In the

Supreme Court of the United States

PETER H. BEER ET AL.,

Appellants

v.

UNITED STATES ET AL

No. 73-1869

Washington, D. C.
March 26, 1975

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Appellants

v. : No. 73-1869

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Wednesday, March 26, 1975

The above-entitled matter came on for argument at 2:33 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

JAMES R. STONER, ESQ., 1000 Connecticut Avenue, Washington, D.C. 20036
For the Appellants

LAWRENCE G. WALLACE, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C. 20530
For Appellee United States

STANLEY A. HALPIN, JR., ESQ., Suite 1212, 344 Camp Street, New Orleans, Louisiana 70103
For Appellees Jackson et al

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 73-1869, Peter H. Beer against United States et al.

Mr. Stoner, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF JAMES R. STONER, ESQ.

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

This case comes to the Court as an appeal from the United States District Court for the District of Columbia from a decision by a three-judge court pursuant to the Voting Rights Act of 1965.

It deals with the City of New Orleans.

The City of New Orleans, in 1954, adopted a reorganization of its form of government, adopted a mayor-council form of government whereby the mayor of the city assumes the executive functions and a seven-man, seven-person council assumes the legislative functions of the city -- the governing of the city.

The plan provides for the two members of the council to be elected at large from the entire city and five members to be elected from specific geographic areas of the city.

Now, the city charter requires that after each

federal dicennial census, the council of the city has the obligation to redistrict the five geographic areas of the city so that each area in each district will be, as nearly as possible, consisting of an equal number of voters.

The City Charter, as I said, makes this mandatory after each dicennial census.

This case comes to the Court to be adjudicated following the 1970 dicennial census and a plan that was adopted by the city council but a little bit of history might be appropriate in considering the posture of the case.

First, following the 1970 census, the city council had the obligation to redistrict the five geographical areas. They undertook to do this by the adoption of a plan, plan 1 referred to in the briefs and record.

Now, this plan was submitted to the Attorney General pursuant to the Voting Rights Act of '65 which creates a system whereby a changed plan can be made operative in the event that the Attorney General does not enter an objection.

In this case, while the Attorney General of the United States was considering the plan, there was talk and movement in the city for a procedure whereby the City Council of the City of New Orleans could be enlarged and, indeed, during the time that the Attorney General was considering the first plan, the City Council did, in fact, adopt an ordinance increasing the size of the City Council from seven

members to 11 members.

This proposed 11-member council consisted of two at-large and nine geographic. This proposal was submitted to the electorate of the City of New Orleans and was defeated in a citywide referendum.

The City Council then adopted a plan whereby the size of the City Council would be increased from seven members to nine members, with two at-large and seven from specific geographic districts.

This, again, was submitted to the electorate and upon the referendum the proposal was defeated.

Now, following this, the Attorney-General of the United States interposed an objection to Plan 1.

Now, where does that leave the City Council of New Orleans? It leaves the City Council of New Orleans with the obligation to redistrict itself for the five geographic districts on the basis of a five-geographic-district council and two at-large.

It did so. It adopted what has been referred to in the brief as Plan 2 and this plan was submitted to the Attorney-General of the United States.

The Attorney-General interposed an objection and upon interposing this objection -- following the imposition of the Attorney-General's objection, the city brought an action pursuant to the Voting Rights Act of 1965 in the

United States District Court for the District of Columbia asking for a declaratory judgment and asking the three-judge court to declare that the plan as adopted -- that is, Plan 2 be made operative and be held to be in compliance with the Voting Rights Act of 1965.

QUESTION: The City could have done the same thing earlier after the expression by the Attorney General of disapproval of Plan 1. It could have done --

MR. STONER: It could have, your Honor. The machinery in the statute allows either an action for a declaratory judgment or a submission to the Attorney General. Yes, it could have.

QUESTION: Is there any indication in the record of why it didn't go to court and seek approval of Plan 1?

MR. STONER: There is no record, no --

QUESTION: Right after the Attorney General's action it formulated Plan 2 and submitted that to the Attorney General.

MR. STONER: That is right.

QUESTION: He disapproved that and then the city went to court and that is the case we now have.

MR. STONER: That is right, your Honor.

That is right, your Honor.

Now, the District Court, the three-judge District Court held that Plan 2 was in violation of the Voting Rights

Act of 1965 and it is that we disagree with.

Now, let's look at what this case is and maybe the best way to attack what the case is, is to ask what it is not.

This case is not a case whereby a city or a government is expanding its boundaries, annexing area as in prior cases in this Court -- it is not that kind of a case.

Nor is it a case where the city is changing from an at-large district to single districts or from single districts to at-large districts.

This is merely a case where the city -- the city council is performing its obligation to redistrict itself pursuant to the mandate in the city charter which, as I stated, was adopted in 1954 -- became effective in 1954.

So the case before the Court is a redistricting of the five geographic districts.

Now, the court below held that the two at-large seats had to be considered in the consideration of the five geographic district and its application under the Voting Rights Act of 1965.

We submit most vehemently that that is not at issue and that this Court should overrule the District Court on that point and the reason we state it is as follows:

The Voting Rights Act of '65 applies to changes that are made in a voting system. Now, this Court has held

that in addition to restrictions to the individual's right to vote it also applies to cases in which a change in boundaries, et cetera and we don't dispute with that issue.

We do, however, submit that the form of government enacted by the City Council in its charter, in its home rule charter of May 1, '54 was a dual system.

It was a system that provided for the election of two members of the council from the entire city at large and it was a system that required the election of five additional members of the city council from geographic districts of equal population.

Now, it might be helpful to the Court to look at a map of the city. I have here which is, incidentally, in the Appendix at page 620 a color map of the City of New Orleans and interposed on that colored map is the five districts as composed in Plan 2 which is the plan before the Court.

The red portion of this map represents voters of the black race. The green dots represent voters of the white race so that we see, upon an examination of this map that, indeed, the white and the black voters of the city are scattered throughout many sections of the city.

Now, in looking at this I would also like to call the Court's attention to the area in which the number C is located. This is the only part of the City of New Orleans that is across the Mississippi River from the other part of

the city.

In other words, the predominantly geographic -- the large predominant part is on one side of the city but there is a small sliver on the other side of the city.

This section across the river is called Algiers and the record shows that there were great differences of opinion between the people of Algiers and the people of the city as to the necessity of another bridge across the Mississippi River and this is an important political issue in the City of New Orleans, not only in the Algiers section but also in the main section of the city itself because voters in one section of the city don't want the bridge to be destroying parts of their city for the abutment and the piers of the bridge itself.

Now, this case involves several things. It involves people. It involves geography and it involves voters.

Of necessity, the city must be divided geographically in order to meet the mandate of the city charter creating the five geographic districts.

I refer to page 620 of the record which shows the geographic redistricting of the city as it was made in 1961, following the '60 census and as it, in fact, exists at the present time because of the inoperativeness of Plan 2 and you will note there that the Algiers section of the city is included in District A and you will also note that

the other part --

QUESTION: Now, wait, that is not 620.

MR. STONER: 621.

QUESTION: 621.

MR. STONER: 621. I'm sorry, your Honor.

QUESTION: That is the 1961 redistricting plan.

MR. STONER: Yes, your Honor.

QUESTION: The one that is now, in fact, still in effect because of the --

MR. STONER: That's right, because the Attorney General interposed an objection and because the Court has failed to render a declaratory judgment the new plan cannot go into effect.

QUESTION: And is it that those two parts, marked "A," they elect one councilman? Is that it?

MR. STONER: Yes, Mr. Justice, they do. They are -- each one of the districts, that is, A, B, C, D and E elect one member of the city council and as I stated, two additional members of the state council are elected at large.

In other words, there is a dual system; the at-large system and the five geographic.

Now, this apportionment of the city is founded in reason and founded in good reason. The two at-large members of the city, city council, have the obligation of representing all of the citizens of the City of New Orleans.

Each geographic district is represented by one person on the council and presumably that person represents the peculiar interest of that geographic area of the city.

And a very important factor in this case is the Mississippi River and the economy of the City of New Orleans as it is affected by the Mississippi River.

The Mississippi River is well-known as the access to the Gulf of Mexico and it is a large and important shipping Center in the United States and I guess, indeed, in the world.

Now, there is testimony in this case -- and I refer to the testimony of Councilman Moreau and, I believe, Councilman Ciaccio also testified concerning this -- and that is that in their minds they felt it was important that each one of these five geographic areas should have some of the river frontage as part of their geographic area because of the tremendous importance of the river and shipping to the economy and to the life of the city of the people of New Orleans.

Plan 2, as adopted by the city council and the plan which is before the Court, is also represented on page 624 of the record.

Comparing the existent plan, which is on page 621 and Plan 2, which is the plan before the Court on page 624, we notice that in the redistricting plan the part across the

river in Algiers in A has been transferred from section A or from district A to district C. This makes the entire District C contiguous on both sides of the river.

It also enlarges geographic section A and geographic section B.

Now, at the time the plan was being adopted and considered by the city council the NAACP in the City of New Orleans also submitted a plan of redistricting of the city and this appears at page 625 of the record and I might submit that the plan, you will notice in many respects, is very similar, particularly with respect to district A and district B.

It is changed in that the Algiers section in the NAACP plan is included in district D, whereas the plan adopted by the city council has the Algiers section included in district C.

You'll also note from the NAACP plan that district E has no geographic frontage on the Mississippi River.

Another plan, we submit --

QUESTION: Let's go back a minute. Why is it, on 621, that one, two, three, four of them are on Lake Pontchartrain? What is the reason for that?

MR. STONER: Your Honor, the district lines which have been followed in redistricting here have followed the

traditional north/south lines in the City of New Orleans.

In other words, the -- when the wards of the city were established, I believe it was in 1912. The wards were drawn on a north/south line and the district -- indeed, the district -- that is, the plan that is presently operative does operate on the north/south line and this plan operates on the north/south line.

QUESTION: But there is no significance to Lake Pontchartrain because there is nothing there.

MR. STONER: Not nearly as important as the Mississippi River.

QUESTION: It is up in that area that all the incumbent councilmen live, isn't it?

MR. STONER: That is true. That is true, your Honor and it -- I believe there is testimony in the record that many members of the council felt it was important that a councilman from one particular district represent also, in addition to the river frontage, that he also represent diverse interests.

In other words, testimony given to counsel and in the record that some of the councilmen felt that it was important that a councilman be answerable not only to one economic interest, one economic group or one social group but, rather, that they be answerable to all and hence the river frontage being included and hence some of the higher

income areas being included in the various districts.

QUESTION: In Plan 2 which, as I understand it is on page 624, that is the plan before us, isn't it?

MR. STONER: That is right, your Honor.

QUESTION: Of the five districts, four of those also abut on Lake Pontchartrain, don't they?

MR. STONER: That is right, your Honor.

QUESTION: All but B.

MR. STONER: All but B, yes.

Now, of course, the peculiar curve of the Mississippi, if you will note --

QUESTION: Right.

MR. STONER: -- there is a curve of the Mississippi there which would appear that there has to be a compact district and it is represented by district B.

QUESTION: And under Plan 2, does each of these districts, A, B, C, D and E, as you suggested just a moment ago, take in a pretty broad spectrum, economic and social groups?

MR. STONER: They do, your Honor.

QUESTION: Each one of them.

MR. STONER: The record reflects that.

It does, with the possible exception of B, which is a predominantly black populated section.

QUESTION: Right, and a downtown section.

MR. STONER: That's right, and part of the downtown section. But it also contains a great deal of the river frontage and the businesses and the interests that are represented by riverfront property and various people who are located along the riverfront.

Now, Plan 2 was submitted to the lower court and we are before this Court asking this Court to reverse because we believe the lower court has made some grievous errors in its decision.

Number one, we believe that the inclusion of the at-large districts in the consideration of the five geographic areas was completely wrong and the reason we say that is because the city charter has a dual system of electing its council members.

It has a system of electing two at-large and it has a system of electing five and we submit that the Voting Rights Act of '65 says that the Act applies only to those changes that are made after November 1, 1964.

Now, the change in the at-large system has not been made by the Plan 2. It has left the city charter as it was and for good reason.

The two at-large councilmen, for instance, perform other functions in the city government in addition to being members of the city council.

For instance, one of them is the chairman of the

city council and that rotates between the two at-large every four months.

In addition to that, the at-large members serve on the water and sewer board and otherwise have other functions as described in our brief.

QUESTION: Would you say, then, that the District Court didn't have authority to review the provision as to at-large councilmen because that wasn't the change that was introduced after the effective date of the voting rights?

MR. STONER: Exactly, your Honor. Exactly, that is our position.

QUESTION: Do you understand that your adversaries here today disagree with you about that?

MR. STONER: I do, your Honor.

QUESTION: In their briefs.

MR. STONER: Pardon? I do, your Honor.

QUESTION: You do.

Well, we'll hear from them. I thought from their briefs they didn't seem to differ much about that aspect of your case.

MR. STONER: Yes.

QUESTION: Mr. Stoner.

MR. STONER: Yes, sir?

QUESTION: What would have happened had the City of New Orleans done nothing after the 1970 census? I

suppose someone could have brought an action in the District Court under Reynolds against Simms or those kind of cases to compel them to redistrict.

MR. STONER: I think --

QUESTION: Well, under your city charter, I suppose.

MR. STONER: It is mandatory under the city charter.

QUESTION: It is mandatory under your charter, quite apart from --

MR. STONER: So that a mandamus action could be brought by any citizen to compel the city council to do its job, namely, to redistrict.

QUESTION: And under our case of Connor against Johnson, the Voting Rights Act doesn't apply to a redistricting that is done under the Aegis of a federal court decree.

QUESTION: Correct.

MR. STONER: I believe that is correct, your Honor.

So we submit, as stated, that the two at-large seats, the court erred completely in considering the two at-large seats.

Now, the court also erred grievously, we believe, in the burden of proof statement which the court has made.

The Voting Rights Act allows a changed plan to become effective upon the filing of a declaratory action in the District Court -- any finding that the plan complies with

the Voting Rights Act of 1965.

The lower court in this case has said that the moving party -- that is, in this case, the city council of the City of New Orleans must prove that the plan which they are submitting is the only feasible plan.

Now, we submit that that does not comply with the traditional declaratory judgment proceudre at all .

Congress established in the Act a declaratory judgment procedure. Now, what is a declaratory judgment procedure?

It is a procedure whereby parties come before a court and ask for the adjudication of their interests so that they may proceed in the normal course of events or the normal course of life.

In that kind of an action, declaratory judgment, it has always been held that the burden of proof is by a preponderance of the evidence. Now, the lower court has said that in this case, the moving party must prove that the plan is the only -- and I emphasize "only" feasible plan.

We submit that that just is not proper burden of proof and, indeed, we may say that probably no plan could be devised which is the only plan because we are dealing here with people. We are dealing with geography and without belaboring the point further, we submit that the burden of proof is entirely wrong.

QUESTION: I take it you do concede you do have a burden of proof.

MR. STONER: We have a burden of proving and I submit, your Honor, that we believe that the burden we have is to show that the plan is a feasible plan and is based on a rational basis -- a rational basis.

We believe that our burden is to show that the plan is a plan founded in reason and in consideration of the various factors which at play in any one area.

QUESTION: Well, do you think that you necessarily win your declaratory judgment action if it were found that under the Constitution the plan was acceptable or, to put it another way, do you think the statute adds something beyond what the Constitution would require in terms of what you have to prove when you are making a change covered by Section 5?

MR. STONER: Well, I believe the statute would really emphasize our obligations under the 15th Amendment and I believe that if we meet the constitutional test that we have established, we carry the burden of proof.

QUESTION: But this is the voting, I take it you say this is a voting case, a 15th Amendment voting case rather than an equal protection case?

MR. STONER: Both apply and there are subtle differences, I believe, in the cases. The lower court

applied a compelling state --

QUESTION: The reapportionment cases have proceeded on the basis that they are --

MR. STONER: 14th.

QUESTION: That their equal protection considerations will solve them. Isn't that right?

MR. STONER: I believe that is correct, your Honor.

QUESTION: So are we talking here about a constitutional standard under Section V or something that is imposed by Section V?

It says -- it speaks about depriving people of a vote by reason of race or color, doesn't it?

MR. STONER: Yes, it says no statute or no procedure shall be enacted which deprives anyone or abridges the right to vote on account of race or color. Yes, your Honor. The lower court has --

QUESTION: Let me ask you -- but the statute also prohibits you from adopting a procedure. You have to show the procedure doesn't have the purpose and will not have the effect of denying or abridging the right.

Now, that has strictly been the constitutional standard. You are bound to come up with a statutory standard, I take it.

MR. STONER: That is right, your Honor. We would

submit that that is not necessarily stricter than the constitutional standards.

QUESTION: And it is that double purpose, the burden of which you are willing to assume.

MR. STONER: You mean, purpose and effect?

QUESTION: To assume the burden of proof, yes, purpose and effect --

MR. STONER: Yes --

QUESTION: -- proving both of those.

MR. STONER: Yes, the lower court in this case found that the plan as submitted had the effect of --

QUESTION: -- correct.

MR. STONER: -- denying and abridging and therefore said -- pardon?

QUESTION: And for that reason did not address the question of purpose.

MR. STONER: That is right. It did not. And we submit that both are applicable in the case. The statute says "the purpose and effect."

QUESTION: If it has the effect, the act is violated then, is it not? If the plan has the effect without regard to whether it has the purpose.

MR. STONER: Well, we would submit that the statute says the purpose and effect, that both must be met.

QUESTION: And so you think that the three-judge

court was wrong in not addressing the purpose --

QUESTION: On the law. On the law.

QUESTION: -- on the law.

MR. STONER: Yes, your Honor.

QUESTION: Yes, I see.

QUESTION: Now, going back to the constitutional approach, is the same standard applicable under the 15th Amendment, in your view, as it is under the 14th?

MR. STONER: The 14th, I believe, would apply more to a restriction on the individual right to cast a vote. The 15th is somewhat broader, I would believe.

QUESTION: And this is a 15th Amendment case?

MR. STONER: Well, it is -- it is, your Honor, but we also submit that the Court misapplied the compelling state interest document.

What the lower court did here was said that unless the black populace -- population is given its maximal voting strength, it has to be -- the plan has to be denied unless the moving party shows a compelling state interest.

Now, we submit that that is an improper test to be applied in this case because we say the compelling state interest test has been traditionally applied by the court in cases in which there has been a restriction on the individual right to cast a vote and I mean by that, cases such as literacy tests and those kinds of cases.

We say that that kind of test is an improper test in the Voting Rights Act of '65.

I see my time is up. Thank you, your Honor.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Stoner.

Mr. Wallace.

ORAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ.

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

In May, 1973 in Georgia against the United States, this Court agreed with our longstanding interpretation that the Voting Rights Act does apply to reapportionments, redistricting and this is the first case in this Court which raises the question of what the Act means with respect to the redistricting.

QUESTION: You mean reapportionments or redistricting undertaken at the initiative of the legislative body, don't you?

MR. WALLACE: That is correct insofar as the Act's procedures are concerned. I don't understand Connor against Johnson to hold that a court, in adopting a redistricting plan in a jurisdiction covered by the Act should not take the substantive standards of the Act into account when it holds that the Act's other procedures are not to be applied in such a situation.

QUESTION: Well, what it said was that the decree of

the United States District Court is not within reach of Section V of the Voting Rights Act which certainly contains substantive standards as well as procedural, doesn't it?

MR. WALLACE: I thought it was in the context of whether it has to be approved by the Attorney General or the District Court for the District of Columbia and I don't think the Court has addressed the question of the propriety of a district court taking the substantive standards of the Act into account and I think there is a strong argument to be made that Congress meant those substantive standards have effect in the jurisdictions covered by whatever procedure may be the appropriate one in the particular case, your Honor.

QUESTION: So you seem to think, if it were operating in a state not subject to Section V, the plan might pass muster but it wouldn't pass muster in a state covered by such an Act?

MR. WALLACE: Well, I think there is a strong argument and it was the position we took in the hearing --

QUESTION: Yes, I know, but how would the argument turn out?

MR. WALLACE: -- is that the Act goes beyond.

We haven't taken a position on that in this case but we did take that position before Congress when it reenacted the Statute in 1970 that Section V imposes

prophylactic substantive requirements beyond just the shifting of the burden of proof, which is a major factor in your substantive result in addition and we stand by that in our administration of the Act.

It was not so clear that the 15th Amendment without this Act would prohibit a change in voting procedures merely because it had the effect of abridging the right to vote on account of race. It depends on how you want to interpret the right to vote on account of race, but the Act is interpreted to mean dilution.

QUESTION: How was the vote abridged in this case?

MR. WALLACE: Well, as I just said, the Act has been interpreted to mean dilution. This was the language used by this Court in both Perkins against Matthews and the --

QUESTION: Well, how was it --

MR. WALLACE: -- Georgia case.

QUESTION: How was it diluted?

MR. WALLACE: Well, this is what both we and the District Court had to determine in looking at the plans that were submitted. First, the so-called Plan 1 and then Plan 2, which was --

QUESTION: Well, is the dilution a relative thing as compared to what it used to be or is it compared with what it could be or what?

MR. WALLACE: Well, in reviewing these plans and

the bulk of them have been reviewed administratively rather than in Court, we start off with the premise that the question before us is not a comparison of the present abridgement with the preexisting abridgement but that the Act was enacted to enforce the 15th Amendment and that can be accomplished only by looking at how the new procedure will operate and see what effect it will have on minority voting strength, whether it denies, on account of race or color, an equal opportunity for meaningful participation in the electoral process, the standards that were quite painstakingly developed by this Court in Whitcomb and White against Regester.

QUESTION: No negroes -- it is not charged that negroes were denied the opportunity to register and vote in this case.

MR. WALLACE: Not at all.

QUESTION: Or that the plan had the purpose or effect of denying anybody the right to vote.

MR. WALLACE: There would be no point in having t he Act apply to reapportionment if that were the only question because all the reapportionments under the Reynolds against Sims and its progeny have to result in fairly equal districts in which everyone will have an equal ballot from that standpoint.

The question is, what practical effect will that

have, what possibilities of racial gerrymandering is the Act designed to protect against? And --

QUESTION: And so, how was it diluted in this case?

MR. WALLACE: In this case it was diluted by looking at all the circumstances of the apportionment that was involved here and there is no short answer to the question in our experience because in addition to the premise that if you look at the whole effect, we also start off with the premise that the Act does not choose between different theories of political representation.

There is nothing per se invalid under the Act with having two at large and five --

QUESTION: The only -- let's assume that there is only one fact change in a new plan that is proposed, namely that the Districts were drawn so that negroes would have three representatives.

Would you still have to go through a long story about it, or would that satisfy the Attorney-General?

MR. WALLACE: Well, the way we have been administering the Act is, we not only look at the face of the submission, but we notify interested persons who have registered with us of what has been submitted. This includes Civil Rights organizations and individuals in the community at issue who have registered with us and we see what they have to say about what the effect will be and then we often

ask the submitting jurisdiction what they have to say in response.

It isn't easy to ascertain whether, within the terms of the statute, a new procedure will have the effect of abridging minority voting strength and minority voting rights just on the face of the submission.

QUESTION: Is the dilution comparitive or not? Are you confronting with the maximum minority leverage that might be gotten from a particular plan or are you concerned with just what is in existence now?

MR. WALLACE: We don't -- neither one, your Honor and as I understand it, the court didn't use either of those criteria but used something in between, a comparison with the percentage of that group in the community as a whole as a starting point and those figures are given in our brief in a little chart on page 7 and that is where we started off looking at this district and the District Court did the same thing and it showed that, in the 1970 census, 45 percent of this community was black. The percentage of registered voters that were black was 34.5 percent, a little over one-third and the black population of voting age would fall somewhere in between.

And then we looked at the districts that were drawn in the context of what they were drawn up for, which was to apportion five district seats of a seven-member

council and the court found -- and we think that this was well-supported by the evidence, that the two at-large members of that council, because of the background and pattern of racial block voting and voting procedures that were in effect including a majority vote requirement numbered post, anti-single-shot provisions with the racial polarization and block voting, that those two at-large seats would be controlled by a white block vote and --

QUESTION: But they were literally not changed.

MR. WALLACE: We never challenged them.

QUESTION: Well, how do you say --

MR. WALLACE: We are saying you assess the five districts in the context of what the city was being districted for and that was five representative, seven-member council, two members of which are controlled by the white vote at the outset so you look at the other five and see whether the districting has denied the minority a fair opportunity for meaningful representation on that council.

QUESTION: But the District Court went ahead and more or less set aside not only the new seats but the seats at large and they literally are not within the language of the Act.

MR. WALLACE: The District Court said that the at-large seats are themselves invalid but it didn't have to say that. The question before the District Court was

whether to issue a declaratory judgment approving the new plan and it had already given several quite independently-sufficient reasons why the declaratory judgment should be denied so that that was an addendum to the opinion which was not something we were contending for and was unnecessary to the result.

QUESTION: And you do not support it here, do you?

MR. WALLACE: No, we are asking that the judgment be affirmed.

QUESTION: Yes, I understand that.

MR. WALLACE: The District Court was right in declaring the declaratory judgment but we have found no reason in anything that has been brought to our attention in this case to impose the two at-large seats and we have some doubt --

QUESTION: Well, as a matter of record, they are not even covered by the statute.

MR. WALLACE: We have some doubt about that. The intervenors contend that it is. We think -- we never have challenged it in this case and there is no need to reach that question in this case.

QUESTION: Although the District Court did, in its opinion, reach it.

MR. WALLACE: It did and --

QUESTION: And to the extent it did, its component, one of the foundations of its opinion, isn't it?

MR. WALLACE: Well, it is an additional ground given for denying the declaratory judgment but I think it is quite clear that the other grounds would be sufficient in themselves in the view of the District Court and we urge that there were other grounds for denying the declaratory judgment.

QUESTION: Mr. Wallace, wouldn't you think that most people reading this opinion and considering the judgment would think that if you are going to redistrict the city, like New Orleans or a state and you know you are going to have to get by Mr. Wallace and his colleagues and the Attorney General's office, that you really ought to take race into account in drawing your district line?

MR. WALLACE: Well, there is no way to draw them without taking race into account.

QUESTION: Well, there is too. It is easy. You could very easily draw them without taking race into account. The only trouble is, if it happens to end up, like in this case, it will be held to have the purpose and effect of denying somebody the right to vote.

Now, how can you get around this judgment without saying, affirmatively take race into account in drawing your district lines?

MR. WALLACE: Well, I --

QUESTION: You would say that you could.

MR. WALLACE: Affirmatively -- we don't say affirmatively taken into account. Obviously, if race is not taken into account --

QUESTION: You are going to get --

MR. WALLACE: -- at all, you can be assured that your new procedure will not have the purpose of abridging voting rights on account of this, but how will you know whether it has the effect, unless you look to see what effect it will have.

QUESTION: Well, I agree; afterwards, you are going to take race into account, but when you are drawing your districts, you really should, I take it -- the Attorney General thinnks -- gerrymander on the basis of race to ensure that the minority group in the community has a fair representation in the legislature.

MR. WALLACE: Fair opportunity, fair opportunity--

QUESTION: That is just plain --

MR. WALLACE: -- to participate meaningfully. That doesn't mean racial gerrymandering. We don't say that the Act --

QUESTION: Well, that is just a bad word, then. Take race into account and draw your districts so that the racial minority will have a fair representation in the --

MR. WALLACE: Well, that depends on the political circumstances in the community. We don't say that the --

QUESTION: Well, why are you backing away from this?

MR. WALLACE: Because we don't take --

QUESTION: You don't think -- you didn't take that into account.

MR. WALLACE: We do say it has to be taken into account, yes, but we don't say you have to gerrymander -- you don't --

QUESTION: You don't?

MR. WALLACE: No, no, no. Because the Act doesn't choose between theories of representation in our view. The Act doesn't choose between theories that --

QUESTION: Gerrymander and you end up with a pattern like there is in this case, you are going to be in trouble with the Attorney General.

MR. WALLACE: Oh, yes, because in this case there is a prevalent practice of racial bloc voting along with finding that the city council members are not responsive to the needs of the black community.

QUESTION: Now you are proving my point. You really ought to take race into account in drawing your districts.

MR. WALLACE: To see whether your new procedure will have the effect of denying the minority meaningful participation in the political process. That's --

QUESTION: Do you think the Congress or do you think the Act, Mr. Wallace, do you think the Act contemplates and intends to encourage bloc voting by racial groups?

MR. WALLACE: No, we don't. We don't presume bloc voting and we don't think the Act is intended to be anything comparable to the statute struck down in Anderson against Martin. We don't want to turn the Act into something like that but we have here a situation in which this was the reality, bloc voting is occurring and partly nurtured by the statute struck down in Anderson against Martin, which required racial identification on the ballots and you have got findings here that the black vote will, in effect, be wasted except in districts in which the blacks are in the majority.

You have got a special situation here which ought to be taken into account in determining whether the purposes of the Act are met and you combine that with a look at these districts which are drawn as long north-south slivers rather than compact districts and it is quite apparent that while they may have made a great deal of sense at the time when the black voters across the middle of the city weren't registered and weren't voting, you didn't want to have a large district in the middle with just a handful of white voters controlling one councilman.

This pattern has now been perpetuated in a way that fragments the black vote, submerges the bulk of it into majority white districts against the background of a situation which they are finding supported by the evidence of the pattern of racial bloc voting and of unresponsiveness to the needs of the black community by persons elected through this racial bloc voting.

That, it seems to us, to meet the standards of White against Regester.

QUESTION: So you are suggesting that if this case had come up in a state not covered by Section V and it had just -- arose as an ordinary reapportionment suit by a citizen claiming that it was discriminatory, that the case would come up the same way?

MR. WALLACE: Oh, I think it would be quite a different case.

QUESTION: Well, you cited White against Regester.

MR. WALLACE: Well, we are citing it as an a fortiorari holding. It was a constitutional case and in which --[inaudible] findings were made and this very well could be a constitutional violation and --

QUESTION: Well, you just said it was.

MR. WALLACE: It wasn't necessary for the District Court to go that far and we didn't have to contend that much.

QUESTION: Well, you just have, though. You have

satisfied White against Regester and hence it is a constitutional violation.

MR. WALLACE: Well, the factors --

QUESTION: Right?

MR. WALLACE: I think that a strong argument could be made to that effect. We haven't taken a position on that. It is unnecessary here. The fact that we are upheld by this Court it is sufficient to find the constitutional violation in White against Regester, are very comparable to the factors on which the District Court relied here.

In addition to extraneous factors that weren't necessary to the result, in our view and that is the situation. The findings are detailed in our opinion -- in the Court's opinion and are recounted in the briefs and our position is that the District Court did reach the correct judgment against the background here.

We have spelled out in some detail in our brief why the guidelines used by the city to justify this particular reapportionment either were not consistently applied or could be satisfied equally well by a plan which would not have the same dilutive effects, the same fragmenting of the black vote in this situation and we submit that the judgment below should be affirmed, perhaps with some clarification about the at-large situation here when -- since

when a new plan is submitted -- if a new plan is submitted to the Attorney-General we would feel that an interpretation of the Act by a court with respect to the at-large seats would be something we should honor, just -- if the opinion can be read as saying that regardless of what is done with the district, two at-large seats have to be rejected in this case which is not the position we have taken.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Wallace.

Mr. Halpin.

ORAL ARGUMENT OF STANLEY A. HALPIN, JR., ESQ.

QUESTION: Mr. Halpin, before you start, will you tell me what happened to the Republican and the NAACP plan?

MR. HALPIN: Yes, sir, Mr. Justice, and may it please the Court:

The Republican plan was a plan submitted to the council. It was apparently never voted on and considered. The NAACP plan was a plan submitted to the city council to consider in its redistricting.

I would specifically mention, so there is no confusion, to this Court that we are not supporting the NAACP plan nor have we ever and the evidence indicates, since this came up in the trial court -- evidence indicated that the NAACP plan was submitted as a political expedient, a plan which that group thought might possibly be passed by the

council and be a little less worse than some other plan.

QUESTION: Mr. Halpin, do you think there is a real difference between the NAACP plan and Plan 2?

MR. HALPIN: I think the NAACP plan also discriminates against black voters, your Honor.

QUESTION: But you see no difference, really, between the two?

MR. HALPIN: Well, I think it is a little less worse, if you want, but no significant difference.

QUESTION: Little difference.

MR. HALPIN: No, sir.

Now, in that sort of -- a series of questions were posed to Mr. Wallace which I think this is sort of suggesting and goes to what is the dilution in this case and what is the standard under Section V and does that standard somehow require some sort of reverse or benign gerrymandering.

I'd like to address that in this way. I believe the intention of Congress in enacting Section V, particularly as it relates to redistricting plans, is set out in the legislative history and in that history there is repeated reference to the problem that once black voters get registered in significant numbers, because of the application of other sections of the Act, they would still be faced in certain areas under certain political

circumstances with a being cut off from the political -- from the process -- cut off at the last step by districting lines which would divide up these newly-concentrated, newly-enfranchised concentrations of blacks, submerge them in majority white districts and therefore, quite effectively divide and conquer this vote.

Now, the hearings before Congress didn't leave it just at that. The Congress was well-aware of the practice, for instance, of bloc voting, of non-responsiveness in these jurisdictions to the distinct interest of this minority.

In this case as well, the District Court -- if you would reexamine, perhaps unnecessarily, but reexamine in regard to New Orleans whether this type of factors existed there.

And they did find that, for instance, in New Orleans up to -- there was a large increase in black voting. There was, in fact, a division of this black voting, that there had been bloc voting in New Orleans and that the key -- that there had never been a black election to the city council and that the city council had failed historically and continued to fail to respond to the distinct interests of the merits.

QUESTION: So your suggestion is that the city, in redistricting itself, should avoid dividing up the black voting strength?

MR. HALPIN: Your Honor, yes. I think when there is a continuation --

QUESTION: Which means some care as to drawing your lines as to what it does to the minorities living in a particular area?

MR. HALPIN: Particularly here, your Honor, where Plan 1 had, for instance --

QUESTION: Your answer is yes, you should take care.

MR. HALPIN: Yes, sir. Once you have a violation of Section V of this sort that has divided the black concentration, the remedy, obviously, is to not divide the concentration.

QUESTION: Mr. Halpin, what if Plan 2 had been a seven-member council all elected at large? Would that have violated Section V?

MR. HALPIN: Absolutely, your Honor.

QUESTION: It would have?

MR. HALPIN: Yes, sir. And, of course, you know, with the evidence and proof.

QUESTION: Well, just with the population of the City of New Orleans. You say a seven-member council, all elected at large would have been a violation?

MR. HALPIN: Yes, sir.

QUESTION: A fortiorari, I would think you would

say because it wouldn't even reserve one district.

MR. HALPIN: Yes, sir. Yes, sir.

QUESTION: You speak of dividing the black concentration. Looking at that map of Mr. Wallace's brief on page 620, the one with the green dots and the red dots --

MR. HALPIN: Yes, sir.

QUESTION: -- that doesn't strike me as what I would call a concentration. It looks like the minority vote would be pretty well spread out.

MR. HALPIN: I think it is a concentration, your Honor. Of course, the District Court did find it to be so considering other evidence besides just looking at the map, of course, but if the Court, for instance, would examine the larger map which is the original exhibit and see that these areas are cut off effectively from wide areas to the north and the south and that it composes a rather consistent band of concentration of blacks throughout the center of New Orleans effectively cut off from white communities by natural boundaries, cemetaries, lakes, canals and so on.

QUESTION: What do you have to say about the burden of proof standard used by the District Court?

MR. HALPIN: Your Honor, I think that here there is no question under Section V that the burden of proof is upon the plaintiffs to demonstrate that both, the plan lacks a discriminatory purpose and lacks a discriminatory effect.

I think there is no question as to the wording in the statute.

QUESTION: Do you think that is all the District Court required?

MR. HALPIN: Yes, sir, I do indeed. There is, you know, and also I would note particularly in this case that the burden question doesn't become particularly significant because the facts in the case are basically not in dispute and wherever the burden happens to be tilted or shifted is not especially significant, particularly in regard to the effect.

I think here we are arguing primarily legal standard and that there isn't much contest as to just precisely what the facts are.

QUESTION: You don't think --

QUESTION: And the District Court said they had that effect and therefore we don't have to inquire into the other element of purpose?

MR. HALPIN: Well, your Honor, I think it is not necessary to reach that. However, I think there is --

QUESTION: Is that what the District Court did?

MR. HALPIN: Yes, sir, they premitted the question of purpose. I think the purpose, however, that -- that there is ample evidence in the record to indicate that there was a racially discriminatory purpose and that would provide

an alternative basis for this Court to determine, particularly the bad faith of the council from Plan 1 to Plan 2 that after the Justice Department had rejected Plan 1, Plan 2 was hardly a good faith effort to correct that.

Also, I think the courts are more and more willing to recognize purposeful discrimination from facts and circumstances. It is no longer a situation where white officials bent on discrimination will get on the stand and admit that they discriminated.

Now, I think there is the type of situation here where the Court could, in fact, find that there was such a purpose.

I think, given the legislative history of Section V, I think Congress did definitely intend to set up a different standard than the 15th Amendment and under that standard there might well be the individual cases, say a redistricting plan, which would not be acceptable under Section V which, under a particular constitutional case, wouldn't be declared unconstitutional and this test could be characterized a couple of ways.

It could be characterized merely as an inference of unconstitutional gerrymandering from these facts and circumstances or it could be characterized as a substantive rule but in any effect, I think it is very clear, after the District Court decision in South Carolina versus Katzenbach

and in some other cases that it is quite possible that Section V will prohibit a type of arrangement that might not otherwise be unconstitutional in the individual case.

QUESTION: Mr. Halpin, are you suggesting that this ought to be looked at as sort of a remedy to a historic practice of discrimination?

MR. HALPIN: Yes, sir, I think what Congress is intending -- I think they saw that there was discrimination in schools, in education, in jobs and so on, in voting, going back down and the reason was that the elected officials were able to ignore the particular interests of the black minority and by attaining to bloc voting and the like and that Congress intended to eliminate this by preventing the division, for instance, in redistricting plans, of these concentrations of black voters so that the white incumbents or politicians in power couldn't appeal and harness bloc voting in such a way that they could then just ignore the interests of blacks.

QUESTION: How about the at-large? The two at-large?

MR. HALPIN: Yes, sir, I --

QUESTION: How long have you had at-large seats?

MR. HALPIN: The -- there is a history which goes back and forth, but prior to 1954, there was a seven-member commission body elected from districts and then in '54, the

plan was changed and there were two at-large members.

The present system dates from '54 so there is no question --

QUESTION: Did they ever have at-large before that?

MR. HALPIN: I think, your Honor --

QUESTION: Well, it's not --

MR. HALPIN: -- I think there were some at-large seats at some time or other. The one document in the record, a document called "Wards in New Orleans --" might state that but I don't recall.

QUESTION: Well, if you have had them since '54, that violates Section V.

MR. HALPIN: Well, to this extent, your Honor. The Plaintiffs are contending that the District Court should not consider the at-large seatsin examining whether the five districting plan was racially-discriminatory.

We think this is frankly nonsense. We think this Court indicated in United States versus Georgia that it is a matter of political reality, Section V is, not just a list of voting-type changes and I think the Court was not only correct but was bound to look at the thing the way it operates and the way it operates is that you have two seats in which whites would certainly be elected and which would not respond to the black community.

QUESTION: If they had not reapportioned at all,

you couldn't have done anything, could you?

MR. HALPIN: Well, your Honor, in fact, the --

QUESTION: Huh? Could you?

MR. HALPIN: -- the -- in regard to the two at-large seats?

QUESTION: Could you have done anything under Section V? No, you couldn't, unless some changes were made.

MR. HALPIN: Yes, sir, there is no question, but I think --

QUESTION: And there were no changes made in the at-large.

MR. HALPIN: I think the changes, though, the districting arrangement was changed, your Honor and I think the --

QUESTION: The at-large seats?

MR. HALPIN: The five -- the construction of the five districts was changed and so therefore the District Court, in examining the -- whether or not the arrangement of the five seats, the way it was rearranged was racially-discriminatory or not, necessarily would have to look at other factors -- as the Court said, a backdrop including the fact that the two at-large seats were there.

Now, this doesn't mean that it is precluded under any kind of situation, having two at-large seats. They may be -- the District Court just found that the combination

under these circumstances of the two arrangements was discriminatory.

Thank you, your Honors.

MR. CHIEF JUSTICE BURGER: Mr. Stoner, you have three minutes left.

REBUTTAL ARGUMENT OF JAMES R. STONER, ESQ.

MR. STONER: Thank you, your Honor.

May it please the Court, we have heard counsel for the United States, the executive department of the United States Government, and we have heard counsel for the intervenors state that because of the two at-large seats the white vote in the City of New Orleans starts out at the outset with two seats.

Now, I submit to the Court that both counsel have neglected to bring to the Court's attention the fact -- and the record shows this -- that three blacks have been elected in other elections in at-large elections in the City of New Orleans in the past.

Judge Morieau was elected to the Fourth Circuit Court of Appeals.

Judge Israel Augustine was elected to the Criminal District Court.

And Dr. Spears was elected to be president of the Orleans Parish School Board. New Orleans Parish has the same geographic limit as the City of New Orleans.

Now, here are three blacks who have, in fact, run for political office city-wide in the City of New Orleans and they have won and I will ask my opponent counsel to consent by stipulation of the court to also bring to the Court's attention a matter which occurred in 1974, in November, 1974.

And I am referring to the election of Edward Lombard on a city-wide basis, a black candidate elected to the clerk of the Criminal District Court and in that election he defeated a white incumbent candidate.

Now, I submit that we cannot start with the proposition -- and both counsel have taken that proposition that in the 1970's that --

QUESTION: Well, why don't you just come right out and say that the finding of bloc voting is wrong because that is what is really wrong.

MR. STONER: You are right, your Honor --

QUESTION: Well, it --

MR. STONER: -- and I will say that. And I will say that the United States Government, by the executive department, is encouraging bloc voting before this Court right now and they are encouraging racial polarization.

QUESTION: When I asked Mr. Wallace something like that, he said he did not think it was a purpose of the Act

or the objective of Congress to encourage bloc or racial voting. I take it, obviously, you would agree with that.

MR. STONER: I would agree with that, as a matter of fact.

QUESTION: But you say their practice in the Department of Justice is not consistent with that expression of philosophy.

MR. STONER: Exactly. Exactly, your Honor. I would submit that it is the obligation of government to encourage peoples to live harmoniously together and the history of the world shows that where people learned to live harmoniously together, they can successfully advance their own interests.

QUESTION: Mr. Stoner, you mentioned all of these judges that have been elected there and all. Do you know of any large city in the deep south as of today that has never had a negro on its city council, other than New Orleans?

MR. STONER: Your Honor, I don't know. I must admit I do not know. I have not made a study of city councils in large cities in the South.

I do say, however, that there has been no election for the city council since 1968 -- or '69 and I further submit that this Court must look at the conditions in New Orleans as they existed in the 1970's, not as they

existed back in the '60's or the '50s.

Sure, there was racial discrimination. Parties were discriminated against --

MR. CHIEF JUSTICE BURGER: Your time has expired now, Mr. Stoner.

MR. STONER: The record shows substantially that that situation has changed in the City of New Orleans.

Thank you.

THE CLERK: The Honorable Court is now adjourned until Monday next at 10:00 o'clock.

[Whereupon, the case was submitted at 3:37 o'clock p.m.]