ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-282

TITLE THOMAS C. McCAIN AND WILLIAM SPENCER, ETC., Appellants v. CHARLES E. LYBRAND, ET AL

PLACE Washington, D. C.

DATE October 31, 1983

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IN THE SUPREME COURT OF THE UNITED STATES

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THOMAS C. McCAIN AND WILLIAM SPENCER, ETC.,

Appellants

v. No. 82-282

CHARLES E. LYBRAND, ET AL

- x

Washington, D.C.

October 31, 1983

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 2:02 p.m.

APPEARANCES:

LAUGHLIN McDONALD, ESQ., Atlanta, Georgia; on behalf of the Appellants.

MS. BARBARA E. ETKIND, ESQ., Office of the Solicitor General, Department of Justice, Washington, D.C.; as Amicus Curiae.

MS. KAREN LeCRAFT HENDERSON, ESQ., Columbia, South Carolina; on behalf of the Appellees.

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. McDonald, I think you may proceed when you are ready.

ORAL ARGUMENT OF LAUGHLIN McDONALD, ESQ.

ON BEHALF OF THE APPELLANTS

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

In 1964, Edgefield County, South Carolina, one of the jurisdictions covered by Section 5 of the Voting Rights Act, had an appointed system of local government consisting of two commissioners who were appointed by the governor from the recommendation of the local legislative delegation, and an elected county supervisor.

The critical date in this litigation is 1966. In that year the appointed commission form of government was abolished and was replaced by a three-member county council elected for the first time at large from residency districts. Although the 1966 legislation was a voting change subject to preclearance, it was never submitted to the Attorney General nor was it ever the subject of declaratory judgment proceedings in the D.C. courts.

QUESTION: Mr. McDonald, what was the nature of the 1966 change that you are describing?

MR. MC DONALD: The 1966 change instituted a three-member elected, at-large county council with additional home rule powers. The prior local governing body had been an appointed commission form of government, two commissioners appointed by the governor and then the third member of the commission was a county supervisor.

That voting change in 1966 was never submitted to the Attorney General and as a consequence at-large elections have been used illegally in Edgefield County and havenot been evaluated by any person, neither the Attorney General nor the D.C. courts, to determine whether or not they are racially discriminatory and their undeniable consequence has been to exclude blacks totally from membership on the county governing body throughout the use of those unlawful, unprecleared, at-large elections.

Now, despite the failure, admitted failure, of the county to submit to the 1966 Act, the lower court found that preclearance was unnecessary because the Attorney General had, so the court found, in fact, precleared the 1966 Act when he precleared a change in 1971 involving

an increase in the size of the council from three to five members and the lower court held alternatively that preclearance of the 1971 increase in size as a matter of law precleared the adoption of at-large voting in 1966.

The Appellants in this case, who are black residents of Edgefield County, submit that the local -- the lower court erred on both counts.

First of all, the Attorney General has made it absolutely clear, both in correspondence with state and local officials and also in briefs filed in this case by the Solicitor General, that he was never asked in the 1971 submission involving the increase in size of the council to evaluate or preclear the 1966 adoption of at-large voting.

The Attorney General has also made it clear that he did not, in fact, evaluate or consider the 1966 change to determine whether or not it had a discriminatory purpose or effect. He never treated the 1971 change as one involving the adoption in 1966, of a change from an appointed to an elected at-large local government, and that the 1971 submission was not a submission of the 1966 Act.

The lower court's finding that the Attorney General "must have considered" the 1966 change is wholly contradicted by the record and by the representations of the Attorney General. He simply did not evaluate the change made in 1966 and he has not done so to this day and neither has the D.C. courts.

QUESTION: Mr. McDonald, what if the strictly factual question of did the Attorney General, in fact, evaluate the 1966 change was to be answered the way you said it should, no, he did not. But, nonetheless, it was perfectly clear that it had been totally, adequately called to his attention, all of the significant data were before him at the time he was looking at the 1971 change. Do you think the simple fact that he did not actually get into the 1966 change was prevented from becoming cleared as a result of the '71 submission?

MR. MC DONALD: I think if a belated submission had been made and if the jurisdiction had fully complied with the submission requirements that the Court has set out in Allen and the United States versus Board of Commissioners of Sheffield, and if the jurisdiction had made a specific, though late, request that the change could have been cleared. But, that was manifestly not done here, because there was no request from the jurisdiction

in 1971 that the Attorney General precleared the 1966 change. The only request -- I think the record is unambiguous on this point -- The only request made of the Attorney General was to preclear and increase in size of the council, to preclear the 1971 change and --

QUESTION: Well, supposing that the 1971 change, just as you said, and I don't doubt it is, but it makes some reference to what happened in 1966. When the Attorney General see that, he says, now, wait a minute, it looks to me like something has happened in 1966 that didn't -- hasn't been called to our attention. Submit to me as a supplement to your 1971 request for clearance all the data that I will need on the '66 change.

MR. MC DONALD: Well, there was nothing ever submitted to --

QUESTION: But, supposing that had happened.

MR. MC DONALD: Well, if it had been submitted and if it had been considered, then it could have been precleared, but it was not submitted. There was never anything ever submitted to the Attorney General which would indicate what the practice was in 1964. There is simply no possible way the Attorney General could have known other than that he was pressured or was able to devine from things that were not before him.

The lower court concluded that the 1971

preclearance work is a matter of law to preclear the 1966 Act, but with all respect, that could not have been --

QUESTION: It was also concluded as a matter of fact, didn't it?

MR. MC DONALD: Which I believe to be patently erroneous on this record.

But, this Court has made it clear that in order to make a submission the jurisdiction has got to do -- It has to do at least two things. I has to make a submission. And, when Allen talks about making a submission and Sheffield talks about making a submission, I take it to mean that the jurisdiction has got to submit sufficient information to allow the Attorney General to make the kind of comparison which Congress had said he or she must make under Section 5 of the Voting Rights Act.

Now, that was manifestly not done here, because there was never submitted through the Attorney General any evidence as to what the practice in Edgefield County was in 1964.

Secondly, not only does the jurisdiction have to make a submission of evidence, but it also has to make a request that a particular change be precleared. That, again, was not done here. There is absolutely

nothing in the record to indicate that the submitting jurisdiction ever requested that the 1966 adoption of at-large elections be precleared.

The Voting Rights Act itself doesn't prescribe any formal procedures, as you know, for the submission of voting changes, but this Court has been very consistent and quite explicit in Allen and Sheffield and in City of Rome in requiring jurisdictions to make a sufficient request and, secondly, to make a request that a specific change be precleared.

It seems to me that the critical fact in this case is that neither the Attorney General nor the D.C. courts have ever done, with respect to the 1966 adoption of at-large elections in Edgefield County, what the Congress said and what this Court has said must be done and that is they must be evaluated to determine whether or not they have a discriminatory purpose or effect.

It has been suggested it is in some sense unfair to the jurisdiction to require it to do so. I think nothing could be further off the mark. If the change is one that is not discriminatory, then the jurisdiction, if it submits the '66 change, will have it precleared and that will be the end of the Section 5 issue. They will be out, if you will, a postage stamp and some time of the county attorney.

If, however, the change is one that is discriminatory, and I would submit that one cannot read the opinion of the single-judge court, the 1980 opinion deciding the dilution claim in this case, and conclude anything other than that the at-large system has the most aggrevated and racially discriminatory impact in Edgefield County.

If, indeed, the change is one that is discriminatory, I think no one could defend the 17-year non-compliance and non-submission by the local jurisdiction.

The Attorney General in this case did everything, we submit, that he was requested to do by the local jurisdiction. He was requested to preclear a change involving an increase in the size of the council. He did preciselsy that. He did exactly what the Congress envisioned that he would do.

If there is any failure to comply with the law, it most clearly is the failure of the local jurisdiction to comply with the submission requirements of Section 5 and submit the 1966 Act.

Appellants respectfully ask this Court to do no more than to enforce the provisions of Section 5 of the Voting Rights Act and to require Edgefield County to submit promptly the 1964 change to at-large elections so that someone, the Attorney General or the D.C. courts

will have an opportunity to evaluate those changes to determine whether or not they have a racially discriminatory purpose or effect.

CHIEF JUSTICE BURGER: Ms. Etkind?

ORAL ARGUMENT OF BARBARA E. ETKIND, ESQ.

AS AMICUS CURIAE

MS. ETKIND: Thank you, Mr. Chief Justice, and may it please the Court:

It seems to us that a theme underlying both the decision below and Appellees' argument is that the Attorney General should have known that the change to at-large elections was involved in South Carolina's 1971 submission, because that notion presents great potential for eroding Section 5 rights. I would like to address it first.

In the Voting Rights Act of 1965, Congress was concerned not only with eliminating existing forms of voting discrimination, but also with preventing any form of discrimination local jurisdiction might devise in the future.

The method Congress choose to protect against new forms of discriminations was to require each covered jurisdiction, before implementing any voting change, to submit it for scrutiny by an independent body. Congress selected the District Court for the District of Columbia

and the Attorney General to conduct this independent scrutiny.

This right of minority voters to be free from voting changes that have not been found to be non-discriminatory can only be ensured if the reviewing bodies' attention is, in fact, brought to bear on the precise change in question.

When preclearance is sought in the District Court, that focus is assured by the requirement that the jurisdiction file a complaint specifying the changes it wishes to have precleared.

Similarly, this Court has held that when a jurisdiction seeks preclearance by the Attorney General, the statute requires the jurisdiction to state unambiguously the changes it seeks to have approved.

When a jurisdiction fails to carry that burden, preclearance cannot be based on a determination that the Attorney General should have known that the change required preclearance.

Such a result defeats the right afforded by Section 5 which is the right to actual scrutiny of voting changes before they are limited.

Such a result also inures who the intended beneficiaries of the Voting Rights Act are. Section 5 was not intended to benefit the Attorney General or the local

jurisdiction, but rather minority voters are the intended beneficiaries of Section 5.

Accordingly, this is not a contest between Edgefield County and the Attorney General in which the county's failure to make an unambiguous submission can be excused by some purported contributory negligence of the Attorney General.

For reasons I shall state, we dispute that the Attorney General was negligent in his preclearance of the 1971 submission. But, in any event, his role under the statute is not an adversarial one, but more of a judicial one. Hence, in the absence of statutory compliance by the jurisdiction, any alleged fault by the Attorney General cannot be attributed to the intended beneficiaries of the Act so as to defeat their rights.

The requirement that a jurisdiction state unambiguously the changes it wishes to have precleared is entirely consistent with the Section 5 scheme. That provision requires the voluntary submission of voting changes by covered jurisdictions and places on them the burden of proving absence of discriminatory purpose or effect.

This Court has recognized that the Attorney General simply does not have the resources to police all the states and subdivisions covered by the Act.

He receives thousands of Section 5 submissions each year and the statute affords him only 60 days in which to act on them.

Moreover, as this Court has also emphasized, the Attorney General cannot be charged with knowledge of all the nuances of local law. By contrast, the submitting jurisdiction knows exactly which changes it wants to clear and it is not too much to expect that it state those changes clearly so the Attorney General will be sure to focus on them and, thus, bring to bear the scrutiny that minority voters are entitled to under the Act.

Here, it cannot be seriously claimed that Appellees or South Carolina ever made an unambiguous request for preclearance of the change to at-large election.

The court below found as a fact that South Carolina did not submit the change before it was implemented in 1966 and it is strange credulity to suggest that the 1971 submission was an unambiguous request for approval of the prior change.

The only changes brought about by the '71 legislation, as Mr. McDonald said, which would redistrict Edgefield County into five rather than three districts and to increase the number of council members from three to five.

The Act was so entitled and South Carolina

never indicated there were any other voting changes subject to the preclearance requirement, much less requested preclearance of them.

The court below relied on the fact that the 1971 legislation contained a provision for at-large elections but the Attorney General knew from the face of the '66 statute that the at-large provision was not new in '71.

Appellees contend that the Attorney General also should have known from the face of the 1966 statute that the at-large provision was first enacted in that year and, thus, was a change requiring preclearance. But, the Attorney General did not know from the 1966 statute that its provision for at-large elections was not a mere codification of prior law as was the identical 1971 provision and, in any event, what the Attorney General perhaps should have known or should have inquired into is irrelevant. The right guaranteed minority voters under Section 5 is actual scrutiny of voting changes before they are put into effect.

Of course, if the Attorney General, in fact, had considered a particular change, regardless of whether he had been unambiguously requested to do so, Section 5 interests would have been protected, but that is not what happened here.

The only information the Attorney General had

in 1971 were in the difference between the 1966 and the 1971 legislation. In order to have evaluated the initial change from a combined appointed, elected council to a council entirely elected at large, he would have needed the pre-1966 information.

Accordingly, if the Attorney General considered the at-large feature at all, he did so only in the context of comparing an at-large, three-member council with an at-large, five-member council.

QUESTION: Ms. Etkind, if we agree with your presentation and conclude that Edgefield County never had the preclearance for the '66 election by virture of the action in 1971, do we have to reach the second question --

MS. ETKIND: No.

QUESTION: --raised on the '76 election?

MS. ETKIND: No.

QUESTION: May I ask this question?

MS. ETKIND: Yes.

QUESTION: Is it agreed that the 1966 Act was filed with the Attorney General while he was considering the Act of 1971?

MS. ETKIND: It wasn't file. He requested a copy of that Act and it was given to him in the context of the '71 submission.

QUESTION: So, he received it?

MS. ETKIND: Yes.

QUESTION: And, what maps were made available to the Attorney General at that time?

MS. ETKIND: I believe it was the map showing the three districts as set up under the '66 legislation and the three districts set up under the '71 legislation.

QUESTION: May I ask this? Does the AG's office -- Do you -- Well, you are not in the Attorney General's office. Does the Attorney General have computer information stored that shows the requests that have been made and shows obviously requests that have not been made?

MS. ETKIND: As I understand it, the Attorney General does have that computerized system, but he didn't have it in 1971.

QUESTION: No files that would have enabled him to check to see whether requests had ever been made?

MS. ETKIND: Well, there were files and he could have checked, but it is our submission that the burden was not on him to do that checking, and in view of the large number of submissions, that burden should not be put on him.

QUESTION: How many submissions are made in a year now?

MS. ETKIND: Well, in 1982 he received requests

for preclearance of more 14,000 changes.

QUESTION: What does that work out per working day? Have you done that? We can figure it later.

MS. ETKIND: I believe there was a reference to that in Justice O'Connor's dissenting opinion in the Port Arthur case, but I don't remember the exact figure.

QUESTION: Okay.

MS. ETKIND: It is our submission that because the change to at-large elections itself has never been subjected to scrutiny under Section 5, the Attorney General's objection should be in force.

CHIEF JUSTICE BURGER: Ms. Henderson?

ORAL ARGUMENT OF KAREN LeCRAFT HENDERSON, ESQ.

ON BEHALF OF THE APPELLEES

MS. HENDERSON: Mr. Chief Justice, and may it pleas the Court:

The single issue before the Court this afternoon is whether or not Edgefield County, South Carolina, with respect to its county council, is in compliance with Section 5 of the Voting Rights Act. This is not a Section 2 issue and this is not a constitutional issue. This is whether or not Section 5 has been complied with.

And, with respect to that issue, we have three points which we would like to address.

Number one, the 1971 Act prescribed the current

method of electing the Edgefield County council today. There has been no change since 1971.

Number two, the '71 Act was precleared in its entirety; that is all of its provisions, the five-member council, the five residency districts, the at-large method and the two year term were all contained in the '71 Act and they were all precleared in 1971.

And, number three, the home rule changes, if they are Section 5 changes at all, were precleared on August 28, 1975 when the Attorney General precleared the Home Rule Act.

Now, the lower court found as a fact that the preclearance of the 1971 Act precleared that Act in its entirety and we submit that that finding is not only clearly erroneous as it must be to be reversed, but it is immanently correct that there was in fact and by operation of law a preclearance of the '71 Act in its entirety.

The '71 Act begins by striking out all of the election provisions of the 1966 Act and that is important, we think, because the '71 Act specifically says the section of the '66 Act which relates to method of election is hereby -- is amended by striking it out and placing it with the following. It replaces the '66 Act with provisions which add two members so that they now have a five-member county council.

It changes all of the residency districts. There had been three. It adds two and changes the composition of all five.

It provides once again for an at-large method of elections and for two-year terms.

It was submitted along with 17 other pieces of legislation and the submission says simply this: "That in accordance with provisions of Section 5 of the Voting Rights Act, there are submitted herewith copies of the following Acts" and the 1971 Act is one of them.

QUESTION: Was there any reason why the '66 one wasn't submitted?

MS. HENDERSON: No, Your Honor, there isn't.

The next act that took place was that the Attorney General wrote to Edgefield County and said that he needed additional information. He needed boundary maps, he needed voter registration statistics, he needed population statistics, and he also needed the election provisions now in force.

That requested was acted upon and he received all that he asked for including a copy of the 1966 Act.

His next action was not to ask what was in effect on November 1, 1964 or was 1966 precleared, but his next act was to preclear the 1971 Act. And, his preclearance letter says simply, "the Attorney General

does not interpose any objection to the change in question." That is the enactment itself at No. 521 of 1971.

In other words, as this letter manifests, he precleared all of the provisions of the 1971 Act.

Perhaps more important --

QUESTION: May I ask a question? The 1966 Act, do you agree that that was a voting change?

MS. HENDERSON: Yes, Your Honor.

QUESTION: That was a change?

MS. HENDERSON: Yes, it definitely was.

QUESTION: And, is it your position that that was implicitly cleared in '71 or it became unnecessary to clear it when you had a different scheme in '71?

MS. HENDERSON: Our position is it was superseded by the 1971 Act because the 1971 Act provides completely for the method of electing Edgefield County council.

QUESTION: So, you do not contend that the action in 1971, in effect, cleared the '66 change?

MS. HENDERSON: We don't contend that it reached back or -- Yes, reached back and cleared the '66 --

QUESTION: So, your position is that you -- that clearance in '71 cleared the entire statute regardless of how many changes it made?

MS. HENDERSON: Yes, Your Honor, we do. And, we think --

QUESTION: And, regardless of how many features of the statute were previous changes that had never been precleared.

MS. HENDERSON: Because of -- Your Honor, that is correct. Because of the way the statute is phrased, the fact that the '66 Act is completely struck out, we think that it might have been different if the '71 Act had said line 3 of the '66 Act is amended from three to five and something like that.

QUESTION: So, it really comes down to a question of who had the duty to find out how many changes there were. Your submission is that the Attorney General should have found out how many changes there were to satisfy himself and his argument is you should have told him what the changes were?

MS. HENDERSON: Yes, Your Honor.

QUESTION: That is the whole fight.

MS. HENDERSON: I think it is important to note that we were, back then in the early years of the Voting Rights Act, and it was not too long after the watershed case of Allen, and I think if we -- I don't know that we even need to compare duties, but I think the Attorney General being charged with the enforcement of the Voting Rights Act probably has more knowledge of what it that was a voting change than Edgefield County

did at that time.

QUESTION: May I ask this one other question? I tak it your submission would be precisely the same even if the 1966 Act had not been given to the Attorney General?

MS. HENDERSON: Yes, for this reason, and this is what I am getting into and that is we think that '71 Act precleared the present method of electing Edgefield County council by operation of law as well as in fact.

The Plaintiff emphasized that he had only the 1966 Act before him. We don't know what he had before him. We know he had at least the information that was requested and we know that he had the '66 Act. But, we do know that he did not have any authority to stop at the '66 Act unless it had been precleared and we do know that he was required to under Section 5, compare it to November 1st of '64. We also know that he was authorized to review the pre-existing elements, even assuming that they had been precleared, the at-large and the two-year term under Lock-hart, and could have objected to those pre-existing elements in the context of the '71 changes.

And, most important, we know that we must presume that he followed the law, that is that he acted within his authority.

The Plaintiffs say that there is nothing in the record to show that he knew was at force on November 1st

of '64 and we say there is nothing in the record to show that he didn't know what was in force on November --

QUESTION: Was the '66 law ever presented to the Attorney General for preclearance up until this moment?

MS. HENDERSON: No, Your Honor, it hasn't been. It was submitted in response to his request for the present method of election in 1971.

We, of course, contend that that has been moot ever since 1971, the '66 statute.

The presumption --

QUESTION: Do you mean that South Carolina has been relieved of its duty? Its duty was to present it for preclearance.

MS. HENDERSON: Yes, Your Honor.

QUESTION: And they have been excused of that?

MS. HENDERSON: No, Your Honor, we think we have presented the present method of election in Edgefield County for preclearance in 1971 and that it was precleared in 1971 and there has been no change in the last 12 years.

This presumption that he acted within his authority, that he did the only thing he was allowed to do, which was to compare it to November 1st of '64, coupled with no evidence to rebut it, we think, makes it conclusive. But, we have even more information and that is in his letter in which he requests additional information, he

discusses the other 16 statutes that were sent in with this '71 Act and he says with respects to those 16, they do not represent a change in voting practice or procedure from November 1st of '64. So, we know that he knew that November 1st of '64 is a determinative date and we have no evidence to show that he treated the Edgefield County act any differently from the way he treated the companion statute.

While we have the burden to submit and we certainly don't dispute that, the Attorney General, once he has a submission before and the duty to either object to it or to preclear it and once --

QUESTION: I thought you had said you had never submitted it. You just said you had submitted it.

MS. HENDERSON: We submitted the present method of electing the Edgefield County council.

QUESTION: But, not the '66 one.

MS. HENDERSON: That is correct. And, that issue --

QUESTION: Be careful when you say you are not including '66.

MS. HENDERSON: No, Your Honor, I certainly am not including '66.

When we submitted the 1971 Act, he had the duty either to object or to preclear it and once he

precleared it we are entitled to rely on that preclearance, we feel, without having to ask him did you compare it do 1964, did you preclear everything, does your letter mean what it says and did you do your job? Whether that preclearance was correct or not, once it was precleared, it was precleared, and, otherwise, as this Court has observed, the preclearance mechanism might never come to an end and otherwise the sufficiency of a submission might always be subject to challenge as it is here 12 years after we received preclearance.

Now, the Attorney General in 1980 for the first time requested the submission of the 1966 Act. And, the Plaintiffs say that this represents a consistent position of non-preclearance and that it is entitled to deference.

We say that for nine years and through two submissions the Attorney General assumed that the Edgefield County method of election had been precleared as prescribed under the 1971 Act. First of all, in 1971, when he had the '66 Act in front of him and must have seen either that it hadn't been precleared or if it hadn't been precleared, that it had, in fact, been superseded entirely by the '71 Act --

QUESTION: You are saying then, Ms. Henderson, that the Attorney General took a different position in

'71 than he did in 1980.

MS. HENDERSON: Yes, Your Honor. And, we think when he had the '66 statute in front of him, he either saw that it had been precleared, which the record says that he did not do, that it had not been precleared, and there is no record to show that it had been, or he saw that it had been completely superseded by the '71 Act and proceeded to compare all features of the '71 act with November 1, 1964. That was his first opportunity.

Then in 1979, when he objected to the home rule ordinance and resolution which merely continues this '71 method of election, he began his objection letter by saying ostensibly this is the same system of election. Now, that wouldn't have been relevant if he hadn't assumed that the same system of election had been precleared. "There is to be no dragging out of this extraordinary federal remedy." And, as the Court in USC Georgia found an 11-year delay as inexcusable, we think that this late attempt, 12 years after preclearance has been obtained, is also inexcusable.

Now, the case should stop here because we have a '71 preclearance, we have a stipulated fact that the method of election has remained the same since 1971, and we have cases and the Attorney General's own regulations saying that a failure to object for any reason is not

reviewable. And, the case, as I say, should stop there.

However, the Plaintiffs' second issue is that the Home Rule Act effected changes which require a submission of Edgefield County's ordinance and resolution, which, as I mentioned, continue unchanged the '71 method of election. The only change effected by the Home Rule Act is in power. It expanded the powers of all South Carolina counties.

The Plaintiffs again stipulate that the Home Rule Act has only changed the powers; that is that the method of election has remained unchanged by the Home Rule Act. And, the Attorney General really, in his letter of objection, appears to agree with it, because again he says ostensibly this is the same system of election. In other words, the Home Rule Act has not changed the method of election.

Edgefield County assumed these new powers, these expanded powers, as of July 1, 1976, and it assumed the powers pursuant to the Home Rule Act, which was pre-cleared in August of '75 and the lower court so held.

The lower court relied on a decision from our local three-judge court concerning Charleston County which was in the exact same situation. It had a pre-home rule method of election which had been precleared and it continued that under home rule and the decision, Woods

versus Hamilton, held that if a South Carolina county kept its method of election unchanged by home rule, then it would not need to submit its implementing ordinance which merely readopts that method of election.

The Attorney General was a party to that law suit and that decision was not appealed. And, even as recently as this year, the Attorney General took the same position in the case that is now pending in the D.C. District Court involving Sumter County in which the defendant Attorney General urged the court to find that the preclearance of the Home Rule Act precleared only the right provisions which were the holding of the referenda and the expansion of the powers.

The ordinance and the resolution itself, and they are found in the Joint Appendix beginning at 183, do not mention powers and they do not change the method of election. They simply continue the method of election.

Again, the lower court so held.

Significantly, we think the Attorney General's objection letter notes its rather uncertain jurisdiction. First, by beginning and saying ostensibly this is the same system of election. It later says that while the formal structure has remained the same, it then characterizes its home rule preclearance as being beyond recall and if the Home Rule Act had been something other than what

was represented to us we might not have precleared it. It is a very uncertain type of objection letter.

But, nevertheless, Edgefield County did make a good faith attempt to comply with it and as the record reflects it set up public hearings, it established a committe to draft single-member districts, and then the Woods versus Hamilton decision came, which said if you are a South Carolina county and make no change in your method of election, you don't need to submit your ordinance and resolution, and, again, the Attorney General did not appeal that.

We would urge the Court to affirm, of course, on both of the issues, but particularly with respect to the second issue; that is that the home rule changes, if they were changes under Section 5, have been precleared. Consider the effect of the implicit holding of the lower court which is that they were, in fact, Section 5 changes or otherwise they wouldn't have had to be precleared.

We think that before the Court expands the Voting Rights Act into a non-election law; that is simply an expansion of powers, that it should consider the language of the Act itself, its own previous decisions, and particularly the City of Lockhart decision where just recently the Court said it had the entire election system in front of it and could determine the pre-existing --

the constitutionality of the pre-existing elements as well as the changes, but never once talked about the fact that it went from a general law city to a home rule city; that is a change in power.

Accordingly, despite the second non-issue that we think the Plaintiffs have raised with respect to the Home Rule Act, we end with the identical issue that we began with; that is the 1971 Act prescribes a current method of election. It was precleared in its entirety in 1971.

To reverse the lower court, we think, would signal at least two things. First of all, that the sufficiency of a submission is always subject to challenge, even 12 years after preclearance was obtained and despite the 60-day language in the Act, and we think the second thing it would signal is non-election changes; that is something like the expansion of powers is subject to preclearance.

But, if the Court affirms, on the other hand, it would signal at least two things. First, that once a covered jurisdiction complies with the Voting Rights Act, that the integrity of its state and local legislation will remain undisturbed; and, second, that the preclearance provisions of the Voting Rights Act are to be limited to their intended scope. And, all of this is not to

leave the Plaintiffs without a remedy, because pending in this very lawsuit is a Section 2 issue, a constitutional issue, and a 1983 issue, which, of course, go to the merits of the present method of election.

The Plaintiffs also have, under our state law, a political remedy, because our Home Rule Act now allows ten percent of the registered voters of any county to petition for a referendum to change to the single-member district.

QUESTION: Ms. Henderson, under -- I would think it is under your submission that if a locality, city or county or state passes a new ordinance or a new law and you just put it in the mail to the Attorney General and say, please clear this, that that clears every possible change that might be involved.

MS. HENDERSON: No, Your Honor, that isn't our position.

MS. HENDERSON: Well, it sounds like it. Do you mean isn't the submitter supposed to go on and say here is what we want cleared?

MS. HENDERSON: Yes, Your Honor. And those are what the regulations require which, of course, were not in effect in 1971.

QUESTION: Well, all right. Would you say then that just mailing the ordinance or the Act in 1971

would be enough?

MS. HENDERSON: I think in 1971, yes, Your Honor.

QUESTION: You just mail it. I think that is your position, that you just mail the ordinance and you don't tell them what change, it is up to him to go and look up all the changes there are.

MS. HENDERSON: No. I think it --

QUESTION: Well, what were you supposed to do in 1971?

MS. HENDERSON: Well, we were supposed to submit it, which we did.

QUESTION: Submit the Act or the ordinance. What was it? Was it an ordinance?

MS. HENDERSON: It was an Act.

QUESTION: All right, it was an Act. What else were you supposed to do?

MS. HENDERSON: Okay. We submitted the Act. Now, in the absence of any regulations, the Attorney General then wrote back and said we don't have sufficient data and here is what we need in order to have sufficient data. He did not ask us what changes do you want precleared and, of course, I don't know what we would have said. We probably would have said --

QUESTION: But, you did say something when

you sent it in, didn't you?

MS. HENDERSON: No. We said preclear under Section 5 of the Voting Rights Act.

QUESTION: And, you didn't say what a change was or --

MS. HENDERSON: No. No, Your Honor, we sent the Act in and then the next thing that the Attorney General did was to request the additional information that he needed in order to make an evaluation.

QUESTION: That is probably what led the Attorney General to write and ask for the '66 Act, isn't it?

MS. HENDERSON: Yes, I imagine so.

And, I think the one thing that the Court should bear in mind really is that we were dealing with the early years of the Voting Rights Act and really what this case involved is going back to the pre-Allen days where perhaps mistakes were made by the covered jurisdictions and perhaps mistakes were made by the Attorney General himself and at this late date, 12 years later, to try to reconstruct what we meant when we sent it in and what he meant when he precleared it, we think, points out the difficulty of trying to do it, first of all, and also points up the reason why the 60-day deadline is in effect and also points out the reason why the Section 5 preclearance is not the only remedy available to --

QUESTION: But, the Attorney General sent back and said -- wants the '66 Act and then he decided that the change between -- that the '71 Act effected as compared to the '66 was all right. He precleared that.

MS. HENDERSON: He precleared the '71 Act, Your Honor --

QUESTION: But, your assumption also is that he also cleared the '66 Act as compared with the change -- The change that was effected by the '66 Act.

MS. HENDERSON: He precleared every provision of the 1971 Act when he precleared the 1971 Act. And, at that time, the '66 issue became moot, because the '71 Act provided once again for at-large and provided once again for all of the features of the present method of election.

QUESTION: Where did you ever ask him to preclear the '66 Act? You never asked him to.

MS. HENDERSON: The record reflects we have never submitted the '66 Act.

QUESTION: Well, how could he preclear it if you didn't ask for it?

MS. HENDERSON: He precleared --

QUESTION: Under the statute.

MS. HENDERSON: Your Honor, that issue became moot when in 1971 the '66 Act was amended by striking

out all of the election provisions, replacing them with new election provisions, and that was precleared.

We think the issue as to the '66 Act has been moot since 1971.

QUESTION: Well, you a minute ago said it had been precleared. You now say it is moot.

MS. HENDERSON: Well, as I have said --

QUESTION: You take the position that the '66 Act is precleared or it was mooted out by the '71 Act.

MS. HENDERSON: It is mooted out by the '71 Act.

QUESTION: And, you don't maintain it was precleared?

MS. HENDERSON: We do not maintain that it was ever submitted and we also --

QUESTION: Have any of the provisions of the 1966 Act been retained or were retained in the 1971 Act, any whatsoever?

MS. HENDERSON: Yes, Your Honor.

QUESTION: What were they?

MS. HENDERSON: The '71 -- Both the '71 Act and the '66 Act provide for at-large and for two-year terms of office.

QUESTION: Yes. And, the number of districts was increased from three to five.

MS. HENDERSON: And all five districts were changed.

QUESTION: And all five districts were changed and maps were submitted that showed the districts that pre-existed '71?

MS. HENDERSON: Yes, Your Honor.

QUESTION: Your position is that the 1971 Act, with those changes, has just completely supplanted the 1966 Act?

MS. HENDERSON: Yes, Your Honor, it did. It struck out the '66 Act and replaced it with the present method of electing the Edgefield County council. Some of the features were the same as the '66 Act and some of them were new.

QUESTION: And, the basic criticism of the present statute is -- well, both of the statutes, I suppose, was in theory the elections were at-large.

MS. HENDERSON: The 1979 objection to the ordinance and resolution states that the new powers assumed by the Edgefield County council in the context of at-large has the potential for diluting the black vote. So, they isolate the at-large feature in conjunction with the expanded powers.

QUESTION: What was the law in existence prior to '66?

MS. HENDERSON: Prior to '66 there was an appointed

QUESTION: What was the date of the act that governed that?

MS. HENDERSON: Oh, goodness, I think that goes way back into the --

QUESTION: The Attorney General never asked for that, did he?

MS. HENDERSON: No, he didn't.

QUESTION: So, he didn't know -- had no idea what the change of the '66 Act effected?

MS. HENDERSON: Well, we think under -- by operation of law --

QUESTION: He never asked you for anything before then.

MS. HENDERSON: That is right. So, we don't know -- We don't know how he knew it, but we know by operation of law he had to know it, because he had to compare it to --

QUESTION: He didn't have to compare it to the '66 Act with anything. All he had to compare was the '71 Act with the '66 Act.

MS. HENDERSON: Well, he could only stop at the '66 Act if it had been precleared, because the determinative date is November 1st of '64.

QUESTION: Well, that is not quite correct,

is it? He could stop at the '66 Act if he believed, even erroneously, that the '66 Act made no change in prior law.

If he was under the impression that there had been at-large voting since before 1964, he wouldn't have had to have precleared the '66 Act because it would not have effected a change.

MS. HENDERSON: That is right, but when he precleared the '71 Act, he had the authority to look at all of them. And, if he had found at-large objectionable, he could have objected to it in '71 if it had been instituted in 1930.

QUESTION: But, under your view, a jurisdiction could pass a new law with a dramatic change in it and not submit it and the next year pass a carbon copy of the new law and say here is what the old one was and he would be presumed to have precleared the change he didn't know about.

MS. HENDERSON: No, Your Honor. That is what the Plaintiffs argue and I think that that couldn't -- What they argue is you could conceivable pass a blatantly discriminatory change, not preclear it, amend it, send the amendment in --

QUESTION: The amendment have a minor change.

MS. HENDERSON: Right. And, if it is not

retrogressive from the blatantly discriminatory, then it would have to be precleared.

First of all, under Lockhart, he does look at all the pre-existing elements, so he would look at that --

QUESTION: But, if he didn't look at. Say he just was so busy with all these thousands of submission that he didn't realize that there was a blatantly discriminato change the year before, you would be in the clear. I mean, he has to be alert under your theory and look at what happened in the time period preceding the immediately preceding Act.

MS. HENDERSON: Your Honor, I think that under today's regulations and under today's standards of submission, we -- He also can send back the submission and say follow our regulations.

QUESTION: Yes. But, if fails to do it, if he is not alert --

MS. HENDERSON: Yes.

QUESTION: -- then you win.

MS. HENDERSON: We win on the Section 5, but, of course --

QUESTION: Re certiorari you wouldn't win back in '71. I mean, at that time, there wasn't any rule about submitting.

MS. HENDERSON: That is right.

QUESTION: You do answer Justice Stevens, back in 1971 he was obligated to look back.

MS. HENDERSON: The Attorney General?

QUESTION: Yes. He was obligated to look back if he ever wanted to raise a question about any uncleared item.

MS. HENDERSON: That is right. And I think that once the 60 days go by and once he has failed to object, for whatever reason, whether it is under a mistake of law or a mistake of fact, then the Court has held in Morris v. Gressette that is not subject to judicial review. But that doesn't leave an unconstitutional change unchallengeable because you have still got Section 2 and you have still got the constitutional challenge or a 1983 challenge, all of which are still pending in this case.

QUESTION: Well, now, what is required for the voters to prevail under any of those alternative theories?

MS. HENDERSON: In the remaining issues? The dilution order that Mr. McDonald alluded to was vacated after the Bolden decision, and pending now is a real hearing on intent, so that if they can show that the at-large method of election has been put in place intentionally --

QUESTION: But if they can't show that, then there would be no relief under your theory.

MS. HENDERSON: Your Honor, there is relief, and

there is relief that -- which is what I was talking about before -- there is relief provided by state law, and that is the petition to change the method of election to single-member district by a referendum, and that takes merely a 10 percent petition, and the black voters of Edgefield County, according to the latest statistics, comprise 44 percent of the elected voters.

There is also a 1983 issue pending, and it is possible that they could prevail on that or on a 14th Amendment argument.

To conclude, we feel that for the reasons which we have stated today, as well as those that are contained in the brief, we would respectfully urge the Court to affirm the lower court.

CHIEF JUSTICE BURGER: Very well.

Do you have anything further, Mr. McDonald?

MR. MC DONALD: Mr. Chief Justice, I have nothing further unless members of the Court have questions.

CHIEF JUSTICE BURGER: No, apparently not.

Thank you, Counsel.

The case is submitted.

(Whereupon, at 3:02 p.m., the case 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:

#82-282 --THOMAS C. McCAIN AND WILLIAM SPENCERM ETC., Appellants
V. CHARLES E. LYBRAND, ET AL

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

BY Diane Hammond
(REPORTER)