OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-802

TITLE CITY OF LOCKHART, Appellant v. UNITED STATES AND ALFRED CONO

PLACE Washington, D. C.

DATE Wednesday, November 3, 1982

PAGES 1 - 45

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IN THE SUPREME COURT OF THE UNITED STATES

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CITY OF LOCKHART, :

Appellant :

v. : No. 81-802

UNITED STATES AND ALFRED CANO :

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Washington, D.C.

Wednesday, November 3, 1982

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:01 a.m.

APPEARANCES:

WALTER H. MZZELL, ESQ., Austin, Texas; on behalf of Appellant.

JOSE GARZA, ESQ., San Antonio, Texas; on behalf of Appellee.

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C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments first this morning in City of Lockhart against the United States. Mr. Mizell, you may proceed whenever you're ready.

ORAL ARGUMENT OF WALTER H. MIZELL, ESQ.

ON BEHALF OF THE APPELLANT

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

This case involves the proper application of the Section 5 of the Voting Rights Act. It arises out of the circumstances which have developed in the City of Lockhart, Texas. Lockhart's a town of about 750,000 people located in central Texas. For some 50-odd years prior to 1973, it was governed as a general law city in Texas by a commission form of government. It had a mayor, it had two commissioners who were elected at large by numbered places, who were elected for two-year terms every even-numbered year.

QUESTION: Was it a majority vote or plurality?

MR. MIZELL: Plurality. In 1972, the city began to explore the adoption of a home rule charter, and a charter commission was formed to begin inquiry as to whether or not a charter would be desirable for the City of Lockhart. They determined that it was and

began, as charter commissioners elected subsequently, to draft a home rule charter for the city.

The charter commission was made up of 15 people, nine of whom were Anglos, six of whom were minority citizens; of those six, four were Mexican Americans and two were Negro.

The commission worked for several months in drafting the charter. They ultimately adopted unanimously a version of the charter which was submitted to the city commissioners. The commissioners took that charter as proposed and without any change submitted it to the voters of Lockhart. In February of 1973, the charter was approved and went into effect.

The impact that had on the voting system in Lockhart was to enlarge the city's governing body from three to five. Now there were a mayor and four councilmen, they were called. The two additional councilmen were elected by plurality in an off-year election. That is, they were elected in odd-numbered years for places numbered three and four.

Following the 73 adoption of the charter, elections were held in April of 73 for the two new places that were created, and elections were held thereafter until 1978.

In 1975, the Voting Rights Act was made

applicable to the state of Texas and picked up retroactively any changes that would have taken place in the voting system after November of 1972. This retroactively picked up the adoption of the charter and the changes in the voting system thereby. But for reasons that are not clear in the record, the charter changes were never submitted to the Justice Department as required by the Voting Rights Act.

Elections continued until 1978; were scheduled for 1979 when the Mexican American plaintiffs in this case filed an action for injunctive relief seeking to block elections in Lockhart under the charter until the charter received pre-clearance.

It's interesting to know that the injunction issued by the judge in Austin, Texas, the local district judge, was written in such a way that it did not allow elections using numbered places, whether they were under the old system or under the new system. And so there have been no elections in Lockhart until this day because the city was foreclosed -- at least it felt that it was -- by the wording of the order from going back to the prior system. Although it would have been willing to initially.

The city's position in Austin in the district court there and has been all along was that the changes

adopted in 1973 by the charter were probably advantageous for minority voting rights in Lockhart, or at least neutral, but certainly not negative in their impact.

In 1982, this year, as set forth in the supplemental brief we filed a week or so ago, Judge Hepalito Garci, the judge in San Antonio who now has charge of the 1979 proceedings, in response to a motion for interim elections which was filed by the intervenor in this case, reviewed the order that had been entered in 1979 and revised that order. And the language that he revised had to do with the procedure by which elections could be conducted pending pre-clearance.

The language of his order clarifies and allows the city to return to the prior system of electing a mayor and two commissioners every other year until such time as pre-clearance is either granted, or if it's denied I presume that we would stay with the old system.

The impact of that order is that it substantially undercuts both the position of the intervenor in this case with regard to what the standard for measurement should be under the Voting Rights Act, and it also undermines the position of the lower court below which framed its opinion in terms of an assumption or conclusion that the judge in Austin, Texas had

concluded that the prior system, using numbered places for election of the two places that were existing at that time, that those numbered places were invalid under Texas law.

So we have the district court in Washington relying in part upon what it believed to be the finding by the district judge in Austin, Texas. That ruling has now been reversed upon reconsideration by the judge, and we are now free for the first time since this litigation began, free to return to the system which was in effect, in practice, prior to the adoption of the charter.

This means that for purposes of comparison, it's the City of Lockhart's position that the appropriate standard was, and at all times has been, the actual system that was in operation in Lockhart and had been since 1917 or thereabouts, using the numbered places.

Now with that in mind, the question becomes what kind of standard of comparison did the court below used. It's our contention that the court below erred as a matter of law in making the comparison to the wrong standard. The allegation was made that numbered places in a general law city, in Lockhart, Texas, were in contravention of state law, and therefore, were deemed by the district court below to be invalid.

They made the comparison and the expert testimony educed on behalf of the intervenor and on behalf of the Justice Department below were based upon the assumption that the system that had been in operation was illegal under Texas law.

The city first takes the position that that's not supportable under Texas law, and we argued that vigorously in the district court below, but we haven't briefed that for this Court because we really don't think it makes any difference.

The law that this Court has followed at least since Perkins versus Matthews of 1971 is that you don't look at some theoretical system that should be used or might be used or could be used; you focus on the system that was actually in effect, and measure the changes against that system.

The system actually in effect is undisputed in this case; and that is, numbered places for election of the two city commissioners prior to adoption of the charter.

Therefore, in trying to identify the precise nature of the changes which were rightly reviewable by the court below, the city urges that there were really only two changes. The first change was the enlargment of the city's governing body from three to five; that's

mayor plus two commissioners to now mayor plus four city councilmen.

We take the position and strongly urge it, that putting numbered places for the two new councilmen whose positions were just created there, was not a change because Lockhart had been using numbered places for over half a century. So what we really did was we just made the council bigger and continued that system in operation.

The court below was divided, and Chief Judge Spottswood Robinson took a slightly different tact in his dissent with regard to those numbered places for the two new seats. He took the position that although the two new seats were unobjectionable, that putting numbered places on those did constitute a change. And then he went on to make the comparison in the before and after test and determined that it didn't make any difference that there was no negative impact whether you considered the imposition of numbered places to the two new seats. He decided that that did not constitute a negative impact change.

And under Beer versus United States which this Court decided in 1976, without retrogressive effect the addition of the numbered places to the two new seats, he concluded, did not have a negative impact.

The city's position, as I say, is slightly different. We simply think that enlarging the council's governing body, or the city's governing body, by two places meant that the numbered place system was carried forward, and the only thing to be really measured was whether or not enlarging the size of the city's governing body had positive, negative or neutral impact.

QUESTION: Well, you seem to suggest then that this was a change, subject to Section 5.

MR. MIZELL: The enlargment of the council, yes, sir.

QUESTION: You agree with that?

MR. MIZELL: We believe that the enlargment was a Section 5 change, and needed to be considered, reviewed by the Justice Department and pre-cleared.

QUESTION: And was that always your position?

MR. MIZELL: Yes, sir, Justice White, it always has been. We initially filed some pleadings in the district court in Austin which --

QUESTION: Said it wasn't even subject to preclearance.

MR. MIZELL: Said it was not subject to preclearance. Those were rather hastily drafted in response to a --

QUESTION: So you concede that it was a change

that must satisfy the Beer standard.

MR. MIZELL: We certainly do. And the second change, which was brough about by the charter, was the staggered term aspect of it. And again, Chief Judge Robinson below in his dissent recognized that you have to -- if you just take a four or five-member governing body that's being elected all at once every other year and carve it up into three one year and two the next, that's one situation.

But our position is -- and Chief Judge Robinson below noted this -- it depends on how they get there as to whether or not there's any discriminatory impact. If you're creating two new ones and happen to decide to elect them in an odd-numbered year or off-year election, then there's no way that you can determine any discriminatory impact because now you have a totally new election for two new seats that never existed before.

If you move from five elected all at once to two one year and three the next, that could certainly have discriminatory impact, and we don't have any argument with that proposition of law. What we do argue is that under the circumstances by which these two new seats were created, there was no negative impact. And Chief Judge Robinson in the court below agreed with that.

So we think that first, the court below used

an erroneous standard with respect to the numbered places. That is, that they compared it against some fictitious scheme that never had existed before, never will exist so far as Judge Hepalito Garcia's order is concerned because if this Court were to rule against us and we return to the prior system, we do it as a home rule city and now, under the old election system.

Which brings me to another point. The third question that was raised in our brief before this Court dealt with the actual status of the City of Lockhart as a home rule city. There is some language in the opinion by the majority below which casts some doubt as to whether or not they intended to reduce Lockhart to its general law status. The status that it had under Texas law, prior to adoption of the charter.

It's not entirely clear, and I certainly want to be open with the Court on that point, that the decision below is a little bit vague as to what they intended on that, but we wanted to be cautious, so we brought the matter to this Court as the third point in our brief.

In response to that point, the Justice Department has taken the position in its brief that we have over-reacted and that the language there that casts doubt upon the home rule status is simply not worthy of

that conclusion. And it is my understanding from reading the intevenor's brief that they also take the position.

So what you have now, as I understand it, is the Justice Department is not taking the position that we were reduced to general law status; the intervenor is not taking that position and certainly, the city would not want to take that position. So I think the Court could safely conclude then that all the parties before the Court are now taking a position that we are and will continue to be a home rule city, operating as a home rule city with all the powers that are granted to a home rule city under Texas law.

The findings of the court below, as I mentioned a moment ago, we think are based upon an incorrect standard for comparison. The facts below, to the extent that they rest upon factfindings, may be seen to be clearly erroneous under Rule 52 and the standard which governs this Court. Although it doesn't necessarily have to be that way because if they are using the wrong legal standard, then the facts that they find may have very little applicability to what this Court might want to decide.

But to the extent that there was testimony below which has bearing upon the changes that were

brought about by the City of Lockhart, it's the city's position that the changes that were brought about had a retrogressive impact, first based upon an improper legal standard, but secondly, they're not supportable under the record anyway.

The finding that adoption of two new seats using numbered places and using an off-year election has retrogressive impact under the Beer decision is just almost indefensible. And I know that's very strong language, but it doesn't make logical sense in the sense of what you would intuitively expect if you enlarge a city's governing body and the impact that that would have on the electabilit of a minority.

It doesn't make sense with respect to the evidence that was before the court. The only evidence before the court which was based upon a proper standard of review -- that is, compare the system in effect before and the system in effect after and make your decision based upon that -- was the evidence from Dr. Delbert Taebel, an expert in the area, who said, Enlarging a city's governing body, based upon my studies, generally has a positive impact upon the electability of an Hispanic minority. And he has tables and their exhibits in the court below are in the record, which demonstrate that that is so.

Now, he didn't do an incremental study going from two to three or three to four or six to seven; he grouped them in sizes, small councils, medium councils and large councils and he abstracted his conclusion from that. But nevertheless, the conclusion is there.

QUESTION: Mr. Mizell, was his testimony -- is that orally or in affidavit form?

MR. MIZELL: It was presented orally. He was subject to cross examination. His conclusion was that enlarging the charter didn't have just a neutral -- excuse me, elarging the city's governing body was not just neutral in impact; that enlarging it has a positive impact on the minority chances for election.

And even though you do it in the context of numbered places, as the new places, or in the context of a staggered term, that, he says, does not erase the positive impact that that has on the electability of a minority.

The government's expert witness never made the comparison in a proper way. And to the extent that the third expert witness testified -- that would be Dr. Cervantes who was the intervenor's witness -- in response to questions by Judge Pratt below stated that well, at best, it was neutral. It was like reading the same issue or getting two issues of the same newspaper,

he said. Doesn't hurt you but it doesn't help you.

So if you're comparing it under the proper standard, as we have presented it here, there is no evidence from the expert testimony of any adverse impact.

The final thing, and the government points this up in its brief quite clearly, you don't have to worry about political theory or anything like that in determining the impact of the charter system in Lockhart.

All you have to do is look at the record of minority participation in this town and you'll see that since 1970 voter registration -- 70 is the only -- we don't have a figure for 1973 or we'd tie it down a little closer. We have figures from 1970 through 77, I believe it is that show that voter registration has increased tremendously in the minority population in Lockhart. Voter participation has increased tremendously. The number of minority candidates has increased tremendously since the charter was adopted. And finally, in 1978, we actually had a member of the Mexican American community elected to office on the city council and he remains in office today since we haven't had any other elections.

So you have logic which demands, I would submit, demands a finding that adoption of the charter had positive impact. You have the expert testimony

which says it's positive or at worst, neutral. And then you have the actual experience. So it's the city's position that the court below just got off on the wrong track and ended up using the wrong standard of comparison.

QUESTION: Are you going to get to the suggestion that the amendment to Section 2 has an impact on this case?

MR. MIZELL: Well, that certainly has been -- there has been a flurry of activity on that point.

QUESTION: Isn't there -- if the law has been changed in a way that affects this case, don't we have to judge this case based on the current law rather than on some prior law?

MR. MIZELL: I would not contest that point.

QUESTION: I'm not suggesting that the change does have an impact, but the argument is that Section 2 means that even if this was not a regressive change, you must nevertheless -- it must nevertheless pass muster under Section 2.

MR. MIZELL: I understand that to be the argument, and I would make two responses to that. First of all, if you look at the legislative history behind the adoption of Section 2, it's got some 40-odd pages that talk about the purpose of Section 2 being basically

to revise the standard which this Court set out in the City of Mobile versus Boulden. And they go into exhausting detail about the pre-Boulden law and post-Boulden law. They were aiming at that and they clearly demonstrate that.

Now, you do have a footnote, it's a sort of casual aside almost, that says that Section 2 standards ought to be involved in a Section 5 proceeding.

QUESTION: Is that in the statute itself or just in the history?

MR. MIZELL: It's just in the legislative history. You see, they modified Section 2. But Section 5 which had been interpreted in the way that we have described it here earlier, retrogressive effect under Beer since 1976, the Congress was aware of how this Court had been interpreting Section 5 and made no changes.

QUESTION: Was any change made in Section 5?

MR. MIZELL: No changes at all. It remains intact.

QUESTION: Well, say a city makes a change that everybody agrees is a change. They seek preclearance from the district court in the District of Columbia and they get it. Based on Beer, it was not retrogressive. Then I take it that if you say that

Section 2 should not be taken into account in a Section 5 proceeding, then the people who object to the plan can then just sue in the district court in their home county and say there's a violation of Section 2, even despite the preclearance.

MR. MIZELL: Well, Section 5 preclearance was never intended to preclude an attack on the constitutionality of the system.

QUESTION: I agree with you.

MR. MIZELL: And it would not, in any way, preclude an attack --

QUESTION: But isn't that awfully wasteful of litigation to say that the district court in this case would have been -- would be disentitled to recognize the possible illegality of the plan under Section 2?

MR. MIZELL: The purpose of Section 5, as I understand it, was to allow a quick administrative review through the Justice Department, and a hearing if necessary before the District Court of the District of Columbia on a very limited nature.

But the Section 2 findings, or the Section 2 standards are much more exhaustive than the kind of evidence that would be presented. It puts the burden of proof in a different way. Section 5 is on the city and in a Section 2 proceeding it would be on the plaintiff.

And I think it would over-burden Section 5, as was set out in this history --

QUESTION: So if there's got to be Section 2 litigation it ought to go on back in the home country.

MR. MIZELL: Where the witnesses are located, where there's knowledge of the local law if that's necessary, and avoid the expense of dragging a city like Lockhart with 7500 people to Washington, D.C. to fight a Section 2 --

QUESTION: Don't we have to deal with this point here?

MR. MIZELL: The Section 2/Section 5 interrelationship?

QUESTION: Yes.

MR. MIZELL: Well, I have one more point on that, Mr. Justice White, which I'd like to suggest. In Beer, there's a footnote in 96 Supreme Court, 1364 and some language in there that deals with the constitutional inquiry under Section 5. And when I first read the Section 2 suggestion it worried me a lot, but basically, Section 2 as I understand it was to reinstate the constitutional standards which the Congress believed existed prior to both.

If you plug that understanding back into Section 2 and put that into Section 5, what you end up

with is the same kind of inquiry that could have been made had they wanted to, but they didn't make it, in this case, in the district court below. As Judge Robinson says -- and this is in the very ending of his dissenting opinion -- he says nobody anywhere in this litigation has contended that the situation in Lockhart achieves constitutional dimensions or unconstitutional dimensions. Or something to that effect.

And it would seem to me that if Section 2 was intended to reinstate the pre-Goulden law which was presumably followed in --

QUESTION: All you're saying is that even if Section 2 was relevant here, it's been satisfied.

MR. MIZELL: It was not raised at the proper time because it should have been raised under --

QUESTION: Well, it couldn't have been raised because the amendments hadn't been passed yet.

MR. MIZELL: But the underlying of Section 2 could have been.

QUESTION: You mean in a constitutional --

MR. MIZELL: In the constitutional context. And there was authority for that in the Beer decision and it was not done because simply that's --

QUESTION: Yes, but Section 2 -- the amendment to Section 2 couldn't have changed the constitutional

standard. What it did is substitute a statutory standard in Section 2 for what was previously a constitutional standard.

MR. MIZELL: That's correct.

QUESTION: So there really wasn't a chance before the amendment was made to argue this point, I wouldn't think. Because let's assume there's no constitutional violation; everybody agrees. It's nevertheless possible that there is a statutory violation and that somebody has to decide it sometime. I'm not saying there is either, but it's certainly possible.

MR. MIZELL: I can only say that it is my understanding from reviewing Section 2's history from the House and Senate records that what they were trying to do was restate the same standards that had previously existed under the constitutional guidelines laid down in White versus Register and the other at-large, single-member district litigation.

In other words, reaffirm the Zimmer criteria.

QUESTION: I understand that argument. What is your view of what would be open on remand if we agree with everything you've said up to the Second 2 discussion? What should we tell the district court to do?

MR. MIZELL: I believe that you should tell the district court to resume the hearing on the issue of intent. They bifurcated the trial and did not reach that, the same as they did in the Beer case, and --

QUESTION: Wouldn't it be appropriate also to ask them to consider the question whether Section 2 is now relevant without us necessarily deciding it?

MR. MIZELL: It would be the city's position that if there were violations of the sort that would have raised the constitutional issue below, they should have been raised then, and it shouldn't be raised now, going back down. Because it's the same inquiry that could have been and was not raised.

QUESTION: But one could make the argument that numbered posts or staggered terms have an effect or result that's specifically intended to be prohibited by Section 2. Again, I'm not saying that's right. But are you saying that we should decide whether or not that's true, or we should tell the district court to decide it? What should be done with that --

MR. MIZELL: With the Section 2/Section 5?

QUESTION: Yes.

MR. MIZELL: I think you should tell the district court that first, they made a mistake in the standard that they applied as far --

QUESTION: I understand that. Yes.

MR. MIZELL: Second, that they don't need to consider Section 2 because the same issues could have been raised the first time through in the context of an allegation of unconstitutionality. It wasn't raised, by the way, in Beer, and our case is very similar to theirs in that respect. So all they need to do then is proceed to hear evidence on that test. I'd like to reserve the rest of my time for rebuttal.

CHIEF JUSTICE BURGER: Mr. Garza?

ORAL ARGUMENT OF JOSE GARZA, ESQ.

ON BEHALF OF THE APPELLEE

MR. GARZA: Mr. Chief Justice, and if it please the Court:

I'd like to address a few of the things that counsel for the appellants has raised in regard to the litigation in Texas. It is our position, in terms of the orders that were issued in Texas, that the court there never prohibited the city from reverting to the prior existing election system. It parrotted the letter of objection from the Department of Justice and it prohibited elections pursuant to an election system within the charter.

Additionally, the district court below never ruled on the illegality or the legality of using

numbered posts in the prior existing election system. And in fact, the district court in this case below did not base its finding of the legality or its finding on that issue on any ruling out of the Texas court. That's simply not the case.

Additionally, some of the facts that I think this Court ought to consider that were established in the court below in determining the backdrop upon which the lower court reviewed the election change are several points.

First of all, the record below shows that the community in Lockhart is a divided community; substantial segregated housing patterns exist and were brought up during the trial. There is a high degree of racially polarized voting in the election system in Lockhart. And race becomes an issue in election systems.

And I agree with counsel for the appellants that one need not theorize about the impact of this election structure. There are six elections that were conducted using the post-charter election system upon which one can measure the impact of that election structure on the Mexican American community and the minority community in Lockhart.

In those six elections, seven Mexican Americans have run for office; only one has won. An

election rate of approximately 14 percent. On the other hand, there have been 35 Anglo candidates, and 15 have been successful for an election rate of 43 percent.

What's significant in this situation is that you would expect a drop-off in success rate for Anglos because they opposed each other in some elections. There were no Mexican Americans that opposed each other.

Significant also in that situation is that Anglo candidates, in fact, ran unopposed during that tenure. No Mexican American ran unopposed during that tenure.

Another point I think that's important in determining what are the issues before this Court, I think it is an issue whether there was an election change. The appellant suggests that the only election change was the enhancement of the council; the increase in council size. Our position is that the election change that subjects the review of the election plan for Lockhart is a change in government.

The record below is significant on this point in terms of the difference between the two structures. The general law city and the home rule city. There's a significant difference. Dr. Cottrell in his testimony talked --

QUESTION: Mr. Garza, it's your position then

that even had there been no increase in the number of positions or any change to staggered terms, that the mere adoption of home rule charter would trigger a Section 5 review. Is that right?

MR. GARZA: That's correct, Justice O'Connor.

QUESTION: Mr. Garza, it would help me to know whether the bottom line really of your position is you'd like to return to the old form of government in this town. Would you like to go back to the 1917 charter?

MR. GARZA: I think what our position is that the system that was adopted within the charter is discriminatory. There is a constitutional challenge that was filed in Texas to the at-large election system. What we would want is single-member districts.

But I think in terms of what we have before us now, the election system adopted by the City of Lockhart is discriminatory and should not be allowed to go on. I think --

QUESTION: Does that mean you'd go back to the election system that existed from 1917?

MR. GARZA: I think what you would go back to is, in terms of your election structure, what you had under a general law city; that is, an at-large plurality, no place system. There is significant --

QUESTION: Well, my understanding is that this

particular city, although it was a general law city, had a mayor elected at large and two commissioners elected from numbered posts by a plurality vote. And is that what you want to go back to?

MR. GARZA: No, Your Honor.

QUESTION: Do you want to write a new charter?

MR. GARZA: No. There was no charter for the city prior to its adoption; it was a general law city. There was no authorization --

QUESTION: I beg your pardon. I understand that. You have a charter now and that's what you're attacking. But I'm trying to get clear in my own mind what you want to go back to, or do you want to write a new form of government because of constitutional defects in the old 1917 organization.

MR. GARZA: The city would have to revert back to a legal system. The legal system would be one without the numbered --

QUESTION: You're saying it's been illegal since 1917.

MR. GARZA: That's correct.

QUESTION: And that's because of the constitution, not because of the Voting Rights Act.

MR. GARZA: It's because of Texas law. It does not authorize -- a general law city is only

authorized to implement those features that are specifically authorized by Texas law. No Texas law authorizes use of numbered post provisions.

I think the record is significant on that point. Not only do we have the Texas statute or the absence in the Texas statute of that authorization; we have testimony by Dr. Cottrell that he's done a survey of cities in Texas --

QUESTION: You're saying the invalidity is a matter of Texas law, primarily.

MR. GARZA: Yes.

QUESTION: Mr. Garza, does your opponent agree with you on that issue of Texas law?

MR. GARZA: They have stated that they don't, but they have not presented any substantial contrary position --

QUESTION: Well, what division did the district judge put in, lately?

MR. GARZA: The only mention of an election system in the district judge's order is that they should go to the pre-existing election system.

QUESTION: Which is a numbered post system.

MR. GARZA: Which is the election system under a general law city.

QUESTION: I can't imagine the judge thought

that that prior system should be put back in if it was unauthorized by Texas law.

MR. GARZA: The judge never made a ruling. And in fact, we --

QUESTION: I know, but must we assume --

MR. GARZA: We made a specific request the judge have a hearing and make a ruling on that specific issue, and the judge decided, without giving reason, that he was not going to take any --

QUESTION: But he nevertheless restored the old system, at least temporarily.

MR. GARZA: He restored the old system.

QUESTION: And you think that he nevertheless, that he didn't believe that it was valid under Texas law?

MR. GARZA: I don't think that he felt that. That's correct, Your Honor.

QUESTION: Do you think he just overlooked it?

MR. GARZA: No. I think that he felt that it wasn't proper for him to decide that issue; that it was an issue for the state courts. But that's my assumption because there's nothing in the order --

QUESTION: Wasn't it his obligation to apply Texas law?

MR. GARZA: I think his only obligation was to enjoin the use of an unpre-cleared election system. And

that's what the initial order called for, and that's what the subsequent order called for.

I think a significant point on this, in terms of the election change that occurred, is that no longer can -- if this election structure is precleared -- no longer will the minority community in Lockhart have the option of challenging the numbered-post provision as a violation of state law. I think that's an election change as well, that the district court relied on in its ruling. No longer will the minority community have the option of going to state court and having removed the election system with numbered posts if the city chooses to do that.

Now, I think what's interesting here, too, is that the City of Lockhart has, in fact, passed a resolution calling for elections in April, without mention as to whether it will use numbered posts. And in fact, has requested of its city attorney that it issue a legal opinion as to whether the numbered post can be legally implemented in the April 1983 election system.

The evidence before the court on that issue not only involved, as I said, the review of Texas law, but also involved the testimony of Riley Fletcher, who is the general counsel of the Municipal League in Texas.

QUESTION: Do you think Congress really intended, in referring these matters involving states far away from the District of Columbia to have the District Court for the District of Columbia, whose judges presumably have no expertise in the law of Texas, to pass on questions of state law as well as questions of federal arising under the Voting Rights Act?

MR. GARZA: I think that the District Court in Washington, D.C. has a duty to examine what the discriminatory impact of an election change is. And in doing that, must analyze that system against what is authorized under Texas law.

The district court in Texas does not have the power under Section 5 to analyze the impact of an election system. It simply must adhere to the findings of the district court in Washington.

QUESTION: Why shouldn't the District of Columbia Court, inexperienced as I presume they might admit they were on Texas law, simply apply the usual presumption that goes with official acts; that they're presumed valid unless shown to be otherwise.

MR. GARZA: I think what's significant in that, Justice Rehnquist, is just having the challenge, just having the possibility that that system is illegal and no question at all but that it is legal under the

charter, I think that signifies a change that the district court talked about -- no longer, after the adoption of the charter, will the minority community in Lockhart have the opportunity to challenge a feature that everybody admits has the potential for discriminating against the Mexican Americans.

QUESTION: Well, he could have done it somewhat differently. We had a case here last year, I believe, from Mississippi involving a challenge to a system in a Mississippi city or county, where first the people obtained a decision from the state court saying that it was invalid under state law, and then they were still, of course, required to get a pre-clearance from the Justice Department because they were going to put in a new system.

But at least I think they saw the wisdom of litigating state issues in the state courts, and then litigating the voting rights issues.

MR. GARZA: I think we have -- since the filing of the 1979 action, through today, there has not been the opportunity to go back to Texas and the state courts and challenge that. First of all, because no elections have been called that would use the numbered post provision. Number two, the city, in its resolution passed this summer calling for elections for April, does

not specifically say whether it's going to use the numbered posts or not.

Since the filing of the action there has been no opportunity, therefore, for the minority community to, in fact, challenge that provision in state court.

QUESTION: Don't you have declaratory judgment down there?

MR. GARZA: Advisory opinions are not proper under Texas law.

QUESTION: I said declaratory judgment.

MR. GARZA: Yes, declaratory judgment.

QUESTION: That's not an advisory opinion, sir.

MR. GARZA: Right. There have not been any elections, there have not been any elections called under that system. The declaratory judgment would go to a determination if, in fact, they were going to use that system. There is no indication at this point that they will use that system.

QUESTION: You never heard of declaratory judgment to determine whether a future act is good or not? You've never heard of that, have you?

MR. GARZA: Yes, Your Honor. In the situation where it's clear that that future act will be taken. There is no indication in Texas that that's what's going to proceed.

QUESTION: There is no certainty that you will have elections in this town in the future?

MR. GARZA: There is no certainty that they will use the numbered post provision in those elections.

QUESTION: There is a certainty that there will be elections; is that true?

MR. GARZA: They have -- yes, Your Honor.

QUESTION: Mr. Garza, though, did not the recent order by the district court in Texas indicate that they were free to use the old system, which would include numbered posts?

MR. GARZA: They were -- the restraining order did not prohibit them from using it. That's right. The restraining order only spoke to the election system under the charter. That's -- the district court in Texas I assume felt that their jurisdiction only went to that. That their authority only went to prohibiting the unpre-cleared election change.

QUESTION: And then if they should do in the future what they last did in the past, they would be using numbered posts, I would assume.

MR. GARZA: But we would have -- if there is no pre-clearance of the charter, we would have the opportunity to go into Texas state courts, and I think rather quickly --

QUESTION: I see.

MR. GARZA: -- preclude the use of the numbered post provision. We do not have that opportunity at this point, and we will not for sure if the charter is pre-cleared.

QUESTION: Mr. Garza, certainly there is language in the Perkins case that would indicate that what the court should look at in the Section 5 review is the system actually being employed, rather than something that perhaps was mandated by state law that's different. Isn't that true?

MR. GARZA: Yes. I think in analyzing Perkins we must look at the underlying, underpinning purpose of the ruling in Perkins. In fact, Perkins said that in a situation where they're trying to make a system comply with the law in New Orleans, in Louisiana, that they had to get pre-clearance. That's what we're saying in Texas.

In addition, the Perkins court specifically said that they were not going to allow political jurisdiction subject to Section 5 to profit by its prior illegal activity. A ruling based on Perkin in this situation that we cannot challenge the legality or cannot base the election change from illegal to legal in this situation would have just the opposite impact, that the Perkins court sought to avoid.

An additional point I think that needs to be made in terms of the retrogressive impact of the election change in Lockhart is the use of staggered terms for the first time. The testimony and the record reveals that staggered terms result in lowering the voter turnout generally. And testimony also reveals that when there is lower voter turnout, it impacts disproportionately upon the minority community.

That, in fact, is the record in Lockhart. In the election where turnout was the lowest, it was significantly lower among the Mexican American population. And that was an additional reason for the ruling of the district court.

Finally, I think the final point in this situation is that Section 2, even if there is no retrogression, Section 2 would preclude a pre-clearance. The Senate Report in the footnote that was referred to earlier I think is quite clear that if there is on retrogression, the election system can still be measured under the results test that was developed for the amendment of Section 2. The Beer case talks about the going beyond retrogression standard and insuring that an election system is not unconstitutional.

At that time, Section 2 incorporated the constitutional standard. Now it incorporates the

results test. And I think it would be -- the debate on the House floor referred to the impact of the amendment on Section 2 and the footnote. And Congressman Edwards, in reply to a question, in fact, said that an election change under Section 5 should meet not only the retrogression standard but also, the results standard under Section --

QUESTION: Mr. Garza, is that really a very satisfactory way of interpreting legislation? You have a Section 5 which has, in the past, been addressed to the kind of situations involved in this case. Section 2, which has traditionally been addressed to the Bolden case. Section 2 has amended -- the primary purpose apparently being to change the result in Bolden. Section 5 is left absolutely alone, and to say that a footnote in the legislative history means that Section 5 was intended to be changed while Section 2, when the language of Section 5 wasn't changed, strikes me as something that probably escaped an awful lot of the members of Congress who thought they were voting on the bill.

MR. GARZA: Well, I think it's consistent with the purpose of Section 5. One of the purposes of Section 5 was to avoid lengthy litigation based on the constitutional standard, or the Section 2 standard, by

having this kind of review and assuring that an election change does not have the discriminatory impact. I think it would be consistent with that goal to interpret Section 2 and the amendments to Section 2 --

QUESTION: Your suggestion is that both the attorney general, if things are presented to him, and the court must consider Section 2 in pre-clearance.

MR. GARZA: Yes.

QUESTION: And I take it that if the system is to go ahead, it's going to have to pass muster under both Section 5 and Section 2.

MR. GARZA: I think that it must be shown to the satisfaction to the district court that there is no retrogression and that also, there is no discriminatory result.

QUESTION: So I take it, then, that if you approach the Section 5 issue first, if you pre-clear it, you're nevertheless going to have to go to Section 2. So what should you start with in a pre-clearance proceeding; Section 2 or Section 5?

MR. GARZA: I think the starting point is the retrogression standard. But the court must determine that, in fact, the election change does not have a discriminatory result.

QUESTION: But which should you start with? I

think it makes some difference; if Section 2 is really the issue at the threshold, that issue certainly should be decided by the district court first, before we do.

MR. GARZA: I think the record in this case supports a Section 2 violation in terms of just the numbers showing that the system is not equally open to members of the minority community, and that election history has been --

QUESTION: Yes, but shouldn't that argument be made in the district court and not here, in the first instance?

MR. GARZA: I think that would be proper.

QUESTION: If that's so, that would suggest if you're right not an affirmance here but a remand, wouldn't it?

MR. GARZA: I think the Court must find that there has been no retrogression and the court below was clearly erroneous in its conclusion. If that is, in fact, the case I think it would be proper for remand not only on the intent question but also on the Section 2 question.

In summary, I'd like to point out a few things. Section 5, from its inception, as was stated in Georgia versus the United States, is concerned with the real impact of an election change; not merely an

inventory of features of an election system. And the history in Lockhart of the post-charter election system clearly demonstrates a discriminatory impact from that election system. Seven Mexican American candidates, six losers, marred by racial block voting, marred by racial techniques during the campaign.

The minority community post-charter was being sent a very clear message, and that message is that you can't come into the political process. If the promise of the Voting Rights Act is to be fulfilled, the election system that is implement in Lockhart cannot receive pre-clearance. Thank you.

CHIEF JUSTICE BURGER: Do you have anything further, Mr. Mizell?

ORAL ARGUMENT OF WALTER H. MIZELL, ESQ.

ON BEHALF OF THE APPELLANT -- Rebuttal

MR. MIZELL: Yes, Mr. Chief Justice, I'd like to just make a point or two in response to the questions that were raised a moment ago.

Regarding Judge Garcia's ruling and the prior situation that Lockhart was in regarding elections, the appendix to the Jurisdictional Statement contains the key finding by the district court in Texas below where it says among the major -- this is page 6A, "Among the major changes required by adoption of the charter was,

among other things, adoption of the numbered-place system." This was the order that was entered in 1979.

QUESTION: What page are you on there?

MR. MIZELL: The appendix to the Jurisdictional Statement, it's the -- it's not the record itself. It's the initial -- page 6A.

QUESTION: And what's the point?

MR. MIZELL: The point is that in the Supplemental Brief we filed on page S4, finding number 11 is the corresponding paragraph in the order. And you may compare the paragraph on page 6A at the bottom of the first full paragraph, to that order and see the change. The district court considered all the arguments that were raised by both sides regarding the impact of its prior order, and decided that the order initially had listed numbered places as a change which should not be used in subsequent elections.

In his order in 1982, Judge Garcia says enlarging the city council and adopting staggered terms are the changes. Just as we've argued here before you today. And that allows us to continue with the system precisely as we did before prior to adoption of the charter.

QUESTION: Well, the order on page S8 expressly says that you're allowed to conduct elections

pursuant to the pre-existing electoral system.

MR. MIZELL: Your Honor, my point is that when counsel was standing here a moment ago, he suggested that there was nothing that would preclude us from doing it i the first place. But the prior order, the language of the prior order on page 6A of the appendix to the Jurisdictional Statement, together with the other language which says you cannot conduct elections pursuant to the charter, meant that the city could not use numbered places, its old system, nor could it use its new system. And it sat there in limbo until the clarification --

QUESTION: Well, there's no question that the pre-existing electoral system used numbered places.

MR. MIZELL: That's correct.

QUESTION: And he expressly permits it.

MR. MIZELL: He does in the 1982 order.

QUESTION: Yes.

MR. MIZELL: But in 71 --

QUESTION: I know, but my interest is whether he -- whether we must assume that he considered the legality of it under Texas law.

MR. MIZELL: I can only go outside the record to answer that, but it was fully briefed as vigorously as either side knew how, on all issues.

QUESTION: Does that mean, Mr. Mizell, that you take the position that as a matter of Texas law, a general law city could use numbered posts?

MR. MIZELL: We take that position initially, yes. We take the secondary position -- and I think it's more important -- that it doesn't matter whether they could or not.

QUESTION: I understand that position. But you think that your opponent is wrong on Texas law.

MR. MIZELL: Certainly do. But we didn't feel like this was the appropriate --

QUESTION: You think Judge Garza -- what was his name?

MR. MIZELL: Judge Garcia.

QUESTION: That Judge Garcia must have thought the numbered post system in a general law city was all right?

MR. MIZELL: I don't know whether he decided that or whether he looked at the Voting Rights Act and decided that whatever system was previously in place could be carried forward. But I can tell the Court that both of those issues were presented to him.

QUESTION: Is it clear whether he thought that there was no coverage for purposes of Section 5 review as a result of that, or that he looked at it and found

no retrogressive effect; that there was a coverage issue but it wasn't retrogressive?

MR. MIZELL: I don't think he was making a determination about retrogression at all on that point.

QUESTION: It's just an interim plan.

MR. MIZELL: I think it was just an interim plan. He was making a decision as to how we could go forward, and he decided the old practice was appropriate.

Thank you. My time has expired.

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

(Whereupon, at 10:55 a.m., the oral argument in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:

City of Lockhart, Appellant, V. United States and Alfred Cano

~~No.~~ 81-802

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BY Pirie Hammond

(REPORTER)