Supreme Court of the United States

OCTOBER TERM, 1970

In the Matter of:

Docket No. 46

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ERNEST PERKINS, et al. :
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Appellants, :
:
v. :
:
L. S. MATTHEWS, MAYOR OF CITY OF CANTON :
:
Appellees :
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- - - - - - - - - - - - - - - - x

Place Washington, D. C.

Date October 20, 1970

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C O N T E N T S

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

ERNEST PERKINS et al.,

Appellants,

v. No. 46

L. S. MATTHEWS, MAYOR OF CITY OF CANTON

Appellees.

Washington, D. C.,
Tuesday, October 20, 1970.

The above-entitled matter came on for argument at 1:10 o'clock p. m.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HENRY BLACKMUN, Associate Justice

APPEARANCES:

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Jackson, Mississippi,
Counsel for Appellants.

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114 W. Center Street
Canton, Mississippi 39046
Counsel for Appellees

PROCEEDINGS

MR. CHIEF JUSTICE BURGER: The next case on for argument is Perkins against Matthews.

Mr. Derfner, you may proceed whenever you are ready.

ARGUMENT OF ARMAND DERFNER, ESQ.

ON BEHALF OF APPELLANTS

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

This is an appeal under Section 5 of the Voting Rights Act of 1965 in the three-judge court in the Southern District of Mississippi, the fourth such appeal in three terms of Court. The first three having been decided by this Court, reversing the lower court in the case of Allen v. State Board of Elections.

I believe the question on the merits here is quite simple and I plan to devote but a small portion of the argument demonstrating that the Court below was wrong on all three of the questions it faced.

The vital question in this case is the question of relief, and that question goes to the heart of whether Section 5 of the Voting Rights Act of 1965 is to be permitted to occupy the critical place the Congress intended for it in 1965 and re-affirmed it in the strongest possible terms when it extended the Act in 1970.

To advert very briefly to the fact the City of Canton in Mississippi for its municipal elections in 1969, adopted three

changes in the procedure that governed the prior municipal election in 1965. They went from individual ward elections to at-large elections in a town in which there are two wards that are very heavily black. They moved the polling places, in one case from the town square to an old jail, and, in another case, from the middle of a black neighborhood--a heavily black ward--to a point just adjacent to a newly annexed white neighborhood; and, third, they extended the boundaries of the town in such a way as to add several hundred net-additional white residents. That is, several hundred more white residents than black residents.

Q Which were the black wards, Mr. Derfner?

A The black wards, Mr. Justice Blackman, are 3 and 4, and my Brief gives the--I believe the record, too, gives the registration figures for all the wards.

All these changes are familiar ones; they are all changes of the type that have been submitted by other jurisdictions to the Attorney-General, as can be shown by looking at page 309 of the House hearings. They are all changes of the type that Congress mentioned many, many times in the debates of 1969 and 70 on the extension. The best example of that, perhaps, is Congressman McCulloch, who was perhaps the leading minority Member in the House involved both in the 1965 Act and the 1970 extension. He listed each of these three kinds of changes as types that were covered by the Voting--by Section 5.

Judge Nixon, a single judge, on the basis of the boundary extension alone, granted an injunction against having the election.

The case then went forward and was decided by the three-judge court, which held, without quite saying ever--without saying, actually, that any of these changes was not covered by Section 5; it went into the motives of Section 5, which this Court has conclusively held are to be decided only by the Attorney-General or by the District of Columbia Court, and pronounced these changes did not violate Section 5.

Q Now, Mr. Derfner, do you determine anywhere the good faith of the changes made? I take it you do.

A Yes, of course we do. What I am saying, however, is that that is not a question to be decided in this case. This Court, in the Allen case made it clear, and I think Justice Harlan asked that precise question there. But that is not a question we have to decide now, or have to prove. All we have to prove is that there was a change and then there is an adequate procedure set up by Section 5 to determine what the good faith or lack thereof was.

Q But if it has the effect--it has the effect of altering the environs invidiously in these balances, then you don't ever get to the question of motive, you don't need to.

A That is right. In fact, it doesn't even have to alter these lines invidiously; all it has to do is alter these

lines and at that point Congress says, "That is a matter you cannot take up any place but with the Attorney-General of the United States or in the United States District Court for the District of Columbia". That ends the matter in a Section 5 case. The court below had only to decide, as Judge Nixon said when he granted the temporary restraining order: "I have to decide: Was there a change? The answer is 'Yes'. Was it submitted? The answer is 'No'. At that point the matter is taken out of my hands and the election cannot go forward on this basis."

Q Well, what I meant by using the term "invidiously" is the question never arises anywhere unless someone thinks it is an invidious--

A Certainly, we wouldn't be suing on meaningless cases.

Q Am I correct in my assumption the three-judge court did not cite Allen?

A I believe they did not cite it. They were certainly aware of it. It--that having come from--three of those cases having come from that same court.

So, I say that the--the merits are--are an easy question.

The final question is, what is the relief to be given in this case, and, on a very simple plane, that is an easy question, too. The very simple plane says: there must be a new

election. And we maintain there must be a new election and that there cannot be any question about that. The law is clear in election cases--in cases such as Hamer v. Cambeth in the 5th Circuit; or the United States v. Barber County. Cases in the District Court. Cases such as Padnott v. Amos in that example--that, if you--if you assert your remedies in timely fashion in a voting case, particularly in a 15th Amendment case, but certainly equally well in a 14th Amendment case, such as property tax cases, or, more recently, apportionment cases. Then, if it develops after the election has been held--you did not get the relief and the election is held--if it develops thereafter that you were entitled to have an injunction, then you were entitled to have the election set aside.

I think this Court--

Q Have we done that in reapportionment cases?

A I am not certain that this Court has done that. This Court has certainly indicated that could be done, and lower courts have done it. I know the 5th Circuit has done it on a case coming from Monroe County, Mississippi.

Q Well, this Court has refused to do it in Allen.

A This Court has refused to do it in--in Allen, if you are talking about this case, this Court said specifically that these Section 5 questions,coverage questions, involve complex issues of first impression, issues subject to rational disagreement. The state enactments were not so clearly subject to

Section 5, and so forth. Therefore, we give only prospective effect to our decision.

I think that was a clear indication, as clear--perhaps as clear an indication as the explicit language in the tax cases, that thence forward jurisdictions were to be on notice that if they did not submit, the proper remedy was a new election.

And that is a traditional--as I say--basically it has come to be a traditional equitable remedy in election cases, and, I think that the ordinary rule there would be that there should be a new election unless there is special circumstances. There were special circumstances in Allen, as there often are when--when a court, and this Court especially, decides a case involving a whole new body of law.

There are no special circumstances in this case and there is no reason that the city of Canton has advanced, or could advance for why it should not be governed by the general rule.

Q What are the terms for the alderman here?

A The terms are four years. They were to have begun on July--in July of 1969. They will close in July of '73. The election in this case, did take place in October--the primaries and the general election, in October, 1969.

The basic question, and this is the--

Q How can the--this is a practical matter--how can you have, if you had a new election, how can you compel

these people who refuse to have their property used as polling places, to have their property used as polling places?

A As--

Q (Continuing) --It is private property.

A --as to that particular--

Q As long as you are arguing that fact, I think--

A Right. But--but, a couple of them were public places. I think two of them--at least one of them was in a court house. Another one was also in a public place.

I certainly admit that there would, in some cases, have to be an impossibility exception indicating that there might have to be a change. And if--if that were so, if the city could come forward and show that it were totally impossible, not simply impractical or inadvisable, but impossible to hold an election in a certain place, or impossible to do a certain thing then they could submit that to the Attorney-General, get a quick--get a quick approval and put that change into effect. I would limit that to the very barest minimum,--

Q Now you are--

A --an impossibility case.

Q (Continuing) --Well--now you have--you have three--there are three--there are three factors here--

A That is right.

Q (Continuing) --on which you can play. One is the changing of the polling places,--

A Correct.

Q (Continuing) --one is the changing to an at-large election,--

A Correct.

Q (Continuing) --of the four who had previously been elected by wards, and third is the annexation--

A That is correct.

Q (Continuing) --of territory and its people to the city, and, in the new election, these people who have been annexed to the city would not be allowed to vote?

A That is precisely the difficult question facing this Court and that is precisely the answer I give you.

Q That they would not be allowed to vote.

A That they would not be allowed to vote. In other words, we say that the new election must take place immediately or within 30 or 60 days. As much--only as much time as is required to prepare ballots and do the things that are necessary for an election, get out notices and so forth, and that that election must be conducted under the rules that applied at the--under the valid rules that applied at the time the election should have taken place.

Q And with respect to the second one I mentioned, there should be an at-large--there should be a ward election, even though that violates the State law?

A That is correct.

And if I may just take a--take a few moments, I will explain precisely why I take that position.

The short answer why that position must be taken is if any other position is taken there will be no Section 5 in the Act; Section 5 will--will have become almost totally meaningless. The only change it will have resulted in is--a significant change, yes, shifting the burden of proof in some of these cases.

Q Yes, but at least as good as the declaratory intentions, wouldn't it?

A At least as good, and no better. And if the declaratory judgment does not give us a new election.

Quite frankly, I think--in this case, what we have is the advantage of a Congress that, in 1969 and 1970, debated extensively through several hundred pages of the Congressional Record, and at least twelve to fifteen hundred pages of hearings and reports, what should happen to the Voting Rights Act of 1965. I think it is a fair statement that the bulk of that debate, aside from questions such as--involving new questions, such as the general banning of illiteracy tests, and the 18-year-old vote, and the absent--residence and absentee provision, the bulk of the argument dealt with Section 5.

And the debate is replete with--with the discussion over Section 5. Basically, the history is quite clear: a bill was introduced which, I believe the record will show, had

Administration backing; the Justice Department testified for it. A bill was introduced which would have abolished the pre-clearance procedures of Section 5. This bill was supported in critical testimony by the Attorney-General, and, especially by the Deputy Assistant Attorney-General, David Norman. His testimony appears at pages 500 and following, of the Senate hearings.

At those hearings, both the Attorney-General and Mr. Norman testified exclusively that Secti--that there was no need for Section 5 because, in fact, all Section 5 did was to provide the following remedies, explicitedly stated by Mr. Norman:

Section 5 provides only the remedy that if you win a Section 5 case then the jurisdiction that did not submit the matter to the Attorney-General or the District of Columbia Court must then submit it.

The congressional debates and the outcome of what happened in Congress is as clear a refutation of that--of that position as is possible to take.

And--if I might just--at this point, discuss very briefly, the legislative history. And I might say that much of this is not specifically cited in the Brief.

The--there were numerous, numerous statements in Congress dealing with the importance of Section 5. There was no report from the Senate Judiciary Committee or from any sub-committee, because the Bill had been submitted, the Extension

Bill had been submitted under a rule requiring a report--or requiring to be reported out by April 1. There was no time for a report. There was, however, a Joint Statement signed by 10 Senators who constituted a majority of the 17. This report is in the Congressional Record and is at pages 2756 and following.

It is a lengthly report, discusses Section 5 in great detail and has three italicized sentences throughout the whole report, each of which italicized sentences, refers to Section 5.

As an example: "This Section--"

It is on page 2756.

--"This Section, in effect, freezes election procedures in the covered areas unless the changes can be shown to be non-discriminatory."

There are other even more explicit statements.

Representative Corman, in discussing the differences between the two Bills, said: "The key point is whether or not Federal power can effectively stop the States from changing their voting laws for discriminatory purposes. That is the only issue."

Best of all, Congressman McCulloch made--put in a nutshell what the importance of Section 5 was and how it had to work. There is a lot of discussion about whether there had been a great deal of compliance or a small degree of compliance here. There had been--there had been at that time some 400

enactments or changes submitted to the Justice Department.

Congressman McCulloch said--it is on page 12136:

"The pre-clearance procedure" -- and this is critical--says: --"serves psychologically to control the poliferation of discriminatory laws and practices, because each change must first be federally reviewed. Thus, Section 5 serves to prevent discrimination before it starts."

That psychological effect--the idea of creating an incentive to jurisdictions to comply, was repeatedly stated. Senator Kennedy said it, Congressman Ryan said it, Senator Bayh said it, Senator Tydings said it. If the Court wishes, I can supply these--these citations. But it is combed through the hearings and combed through the debates on the Floor.

I submit that--that there is no conceivable way to carry out that effect, that is, to create that incentive and to make it strong, unless Section 5 carries a--an advantage for obeying it and a disadvantage for disobeying it.

And I think it is clear, and I think Congress certainly meant this to be the case, that if, all you do if you lose a case is go submit it to the Attorney-General, you have not suffered a disadvantage and there is no conceivable--there is no conceivable incentive created to submit laws in the future.

It is clear that, in this situation, Congress meant Section 5 to be as effective as possible.

Senator Hart made it very plain. He said: 'We do

not have enough successes around here to be wasteful of them. The condition of this country argues very strongly that when we manage to develop an instrument effective to enable us to deliver on promises of long-standing, we had better not dilute it."

The question is a remedy, it is inseparable from the question of the meaning of the statute. Congress meant Section 5 to carry with it a remedy that would make the--the hopes of Congress in passing Section 5 fully effective. The only possible remedy is a remedy that says: if you do not submit, you do not have a valid law.

But--

Q But what do you say to the Court's refusal to do what you say must be done--with which I happen to agree with you in Allen--but if the Court refused to do it, why do say that that shouldn't apply here?

A Because in Allen we dealt, as I say, with--

Q You mean this is the first interpretation--

A This is the first interpretation.The Court specifically said "complex issues of first impression". In this case it is not a question of first impression and not complex issues. The Act has been in effect now. This is the--

Q The order is post-Allen?

A This is post-Allen. The case arose post-Allen. The election took place post-Allen.

Q Do you mean it should only have prospective effect? Is that it?

A I think it would be fair for this Court to say that--I think--yes, I think that is what the Court did say in Allen, and I think what it was saying is that no elections that take place--that took place before the decision in Allen can now be overturned. And I think in fact it--the general rule in elections would--would indicate that you cannot overturn any elections that have taken place in the past.

I think, by the way, that would not indicate that you can't challenge changes that have been made in the past.

Q Mr. Derfner, if the '65 election had been held as the '62 law required, would you be here?

A I would be here on the other two changes. I certainly would. The '65 election was not held as the '62 law required--

Q I know it was not. That apparently was in violation of the '62 law's requirement, wasn't it?

A The record here doesn't show--yes, it is in violation. The record here doesn't show why they held the '65 election--

Q The three-judge-court's opinion says it doesn't show why.

A But we--I know that is said in the opinion of the three-judge court, and I--

Q Then you know why it was they didn't follow the '62 law?

A We are not told why it was and we were never told in the record.

Q Doe--

A Frankly,--

Q --Doesn't your case in part depend on they're not having complied with the '62 law, in '65?

A No. I think their degree of compliance or not with the law is a matter for the District Court in the District of Columbia to take up, or the Attorney-General to take up on the question of motive.

I know that in 1969 they are going to put the election a different way from 1965. It is up to them to show why they want to change it or why they did what they did in '65.

Q But--but if there were new elections, I understand you, you would want it held as the 196--under the pattern that was followed in--

A Yes, I would.

Q --1965, even though that pattern was a violation of the '62 law--

A Yes, I would want that election--

Q --and repeated in the '65 Civil Rights law?

A --I would want that election frozen unless they could--they could justify it as was done in U. S. v. Louisiana,

and as is the traditional doctrine in voting cases. If you violate a law in the past, that law is frozen. At least in 15th Amendment cases, and Section 5 is--goes to the very limits of the 15th Amendment and is intended to carry with it all the possible force of the 15th Amendment.

Q And you say it is well-settled that these--that the other two factors do come under the statute?

A I think it is--

Q --that is, change in polling places?

A --very well established, both from administrative factors and from legislative history. There are any number of citations that I can you--I can give the Court those if this Court likes, in which polling places and boundary extensions were mentioned as being the kind of things that come within Section 5.

Q Does the record show whether these polling places were changed--there were some change at least in the polling places every single election?

A The Complaint states and the Answer, I think, admits that the polling places, true, for the 1965 election, were the same they had been for the previous 3 or 4 elections.

Q And that the first change, the first time--

A The first general municipal election change. There had been a bond issue election the previous year, I believe, at which there were some changed and some not.

Q What were the changes made after the '65 Civil Rights Act, after Section 5 became law? What were the changes made here after the '65 Federal Act became law?

A You mean the changes after November 1, '64? Which is what--

Q Well,--

A --Section 5 talks about?

Q Yes. What were they?

A Ah,--

Q You said to me earlier that there were two changes anyway, so you would still be here--

A Right.

Q --even if they did--

A The change from ward election to at-large is one, and you have mentioned that, Justice Brennan.

Q Yes.

A The other changes are the change in the polling places--

Q And how--that was made--what, by statute or regulation?

A Just by city--by the Election Commissioner saying, "These will be the polling places.".

Q And what about the other--

A And the other change is the boundary expansion.

Q And how was that done?

A And those were made by the city in--through Chancery Court degree, but without appeal.

Q Under some--what--under what State statute?

A Under a State statute allowing cities to expand by going to Chancery Court.

Q I gather your argument is, even if--even--that in any event, in either of those changes,--

A If--

Q --there is a requirement of either the Attorney-General approval or District of Columbia District Court approval, right?

A Quite so. And on--on the change--

Q And if you are right about that, you prevail whatever the difficulty that--arising?

A Right. All I need is one of the three, and then the question becomes, as I say, one of relief.

I would like to direct the Court's attention to some specific material which--

Q Mr. Derfner, what do these changes in polling places amount to--how many places were there in each ward? Just one?

A There are four wards in the city of Canton; there is one polling place in each ward. There are four aldermen--

Q But there isn't any subdivision in the precinct--

A No, there is not.

Q Oh.

A Wards 1 and 2 are heavily white and basically they--there is not much complaint about those changes. Wards 3 and 4 are heavily black and that is where the polling places were changed; in one case to an old jail and in the other case moved from the middle of the black neighborhood to an area right adjacent to a newly annexed white neighborhood.

Q And they were not moved at all?

A They were not.

Q Your argument is that the law is invalid because Mississippi did not get the consent of the Attorney-General to pass it?

A Quite so. And under Section 5 I would say that failure to get the consent--

Q And second, Mississippi did not come to the District of Columbia to try to get a judgment?

A That is right, Your Honor.

And I would say that failing to do those things, is as fatal to the law as failure to get the Governor's signature on a bill. It is an integral part--Section 5 makes these procedures an integral part of the validity of any enactment or any change that a state sub--covered state subdivision--

Q But that doesn't refer to the other States?

A Pardon me, Your Honor?

Q The law doesn't refer to the other States that

you are talking about?

A No, as Your Honor has made quite plain in two previous decisions, it applies to the States covered under the formula, which happens to include your State, I am afraid.

I would like to refer specifically to the colloquy between Mr. Norman and Senator Bayh in the--in the Senate Hearings.

The--the critical portion is on page 520 of the Senate hearings--

Q Do you have it in the Appellant briefs?

A This is not in the brief, I am afraid.

And basically, Mr. Norman at that point, was saying--had just said:

"All you win if you win a Section 5 case is that the city or state or what have you, has to go submit the law to the Attorney-General."

Senator Bayh said--he was talking about--"It is an easy case to prove. It would be a more difficult case to prove actual discrimination."

Mr. Norman said: "In the example that you gave, if indeed a court would enter an order based on my proof that we objected"--and he has objected to the enactment--"that is all the proof that would be put in. That would be an easier burden of proof than proving discrimination. That is correct. But I don't think a court would do that."

There it is clear that Mr. Norman is talking about a court not being willing to give any relief beyond requiring submission.

Senator Bayh says: "Is it necessary for me to read the words of Section 5 to take issue with our distinguished witness as to whether the court would be violating the words and the intent of Section 5 if it had the course that you suggested?"

Mr. Norman said: "No, if we went to court and filed a paper and said we objected to this and they had threatened to use it anyway, please enjoin them from using it, it is not inconceivable to me that a court would say 'That was right, why did you object, what was wrong with it?', talking about requiring this thing to be submitted."

Senator Bayh says: "But the law says whether this court makes the inquiry or not, if that ruling or regulation or change has not been submitted to you on its face it is invalid. Now that is what it says right here in the words of Section 5. I won't bother to prolong the hearing by reading that, but that is what it says."

I think the position--the lines are quite clearly drawn and they were quite clearly drawn in the debates over amending--over extending the Act. The Justice Department took the position that the only relief to be allowed was requiring submission.

The Senate and the House quite clearly understood

that that would gut the Act, and they quite clearly rejected that position. Now I think it takes--it takes no great difficulty to see that if the only relief to be gained is requiring submission to the Attorney-General, if the only thing that the Appellants in this case can gain by spending three or four thousand dollars and how many hours on a lawsuit, is when they win two years later, to have the city submit its changes, there aren't going to be any private suits. The Justice Department's indicated there aren't going to be any Justice Department suits for simple violation of Section 5.

I think Congress recognized all those things.

I might add there were a number of other references in the debate, references to the Hadnott v. Amos case, and to a more recent case filed by the Justice Department called United States against Democratic Executive Committee of Wilcox County, in which--

Q What is the basis for your argument or perhaps you would argue, as to why the change in boundaries come within the coverage of the Voting Rights Act? Certainly Allen did not embrace any such cha--or requirement as that?

A Allen did it by implication, because--

Q Because the Act is to be construed very broadly,--

A Right.

Q --but it did not hit the specific practice.

A No, but it did hit the--it--it did say that

diluting a person's vote or affecting the strength of his vote is covered by changing in that case from ward to at-large, or beat to at-large. It seems to me clear, for example, that drawing in the boundaries to cut out black votes would be covered. And I think the Allen case very readily reads and has been circumstrued by both Congress and the administrators to mean that if you add X number of white voters and therefore dilute the effectiveness of any given voter, especially a black voter who is already in the city, that you have affected his right to vote and you have denied his vote under Section 5, in the meaning of Section 5.

Q Would the election--it may be that Section 5, as you say covers this case and maybe not, but even if it does, would it--would the outcome of the election have been different?

A Yes, quite clearly. The election results, both primary and general election are not in the record because the elections took place after the case was closed but the figures are not in dispute and it is quite clear that blacks would have won because they got more votes in both Wards 3 and 4.

Q Well, all right,--

A And that--

Q --but how about just from the--I mean, you are talking about the annexation part.

A It is hard to tell.

Q Well, there were only 96--a net gain of 96--

A No, I think these figures are wrong. I think--

Q Well, you just challenge the figures in the District Court?

A Yes, I did. The District Court said that at the time the annexations were--

Q Well, what are we going to pick up, your figures or theirs?

A I think you should take the figures that can be gained from the record. And the exhibits at the very back of the Appendix show how many people were actually counted there by the--by the city's ennumerator. They had a man go out--Mr. Smith who was a witness at the trial--go out and count houses and count people, and, based on that you can figure out exactly how many people were there.

The District Court made it quite clear it was talking about how many people had been brought in at the time of annexation, not how many people would be affected at the time of the election. And I think the time of the election is the critical point.

Q Yes, but if all of the--if all of the whites who lived in the next area registered,--

A Um-huh.

Q --and all the blacks registered,--

A You would have a net of approximately 250 or more extra whites.

Q That is just flatly contrary to what the District Court said.

A That is true. But it is not flatly contrary to what the record says.

Q Mr. Derfner, would that have made a difference in the election?

A It is--that itself might not have made a difference, would not have made a difference, because the overa--without the--except for the ward--

Q Then without these--you say 250--without these 250 white votes,--

A The general margin in the general election was some 800 votes for most of the offices, and some were less than that in the primary election. If you take together the annexations and the moving of the polling places--and I think, by the way, if you take a look at the turnout in Ward 3, you will see that it is significantly below the turnout in the other wards. Ward 4 is also below.

If you take the moving of the polling places plus the annexation, I think you will find that there is enough of the probability that a change would have taken place, so that this Court should--should--a new election would be fair, it would be equitable, because we are not talking about a situation in which a change in the results was a pipedream. We are talking about--and remember, in some cases, as in Dell against South-

well, you don't need any effect on the results. We are talking though about a situation in which the results could well have been changed.

Q Yes, but in Allen--in Allen I thought the Court made clear that even though there might be a violation of Section 5, perhaps you don't always order new elections.

A Frankly, Your Honor, if--if--when I had been here in Allen and when Mr. Minton, who is on my left, had been here in Allen, and if we had thought that--that the Court meant that to apply beyond the Allen case, we would not have brought any more Section 5 cases. There wouldn't be any more Section 5. It is just not worth anything if it doesn't mean a new election.

I would like to--

Q You mean it doesn't mean anything prospectively?

A Pardon me, Your Honor?

Q You mean it doesn't mean anything prospectively?

A With the short life of the Act, it certainly makes--does not mean enough to make a difference. At the time we brought these cases, the Act was due to expire in a year and now it has been extended for five years. There will be one more municipal election under these terms.

Frankly, a totally prospective ruling just doesn't have the value that Congress meant it to have.

Q Mr. Derfner, you have exhausted your time, now.

A Yes.

Q Well, if the Attorney-General had consented to this law being passed by the State of Mississippi, would it have been valid?

A If he had consented when?

Q If he--if it had been submitted to the Attorney-General and he had said that it could be passed, would it have been a valid law?

A You mean before the election?

Q Certainly it would have. Well,--I take it back. It would have been valid under Section 5. We still would attack it under the 14th and 15th Amendments.

Q If all that had to be done to make Mississippi pass this law was to have the Attorney-General say you can pass it--

A Under Section 5?

Q Yes.

ARGUMENT OF ROBERT L. GOZA, ESQ.

ON BEHALF OF APPELLEES

MR. GOZA: Mr. Justice Burger, may it please the Court. The Appellees are not here to challenge the wisdom of the Congress in enacting the 1965 Voting Rights Act or the decisions of this Court in upholding its constitutionality generally, and specifically the constitutionality of Section 5.

We are here to defend the actions of the City of Canton which are under attack by the Appellants, and the attack

is threefold.

First, upon the annexation.

Second, upon the polling place changes.

And, third, upon the elections at-large.

Now to clarify a question that Mr. Justice White asked about the net change in the number of potential voters because of the annexations, perhaps we were in error but it was my understanding that the three-judge court sat as not only the trial of the fact, but the--to make the decisions in regard to the law at the hearing in the lower court.

That court found that there was a net gain of 94 potential white voters and found that, as a fact. Now this net gain of--Sir?

Q Did it exist--

A Sir?

Q Did it exist before the contrary conclusions?

A Your Honor, it is--if I recall correctly, the stipulation supports those figures as does--

Q The stipulation?

A Yes, sir. --as does the testimony and as does the finding of the Court.

Q I see.

And 90--94--

A A net gain of 94.

Q Could that possibly have made any difference in

the election?

A Your Honor,--

Q By itself--by itself?

A --the majority of the white candidates over the black candidates were some 800 to 900 votes so I do not think that that would have made any material difference, no.

Q Was that suggestive if--if the figure, instead of 94 should be 250, it still would make no difference in the answer?

A I don't believe so, Mr. Justice Harlan, I don't think it--

Q No, no, no.

A --it would, no.

Q You have other factors?

A Yes, sir, we have the other--other two factors which, of course, they contend did affect the election. We contend it did not.

Just for--I know that the Court has read the Briefs, but just to clarify by the same merit, I point out that these expansions were three. There were three separate expansions They were done in 1965 in which an area, including all black voters, potential voters, was annexed--

Q Was that before the date of the Civil Rights Act?

A No, sir. It was after--

Q Yes.

A --November 1, '64, but it was in August, '65, I believe. And then the other two elections, one in '66 and one in '68, and stipulation shows that these were done pursuant to a long-range plan of the City of Canton for its growth and development. It was not something that cropped up after the enactment of the Voting Rights Act.

The statute under which these expansions were made, of course, has been in existence long before the Voting Rights Act was ever dreamed of, and the State law under which the city proceeded.

The second thing is that the 1962 statute which permitted elections at-large was also, of course, in existence prior to the Voting Rights Act, and it is true that the city had not followed it or did not follow it in '65.

Those are the two things which I would like to point out in view of the statement by counsel opposite that these things were post-Allen. They actually were not post-Allen. They were done prior to or about the same time that the Allen decision was handed down by this Court.

The point that Appellees would like--would like to urge is this:--And the question before the Court as we see it is this:

Does the Court wish to expend or expand the enterpretation of Section 5 as laid down in the Allen case to the extent which Appellants urge and reached the appalling result

that 95 per cent of any municipal enactment or administration of an enactment would have to be submitted to the Attorney-General of the United States or to the Court of Appeals for the District of Columbia before it is effective, or, should the Court put the bit and briddle of reason and common sense on Section 5 and confine it within the practical bounds which will tear out the intent of Congress that the election processes shall not be discriminatory and, at the same time, insure a municipality the authority and the power to conduct the management of its affairs in an orderly fashion.

Because, to do what the Appellant asks you to do and to hold these annexations to be barred for the purpose of elections which I don't see how you can do that; it has either got to be a valid annexation or an invalid annexation. You cannot have the people in the city paying taxes and not able to vote.

And so things that would happen are these. You questioned the police and fire jurisdiction in these areas since 1965 in one case and '66 in another, and since '68 in another. You have people who have paid municipal taxes for a period of five years--some of them--in these areas. You have to consider the affect on zoning, housing and housing codes, plumbing and building codes. On just about every facet of municipal government in the annexed area.

And it occurs to us that--that Section 5 interpretation

should be limited to the election processes which we could summarize as this. The qualifications and eligibility to register, the registration process itself, the physical act of casting the ballot, and the right which this Court has indelibly inscribed upon the American conscious of having your vote, or the vote of each elector, count with the same value and the same weight as all other votes cast in that election.

And unless some enactment or administration of an enactment would affect one of these four phases of the election process, then it should not come within Section 5.

Of course, if the enactment or the administration of the enactment remotely affects and can be shown to have a discriminatory purpose or effect then adequate rights prevail in the 14th or 15th Amendment as the case may be. We just urge upon the Court that these annexations should not be construed as coming within Section 5.

Q What would you--what would you say are the efforts in back of the--

A Your Honor, if you want to get at all into the practicalities of holding an election in a small town. One is finding a polling place. Now, at first blush you might think that that is the easy thing to do. But it is not necessarily so. And you have to take a place with adequate facilities, taking into consideration parking, the effect if it rains, shelter for the voters, and that sort of thing. It

is not the easiest in the world to do. We did the best we could in this particular case. The polling places had to be moved, and we picked the--

Q Wouldn't that go to the question of the purpose or effect rather than whether this was in the Act itself?

A Your Honor, it would seem to me that that is the only logical conclusion to reach, that if it can be shown that these polling places were moved for a discriminatory purpose or if they had a discriminatory effect, that the adequate remedy would be under the 15th Amendment and not to compel the City of Canton to conduct brand new elections simply because the two banks would no longer permit them to use their lots.

That has been our contention all the way through this. It is a practical matter. It could not be helped. And I would think the record adequately shows why we did it, how we tried to make a full disclosure to the three-judge court, and just, you know, if a new election was ordered tomorrow--excuse me.

Q That may be right but at this stage of the matter, the only question is whether the three-judge court has the power to pass on it,--

A That is correct, Your Honor, and--

Q --position, the Attorney-General or given the decision in the Allen case--

A Well, I think even more important than that, this Court should decide whether or not the change of a polling place with no discriminatory purpose or effect is a change within the meaning of Section 5. Or is it, as one of the congressional hearings said, a distinction between voting machines and paper ballots. We also went to voting machines in this election and had been using paper ballots up to now.

Now is that such a change as to warrant the holding of a new election, or is that progress?

Q Nobody is arguing about that in this case, are they?

A No, sir, that is true, and they didn't argue about the 1965 annexation that took in only black people either until we brought it into the case ourselves. But--but the point I am trying to make is, is this: are all changes regardless of degree such changes that come within Section 5 and if it is violated require a new election? Or should we stick to the things which affect registration, the actual voting and the right to have your ballot counted equally?

Q Well, doesn't change of boundaries affect all of it?

A Excuse me, sir?

Q Change of district lines affect all of it?

A Well, the district lines have not been changed, Mr. Justice Marshall.

Q Well, what is the difference between changing a

district line and changing the boundary?

A Well, in this case it would be--there would be no difference if the elections were held at-large.

Q Well, all I am trying to say is I don't see any difference. If you can't change the two lines inside without getting permission of the Attorney-General, how do you change the outside lines without getting his permission? Even if it were perfectly all right to do it, it is a change.

A Yes, sir, Your Honor, it is a change, but here--here is what you run into also. When I was--anything which causes an increase or decrease or a shift in population from one end of the city to another, according to the Appellant's contention, is a change. All right. Urban renewal projects, rent subsidy projects, highway relocations--all of those things have that effect.

Q I hope you don't assume I would go that far.

A No, sir.

Q But just talking about that one line, it seems to me, and I don't want to give away your case,--

A Yes.

Q --I mean on that, I couldn't conceive of the Attorney-General not permitting it.

A Of course, I am not prepared to answer that--

Q No.

A --that question at all. To me--to me the things

are--are different, but in this case the ward lines you have to leave them at nothing, because the people are being elected at-large now, or, at least that is the way we did it.

Q Mr. Goza, was--

A Yes?

Q --the Allen case argued before the three-judge case--court?

A Before a three-judge court?

Q Was it argued before the three-judge court?

A Yes, sir. Mr. Derfner and myself both on it.

Q It was argued?

A Yes.

Q And yet the court didn't decide it?

A I don't decide whether it is in Judge Coleman's Opinion or not.

We--we contend that the distinction between the Allen case--and we did before the three-judge court--is--is this, that, in the Allen case what the court decided on was that it deleted the black vote by extending it into all five beats in the county when, in effect, what it actually did was it put the influence of the white majority into the two black beats In this case there is a majority of black voters in the city of Canton. What we did when the election was called at-large was to extend the black majority to all four beats instead of confining it to two beats.

It is still in four. This extends it to all four beats and, in effect, if there is such a thing as the polarization in the black vote, it in effect gave the black majority the opportunity to elect all municipal blacks. That was not true in the Allen case.

But the black majority prevailed in the city of Canton. And they had an opportunity to vote in Wards 1 and 2 which, if the Appellant's contention is accepted by this court, they will not have. We contend that that could not possibly be discriminatory, even though it is a change.

Now the reason, I believe, Mr. Justice Brennan asked why the 1965 election was not held in accordance with the 1962 statute and the reason is it was my mistake. We were not aware of the 1962 statute when the 1965 election was held and therefor was not followed.

At the time of the 1965 election there were some 200 black voters in the city of Canton and it was certainly no attempt to discriminate against them at all. It was just a mistake on my part. Even though that is not in the record, that is what happened.

Q Do you regard the '62 statute mandatory or permissive?

A Yes.

Q Mandatory?

A Mandatory, yes.

Q Did you have any action in preparing this in the fall of '65?

A Yes, I did. I just said that. It was my fault. I made a mistake and did not read the pocket part.

Q Are you the city solicitor?

A Sir?

Q You are the city solicitor or--

A Yes, sir.

And I was the--the city fathers allowed on my interpretation of the statute and it was just a mistake which was--stupid, but made in good faith.

Q In the unit has there been any change that would exempt elections to vote bond issues? That would take bond issues, for example, out of the--out of the statute, out of the Civil Rights Act?

A Not that I am aware of.

Q Or the amendment?

A I am not aware of it, sir.

Q But the industry (?) was voted a bond issue back when you held this election.

A But in 196--

Q You couldn't market those bonds for quite a long time, could you?

A We could not market them?

Q You could not market them, no bank would handle

the bond issue until all the litigation was settled?

A That is--that is correct, sir, and we have approximately $1 million worth of bonds outstanding now in annex dailies and in work to pare to take into our annexed area. And I don't know what effect that will have on those.

Q What is the name of your city?

A Canton, Mississippi.

Q What is the population?

A I don't know what the '70 census will be, but the '60 census was 9707 and we expect it to be about 11,000 in the '70 census.

Q A little bit over that?

A Yes, sir.

In conclusion, I would like to say there must be some practical interpretation placed on--on Section 5. We feel that the Allen case has actually gone as far as--in placing a broad scope on it as it can and still allow municipalities who are acting in good faith, and there is not a word in the record or suggestion anywhere that the city other than in good faith, which would permit them to carry on the normal and ordinary functions of municipal government without wearing out the roads to Washington to see the Attorney-General and this Court here.

It cannot be that every single act that the city performs--because everything you do affects the people in the city; everytime you affect people it could have a remote

effect upon voting or elections. And there must be a line drawn to where the effect must be direct rather than indirect. We urge you to uphold the judgment of the lower court.

Q You are urging a narrower conception of the statute, aren't you?

A Yes, sir, in the interest of small municipalities, I certainly am, Mr. Justice Black, because it is hard enough to function as it is and--and--while--if you do act in bad faith and bad motives and what you do has a discriminary--discriminatory purpose or effect, you expect to be called to talk. But when you are doing the best you can and having the best interest of all citizens--black or white--within the city, the heart, then I think the practical approach must be reached to this Section 5. Otherwise--excuse me--

Q Excuse me. Go ahead.

A I was just going to say, otherwise, everything that a municipality does could remotely be construed as coming within Section 5 if the argument of the Appellant is accepted.

Q How do you think these voting by wards would fare under Reynolds against Sims?

A Sir?

Q I say, how do you think voting by wards would fare under Reynolds against Sims?

A Your Honor, I don't believe it is. That is the reason we called ourselves going by the decision of this Court

in the one-man-one-vote cases, and making it fair. That is what we really thought we were doing, and--

Q And how did you--

A --and because we understand it was either re-apportion the ward or elect the officers at-large. And electing at-large seemed to be the fairest way of doing it, and that is what we did.

Q It deserves tolerance. Efforts were made in the constitutional convention to give Congress the right to veto the laws of the cities, and it was declined. If that is the case, do you suppose it would be asking too much in asking the statute not be too broad to make into two (?), that it attempted to veto, it attempted to delegate powers to Congress that Congress itself did not possess, to let the Attorney-General veto a city law? Would you say that has some argumentative--

A Well, that--that--that pretty well sums up our contention because the authority to veto was not very far removed from the power to compel a subdivision to do something. If you can veto what they have done, the next step is to make them do something else. And we contend that is not right.

Thank you.

Yes, sir?

Q Where do you draw the line--

A Your Honor, anything that did not pertain to

qualifications and eligibility to register, the registration process itself, the physical casting of the ballot, and the right to have your ballot counted with equal weight as all other ballots cast in the election. If it didn't come within those four things, I don't think that Section 5 should have anything to do with it. Because, if it didn't--if it doesn't come within those four things, and certainly these three things they are complaining about do not, then any remedy should be under either the 14th or 15th Amendments.

Thank you.

Q Your time is exhausted, counsellor, unless you wish to correct some factual matter or answer questions.

ARGUMENT OF ARMAND DERFNER, ESQ.

ON BEHALF OF APPELLANTS-REBUTTAL

MR. DERFNER: If I could ju--if it would be appropriate for me to just state a brief--make a brief statement to--in response to questions posed in slightly different form by Mr. Justice Marshall and Mr. Justice Harlan.

Basically, the question was: How--how can you expect--or, how would the apportionment fair under Reynolds against Sims, and how in the ward elections?

And Mr. Marshall's question was relating to the--to the expansion of boundaries. And I think basically what Section 5 had said is that--is that the certainty that these are valid under the 15th Amendment and that these have been

passed in good faith is so important that Section 5 must be enforced that way, but these are not questions to be considered nor even does he have to make any proof on in the record below, and as to the apportionment a slight dislocation in the question of proper apportionment for one election is not of such consequence, will not dislocate the law as much as allowing the change to pass without proper clearance from Section 5, which, if it happened, would create every incentive for every jurisdiction never to submit another change under Section 5.

(Whereupon, at 1:55 o'clock p. m., argument in the above-entitled matter, was concluded.)

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