In the

Supreme Court of the United States

EAST CARROLL PARISH SCHOOL BOARD
AND EAST CARROLL PARISH POLICE JURY

Petitioners,

v. No. 73-861

STEWART MARSHALL,

Respondent.

Washington, D. C.
January 21, 1976

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Wednesday, January 21, 1976

The above-entitled matter came on for argument at 11:08 a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
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
JOHN P. STEVENS, Associate Justice

APPEARANCES:

JOHN F. WARD, JR., ESQ., 770 North Street, Baton Rouge, Louisiana 70802, for the Petitioners

STANLEY A. HALPIN, JR., ESQ., Suite 1212, 344 Camp Street, New Orleans, Louisiana 70103, for the Respondent.

BRIAN K. LANDSBERG, ESQ., Civil Rights Division, Department of Justice, Washington, D. C. 20530, as amicus curiae on behalf of Respondent.

I N D E X

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 861, East Carroll Parish School Board against Marshall.

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

ORAL ARGUMENT OF JOHN F. WARD, JR., ESQ.

ON BEHALF OF PETITIONERS

MR. WARD: Mr. Chief Justice, and Members of the Court, and may it please the Court: I have requested the marshal to notify me. I would like to save a little time for rebuttal in view of the Solicitor General being permitted to participate in the oral argument and brief along with one additional amicus curiae.

MR. CHIEF JUSTICE BURGER: When the white signal goes on, you will know that is the signal to save time for rebuttal.

MR. WARD: Before getting to the discussion of the issues, facts, and circumstances in this case, I think there are two points that your Honors need to consider and keep in mind while you are considering the issues and the facts and circumstances of this case.

One, East Carroll Parish is in northwest Louisiana, a small rural parish. In Louisiana our law requires the district attorneys in our State to represent the local governmental units in their districts, such as school boards and police juries. Oftentimes the district attorney will have

three parishes in his district which gives him three school boards, three police juries to advise. Of course, he is primarily a county prosecutor, criminal law. Our district attorneys are generally understaffed and overworked, and their assistants, the few that they have, are trained primarily in criminal law.

We do not have for our school boards, unfortunately, and our police juries a battery of lawyers such as the Solicitor General and Justice Department have or the Lawyers Committee for Civil Rights Under the Law, or even lawyers with the expertise and knowledge in constitutional law that Mr. Halpin has from the many cases he has handled with the American Civil Liberties Union.

I say that not to present a David and Goliath type picture, but merely so the Court will understand that back in 1971, '68 to '71, when this case was in the district court, that school board and police jury were relying on the advice of an assistant district attorney who really had not a great deal of experience in this area of law,and also, the second point, this particular area of the law was constantly changing. It was virtually impossible, really, for lay police jury members and lay school board members to know from day to day what the law really was with regard to reapportionment. It was not until really your Avery decision that we knew that it would apply to local political subdivisions as well as

congressional districts and State legislatures.

At that time, in '68, we tried to anticipate the problem of reapportionment and assist these school boards, as the briefs of all three, the respondent, the Solicitor General, and amicus curiae, point out. The Louisiana legislature in 1968 adopted a law which would permit school boards to reapportion themselves. That was Act 561.

A similar -- not similar law, but to the same effect, was suggested by the police juries, Act 445. It is intimated in respondents' brief, in the Government's brief that because in prior years the school board members and police jury members had been elected from the wards within a parish that when the legislature switched to a reapportionment plan which would permit at-large districts, that there was some invidious motive in switching from single-member districts, if you could call our police jury wards single-member districts, they really were not, because some of them were multi-member, but to switch them from that system to a possible permissive at-large system was designed to discriminate against black citizens and to deny them the right to vote and the right to participate in the electoral process.

Nothing could be farther from the truth. For the School BoardsAssociation, Louisiana School Boards Association, which is a nonprofit advisory service type organization which I happen to represent, I drafted the legislation for the

school boards that the legislature adopted, Act 561. It was slightly amended in the legislature, but basically we were lucky and it came through pretty much as it went in. We never considered once the possibility of that at-large feature, permissive at-large feature, being used to discriminate against black citizens or to dilute their vote. We simply wanted to give our school boards as much latitude as possible in trying to devise the best plan that they could to help them provide the best possible education system they could in their parish.

The Attorney General of our State somewhat delayed submitted those two Acts to the Attorney General of the United States as required by the Voting Rights Act. He entered an objection due to the at-large feature. We spent, myself and Mr. James Prescott, who is Executive Secretary of the Louisiana School Boards Association, about two years with numerous phone calls and correspondence trying to convince the Attorney General that since the at-large feature was permissive and since the Voting Rights Act would require submission of local governmental units reapportionment plans to him, there was no need for him to object to the State legislation. And not only that, but because of his objection, we now find that some school boards -- I say them particularly because I represent them more than I do police juries -- could not reapportion because of the inoperativeness of the State

legislation.

QUESTION: It was authorizing legislation, was it not, both Acts were authorizing legislation.

MR. WARD: Yes. That's correct, your Honor.

QUESTION: Authorizing school boards to do this if they wanted to.

MR. WARD: That's correct. It did not mandate at-large districts. It made it permissive.

QUESTION: And that was true of both Acts, for the school board and for the police jury.

MR. WARD: That's correct. The police jury Act was much shorter. It simply repealed a lot of the statutes tying police juries to wards. Whereas, our Act went into more detail, limited the smallness and the maximum size of the board within their discretion, permitted single-member districts or at-large districts.

By the way, one reason for that was that school boards had been tied to police juries historically. Simply, we elect the same school board members and the same wards elect police juries. And the school boards have wanted to get away from that for many years.

QUESTION: Mr. Ward, tell me about a police jury. Does it have the same authority generally as a county board of supervisors?

MR. WARD: Generally speaking, Mr. Justice Powell,

I would say yes. Building roads and drainage ditches and that kind of thing.

QUESTION: Does it have the power to levy taxes?

MR. WARD: Yes, sir.

QUESTION: It's the only governing body in the parish?

MR. WARD: It is the only governing body in the parish except for the school board which has complete and sole jurisdiction over the school system for the parish and any town council which may be in a town or a village. It is the sole governing authority for the parish government.

But school board functions and police jury functions are so totally different that we had long wanted to get away from being tied to the police jury. There is no reason why school board members should be elected from the same districts that police jury members are. We have parish-wide school systems, and it's not important whether this man gets a school built in his district as compared to this man over here. It's do you get the right kind of school built throughout the parish to provide the best education.

We ultimately were successful in getting the Attorney General, convincing him that he could withdraw his objection to the permissive legislation, which he did in '72 after this case had been through the district court.

Now, when it was before the district court originally

it was on a suit on the 14th amendment grounds of one man one vote in '68. Of course, an at-large system meets one man one vote requirements perfectly with zero deviation.

When 1970 rolled around, as a matter of fact that plan was approved by the district court. There was no appeal taken. And really it's sort of res judicata.

QUESTION: That was an at-large plan, but was residential requirements?

MR. WARD: That's correct. The same residence requirements, meaning their wards.

In 1970, however, the district court on its own motion requested the board and police jury to either file a new plan or at least to file updated statistics based on the 1970 Census which --

QUESTION: Who requested that?

MR. WARD: The district judge.

QUESTION: Who had retained jurisdiction.

MR. WARD: No, sir, not specifically. I do not believe the appendix indicates that he retained jurisdiction from his -- he may have. You're correct.

QUESTION: He must have or there would have had to be a new lawsuit.

MR. WARD: That's correct. It required them to update. They did simply by filing the same plan, the '70 Census figures did not affect the one man one vote because it was an

at-large system.

QUESTION: So did he enter a new order?

MR. WARD: At that point the present intervenor respondent intervened, Mr. Marshall, and complaining of 15th amendment discrimination in dilution of the black vote. The district court held a hearing in July of 1971 in which the plaintiffs, the intervenor here, Marshall, brought evidence to the effect that you had a history of segregated school system in East Carroll Parish, that Federal registrars had to come in and register black voters, the usual thing of that hopefully obsolete history of our past as to practices which we now regret.

However, in this particular parish at that time even black citizens constitute about 58 percent of the total population in the parish. At that time they were 45 percent approximately of the registered voters in the parish. I don't know what the eligible voting age figures would be. I do not have those. The district court concluded and in his order of August '71 set down seven points, four of which, as I recall, related directly to whether or not this plan discriminated against the black citizens of East Carroll Parish. He found that it did not, that they were a majority in population, that the plan was equitable, one man one vote since it was at large, and he approved of that plan.

The intervenor noticed an appeal to the Fifth Circuit.

The panel decision affirmed the district court two to one. An application for rehearing was filed and granted by the Fifth Circuit, and they reheard the case en banc ("en banc" as we say in Louisiana) and by a 9 to 6 split decision reversed the district court finding that due to the fact that black citizens in East Carroll Parish were at that time only 45 percent of the registered voters, regardless of the question of how many were eligible to register, of age to register, that that was sufficient to dilute the minority vote, even though the blacks were in a --

QUESTION: So it was a constitutional holding.

MR. WARD: Constitutional, yes, sir. That was a constitutional holding based primarily on white versus registered. There were six dissents, six dissenting opinions to the effect that population is the proper criteria and not registered voters and that because of population majority, there was no way that an at-large plan could discriminate against that majority.

QUESTION: Mr. Ward, what was the judge's answer to contentions in the district court that, without even getting the constitutional issues, the preference is for single-member districts when a court is fashioning a reapportionment plan?

MR. WARD: I may partially have to beg ignorance, your Honor. I did not represent the petitioner either at the district court or the Court of Appeals.

QUESTION: This Court has said that is the normal rule, isn't it?

MR. WARD: That is correct.

QUESTION: Although multi-member districts aren't per se unconstitutional, if a court has to come up with a plan or approve a plan that the preference is for single-member districts.

MR. WARD: Well, I think you did say in Conner v. Johnson that when a court fashions a plan -- it may not have been Conner v. Johnson -- that it should prefer single-member districts, although I do not yet understand the preference.

QUESTION: Well, you may not be able to understand it. What I asked you was what was the district court's answer to that?

MR. WARD: His answer to that was, if the issue was raised at the district court level, that regardless of that preference, unless there was proof that the other plan was unconstitutional, there was no need for him to draw a single-member district plan. He did not actually draw this plan.

QUESTION: I know, but it was put into effect by a court order.

MR. WARD: That's correct, yes, sir.

QUESTION: It was not a piece of legislation.

MR. WARD: Yes -- well,--that's the contention in this suit now by the Solicitor General.

QUESTION: Well, it was not a piece of legislation; it was a court-ordered plan.

MR. WARD: The court ordered the policy jury and the school board to adopt --

QUESTION: Exactly.

MR. WARD: And submit to it a plan, which they did.

QUESTION: Which they did, which is normal in the apportionment cases. You get the board to submit plans. That's where they usually come from.

MR. WARD: That's right. And he accepted their plan as being constitutional.

QUESTION: The school board and the police jury had legislative authority to do it, did they not?

MR. WARD: There would be a --

QUESTION: Under the authorizing acts of the State legislature.

MR. WARD: If you go purely technically, at the time this case was decided in the district court, the Attorney General's objection to the permissive legislation was still in effect and was not withdrawn until '72, so those State statutes were not in effect.

QUESTION: And they had no legislative authority. They could certainly comply with the court's request to submit a plan, but they couldn't legislate without the statutory authority.

MR. WARD: That would be correct. That is correct, your Honor.

QUESTION: I see.

MR. WARD: And the court approved the plan as being constitutional over the objections that it discriminated.

Now, of course single-member districts and multi-member districts, you can draw reapportionment plans like a pie, you can put it into all sorts of different kinds of slices, depending on who has got the knife.

QUESTION: Was it urged in the Court of Appeals single-member districts should have been put in because of the preference expressed by this Court for /single-member districts in court-ordered plans?

MR. WARD: It was raised, your Honor. There was not a great deal, however, made of it that I can find either at the district court level or at either Court of Appeals.

QUESTION: While the case was pending in the Court of Appeals did the district court try to change its order?

MR. WARD: Yes, your Honor, it did.

QUESTION: And didn't it put in single-member districts while the case was pending in the Court of Appeals?

MR. WARD: That's correct, your Honor,

QUESTION: What did the Court of Appeals say about that?

MR. WARD: Once the case was on appeal, the district

court no longer had jurisdiction without a new order.

QUESTION: That was the panel decision, though, of the Court of Appeals. I didn't see that repeated in the en banc.

MR. WARD: In the en banc, as I recall, if they mentioned it at all, it was barely in passing because they had decided apparently that they were going to reverse the at-large plan. So there was no need for them to particularly consider that question.

QUESTION: There wasn't any need for them to even have an en banc hearing if the district court was already ready to put in a single-member district plan.

MR. WARD: But does the district court have jurisdiction to issue orders once a case is on appeal? Or can he cut out the chance to hear the issue on appeal when it has already been appealed? Another thing, this was an ex parte order issued without hearing, without notice to the defendant political subdivision at all.

QUESTION: Anyway, as the case comes to us, we are talking about the validity of the district court order that the district judge wants to scrap and has tried to scrap.

MR. WARD: I would respectfully submit that under all the rules --

QUESTION: Well, isn't that true? That is the fact. I agree with you that the Court of Appeals said to you that the district judge had no authority.

MR. WARD: Apparently somebody convinced him without a hearing or anything that perhaps the state of decisions that had come down since his original order commanded single-member districts. If that is the law, it certainly should not be the law because single-member districts can be just as discriminatory as at-large and multi-member districts.

QUESTION: Is there anything in the record, Mr. Ward, that indicates one way or the other whether the district court's second order was entered with or without a hearing?

MR. WARD: You will not find a new motion in the record after the original complaint was filed. In his brief he attaches the order of the court, but he does not attach any new motion nor is there any in the record that I was able to find or any notice of a hearing to be set. And according to the information given me by the then assistant district attorney who was handling it, nobody knew about it until it was issued.

QUESTION: Does the order itself shed any light on that with a preamble statement as to how the order happened to be entered?

MR. WARD: No, sir, your Honor, if I recall, the --

QUESTION: Usually if there is a hearing, it recites the fact of a hearing, does it not? Is that Louisiana practice?

MR. WARD: All it says -- I will read the beginning.

QUESTION: Where are you reading from?

MR. WARD: I'm reading from respondent's brief, page laa, the appendix.

The order itself, this is the order of '72, March 27, 1972, commences by saying, "On August 7, 1971, this Court entered an order approving at-large parish-wide elections for the Police Jury and School Board of East Carroll Parish. Subsequent decisions, particularly the United States Court of Appeals for the Fifth Circuit, have convinced this Court that at-large elections for a parish with sizable black population and a history of denial of the vote to black citizens, is constitutionally impermissible and is without valid Louisiana statutory authority. Having received the various alternative plans proposed by plaintiff-intervenor and defendants at the July 29, 1971, hearing, the Court finds that the nine-member ... plan" is the best. No indication at all of any further motion by the intervenor or any notice to the defendant public bodies or chance to defend against that viewpoint, which we submit is incorrect, both procedurally and as a matter of law.

QUESTION: Mr. Ward, while we are talking about the procedural problems, you mention in your brief, at least if I read it correctly, that there has been a change in the relative strength of the black versus white voting population. Is that in the record? What's the support for that in your brief?

MR. WARD: My authority for that change in registered

voters comes from a letter from the Registrar of Voters, as I requested him to let me know what was his registration now. Those figures are accurate, they are not in the record. The record would have to be supplemented. And I inquired of the clerk after filing my petition if it would be proper to do so and he indicated that at the time he did not. Mr. Halpin and I discussed that factor.

These are one of those cases that can't be decided on the basis of just old stated facts in 1971 like maybe an automobile accident can be decided. The law changes and --

QUESTION: Do you think it would be appropriate for the whole case to go back to the district court and start over? Is that what you are really saying?

MR. WARD: No, sir. I'm saying I don't think you should. I think you should decide this case on the merits even if the Government's position as to section 5 of the Voting Rights Act is correct and should be applied in other cases. There would be no real point in sending this case as it stands before you now back to the district court and put these two bodies to all of the expense of going to the Attorney General under section 5, then possibly having to go to the district court of the District of Columbia to get a ruling if the Attorney General's ruling is adverse. I think the Attorney General may also need some direction from this Court as to is an at-large system under these kind of circumstances

constitutionally impermissible. Presumably if you do not, he may in his consideration, if it went back to the district court and through the Attorney General under section 5, say it's constitutionally impermissible and here we come right back to this Court again, because it just doesn't seem conceivable to me that --

QUESTION: Mr. Ward, which are the circumstances we should base that decision on? An assumption that the blacks outnumber the whites or the whites outnumber the blacks in the voting arena?

MR. WARD: The respondent here, the complaint --

QUESTION: What is the factual basis on which you want us to make that decision? If it's on the basis of the record, it might be one decision; if it's on the basis of what you tell us in the brief, it might be something else.

MR. WARD: I think on the basis that I think -- f there is a problem of doing it on the basis of the record, the Court should permit the record to be updated with regard to the present facts as to the --.

QUESTION: You think the updating should be done in this Court rather than in the district court.

MR. WARD: In the essence of time, I would say yes, your Honor. If it must go back to the district court for that, then let it go back for that limited purpose. But even the district court is going to need some direction from this Court

as to if the facts are this, what is the law; or if the facts are this, what is the law? Are there now more registered black voters in East Carroll Parish than white? And is the population still 58 percent black? And if it is, then is this at-large plan constitutional? I think the district court will need to know, because I don't believe he knows now whether it is or whether it is not.

QUESTION: We don't either.

MR. WARD: But you have to make the decision as to whether --

QUESTION: But how can we if we don't know?

MR. WARD: As to those facts, if you want to send it back to the district court or permit us to supplement the record with the exact facts, that may be the proper thing to do. It's a long time and a lot of expense for these two local government units who don't have a great deal of money. Local governments aren't very rich, particularly in small rural parishes.

I would like to perhaps conclude by saying I don't necessarily disagree with the Government's position as to the use of section 5,and the plans should be submitted. The law of section 5 has changed so much since the Voting Rights Act was first adopted. In 1965 the only newspaper publicity was about requiring them to read the Constitution and that sort of thing. It wasn't really until about 1969 or '70 that we began

to realize,that is, in the local government area, that this section 5 is back there that everything we do must be submitted to the Attorney General. We relocate a polling place,in somebody's grocery store, and he says, "I'm tired of putting up with this, go find yourself another polling place." We do that and it must be submitted. It's a problem.

But I have submitted plans to the Justice Department under section 5 and have had them approved, all single-member districts, all multi-member districts, and combinations, and that does not bother me. Having to come all the way to Washington, D.C. and bring witnesses in order to try to defend myself in the D.C. district court, that's another problem. Of course, Congress did it. I don't know that you could do much about it, unless it is discriminatory against a State for depriving them of the normal judicial procedure of their local district judges. There seems to be some indication that perhaps Congress did not trust our local district judges. I find them -- Mr. Halpin wins as many cases on one side as I do on the other, so I would say they do a pretty good job.

But perhaps that is a way to take a burden off the court system by requiring it to go to section 5 in other cases, even though suit has been filed. And our problem back in '71, particularly with Conner v. Johnson, we did not know how far Conner v. Johnson went, and suits were being filed and the district attorneys relied on their district judges and

their district judges -- this is not the only one -- interpreted Conner v. Johnson to apply even when he did not devise the plan himself but had compelled the plan through a court order directing the legislative body to submit a plan to him.

I think you can decide the merits of this case, under these circumstances, on the merits and hold this at-large plan as being constitutionally permissible under these circumstances and make an alternative decision as to other cases and the section 5 position of the Government.

Thank you, your Honor.

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

Mr. Halpin.

ORAL ARGUMENT OF STANLEY A. HALPIN, JR.

ON BEHALF OF RESPONDENT

MR. HALPIN: Mr. Chief Justice, and may it please the Court: There are certain factual matters that I feel compelled to correct at the outset. The matter of the question of the percentage of black voter registration in the parish has arisen on a question from Mr. Justice Stevens, and the petitioners in their brief assert that as of the particular time in which they refer to in their brief that there was a majority of black voters, and their figures I think show that there were 17 more black voters than white voters.

However, I checked this, and my information is that there was only a short period of time of approximately three

weeks during the summer of '75 in which this was the case due to a flux in adoption of the new Louisiana Constitution which enfranchised a new segment of people, and blacks in the parish, as they always do there, worked hard and got sort of a jump on the registration for a few weeks. But then the registration went back to its normal level so that the figures that I had someone obtain from the Registrar of Voters in East Carroll Parish yesterday are as follows, that there are 3,511 blacks registered and 3,759 whites registered, or a white majority of 248 voters.

QUESTION: I think, Mr. Halpin, what you are telling us that for is that we are not in any position to get into resolving the contest over the facts here.

MR. HALPIN: Precisely.

QUESTION: Unless at some point you would both agree on facts which could be judicially noticed.

MR. HALPIN: Precisely, your Honor. There are facts,-- This is just one of them, but there are also inferences to be drawn as to these facts. There have also been elections that have been run in five years since the trial of this case. These are matters of serious contests,and I frankly cannot see how we can -- we cannot resolve the case on facts as they exist.

QUESTION: Along that same line, can you shed any light on whether or not there was notice and hearing in connection with Judge Dawkins' order of --

MR. HALPIN: Yes, sir, that's what I was going to refer to. I don't have my complete file with me. My recollection is that I filed a motion to modify the injunction which then resulted in the court order. I'm not absolutely positive, and I will be glad to communicate by letter and attach if that was the case. Certainly, the situation was that the petitioners had certainly every right to move the court to reconsider or rehear had they objected to the second order. There is no question the second order was done very rapidly and --

QUESTION: While this was on appeal?

MR. HALPIN: After appeal had been noticed, yes, sir.

QUESTION: What's your position on whether the district court -- I take it you felt the district court had jurisdiction to do it.

MR. HALPIN: In respect to that, I think if we are dealing with an injunctive matter, particularly in sections where you have a great deal of flux, that certainly the district court has the right to modify an injunction, you know, to meet present circumstances and change in the law, whatever, and that particularly in this case there are procedures which we indicated in a footnote in our brief that at least eight of the circuits agree that in situations as this, where the district judge is changing his mind, the proper procedure is for the district judge to indicate his difference and then for the Court of Appeals to remand to give him an opportunity to

do this.

QUESTION: Mr. Halpin, did you serve the other side?

MR. HALPIN: If I filed a motion, I did serve it on the other side, your Honor.

QUESTION: Well, I heard him say he didn't know about it until after he came down.

MR. HALPIN: Well, Mr. Ward wasn't counsel then, so I think he was saying he doesn't know. But I will be glad to supply the Court with whatever was filed or indicate in a letter that no motion was filed. But my recollection, although that was five years ago, my recollection is that I did file something, and my practice as an attorney is always if I file a motion to serve it on opposing counsel.

QUESTION: I take it the Court of Appeals had before it the district judge's second order.

MR. HALPIN: Yes.

QUESTION: And decided that they either could not or would not consider it because in their view he had no jurisdiction.

MR. HALPIN: They deemed it is out of jursdiction this .. And I think the proper procedure at that stage would have been to remand the case so that -- perhaps with instructions.--

QUESTION: What was the district judge's answer to the Conner v. Johnson claim that single-member districts were to be

preferred when the court adopted a plan?

MR. HALPIN: Frankly, it's not absolutely clear. I have to guess, of course, to a certain extent as to what the judge is saying. I raised that orally before this, and it does appear in the appendix.

QUESTION: You raised the same thing in the Court of Appeals --

MR. HALPIN: Yes, sir.

QUESTION: -- and the Court of Appeals put it on a constitutional basis.

MR. HALPIN: Yes, sir, and I can only assume that what was going on with the district judge is that somehow he didn't consider himself in the situation of drawing a remedy or that somehow that case -- I really don't know, your Honor.

QUESTION: It was a Section 5 matter and if he --

MR. HALPIN: Yes, sir. I think -- yes, I think it's one way or the other. I can't really read his mind, but it would appear to me that he was saying, he perhaps was saying, that this was a legislative enactment and it's not a Conner v. Johnson situation, I think it's either/or. Then it should have gone under section 5. And if not, it's under Conner v. Johnson and Chapman v. Meier. But exactly what his thinking was at that time, I can't really tell the Court.

QUESTION: You are urging that this case is moot.

MR. HALPIN: Yes, sir. Yes, sir. I think in view

or that second order, that it is.

QUESTION: You are urging that the case is what?

MR. HALPIN: Is moot, your Honor, in view of the second order, and that -- this is on certiorari --

QUESTION: How does the second order get here? Is it in the record in the Court of Appeals?

MR. HALPIN: Yes, sir.

QUESTION: It's in the record in the Court of Appeals?

MR. HALPIN: Yes, sir.

QUESTION: And that record is here.

MR. HALPIN: I would think so, your Honor.

QUESTION: The whole record.

MR. HALPIN: I would assume that it is.

QUESTION: How did that get in the record of the Court of Appeals? I don't mean in the briefs, I mean how did it get in the record?

MR. HALPIN: Well, notice of appeal was filed by the other side to the second order, and I assume it was then lodged.

QUESTION: .. moot, this case is not older.

MR. HALPIN: Well, your Honor, I would raise a technicality, though, that I would think that it would be in the sense that the district court has definitely indicated its view to change its mind.

QUESTION: I know, but wouldn't you be satisfied if

this case went back before the district court on a Conner v. Johnson that you should have given preference to single-member districts and didn't?

MR. HALPIN: Well, that's not my first preference, but --

QUESTION: I know, but wouldn't that accomplish everything?

MR. HALPIN: That would accomplish in some respects. I don't think that's the best -- Yes, that would accomplish our purpose, and that would be treating it as a Chapman v. Meier situation, but the reason that I'm concerned about that, now, is that I think this is a section 5 situation. We have got not only this case to deal with, but we have got many other cases to deal with, and I'm familiar with those particularly in Louisiana where these court decrees have been used to circumvent section 5. We lodged in the record for the Court's benefit what I find the worst example of this, but the classic example of circumvention, a case named Whatley v. Union Parish. It's a very short record, everything was filed on the same day. It's about 10 days. The complaint was filed on the same day, the answer was filed on the same day, an order was filed and signed on the same day by the court approving a plan for the redistricting of Union Parish in Louisiana, a place with a significant black population which the Justice Department had only months before objected to under section 5 as a violation.

And the thing is I think the way to handle this case would be to make a clear pronouncement that this is clearly covered, for instance, by Connor v. Waller that this sort of circumvention should not continue. We cite in footnote 32 of our brief, which I believe is at page --

QUESTION: Waller, disposition last -- what was Connor v. Waller?

MR. HALPIN: Connor v. Waller, your Honor, was a Mississippi situation.

QUESTION: That's the one we handled summarily last June or so, isn't it?

MR. HALPIN: Yes, sir. Specifically the Court indicated there that the district court in holding that -- the Mississippi State legislature had adopted a court (sic) very similar to that which the three-judge district court had adopted and then the district court said this is not subject to section 5. This Court said it was subject to section 5 and said the court shouldn't have considered those different racial allegations.

But at footnote 32 of our brief, on page 18, we cite a number of cases, I think there are about 10 or 12, all in that same district in Louisiana in which the courts have approved redistricting planswithout them ever having been submitted under section 5.

QUESTION: Yes, but, Connor v. Waller involved

whatever was submitted to the district court in that case was a product of legislative action. It was a piece of legislation.

MR. HALPIN: Yes, sir. Here, your Honor, the police jury adopted a resolution. They sent a letter to the court saying, "We have adopted this; please incorporate it in your forthcoming order."

QUESTION: In Connor v. Waller you had two separate Acts, one of the Upper House and one of the Lower House which added up to the legislative plan. Is that it?

MR. HALPIN: I'm not terribly familiar with it, but it could be, your Honor.

QUESTION: That's my recollection of it and there wasn't any question that that was a legislative plan, and yet the court for some reason held it was not covered by section 5. We summarily reversed and said, yes, a legislated change like that was indeed a section 5.

MR. HALPIN: Right.

QUESTION: Is that the situation here?

MR. HALPIN: Just about, your Honor. I think so. In Connor you had this ongoing redistricting litigation. This redistricting done was in the context of litigation just as much as it was here.

QUESTION: You colleague says that when this plan was adopted, it had no legislative power to adopt this. It was just responding to a request of the court.

MR. HALPIN: Well, it's not clear what they say. At one point in their brief, at page 6, I think they admit quite the opposite. They say that this wasn't a court-fashioned plan, this was something the police jury had been working on even before. They said it's something that was adopted by the jury.

QUESTION: Well, that may be true, but I think his point was that under the State authorizing statute, it was not in force.

MR. HALPIN: That's correct. So that technically -- however, there are lots of bodies, police juries and school boards, which continue to do that, to enact it without that authorization. And incidentally, again, a point of factual correction, the objection to 561 dealing with school boards has been lifted, but the objection to 445 dealing with police juries has never been removed by the Justice Department, and that was a misstatement of fact.

QUESTION: In other words, police juries continue to be without legislative power to reapportion themselves, is that right, because it's being held up by the Justice Department.

MR. HALPIN: To go at-large.

QUESTION: Pardon?

MR. HALPIN: To go at-large. They can redistrict themselves as long as they do it to single-member districts. They can't go at-large using that new statute under current law.

QUESTION: They do not themselves have legislative power to do that.

MR. HALPIN: Right.

QUESTION: Because the authorizing statute has been suspended while it's pending approval under section 5 by the Justice Department, is that it?

MR. HALPIN: Yes, sir. Well, it's been objected to.

QUESTION: Well, I say --

QUESTION: It's not a Connor v. Waller case by definition.

QUESTION: It is not by definition, it couldn't be.

MR. HALPIN: Well, as a practical --

QUESTION: I don't mean as a practical matter, but as a legal matter it is not, is it?

MR. HALPIN: I think it's indistinguishable, your Honor. I think it is a situation where you do have an adoption, although in the sense that they don't have authority to adopt it, it's not an adoption.

QUESTION: Suppose a police jury is named a defendant in a district court action and defends, and they hire an attorney and there is the -- I don't know whether you have a chairman or a president of a police jury -- in a committee that supervises this suit. And the attorney and the chairman of the police jury get together, the court has asked them for a plan, and the chairman and the attorney get together and say, We

will submit this plan. Surely that's not a Connor v. Waller situation, is it?

MR. HALPIN: I think it is, your Honor. I think the test is who drafted the plan.

QUESTION: I thought certainly what Connor v. Waller talks about is was this a legislative enactment.

MR. HALPIN: I think that distinction is oversubtle and doesn't really meet the needs of interpretation at all.

QUESTION: That may be your view of the law, what the law should be, but certainly Connor v. Waller spoke in terms of the legislative enactment.

MR. HALPIN: Yes,sir, but I think if you read Connor v. Waller with Conner v. Johnson wherein in Conner v. Johnson you had a situation where the court was drawing its own plan as an interim measure, and this Court said OK, that's beyond the reach of section 5, that's the exact tracks and narrow holding there.

QUESTION: Well, you say the court drawing its own plan. You've practiced enough, and I think I practiced before I went on the bench, to know that there are very, very few judges who sit down without any advice from counsel on either side and ponder the whole thing through and come up with something that was never suggested to them by a lawyer. Don't you agree?

MR. HALPIN: Well, yes, sir. Frequently they are now

appointing special masters who do draft the plans.

QUESTION: In the absence of a special master, I don't mean just in a case like this, but in any case, the judge gets at least his idea if not the findings that he actually signs,from one of the parties.

MR. HALPIN: Well, of course, it's always an adversary situation, yes, sir.

I think the technical line when you read Conner v. Johnson together with Connor v. Waller , that the rule comes out that you do have to attempt to make this determination as to whether this is a creature of the court or a creature of the legislature. And to not do that --

QUESTION: What you are really suggesting is that the district judge when he calls for somebody to submit some plans,he's got to wait until you dispose of this case,until one of the parties has his wrestling match with the Attorney General.

MR. HALPIN: OK. This where way I think it --

QUESTION: Either that or he has to receive the plan and then himself ask the Attorney General.

MR. HALPIN: I think that if --

QUESTION: That's exactly what the Court rejected in Conner v. Johnson.

MR. HALPIN: Well, in a sense where it's a court-drawn plan. But I think certainly the primary jurisdiction should be under section 5, and that the proper course, for instance,

for a court to do in this action, unless there is an emergency situation where you have to adopt a plan --

QUESTION: I didn't know section 5 replaced all the reapportionment litigation in the country.

MR. HALPIN: No, sir, of course not. I'm speaking only where --

QUESTION: Only where what?

MR. HALPIN: -- there is section 5 jurisdiction.

QUESTION: You just said it should be the primary mechanism to reapportion.

MR. HALPIN: I'm sorry. Where section 5 coverage exists, I think the proper course of action --

QUESTION: Where it does exist. That's the question right here now.

QUESTION: It's been squarely held that a court-ordered plan is not subject to section 5 approval, hasn't it?

MR. HALPIN: It's been squarely held, your Honor, that a plan which was drawn by the court --

QUESTION: A court-ordered plan as contrasted from a legislative plan that was adopted by a legislative body, State and/or local.

MR. HALPIN: Yes. My concern also -- certainly, Chapman v. Meier and Conner v. Johnson would require single-member districts, but I wanted this opportunity to point out to the Court some of the very difficult practical problems that we

are dealing with in Louisiana and other places, and that there should be some mechanism to avoid the circumvention of section 5 through court orders. And that mechanism would be, such as we have suggested in the brief, either to draw this thing to meet --

QUESTION: You are suggesting, though, that Federal district judges are parties to circumventing section 5.

MR. HALPIN: Your Honor, inadvertently.

QUESTION: Are you supposed to assume that?

MR. HALPIN: Inadvertently it happens that way. I'm not suggesting any attempt whatever, but I think because --

QUESTION: Then you are assuming a --

MR. HALPIN: A possibility in the law, and asking this Court really to clear it up so it wouldn't happen.

QUESTION: You are assuming they don't know what is going on.

MR. HALPIN: No, sir.

QUESTION: One or the other you are suggesting, either they are doing it deliberately or ignorantly.

MR. HALPIN: I suggest this, your Honor, that if the law -- if this Court would make a clear pronouncement on that, then there wouldn't be this sort of fuzzy area between section 5 which is --

QUESTION: I suppose you also would concede -- or would you? I would like to ask you, what do you think the difference between the section 5 standard is and the

constitutional standard?

MR. HALPIN: Your Honor, that's one of the problems that my --

QUESTION: I can understand your interest in wanting to come under section 5.

MR. HALPIN: I think the principal difference --

QUESTION: Because they will not permit multi-member districts under section 5 if there is any kind of identifiable residential pattern of living in the community, isn't that right?

MR. HALPIN: I think as a practical matter the difference is where the burden of proof lies. To the extent to which that is a factor in the case, it would make a difference in the standard. But when you are dealing with at-large elections, it seems that the substantive standard is not --

QUESTION: Do you know any multi-member districts that the Attorney General has approved under section 5?

MR. HALPIN: No, sir.

QUESTION: You aren't about to find one either, are you?

MR. HALPIN: No, sir.

What I would urge the Court is that if, as the Court has suggested, this is a creature of the court or a court-ordered plan, which wouldn't be under section 5, that clearly Conner v. Johnson and Chapman v. Meier would require that

single-member districts be devised as a remedy.

QUESTION: Mr. Halpin, I've got Connor v. Waller now, and indeed what we held there was that the district court erred in holding that House Bill No. 1290 and Senate Bill No. 2976, Mississippi Laws 1975 Regular Session, are not legislative enactments required to be submitted pursuant to section 5 of the Voting Rights Act. There wasn't any question there that we had statutes of the State legislature in Mississippi.

MR. HALPIN: Oh, yes, sir.

QUESTION: That were held not to be legislative enactments, and we said that was just plain wrong and they should be required to go under section 5. But what we have here is not quite that.

MR. HALPIN: Here we have a resolution of the school board of November 18, 1968, or whatever it is, and the question is is that well under ..

QUESTION: I know, but how could it be a legislative enactment if they had no power to enact it?

MR. HALPIN: That's true, your Honor.

Certainly, in any event, it's quite clear that there are a number of things that have happened since this case was tried some five years ago, and I think it certainly is appropriate that it be considered on the present facts, and this Court is in no position to do that.

I would think that it should be under section 5 of the

Voting Rights Act, in particular, that since now the school board does have, one body does have, the authority to be able to go at-large. Maybe that's the result that we will have to reach ultimately and that some of these questions may be metaphysical, because when it comes back to this Court, the Court will be in the situation this board now has the authority to do it and it may well be an enactment then under Connor v. Waller, and those are the matters that will have to be resolved.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Landsberg, we will not ask you to fragment your arguments. We will have you on at 1 o'clock.

[Whereupon, at 12 noon, a luncheon recess was taken, to reconvene at 1 p.m. the same day.]

AFTERNOON SESSION

(1 p.m.)

MR. CHIEF JUSTICE BURGER: Mr. Landsberg, you may proceed whenever you are ready.

ORAL ARGUMENT OF BRIAN K. LANDSBERG AS AMICUS CURIAE ON BEHALF OF RESPONDENT

MR. LANDSBERG: Mr. Chief Justice, and may it please the Court: Section 5 of the Voting Rights Act provides in relevant part that whenever a State -- and it's set forth on page 2 of the Government's brief -- that whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting or standard practice or procedure with respect to voting different from that in force or effect on November 1, 1964, then that State or political subdivision must comply with the preclearance provisions of section 5 either by bringing a suit in the District Court for the District of Columbia seeking approval of the change as not having a discriminatory purpose or effect or by submitting the change to the Attorney General.

If it's submitted to the Attorney General and the Attorney General has not interposed an objection within 60 days, then the State or political subdivision may enforce the change.

Now, the question today, I suppose, is whether the

words "seek to administer" which are found in the first --

QUESTION: Is this question among the questions on which certiorari was granted?

MR. LANDSBERG: No.

QUESTION: What do you suggest we do about that?

MR. LANDSBERG: Your Honor, I think it's a question of judicial administration which, if we are correct in our position that the courts below should not have considered the plan submitted to them prior to preclearance, then we think that --

QUESTION: You think it's like a jurisdictional question.

MR. LANDSBERG: It's in the nature of not subject matter jurisdiction, but of primary jurisdiction, as we suggest in our brief.

QUESTION: Ordinarily, though, we don't let even one of the parties argue an issue that was not raised in the questions presented under certiorari. You're amicus, and you are seeking to alter it.

MR. LANDSBERG: Your Honor, this Court has on its own raised questions where it felt that principles of judicial administration required the Court to do so.

QUESTION: There's a difference between arguing it and an amicus doing it, of course.

MR. LANDSBERG: That's correct, Mr. Chief Justice.

As an amicus, we are I suppose suggesting that this Court should do it, and it is an issue which has been briefed, it's an issue which has been addressed in oral argument. This Court has the authority to decide it. It is also an alternative ground for affirming the judgment of the Court of Appeals sending the case back to the district court.

QUESTION: But also the question you want to raise seems to run against the grain of our prior cases.

MR. LANDSBERG: Well, I think that's the question that I would like to discuss, because I don't believe that it does.

There are two cases. Neither case is an interpretation of the words "seek to administer." The first case, Conner v. Johnson held that a decree of a district court was not subject to review by the Attorney General. In that case the district court had formulated its own plan because the jurisdiction involved had failed to present an acceptable plan that met 14th amendment standards. So the Court properly held that under section 5 the court-ordered plan was not a plan which had been enacted by the jurisdiction, and it was not a plan which the jurisdiction sought to administer.

QUESTION: Yes, but the fact remains that once the plan was issued by the district court, the locality administered it.

MR. LANDSBERG: It was required to.

QUESTION: Well, it administered it, didn't it?

MR. LANDSBERG: It did administer it. It was under order to administer it.

QUESTION: Nevertheless, it could administer the plan without going to the Attorney General.

MR. LANDSBERG: That's what this Court held. And we have no --

QUESTION: I'm not sure you agree with that.

MR. LANDSBERG: No, we have no quarrel with that.

And Congress in reenacting the Voting Rights Act in 1975 cited the Court's decision in Conner v. Johnson with approval as expressing the will of Congress.

Congress also was of the view, and the legislative history is set forth on pages 18 to 20 of our brief, that section 5 would apply to situations such as this. This is not a case where it was necessary for a decision of a district court to be submitted to the Attorney General. The proper course for the district court here would have been to defer ruling on the case until the jurisdiction had complied with t he provisions of section 5. We think that's what this Court said that the State of Mississippi should have done in Connor v. Waller.

Now, the difference between this case and Connor v. Waller is that in Connor v. Waller there was an enactment; here it is arguable at least with respect to the police jury that there was not an enactment because of the invalidity of the

State law providing -- the enabling statute allowing at-large elections.

QUESTION: What if the district court here, Mr. Landsberg, had done just what it did, but there had been no appeal taken from its judgment and it became final, would you still say that there was a litigable violation of section 5?

MR. LANDSBERG: It has been held that there is by the Court of Appeals in the District of Columbia.

QUESTION: In this circuit here?

MR. LANDSBERG: Yes.

QUESTION: Even though the district court judgment is final?

MR. LANDSBERG: Yes. And we would prefer to avoid that situation where the Attorney General is called upon or required to review a statute which a district court has already approved. We think that the procedure that we are suggesting would avoid that result.

The differences between Connor v. Waller and this case are perhaps twofold. In Connor v. Waller there was not a court order to submit the change to the court. The court, however, under established practices in reapportionment cases generally, gave the legislature an opportunity to enact a new reapportionment plan.

QUESTION: What would you say the rule should be under section 5 if the court enters a declaratory judgment that

a reapportionment plan in existence is unconstitutional and requests the parties, both sides, to submit plans, and suppose the Attorney General of the State is then in court defending the State plan, and he goes back and confers with his legislative colleagues and he comes back to the court with a plan and submits it as the State's official suggestion to the court for a plan, and the other party, of course, comes back with a plan, too.

Now, the court has requested the State to make its official recommendation to the court. What's your rule there? Does Conner v. Johnson apply or Waller?

MR. LANDSBERG: Waller. It would be a plan which the jurisdiction is seeking the court's approval and it's thereby seeking to administer. I don't think that this is the ordinary way in which a reapportionment case would be handled. Ordinarily the court would --

QUESTION: What did you say?

MR. LANDSBERG: I think that ordinarily the court would first ask or give the opportunity for the State or political subdivision to formulate a plan.

QUESTION: Not when the legislature isn't about to meet before the next election.

MR. LANDSBERG: Well, if we are in an emergency type situation, that's true.

QUESTION: That's half the time.

MR. LANDSBERG: That's true. In Connor v. Waller there was an emergency type situation.

QUESTION: I know, but in the situation Mr. Justice White posed, the Attorney General has been party to the litigation, and the litigation has resulted in invalidation of the existing legislative reapportionment plan, and the request is made to the parties to submit a plan, and the Attorney General says, well, if you are going to have a plan, try this one, not something the legislature adopts, but something that he formulates, and he submits the plan, and that plan is then adopted by the district court, is that wrong under Johnson?

MR. LANDSBERG: We think it's wrong under the Voting Rights Act, but I don't think that Johnson speaks to it. I think that the situation that Johnson speaks to is where the court has formulated a plan.

QUESTION: Is it a Waller situation when not the State legislature but the Attorney General formulates and submits a plan?

MR. LANDSBERG: It is an attempt by the State in the person of its counsel to administer a change.

QUESTION: You make that a Waller situation.

MR. LANDSBERG: Yes, and I think that if one looks at the purpose of the Voting Rights Act, the situation which led to its enactment, that the procedures of the Voting Rights Act were intended to apply not just to actions which the State

took legislatively, but also to voting practices which might be imposed without the authority of State law perhaps, by local officials or by local police juries or school boards.

QUESTION: Suppose the State responds, in the example that Mr. Justice Brennan and I were talking about, responds and submits a plan and the court says, well, there are some good parts to that, but some good parts to the other side, too, and I'm going to put them together, and it drafts its own plan and it's half and half, half State, half the other party. I take it you would say that the State was wholly disqualified from even submitting a plan to the court until it had gone to the Attorney General.

MR. LANDSBERG: That's right.

QUESTION: So that this court's order would be invalid because in part it rested on a State proffered plan.

MR. LANDSBERG: Not the --

QUESTION: It's a very usual situation, you know.

MR. LANDSBERG: -- that the court should not rely on the State's plan until that plan has been precleared. That's what I think Congress very clearly stated in saying that section 5 is intended to establish -- this is on page 19 of our brief -- a form of primary jurisdiction for section 5 review under which courts dealing with voting discrimination issues should defer in the first instance to the Attorney General or to the District of Columbia District Court.

QUESTION: I gather your submission is that a district judge, not having any legislative plan to propose to replace an invalidated legislative plan, can formulate his own where preclearance would not be required, only if whatever he formulates has no input at all from the State.

MR. LANDSBERG: No, I wouldn't think we would go that far.

QUESTION: I thought what you just said --

MR. LANDSBERG: No, I think that when the plaintiff presents a plan, certainly the State would as a party to the case have an opportunity to comment on any proposals that were made. If the court were to appoint a special master, the same would be true.

QUESTION: Well, the conventional report, the report which you referred to, says that where the district court directs an entity to adopt a new plan and present it to the court for consideration. You think it was referring to just the business of the Attorney General at the request of the court submitting a recommended plan?

MR. LANDSBERG: I think it would cover that as well.

QUESTION: That's not adopting a plan. It doesn't even purport to adopt a plan.

MR. LANDSBERG: We get the situation in this case we have two sets of resolutions, one of which says the school board and police jury adopt a reapportionment plan and then

the next time a resolution is passed by the police jury and the school board saying, "We propose this plan." Well, it was not formally adopted, but the effect of what they are trying to do in both situations is precisely the same.

QUESTION: Do I understand you to say that the court could or could not develop a plan on its own motion?

MR. LANDSBERG: I think that can only be done, as I understand this Court's decisions, where there is some sort of emergency situation and it's been unable to get an acceptable plan from the jurisdiction. In the ordinary case, as in this case, there was a period of four months between the submission of the plan and the trial on the plan. There was ample opportunity for the political jurisdiction to submit the plan to the Attorney General for his review in the interim.

QUESTION: Well, if the court is going to develop a plan on its own motion, would you think the intervention or suggestions from counsel for the State would then make that something other than the court's plan for an emergency?

MR. LANDSBERG: I think it would depend upon the nature of the input.

QUESTION: Isn't the Attorney General of a State an officer of the court on whom the court is always entitled to call for suggestions and assistance?

MR. LANDSBERG: Well, he is, but he is also an officer of the State and counsel for the State and is

representing the State in seeking permission to administer the plan.

MR. CHIEF JUSTICE BURGER: Your time is up, but I think Mr. Justice Stevens had a question for you.

QUESTION: Thank you, Mr. Chief Justice.

I just want to be sure I understand your position. Supposing the plaintiffs submit the plan and the defendant, the State subdivision, files a memorandum in which it suggests to the court that the plan have certain features in it. Could such a memorandum be filed without being submitted to the U.S. Attorney General?

MR. LANDSBERG: A memorandum in effect objecting to certain --

QUESTION: Objecting and saying he thinks the plan the court is to adopt should have features A, B, and C in it.

MR. LANDSBERG: Well, I think that would be a close case.

QUESTION: It just goes to the form of the submission by the --

MR. LANDSBERG: I am trying to suggest it ought not to be governed by the form. It ought to be governed by what the submission really is; in whatever form it is an attempt by the State to administer a particular voting change, and that, Congress has said, must be subjected to the provisions of section 5.

QUESTION: So anybody can submit anything to the judge but the State.

MR. LANDSBERG: Well, we are talking about the unusual situation where --

QUESTION: In the unusual -- in your situation --

MR. LANDSBERG: The State may comment on what the --

QUESTION: The judge can look for advice to everybody in the world except the State.

MR. LANDSBERG: The court may look to the State for comments on what the other parties have submitted.

QUESTION: Suppose the comment is, "I don't agree with that because I agree with this." They couldn't take this.

MR. LANDSBERG: There again I think we are getting into a close area where one would have to look at the actual document that's been filed.

QUESTION: Well, you are suggesting, it sounds like, that when a declaratory judgment is entered, the Attorney General should retire the case for fear of poisoning the resulting decree.

MR. LANDSBERG: No, I think not. I think what the structure of the Act intended to provide is that the Attorney General would submit it to the United States Attorney General who in most instances has approved plans; if the Attorney General disapproves the plan, then the State should have an opportunity to formulate a new one.

QUESTION: Thank you, Mr. Landsberg.

Mr. Ward, do you have anything further?

REBUTTAL ARGUMENT OF JOHN F. WARD, JR.

ON BEHALF OF PETITIONERS

MR. WARD: I will be very brief, your Honor.

I have somewhat the same problem with the section 5 argument that Mr. White has raised. On the one hand the Government says if the court finds a body malapportioned, orders it to submit a plan, it submits a plan under a lawsuit filed by a plaintiff, plaintiff submits a plan, let's say you have an intervenor, also submits a plan. If the court chooses the plan submitted by the political subdivision it's subject to section 5 review; if it chooses --

QUESTION: Or any part of it.

MR. WARD: Or any part of it. If it chooses on the other hand the plaintiff's plan as being the best plan, it is not subject to section 5 review. The same would be true of the intervenor plan, which seems to me to beg the question. One plan the Voting Rights Act requires clearance by the Attorney General, another plan having the same effect or a different effect, but for the same purpose, is not subject to preclearance.

This case, I think you can decide on its facts even on the record before you without the update that the Aubaugh opinion of the Fifth Circuit Court of Appeals which reversed

the district court and held that an at-large plan discriminates against blacks where blacks are in a majority in population but slightly less than a majority in registered voters is not in accord with your previous decisions in White v. Regester; it is arguing over a minimal difference. For example, the voter registration figures at that time, 3,342 white, 2,899 black, a 443 more white registered voters than black. My figures as of when I filed my brief, new figures, were 3,550 black, 3,533, or 17 more black registered voters.

If you went to the registered Democrats, because in my State we are almost a one-party system unfortunately, the difference would be considerably greater in number of more blacks registered than whites. But when you go to Mr. Halpin's figure, which he says he got by telephone call from the Registrar, it shows as now more white registered voters than black, but again a difference of only 242. Between 17 to 242 to 443, that is such a minimal difference that it is virtually impossible, or inconceivable to me that that makes an at-large plan constitutionally impermissible, that slight difference. In a parish with a majority population like this, black and white pretty near equal, 55-58 percent black registered voters, are going to vary from year to year depending on the age of children, for one thing.

Another thing that I think you must remember, before the Court of Appeals, this plan in effect, blacks have been

elected to the school board and have been elected to the police jury. I might direct your attention to the appendix at pages 119 through 121, I believe, in which a member of the policy jury is questioned during the hearing in July of '71 as to the town of Lake Providence, which is the only large town in the parish. And he is questioned as to the black population being virtually almost 2 to 1 greater than white. He testifies also that part of that past history, no black had ever been elected as alderman in the town of Lake Providence even though they run at large and a black majority is almost 2 to 1. But today, gentlemen, all five aldermen are black. The mayor of the town is black. The respondent himself, who was previously defeated for the office of City Marshal has now been elected City Marshal and is City Marshal today. I respectfully submit to you that under the facts and circumstances in this case, this plan is not unconstitutional. The Fifth Circuit's en banc decision should be reversed and the district court's original order implementing this at-large system should be approved.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 1:24 p.m., oral argument in the above-entitled matter was concluded.]