In the

Supreme Court of the United States

WES WISE, MAYOR OF THE CITY OF DALLAS, ET AL.,

Petitioners,

V.

ALBERT L. LIPSCOMB, ET AL.,

Respondents.

No. 77-529

April 26, 1978

Pages 1 thru 62

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Washington, D. C.

Wednesday, April 26, 1978

The above-entitled matter came on for argument at 10:56 o'clock 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 PAUL STEVENS, Associate Justice

APPEARANCES:

JOSEPH G. WERNER, ESQ., Assistant City Attorney, Dallas, Texas; on behalf of the Petitioners

JAMES A. JOHNSTON, JR., ESQ., Johnston, Larson & Dixon, Suite 1002, Main Bank Building, Dallas, Texas; on behalf of the Respondents

PETER BUSCEMI, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C.; on behalf of the United States as amicus curiae

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 77-529, West Wise v. Lipscomb.

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

ORAL ARGUMENT OF JOSEPH G. WERNER, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. WERNER: Mr. Chief Justice, and may it please the Court: I am Joseph Werner, counsel for the petitioners in this case, the Mayor and City Council of the City of Dallas.

This is a civil rights case in which Negro voters of the City of Dallas challenge the all at-large system of electing the City Council in Dallas.

The District Court held that that all at-large system was unconstitutional in that it denied Negro voters equal protection.

QUESTION: Was that under the Equal Protection Clause of the 14th Amendment?

MR. WERNER: Yes, sir.

QUESTION: Not the 15th Amendment at all?

MR. WERNER: No, sir. It was alleged that there was a violation of the 15th Amendment, but --

QUESTION: But the grounds for the court's decision was the Equal Protection Clause of the 14th Amendment?

MR. WERNER: Yes, sir.

QUESTION: Insofar as the Dallas electoral system discriminated racially, is that it?

MR. WERNER: Yes, sir.

QUESTION: There was no finding of any violation of Reynolds v. Sims?

MR. WERNER: No, sir, there is no question of Sims. It was a purely at-large system in the beginning, there is no question of numerical imbalance, but that it was a white versus register-type dilution problem and not a --

QUESTION: Not a 15th Amendment problem?

MR. WERNER: No, sir.

QUESTION: But there was no finding of any constitutional violation here, was there, in the at-large system?

MR. WERNER: Yes, sir. The purely at-large -- you see, it started out with all eleven members of the council elected at-large citywide. The District Court found that that system was unconstitutional in that it denied equal protection to the Negro voters.

QUESTION: And this case does not involve that issue, does it?

MR. WERNER: No, sir.

QUESTION: You have a totally new structure now?

MR. WERNER: Yes, sir.

QUESTION: But it didn't find a one-man, one-vote violation?

MR. WERNER: No, sir. No, sir. As I said, because it was purely at-large in the beginning, there was no possibility of a numerical imbalance.

QUESTION: Right.

MR. WERNER: The District Court, after it held the previous system unconstitutional, gave the City of Dallas and the City Council an opportunity to come up with a plan to remedy this constitutional violation. The court held hearings subsequently in which it received this 8-3 plan which was generated by the City Council, and this plan involves the election of 8 of the 11 council members from single-member districts and the election of the remaining 3 members at-large citywide.

QUESTION: Mr. Werner, you refer to the plan having been generated by the City Council. Would you tell us exactly how that happened step by step?

MR. WERNER: Yes, sir. The process was that on the 17th of January, the court held the original plan unconstitutional, three days later the City Council adopted a resolution which informed the court that it was the intent of the council to pass an ordinance which would adopt this 8-3 plan. On February 5th the court commenced hearings on this proposed 8-3 plan and on two alternate plans submitted by the plaintiffs in the case. On the 8th of February, the District Judge announced a preliminary finding that he considered the 8-3 plan to be

constitutional. Two days later, after the conclusion of that hearing, the City Council adopted the ordinance, 14800, which promulgated as law the 8-3 plan.

QUESTION: But the City Council had not adopted a plan until after the court approved the plan that was suggested?

MR. WERNER: That's correct, sir.

QUESTION: Except by a resolution.

MR. WERNER: Except by a resolution.

QUESTION: Well, the City Council did it though, didn't it?

MR. WERNER: Yes, sir.

QUESTION: But it just wasn't in the form of an ordinance?

MR. WERNER: That's correct, sir.

QUESTION: Is the resolution in the record?

MR. WERNER: Yes, sir.

QUESTION: It might as well have been an ordinance?

MR. WERNER: Well, I think if it had been an ordinance, there wouldn't be any question at this point.

QUESTION: Well, why should there be any difference?

MR. WERNER: Well, I think in fairness to the respondents in this case, there is some ambiguity in the resolution. I think it clearly indicates that what the legislative body favored was the 8-3 plan. However, the resolution --

QUESTION: Of course, that is what the City Council

was proposing.

MR. WERNER: Yes, sir.

QUESTION: That is clear enough.

QUESTION: Let me ask you this question: Did the City Council have any power or authority to approve a plan definitively? Did it not have to be submitted to the voters?

MR. WERNER: Mr. Justice Powell, what we had here was a previous plan prescribed by charter. Now, obviously the charter, somewhat like our city constitution, cannot be amended except by vote of the people. However, after the --

QUESTION: Or an order of the court.

MR. WERNER: Yes, sir. After the order of the District Court declaring it unconstitutional, then that charter provision, our position is, ceases to exist, and we have the authority as a home-rule city under the laws of Texas to evidence our actions either by resolution, by ordinance or by vote of the people in the form of the charter.

QUESTION: And you might just as well have passed the ordinance when you passed the resolution, except you probably would rather know whether it was constitutional before you passed it as an ordinance.

MR. WERNER: Yes, sir.

QUESTION: Is that the explanation of why the council proceeded by resolution rather than ordinance at that time?

MR. WERNER: Mr. Justice Brennan, frankly we don't

know at this point, we can't recall, and I assume that that is what we were doing. If we had had the benefit of Chapman v. Meier which was decided within a few days --

QUESTION: Well, what if it had been an ordinance when the resolution was passed, what if it had been done in the form of an ordinance, the District Court would have done exactly the same thing with respect to it?

MR. WERNER: Yes, sir, I think it would have. And I think if it had been passed as an ordinance a few days before the hearing, then there would be no question that the city had promulgated this plan as law and that it was binding.

QUESTION: Mr. Werner?

MR. WERNER: Yes, sir?

QUESTION: The question I am now going to ask you is not addressed to the merits in this case but you filed an application for a stay with me last August, your name is on it, and it states "The City Council reapportioned itself and enacted an ordinance" --

MR. WERNER: Yes, sir.

QUESTION: -- "and thereafter the court held a hearing." Now, that was in error, I take it, from what you now say?

MR. WERNER: Mr. Justice Powell, if I said that, I would have misled the Court and you, sir.

QUESTION: I think I repeated it in a Chambers

opinion. I will say this, in fairness, the District Court said pretty much the same thing. But as I now understand the facts, that is now what happened. I am not suggesting that it makes any difference, as Mr. Justice White indicated, but I do suggest that the papers filed here, while I am on this subject, I must say that the response to your application didn't clarify it either.

MR. WERNER: Well, Mr. Justice Powell, what happened here was that there was -- on the 8th of February, there was no order entered and the docket doesn't reflect any order. What happened was the judge made a preliminary finding that he considered the 8-3 plan to be acceptable. There was no order, written order of any description entered until March 25th, about six weeks later, and of course the judgment in the case was not entered until May 22nd, which was about three and a half months later. So we didn't consider at that point that there had been any -- at the time the ordinance was adopted, we did not consider that there had been any binding order of the court issued.

QUESTION: Go ahead. I just wanted to clarify that. I felt when I finally saw the papers in this case that both parties had failed adequately to inform me when this matter was before me last summer.

MR. WERNER: Yes, sir. Well, if we misled you and the Court, we apologize for that, but it was I think the

contention between the parties, has always been the authority of the city to make a change to the election plan through the means of an ordinance rather than by a charter amendment, and I don't think at that time any of the parties considered the timing of this ordinance to be critical, and I don't think we considered that the ordinance was adopted after an order of the court.

QUESTION: Now you are confusing me. You have spoken previously of a resolution, not an ordinance. Now, which was the source of the new 8-3 plan, a resolution or an ordinance?

MR. WERNER: Well, Mr. Chief Justice, there were both. On the 20th of January, before the remedy hearing, there was a resolution passed stating the intention of the council to adopt the 8-3 plan. Then the remedy hearing was held in the District Court and then two days after the conclusion of that hearing the ordinance was passed.

QUESTION: And that was pursuant to the directives of the court?

MR. WERNER: No, sir, there was no directive of the court when they passed the ordinance.

QUESTION: The court addressed itself to the plan submitted by the city under the resolution?

MR. WERNER: Yes, sir.

QUESTION: And said it was constitutional?

MR. WERNER: Yes, sir.

QUESTION: Now, did it purport to treat that as a court plan and say, "I approve this plan," or did they -- you know, usually if the city passes an ordinance, it isn't a court plan, it's just something you either accept or reject.

MR. WERNER: Yes, sir.

QUESTION: What did the court do with respect to the resolution?

MR. WERNER: On February 8, at the conclusion of the hearing, Judge Mahon, the district judge, made a rather lengthy statement from the bench in which he said that he finds that the 8-3 plan, in his words, "passes constitutional muster," and he said, "I will later enter findings" -- he said --

QUESTION: Did he ever incorporate that plan in a decree?

MR. WERNER: Yes, sir. The first writing from the court --

QUESTION: Well, you don't do that with an ordinance that you uphold. You just say its constitutional. You look to the ordinance to see what the provisions are.

MR. WERNER: I may have misunderstood your question, Mr. Justice White.

QUESTION: Did he incorporate the very terms of the plan in the decree?

MR. WERNER: No, sir, only by saying that he --

QUESTION: Found it constitutional?

MR. WERNER: Constitutional, yes.

QUESTION: All right.

QUESTION: When he approved the 8-3 plan, it was simply a holding of the court that it passed constitutional standards, but it's not part of a decree?

MR. WERNER: No, sir. And there was no written order of any description entered until long after the ordinance was enacted.

QUESTION: I think I have the language of the District Court that Mr. Justice White may have in mind. It is on page B-16 in the petition, at the end of the middle paragraph. That's B-16.

"This court then gave the city of Dallas an opportunity to perform its duty to enact a constitutionally acceptable plan. I find that it has met that duty in enacting the 8-3 plan of electing council members."

Now, in light of what I now understand, the correct, to say the least, they use the word "enacting" somewhat loosely.

QUESTION: Expressing an intent.

MR. WERNER: Yes, sir.

QUESTION: Well, at least he treated it as an official expression of the city.

QUESTION: And then after this decree it was followed by an ordinance, and that in turn was followed by a charter

amendment.

MR. WERNER: Yes, that is my understanding; yes, that is correct.

QUESTION: Wasn't it true that there was an oral opinion first which was then followed by the ordinance which was then followed by what Mr. Justice Powell just read?

MR. WERNER: Mr. Justice Stevens, there was the resolution. Then --

QUESTION: On January 20th?

MR. WERNER: Yes, sir.

QUESTION: And then on February 8th there was the remedy hearing, in which he made an oral decision?

MR. WERNER: Yes, sir.

QUESTION: And there then was an ordinance which is No. 14800, which refers back to the oral decision; is that not right?

MR. WERNER: Yes, sir.

QUESTION: And then after the ordinance was passed, there was then the written decision that Mr. Justice Powell read from in March?

MR. WERNER: Yes, sir, March 25.

QUESTION: So this was after the ordinance.

QUESTION: The oral decision was between the resolution and the ordinance.

QUESTION: The enactment of the ordinance, the word "enactment" there --

MR. WERNER: Well, I think the reference is to the ordinance, but I can't be certain what he meant.

QUESTION: By this time there was an ordinance?

MR. WERNER: Yes, sir.

QUESTION: At the time of the ordinance there had already been a decision by the court, because the ordinance itself refers to the decision.

I call your attention to page A-2.

MR. WERNER: Yes, sir, it refers to the oral decision, and if I may, I'll read from the transcript of the judge's remarks. This is Volume 11 of the original transcript, page 86. The court says:

"This court is" --

QUESTION: Do we have it here at all? In the appendix?

MR. WERNER: No, sir, it's not reproduced in here.

The district judge says:

"This court is accepting the city plan of 8-3. I am ordering that the election schedule for April of this year will proceed and elect the city council for this year under the plan of 8-3 that has been presented to this court. At the same time this court will, I am going to enter a final order, I mean a judgment of opinion that is going to take me several days," and so forth.

So he indicated at that time, it seems to us, that

this was a tentative or preliminary decision on the matter and that he intended shortly thereafter to render his official decision on the case.

Now, Mr. Chief Justice and may it please the Court, it's our position that at the time that the court first entered a written order and its first binding order that the city council had already promulgated as law this 8-3 plan which is in contention. By the time the filing date arrived for the ensuing election, the plan had been promulgated as law and by the time the judgment was finally entered in the case, of course, the plan had been promulgated as law by the city council.

We contend that because the council had promulgated as law this election plan with full authority under state law, that this is not a court-ordered plan and that the special circumstances rule of the East Carroll case should not apply. We suggest instead that the rule of Burns v. Richardson applies and that the plan should be subject only to constitutional review.

Alternatively, we submit to the Court that even if the East Carroll rule is applicable, that the Court of Appeals has erred in saying that the special circumstances present in the case which deal with the voting situation of Mexican-American voters can be considered only if there is a constitutional violation, and we think this is contrary to indications

that we see in the opinion in the United Jewish Organizations v. Carey case.

We do not think that special circumstances in a case like this depend on a prior showing of constitutional violation, and we think in this case as in any equitable case, or decree in equity, that the court should take into consideration the general public interest and should not enter a decree which will harm any segment of the population, and we think that the findings of the District Court show that if an all single member district plan were put into effect, that the Mexican-American voters would very definitely be harmed by that decree.

The other issue in the case which supports the use of a mixed at-large and single member system is the finding of the District Court that it would be beneficial to the city to have general city-wide interest represented on the City Council so as to provide factionalism among wards within the city and so that the City Council members would be exposed to a more statesman-like view, and that projects of interest to the city in general would not suffer from having been subjected to ward interest and factionalism.

May it please the Court, we'll reserve the rest of our time for rebuttal.

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

Mr. Johnston.

ORAL ARGUMENT OF JAMES A. JOHNSTON, JR., ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. JOHNSTON: Mr. Chief Justice and may it please the Court, it is the contention of respondents here today that this Court is dealing with a fact situation that is clearly within the ambit of Connor v. Johnson and East Carroll Parish V. Marshall. We believe that the threshhold issue is the standard of review that is to be applied by an appeals court and that that standard of review is determined by whether or not we're dealing with a court-ordered plan or legislative plan.

It is our contention that we have here very clearly a court-ordered plan, that is a plan that was ordered into existence by a federal court exercising its equitable jurisdiction in an adversary proceeding.

Now, there is some ambiguity in the record as it is presented in the appendix and I'd like to address myself to that at this time. Your questionings already have indicated some elements of that ambiguity. I would point out on page 147 of the appendix that the court itself stated that at the close of testimony on February 8, 1975, "I made findings which approved the city's plan as constitutional. Accordingly I ordered that the 8-3 plan as had been offered by the city be instituted in time for the April 1975 City Council election."

Let me point out at this point that the City

Council does not, either by resolution or by ordinance, have the power to change the election system in the city of Dallas.

QUESTION: Mr. Johnston, does it have authority by resolution to empower its legal counsel to make representations to the district court in a case like this?

MR. JOHNSTON: It can and did empower its legal representatives to make representations to the court, and I have here and can supply to the Court a copy of the accompanying letter that counsel for the city sent to the court, and that accompanying letter said:

"Pursuant to your order issued January 17 I am enclosing a certified copy of the Dallas City Council resolution dated January 20."

I think what is clear here is that this resolution was offered pursuant to an order of the court to offer --

QUESTION: That sounds like we're going back to the forms of action, to make this sort of distinction between a court saying, "We will impose a plan but let's hear from the city as to what kind of a plan it wants," and saying that that's subject to a different standard of scrutiny and saying that -- than for a court to say that the present plan is unconstitutional, let the city try again.

MR. JOHNSTON: I think the distinction has to be made as to whether or not the city has the authority to try again under its own legislative scheme.

QUESTION: Why is that for a federal court to decide?

MR. JOHNSTON: Well, we are talking about legislative power and the constitution of the state of Texas denies to the City Council --

QUESTION: Why are we talking about -- I don't see why we are talking about legislative power. We're trying to decide what standards the district court is supposed to use, and here this was an unambiguous expression of the lawmakers' views in the city of Dallas.

MR. JOHNSTON: The courts had before in East Carroll, the same kind of unambiguous statement of what the city would choose.

QUESTION: I take it the district court had rejected the plan as unconstitutional and proceeded to draw up its own, might be something else again, or if the city lawyer had just submitted the plan without any evidence that it was official policy of the city.

MR. JOHNSTON: Well, the case law to this point would indicate that this court has been looking as in East Carroll to the authority of the city to --

QUESTION: So you would say if the city had had power to change the representative scheme overnight by an ordinance, and if their first action in response to the court's suggestion had to pass a new ordinance, the case would be different?

MR. JOHNSTON: Well, the case would be different and I would still urge the same result, because we are dealing with a plan that was offered up after the fact of dilution of black voting strength, that finding had already been made by the trial court. We're not talking about a situation where in the course of litigation the city changes its election --

QUESTION: It sounds to me like you're urging that the substitute plan offered was unconstitutional.

MR. JOHNSTON: No, we're saying only at this point that it violates the federal common law of voting rights.

QUESTION: You don't mean the common law of voting rights, do you? You mean the appropriate equitable remedies for violation of the Constitution?

MR. JOHNSTON: That language is not my own; it appears in this --

QUESTION: I wouldn't adopt it, if I were you.

QUESTION: You don't find it murky?

QUESTION: We're talking the precedents to which you refer and upon which you rely have to do with what's appropriate and equitable remedy to repair a constitutional violation, and the cases to which you refer all involve violations of the doctrine of Reynolds v.Sims. Not a single one of them that I know of involved a violation of such as was found here, which we don't have before us and therefore we can't assess as to even whether or not it was a constitutional violation.

But there's no claim that there was a violation of the so-called one-person, one-vote?

MR. JOHNSTON: That's correct.

QUESTION: And indeed, all the cases to which you refer, none of them with which I'm familiar, and you're free to correct me and I may be wrong, I often am, have to do with at-large municipal elections of councilmen, and there's been a presumption in this case that multi-member districts to a state legislature are somehow the exact equivalent of at-large elections of municipal, in a municipality, to the city government. And they're quite two different animals.

MR. JOHNSTON: Let me respond, if I may. The -- in East Carroll Parish v. Marshall, began in the context of a Baker v. Carr, one-man --

QUESTION: Correct.

MR. JOHNSTON: Okay. However, when the court approved the Parish's proposed all at-large plan in 1971, Mr. Marshall intervened alleging that that plan diluted black voting strength in the Parish. The district court rejected that finding but it was preserved for appeal to the court of appeals, and the court of appeals found in fact that there had been a dilution of black voting strength as alleged by Mr. Marshall.

And so when that case, East Carroll, was before this Court, it was before this Court on that basis as well as on the

one-man, one-vote basis.

QUESTION: It did involve a school district but it did not involve a home rule municipality, did it?

MR. JOHNSTON: That's correct, Your Honor, but the fact that the city of Dallas is a home rule city should not overlook the fact that it is limited in its ability to devise its own election scheme. It must submit --

QUESTION: Yes, but I'm talking about the constitutional tests here and the remedy for asserted constitutional violation. This violation was not a Reynolds v. Sims violation --

MR. JOHNSTON: That's correct.

QUESTION: -- and we're not talking here about multi-member districts to state legislatures.

MR. JOHNSTON: That's correct. But it would seem to me that the federal remedy which we urge and which East Carroll urges, which would require single-member districts absent unusual circumstances, is particularly appropriate when there was a finding by the district court as the result of an adversary proceeding that there was, that the at-large features of the city of Dallas election system diluted black minority voting strength.

For the city to come back with three at-large seats preserving that same feature found unconstitutional, and --

QUESTION: That's a given in this case, but in

assessing this plan, don't we again have to look and see whether an at-large election is unconstitutional? Isn't that at least the threshhold inquiry?

MR. JOHNSTON: Well, the district court had already made findings --

QUESTION: Well, the district court did --

QUESTION: But you're here, now.

QUESTION: -- but you're here now, and if there's nothing at all unconstitutional about at-large elections in a municipality of the governing body of the city, that's the end of this case, isn't it?

MR. JOHNSTON: Well, if the Court wishes to address itself to that issue, it may do so.

QUESTION: Well, isn't that a threshold issue here?

MR. JOHNSTON: No one else, certainly petitioners have not raised that issue and did not appeal in either court of appeals --

QUESTION: Well, they certainly raised it to the extent that they say the at-large election of three members of the City Council is not unconstitutional.

MR. JOHNSTON: That's correct. And I would point out to the Court that Wallace v. House dealt with a commissioner form of government for a city, and that is a case where the court of appeals of this circuit has, as in this case, had to address itself to that issue.

This court remanded that case to the 5th Circuit for review in light of East Carroll Parish. The circuit examined the entire record and examined contentions very much like the city's here that at-large elections preserve a city-wide view and rejected that as having established any kind of unusual circumstances.

QUESTION: Has this court ever held that an at-large election within a jurisdiction is unconstitutional? Be it city or state?

MR. JOHNSTON: I think Wallace v. House, well, tacitly reaches that point because it goes immediately to the remedy --

QUESTION: The remedy; yes, the remedy.

QUESTION: But those are all based on one-man, one-vote violations, and then you get the remedial phase, weren't they?

MR. JOHNSTON: It's not my understanding that Wallace is based on one-man, one-vote. My reflection of the record in that case indicates that there was an allegation of and finding in the 5th Circuit that there was dilution.

QUESTION: That isn't one-man, one-vote, it isn't exactly one-man, one-vote. Whitcomb v. Chavez certainly rejects any notion that at-large voting in the city is per se or even semi per se invalid.

MR. JOHNSTON: That's correct, but it does indicate that if the proof is there, and White v. Register goes further

than that and says that the proof was there in that circumstance, then you have established a constitutional violation of equal protection.

QUESTION: But one of the original complaint in Whitcomb v. Chavez wasn't that multi-member districts violated the constitution, but there was a violation of the one-man, one-vote principle, wasn't there? And then the question was whether the remedy was appropriate.

MR. JOHNSTON: I can't recall the record.

QUESTION: Let me back up on one thing that's got me somewhat confused.

Suppose Judge Mahon, the district judge, and after asking the city to make suggestions and the city made no suggestions, he had ordered the 8-3 plan, and they carried it out without a resolution, without an ordinance, simply carrying out the court's decree. What would be your view, what effect that would have on your posture now?

MR. JOHNSTON: Well, our posture would be the same, that it was in fact a court-ordered plan, subject --

QUESTION: Well, for all practical purposes it was a court-ordered plan, wasn't it, and the city was simply as a matter of comity or for whatever reasons passing an enactment that carried out what they knew the court wanted and what the court had said would pass constitutional muster.

MR. JOHNSTON: And what the court would require as

a remedy.

We have no objection as such and did not object at the time to the city offering to the court a plan. There is political expertise to be had amongst members of the City Council although their vote was not unanimous; their input was important and we did not object to it as such.

What we did object to, what we did appeal from, was preserving those same at-large features that the court had rejected in finding that there was dilution of black voting strength.

Now, it's not easy to prove that there has been dilution of black voting strength by means of at-large elections. The truth is not simple, but it was met in this case.

QUESTION: It's particularly difficult, isn't it, when you have an 8-3 plan, that is eight of them elected by districts and only three at-large; two at-large really, because one of them is the mayor.

MR. JOHNSTON: That's why I think the remedy required by East Carroll is particularly appropriate in these kinds of cases, because it instructs the city or whoever is working with the court in order to propose a plan that they must do several things, and one of those things is that they must establish that there are unusual circumstances which will justify the continuation of any at-large features in that plan. It's particularly appropriate in this case.

QUESTION: Well, you wouldn't suggest for a moment that in the course of this case that whatever state it was, that the city -- let's assume that the City Council of Dallas had the power in its charter to pass a new ordinance. It just simply passed a new ordinance and the old ordinance that the court was considering just simply wasn't there any more. The court would either -- the ordinance would either go into effect; it would go into effect unless it was enjoined and found unconstitutional, wouldn't it?

MR. JOHNSTON: Well, of course, that's not the --

QUESTION: Well, I know you say it isn't the facts --

MR. JOHNSTON: Well, one would have to, and I presume one would seek some sort of injunctive relief --

QUESTION: But you would then have to submit that ordinance to the court and that ordinance would have to be found unconstitutional before it could be enjoined?

MR. JOHNSTON: That is --

QUESTION: And I understand the 5th Circuit in this case says that this ordinance is not unconstitutional.

MR. JOHNSTON: The circuit in this case never reached that issue. It did not speak to that issue at all. It said that that was one of the things --

QUESTION: The district court certainly did, didn't it?

MR. JOHNSTON: The district court certainly did.

We pointed out --

QUESTION: They said there was no unconstitutional impact whatsoever under this.

MR. JOHNSTON: That's correct. Let me point out the difficulties that anyone litigating a plan in a hurry where we had an election coming up in April and we were in February, we spent five years attempting to prove the unconstitutionality of the eleven at-large seats in the city --

QUESTION: Exactly, and the city came along and passed a new ordinance.

MR. JOHNSTON: Let me point out that the city -- and I think this is instructive. We supplied the court with a copy of the ballot that was used in April of 1976 when the voters finally ratified that ordinance and finally amended the charter with regard to the change in election scheme, and that ballot on page 16 of the document we supplied the Court, which begins with a letter from Mr. Werner to an attorney, says, "Shall Chapter 3 Section 1 and Chapter 4 Section 4, 6 and 8 of the Charter of the City of Dallas be amended to provide for the compliance with the federal court order for election of eight members to the City Council from single-member districts and three including the mayor at-large?"

We think that's instructive because it indicates what, that the city believed as we believed that that election that took place in April of 1976 was a housekeeping

measure merely to reflect the changes that were already made by court order in the city court.

QUESTION: Was it part of your submission in opposing the 8-3 ordinance that it was unconstitutional, or did you merely argue that it was an inadequate remedy for the previously found constitutional violation?

MR. JOHNSTON: Our argument essentially was that it was an inadequate remedy.

QUESTION: So that there really has never been an issue that anybody had to decide as to whether the 8-3 order was constitutional or unconstitutional, is that correct?

MR. JOHNSTON: The judge presumed that if it were constitutional, it would be an adequate remedy, although I may point out that the judge was troubled by Carter v. Johnson and throughout his opinion attempted to state unusual circumstances such as the Mexican-American situation which would justify the plan. But we were not anywhere equipped to argue the constitutionality of that plan because that kind of proof is very difficult to come by, and in the short space of time that we had.

QUESTION: If the fact or the conclusion of constitutionality were the end of the case he would not have needed even to address the question of the Mexican-Americans, is that not correct?

MR. JOHNSTON: That's correct.

Let me also point out that as the government has pointed out in its brief amicus that when this charter amendment was passed in April of 1976, Texas was at that time covered by the Voting Rights Act of 1965, something that it was not covered when the case was tried and the decision was rendered in 1975. And the city did not submit that case to the Attorney General for preclearance. The inference is that the city believed that plan to be a court ordered plan which was not required to be submitted to the Attorney General under the court's language in Connor v. Johnson.

QUESTION: Well, the district court said it gave that city a chance to come up with a plan and then he said, "I find that it has met that duty in enacting the 8-3 [illegible] of electi[illegible] council members."

MR. JOHNSTON: The judge's opinion is ambiguous in several respects. In that way it is ambiguous because the court later on points out on page 151 of the appendix that members of the council cannot on their own modify the charter to alter the voting scheme.

QUESTION: Well, that may be so, but this seems to me rather unambiguous in saying that in his view the plan, wherever it came from, passed constitutional muster.

MR. JOHNSTON: Well, I think it is clear that the court --

QUESTION: And don't you believe that the intervenor were urging that the plan was unconstitutional?

And so there was an issue before the judge about the constitutionality of the plan. He just didn't make this, arrive at this conclusion sua sponte.

MR. JOHNSTON: Well, I can only respond that the court was, as were the parties, operating under intense time pressure --

QUESTION: That may be, but the intervenors claimed it was unconstitutional and he said the plan is constitutional. Did you appeal that? When you went to the 5th Circuit, what did you say to them, what did you raise there?

MR. JOHNSTON: Well, the issue that we raised in the 5th Circuit was the appropriateness of the remedy.

QUESTION: And did you say the plan was unconstitutional?

MR. JOHNSTON: That appeal was some years ago.

QUESTION: Here's what the 5th Circuit said: "It cannot however be successfully maintained that the use of at-large voting to elect three council members is itself constitutionally defective."

MR. JOHNSTON: That's correct, and there's plenty of language from this court indicating that at-large features in and of themselves must be attacked on the factual basis and the factual matrix into which they've developed.

QUESTION: That is multi-member districts for a state legislative body?

MR. JOHNSTON: Well, that, I would say that Wallace v. House and then applying it to the Parish as in East Carroll indicates that the court is willing to go further than that.

Let me conclude by saying that it is very difficult to distinguish --

QUESTION: You referred several times to Wallace v. House. That's not a case from this Court, is it?

MR. JOHNSTON: Yes, it is.

QUESTION: We remanded it for reconsideration.

MR. JOHNSTON: You remanded it for consideration in the light of East Carroll.

QUESTION: That's the extent of this Court's action.

QUESTION: But it's not a decision on the merits by this Court.

MR. JOHNSTON: Well, to the extent that the court of appeals took it to mean that what was involved was the East Carroll issue, which is a one-issue case, essentially.

QUESTION: Well then, it's certainly a decision of the court of appeals to that effect but not a decision of this Court to that effect.

MR. JOHNSTON: Well, I would only say, Mr. Justice Rehnquist, that the clear implication of the remand of Wallace v. House was that what the court must consider, what the court of appeals must consider was the appropriateness of

the remedy.

QUESTION: You mean otherwise why send it back under East Carroll?

MR. JOHNSTON: Exactly. And of course the court of appeals did do that and cert was denied by this court.

QUESTION: Well, do you think all of our remands are that precisely tailored that we never grant vacate and remand except having thought the thing through that carefully?

MR. JOHNSTON: I would assume --

QUESTION: That's not a fair question to ask you.

(Laughter.)

QUESTION: I think it's very fair.

QUESTION: A remand is a question, not an answer. If we were sure of the application we would summarily decide the case, but it not being clear, we send it back and ask the court of appeals to consider the relevance of East Carroll and the others.

MR. JOHNSTON: Well, when a court of appeals did reconsider, it asked itself a question of why the case was remanded rather than simply reversed or affirmed, and concluded that the inquiry as to the appropriateness of the remedy under East Carroll was a factual one that they could undertake because they had a complete record before them, and they undertook at that point to determine whether or not there were unusual circumstances, found that there were not

in the face of claims much like the city of Dallas here, and as I —

QUESTION: And then didn't it come back here again?

MR. JOHNSTON: It did, that's correct.

I find it difficult to distinguish this case from East Carroll and from Wallace v. House, all cases that have gone through the court of appeals with the 5th Circuit. Each time there were plans submitted by the legislative body pursuant to court order, each time that that legislative body lacked the authority to draw up the plan, did not have the authority for one reason or another to implement the plan. In East Carroll it was because of a challenge under Section 5 of the Voting Rights Act to the enabling legislation. And in each case the plan was ordered into effect by the courts.

Now, once you reach the threshold issue of whether or not the rule of East Carroll is going to be applied, the issue becomes whether or not there are unusual circumstances which would justify preservation of the at-large features. The district court found such in the Mexican-American presence in the city of Dallas, a minority group containing 8 to 10 percent of the population of the city of Dallas.

The trial court's findings are confusing and contradictory and I think ultimately not based on fact and therefore an abuse of the discretion of the trial court. Trial court found that there was no present dilution of Mexican-American

voting strength, although there might have been dilution in the past. The court of appeals accordingly indicated that there was, because there was no present dilution, their access was equal to that of the white majority and therefore there was no need to enhance the benefits by these three at-large seats.

But more importantly it is the contention of the respondents that in order for there to be an unusual circumstance to support the Mexican-American issue raised by the district court, there would have to be facts in the record to support the finding that single-member districts would restrict the access of Mexican-American voters, and there are no such findings in the record. In fact the district court could only conclude that Mexican-American voters might suffer restriction in access under the single-member district plan.

The record that we presented to the court indicates that in a single-member district plan, such as the ones we proposed, a district, District No. 2, would contain approximately one-third Mexican-American population, and as such Mexican-Americans practicing the politics of coalition, as the court of appeals called it, would have far greater input into the election of members of the council than they would when they comprised only 8 to 10 percent of the population. In fact, we presented to the court a witness, a Mexican-American by the name of Robert Medrano, who had run at large for a school board seat and lost and then when they changed to an

all single-member district plan, had won in a seat that was approximately evenly divided between blacks, Mexican-Americans and white voters, therefore demonstrating in the only factual demonstration in the record that Mexican-Americans could in fact win in single-member district circumstances.

QUESTION: Does that prove any more than what has been said in some opinions of the courts that people do not necessarily indulge always in block voting?

If they find a candidate attractive, they will vote for him as such? That's what indicates the reason for half a dozen Negro mayors in the United States in large cities, does it not?

MR. JOHNSTON: It does, in fact, Mr. Chief Justice.

QUESTION: They voted for the man, not on a racial basis.

MR. JOHNSTON: However, the record as developed in the trial of this cause from every expert witness indicates that in the city of Dallas we have the unfortunate situation where block voting along racial lines is the rule, and anything else is the exception.

QUESTION: It also shows that when the primary case was won in April 14, 1944, all of the Negroes in Dallas were a solid block, and by election time they had split into four different groups.

MR. JOHNSTON: Well, the --

QUESTION: That's what the record shows, four groups. And that was about five months, wasn't it?

MR. JOHNSTON: The record will also show in this case that since the institution of the 8-3 plan ordered by the district court, there has not been a Mexican-American candidate elected to the City Council of the city of Dallas. Previously there had been one, but since this time, although they have run, I think the record will indicate that none of them have won more than a third of the vote and therefore have failed in their efforts to be elected at large.

The court itself acknowledged in its opinion that at-large voting might operate in part as a restriction of the access of American voters, and we think there is simply no evidence to support them as unusual circumstances.

Finally, we address briefly the issue of whether or not a city-wide viewpoint can also be an unusual circumstance. We point to the court's opinion last term in Connor v. Finch where this Court indicated that a historic policy in multi-member districts was not a sufficient reason to uphold multi-member districts. And in Wallace v. House itself, the Court of Appeals originally attempted to justify a single at-large seat among five on grounds that they're avoiding ward parochialism contention subsequently rejected on remand.

QUESTION: Mr. Johnston, was Connor v. Finch a city council or a legislative apportion?

MR. JOHNSTON: It was a legislative apportion.

QUESTION: Isn't there a fair amount of expertise in city management and city government to the effect that strictly election by ward does tend to lead to pork-barrelling in a way that it doesn't on a state-wide basis?

MR. JOHNSTON: If there is such studies, it was not in evidence in this case. That was asserted by some politicians who had been elected at large.

MR. CHIEF JUSTICE BURGER: Mr. Buscemi.

ORAL ARGUMENT OF PETER BUSCEMI, ESQ.,

ON BEHALF OF THE GOVERNMENT AS AMICUS CURIAE

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

I would like to begin by saying that I think Mr. Justice Stewart is correct in suggesting that this Court has never found at-large municipal elections to be unconstitutional. This Court in East Carroll Parish Schoolboard v. Marshall, however, did find that the district court in ordering at-large elections, not only the East Carroll Parish Schoolboard but also for the Parish jury, which is the local legislative body, had violated the remedial principle that this Court has set out in numerous reapportionment cases, all of them beginning with one-man, one-vote violations.

QUESTION: As this case did not.

MR. BUSCEMI: That's right.

In addition to the East Carroll case, this Court has recognized in Dush v. Davis and in Dallas County, Alabama v. Reese that there is the possibility that at-large municipal elections, local elections, either county or city, may result in the minimization or the canceling out, to use the Court's words, of the votes of particular identifiable minority groups.

QUESTION: Well, that's always true when you have an election by majority rule. If a municipality is 55 percent Democratic, the votes of the Republicans are going to be cancelled out.

MR. BUSCEMI: True, and that's the basis of the Court's holding in Whitcomb v. Chavez, where the Court found that there was no restriction of access by blacks to the political process, but that the blacks were primarily Democrat, there were lots of Republicans in Indiana, and the Republicans won a lot of elections, and as a consequence of that there were very few blacks that were elected to the State Legislature from Marion County, Indiana. That is not what the district court found in this case. I think the evidence supports the findings of the district court.

QUESTION: Don't you think there's a difference at least from the point of view of political structure and political science between a board of county commissioners or a county jury or whatever it may be called in various states on the one hand, or a school board on the same side on the

one hand, and a small city council elected at large with a city manager system in a home rule municipality on the other?

MR. BUSCEMI: Yes, Mr. Justice Stewart, there may very well be a difference there, and we are not contending and respondents are not contending --

QUESTION: And if there is a difference, why should the same constitutional rule, at least why should it automatically be transferred from one to the other?

MR. BUSCEMI: Well, this case as it stands now does not really involve a constitutional rule. We're talking about a remedy that's been --

QUESTION: Well, at least right at the threshold, it involves whether at-large municipal elections are -- if there's any defect in them at all, doesn't it?

MR. BUSCEMI: Well, that's true, and the district court found that in the circumstances --

QUESTION: The district court found so.

MR. BUSCEMI: In Dallas there was a defect --

QUESTION: Electing 11 of them at large, and whether or not that's right or wrong is not now before us, as I understand it. But certainly at the threshold there is before us the question of whether the election of the three members of the council, including the mayor, at large is defective in any respect.

MR. BUSCEMI: That's right. This Court need not

find that the election of three council members at large is unconstitutional.

QUESTION: Well, if it's undesirable, is a matter of a remedy -- isn't that the threshold?

MR. BUSCEMI: That's right, and this Court has said admittedly in one-man, one-vote cases that reapportionment should prefer single member districts.

QUESTION: And yet Miller said so with respect to a city manager municipality. Never, has it?

MR. BUSCEMI: Not in the context of at large dilution.

QUESTION: No. In any context, has it?

MR. BUSCEMI: Well, in East Carroll, for example --

QUESTION: Well, that's not a city manager municipality, is it?

MR. BUSCEMI: No. Parish police jury.

QUESTION: Your position is that even though we were to conclude if presented with the issue on the merits that an 11 man at-large city council would not be unconstitutional the district court simply should have dismissed the complaint. In this case we should nevertheless affirm the 5th Circuit which held that three at-large members were improper remedially?

MR. BUSCEMI: Well, I think the only issue before the Court is whether the remedy was improper. Now, as Mr. Justice Stewart suggests, if the Court finds that at large

elections may be ordered as a remedy, the Court -- because the Court does not believe there is any constitutional violation involved in all 11 being elected at large, then presumably the Court would not need to affirm. But our suggestion here is that the violation that was found was indeed a violation and that the appropriate remedy for a court-ordered reapportionment plan involves single-member districts.

Now, as the district court pointed out, Dallas is completely free to present the 8-3 plan to the district court for the District of Columbia or to the Attorney General for preclearance under Section 5 of the Voting Rights Act. And then, if the plan is precleared, it will go into effect and any court-ordered remedy for the constitutional violations found will be over.

QUESTION: After a district court orders it, you say? Are you suggesting it must be precleared, that the judge's order must be precleared?

MR. BUSCEMI: Not at all.

QUESTION: Well, isn't this the judge's order, isn't this the judge's plan?

MR. BUSCEMI: Right now it is a court-ordered plan, that's right.

QUESTION: Why is it subject to Section 5 then?

MR. BUSCEMI: We're saying as a court-ordered plan, it is defective because it departs from the remedial principles

announced by this Court in earlier cases.

We are saying that if Dallas wishes to have this plan --

QUESTION: Dallas didn't wish to have it; the Court imposed it on them. Dallas didn't want it at all.

MR. BUSCEMI: Dallas now says that it wants the 8-3 plan.

QUESTION: Well, it wants it as something, as though, after it's ordered by this Court they might want it -- they didn't want it in the first place. They have it because the Court ordered it, haven't they?

MR. BUSCEMI: That's true.

QUESTION: Why does Section 6 get into the act?

MR. BUSCEMI: Well, because if Dallas now wants the 8-3 plan or if Dallas wants a 7-4 plan, or indeed if Dallas wants two single-member districts and 9 members elected at large, they are free to submit that plan to the District Court of the District of Columbia.

QUESTION: Suppose we --

MR. BUSCEMI: They did not challenge the question -- the finding of unconstitutionality.

QUESTION: Suppose we don't agree with you that it's a court-ordered plan? Suppose we were to view the resolution and such as a legislative plan. Would it now require Section 5 clearance?

MR. BUSCEMI: Yes.

QUESTION: It would? Even though it became such before Texas became a covered jurisdiction?

MR. BUSCEMI: Yes.

QUESTION: What authority is used for that?

MR. BUSCEMI: Section 5 provides that the city may not enact or seek to administer any plan not in effect on November 1, 1972.

QUESTION: Then is it your submission that if this is a legislative and not court-ordered plan, nevertheless there has to be an affirmance because there has not been a preclearance?

MR. BUSCEMI: That's right.

QUESTION: You mean Texas when it was covered should have gone back and submitted every -- when was it covered, 1970-what?

MR. BUSCEMI: September 18, 1975.

QUESTION: '75. So it should have gone back and canvassed all the changes that had ever been made since 1972 and submitted them all to the Attorney General?

MR. BUSCEMI: Yes. But indeed, no changes have been made since '72. The at-large --

QUESTION: Anywhere in Texas?

QUESTION: How can you know that in a state like Texas?

MR. BUSCEMI: Well, I'm talking about in Dallas.

QUESTION: Well, the question was Texas. Your proposition was the whole state.

MR. BUSCEMI: That's right. There have been changes --

QUESTION: Anywhere in Texas, locally, state-wide, any change in the great state of Texas, you're supposed to have bundled them up in a bushel basket and take them all to the Attorney General.

MR. BUSCEMI: The ones that were not in effect on November 1, 1972.

QUESTION: And did they do that?

MR. BUSCEMI: Has all of Texas done it, or is it Dallas?

QUESTION: Any of them. Does the Attorney General attempt to find out if they ever did it, or do you just wait for complaints?

MR. BUSCEMI: We wait for submissions.

QUESTION: All right.

QUESTION: Let me see if I correctly -- in Perkins I think the Court held that even a change of location of ballot, of polling place, required pre-clearance?

MR. BUSCEMI: That's right.

QUESTION: Don't you suppose since 1972 there have been some changes of polling places in the state of Texas?

MR. BUSCEMI: I'm sure there have, and I'm sure many of those have not been submitted, and I'm sure that the Attorney General has not exercised his right under the statute to bring private --

QUESTION: Perhaps elections based on the changes in the polling places may now be challenged because of failure to get a pre-clearance?

MR. BUSCEMI: Well, I don't think that the change in polling place itself would be --

QUESTION: Has there ever been any court decision that Section 5 is retroactive like that? Or do you just read it on its face?

MR. BUSCEMI: Well, I think that when Section 5 was initially --

QUESTION: And it's possible to interpret it, I suppose, as meaning that any change hereafter that wasn't in effect in 1972?

MR. BUSCEMI: Well, any change hereafter --

QUESTION: That is --

MR. BUSCEMI: -- would not be in effect on November 1, 1972.

QUESTION: Well, all right. All right. But has there been some court decisions on this retroactivity?

MR. BUSCEMI: I'm not sure whether there were any -- when the Voting Rights Act was originally enacted it was passed

on August 6, 1975, but it referred to change that had taken place since November 1, 1964.

QUESTION: Have there been some submissions from Texas since it was in cluded, based on the fact that this particular practice that is now being administered was instituted in 1973 and is still being administered?

MR. BUSCEMI: Not that I know.

QUESTION: So it's never even been construed by the Attorney General?

MR. BUSCEMI: Well, I think that --

QUESTION: Until now.

MR. BUSCEMI: I think that if there had been such a submission, the Attorney General would have reviewed it under Section 5.

I just want to comment briefly on the special circumstances that were noted by the District Court. First of all, those circumstances were noted in the context of an evaluation of the 8-3 plan, in the context of an evaluation of the constitutionality of the 8-3 plan. The District Court never said that it was talking about special circumstances or unusual situations that this court has referred to in speaking of departures from the single member district preference in court-ordered remedies. The District Court did not make such a finding, and indeed, the special circumstances cited by the District Court in connection with its assessment of the plan's

constitutionality are far different from the special circumstances noted by this Court on the only occasion when this Court approved multi-member districts in a court-ordered plan. That was in Mahon v. Powell, where you had a very special situation involving the Norfolk Naval Base.

QUESTION: Do you think it makes any difference in this connection between a city such as Dallas, which has had at-large voting since 1907, and the parish in Louisiana that had had at-large voting only since 1968?

MR. BUSCEMI: Well, I think that may very well make a difference with respect to whether at-large voting is useful in the city or whether it is constitutional. I don't think it should make a difference on what a court-ordered reapportionment plan should involve. I think that this Court in Chapman v. Meyers spoke about the longtime use of at-large elections and --

QUESTION: No. No, I think Chapman v. Meyers was South Dakota --

MR. BUSCEMI: North Dakota.

QUESTION: North Dakota. Well, didn't the court say there, Mr. Justice Blackmun will correct me, that there'd been no tradition in --

MR. BUSCEMI: In the Senate, in the North Dakota Senate. The Court did comment, however, that there had been a tradition of at-large, that is multi-member districts, in

the North Dakota House of Representatives.

QUESTION: But not in the Senate?

MR. BUSCEMI: That's right.

QUESTION: And the Court made a point of that.

MR. BUSCEMI: That's right.

MR. CHIEF JUSTICE BURGER: We will resume at one o'clock.

MR. BUSCEMI: Thank you.

[Whereupon, at 12 o'clock noon, the Court was in recess, to reconvene at 1:00 o'clock p.m., the same day.]

AFTERNOON SESSION - 1:00 P.M.

MR. CHIEF JUSTICE BURGER: You have some rebuttal time. I think you have one minute remaining, Mr. Buscemi.

MR. BUSCEMI: Thank you, Mr. Chief Justice.

During the luncheon recess I have obtained some information on the Court's question on the application of the Voting Rights Act to the state of Texas and changes that occurred between November 1972 and September 1975. The Attorney General has received hundreds of submissions involving such changes both from Texas itself and from localities within the state. Some of those changes, we are informed, did involve changes in polling place locations, in answer to Mr. Justice Brennan's question.

Indeed, during the 12 months immediately following the application of the Voting Rights Act to Texas, more submissions were received from that one state alone --

QUESTION: I don't doubt it.

(Laughter.)

MR. BUSCEMI: -- than from all the other areas covered under the Act combined.

QUESTION: Do you still contend that this case is subject to Section 5 submission?

MR. BUSCEMI: Well, the relevance of this point to this case is if an ordinance, if the city council could have under state law reapportioned itself by ordinance, and if such

an ordinance had been passed, and if the 8-3 plan was now effective by virtue of a city council ordinance, then that ordinance would have to be submitted.

QUESTION: Well, Mr. Buscemi, why didn't you answer the Chief Justice yes? Merely from the fact that it was April 1976, after the '75 coverage, that the ordinance finally became legal, when it was approved at the referendum?

MR. BUSCEMI: That's right.

QUESTION: And it didn't become effective until then?

MR. BUSCEMI: Absolutely, to the extent that --

QUESTION: Then why can't you answer the Chief Justice's question, of course the 8-3 plan has to have preclearance under Section 5.

MR. BUSCEMI: Absolutely. That is the answer to the Chief Justice's question. To the extent that there is a legislatively enacted plan involved here, it is only through the charter amendment that was passed in April 1976, and that what was argued in the second --

QUESTION: Was the city doing any more than rubberstamping what the court ordered?

MR. BUSCEMI: No, the city was not. But in Connor v. Waller, this Court held that an enacted plan that just reproduces the terms of court ordered plans is subject to preclearance.

QUESTION: In effect, then, you're saying that the

judge's action is indirectly subject to review by the Attorney General?

MR. BUSCEMI: No, we're saying if the state legislative body or the local legislative body decides to adopt what a court has ordered into effect, then it's subject to pre-clearance and that is entirely different because there are different --

QUESTION: Does he have any choice about it?

MR. BUSCEMI: Excuse me?

QUESTION: Does the city have any choice about it?

MR. BUSCEMI: Absolutely. The city had no obligation whatsoever to enact the 8-3 plan. They could have enacted any plan they wanted and submitted it to the District Court of the District of Columbia or the Attorney General for pre-clearance, and there is currently pending in this Court a jurisdictional statement in No. 771376, United States v. Georgia, in which a three judge court did consider a submission of a change occurring between November '64 and the application, and the effective date of the Voting Rights Act, August '65, and saying that that change was covered but saying that it had been pre-cleared.

The issue in the case is whether the Attorney General had pre-cleared it.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Werner, do you have

anything further?

ORAL ARGUMENT BY JOSEPH G. WERNER, ESQ.,

ON BEHALF OF THE PETITIONER -- REBUTTAL

MR. WERNER: Very briefly, Your Honor.

QUESTION: Will you address this question of pre-clearance before you finish, Mr. Werner, particularly in light of the referendum in April '76 after Texas was brought under this?

MR. WERNER: Yes.

In response to the question by Mr. Justice Powell, I believe you asked does it make a difference that we've had at large voting since 1907, I believe you asked that question of Mr. Johnston: Looking at Mr. Justice Blackmun's opinion in the Chapman case, I get the feeling that this theory is based on a deference to state action and that what is really critical here is whether the federal courts are imposing some system of elections on a state which is contrary to established state policy.

Now, if that is what we're really dealing with here, I think it's clear that the use of at large voting in Dallas city elections is clearly established state policy, both for the state of Texas and the city of Dallas, and that there is no affront to the sovereignty of the state of Texas by virtue of this federal court order which either orders or approves the use of at-large voting.

We had places -- what we're dealing with here are places with 9, 10 and 11 on the city council, those places 9, 10 and 11 were at-large places beginning with the charter of 1968, was when we went from 9 to 11 members, so places 9, 10 and 11 remain absolutely unchanged since 1968. Furthermore, as you -- direct response to your question, Mr. Justice Powell, we have had at large voting generally since 1907 and that, of course, was instituted in the city of Dallas before we had home rule, and it was done by act of the Texas Legislature in 1907. So we've had it continuously in various forms since 1907. We've had it in our charter with respect to these exact three positions on the council since 1968, and I think there's absolutely no question that this at-large voting -- and of course, it's the at-large voting that we're arguing about here today, that's in contention -- and clearly the federal court did not impose at-large voting contrary to established state policy. So I see no reason to invoke the East Carroll rule in this situation.

Now, Mr. Justice Brennan, with respect to the submission of the charter amendment under Section 5, I think very clearly the literal language of the statute requires pre-clearance. Now, the only problem that we see with this is that as we all recognize, whether this is a court-ordered plan or whether it is a court-approved plan, the federal district judge has indicated his approval of the plan and so if we come

to the point where we submit the plan to the district court of the District of Columbia, I think we're submitting in effect the approval of the local district judge to the further approval of the District Court of the District of Columbia.

QUESTION: Or alternatively, the approval of the Attorney General of the United States?

MR. WERNER: Yes. And I think, and the reason why I think this is significant is that I really don't think this is what the Congress had in mind. Of course, in the Sheffield case the Court construed the intent of the Congress in enacting Section 5, and I really don't think that what the Congress meant to do was to have the District Court of the District of Columbia or the Attorney General review something that had already been sanctioned by the --

QUESTION: At the time the judge initially passed on the resolution, Texas was not subject to the Voting Rights Act?

MR. WERNER: No, sir.

QUESTION: He was then free to pass on the constitutionality of this substitive, whereas today if that had been subject to Section 5, he would not have been free to address the constitutionality of this, if he considered this to be a legislative submission, because that would first have had to go under Section 5.

MR. WERNER: Yes, sir, and I think there's a

difference here between what the District Court did -- basically we had ourselves a 14th Amendment lawsuit in the District Court, the local District Court, and I think Section 5 clearance is more closely aligned with 15th Amendment problems.

QUESTION: Did any of the parties to this action in their, as opposed to amicus curiae, raise the Voting Rights Act issue?

MR. WERNER: The respondents raised it in the 5th Circuit, yes, sir.

QUESTION: And what did the 5th Circuit say?

MR. WERNER: They disregarded that thing. They said nothing about it in the opinion.

QUESTION: Well, they went up on another ground?

MR. WERNER: Yes, sir.

QUESTION: In his favor.

MR. WERNER: Yes, sir.

QUESTION: Tell me, Mr. Werner, I gather from what you say at least no decision has yet been made by Dallas whether or not to submit?

MR. WERNER: Well, until very recently, until Sheffield was decided we didn't think we had to submit anything, frankly, and we did submit some polling place changes and things like that over the last couple of years, because we were afraid if we had to pick that up, if Sheffield were decided against us, we were afraid that administratively it would

just be too much, so we went ahead and submitted those, but we didn't submit the charter amendment for two reasons. One was the question that the Court just settled in Sheffield and the other was that we weren't sure about this question of whether it was, the fact that the District Court had indicated some approval about it.

QUESTION: Yes.

MR. WERNER: But to try to clarify my point about the effect of what the local district judge has done here, I don't think that just the fact that the local district judge has approved the plan on some points and possibly not on the substantive issues required by the Voting Rights Act necessarily means that we don't have to submit it. What troubles us in this respect is that we don't really think that that's what the Congress intended to do. I think what the Congress intended to do was to prevent evasions and regressions that some of the Southern states had resorted to in the way of court decisions. In other words, the court would invalidate a certain electoral device and then just as a dodge or an evasion, the local government body or the state would resort to some other change.

I think clearly that's not what's happened here, and so although as I readily concede we're covered under the literal language of Section 5, I'm not sure we're included in the Congressional intent.

QUESTION: Do you think the Section 5 issue is here at all?

MR. WERNER: Well --

QUESTION: It wasn't decided in the court of appeals, was it?

MR. WERNER: It was not treated in either of the courts below, Mr. Justice.

QUESTION: And it couldn't have arisen in the district court?

MR. WERNER: No, sir.

QUESTION: It's quite possible, I suppose you're telling us, that a plan approved by a court can be permissible as a plan that has been initiated by a legislative body even though the initiation by the legislative body does not amount to legislation as such, and that even therefore if it's not a court devised plan, and can permissibly be something other than what a purely court devised plan could be.

Nonetheless, it's a court approved plan and therefore might immunize it from the necessity of submission under Section 5, if later adopted by way of a charter amendment, which this one was.

MR. WERNER: Well, no, sir, it's not exactly what I'm saying. What I'm saying is that I can hypothesize the situation where a district court would approve a plan on grounds other than something that would satisfy the Voting

Rights Act. The district court might not really address itself to what I regard as issues more closely related to the 15th Amendment, and still in a case like this, approve a plan which was challenged only on 14th Amendment grounds.

So what I'm saying is, I don't think the local district court necessarily covers all the issues that would be covered in a submission to the Attorney General.

QUESTION: -- that he doesn't have to.

QUESTION: In a court ordered plan, he doesn't need to live up to Section 5?

MR. WERNER: Yes, I understand that.

QUESTION: And Brother Stewart is saying that this is, whatever the chronology here, this qualifies for that rule. This qualifies as a court rule, rather than a legislative rule, for purposes of Section 5.

QUESTION: Even though it might not be a court ordered plan for purposes of our previous decisions with respect to multi-member districts.

MR. WERNER: Well, that's not --

QUESTION: Since the initiative came from the legislative body.

QUESTION: This is a good position for you.

(Laughter.)

QUESTION: Except a very comfortable position for you.

QUESTION: Except, Mr. Werner, I take it, you can't have it both ways.

QUESTION: -- a court-ordered plan for purposes of Section 5, then it ought to be a court-ordered plan for purposes of --

QUESTION: My question suggested that you could have it both ways.

QUESTION: If we agree with you, how does Section 5 under Chapter 5 come in there?

MR. WERNER: Well --

QUESTION: You want the district court. You want to erase the court of appeals and go back to the district court.

MR. WERNER: Yes, sir.

QUESTION: How does Chapter 5 affect that?

MR. WERNER: Well, then we're in the position of being under the literal language of Section 5, but possibly not within the Congressional intent because we didn't do this as an evasion.

QUESTION: I think these cases have not given much weight to that congressional intent as you limit it. Perkins and --

MR. WERNER: Yes, I understand.

QUESTION: -- all the others. We have to go back on an awful lot of things we've said, wouldn't we?

MR. WERNER: Well, I'm actually -- this is a situation

which the Court has not precisely addressed itself to. It's a little bit different from Perkins and the other cases.

QUESTION: We came close to it in the District of Columbia case, did we not?

MR. WERNER: I can't answer that case.

QUESTION: The decision by the District of Columbia court.

MR. WERNER: Yes, sir. We're not, you know, this would not be what we regard as a disaster to have to submit it to the Attorney General, or to the D. C. --

QUESTION: Surely not before us in this case, is it? Surely not an issue in this case, is it?

MR. WERNER: Well, as we just said, it was not raised below and it was --

QUESTION: We should not decide it if the court of appeals hasn't had an opportunity to pass on it, should we?

MR. WERNER: I think it best it should go back to the district court to be considered.

QUESTION: Mr. Werner, when is your next municipal election?

MR. WERNER: The next council election will be in April '79. We have council elections only in April of odd-numbered years, but sometimes at other times we have bond elections --

QUESTION: So there is some time if you had to go

through clearance?

MR. WERNER: Yes, sir, ample time.

QUESTION: Yes.

MR. WERNER: Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

[Whereupon, at 1:16 o'clock p.m., the case in the above-entitled matter was submitted.]

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