

# The Burger Court Opinion Writing Database

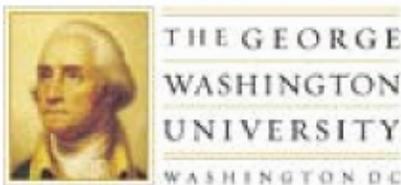
## *Turner v. Fouche*

396 U.S. 346 (1970)

Paul J. Wahlbeck, George Washington University

James F. Spriggs, II, Washington University

Forrest Maltzman, George Washington University



Supreme Court of the United States  
Washington, D. C. 20543

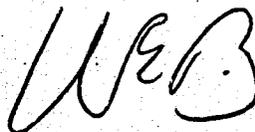
CHAMBERS OF  
THE CHIEF JUSTICE

January 7, 1970

Re: No. 23 - Turner v. Fouche

Dear Potter:

I had some doubt whether the "freeholder" issue was before us. Subject to further persuasion your opinion makes a good case that the issue is and hence I wish to join you.



W. E. B.

Mr. Justice Stewart

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

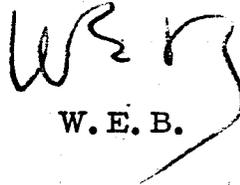
CHAMBERS OF  
THE CHIEF JUSTICE

January 15, 1970

Re: No. 23 - Turner v. Fouche

Dear Potter:

I reaffirm my concurrence of 1/7/70.

  
W. E. B.

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HUGO L. BLACK

January 14, 1970

Dear Potter:

Re: No. 23 - Turner et al v. Fouche, et al.

I agree.

Sincerely,

*Hugo*  
Hugo

Mr. Justice Stewart

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

January eighth  
1970

Dear Potter:

Re: No. 23 -- Turner v. Fouche

Please note I join your  
opinion.

William O. Douglas

Mr. Justice Stewart

January 8, 1970

Re: No. 23 - Calvin Turner v. W. W. Fouche  
No. 30 - Willie Carter v. Jury Commission  
of Greene County

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Dear Potter:

I am glad to join your excellent opinions in both of these cases, but have one suggestion with respect to Carter.

It seems to me that perhaps the strongest prop for the petitioners' position in Carter is Louisiana v. United States (see especially the language at 380 U. S. at 150), and that it might be well to strengthen the treatment which you have given the Louisiana case on page 16 of your opinion by including a footnote along the following lines:

These considerations distinguish this case from Louisiana v. United States, 380 U. S. 145, where we held invalid a provision of the Louisiana Constitution investing state voting registrars with an unbridled discretion that had been abused to accomplish the disfranchisement of Negroes. The provision, which required a prospective voter to interpret a passage of the State or Federal Constitution to the satisfaction of the registrar, was found by the District Court to have been adopted for the purpose of depriving Louisiana Negroes of their right to vote. 380 U. S., at 151, aff'g 225 F. Supp. 353, 356, 363-381. Further, the District Court in the Louisiana case found, in view of the "vote-abridging purpose" of the interpretation test and the proof of its pervasive misapplication in 21

parishes, that its "vices cannot be cured by an injunction enjoining its unfair application." 225 F. Supp., at 391-392, aff'd, 380 U.S., at 150. See also Davis v. Schnell, 81 F. Supp. 872, 876-880, aff'd per curiam, 336 U.S. 933. The District Court in this case quite manifestly concluded that injunctive relief could be effective in curbing the discriminatory practices, and, in view of the flexibility remaining in that Court to grant further relief if necessary, we cannot say that the conclusion was unwarranted.

I should think this could be done by some modification of footnotes 41 and 42 of your opinion.

Sincerely,

JMH

Mr. Justice Stewart

January 14, 1970

Re: No. 23 - Turner v. Fouche  
No. 30 - Carter v. Jury Commission of  
Greene County

Dear Potter:

This is to let you know that I am glad to join  
your recirculated opinions in both of these cases.

Sincerely,

J. M. H.

Mr. Justice Stewart

CC: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

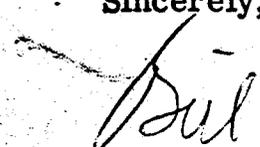
January 12, 1970

RE: No. 23 - Turner v. Fouche

Dear Potter:

I agree with your opinion in the above  
case.

Sincerely,

  
W. J. B. Jr.

Mr. Justice Stewart

cc: The Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

Discrimination Cases

Turner v. Fouche, No. 23 (Georgia)  
Carter v. Jury Commission, No. 30 (Alabama)

Turner seems fine.

The result and reasoning in Carter also seem ok as far as they go. But one problem does remain. Justice Stewart does not deny that the Alabama statute is quite broad (even if not constitutionally overbroad) and provides ample opportunity for racial discrimination. He approves the finding of the district court that the statute has in fact been used for such discrimination. And he recognizes that "federal courts are not incompetent to fashion detailed and stringent injunctive relief" to remedy discrimination. It seems to me that the opinion should devote a paragraph or so to an elaboration of the kind of relief a federal court can give in this kind of case to prevent further discriminatory application of a broad statute.

The relief given by the district court seems to me rather limited. The court in effect simply required that the Jury Commission of Greene County comply with the law of Alabama (which is not discriminatory on its face) and the Constitution (which prevents discriminatory application). The court also required the Commission to file periodical reports disclosing the racial composition of jury panels. Unfortunately appellants have not devoted much attention to the kind of relief they wanted in the event the statute was not declared unconstitutional; they directed their fire at the statute itself. However, ~~in such cases appropriate relief is not~~ suggests since this is the first civil case testing jury composition, some general discussion of relief seems appropriate. It could be pointed out that one form of relief would be a requirement of a written statement of nonconclusory reasons for the exclusion of each particular Negro otherwise qualified, or

the jury commission might be required to draw up a list of objective factors requiring exclusion, and the commission could be allowed to depart from that list to exclude a Negro in a particular case only where the commission stated in writing its reasons for excluding him. A fertile imagination could probably devise other forms of relief.

A discussion of relief would be of little value in a concurring opinion since it is dictum. But it may be desirable to urge Justice Stewart to put some such discussion in his opinion, preferably at page 16.

\* \* \* \* \*

*An argument*

~~A strong~~ argument can be made, I think, for simply overturning the statute in Alabama, though one not without problems. In *Louisiana v. U.S.*, 380 U.S. 145 (1965) (Black, J.) the Court overturned a Louisiana requirement that applicants to vote be able to discourse on the federal & state constitutions. The statute was found to have vested uncontrollable discretion in voting registrars w/o adequate standards & to have been discriminatorily applied in practice; there was also some evidence that the statute had been passed for a discriminatory purpose, but it is not clear that the Court really put much weight on this factor. It can be argued that where a statute is very broad & has been discriminatorily applied for a considerable period of time it should be simply invalidated. *Louisiana v. U.S.* provides fairly good support for such a proposition. Such a holding would leave in effect similar statutes in other states which have not been discriminatorily applied. Thus to overturn Alabama's jury selection statute would not necessarily require overturning similar statutes in other states. The main difficulty with this approach in this case is that on this record it can be said only that the statute has been misapplied only in Greene County; it is not easy to argue that a state statute should be overturned in toto where, so far as the record shows, it has been discriminatorily applied.

discrimination in that particular county. Thus reliance on discriminatory application as a ground for invalidating a statute (a la La. v. U.S.) does not seem attractive absent a showing of wide discrimination. And I take it the record does not show such discrimination here.

It may be that Justice Harlan will urge Justice Stewart to give attention to the significance of La. v. U.S. in this context, or so from a talk with one of his clerks.

I recommend that you join Justice Stewart's opinion, but urge he be a bit more expansive in discussing possible forms of relief.

RMC

*I don't think the argument for overturning the statute is at all convincing. Tho I suppose an additional paragraph of the nature Richard suggests would help ensure that the district judge gets the message that he must compel a fair administration of the jury selection procedure, I think that message is already clear in the opinion as written. Thus I'd simply join.*

TR

To: The Chief Justice  
Mr. Justice Black  
Mr. Justice Douglas  
Mr. Justice Harlan  
✓ Mr. Justice Brennan  
Mr. Justice White  
~~Mr. Justice Fortas~~  
Mr. Justice Marshall

3

SUPREME COURT OF THE UNITED STATES

From: Stewart, J.

Circulated: JAN 6 1970

No. 23.—OCTOBER TERM, 1969

Recirculated: \_\_\_\_\_

Calvin Turner et al.,  
Appellants,  
v.  
W. W. Fouche et al. } On appeal from the United  
States District Court for the  
Southern District of Georgia.

[January —, 1970]

MR. JUSTICE STEWART delivered the opinion of the Court.

This case, a companion to *Carter v. Jury Comm'n of Greene County*, ante, p. —, involves a challenge to the constitutionality of the system used in many counties of Georgia to select juries and school boards. The basic statutory scheme at issue is this. The county board of education consists of five freeholders.<sup>1</sup> It is selected by the grand jury,<sup>2</sup> which in turn is drawn from a jury list selected by the six-member county jury commission.<sup>3</sup> The commissioners are appointed by the judge of the state superior court for the circuit in which the county is located.<sup>4</sup>

<sup>1</sup> Ga. Const., Art. VIII, § V, ¶ I, Ga. Code Ann. § 2-6801 (1948). At the oral argument we were advised that under Georgia law a "freeholder" is any person who owns real estate.

<sup>2</sup> Ga. Const., Art. VIII, § V, ¶ I, Ga. Code Ann. § 2-6801 (1948). See also Ga. Code Ann. § 32-902 (1969).

<sup>3</sup> Ga. Code Ann. §§ 59-101, 106 (1965 and Supp. 1968).

<sup>4</sup> Ga. Code Ann. § 59-101 (1965). Prior to 1966 the superior court judges were elected by all the voters in the State, but now they are elected by the voters of the circuits over which they have jurisdiction. See Ga. Const., Art. VI, § III, ¶ II, Ga. Code Ann. § 2-3802 (Supp. 1968); *Stokes v. Fortson*, 234 F. Supp. 575.

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

To: The Chief Justice  
Mr. Justice Black  
Mr. Justice Douglas  
Mr. Justice Harlan  
Mr. Justice Brennan  
Mr. Justice White  
~~Mr. Justice Fortas~~  
Mr. Justice Marshall

6

From: Stewart, J.

SUPREME COURT OF THE UNITED STATES

Circulated: \_\_\_\_\_

No. 23.—OCTOBER TERM, 1969

Recirculated: JAN 9 1970

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January 14, 1970

Re: No. 23 - Turner v. Fouche

Dear Potter:

Please join me,

Sincerely,

L.R.S.

Mr. Justice Stewart

U.S. Supreme Court

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

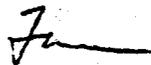
January 8, 1970

Re. No. 23 - Turner v. Fouche

Dear Potter:

Please join me.

Sincerely,

  
T.M.

Mr. Justice Stewart

cc: The Conference