IN THE SUPREME COURT OF THE UNITED STATES

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, etc., et al., Appellants,	:	
v.	:	No. 72-129
NEW YORK, et al., Appellees.	:	

Washington, D. C.,

Wednesday, February 28, 1973.

The above-entitled matter was resumed for argument at 10:09 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

[Same as heretofore noted.]

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: Mr. Randolph, you may resume. You have about nine minutes left.

ORAL ARGUMENT OF A. RAYMOND RANDOLPH, JR., ESQ.,
ON BEHALF OF THE UNITED STATES [Resumed]

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

As I was discussing yesterday, the only issue in this case is: Did the District Court err in denying intervention in April 1972, in light of the circumstances existing at that time, in light of the allegations before it?

Under Rule 24(a) the application for intervention must be timely. It's a requirement of the rule. We think this is particularly important in Section 4(a) cases where time may, in fact, be of the essence. Congress itself recognized this by assigning these cases to three-judge district courts and allowing for direct appeal to this Court.

Now, here appellants filed their motion to intervene on April 7. The action itself had been filed by the State of New York on December 3rd. More than four months had passed since the action had originally been filed, the Justice Department had been investigating New York's complaint during this time, and had completed its investigation.

In the District Court, at this time, the only explanation appellants gave to the District Court for filing

the action at this time is contained on page 47 of the Appendix. I read from their Motion to Intervene. Paragraph 6.

"Because counsel for petitioners was only informed within the last 48 hours that the United STates would not adequately represent the interests of petitioners, and because substantial litigation ... has not yet occurred, the instant application to intervene is timely."

As against this, New York objected to the intervention, and their objections are contained on page 67 to 70 of the Appendix.

New York pointed out four basic things.

No. 1, the action had been pending for four months.

No. 2, appellants, or applicants at the time they were before the District Court, were clearly on notice in this case. The affidavit pointed to a New York Times article, where political leaders in these counties were discussing whether to take action with respect to New York's complaint, the fact that in the article itself, which is reprinted in the Reply Brief of the Appellants here, also mentioned that a Citizens Voter Education Committee chairman had mentioned the action.

The other point that New York made is that intervention at this time would disrupt and possibly preclude New York's upcoming primary election where delegates to the Democratic National Convention would be chosen, where delegates

to the State Assemby and the State Senate and congressional seats would be chosen. The reason it would have that effect is because New York had agreed that this reapportionment is covered by Section 5. Unless New York got out from the Act under 4(a), Section 5 would remain outstanding and then they would have to go through the lengthy process of having clearance through the Attorney General, which could not be completed by the time the elections were scheduled to be held.

The fourth point and from the Department of Justice's point of view, and we think the most important that New York made, is that at no time during this period did the appellants offer any evidence to the Department of Justice regarding why New York was not entitled to summary judgment.

Now, this is what was before the district court. These are the allegations that were before the district court, and of course the district court denied intervention at that time.

Now, we think that the court acted within its discretion. The only other case dealing with intervention in the Section 4(a) case, which is very close to this case, is the Apache County case, which we've cited and discussed beginning on page 22 of our brief.

Judge Leventhal, speaking for the court in that case, in discussing intervention, said that in these kinds of cases

the applicants must at least first, and I quote, "bring to the attention of the Department of Justice any instances of discrimination in the use of literacy tests."

Appellants have not done so here and, in fact, just about a year and a half before they sought to intervene, they had gone on record indicating that in fact they had no such evidence. I read from the 1969 hearings on the Extension of the Voting Rights Act, and Clarence Mitchell's testimony before the House Judiciary Committee:

"Chairman Emanuel Celler: Have --"

QUESTION: Is this something the district court considered, or not?

MR. RANDOLPH: No, it's not.

QUESTION: Well, that's all right.

MR. RANDOLPH: I'm trying to indicate why -- a possible explanation why no evidence was presented to the Justice Department. This is on record, I'm reading from pages 251 to 252 of the hearings, which are cited throughout appellants' brief.

"Chairman Celler: Have you, as one of the principal officials of the National Association for the Advancement of Colored People, had any appreciable complaints from parts of the country other than those Southern States which indicate that there are abuses of the type you have mentioned here?

"Mr. Mitchell: The answer to that question, Mr.

Chairman, is no."

It goes on to say: "I would further state that I checked with the general counsel of the NAACP Legal Defense and Education Fund, Mr. Greenberg, and asked for his permission to quote him to this subcommittee. He said we have not had any cases in the long history of our organization involving denial of the right to vote for literacy reasons outside the Southern States of this country. We have very little litigation on the question of voting in States other than those covered by the '65 Act."

QUESTION: How far outside the record are you going in viewing the district court's decision?

MR. RANDOLPH: I think that you should stay exactly within the record, Mr. Justice. I cite this because there has been an awful lot of testimony cited on the other side about what other people said during the 1969 hearings. I'm trying to set kind of the atmosphere that was present at the time when New York instituted the suit, what people concerned with these questions thought about it.

We have had allegations in the case that, well, we were interested in this case all along and no one came to us to ask us our view of the case. In fact, that's not entirely accurate.

But the point is that for four months nothing was done while the Justice Department was investigating the case.

We think that it's a particularly appropriate requirement for intervention in these kinds of cases, and the Court, in Apache County, so held. That the applicants ought first to come to the Justice Department, who is investigating the case, and present it with the evidence that they have of discriminatory use of literacy tests.

In fact, I think if you remember the argument of my colleague here yesterday, that is exactly what they were going to do with respect to the Section 5 action.

QUESTION: Did it necessarily, all you are arguing -- what you have to conclude is that it wasn't timely.

MR. RANDOLPH: That's right. That's right.

QUESTION: Now, you say it wasn't timely because the election was imminent.

MR. RANDOLPH: Right. I think that --

QUESTION: Well, it wasn't necessary to enjoin the election or interrupt it in any way to permit intervention?

MR. RANDOLPH: I don't believe that's so, Mr. Justice.

QUESTION: Why?

MR. RANDOLPH: I'll try to explain why.

QUESTION: Why, I would suppose that courts have authority to let some action proceed under some statute that might be unconstitutional.

MR. RANDOLPH: Well, first of all, the first point

I'd like to make is that that was not suggested to the district court, in fact, --

QUESTION: Well, does that make a difference?

MR. RANDOLPH: Well, I'm trying to set the stage as to what was before the district court.

Second of all, the way the Voting Rights Act is framed, changes in voting cannot be implemented until they've been cleared by the Attorney General. Now, the changes --

QUESTION: Yes, but that decision still had to be made, as to whether this State was properly subject to it.

MR. RANDOLPH: Well, the only way that requirement could be forgotten is if the State got a Section 4(a) judgment, removing it from coverage.

The appellants wanted to intervene to prevent New York from getting the Section 4(a) judgment. Without that Section 4(a) judgment, if New York sought to implement and conduct its election and, I might add, at the time that all this was going on, nominating petitions were beginning to circulate, candidates were beginning to organize campaigns and so on. If they had sought to implement those changes, that would have been a violation of Section 5 of the Voting Rights Act.

Regardless of whether appellant's action in New York, which they had implemented, had gone forward or not, it would still be a violation of the Section, because they

cannot implement those changes until or unless they have an outstanding --

QUESTION: Well, we've permitted elections to proceed under statutes that, on their face, seem to be unconstitutional.

MR. RANDOLPH: Well, in Allen, I remember --

QUESTION: It was a fortiori that made it perhaps -- I don't know, what do you suppose would have happened? I suppose the government would have consented to let the election proceed under the --

MR. RANDOLPH: Well, on the basis of hindsight, I suppose it would. I mean, we certainly wouldn't --

QUESTION: That was your case. I mean, you were consenting to take it out.

MR. RANDOLPH: Yes.

QUESTION: What would the other side have done, if they had --

MR. RANDOLPH: I think that if one reads the motion to intervene, which is contained on pages 44 to 47, appellants' motion to intervene, there's not a word in there about -- which is supposed to, under Rule 24(c) it's supposed to contain the grounds for intervention. There's not a word in there about whether New York had used its literacy test discriminatorily, which was the issue in this case. This entire motion to intervene is framed on the basis that we want

to stop New York from having these elections.

QUESTION: Well, you think, then, that was really the motivation for the motion?

MR. RANDOLPH: I don't see how anyone could reach any other conclusion if you read the motion to intervene.

QUESTION: Is it your position that because of the structure of the Voting Rights Act, New York's primaries could have gone ahead only if there was a final judgment from the district court here exempting them from the coverage?

MR. RANDOLPH: Or, in the alternative, if they had gotten clearance from the Attorney General. But the process of getting clearance, appellants have suggested that: Well, we could have -- they could have gotten expedited. The regulation that they cite in their reply brief says essentially the Justice Department would do the best it can, but the point is if it takes 50 or 40 or 60 days to investigate redistricting in New York City, then nothing can happen during that period of time, I mean the State of New York can't pass on qualified candidates, and this has an effect more like a domino effect throughout the State. If you pull out three of the congressional districts, for example, involving -- or the congressional districts in Kings County, New York County, and Bronx County, that has a snowballing effect throughout the State, because they are not done on county lines. You pull them out and then you'll affect

Richmond, you'll affect Westchester, and so on.

QUESTION: Mr. Randolph, under the state you are obligated to consent to entry of judgment here unless you had some reason to believe this test has been used discriminatorily?

MR. RANDOLPH: Right.

QUESTION: Now, isn't that very like the burden you have or the authority you have or the directions you have under Section 5, when something is presented to you?

MR. RANDOLPH: Very close. The issue is different.

QUESTION: Well, what is the issue? How is the issue different?

MR. RANDOLPH: In Section 5 the question is whether the change in voting that has just been implemented is discriminatory on racial grounds.

QUESTION: That's right; that's right, but --

MR. RANDOLPH: In Section 4(a) the question is --

QUESTION: I'll put it to you this way: If you consent to entry of judgment in a suit such as we have here, wouldn't you have passed the New York law if it had been submitted to you?

MR. RANDOLPH: I don't think that follows at all, Mr. Justice.

QUESTION: No, it doesn't.

MR. RANDOLPH: No. Because the issue in this case is: Where the literacy tests in the past ten years used to

discriminate on the basis of race?

The question in the Section 5 cases is --

QUESTION: Is the new statute.

MR. RANDOLPH: -- is the new statute going to discriminate on the basis of race?

Now, I would hope that a State that would get out from under Section 5 --

QUESTION: At least it's very unlikely that you would consent in the one case and hold the law to be --

MR. RANDOLPH: It would be unlikely only for the reason that if the State is not discriminated in the use of its literacy case can one conclude that it wouldn't discriminate on the basis of districts that it draws. I don't know whether that's a valid conclusion.

QUESTION: I see. I see.

MR. RANDOLPH: For these reasons, we think that the district court acted within its discretion. As we said before, we did not object to the motion to intervene. After the motion to intervene was denied, we looked at the case and we believe that they acted within their discretion in denying it at that time.

QUESTION: What is your fundamental reason for saying that it's not an intervention as of right, as compared with permissability?

MR. RANDOLPH: Well, in the first place, the

individual appellants in this case are five people only from Kings County, New York. None of them claim to be victims of voting discrimination. All of them, in fact, say they are duly qualified voters.

The organization represented is the NAACP, which is the 18 branches of the NAACP in New York City. What they're purporting to represent, Mr. Justice, is simply the right of minority groups not to be discriminated on the basis of race. But that's precisely what the Attorney General is charged with representing under the Act.

We don't think their interest is any different from the Attorney General's, that is, to represent the public interest.

Now, I know of only one case, really, where an intervenor has been allowed to come in to represent the public interest, and that is the El Paso case. If that case is not restricted, if it's not restricted to situations where the government has violated a prior mandate of the court, then we would agree that in certain circumstances we think that people can come in to intervene as of right in Voting Rights Act cases. I mean we would have no other choice but to say that.

But we think that as a prerequisite they ought to at least submit evidence to the Department of Justice, which is investigating the matter, and say: Look, this is why we

think New York is not entitled to a 4(a) judgment.

We don't think that a person should be allowed to just simply sit back, have the evidence, wait for the government to complete its investigation, wait, push it all the way to the moment before primary elections were going to be held, and then suddenly say, Hey, we have this evidence, and we don't think New York is entitled to the summary judgment it seeks; we think they ought to have an obligation to come in earlier and present us with it.

That's what appellants were going to do under their Section 5 submission. Mr. Greenberg mentioned that yesterday. The first step is they were going to present the government with its submission about why.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Attorney General.

ORAL ARGUMENT OF GEORGE D. ZUCKERMAN, ESQ.,

ON BEHALF OF THE APPELLEE

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

I'd like to begin on this timeliness question, and try to explain the serious harm that the State of New York would have faced if the delayed intervention of the applicants had been allowed in this case.

To understand this, you have to begin with the fact

that, through no fault of its own, the State of New York was not supplied with a complete set of census statistics by the United States Bureau of the Census until October 15th, 1971, and it was only after that date that the STate could begin the task of drawing 150 new assembly districts, 60 new State Senate districts, and then subsequently 39 new congressional districts.

Now, it was recognized that the time involved in drawing these districts, based on the principle of one-man-one-vote, which would cut across county lines, could not be completed before the early part of 1972, at the earliest. And the State feared that a lengthy process involved in getting this cleared through the Justice Department might delay the applicability of these new districts in the 1972 elections. And thus this Section 4(a) suit was commenced.

As it turned out, our fears were realized, since the Assembly and Senate districting statute was enacted on January 14th of 1972. It was submitted pursuant to Section 5 on January 24th. We did not hear anything further from the Justice Department until more than seven weeks later, when, on March 14th, we received a letter saying that they wanted further information, particularly demographic information, as to the population and registration by race and by Puerto Rican ancestry in each of the districts in the three affected counties.

I may add that information as to registration is not supplied by the Census Bureau, this requires extra information which would have taken weeks to complete. And therefore, when we come to the date of April 7th, when appellants are first seeking to intervene, any delay at that point would have caused chaos in the electoral processes in the State of New York.

On April the 4th, the first day for circulating petitions for the spring primary had already commenced. Without a Section 4(a) judgment, all these new lines would have been subject to an injunction. As a matter of fact, the appellants, at the same time that they filed their suit in WAshington, had filed a suit in the Southern District of New York to halt the elections until the new Assembly, Senate, and congressional district lines.

Now, what would have happened, we would have had to go back to the old districts, which were based on population figures on the 1960 Census that were 12 years out of date.

Now, against the serious harm that the State of New York would have suffered by this delayed intervention, what do appellants' papers show? Do they show thousands of cases in which individuals have been discriminated against, in the application of a literacy test?

No. They don't even show a single instance in which any New Yorker has been discriminated in a conduct of

literacy tests.

Apparently the thing that appellants are most worried about is their claim that the new congressional lines might have been based on racial gerrymandering. They cite no specific evidence for this, but even if this was the case, there is no reason why they couldn't have brought a civil rights action under section 1983 in the district courts in New York, and tried to prove their case, as would have been done -- as we know from the Gomillion case and Wright v. Rockefeller, and has been done in many other instances.

Instead, what they really have tried to do is take the easy way out by a Section 5 action, where you don't have to prove discrimination; all you have to prove is that the State did not comply with the clearance procedures of Section 5 of the Voting Rights Act.

May I remind the Court that in the case of South Carolina v. Katzenbach, at that time the State of South Carolina was attacking the constitutionality of the Voting Rights Act of 1965, in particular Section 4 and 5, and they made the argument that these sections were unconstitutional because for a State to prove a lack of discrimination would involve an almost impossible burden, since it is very difficult to prove the negative of a proposition rather than the positive.

This Court answered that contention by relying primarily on the testimony of then Attorney General Katzenbach,

and said: All a State need do is submit affidavits from their voting officials attesting to the fact that there has been no discrimination in a conduct of literacy tests, and then answer any evidence that the Justice Department might uncover during the course of their investigation.

And that was the situation here. This is what the State of New York did. They submitted to the district court every literacy test that was given within the past ten years. And they submitted affidavits from election officials to show that not only did New York City just sit back and wait until people came to it to register, on the contrary, since 1964, the Board of Elections of the City of New York has sent mobile registration units into the heart of the inner city areas, into the areas where there is a high density of black population, and through the use of sound trucks, have encouraged people to come and register and vote.

I dare say I know of no other city in the country which has done as much to try to encourage minority citizens to vote. And therefore we feel that this particular action is particularly unfair, that is, the consequences of Section 4 are based on a purely statistical presumption, which we believe we have rebutted.

Now, in appellants' briefs before this Court, although there was no evidence presented by them to the district court, they have tried to draw an analogy to the

Gaston County case, trying to argue that if you can prove educational inequality in New York, you can somehow try to raise an argument of discrimination in the conduct of a literacy test.

But the Gaston case can be easily distinguished from the situation in New York. First of all, in Gaston, no matter what the educational background of a person was, he had to pass the literacy test, even if he had a Ph.D. degree. In the State of New York, prior to 1965, if you completed eight grades of school and since 1965 if you completed only six grades of school you did not have to take a literacy test.

So even if they could show -- which we don't believe they could -- that there was inequality in various schools in the City of New York, this is irrelevant, since anyone who has completed six grades of school would not have to take a literacy test.

It has also been shown that throughout the ten-year period leading up to the institution of this action less than five percent of those who took the literacy test failed it.

Appellants have also tried to raise an argument that Congress, in enacting the 1970 Amendments to the Voting Rights Act, sought to include New York State because of some evidence of discrimination, and yet nothing in the record of Congress in the hearings on the 1970 Extensions points to this

thing.

The purpose of the 1970 Amendment, and using 1968 as a standard, was simply because it would be illogical to extend the Act's protection for an additional five years without updating the date of the election which would serve as a standard in measuring voter participation. Not because of any evidence that there had been any discrimination in New York State.

And, indeed, as the Solicitor General has pointed out, Clarence Mitchell, in his testimony before the House Judiciary Committee, admitted that he had no evidence of any discrimination in New York State.

Now, one other argument I'd like to just point to on the question of the remand: It has been blithely assumed that there would be no dire consequences if this thing was remanded to the district court to take further testimony.

May I point out that if the judgment below was vacated, we would now have a cloud of doubt as to the validity of all the existing Assembly, Senate, and congressional districts. More than that, in this past year, we had a new councilmanic statute adopted for the City of New York, 33 new councilmanic districts, which have never been cleared, of course, by the Justice Department, and therefore all these new councilmanic districts for this year's election would be subject to an injunction.

In addition, all the election laws that have been passed, including the runoff provisions for the mayoralty election of New York City this year, would be subject to a Section 5 injunction, and therefore we view the consequences of a remand as causing considerable chaos in the electoral processes in the State of New York.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Greenberg.

REBUTTAL ARGUMENT OF JACK GREENBERG, ESQ.,

ON BEHALF OF THE APPELLANTS

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

In reply I would like to touch on several points. The first is timeliness, and apparently the time, the appropriateness of the time is being measured by two ways in the assumptions that counsel for respondents are making as to what was the reason for the district court judgment, which it never articulated.

First, as to the time in which we filed after the government's position became manifest, we filed within two days after learning it and four days after filing it, I can't imagine anyone doing anything speedier.

Secondly, as to the time before the primary election, counsel for the government has referred to our action being on the eve of the primary. In fact, it was 74 days in advance

of the primary. And I submit that any court can tell counsel that if you want to intervene in this case, and if you want to have your hearing, get your case in within so many days so that we can go on with the problem or we will make other arrangements, if necessary, and counsel would have been ready and willing to do it. And of course we do that sort of thing all the time.

QUESTION: When do you have to file?

MR. GREENBERG: When do you have to file what?

QUESTION: In order to run in the primary, you ought to know what districts you're going to run in.

MR. GREENBERG: That's correct, Mr. Justice, --

QUESTION: Well, when was the filing date?

MR. GREENBERG: The filing date, I believe, was considerably earlier. It was April 4th.

And we filed our application for intervention, I think, on April 4th or 5th. But the two could have gone on simultaneously. If it was illegal, the court then could have taken some appropriate measures to deal with that, either, as you suggested in your question, let things stand for the time being or order some alternative procedures to be decided. The case could have been decided in a matter of days or weeks.

QUESTION: Are you that sure, Mr. Greenberg, that short of a final judgment by the District of Columbia Court,

that New York didn't have to comply, that it could have granted some sort of interim permission for it not to comply?

MR. GREENBERG: New York was indeed proceeding at that time, and it did not yet have a final judgment. New York had been proceeding since at least a month earlier, with filing petitions and getting them out and so forth. So New York was that sure, and obviously they were going on ahead with it.

If their procedures had been validated, and I submit that the proposed answer and our motion to alter judgment and the materials submitted indicate that we would have won that case if we had been permitted to intervene.

QUESTION: What was New York's approach that they didn't need to submit?

MR. GREENBERG: New York's approach was that they had not used the -- they had urged that they had not used the literacy test for ten years earlier, with the purpose or the effect of racialdiscrimination.

QUESTION: So coverage wasn't --

MR. GREENBERG: Right.

QUESTION: Coverage wasn't automatically admitted, but by its terms the Act did cover it?

MR. GREENBERG: Oh, yes. Yes. But they said they had not used the Act with the purpose or the effect of racial discrimination. Their only allegations, their only evidence

was concerning effect, and evidence on effect, if we're going to follow the Gaston County case, was all on the papers, and in census reports and various published reports which we have attached with our motion to alter judgment.

So the timeliness thing, there were 74 days in there, and many a court has told many a litigant to get something settled in a great deal shorter time than 74 days. And I submit if the court had said that here, and the parties hadn't complied, they could have, at that point, denied intervention and not allowed the intervenors to proceed further.

None of that was -- there was no reason, it was just that: you can't intervene; you can't appear. That's the only thing that was said.

Secondly, there's been some suggestion about standing here, and we submit that applicents here have precisely the same standing as any voter in any reapportionment case, and indeed the standing of the applicants Wright and Fortune is additional -- they have additional standing in that they are office holders, they are State Assemblymen, they are asserting the public interest, I guess, as any litigant does in a constitutional case. They're doing far more than that, they're asserting their own personal interest in the rights that have been vindicated and recognized by the court.

QUESTION: Is it your suggestion now, Mr. Greenberg,

that the Court must always write an opinion explaining, when it acts in a situation like this?

MR. GREENBERG: No, obviously courts have --

QUESTION: Maybe they thought the appeal was -- maybe they thought the motion was frivolous.

MR. GREENBERG: Well, perhaps they might have. I think that then we would have to look at the objective record we have before us, and we would submit: on the assertions here it was not frivolous, it was quite serious, and the litigants were serious litigants, they were State office holders and voters, the counsel were counsel that the courts were familiar with, and not anyone who acted in a frivolous manner. And the allegations were serious and serious exhibits were submitted along with the motion to alter judgment.

So we just have to look at the papers we have before us to come to a conclusion as to what the court meant.

As to the legislative history, which Clarence Mitchell purports to quote me, I think he did quote me, and that's been cited to the Court. I imagine that that was a tactical situation in which he was aruing that the law should go forward, the Congress should go forward and pass the law to cover only the South and not the North.

Whatever Mr. Mitchell thought and whatever I thought at that moment, Congress thought otherwise, and they passed

the law to cover the North as well as the South, and indeed the very provision we're talking about is the Cooper amendment, and it just didn't advantageously touch upon New York, on page 19 of our brief, Senator Cooper said "The chief State involved is the State of New York. Three counties of New York were involved, Bronx, Kings, and New York. In the 1964 election more than 50 percent of the voters were registered and more than 50 percent voted. However, for some reason in the 1968 election 50 percent were not registered or voting."

And so New York was not covered casually. That is the intent of Congress, and we submit that if the intent of Congress is not being carried out by a litigant in a lawsuit, be it the United States or anyone else, and that lawsuit will affect a party, Rule 24 quite explicitly provides that there may be intervention. That's what applicants attempted to do. That's what they were not permitted to do. It being a matter of application for intervention as of right, it should have been allowed and we submit that the judgment below should be reversed.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Greenberg.

Thank you, gentlemen.

The case is submitted.

[Whereupon, at 10:42 o'clock, a.m., the case was submitted.]