Supreme Court of the United States

CITY OF RICHMOND, VIRGINIA, Appellant, v. UNITED STATES OF AMERICA ET AL	)	No. 74-201

Washington, D. C.
April 23, 1975

Pages 1 thru 68

IN THE SUPREME COURT OF THE UNITED STATES

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CITY OF RICHMOND, VIRGINIA,

Appellant,

v. : No. 74-201

UNITED STATES OF AMERICA ET AL

- -x

Washington, D. C.

Wednesday, April 23, 1975

The above-entitled matter came on for hearing at 10:54 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

LAWRENCE G. WALLACE, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C. 20530

CHARLES S. RHYNE, ESQ., 400 Hill Building, 839 Seventeenth Street, N.W., Washington, D. C. 20006

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W. H. C. VENABLE, ESQ., Cashie House, 422 East Main Street, Richmond, Virginia 23219

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 74-203, City of Richmond, Virginia against the United States.

Mr. Wallace.

ORAL ARGUMENT OF LAWRENCE C. WALLACE, ESQ.,

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

This is a suit for a declaratory judgment under Section 5 of the Voting Rights Act of 1965 brought by the City of Richmond seeking a declaratory judgment that the voting changes resulting from an annexation made by the City in 1970 would not have the purpose or effect of abridging the right to vote on the basis of race.

The annexation added 23 square miles to the city containing 45,700-and-some white persons and 1,500-and-some black.

As a result the proportion of the city's electorate of the city's population was changed, from 52 percent black to 42 percent black and the composition of the city's voting age population from 46.3 percent black to 37.3 percent black.

The annexation --

QUESTION: What was the voting age, not registered voters?

MR. WALLACE: That is the voting age population,

according to census figures.

QUESTION: From 42 to 37, roughly.

MR. WALLACE: From 44.8 to 37.3. Those are the only figures available, the census figures of population by age. We don't have figures on registered voters by race.

QUESTION: Of course, prior to annexation, the population of the annexed territory were not registered voters in Richmond, could not have been.

MR. WALLACE: Not in Richmond, that is correct, Mr. Justice. The annexation was the culmination of long efforts which I recounted in detail in the briefs and which I won't take the time to rehearse here.

The reply brief filed by the Appellant City of Richmond, has the chronology of all the events in this complex litigation, beginning on page 12, which is quite helpful.

Basically, there were studies that began in the 1950's showing a need in the view of many for annexation because of changes in the composition of the city, exodus of young, affluent persons. There are many references that the city was becoming a place of the poor and the old and the black and throughout the course of the proceedings there was a need for land that could be developed and there was a problem about the tax base of the city.

After an unsuccessful effort to merge with Henrico County, the annexation suits were brought in 1961 against both

Henrico and Chesterfield Counties. The one against Henrico proceeded first and resulted in an award by the annexation court which the city found unacceptable. Indications are because of the heavy payment that would have to be made and --

QUESTION: There are two ways to annex, as I understand it, one, by majority vote of both the annexor and the annexee and the other by court order, special annexation court order.

MR. WALLACE: That is correct, Mr. Justice. The merger was the former method and while the city voted for it, the county voted not, so the annexation suits were then brought and when the Henrico suit culminated in a unacceptable award, the city proceeded with the Chesterfield suit which was then compromised and what we have before us is the result of the compromise.

QUESTION: Mr. Wallace, are you and Mr. Rhyne dividing up between issues?

MR. WALLACE: No, sir, we haven't planned to do that. I am going to speak of all the issues. The district court found the annexation invalid in both purpose and effect and if I may, I would like to address the question of effect and then the question of purpose and then our view of the proper disposition of the case.

QUESTION: Mr. Wallace, I have got a question that's somewhere along the line. Since the Attorney General now

apparently has approved the Richmond plan, why isn't this moot so far as Section 1973C is concerned under the Voting Rights Act?

MR. WALLACE: Well, we -- we have changed our position in the litigation of the relative modifications of the plan but that doesn't mean that there has been a submission to us and we have interposed no objections. When we reached our agreement with the city, Mr. Rhyne quite properly raised that [illegible] just now submit the plan to the Attorney General and we took the position that it would be improper for us to abate the suit that way, that once the matter was pending in court, we let the court decide whether the act has been complied with or not.

We are a party to the litigation.

QUESTION: You mean, these matters can never be disposed of by compromise once the proceeding has commenced in the --

MR. WALLACE: Well, there are two intervenors who didn't agree with the compromise and we just --

QUESTION: Do intervenors normally maintain a live lawsuit when the plaintiff and the defendant have compromised?

QUESTION: Yes, they can in antitrust litigation, anyway.

MR. WALLACE: Yes, there have been instances upheld, the El Paso case is being cited to it.

QUESTION: They have been upheld.

MR. WALLACE: In any event, we have not purported to end the litigation. We are taking a position as a litigant in the litigation and not a position that the question has been submitted to us for clearance and we have given it clearance under the act.

Now, the question of effect, which is the first one to address and the first one addressed by the -- our brief -- turns on what dilution must necessarily occur in black voting strength as a result of the addition that largely white group to the city s electorate.

In this case, it was because of that dilutive effect that the Attorney General refused to grant preclearance upon the city's submission two weeks after this court's decision in Perkins against Matthews which made it clear that these annexations are covered by the Voting Rights Act, the annexation had already gone into effect before the preclearance was sought and we suggested at the time that if the dilutive effect could be ameliorated by changing from an at-large system of electing councilmen to a single-member ward system, then we would be glad to reconsider and --

QUESTION: Mr. Wallace, may I ask how long the at-large system had been in effect, since about 1950?

MR. WALLACE: I think it was 1947 -- '48, 1948 the attorney tells me.

QUESTION: And that was considered, I am sure, quite a reform in the structure of the municipal government when it came along because, generally, political scientists think that to be an enlightened form of government, a small council elected at large and with a city manager.

MR. WALLACE: And with a city manager system, yes, sir.

QUESTION: And that came in in '48. How large a council? How many members?

MR. WALLACE: It was a 9-member council.

QUESTION: From the beginning. So this involves no change in the number of members of the council.

MR. WALLACE: That is correct.

QUESTION: It is simply a change from a -- ultimately, from an at-large election to a ward or district election.

MR. WALLACE: We were in a situation where there was an emerging black majority which would be frustrated by the annexation.

QUESTION: Assuming black voting.

MR. WALLACE: Yes, which is now --

QUESTION: What had been the history between the 1948 and 1969 point of view of racial identity of the membership of the council? Had it been all-white, always?

MR. WALLACE: There has been one black-member of it in more recent years. There have been also two white members

supported by the Crusade for Voters, which is the predominantly black political organization in the city.

QUESTION: Has it been a nonpartisan kind of ballot?

MR. WALLACE: It is not the traditional political parties and the ballot itself is nonpartisan, but there are --

QUESTION: There is no designation on the --

MR. WALLACE: -- there are organizations --

QUESTION: There are organizations that nominate slates.

MR. WALLACE: That support candidates, yes.

QUESTION: And has it been any kind of preferential-type voting, such as proportional representation?

MR. WALLACE: No.

QUESTION: Just the voter marks a lot of Xes.

MR. WALLACE: They are --

QUESTION: Up to nine Xes.

MR. WALLACE: Up to nine Xes. They are not numbered seats and you don't have to have a majority to win.

QUESTION: The highest nine are elected.

MR. WALLACE: That is correct.

QUESTION: And the voter has --

MR. WALLACE. Can vote for as many as he wants, up to nine.

QUESTION: As far as the list on the ballot with no party designations.

MR. WALLACE: I think that is right.

QUESTION: And he puts up to nine Yes, no more than nine.

MR. WALLACE: That is correct.

QUESTION: And that's not proportional representation, never has been.

MR. WALLACE: That is not proportional representation. And in the course of the litigation, since the city brought the lawsuit still seeking approval for the at-large system with the annexation, in the course of the litigation, the city and the United States arrived at a compromise or a proposed consent decree that begins at page 150 of the Appendix in which a single-member ward system would be set up and in our view, this would eliminate any substantial dilutive effect of the annexation on voting for the city council.

It would result in four districts with substantial black majorities, four districts with substantial white majorities and other districts in which the proportion of blacks and whites is basically the same as the proportion in the city as a whole.

QUESTION: In districts of approximately equal population?

MR. WALLACE: Approximately equal population. They were drawn on a non-racial basis or on the basis of contiguity, compactness, sharing of interests, not having any district

crossing the James River, criteria of that sort which are spelled out in some detail.

Now, the district court, nonetheless, has taken the position that the effect is one that is improper under the act, under what it refers to as the rule or standard of the Petersburg case, which is also relied on very heavily by the crusade for voters, one of the intervenors here and they read the Petersburg decision, which was a decision by another three-judge court, which was summarily affirmed by this Court, as holding that when there is an annexation of this sort, the ward plans have to be drawn in such a way as to minimize any adverse impact on black voting strength, that the black voting strength has to be maintained to the extent possible in the drawing of the ward plans themselves.

We think that is a serious misreading of the Petersburg case and I want to take a minute or two to explain why.

In that case -- and I have the opinion here -- the Attorney General, in rejecting the annexation in a very similar situation, where there was an at-large council system, wrote a letter spelling out in detail the Government's position and that letter is reproduced in the district court's opinion, and we explained that one way to meet the problem of dilution on the council -- and I am quoting from the letter -- would be to adopt a fairly-drawn system of single-member wards and that would our position, that it would be fair

representation for everyone in the expanded city that was required, not an effort at overcompensating black voters because of the addition of others to the community.

Now, in response to this, the intervenors in Petersburg argued that even if that change were made with respect to the city council, the district court should not approve the plan in Petersburg, for the reason that the election of the six constitutional officers provided for in the Virginia Constitution would not be affected and the dilutive effect of the at-large vote would occur in the election for the city treasurer, the sheriff, the commissioner of revenue, et cetera.

QUESTION: The city-wide vote, the at-large vote.

MR. [illegible] is correct and that was inescapably an at-large vote and the ward plan couldn't do anything about that.

In response to that argument, as we read the opinion in Petersburg, the district court said, "the court concludes --" and I am reading from the opinion -- "in accordance with the Attorney General's finding, that this annexation can be approved only on the condition that modifications calculated to neutralize to the extent possible any adverse effect upon the political participation of black voters are adopted."

That is, that the plaintiffs shift from an at-large

to a ward system of electing the city councilmen.

In coming to this conclusion with respect to the argument of the intervenors as to the constitutional officers, we take note of several factors that the court spelled out as reasons for not construing the act to block annexations, in effect.

Now, we read that language to the extent possible as meaning, with respect to the offices where it is possible to ameliorate the dilutive effect, not that the amelioration itself has to maximize black voting strength and that is the basis on which we filed our motion to affirm in the Petersburg case and we don't believe that this Court's affirmance has endorsed a principle that the district court in the present case has said that the Petersburg case stands for, that there has to be, in effect, a maximization of black voting strength in converting the ward system in the way the wards are drawn and that might be --

QUESTION: Was there summary affirmance in this Court?

MR. WALLACE: There was a summary affirmance in this Court.

QUESTION: Without argument.

MR. WALLACE: Without argument.

QUESTION: That's what I thought.

MR. WALLACE: As I recall, Mr. Justice Douglas

wanted to hear argument in the case, or noted that he wanted to hear argument.

It was at 410 U.S. 962. It is cited in the briefs.

So, basically, we feel that the standard of Petersburg and the standard that we have been applying right along in approving annexations and you'll note a footnote in our brief indicates that I think it is 867 annexations that have been submitted to us under the act. We have disapproved only six. We have been operating on the premise that a system of fair representation of everyone in the annexed area is all that is required and if we are wrong in that, we'd like to know but we don't think we are wrong in that. We don't think the act was intended to do otherwise.

QUESTION: Well, suppose there is -- a city council is elected at large and the black vote in the community is potentially more than 50 percent -- or is more than 50 percent.

It just hasn't -- the vote just doesn't get out, but the vote is there and then the city is districted and council members are to be elected at single-member districts.

It is not argued after that that single-member districts do not maximize the potential of black votes but it is argued that the black voting power has been diluted because it may not any longer elect all of the council.

Now, would that be dilution in your -- in the Government's scale of values or not?

MR. WALLACE: Not as we have been administering the act. We don't think the act requires one method of representation or the other.

QUESTION: So that although blacks before could have elected all the council members, the fact that they could only elect afterwards, assuming bloc voting, afterwards only five or six of the council members, that wouldn't be a dilution in your book.

MR. WALLACE: No, that would not.

QUESTION: That is involved here, isn't it?

MR. WALLACE: There might be a racially-discriminatory purpose in making the change, but the effect that the districts are fairly drawn would not be an effect that violates the act, in our view.

QUESTION: And that is rather involved here because the argument is that seven blacks could have controlled the city council and had a majority in the district.

MR. WALLACE: But that, in our view, as far as effect is concerned, is made up whereby the fact that the black voting strength is being immediately enhanced now.

QUESTION: But you could have another case suggested by my brother White's question. Let's assume a city with a 65 percent majority of negroes of voting age who, in fact, didn't exercise their potential and therefore a majority of the council, in fact, historically had been non-negro and then

you annex property and that reduces that majority from 55 to 51 and you continue the at-large.

Now, would that be a violation of anything?

If you don't make any changes. It has been at-large before and it is at-large now and there is still a majority of negroes of voting age.

MR. WALLACE: Well, we would have to look at the circumstances. It might not be.

QUESTION: But there has been a slight reduction in the majority.

MR. WALLACE: There might not be any reason to interpose an objection there. It is hard to answer a question-

QUESTION: In the abstract.

MR. WALLACE: In the abstract without hearing from interested persons who may bring facts to our attention.

QUESTION: Concrete facts or purposes.

MR. WALLACE: That is correct. I think my time is running out. I just want to summarize very briefly our position on purpose and disposition and that is that the record does show legitimate purposes including a very important effect the deannexation would have on the school system in Richmond which is not addressed at all in the intervenors' briefs.

We think that the appropriate disposition would be to develop the legitimacy of these purposes and whether they

have purged the discriminatory purpose that was shown on remand. In the meantime, it has been five years since there has been an election and we would like to suggest to the Court something not suggested in our brief, that it would be appropriate if the Court agrees with us that a remand is the proper disposition on the purpose issue that it would be appropriate to provide that an election can be held in the meantime pursuant to the consent agreement proposed by the United States and the city, an election from these nine wards with the terms to expire July 1, 1976 so that we would have a more up-to-date elected city council in Richmond.

I don't think anybody would be worse off than they are with the old council that was elected in 1970 and on which replacements are being made without elections by the existing members of the council.

QUESTION: What is the term under the law, a two-year term?

MR. WALLACE: It is a two-year term, yes.

QUESTION: Are the elections in odd-number years or even?

MR. WALLACE: The even-numbered years so that --

QUESTION: I think the gubernatorial is in odd-numbered years in Virginia and the municipality is an even-numbered.

MR. WALLACE: And the city would prefer not to wait

until 1976 for the next election and we don't see why that need occur here.

QUESTION: Is the school district co-terminus with the municipal boundary?

MR. WALLACE: It is, in Virginia.

QUESTION: Precisely so?

MR. WALLACE: It is precisely co-terminus so that a deannexation would have something of the effect that was involved in the United States against Scotland Neck City Board of Education. I don't want to exaggerate the analogy but there is a similar effect to that case in Gomillion against Lightfoot. Should there be a deannexation.

QUESTION: Mr. Wallace, in the last five years, has any councilman died or resigned and, if so, how is his replacement selected?

MR. WALLACE: The replacements are being made. There have been [illegible] I don't know if there has been any death. And replacements are being made by the remaining members of the council.

QUESTION: So it would be self-perpetuating as of the moment.

MR. WALLACE: Elections have been enjoined under, first, an order of this Court enjoining the --

QUESTION: The Government under this -- the Government has been administering the statute to say, I would

gather, that even if, in your judgment, there is no dilutive effect, no bad effect at all, a bad purpose would still upset a plan?

MR. WALLACE: Well, the act says that. I don't know if we have ever --

QUESTION: I thought it said --

MR. WALLACE: -- had a case where we have had to refuse to clear --

QUESTION: Because it is perfectly clear that if there is a bad effect, you don't have to have a bad purpose, too.

MR. WALLACE: That is correct.

QUESTION: But the other way around, I suppose the cases are few and far between so there is no bad effect but yet there is a bad purpose.

MR. WALLACE: We think that this case is a peculiar example of that.

QUESTION: And yet you are willing to remand on purpose, even though you think there is no effect.

MR. WALLACE: Well, we don't think the parties developed their evidence on the question of whether there is a legitimate purpose.

Once there was a finding of a bad purpose, the effect of which has been ameliorated, it seems to us that there has to be an inquiry into whether a legitimate purpose

does justify this annexation.

We think the answer is fairly clear on the record as it stands and we are only suggesting the remand as a matter of fairness because the parties didn't focus on this issue this way.

QUESTION. Has there ever been a court decision under this act that said that the effect was good but the purpose was bad?

MR. WALLACE: I am not aware of any.

QUESTION. The statute by its terms does require the state or political subdivision to get a declaratory judgment to the effect that the procedure does not have the purpose and will not have the effect. Really, it is phrased so that they have to carry the burden, I would think, on both.

MR. WALLACE: On both issues.

QUESTION: That is the language.

QUESTION: I guess you would say that you intend whatever the effects are.

MR. WALLACE: Well, it seems to us that the plain language says that we are not supposed to approve, and the district court is not supposed to approve a voting change that was made for a racially-discriminatory purpose, even though it doesn't have a racial --

QUESTION: Even though they think it is a great

improvement.

MR. WALLACE: Regardless of the effect.

QUESTION. Right.

MR. WALLACE: And so that issue remains here. We think a sufficient showing was made considering, especially, that the parties have stipulated that the record in the Holt litigation is also part of the record here but we have suggested the remand only to give the parties an opportunity to focus more specifically in the issue in this case.

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

Mr. Rhyne.

ORAL ARGUMENT OF CHARLES S. RHYNE, ESQ.

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

I represent the City of Richmond.

We ask that this Court approve as the judgment the consent judgment that was worked out by the Attorney General in the City of Richmond. It is set forth in the record. It contains not only the work plan but the machinery for almost immediate election, as the City of Richmond feels the sooner we get back to ballot box control, the better everyone is in their city.

Now, first of all, let me say with respect to a question that was asked about since 1948 and black participation in the city council.

Mr. Maddox has shown me a piece of paper which is really set forth in the record, pages 112 to 132, which shows this:

Since 1948, under the election-at-large system, the citizens of Richmond have elected four, I guess it is, to the council and one has been appointed.

At one time there were as many as three black citizens on the city council.

QUESTION: On the nine-member council.

MR. BRYAN: On the nine-member. Well, I believe the record with respect to Richmond, while we talk a lot about bloc voting and polarization and everything, these blacks could not be elected without white votes, because, as Mr. Wallace has pointed out, they have never constituted more than 44 percent of the voting population and the record also shows, of course, that the whites are generally much larger in their percentage of voting than the black citizen.

So the City of Richmond, number one, because this matter has been here four times already, and this is the fourth time, would like to get back to handling its own affairs and get out of court.

Now, with reference to this particular nine-ward plan, what happened, as the record shows, is that after Petersburg held that an at-large election must be replaced by a ward plan in order to eliminate the discriminatory effect

there, the City of Richmond conceded on the record below that that principle governed Richmond and began working very intensively to try to come up with a plan that would satisfy that standard that would not abridge or deny the right to vote on account of race or color and so, back and forth, back and forth, plans went with the Department of Justice trying to achieve a plan that would meet with their approval as having eliminated all possible discriminatory effects of the annexation and finally, that was achieved and I must tell you, Mr. Justice Rehnquist, I thought that when that was achieved, the case was over because it seemed to me that under the statute you can either go to the Attorney-General and if he interposes no objection, if he approves, in other words, or you can go to a three-judge court.

Now, the city was in the three-judge court and the Department of Justice took the position that since they were there that the matter should be presented to the three judges, the special voting rights court, but that it should be presented as a consent judgment.

WEll, because it would also have this election machinery in it, too. That was one other part of that presentation.

Well, I presented that to the city and they agreed to it because, as I say, their great desire is to get on with the election in Richmond and get this all behind them.

Now, the plan as presented, the nine-ward plan, really allows the black citizens of Richmond fair representation in the overall of the political processes of the city. Prior to the annexation, they couldn't elect anyone.

Under this plan, assuming bloc voting, polarization, which I -- see, I don't like to assume. This is kind of -- I think repugnant to a lot of ideals of a lot of people but, assuming, then, the blacks are assured of four seats on the city council.

Now, as Mr. Holt says in his brief on page 16, four seats on the council is really fiscal control of the city because you can't adopt a budget without six votes so I think that this is an enormously-meaningful, fair solution to this whole problem.

The case, when it came on below, as we say in our reply brief, we quote the order, the three judges said that the issue was the annexation in Richmond as amended by this four ward plan and then they -- after there was some discussion about offering evidence on the original annexation, the master went back to the three judges and they said, well, you can let in evidence on the original annexation.

But to me, completely throughout this whole proceedings, I thought when the Attorney General who was made a statutory expert under this act, and nearly all of these plans are passed on to him, they don't go to court, that when he

put his stamp of approval on this, the case really should have been over.

Now, time and time again, this Court has said that you give special deference to the views of someone who is charged with the administration of a statute and we quote all of those in our brief and as most I sincerely believe that the Attorney General's views [illegible] entitled to more weight and more deference than have been given.

QUESTION: [illegible] you could almost make a [illegible] I should think, that the Attorney General's approval to the stipulation almost removed jurisdiction from the court.

MR. [illegible] I tried that argument down at the Department of [illegible] to get them to agree with me. I [illegible] you can see that, while they are in favor of this [illegible] under the new city, they are given four years and a chance at another one in a voting ward that is gradually moving from white to black.

QUESTION: Well, I mean, regardless of the merits. Once the Attorney General approved it, even though he was late in doing so, if you think in nunc pro tunc terms, that defeated any court's jurisdiction.

MR. RHYNE: Well, --

QUESTION: Because how do you prove it before the

lawsuit, there could have and would have been no lawsuit.

MR RHYNE: That is right.

QUESTION: And no need for a lawsuit.

MR. RHYNE: That is right. That is absolutely right. Now, one of the things about the decision below is that they stated rather peculiar and unusual burdens of proof after the case was all over with. They said that because the city was smeared with a discriminatory taint, it was up to the city, and there was an extra burden cast upon the city to purge itself by not only proving lack of dilution, but by proving some legitimate purpose for the annexation.

Well, this annexation started actually in the 1950's and all through the 1960's there was either litigation or something going on in connection with it and the record before the annexation court -- and they have a special annexation court that hears this -- there were 82 witnesses, 9,000 pages of testimony, 132 exhibits, overwhelming as to the purpose under Virginia law of the annexation.

They just overwhelmed the court. The record is completely one-sided there as to the necessity and expediency of this annexation and so the annexation question, as such, we don't believe the economics of all of that was before the three judges. That would take two, three months to try and as Mr. Holt says in his brief, "I don't want to go all through that."

We stipulated in the entire record in the annexation case and so far as economics is concerned, there is no question but what the city proved all of those things but we earnestly suggest to this Court that the Voting Rights Act is concerned with voting. I read that from beginning to end a good many times. It talks about voters, eligible voters and registers of voters and all that kind of thing but it never talks about any economics as wiping out the registered voters' rights.

To me, that [illegible] equality, equality, equality.

QUESTION: Didn't the court below look into economics with the thought of [illegible] the purpose of the annexation, that if it wasn't justified by economic means, that would at least support an [illegible] that it was justified by prohibited motives?

MR. [illegible]: I [illegible], Mr. Justice Rehnquist, that that is one way that it could be read, but the -- my point there is that if there is a policy to consider economics, why didn't they look at all the economics that are in the record in the annexation court which was stipulated then?

They didn't do that. So I think that insofar as economics wiping out a constitutional right, it just -- it just can't be and we are not here urging that.

QUESTION: Mr. Rhyne, if I might get back to the agreement Richmond reached with the Attorney General, was that

before the court below?

MR. RHYNE: Yes, it was. Yes, it was because immediately after the Attorney General agreed to it and then when --

QUESTION: Is there any discussion of it in the opinion?

MR. RHYNE: Pardon?

QUESTION: Is there any discussion of it in the opinion?

MR. RHYNE: None at all.

QUESTION: I can't even find a reference to it.

MR. RHYNE: Not at all. They seemed to give no weight --

QUESTION: Had it been before the master?

MR. RHYNE: I think the finding of it was that the consent decree came before the master was appointed and it was before him, yes.

QUESTION: Isn't that the land plan that the three-judge court talks about, isn't that the plan that you are pushing?

MR. RHYNE: Attached to the consent judgment, yes. Yes, it is.

QUESTION: Well, wasn't the master -- didn't the master have that before him?

MR. RHYNE: Yes, he did. But he paid no attention to it. He didn't mention it. And neither did the Court.

QUESTION: The consent decree, but not all of it.

isn't that about it?

MR. RHYNE: Yes. Yes. And so --

QUESTION: On page 18 it says, "Richmond undertook to develop a ward plan after the decision in the City of Pittsburgh and it now relies on Petersburg to argue that the annexation was made lawful by the adoption of its single-member district plan. Is that the plan?

MR. RHYNE: Yes, it is. Yes, it is. But there is no reference to or deference to the fact that this was cleared with the Department of Justice as completely removing the discriminatory effect of the annexation.

Now, I think I will reserve the remainder of my time for reply.

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

Mr. Derfner.

ORAL ARGUMENT OF ANALIS DERFNER, ESQ.

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

I represent the Crusade for Voters of Richmond, one of the intervenors here.

We believe this is the type of case that Section 5 of the Voting Rights Act is designed to deal with. On the surface, we have a normal annexation purported to be for legitimate ends to help a city through some of the problems that a number of cities go through in this day and age.

On the surface, then, it is like nearly 1,000 other annexations that have gone through under the Voting Rights Act with no problems.

In fact, though, this annexation was and remains a deliberate effort on the part of the city to negate the gains made by black voters under the Voting Rights Act.

When Congress enacted Section 5, added Section 5 to the Voting Rights Act in 1965, it did so because, as the testimony in the legislative history shows, Congress well knew that the history of voting discrimination had been the inventive development of new strategems to cope with -- to make certain that white political control was maintained and that discrimination against black voters was maintained after the existing strategems were struck down so that Section 5 was, in effect, a counterpart of Section 1 which mandated the elimination of tests and devices and, in fact, in Richmond, what we have is a situation where the growth of black voting strength, the overcoming by black voters of the history of discrimination against them which occurred as the '60's grew on, especially with the passage of the Voting Rights Act, was suddenly aborted in 1970 -- 1969, actually. It took effect in 1970.

QUESTION: On your facts, there was at least one negro city councilman long before 1969.

MR. DERFNER: Not to my understanding. I may be

mistaken.

QUESTION: His name was Oliver W. Hill.

MR. DERFNER: Yes, that is correct. Mr. Hill was elected in 1948 or 1950, in the very early days. After his one term in office, there was no black councilman until after the passage of the Voting Rights Act, I believe, in 1966 or '68 was the next election of a black councilman.

I am sorry about forgetting about Mr. Hill.

The annexation in this case, it seems to be agreed by everybody with the possible exception of the city, did have this bad purpose. Much of the question here turns on the effect.

I'd like to begin by noting that the effect of this, the effect of this annexation was, if put in population terms, to add equivalent of one and a half white wards or one and a half wards of white voters to the city and --

QUESTION: Is it your position, Mr. Derfner, that if the purpose is bad, you don't have to get to the effect?

MR. DERFNER: Yes, I do, your Honor. The position of the Crusade is that an order -- is that the act requires that the city, if it is to gain declaratory judgment, prove that it does not have the purpose and will not have the effect, that both of those are independent tests and that in the absence --

QUESTION: You don't suggest that because there was

at one time a bad purpose that it is forever bad and incurable.

MR. DERFNER: No, not at all.

QUESTION: Well, and the argument here is that a plan or change that originally had a bad purpose and a bad effect of, the argument is, it no longer has either one of them because the effect has been cured and presumably, the purpose.

MR. DERFNER: Well, it is that presumably that counts.

QUESTION: That is the argument.

MR. DERFNER: It is the presumably that counts. That's right. But I do think that the city, in order to disprove bad purpose or to show that the bad purpose has been dispelled, must do something more than show some minimization or some degree of amelioration of the bad effect.

I think that the Government seems to agree with the Crusade that -- and with the Court -- that there has to be some independent proof that the bad purpose has been dispelled.

One of the items of that proof would be a showing that the annexation has or had a -- what the court called, "an objectively verifiable legitimate purpose" and I think, from -- to my mind, this is the same standard as is referred to by Mr. Justice White in his opinion in the Palmer case when he used the phrase, "colorable nondiscriminatory

reason."

I think the Government has highlighted the problem of the purpose. I simply disagree with the inferences it draws from the state of the evidence below.

The Government, in effect, says, we think the evidence below wasn't clear and we think there ought to be a new hearing, in effect.

What that means to me is that the city didn't meet its burden; not only didn't meet its burden but cannot now show what it would have to show to gain a reversal on that ground. That is, that the findings of the special master and the district court on purpose were clearly erroneous, that the city can't meet that standard, that it didn't meet its burden of proof [illegible] district court.

Therefore, what the Government is saying is that, although the city failed to meet its burden of proving sound purpose below, it is -- it should be entitled to a new trial because, really, the Government of the United States thinks that that evidence might be available to it.

Well, that suggestion of the new trial, I suppose, is a matter of equity and a matter of procedure to be determined by the district court below in the first instance, to be determined perhaps by this Court on review.

But I don't think there should be any confusion about what it amounts to and it seems to me that it amounts

clearly to a recognition of the fact that the record below shows that there isn't any evidence, there isn't enough evidence for the city to meet its burden of showing an objectively verifiable legitimate purpose and therefore, with that being one of the elements, of showing that the bad purpose has been dispelled.

I think, as a starting point, what the Government says amounts to a recognition that the city failed to meet its burden.

If it failed to meet its burden under the act, there is no choice. The district court did not have the right or the power to grant the declaratory judgment.

Now, there has been a lot of discussion about the effect and about what is the consequence of the city's adoption of the nonpartisan system.

I'd like to begin it by a brief reference to the question that has come up for the first time today, that is, what is the -- what is the legal consequence of the Attorney General's acquiescence or his agreement that a particular form of submission or consent judgment is appropriate.

QUESTION: Was this issue ever presented to the three-judge court as to whether or not the Attorney General's agreement ousted the Court's power?

MR. DERFNER: I don't think it was presented in any full sense. My recollection is that --

QUESTION: That is one of the questions presented here.

MR. DERFNER: My recollection -- I understand that, your Honor, Mr. Justice White. My recollection is that the city prepared the plan and prepared a cover consent judgment which it circulated that the Attorney General and his representatives signed that the representatives of the two intervenors did not sign, that the city then submitted the matter -- submitted that judgment as a proposed consent judgment to the district court and that the two intervenors filed brief memoranda saying that they didn't agree and thought it should not be accepted since it did not have the consent of all parties in the case and as far as I know, that was the end of the matter.

There was no legal argument nor any memoranda nor any further effort by the city to argue that point.

I would say this on that subject, that I think the structure of Section 5 was initially exclusively -- initially created in exclusive remedy for the city in the district court by declaratory judgment, that during the hearings in the Senate, as I recall, Attorney General Katzenbach was asked, wouldn't this be a great burden for a number of changes that would be quite minor?

And he acknowledged that it probably would be and it was after that, while the hearings were going on, that

the Government came back, or the legislative draftsmen of the Justice Department came back, with the provisio which is now in Section 5.

It was initially understood, I believe, that the provisio would be a limited remedy and that the declaratory judgment would be the predominant one. As it has happened, mechanically, it has gone the other way around.

QUESTION: But, surely, the statutory language gives no intimation of that sort of a legislative purpose but the consent of the Attorney General is valid only in the case of some things that are covered by the declaratory judgment portion of the statute but not all of them.

MR. DENNIS: But this Court, in Georgia -- in the Georgia case -- made it plain that the Attorney General operates as a surrogate for the court, as a substitute, if you will and I think it would be improper to say that the surrogate can swallow up the court once jurisdiction of the court is attached.

I would also remind the Court of its brief reference in the Allen case, the very first case dealing with a submission under the Voting Rights Act or with a question of whether something had to be submitted.

There, the Attorney General of Mississippi argued, that we sent this change to the Attorney General and never heard anything. Therefore, we take it that he has let that

60 days pass and this Court talked about the requirement, the requisites of formality and formal submission.

QUESTION: Yes, but if the Attorney General is given a formal submission and approves it under the language of the statute, then there is no action for a declaratory judgment in the District of Columbia.

You agree with that, don't you?

MR. DERFNER: In the ordinary case, that is true.

QUESTION: What case other than the ordinary case, where would you find jurisdiction for that sort of an action?

MR. DERFNER: I don't think that the attorney -- well, I think that the jurisdiction, once it attaches on the district court --

QUESTION: Well, I am talking about a case where jurisdiction is never -- the Attorney General has approved and then an action is sought to be brought by someone else, presumably, since neither the city has to bring it and the Attorney General chooses not to bring it.

Under this three-judge District of Columbia declaratory judgment statute, who could bring that sort of an action?

MR. DERFNER: The only action available at that point would be an action by a voter, presumably, seeking to review under either the Administrative Procedure Act or under the interstices of this act, seeking to review the Attorney General's failure to object but, clearly, there is no question

that the declaratory judgment court created under Section 5 would not be invoked if the Attorney General -- if the Attorney General's failure -- if the Attorney General had had a submission and failed to object without jurisdiction having attached.

But it seems to me that once the court's jurisdiction had attached, we have an entirely different matter.

QUESTION: The voter, even if the Attorney General had approved, would still, under the last sentence, have an action, I take it, in the Eastern District of Virginia.

MR. DERFNER: Under the 15th Amendment.

QUESTION: Under the 15th Amendment.

MR. DERFNER: Yes, unquestionably.

QUESTION: Quite apart from the statute, just as anybody with standing always would or could have.

MR. DERFNER: Yes, no question about that. But I think the last --

QUESTION: Quite apart from the statute.

MR. DERFNER: I think the last sentence was, essentially, a savings clause to make it clear that in any case, it could not be ousted.

QUESTION: Right.

MR. DERFNER: But it seems to me that it is quite wrong to read the statute as saying that the Attorney General can, to use the colloquialism, "pull the plug," on a

case filed before an Article III court, a special court created by Congress --

QUESTION: What if the only two parties in the case were -- the city brings the case, doesn't it?

MR. DERFNER: Yes.

QUESTION: And who does it sue?

MR. DERFNER: It sues the United States. I am not sure if it is -- it either sues the United States or the Attorney General. The practice has been to sue both.

QUESTION: All right, it sues. Now, then, let's assume, two weeks after the case is filed, the plaintiff moves to dismiss it. Do you think the court is disempowered to grant the motion?

MR. DERFNER: No, I think that the court --

QUESTION: What if the city has made a settlement with the Attorney General and he just moves to dismiss?

MR. DERFNER: I don't think the court is disempowered to.

QUESTION: I would think you would say that because the Attorney General and the city have just pulled the plug on the case.

MR. DERFNER: No, I am saying I think the court still has at that point -- has to review and has discretion. I think it is not disempowered to dismiss but I don't think the dismissal automatically has to follow and I think this Court

has dealt with --

QUESTION: Well, the fact is, the city never moved to dismiss in this case.

MR. DERTHER: The city never moved to dismiss. I am just reminding this Court again of its opinion in the -- it is a pair of opinions, I suppose, a pair of decisions in the New York case in which the rights of the intervenors have been a matter of great concern, not only to the courts but to the Justice Department. That has been a continuing controversy, but I still [illegible] the point that once the court's jurisdiction [illegible] and, especially once intervenors [illegible] have been let in with, I might say, the Justice Department's acquiescence in this case, that the court cannot [illegible] by the motion that might well have been available [illegible] would have been available had the court's jurisdiction [illegible].

QUESTION: [illegible], or any suit in the Eastern District of Virginia by any citizen under the 15th Amendment, does that mean any citizen?

MR. DERTHER: Any citizen with standing.

QUESTION: But the 15th Amendment gives no rights to white citizens.

MR. DERTHER: Pardon me?

QUESTION: Well, the 15th Amendment says -- "a citizen of the United States vote shall not be denied on account

of race, color or previous condition of servitude," so it would be --

MR. DERFNER: It would be a black citizen in the ordinary case; in the exceptional case it might conceivably be a situation where white citizens were discriminated against.

QUESTION: [illegible] going to amend the 15th Amendment?

MR. DERFNER: [illegible]

QUESTION: [illegible] to amend the 15th Amendment?

MR. DERFNER: [illegible] to do so and, [illegible] was brought in the [illegible] seeking to assert [illegible]

QUESTION: [illegible] under the 15th Amendment -- [illegible] were that a majority [illegible] in the particular [illegible] against white voters.

MR. DERFNER: [illegible] seeking to make in response to your question, Mr. Justice Marshall.

QUESTION: The white race is a race.

MR. DERFNER: Yes, and they are entitled to protection. I was just talking about the ordinary situation and

the Virginia situation being one in which, as a practical matter, white citizens have never been discriminated against on account of race.

QUESTION: In other words, you agree that because the objectives of the amendment were, at the moment, adoption, one race doesn't confine or define its scope.

MR. DERFNER: Unquestionably. Unquestionably. That, of course, becomes a somewhat different question when we are dealing with the appropriate remedy to be devised for a situation where there has been a history of discrimination against one race and that comes into this case, too.

QUESTION: That is a factual issue, though.

MR. DERFNER: Yes, it is.

QUESTION: It's a constitutional one.

MR. DERFNER: But as to the constitutional issue, certainly, the 15th Amendment goes, as you might say, both ways or always.

QUESTION: All right.

MR. DERFNER: I want to direct myself in the time remaining to the question of effect. I think unquestionably the addition of these 45,000 white people in the context of the population figures that were existing in Richmond, had -- and has a dilluting effect.

The question is how that dilluting effect is to be [illegible] and I think -- I think what the Petersburg case said

and the way the district court here read the Petersburg case, is that if we have no discriminatory purpose, you can over-- you can meet your burden as to effect by making a good faith showing that you have minimized the dilutive effect to the extent possible or to the extent reasonable. It is something, I suppose, of a reasonable man standard.

I think the district court here was suggesting -- I think there are two things that are different about this case. First, I think as the district court suggested in footnote 46 of its opinion here, there may well be a different standard as to how far one must go in ameliorating effect where there has been and is a discriminatory purpose.

In other words, it may be that the phrase "eliminate dilution" is appropriate in a discriminatory purpose case, whereas the phrase, 'minimize dilution' would be sufficient in a non -- in a case that [illegible] discriminatory purpose and, on this, I think we do get some support from the majority opinion in the case of Wright [illegible] of Emporia in which there was a discussion of the ways in which bad purpose or discriminatory purpose can affect the effects either by heightening the feelings of stigma or by casting some glow or gloss on the evaluation of the claimed legitimate purposes.

That is one thing, but --

QUESTION: What is your view of the question I asked your colleague, if there is a city council elected at large

and the blacks have a potential majority or an actual majority and then the city is single-districted so that the blacks can no longer elect all of the council?

MR. DERFNER: I don't think that is dilution because I don't think -- and in that large an election, the supposition that you might get all nine or virtually all nine of the council is, in a sense, a bonus that flows from the mechanism and to come back from that to --

QUESTION: So single-districting as long as the single districts weren't drawn to dilute themselves black power, it would be all right -- wouldn't they?

MR. DERFNER: Yes. Yes. At least in the ordinary situation where you were not coming on the heels of an annexation of this sort.

QUESTION: Yes, yes.

MR. DERFNER: When you are coming on the heels of an annexation of this sort, some different standards may apply. One that I mentioned is the idea that elimination rather than minimization may be required.

A second point I would make, though, is that in this case I don't believe the city has met its burden of proving that if nine-member plans did meet the effect test -- I would mention, since my time has expired -- just briefly that the city refused -- I think the record will show this -- the city refused to consider any other plans once it had its plan

drawn and the department's agreement. It refused to look at any other plans although I think it was not only arguably but definitely under an obligation given the background and circumstances to find the best plan available and I don't think that -- the Crusade's plans were not offered or are not offered as plans that are, in fact, necessarily better or constitutional or mandatory or anything like that, but are simply offered to show that even under the city's pattern, better alternatives were available.

It might be that the proper plan would not be one that had four black, four white and a ninth district somewhere in the middle, it might be that the better plan -- the best plan would be one that had essentially no uni-racial districts or one or two, if that is the best you can draw given neighborhoods with other districts being, in a sense up for grabs.

We simply sought to show that even under the city's pattern that a better plan can be drawn. We don't believe that bloc voting is an inevitable necessity.

The pattern has shown that where, in the most recent elections, there has been some departure from that because the Crusade did support two whites as well as several black candidates and I might point out that in judging the question of enhancement, had this annexation not taken place, the results of the 1970 elections, the most recent elections,

would show, if we took out the votes cast in the annexed area, that Crusado black candidates would have had four seats; two whites who were elected, one black who was elected and a fourth -- a second black, a fourth person who was elected in the old city but who was not elected because he didn't finish high enough in the annexed area.

I think by a variety of tests, the city didn't meet its effect test, it didn't meet its purpose test and I'd like to advert just very -- for 30 seconds -- to the Government's suggestion of an election.

We, too, believed that an election would be highly appropriate, that it has been five years since an election has taken place. But what the Government would have us do is to have the plan which the city was not able to show satisfied the voting [illegible] have that put into effect, have what amounts to a [illegible] what it could not [illegible] the three-judge court and, since the upcoming election will be -- will involve many that affect the future [illegible] of the City of Richmond and this annexation, I think that if it is not proper to have an election of that sort, if we are to have an election -- and there are many good reasons for having one -- I think that, at least for temporary purposes, it would be appropriate to have an election in the old city conducted under the old system.

I realize that raises significant 14th Amendment problems but I think we are in this situation -- we are in a very peculiar situation. I think peculiar remedies may be called for.

This case does not involve -- the decision of the district court does not mean that annexations of legitimate sort by cities legitimately and honestly seeking to meet their problems are in any way hampered.

What this case involves is simply the appropriate action or the appropriate [illegible] of the Voting Rights Act, of Section 5 of the Voting Rights Act on those changes which, like this one, it was designed to deal with.

QUESTION. Well, isn't one of the legitimate problems of many large cities the problem of white flight? And don't you -- is it totally ruled out under this act --

MR. [illegible]

QUESTION: [illegible] to take that into consideration in trying to get more white people into a metropolitan area where the thing is rapidly tipping?

MR. DENNIS. I don't think that. No, I don't think that is ruled out, but I think in this case what we had was much, much more.

Any annexation that Richmond might undertake or might choose to undertake after this case is over would, in part, be based on that goal, I suppose, and that in itself would

not be illegitimate.

It is this particular annexation which Richmond has sought to clothe in the legitimate garb of annexations in general that was infected by purposes far worse than the one that Mr. Justice Rehnquist means.

I am sorry I have overgone my time.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Very well. Mr. Venable.

Would you prefer to begin at 1:00 o'clock and not divide your argument?

MR. VENABLE: It makes no difference to me, your Honor.

MR. CHIEF JUSTICE BURGER: All right, you may proceed.

ORAL ARGUMENT OF [illegible] C. VENABLE, ESQ.

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

My name is [illegible]ball Venable. I represent Curtis Holt, Senior and the class of black voters in the City of Richmond.

Mr. Holt's involvement with this annexation goes back to before the annexation actually took place.

His first attempt at legal involvement in this case was a telegram sent to Mr. Justice Douglas in the fall of 1969 asking Mr. Justice Douglas to please intercede and prevent the annexation from taking place on the 1st of January, 1970.

Following that, he spent a year unsuccessfully seeking the aid of the Justice Department on his claim that this was a racially-motivated annexation that did no good economically or in future growth for the City of Richmond and had accomplished its sole purpose, which was to prevent black participation in the governmental affairs of the City of Richmond.

Failing, and despairing of securing that aid from the Justice Department, he filed a suit --

MR. CHIEF JUSTICE BURGER: We'll resume there at 1:00 o'clock.

MR. VENABLE: Thank you, sir.

[Whereupon, a recess was taken for luncheon from 12:00 o'clock noon to 1:00 o'clock p.m.]

AFTERNOON SESSION

MR. CHIEF JUSTICE BURGER: Mr. Venable, you may resume.

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

Several points were raised in argument by the Appellants and Intervenors and the Federal Parties. The first one dealing with mootness, the mootness question, I think, originally raised by Mr. Justice Rehnquist.

I think it is important to point out that neither the city nor the government, after submitting this attempted consent judgment, sought the dismissal, nor did they seek any other affirmative action other than to present it to the Court.

QUESTION: Sometimes, of course, we wash those issues out on our own, as you are probably aware.

MR. VENABLE: Yes, sir.

I believe the Government --

QUESTION: You could argue it is jurisdictional.

MR. VENABLE: Jurisdictional to the Court that the Attorney General has presented a consent order?

QUESTION: Well, that the Attorney General and the city now have agreed.

MR. VENABLE: I think they agreed as to effecture, Mr. Justice White, I don't think they agreed as to

purpose and that is why the Attorney General went on with the trial and even suggests today that we go back and consider even more the question of purpose.

I think it was only presented on the issue of effect and that the Attorney General then went on and took evidence in reference to purpose and even today doesn't believe that that focus was specific enough or detailed enough and would ask this Court to remand back for additional questions on purpose so it is not an approval nor is it a failure to object.

QUESTION: Well, you say, in effect, the Attorney General withdrew from the consent order?

MR. VENABLE: Yes, sir, I do.

In my brief I made a statement that four seats on the city council guaranteed fiscal control. I wish to point to the Court that I am in error on this. Five seats can pass a general approved budget.

It requires six votes for any special appropriation. So five seats on the council in the City of Richmond is fiscal control of the city as well as administrative control.

I disagree with the Solicitor General on the statement of this case. This case goes back to the 1950's and it goes back specifically to 1960 at which time the City of Richmond attempted to enter into a merger with Henrico County.

The record shows and the evidence is that the city limited all of its comments to the officials of Henrico County to the question that the city was having a fast-increasing black population and they needed more white people.

It is instructive to note that when the merger vote was held, 100 percent of all black voter precincts in the City of Richmond voted no to merger; 60 percent of all mixed precincts voted no to merger and the Crusade for Voters wrote a letter specifying to the Governor and to the press that merger was a dilution and an attempted dilution of their vote.

Following that time, the City filed two annexations, one against Henrico, one against Chesterfield and let the Chesterfield Annexation sit on the back burner.

They received an award from the Henrico Annexation Court of 16 square miles and $55 million and approximately 45,000 people, white people.

They turned down that award, and as they suggest, because it cost too much money, but because they found that the city charter wouldn't allow them to float bonds to pay for annexation. In 1966, they changed that law in preparation for the upcoming trial in the Chesterfield case.

In 1967, following their rejection of the Henrico award, secret meetings began between the city, the white officials of the City of Richmond, specifically excluding any black representatives, and continued up until the time of

the compromise with members of Chesterfield County Board of supervisors and their county manager.

The entire discussion from the very beginning was, we need white people.

They discussed politics. The poll tax is off. The blacks are increasing in their political participation.

They commissioned two political discussions and analyses of the 1966 and '68 elections which predicted that the blacks would receive at least four, possibly five seats in the 1970 election.

Also during this time they tried an end run with the general legislature of Virginia, something called the Aldhelser Commission which sought to allow the General Assembly to change the boundaries and one vice-chairman went on the stand, which is evidence in this case, and said, our sole purpose was to keep the blacks from taking over the City of Richmond.

To quote the Mayor, who headed up the negotiations, "As long as I am Mayor of the City of Richmond, the niggers won't take over this town."

To quote the Mayor again, speaking to another councilman at a meeting in Virginia Beach, "I did what I did in reference to the compromise because the niggers are not qualified to run the City of Richmond."

And that is the entire focus of the City of Richmond

from 1960 and it continues up until today.

To quote the present Mayor of the City of Richmond, "Once we get a ward plan," which he characterized as reconstructive, "and Section 5 of the Voting Rights Act expires, we'll hold an at-large referendum and get rid of that ward plan."

The city has resisted ward plans, single-member districts, from the very beginning up to and including the time in which it filed the suit in the three-judge district court in the District of Columbia and maintained the posture that the original [illegible] was perfectly all right and at-large expanded [illegible] were perfectly fine.

It was not until [illegible] Petersburg case that they even sought or acquiesced [illegible] plan and then what did they acquiesce in? A ward [illegible] the district court below found in and of itself [illegible] purpose to maintain white supremacy in the City of Richmond.

Now, we have proposed as a relief in this case, that the proper remedy in this situation -- I have proposed this in the District Court of Columbia. I proposed it in what is known as Holt II, which is still stayed, since December of 1971, where we sought an injunction because the Voting Rights Act had not been complied with.

I maintained it in Holt I.

The problem with that position is that we have a

basic assumption that an award of deannexation in this case would result in the end of annexation for cities and that simply is not the case.

An award of deannexation in this particular case would uphold the dignity of the Voting Rights Act of 1965, would serve notice that you can't go out to "Keep the niggers from taking over municipal government" and serve that purpose well.

It would not prevent cities from expanding, as -- as Judge Butzner of the Fourth Circuit so cogently noted, "divestiture --" his word for deannexation -- "would not mean that cities can't annex even where annexation would change the racial percentages of the population.

QUESTION: Do you argue that the mere fact of converting from a multi-member -- from an at-large to a single-member district system had a discriminatory effect?

MR. VENABLE: For a discriminatory effect, Mr. Justice White? No, sir, I don't argue that. I argue that in the context of a purposeful attempt to dilute the --

QUESTION: Tell me -- you said a moment ago that the purpose was to use the single-member district plan to maintain white supremacy. How would it do that?

MR. VENABLE: It would do it in this fashion. If you will note that the ward plan submitted by the county follows one and only one natural boundary and that is the

river. The reason it follows the river is to --

QUESTION: You mean it is the type of single-member plan? It is the way they drew their districts , you think?

MR. VENABLE: Yes, sir, the --

QUESTION: Okay.

MR. VENABLE: -- way they drew their districts plus in the question of the Georgia decision which dealt with the potential, the access, the potential access to the political process, a ward plan by its very nature guarantees a maximum.

QUESTION: Well, I know, but I thought you said per se you wouldn't say that a single-member district plan was dilutive, even though, if it were at large, the blacks might get all nine.

MR. VENABLE: I would not like it but I think in the context of what we -- what the cases have held.

QUESTION: What might you not like?

You might not like what?

MR. VENABLE: I would not like the change of an at-large system in the context of your first questions, I believe, earlier today, that where black citizens have played the democratic process, have given it adherance, to the whole concept of work within the democratic system and have worked hard to gain their political position, to have that rug jerked out at the last minute, just when they were within grasp of political control, I think would violate all the

standards of fair play in the democratic process but, in answer to your question, in the pure abstract, going from an at-large to a single member is not, per se, dilutive. But you have to look at dilution in the context within which the change occurred.

Now, in the case of the City of Richmond, going from a ward plan -- I mean, from an at-large to a ward on the heels of what has to be the most classic case of out and out purposeful disenfranchisement, in that context, I believe that a ward system does not cure, nor even approach, the question of purpose or the question of effect, especially the ward plan prepared by the City of Richmond.

The Court, in dealing with that question of the burden of the city, it is characterized by Mr. Rhyne as the city, that that is an extra burden.

Actually, I think what the court is doing is relaxing the literal interpretation of the act, which says you have got two burdens.

You have got to prove no purpose and you have got to prove no effect.

What the court is actually doing in that case is saying, there is an exception to that rule.

There is an exception to a literal interpretation and I think the reasoning goes like this: That if you have a verifiably-objective, legitimate annexation, it serves all

the races of that community. It serves all the overriding governmental needs and purposes. And if it is objectively verifiable, then, and only then, do you come back to a Petersburg approach and seek to eliminate as much as possible any of the dilutive effect because if you can eliminate the effect, there is no need to send it back because you are harming the entire governmental structure in so doing.

QUESTION Mr. Venable, do you support an election proper?

MR. VENABLE: Do I support an election? Now, we have been asking for an election, Mr. Justice Brennan, since 1971. I would not --

QUESTION: In what ward?

MR. VENABLE: In the old city.

QUESTION: Only limited to the old city?

MR. VENABLE: Yes, sir.

QUESTION At large?

MR. VENABLE: At large in the old city.

The problem with this case is that it comes and has come before every court in a posture that was never envisioned by the Voting Rights Act.

It was envisioned by the very clear language that no change will be implemented unless it has been prior approved.

Now, whether or not the prior clearance situation is

agreeable, the fact is, that is what the law says and yet the city implemented this change, waited over a year before it sought approval, was rejected within a year and a half, only five days from a motion for summary judgment in Holt II did they ever go to the district court, and have never really made a formal submission since the beginning, since the very first submission.

So what we are dealing with is a fait accompli, as opposed to dealing with what this act was supposed to be all about, to shift the burden.

QUESTION: It wasn't all that clear that it was about annexation at the time this annexation took place, was it?

MR. VENABLE: I would agree with you, Mr. Justice Rehnquist, except for this fact: The facts of this case show uncontrovertibly -- and I think all parties admit -- that the white power structure of the City of Richmond set out with one purpose in mind and that was to disenfranchise the black vote in the City of Richmond.

Now, they knew that the Voting Rights Act covered changes which had the effect of disenfranchisement.

QUESTION: Well, that isn't quite the right word, is it?

MR. VENABLE: To affect voting.

QUESTION: It is a very debatable question whether --

to my mind -- whether, you know, you had to reach the results you did in Allen and in Perkins. I think a fair-minded lawyer could conclude that an annexation was not within the statutory language.

MR. VENABLE: Be that as it may, the fact remains that once it was clear -- once it was clear, what did the city do? It made a submission. Mr. Holt and Crusade made their submissions. It was objected to.

What did the city do from that point forward?

Nothing.

It took a motion for summary judgment [illegible] to bring them all the way to Washington in the District Court of Columbia [illegible] approval for the original annexation [illegible] plan.

Now, I think the city, [illegible] raised here today in our argument [illegible] original annexation [illegible]. What about the ward plan?

The court below found that the ward plan itself operated as a [illegible] white supremacy and control in the City of Richmond.

Now, [illegible] the city did not carry its burden in any [illegible] in the lower court because it cannot carry its burden in the lower court. The objective of the veritable legitimacy of this annexation, all the

Government -- and the Government and the city's arguments deal with, well, this is the consequential, incidental result of the legitimate annexation. The evidence is replete. I do not agree with the Solicitor General. From the very first day of Holt I, which is swallowed up in this case, the entire thrust of the Holt intervenors has been that one of the most glaring examples of why this annexation is a bad annexation is that it serves absolutely no Governmental purpose.

The Government and the city say, the courts recognize that annexations are inevitable. I will assent to that. But not this annexation was inevitable.

To approve by remand or otherwise this annexation would allot the City of Richmond into the worst possible annexation it could ever have, economically, administratively, racially and would serve notice that there is a way to avoid the prescriptions.

QUESTION: Mr. Venable, a little while ago, before some questions came, you were speaking of deannexation. Are you asking this Court to grant you that relief?

MR. VENABLE: Yes, sir, I am.

QUESTION: Was it denied to you below?

MR. VENABLE: No, sir, it was not. What happened below was that the Court merely said, your application for a declaratory judgment is denied. They then went on to say

that Mr. Holt's request for deannexation had considerable merit, took note of the fact that Holt II, which is as referred to, that is the Voting Rights case in the Eastern District of Virginia which is pending the decision of this court where we are asking for an injunction on the question that it is covered, hasn't been approved, that they, knowing the local nuances of such an order -- the mechanics of the deannexation order -- would be the proper one to carry it out.

In other words, if we deny the declaration, then the coverage question comes into focus. Is there coverage? Yes. Has it been approved? No. Therefore it must be enjoined and that court could then have the machinery rather than the District Court of Columbia to carry it through.

I had also suggested that the state court is still in force, the annexation court, by agreement of the parties, the city and the county, which also could be used as an arbiter for any problems.

Deannexation is a very reasonable remedy.

QUESTION: You took no cross-petition here.

MR. VENABLE: No, I did not, sir.

QUESTION: You can't enlarge the relief granted you by the district court, then, I believe, under our rules.

MR. VENABLE: I understand that, Mr. Justice Rehnquist. The problem is, however, that like in Allen,

everything is here. No more can really be said. Perhaps the statement of this Court in affirming the District Court of Columbia could state the effect of its ruling. Because I foresee, very sincerely, that we will go back, if the lower court is affirmed, as I think it must be, and we will go back to Holt II and we will then have to fight the question of coverage and whether or not that court has more jurisdiction than this Court granted it in the Allen case, which is to go into substance.

QUESTION: Is there a reason you didn't cross-petition?

MR. VENABLE: Was there a reason at the time I did not cross-petition?

QUESTION: Yes.

MR. VENABLE: Yes, sir, because I felt that it wasn't necessary, as under Allen, where there was not a question of cross-petition, this Court said, we will -- we could send it back but everything is here. We can grapple with the problem now and issue a ruling and then send it back consistent with that.

What I am asking this Court to do is to grapple with the remedy and send it back consistent thereto. I think deannexation is an eminently reasonable -- and under the facts of this case, it requires no great time.

You are talking about having immediate elections,

this deannexation could occur in 30 days, by all the evidence in this case.

QUESTION: A cross-petition would have better protected your rights, wouldn't it?

MR. VENABLE: Yes, it would, and I am in error if I have denigrated my rights in that respect.

I see that my time is up. Thank you.

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

Mr. Rhyne, you have eight minutes remaining.

REBUTTAL ARGUMENT OF CHARLES S. RHYNE, ESQ.

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

There is an error on page 57 of our brief that I would like to correct first of all. We refer there in the last paragraph, to the median family income of $12,400 in the annex area, to $7,692 median income in the remaining part of the city and then on down four lines from the bottom, we say, those with median family income under $20,000. That should be under $4,000, which is the poverty level.

QUESTION: Change $20,000 to $4,000.

MR. RHYNE: To $4,000.

Now, I would also, because my distinguished colleague, Mr. Wallace, has called my attention to it several times, point out that the Government does not take the position here that there isn't evidence -- and overwhelming evidence -- to

support the fact that the city does have an objectively-certifiable -- verified legitimate reason for retaining the annexed area and they say that in their brief on pages 30 to 35 so that they agree that the evidence is there.

The only reason they made reference to a possible remand was to lean over backwards in case someone might come up with something else. But they feel that the best solution of this is to get on with the election.

Now, on purpose, I think we ought to be fair about it.

QUESTION: Now, to get on with the election, everybody seems to agree about that, but -- in his way, but Mr. Venable just told us, when he was talking about that, he was talking about getting on with an election and confining the electorate to the old city.

Now, what sort of -- getting on with what kind of an election are you talking about?

MR. RHYNE: An election under the non-ward plan which we feel is the only fair election where the black citizens of Richmond will have full representation and participation in a political process because they are there guaranteed four seats.

Now, with reference to deannexation, Mr. Justice Stewart and Mr. Venable, I would call attention to the fact that the Crusade, in their representation to the three-judge

court below -- and we have quoted this on pages two and three of our brief -- opposed deannexation, said that this would leave the city an empty shell, a worn-out shell and it wouldn't have the room or financial resources to provide a good life for its citizens.

It would also instantly transform the schools from a black majority system to a virtual black system.

So I would seek very earnestly that deannexation, other than Mr. Venable, everybody agrees is a bad remedy and we sincerely urge that on purpose, that Mayor Bageley was the only one who was quoted throughout and Mayor Bageley has been off the city council now as mayor since 1970. He has nothing to do with this ward plan.

There are only two people left on the council who were on there at the time of this bad-purpose settlement and these people have worked awful hard to bring this about. They are not bigots or racists in Richmond, Virginia. I think this is shown by the fact that the white people have elected so many blacks to the council and they have an enormous number of blacks who take part in their city government.

I think there are -- how many departments are headed by blacks? Seven or eight? Seven.

This is not that kind of a city and so I think that if you are going to talk about purpose, let's be fair about it. One man's terrible word in a bathroom down at Williamsburg

shouldn't smear the good people of an entire city and who is going to pay the penalty for the bad purpose?

It shouldn't really come down that way.

The Government is obviously satisfied that there is no bad purpose here, or they never would have signed this or agreed to this ward plan and this solution.

QUESTION: Well, don't you have to persuade us that the district court's finding against you on that point is clearly erroneous?

MR. RHYNE: And we urge that it is, your Honor. The evidence is overwhelmingly against that finding. The mere fact that the Attorney General agreed to it is some evidence.

In the other evidence on the ward plan is such. It is only this so-called 'extra burden' and the economic thing where they say we didn't satisfy it. They never have told us just what the extra burden was. So we met our burden overwhelmingly and we -- with the Attorney General -- presented this nine-ward plan.

So I -- and I think that all the evidence there was in support of this plan and proved that the city now, in connection with this plan, doesn't have a bad purpose and certainly, the ward plan doesn't have a bad effect.

It gives everybody a fair participation in the government of the City of Richmond and so, again, we urge that this Court find that the consent judgment is the best

possible solution.

Not a perfect one. There is no perfect solution. But it is the best possible solution and let the people of Richmond get on with this.

They have been litigating and litigating and litigating and this reference to the 15th Amendment, well, that has been all the way up here and the Fourth Circuit held no 15th Amendment rights were violated by this annexation but you just go over and over and over it again.

So we urge you to end it. It can be ended. They can have an election within 60 days and Richmond can govern its own affairs and get out of the courts.

That is what we urge the Court to do.

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

[Whereupon, at 1:25 o'clock p.m., the case was submitted.]