In the

Supreme Court of the United States

W. C. McDANIEL, ET AL.,	)	
	)	
Petitioners,	)	
	)	
v.	)	No. 80-180
	)	
JOSE SANCHEZ, ET AL.,	)	
	)	
	)	

Washington, D.C.
March 2, 1981

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ORIGINAL

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W. C. McDANIEL, ET AL.,

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v. : No. 80-180

JOSE SANCHEZ, ET AL.,

Washington, D.C.

Monday, March 2, 1981

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 o'clock a.m.

APPEARANCES:

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ROBERT G. PARMLEY, Esq., Texas Rural Legal Aid, Inc., 504 Sidney Baker St., Kerrville, Texas 78028; on behalf of the Respondents

LAWRENCE G. WALLACE, Esq., Deputy Solicitor General, Department of Justice, Washington, D.C. 20530; on behalf of the United States as amicus curiae

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'll hear arguments first this morning in McDaniel v. Sanchez.

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

ORAL ARGUMENT OF RICHARD A. HALL, ESQ.,

ON BEHALF OF THE PETITIONERS

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

This is a case which presents the question of whether Section 5 of the Voting Rights Act, which is 42 U.S.C. 1973c, requires the pre-clearance of a county reapportionment plan which was prepared after a trial at the Court's direction, after a previous plan had been invalidated, and after an evidentiary hearing upon the use of the proposed plan. And when the plan that was newly completed was declared by the trial court to be one which should be used for the 1980 elections. The original lawsuit was brought alleging an existing districting plan for four commissioners' precincts of Kleberg County to be unconstitutional first because the existing plan diluted the vote of the Mexican-American residents of the County, and secondly because it violated the one-man-one-vote principle of the Constitution.

The trial of the case was devoted primarily to the first question; that is, whether the existing plan diluted

the voting strength of Mexican-American residents. At the conclusion of the trial the trial court held that there had been no dilution of Mexican-American voting strength but that there was a violation of the one-man-one-vote principle and ordered that the County prepare a new plan and submit it to the Court for consideration. The trial court set a hearing date on the new plan, the parties appeared at that time -- and incidentally, this was a class action brought by Mexican-American residents of Kleberg County.

At the evidentiary hearing on the plan, the trial court heard evidence as to the statistical results and also heard questions with respect to the effect of the new plan on the voting strength of Mexican-Americans, how Mexican-American residents and voters had been affected by the particular plan that was presented. The plan was actually prepared by a professor from Texas A & I University, whose sole objective was to achieve an equality in number between the four precincts. He was instructed however, on one occasion, that the County would prefer that a boundary line be withdrawn to include the courthouse in Commissioners' precinct number 1, he was also asked to try to maintain the integrity of existing voting or election precincts, rather than to divide them up. He accomplished all this, although he did have to divide or split a number of voting precincts.

And as we have pointed out in our brief, this is an action which could only be taken by the Commissioners' Court in July or August of a given year and it was not done in the Texas Court -- it was not done in that time-period and the Texas courts have held that a Commissioners' Court, itself, is absolutely precluded from making a division of Commissioners' precincts other than at the stated time, and that is --

QUESTION: Your opposition disagrees with that, don't they?

MR. HALL: I know they do, Your Honor, but I disagree with my opposition, because I think that the case of Wilson v. Weller makes it very clear, both in its holding and its distinguishing of another Texas Supreme Court case that where in fact election precincts -- and we're not talking about Commissioners' precincts at this point, we're talking about election precincts, when election precincts are divided, or the boundaries are re-drawn -- it can only be done in July or August and at no other time.

In any event, it is a factor in this lawsuit simply because of this Court's holding in East Carroll Parish v. Marshall, in which the fact that a Louisiana police jury had no authority to reapportion itself pursuant to an enabling statute which had been questioned

by the Attorney General was suggested to be dispositive of the question whether the particular plan was a court-ordered plan or was a legislative plan. In any event, the trial court did review the plan and in its order stated that he had considered the Plaintiff's objections to the plan as well, and the Plaintiff did come forward with evidence challenging the proposed plan on the basis that it did dilute Mexican-American voting strength. The Court concluded that the plan was acceptable and ordered that it should be used in 1980.

QUESTION: Did the District Court in any way alter the plan as proposed?

MR. HALL: No, Your Honor, the District Court did not. And following his approval of the plan, there followed a series of procedural steps which resulted in the Fifth Circuit's summary determination that the plan could not be used and should be submitted to the Attorney General or to the District Court in the District of Columbia for preclearance under the Voting Rights Act before it could be put into effect. And of course, that raises the question presented-- the question presented here, whether a plan conceived as this one was, in the course of litigation which had been long since commenced was required to be submitted for Section 5 preclearance or whether the District Court could order such a plan into effect

without preclearance.

QUESTION: Did you argue to the Fifth Circuit that the Commissioners' Court didn't have power to re-apportion itself in accordance with this plan?

MR. HALL: We did in a motion for rehearing, Your Honor. The truth of the matter is that the question was presented to the Fifth Circuit in a series of briefs that were directed toward a summary reversal of the District Court's order.

QUESTION: Well because the per curiam in the Court of Appeals says "by submitting a proposed reapportionment plan to the District Court, the Kleberg County Commissioners' Court complied with and fulfilled its legislative responsibilities."

MR. HALL: Well I think, Your Honor, that the legislative responsibilities of which the Fifth Circuit was speaking was -- a one to which this Court has addressed so many times, and that is simply the preparation of a plan or the submission of a plan at the direction of the Trial Court rather than the preparation of that plan by the Trial Court itself. I think that's the fulfillment of legislative duty which is suggested.

QUESTION: That isn't quite what this language says, is it?

MR. HALL: I'm sorry?

QUESTION: That isn't quite what this language says; you're saying -- all you're saying is that the party to a lawsuit was asked to submit a plan and it did. The Court of Appeals says it did it legislatively.

MR. HALL: Well, Your Honor, I can only suppose what the Fifth Circuit was speaking to there, but I think that all the Fifth Circuit was saying was that this was not a plan which was a court-ordered plan; it was not a plan which was prepared judicially it was prepared legislatively, in the sense that the trial court told the county, one of the parties, to go out and prepare and return with a plan and the county did return with a plan and in that sense it was a legislative plan. In that sense only, it was not a plan --

QUESTION: Would you make the same argument if the Court had simply issued a declaratory judgment invalidating the old plan and giving the Commissioners' Court a certain time to come up with a new ordinance or whatever -- what is it you called it, an ordinance, or --

MR. HALL: It would be an order of Commissioners' Court --

QUESTION: An order, yes. If that's all the Court had done -- we'll give you time, like Courts usually do, to reapportion yourself.

MR. HALL: Well, in truth, Your Honor, that is

what is done with the exception that the trial court did not tell the Commissioners' Court to go reapportion itself and --

QUESTION: It said -- submit a new plan, that's what they said.

MR. HALL: They said submit a new plan to the Court, not go out and prepare one and adopt it and follow such procedures as might be appropriate if you were not in the middle of a suit challenging the constitutionality of the existing plan.

QUESTION: Well is it true that in order to comply with the Court's view of what was wrong with the old plan, that the Commissioners' Court would not have the power under your view of their power, to reapportion themselves constitutionally? In that they wouldn't have the power at this time to split precincts?

MR. HALL: No, Your Honor. The Commissioners' Court would have had the power to reapportion itself into four Commissioners' precincts. The Texas Constitution says that it may do so from time to time as it deems appropriate. So there's no question about its power to do that.

QUESTION: So it could have complied with the constitutional requirements on its own?

MR. HALL: It could have complied with that. The question is whether it could have achieved a satisfactory

one-man-one-vote result without dividing election precincts.

QUESTION: Well that's what I'm getting at. That's what I'm getting at. Would it have had the power to bring itself into compliance with the one-man-one-vote requirement?

MR. HALL: Well, truthfully that question was not litigated, and I know it is raised by the Respondent, Your Honor, but the answer is it would not have had the power to do it in the abstract, if there had been no lawsuit, the Commissioners' Court would not have had the power under Texas law to redrawn its Commissioner precinct lines if, in order to do that, it had to split some existing election precinct lines.

You see, a Commissioners' precinct might be made up of 6 or 8 election precincts which are subdivisioned within the Commissioners' precinct. And what I understand the state statute to prohibit is the dividing or splitting of one of those sub-divisions, one of those election precincts, at any time other than in July or August.

QUESTION: So if the Commissioners' Court had responded to the court by saying in order to satisfy you we would have to exceed our powers and we just can't, we just are forbidden to propose the plan?

MR. HALL: If that --

QUESTION: Then the Court would have had to draw up its own plan, I suppose. And that clearly wouldn't have been subject to clearance, preclearance.

MR. HALL: That would be true. If the County had come back with any excuse, which amounted to a refusal to do it --

QUESTION: Or a claim of inability?

MR. HALL: That's true. It said it was unable to do it, it just wasn't physically possible, as in this case it might, it could have come back and said it's too late we're almost to the 1980 elections --

QUESTION: Well you, are in essence claim that they were forbidden under state law to give a legislative response to the Court's request, which is a perfectly legitimate argument.

MR. HALL: It's a legitimate argument, Your Honor, but in all candor, that's not really what I am saying, because I understand you to be asking me whether it would have been physically possible to come up with some other plan which would have achieved the one-man-one-vote result that was desired without splitting any of the sub-precincts, these election precincts.

QUESTION: And you think it wasn't?

MR. HALL: Sir?

QUESTION: You don't think it was possible?

MR. HALL: I don't know whether it was or not. I know that the Respondent --

QUESTION: Well if it was impossible, the Commissioners' Court wouldn't have had the power to achieve it.

MR. HALL: That's true. That's correct.

QUESTION: Well then, is what you're saying that had these original plaintiffs simply come to the Commissioners' court and said we don't think the present voting lines conform to one-man-one-vote rule, we want you to change them, that they would not have had the authority under Texas law to change them and the plaintiffs would have had to go into federal court to get them changed?

MR. HALL: No, Your Honor, that's not the case. The Commissioners' Court would have had the authority to change the Commissioner's precinct line, but not if in order to achieve one-man-one-vote balance they had also had to split or divide some of these voting precincts, if in order to get the right number of people in each of the four Commissioners' precincts it had been necessary for the Commissioners' Court to break up an existing voting precinct -- to say, okay, part of you who voted in voting precinct 21 are now going to be in a different precinct -- if they had had to do that they would have been without authority to do it under the Texas decision, but if they had not

been required to vote, to change voting precincts, to alter the boundaries of those, then it would have been within their power to make the change.

In any event, the Fifth Circuit concluded that the plan which had been submitted to the trial court and which had been approved by the trial court could not be used because it had not been precleared under Section 5 of the Voting Rights Act and directed that the trial court -- and held that the trial court should not have considered the constitutionality of the new plan before it had been precleared, remanded the case, the petition for certiorari was filed -- and that brings us to this moment.

QUESTION: Before you get into your argument, may I ask a question about the legislative authority? If, because the -- assuming it was necessary to break up the voting precincts in order to satisfy the one-man-one-vote requirement, could some other legislative body have had the authority to do that?

MR. HALL: No, Your Honor. I don't know whether the question has arisen. The only authority I am going on is Article 2.041 of the Texas Statutes, which simply provides that the election voting precincts may not be altered other than by the Commissioners' Court -- other than July or August. And there is no other authority in Texas of which I am aware, that would have the power to

alter election precincts other than in July or August.

QUESTION: Well then, if there's that restriction on breaking up election precincts and if that would prevent a one-person-one-vote satisfactory response would it not necessarily follow that that restriction was invalid as a matter of federal law?

MR. HALL: I haven't had the question, Your Honor, and I don't know whether it would be or not. I don't really see why that's not a reasonable requirement --

QUESTION: Well but it's a requirement that would make it impossible to comply with the Equal Protection Clause if it was faithfully followed, isn't that what you're --

MR. HALL: No, not really, because in any July or August the Commissioners' Court would have the authority to do that and the problem is simply one of timing with respect to an upcoming election. The legislature in Texas has simply said we don't want the Commissioners' Court doing a lot of changing of voting precincts any closer to an upcoming election than July or August and I think that's a reasonable provision by the state legislature.

QUESTION: But why July and August? Why not any time prior to September 1? What if they do it in May or June?

MR. HALL: I suspect, Your Honor, that -- I don't know why at the particular time, I suspect that almost any change could run afoul of the primary and general election problems that we have in Texas. Generally speaking, primary elections are held in May and the general election in November, and I don't -- I don't suppose that -- well a change even in July or August in an election year would alter the voting pattern or the place of votes between the date of the primary and of the general elections.

So I can't answer your question. I don't know why that particular restriction, I don't know -- it's not been challenged, that I'm aware of, on constitutional grounds.

QUESTION: But didn't the primary used to be held at the end of July?

MR. HALL: Your Honor, I do not know.

QUESTION: Maybe it wasn't --

MR. HALL: For as long as I can recall, it has been held in May and the Court may be correct about that.

QUESTION: I'm not sure.

MR. HALL: All right, sir. In any event, the decision of the Fifth Circuit brings us here and we have a number of reasons for believing that Section 5 of the Voting Rights Act as it relates to preclearance should not

be applicable in a case which is already in a federal district court and already subject to constitutional scrutiny.

The first reason for this is that as we view the Voting Rights Act, it assumes the existence and the continuation of an existing plan, both the legislative history and the decisions of this Court have referred to the effect of the plan -- of the Voting Rights Act in Section 5 as in effect, freezing into use and existence an existing plan, and if that were the case there would be no problem or hardship so far as the election process in the County is concerned because it would, as it went through the machinery prescribed by the Voting Rights Act, have an existing plan that could be used during the time required for that procedure. But that is not the case where the catalyst for the presentation of a new plan is an order of a federal court striking down the old plan, there is no plan then to be frozen into effect and there is no plan prepared or participated in by the local, political subdivisions which can be utilized during the interim.

We also think that the language of the Voting Rights Act which speaks to changes in procedure which a subdivision, political subdivision "enacts or seeks to administer" is not simply fortuitous language; we think that the legislature meant what it said, that it was

speaking of changes that were voluntarily undertaken by a political subdivision, that is, the political subdivision enacted or sought to administer a particular plan which was different from the one that had existed before and which had been frozen into effect.

This is not a case in which the Commissioners' Court enacted or sought to administer a new plan, it did neither. It was told by the trial court it could not use its old plan and that it should submit a new plan. So, for that reason also, we think the Voting Rights Act does not apply in a case involving these circumstances.

Third, the Voting Rights Act and the decisions of this Court speak to the purpose of insuring that there is a federal presence in the formulation of any plan which is different from the one which had been frozen into effect by the Voting Rights Act. And we have a federal presence in this case, very much so; we have the most intense federal presence that you could imagine, in the discarding of the old plan and the formulation of the new plan. We had a federal district judge in Corpus Christi, Texas, one county over from Kleberg County, that was aware of all the facts. He had already listened in detail to the plaintiff's class action challenge of the existing plan, he knew intimately what the circumstances and background were. And there was no better forum anywhere to consider the changes which were

proposed than the local federal district court. So that objective of the Voting Rights Act, we think, has been squarely met in the case of a plan which is presented following the striking down of an existing plan by a federal district court.

QUESTION: If that's the objective. The -- I suppose the other side of the coin is, that the federal presence of which you speak is a specific federal presence, namely, the Attorney General or the District Court of the District of Columbia?

MR. HALL: Well that, I'm sure is the argument in support of the applicability of the Voting Rights Act, Your Honor, but certainly the legislative history didn't speak to that. It does -- it does speak to the existence of a body of expertise, and uniformity that is sought by channeling all of these decisions through the Attorney General or the District Court of the District of Columbia, but for the life of me, I don't see that the Attorney General or the District Court of the District of Columbia, no disparagement intended, has any greater expertise in a case of this type where a local federal district court has already considered in great detail in an adversary proceeding, the various factors which would affect the formulation of a new claim.

And finally, it seems to me that the Voting Rights

Act does not contemplate the existence of a pending suit which already raises constitutional issues which the -- with which the local federal court has grappled. And that is perhaps a different facet of the suggestion that where you do have a federal presence already involved with a lawsuit there is no occasion to seek further federal presence in the form of an Attorney General or the District Court in the District of Columbia.

The decision, we think, of the Fifth Circuit ignores completely this Court's decision in East Carroll Parish School Board v. Marshall, in which, in virtually identical situation, the question was raised in an amicus curiae brief by the United States and in which this Court said that Section 5 preclearance was not required in the case of a plan which was prepared at the instance of a federal district court and submitted to a federal district court.

The -- I would like to point out that I see more problems with requiring preclearance of a plan conceived in the course of existing district court litigation, than I do in, in not requiring preclearance. First of these, of course, is the tremendous delay and expense incident to a preclearance procedure when you already have a pending lawsuit in a local district court. As I understand those cases, in which the question might be raised and as I understand

the Voting Rights Act, if the trial court were required in this case to remand the County to the Attorney General of the District Court of Columbia, the County could go to the Attorney General and proceed back and forth until a plan had been approved there or disapproved. It could then, if it were disapproved, it could go to the District Court in the District of Columbia; I assume an appeal could follow that, and then, the case could go back to the trial court where, by the express terms of the Voting Rights Act, the question of constitutionality could be litigated. And if the trial court should determine at that point that the plan was unconstitutional although it didn't violate the provisions of the Voting Rights Act, we would start, I gather, all over on this procedure. And I think that is a -- I think that defeats the equitable jurisdiction of the Court and I think it -- it insures a multiplicity of litigations and perhaps harm to the voters themselves. I can conceive that a political subdivision which does not wish to get right on with a new plan could perpetuate its own unconstitutionally elected officials in office indeterminately by playing the game of proceeding to the Attorney General, of submitting half-hearted plans and so forth.

And I realize the answer to that is, well the trial court could prepare his own plan and order it into effect. But it seems to me that at that point we would come back to

the question then of why it should be that a district court plan is not subject to Section 5 preclearance, why the district court has sufficient ability and expertise to prepare its own plan, but not to review a plan prepared or submitted by a local political subdivision. We think everything about the Voting Rights Act and everything that relates to the question of preclearance is directed towards voluntarily undertaken changes in voting procedures and not the one which is taking place under the scrutiny of federal court. Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Parmley.

ORAL ARGUMENT OF ROBERT J. PARMLEY, ESQ.,

ON BEHALF OF THE RESPONDENTS

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

Before addressing the Defendant's argument, I'd like to elaborate a little on some of the judicial decisions and actions in this case. On October 2nd, 1979, approximately one year after the trial on the merits, the district court found that Kleberg County was mal-apportioned and in the October 2nd order the district court informed the defendant that the initial burden of fashioning the constitutionally acceptable remedy was on the Commissioners' Court, the district court quoting Wise, then advised the defendants that it would afford them a reasonable opportunity to meet

constitutional requirements by adopting a substitute measure and that the Commissioners' Court was unwilling or unable to present the Court with a substitute plan, then it would become the unwelcome obligation of the District Court to devise its own plan.

The District Court then directed the Commissioners' Court to come up with a plan and a hearing was set on that plan on December 10, 1979, approximately 60 -- two months later.

QUESTION: Mr. Parmley, do you think that Wise contemplated, when it spoke of the unwelcome responsibility of federal courts and the legislative responsibility to comply with the one-man-one-vote rule, that it contemplated an action by a Commissioners' Court such as this that was forbidden by state law, if in fact it was forbidden?

MR. PARMLEY: Well Your Honor, I don't believe that the Commissioners' Court action in this case was forbidden by state law.

QUESTION: Suppose it was, then answer Justice Rehnquist's question.

MR. PARMLEY: Whether or not Wise would have -- I'm not sure I understand the question.

QUESTION: Well, suppose that state statute forbade the county court from doing what the District Court asked it to do. Do you think that the District Court,

nonetheless, should have required it to do it, or should it simply have devised a plan of its own, realizing that the county court was prohibited by a state statute from itself acting at that particular time?

MR. PARMLEY: I think the District Court was aware that the legislative body had presented a plan that it did not have legislative authority to present; that the District Court should have instructed that legislative body to go back and respond to its duty to present a valid substitute.

QUESTION: As a party to the lawsuit, but not as a legislative body, couldn't that be? I mean, as a legislative body, it is, I suppose, bound by Texas law, but as a party to the lawsuit, it is bound by the orders of the District Court.

MR. PARMLEY: Well, I guess it's just a question of whether or not the District Court can defer twice to the legislative body. If it's only given one shot, then I would say if it came forward with a plan that was invalid under state law, then I would say a second plan would not be afforded legislative deference and it would be considered as any other plan presented by a party to the lawsuit.

QUESTION: It's a pretty important question in view of the dicennial census, isn't it? Because presumably a lot of state and municipal subdivisions are

going to be subject to suit if they don't redistrict themselves on the basis of new population figures and yet if the District Court in which the suit is brought finds that they are mal-apportioned and directs them to submit a plan, they may be under some state law restraint as to whether or not they can do the particular thing that the District Court wants.

MR. PARMLEY: Yes sir, I understand that position, but I believe that legislative history will show that a correct application of Section 5 is that whenever -- when the legislative body has received a judicial deferral, to come up and present a substitute plan, when that legislative body has finalized its plan which incorporates public policy objectives and is preparing to submit that plan to the District Court, it is in effect seeking to administer that plan through incorporation in the court's order. And by seeking to administer that plan, by incorporation in the court's order it falls under the operational language of Section 5, which is whenever a political subdivision seeks to administer a voting change then that change must be precleared. Our position would be that the legislative body in that particular case, as part of its legislative duty to come forward with a valid plan, would have had to have Section 5 preclearance. The issue of whether or not it actually had legislative authority

does not matter because although -- because, the plan could be implemented through the court order. Operational language is to seek to administer, it doesn't necessarily require that they have to enact it.

QUESTION: What if the census shows, the 1980 census figures show that this Kleberg County Commissioners' Court is mal-apportioned, then the Commissioners' Court simply sits on its hands and does nothing so that it can't be accused of seeking to institute any new thing that would be required -- preclearance under Section 5. Nonetheless, Plaintiffs bring an action in the District Court saying you're violating our constitutional rights because it's not one-man-one-vote. They're kind of between a rock and a hard place, aren't they?

MR. PARMLEY: Well, I think that the legislative history of Section 5 supports the application which I just told you, that in Fourteenth Amendment cases, where there is a violation that is found by the Court -- at the 1975 extension hearings, the Senate Judiciary Committee Report specifically stated that after the invalidation of a plan by the -- and legislative deferrment, the Court should defer its consideration of plans presented to it until such times as these plans have been submitted for Section 5 review. Only after such review should the Court proceed with any remaining --

QUESTION: Well Mr. Parmley, what if in this case the Commissioners' Court had said judge, we just don't want to come up with a plan and -- it's too difficult and we don't think we have the authority and even if we did, we just don't agree with you that the old one is bad, we're going to appeal and meanwhile, the -- if you want to put in your own, fine, go ahead. You don't think the judge would have held the Commissioners' Court in contempt, do you? Do you think the Court has authority to order the submission of a new plan? It can give the legislative body time to submit a new plan, do you think they can order it and enforce that order?

MR. PARMLEY: No, Your Honor. My reading of Wise is that the --

QUESTION: Well what if --what then if the Commissioners' Court just sits on its hands as Justice Rehnquist says, and once the declaratory judgment is issued it just doesn't do anything. The Court then is going to prepare its own plan, isn't it?

MR. PARMLEY: Or invite the Plaintiffs to submit plans and that may be an incentive for the legislative body to come up with their own.

QUESTION: Well it may be, but if they don't, then -- and the Court puts in its own plan, then under our -- unless we overrule our cases, the Court plan isn't subject

to preclearance, is it?

MR. PARMLEY: That's correct. But the legislative body does not propose a plan --

QUESTION: So it may be that we're not arguing about much here, in the sense that a Commissioners' Court could just -- or any legislative body after a declaration of unconstitutionality of an old plan is just going -- it doesn't want to preclear, it just isn't going to submit a plan. Of course, a lot of legislative bodies would rather have their own plan in than a Court's plan. But nevertheless, there is a way of avoiding preclearance, apparently.

QUESTION: Well if he's -- if you're -- if he's right. Here, the District Court used the word directed; with that in mind, the defendants are hereby directed to submit a proposed new plan by the 13th day of November, 1979. Do you think that that should be read as requested?

MR. PARMLEY: Yes, Your Honor.

QUESTION: Though it's not the word he used.

MR. PARMLEY: Well he said directed but he also said he was -- affording them an equal opportunity --

QUESTION: And that -- if the defendants didn't comply with the direction they might be in contempt of Court.

QUESTION: But you just suggested that probably the Court didn't have power to order anybody to submit a

plan, a legislative body to submit a plan.

MR. PARMLEY: Well I think it could order -- I think it should order a legislative body to come forward with a plan.

QUESTION: And here it seems to have done so, by use of the word directed. It didn't say requested.

QUESTION: Mr. Parmley, could it be --

QUESTION: Or given an opportunity to.

QUESTION: Could it be that whether he used requested, directed or suggested, what it means is if you won't prepare one I will?

MR. PARMLEY: That's my understanding.

QUESTION: Could not the legislative body frustrate even the most mandatory direction by submitting a plan that was, on its face, unacceptable? And then put the Court in the position of having to do its own plan.

MR. PARMLEY: Yes, Your Honor, but I would say that there would be an incentive not to do that because the Court may adopt the Plaintiffs plan, and I don't think a legislative body would want to have the plaintiff's plan adopted, but --

QUESTION: Here did the Plaintiffs submit a plan?

MR. PARMLEY: Yes, Your Honor, they did. But it was submitted at the trial on the merits, and I might add that that plan did not split election precincts.

QUESTION: Of course, part of the Plaintiff's case was the dilution of the votes of the Mexican-American voters, a claim that was rejected by the District Court.

MR. PARMLEY: Yes sir, that's so.

QUESTION: Correct? And did the Plaintiff's plan meet the Plaintiff's theory in that regard, that it diluted the votes of Mexican-American voters?

MR. PARMLEY: No, but in our opinion, the Plaintiffs plan tried to correct that.

QUESTION: Yes, well that -- and that claim was rejected by the District Court.

MR. PARMLEY: The Court yes, the District Court found there was no dilution in Mexican-American voting strength.

QUESTION: Right. But that there was a violation of the one-person-one-vote principle.

MR. PARMLEY: That is correct.

QUESTION: Maybe I missed something, but what would be the constitutional objection to a District Court ordering the party to a lawsuit who is found to have violated the law, from proposing a remedy? I don't understand why there would be any constitutional objection to such an order.

MR. PARMLEY: Well, I believe they could. I think that's what, in fact, happened in Burns v. Richardson.

I think the Court there ordered them to come up with an interim plan and they in fact did. So I guess the answer to that is yes, they can order them to come up with a legislative plan.

QUESTION: That is, order them at the pain of contempt, or order them and if they don't do so then the Court does its own?

MR. PARMLEY: Well I guess they could put them in contempt, if they don't follow an order, it seems to me that the --

QUESTION: You mean an entire state legislature as in Burns?

QUESTION: Well that's an issue that we don't have directly.

QUESTION: Well what happens to the County in the meantime then? How is it governed if the -- if the prior statute it had was bad or the ordinance it had was bad, and the Court is not satisfied with the plan proposed by the Defendant, it is unwilling to adopt the Plaintiff's plan, doesn't it have to simply impose a plan of its own?

MR. PARMLEY: Yes, I think it would impose, probably an interim plan, and possibly request the Defendants to come back with a satisfactory plan, -- if that's the legislative body --

QUESTION: Well under our cases, it wouldn't

necessarily be reversible error if pending a new plan the old plan stayed in use. Even the unconstitutional one, we've sustained that.

MR. PARMLEY: Yes, that's correct. The District Court could do that, under its power.

In relation to the legislative authority of the Commissioners' Court redistrict, there is an authority that I left out in my brief that I would like to bring to the attention of the Court and that is an opinion from the Texas Attorney General. That opinion is opinion number M606, and the facts of the case are that Bailey County, Texas redistricted their Commissioners' Court precinct lines in January of 1970 and in the process of redistricting their Commissioners' Court precinct lines they split election precincts. Bailey County then sent a letter to the Attorney General and said now that we've split election precincts can we conform those election precincts with the Commissioners' Court precincts? And the Attorney General responded and said yes, I understand your situation, you did split the election precincts, that's fine. But you cannot now conform them; you have to wait until the July or August term of Court. I have a copy of that opinion here today if the Court would like me to leave it.

Additionally in that case the Attorney General cited the various articles of the Texas Election Code

and the Texas Constitution that have been argued back and forth here today. The Attorney General also cited the case of Wilson v. Weller, which the Petitioners depended on for their support, but they did not have legislative authority. I might add that in the case of Wilson v. Weller, that involved a single unitary order of Kleberg County; it involved the same county, where they redistricted Commissioners' Court precincts and election precincts at the same time, in the same order. And the Court in that case found that they could not redistrict election precincts, although they could redistrict Commissioners' Court precincts they could not redistrict election precincts, and they invalidated that part of the order in reference to the redistricting of the election precincts.

QUESTION: Leave the copy of that Attorney General's opinion with the Clerk, will you?

MR. PARMLEY: Yes sir.

MR. CHIEF JUSTICE BURGER: Mr. Wallace.

ORAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ.,
ON BEHALF OF THE U.S. AS AMICUS CURIAE

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

Counsel for the Petitioners has correctly stated that there was a federal presence to which the Commissioners' Court submitted their proposal for reapportionment, but

that was wholly apart from who the federal presence was. The District Court did not purport to apply the standards of Section 5, did not make any inquiry about whether there was a retrogression in the treatment of minority voters within the meaning of this Court's decision in Beer, let alone place the burden of proof on the covered jurisdiction that it would have to sustain under Section 5 in proving that the purpose or effect is not to discriminate.

The question before the Court is really a narrow question of statutory interpretation about the meaning of the words seek to administer. In Section 5, it's a question that the Court has found recurringly troublesome in trying to interrelate Section 5 with reapportionment litigation and there is, as Mr. Justice Rehnquist has suggested, a need for as much clarification as possible now, with all the reapportionments that will be resulting from the 1980 census.

For the interpretation of this language to be consistent with the statutory purpose, it is crucial in our view that two very serious pitfalls be avoided. One is to avoid an interpretation that gives jurisdictions covered by Section 5 a dis-incentive to reapportion themselves. It is settled by this Court's decisions and by the legislative history that Section 5 does apply to reapportionments, and this Court has reiterated time and again that reapportionment is principally and ideally, a legislative function

and that legislative bodies should be given an opportunity to undertake to do the reapportionment on their own. But it's always easy in these situations for a legislature to do nothing and to hold back as was the case of the Commissioners' Court here until 8 years after the 1970 census. And it's not uncommon in covered jurisdictions for us to encounter this kind of holding back even under the 1970 census, particularly if there's hope that thereby a reapportionment will eventually be achieved after someone brings a lawsuit without the necessity to submit the legislature's proposal for Section 5 preclearance.

And if the covered jurisdiction can avoid submitting the proposal that way and still propose it to the reapportionment court, under an entitlement to deference from that Court under this Court's decision in Wise v. Lipscomb, the deference that would be afforded to a legislative proposal. Then the way is open it seems to us, to widespread evasion of this Court's decision in Georgia v. United States; that the protections of Section 5 are going to be available for reapportionments and the congressional purpose that's been strongly stated in the legislative history and the reenactments of Section 5, that reapportionment provides a special danger to minority voting rights and it's important that the protection be afforded.

Now this brings me to the second interrelated

pitfall that it is very important to avoid, and that is creation of a gap or a loophole in the protection afforded by one or the other of two lines of decisions of this Court. One of those lines of decisions holds that efforts by covered jurisdictions to reapportion themselves must be precleared even if those efforts occur in the course of reapportionment or other voting right litigation, that is, Connor v. Waller and related writings in other cases.

And the second line of decisions is that judicially imposed reapportionments need not be precleared, but they are subject to special remedial standards and those standards are protective of minority voting rights in the application, even though they are not identical to Section 5. And our principle submission is that the standards for what is a legislative plan and what is a court-imposed plan should be the same for purposes of both of these lines of decisions. The Court's opinions have assumed that the standard is the same --

QUESTION: Well, the substantive standards are a little different when you come to multi-member districts, and so on.

MR. WALLACE: That's right. The substantive standards are the same, but in defining what is a court-ordered plan and what is a legislative plan, as we've set out on pages 28 and 29 of our brief, opinions of this

Court have assumed that you arrive at the same answer for both purposes and Congress has certainly operated on the assumption that there is not going to be a gap in protection, whereby in a covered jurisdiction the reapportionment can occur without either protection being afforded minority voting rights, and so our proposed solution, the interpretation that we espouse and that Mr. Parmley was espousing is one that we have proposed to the Court before. But happily, it's one that is consistent as we see it with the statutory language and with the legislative history to the extent that that legislative history specifically addresses this question and it does, in the 1975 Senate Report.

And that is that seeks to administer does embrace a proposal by the covered jurisdiction to a reapportionment court, that that court order into effect the reapportionment plan that the covered jurisdiction is in the course of litigation proposing. We don't think that this really should turn on the niceties of state law, about whether there is some limitation in the authority of the covered jurisdiction's body making the proposal to have enacted this change on its own in the absence of the reapportionment litigation. This would raise many uncertainties about the coverage and difficult questions of state law to be resolved in federal court which have

no particular expertise about them, but the result either way would be that the covered jurisdiction would be seeking, through the approval of the reapportionment court to administer a new apportionment, precise --

QUESTION: Well, Mr. Wallace, what if the Commissioners' Court said that Judge, we just aren't able to come up with a plan and we know you -- we disagree with our old one and we're going to appeal, but meanwhile, we can't get together on a plan and don't propose to submit one? And then the Court gets Dr. Nash, or Professor Nash, and -- the Plaintiffs -- and he puts in a plan of his own?

MR. WALLACE: It would act with whatever other assistance we can be made available. The Plaintiffs propose two plans here, and Dr. Nash or or other experts might have been available and a court ordered plan would then have to comply with the special remedial standards that --

QUESTION: But if a --

MR. WALLACE: -- this Court has prescribed for court-ordered plans.

QUESTION: But if a -- or a state party to the lawsuit actually responds, then do you think that any kind of a response is subject to preclearance?

MR. WALLACE: Well, we don't quite say any kind

of a response --

QUESTION: Suppose -- any response that purports to respond to the request, or propose a plan?

MR. WALLACE: That proposes a plan, a proposal of a covered jurisdiction to the reapportionment court that this is what we'd like to put into effect as our new apportionment raises the problem that Congress was applying Section 5 to assure protection.

QUESTION: But you don't think that the responding legislative body has to purport to act legislatively in the sense that it should have a meeting and have a -- open to the public, and go through the procedures for the adopting of an ordinance or of an order or not? Or can he just sit down with his lawyer and say well that's all right, why don't you just go ahead and write this up?

MR. WALLACE: Well all of that may be much more desirable as a matter of state practice and state law for them to do it in an open way and in a way that they would ordinarily reapportion themselves. But there are many changes that a covered jurisdiction seeks to administer without the enactment of legislation, which have to be precleared. There are many election officials who have authority to change election precincts, there are other steps that are taken and changes in the election law which do not require specific legislation; they are

done under a general grant of enabling legislation, and it's not unusual for submissions to be made -- or changes if the covered jurisdiction is seeking to administer that don't amount to legislation. It's only in this one area that a question has been raised by this Court's opinion about whether something that falls short of legislation is something that the covered jurisdiction is not seeking to administer within the meaning of Section 5.

QUESTION: Mr. Wallace, what if you run into the situation where the Commissioners' Court, after the census information is distributed simply sits on its hands and decides it is clear we are malapportioned -- but we like it this way, and let them, someone come after us. Then the plaintiffs come and file a malapportionment suit in the District Court. What are the mechanics of your plan that would proceed?

MR. WALLACE: Well if the jurisdiction does not respond to the District Court's invitation to them, to submit a proposal that the District Court should put into effect on an interim basis hopefully, until there is actual legislation enacted. If the jurisdiction does not respond to that, then the District Court has no choice but to go ahead and remedy the constitutional violation without whatever help it can get from other parties to the litigation --

QUESTION: And that would require no preclearance?

MR. WALLACE: That is correct. We don't see how the language of the statute can be interpreted to say that the covered jurisdiction in that circumstance is seeking to administer a plan, and it's only if the covered jurisdiction in answer seeks to administer a plan that preclearance is required for what the covered jurisdiction is undertaking to do. It's not the Court order that would be precleared. It's supposed to be precleared before the Court considers it, and the regulations --

QUESTION: Well, Mr. Wallace, --

MR. WALLACE: -- of the Attorney General qualify for expedited consideration --

QUESTION: -- even if a Court has to draw up its plan and puts it in its decree, and orders that the next election be held in accordance with this plan, it's the county or the political entity that's going to be conforming to that plan; it's going to be administering the plan but it's going to be administering the court's plan.

MR. WALLACE: That is correct, Mr. Justice.

QUESTION: And that is not subject to preclearance, that kind of administering?

MR. WALLACE: I think if they did subsequently have an enactment --

QUESTION: Well, let's assume that it did not.

MR. WALLACE: -- replicating the court's plan, that enactment would, under Connor v. Waller, have to be submitted.

QUESTION: Yes.

MR. WALLACE: If they felt that they had to do that in order to actually administer the plan, but if they are just doing it under the Court's order, our view has been that that is not subject to preclearance. It seems to me that that's the meaning of Connor v. Johnson, that the Court's--

QUESTION: Would you --

MR. WALLACE: -- order is not to be precleared.

QUESTION: -- Mr. Wallace, would you prefer it were not that way?

MR. WALLACE: Well there was some suggestion in the Senate Committee Report, in 1975, that there would be preclearance even then. And you know, obviously, the full protection of Section 5 might not be available in that situation without preclearance, however there is considerable protection for minority voting interests in the remedial standards that this Court has developed for court ordered plans and it perhaps would not be amiss to say in covered jurisdictions, the court in ordering such a plan into effect also should consider whether there would be a retrogressive effect, such as the Court spoke of in Beer.

QUESTION: Mr. Wallace, may I ask you a question about the burden imposed by Section 5 on the Attorney General? How many applications for clearance were filed last year?

MR. WALLACE: Well, I'm sure the number is very large, Mr. Justice, but I don't have it at my fingertips.

QUESTION: In the Sheffield case, that was here, I think in 1978 -- it was then indicated that they were coming in at about the rate of 1000 a year?

MR. WALLACE: I think that's correct.

QUESTION: And that's four per business day, approximately. And they must be considered and acted on within 60 days. How much time per application at the rate of four per day is the Attorney General able to give to these applications?

MR. WALLACE: Well there is a considerable staff that works on these matters. Many of the applications are very routine changes that are precleared without much problem, and about 99 percent of them are precleared. However, that's not true of apportionments -- reapportionments--

QUESTION: Then many of the applications involve multiple changes?

MR. WALLACE: Some of them do.

QUESTION: And the Act requires the Attorney General to exercise his personal discretion.

MR. WALLACE: He has, for the most part, delegated that authority to the assistant Attorney General for Civil Rights.

QUESTION: At the rate of four a day, and a District Court judge, presumably, spends a good deal more time on questions of this kind than the A. G. could.

MR. WALLACE: He certainly does, Mr. Justice, but -- as I pointed out at the onset, he is not applying the same standards, he's not making the same inquiry at all, even though he's spending more time, nobody has made the inquiry if that's the only inquiry made. The inquiry that Section 5 was designed to have made about whether there's a retrogressive effect on minority voting rights.

QUESTION: Do you have anything further, Mr. Hall? You have one minute left?

MR. HALL: I'll speak quickly, Your Honor.

ORAL REBUTTAL ARGUMENT OF RICHARD A. HALL, ESQ.,
ON BEHALF OF PETITIONERS

MR. HALL: If there were ever a disincentive to reapportionment it seems to me that the scheme proposed by the Respondents would provide that disincentive. Why on earth would a county submit a plan to a district court for approval? Why would it give the District Court any assistance at all? If it knew that if it were lucky enough to submit a good plan, one to be accepted, it was then going

to be sent off to the Attorney General, to the District of Columbia, perhaps, and then come back for a subsequent challenge on constitutionality by anyone who wanted to make it, when the opposite choice would be to submit no plan at all or perhaps submit one that was very artfully deficient, that perhaps even the local federal judge could perceive the shortcoming in, let him make the correction and then it's his plan and you don't have to worry about it. I think this proposal that the United States makes would just compound the problems of our federal courts and our political subdivisions.

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

(Whereupon at 11:03 o'clock a.m. the hearing in the above matter was submitted.)

CERTIFICATE

North American Reporting hereby certifies that the attached pages represent an accurate transcript of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

W. C. McDANIEL, ET AL.

v.

JOSE SANCHEZ, ET AL

No. 80-180

and that these pages constitute the original transcript of the proceedings for the records of the Court.

BY: William J. Wilson