25 comma is designed to aid us in the construction, and in

1 this case it would indicate that the final clause applies  
2 and modifies both appointee and advisor.

3 MR. DEUTSCH: That is an available reading.  
4 That is the reading, I think, that the petitioners would  
5 place upon the statute. I would again say that if the  
6 rule to be applied, however, in an area dealing with the  
7 Federal and State balance, which this is, requires some  
8 degree of confidence that that is the correct  
9 interpretation, that degree of confidence is not present,  
10 and in fact the Court should, if it errs at all in  
11 interpretation, err in favor of the Federal-State balance  
12 and its maintenance.

13 QUESTION: We should try not to err at all. I  
14 think we're going to try to get it just right.

15 (Laughter.)

16 MR. DEUTSCH: I know you do, Your Honor.  
17 Additionally we would suggest that all judges under the  
18 Missouri Non-Partisan Court Plan, elected and appointed,  
19 as they have been described, are exempt from the  
20 requirements of ADEA because they are elected officials,  
21 elected by the qualified voters of the State of Missouri.  
22 There are 342 judges in the State of Missouri under  
23 article V of our constitution, the Missouri Plan. 201 of  
24 these are elected. These are the judges, circuit and  
25 associate circuit, in primarily the rural areas of the

1 State. They do run in partisan elections.  
2 40 percent of our judges, 141, are under the  
3 Missouri Plan. They are appointed by the Governor. They  
4 are -- by a process where a commission appoints or selects  
5 three of the most capable applicants who apply for a  
6 position, the Governor may choose one. But the  
7 constitution requires that this individual run in the next  
8 general election after 12 months of service on the bench  
9 in a retention election. We, under our law, under an  
10 interpretation placed on that since 1973, find under State  
11 law that is an elective office. It has not lost its  
12 nature as an elective office by virtue of the change in  
13 the selection process.

14 QUESTION: The problem is the word "elected to  
15 office." Isn't that where you get into trouble? He isn't  
16 to it. He was appointed to it, and the election goes to  
17 retention.

18 MR. DEUTSCH: That's correct, and that was -- in  
19 a short footnote, the disposition made of it by the U.S.  
20 district court was that these are not elected to office.  
21 These judges are appointed to office and then elected. I  
22 would suggest that that is an entirely too crabbed an  
23 interpretation of the provision. It makes really very  
24 little sense. What the court would seem to be saying,  
25 then, is that Judge Makanie, who at one time was in this

1 case, is also an appointed judge. Judge -- or excuse me,  
2 Governor Hearn appointed him to office and then he later  
3 ran for the vacancy. Most of our judges are appointed by  
4 the Governor because of the movement within the judiciary  
5 through promotions and retirements, and most of the  
6 officials would always be appointed judges if this is the  
7 case.

8 QUESTION: But the -- but even these judges who  
9 are appointed initially, their terms expire and in order  
10 to have a subsequent term they have to be voted on.

11 MR. DEUTSCH: That's correct. They are  
12 answerable to the voters. And I think this is probably  
13 the crucial element. To finish up the answer to my  
14 question, I believe that the proper construction to be  
15 placed upon the elected officials' exemption is that it  
16 should be elected to an elective office. The fact that an  
17 office is appointed, you will never answer to the voters  
18 if it is an appointed office. However, if you do answer  
19 to the voters, I believe the proper construction of that  
20 term is that it is an elective office, and the fact that  
21 you may be appointed to it is irrelevant to the nature of  
22 the office, and that is in fact what our State law seems  
23 to hold.

24 QUESTION: Why would it -- why would the State  
25 -- why would your State have an occasion to decide that

1 question?

2 MR. DEUTSCH: We had a request for an attorney  
3 general's opinion back in 1973.

4 QUESTION: Why? Why?

5 MR. DEUTSCH: Pardon me?

6 QUESTION: Why? Why? What -- with --

7 MR. DEUTSCH: Because the -- our constitution  
8 prohibits a member of the general assembly from succeeding  
9 to an appointed --

10 QUESTION: I see.

11 MR. DEUTSCH: -- office for which he raised the  
12 emoluments, and that occurred. We ruled, however, that  
13 the legislator may be appointed to office because this is  
14 an elective office under State law. So our law in the  
15 State, which we respectfully urge that deference be given  
16 to, does make this an elective office.

17 And as I was beginning to get back to your  
18 point, Justice White, the thing to understand about the  
19 Missouri system is that it is essentially a bit of a  
20 bargain between the members of the judiciary and the  
21 public. The members of the public want the highest  
22 caliber, highest quality judiciary they can find. We have  
23 found in our State that elections often do not provide the  
24 highest caliber lawyers, the highest caliber officials  
25 that we are looking for. We have found that appointment



1 works to that end. However, what we have done is create a  
2 very tough selection process, very hard to get in.  
3 Certainly political credentials will not always serve you  
4 well.

5 And we have granted essentially super-  
6 incumbency. The judge who is appointed serves an  
7 enormously long time, particularly on the court of  
8 appeals. 12 years for our court of appeals judges, 6  
9 years for our circuit judges. They are given the benefit  
10 of super-incumbency because they run against no opponent.  
11 They run for retention. They run against themselves. It  
12 is true that no one has ever not been retained. That's, I  
13 think, a matter of pride in the State of Missouri, because  
14 we do take pride in our judiciary.

15 But at the end of the term there is a price to  
16 be paid. And that is the price that the voters of  
17 Missouri in 1970 enacted overwhelmingly, and I think based  
18 upon experience in the State of Missouri, that a mandatory  
19 retirement age guarantees that the benefits of this super-  
20 incumbency will not carry on forever, that it will end,  
21 and that the benefits of being able to move new people  
22 into the system, into the judiciary, will be obtained  
23 through an orderly attrition created by mandatory  
24 retirement.

25 QUESTION: May I ask you a question about the

1 policy-making point, going back to the earlier argument?

2 MR. DEUTSCH: Certainly.

3 QUESTION: I understand your argument about  
4 changing sovereign immunity and major changes in the law  
5 that are worked by the supreme court of the State. But  
6 the average trial judge, most of these 141 judges are not  
7 members of the supreme court and do not independently  
8 change the policy on sovereign immunity. How do you --  
9 how do you describe the average trial judge as being a  
10 policy maker?

11 MR. DEUTSCH: I think any criminal defendant  
12 that has ever stood in front of one of our trial judges  
13 for sentencing probably regards him as a policy maker. I  
14 think that is probably one example of where, if there were  
15 a policy-making function and you had to figure out what  
16 was for the good of the community, what the common and  
17 accepted principles of penology would have to say about  
18 the sentence you were about to mete out, all of the things  
19 that go into a determination of an exercise --

20 QUESTION: Well supposing -- I don't know, maybe  
21 you don't have something like our sentencing guidelines in  
22 the Federal system. They were rather specific sentences  
23 required to be imposed. Is that the only kind of policy  
24 the -- I mean, is there any other area in which you say  
25 the trial judge makes policy other than sentencing?

1 MR. DEUTSCH: Well, of course they participate  
2 in the policy-making judgments for the judicial branch  
3 through their budget, and so forth. But I would note  
4 also, Your Honor, that in the policy-making exemption it  
5 not only says policy-making level, which is an  
6 institutional rather than functional approach, but I don't  
7 find anything in the legislative history or the statute  
8 that says that you make policy all the time, or you make  
9 it half the time, or you make it once in a while. I think  
10 that an understanding of --

11 QUESTION: What is the lowest level of  
12 jurisdiction that the judges covered in this category  
13 have? Do you have municipal court judges?

14 MR. DEUTSCH: Associate circuit judge.  
15 Municipal judges are excluded from the Plan.

16 QUESTION: Associate circuit. What sort of  
17 jurisdiction do they have? What kind of policy do they  
18 make?

19 MR. DEUTSCH: They have, I believe it's a  
20 \$15,000 dollar limit.

21 QUESTION: Do they have criminal court  
22 jurisdiction?

23 MR. DEUTSCH: They have criminal court  
24 jurisdiction. They do a lot of the DWI's. They sentence  
25 a lot of the defendants. Additionally in our State --

1 QUESTION: Felony? Do they have felony  
2 jurisdiction?

3 MR. DEUTSCH: Yes -- well, particularly because  
4 in our State depending upon the circuit and its caseload  
5 the presiding judge may appoint an associate circuit judge  
6 to sit as a circuit judge. That happens quite frequently,  
7 particularly in the rural areas of the State, because  
8 although in a circuit there may be only one circuit judge  
9 for several counties, each county is constitutionally  
10 entitled to one associate circuit judge, and that is their  
11 judge. He is the highest ranking judicial official in  
12 that county most of the time.

13 QUESTION: And it is a full time job for them?

14 MR. DEUTSCH: It certainly is. And it is  
15 prohibited to practice law while holding it.

16 QUESTION: Mr. Deutsch, with respect to the  
17 associate circuit judges, they have \$15,000 civil  
18 jurisdiction? Is that right?

19 MR. DEUTSCH: I believe that's the number. It,  
20 they keep raising it.

21 QUESTION: Well, within that jurisdiction they  
22 could be asked to recognize a new common law cause of  
23 action, couldn't they?

24 MR. DEUTSCH: Oh, certainly. Certainly. They  
25 have --

1 QUESTION: And if requested they would have the  
2 option to do so, subject to appeal, wouldn't they?

3 MR. DEUTSCH: That's correct. And I think  
4 that's another thing that has been brought up in those  
5 decisions such as EEOC v. Vermont, that judges can always  
6 be appealed. Well, judges can only be appealed if the  
7 lawyers take it upon themselves to do it. I think that is  
8 unlike the executive branch in many regards, and most  
9 particularly, not everybody in the executive branch is  
10 appointed by the Governor and has to run for retention  
11 election or run in a partisan election.

12 These judges at every level are real judges.  
13 They do have the power, the judicial power of the State of  
14 Missouri. We regard them as important. We regard them as  
15 State officials of some magnitude. And we believe that  
16 the Congress indicated, in its use of terms in the  
17 appointed official exemption, that it understood that and  
18 put them into a group of appointed officials in the  
19 policy-making level who were to be exempt from the ADEA.

20 Finally I will just touch briefly upon the  
21 constitutional question, the equal protection matter. I  
22 don't think that the Court needs to take a great deal of  
23 time to struggle with the Cleburne case. I think that  
24 case is clearly understandable. In Cleburne the situation  
25 there presented no rational basis upon which to sustain

1 the law at issue, and in this case I believe that we have.  
2 And I would point out that there are several rational  
3 bases.

4 But for purposes of the case let me just suggest  
5 that the most important of those rational bases is the  
6 availability of the resources that this orderly attrition  
7 creates for our chief justice to make the work of the  
8 judiciary go forward, the fact that we get to move, by  
9 that attrition, younger members of the profession into our  
10 legal -- into our judiciary, and most importantly the fact  
11 that we are able to correct --

12 QUESTION: On that argument I guess you could  
13 justify a 50-year retirement age, couldn't you?

14 MR. DEUTSCH: I think we probably could. I  
15 don't see where we would want to.

16 QUESTION: 35? How about --

17 MR. DEUTSCH: Most of the judges --

18 QUESTION: You could justify a 35-year  
19 retirement.

20 MR. DEUTSCH: I don't think so, Your Honor.

21 QUESTION: Why not? You'd move them along a  
22 little faster.

23 (Laughter.)

24 MR. DEUTSCH: Well, that might be a little too  
25 fast. Most of --

1 QUESTION: Well, you certainly could say that  
2 judges could only serve one term.

3 MR. DEUTSCH: We have -- term limitation is one  
4 of the fears that we have that come out of this case if  
5 the petitioners are agreed to. We kind of like the terms  
6 that our judges have now. They are nice and long, and  
7 they have that super-incumbency that helps them out a  
8 great deal so they're not always out campaigning and  
9 raising money and --

10 QUESTION: But you could say judges, whether  
11 they are elected or appointed, can only serve one term.

12 MR. DEUTSCH: We could -- we could do that  
13 constitutionally, and I don't think that the ADEA would  
14 certainly prohibit it. We already have a term limitation  
15 on our Governor of two terms, and --

16 QUESTION: Because that would not be  
17 discrimination on account of age.

18 MR. DEUTSCH: I would hope not.

19 QUESTION: Right.

20 MR. DEUTSCH: To conclude with what I was saying  
21 before, the main feature that I think that comes out of  
22 the Missouri Plan, at least in the last 20 years since the  
23 mandatory retirement age has been in effect, is the fact  
24 that we have done a very good job, I think, of being able  
25 to promote more women, more minorities, into the

1       judiciary, a place where it was lacking in the past. We  
2       have had under this very defendant, the first supreme  
3       court, female supreme court justice in the State's  
4       history, the first appellate court female member in the  
5       State's history, many minority and female members of the  
6       courts throughout the State --

7                QUESTION: If your 70-year-old age limit causes  
8       this turnover, you've had that a long time. Why did it  
9       take so long to get a female judge?

10               MR. DEUTSCH: I believe that perhaps some of the  
11       predecessors were not trying hard enough, Your Honor.

12               QUESTION: Mr. Deutsch, was the -- do you know  
13       whether the ADEA was based exclusively on the Commerce  
14       Clause, or was it also based on the Fourteenth Amendment?

15               MR. DEUTSCH: Well, the only thing that jumps  
16       out at me is that in the statement of purposes it says  
17       that a finding that the age discrimination in employment  
18       is a burden on interstate commerce. I don't find anything  
19       that is that clear of a statement concerning the  
20       Fourteenth Amendment, and therefore I would conclude, as  
21       some courts have, that the Commerce Clause is the basis  
22       upon which the ADEA was enacted.

23               I think that perhaps with the disposition of  
24       this Court's rulings between National League of Cities and  
25       the Garcia case, I have noticed a decline in the number of



1 times that that finding has been necessary to be made. I  
2 think it was probably an issue when it was thought  
3 important to avoid the reach of National League of Cities  
4 in order to not have the ADEA declared unconstitutional.  
5 But since 1983, in particular with EEOC v. Wyoming, it  
6 does not seem to be a very necessary feature to declare it  
7 to be under the Fourteenth Amendment at this time.

8 In conclusion, then, Your Honors, I would  
9 suggest that Missouri and the Missouri Plan are a model  
10 for appellate and trial court merit judicial selection.  
11 It has been widely emulated. It is something that we  
12 cannot for the life of us see why the Federal Government  
13 should want to become involved in. We do not see one word  
14 having been spoken by Congress indicating an intent to  
15 become in the selection --

16 QUESTION: Can we decide this case in your favor  
17 without saying that the Missouri Plan is great?

18 (Laughter.)

19 MR. DEUTSCH: I would prefer, of course, that  
20 you say that, Your Honor, but I think we would accept that  
21 conclusion without those precise terms.

22 If there are no further questions, thank you.

23 QUESTION: Thank you, Mr. Deutsch.

24 Mr. Shoemake, do you have rebuttal? You have 2  
25 minutes remaining.

1 REBUTTAL ARGUMENT OF JIM J. SHOEMAKE

2 ON BEHALF OF THE PETITIONERS

3 MR. SHOEMAKE: Thank you, Mr. Chief Justice.

4 With regard to the question of whether or not the  
5 appointed judges when they stand for retention are elected  
6 to office, the Missouri constitution provides that, except  
7 as otherwise provided in this subchapter, all candidates  
8 for elective office shall be nominated at a primary  
9 election. And these appointed judges do not do that.  
10 They do not run in a primary election. That is the  
11 constitutional requirement. All candidates for elective  
12 office shall be nominated at primary --

13 QUESTION: How is that significant in  
14 determining what Congress meant, though?

15 MR. SHOEMAKE: I think it's significant in that  
16 -- it's not -- it goes to the issue of whether or not  
17 these appointed judges are elective and hence exempt from  
18 the coverage under the ADEA.

19 QUESTION: I mean, it shows they don't fall into  
20 sort of one paradigm for the selection of people to run  
21 for office, but that's as far as it goes.

22 MR. SHOEMAKE: Well, Justice Souter, I submit it  
23 goes a little farther in that it shows that those who have  
24 -- how they're dressed as elected officials, these  
25 appointed judges do not wear that clothing. They are

1 different. They are retained in office.

2 With regard to the interpretation, finally, that  
3 Congress did not exclude or include judges, that is true.  
4 What the Congress did was to say that the statute shall be  
5 construed broadly, and that any exemptions shall be  
6 construed narrowly.

7 And finally, the --

8 QUESTION: Where is that?

9 MR. SHOEMAKE: That's in the conference report  
10 relating to --

11 QUESTION: Oh. The conference committee said  
12 that. I thought --

13 MR. SHOEMAKE: No, it is not in the statute,  
14 Justice Scalia. And finally, the Age Discrimination Act  
15 in its introductory remarks talks about the -- the  
16 arbitrary discrimination on age. That's what it's  
17 designed to rectify. And we submit that these judges in  
18 Missouri are being arbitrarily discriminated against  
19 simply because they are 70 years of age.

20 No further questions. Thank you very much.

21 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
22 Shoemake.

23 The case is submitted.

24 (Whereupon, at 11:58 a.m., the case in the  
25 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:*

#90-50 - ELLIS P. GREGORY, JR. AND ANTHONY P. NUGENT, JR., JUDGES, Petitioners  
JOHN D. ASHCROFT, GOVERNOR OF MISSOURI

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

BY

*Jaycee Hantel*

(REPORTER)