IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-201

CITY OF RICHMOND, VIRGINIA,

Appellant,

v.

UNITED STATES OF AMERICA and
WILLIAM B. SAXBE, ATTORNEY GENERAL, and
CURTIS HOLT, SR. *et al.* and
CRUSADE FOR VOTERS OF RICHMOND, *et. al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR THE APPELLANT

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THE CRUSADE HAS FORESWORN ITS EARLIER POSITION

The Crusade For Voters (Crusade), in an about face, has adopted Holt's position in its Brief proper as to de-annexation, thereby abandoning its earlier position.

Before the Court below, the Crusade argued strongly for a "fairly drawn ward plan", and was diametrically opposed to de-annexation, for good reason. For example, in its *Objections to Report of Special Master,* (in Court below) which recommended de-annexation, the Crusade noted, at p. 2, 3:

> "The result was a decision which sacrifices the real voting interests of live black voters in the City of Richmond in order to preserve the Voting Rights Act as an abstraction.
>
> "This ironic result comes about because the Special Master's recommendation would return Richmond to its old boundaries. Elections would be conducted on the old at-large basis, in contrast to the Crusade's proposal that dilution would be avoided by allowing Richmond to expand and by holding elections according to a fairly drawn nine-ward system.
>
> "The reality is that the Special Master's conclusion hurts black voters in Richmond for two fundamental reasons:
>
> "(1) As a practical matter, because of the comparative population and registration figures by race in the old City, and because of the realities of at-large elections, black voters in Richmond stand a better chance of exercising real influence with their votes under a fairly drawn ward election system – even with additional white voters – than under at-large elections;
>
> "(2) To the extent that Richmond's black voters do exert influence in the governance of their city, it is no great gain to exercise that influence in a worn-out shell which does not have the room nor financial resources to provide a good life for its citizens."

Further, at page 7 of its *Objections to Report of Special Master,* the Crusade stated:

> "If deannexation were ordered, the potential benefits of annexation would not be realized and additional problems would arise. In particular, the Richmond public schools would instantly be transformed from a black majority system to a virtually all-black system with staggering implications for the course of the desegregation efforts in which Richmond blacks have been involved for more than a decade.
>
> "The testimony and problems referred to above make it clear that the City of Richmond will suffer substantial economic and social deprivation if deannexation is ordered. . . ."

and, again, at page 9, the Crusade states:

> "Deannexation in this case would be a perfect example of the solution which is obvious but wrong."

Finally, in concluding, at page 10, the Crusade stated:

> "The Crusade for Voters of Richmond submits that the report of the Special Master should be rejected insofar as it recommends deannexation. . . ."

The Crusade proposed ward plans (J.A. 163, 164, 165), as discussed by both the City and the Federal Parties in their Briefs on the Merits, had no relation to voting age population, or, indeed, to present population. They were designed solely to provide a black majority on the City Council, and would result in substantially disproportionate representation. Whether or not it now feels that such plans may be unconstitutional themselves, the valid factual and legal

reasons why de-annexation is improper have not changed. The minds of the Crusade may have changed, the facts have not.

The Crusade states that, in the event of de-annexation, "Nothing prevents Richmond from seeking another annexation upon completion of this case." (Crusade Brief, p. 23). This is not true, as is pointed out by the Crusade in the same brief, at page 17, in that "Virginia itself has enacted a five-year moratorium on annexations. . . ."

THE ATTORNEY GENERAL'S ROLE IS NOT A "PASSIVE" ONE, AND HIS OPINION IS ENTITLED TO GREAT DEFERENCE.

The Court below, because of an ostensible impermissible purpose, has required an "extra burden" of the City, "to purge itself of discriminatory taint." (JS App. B, p. 20). In the factual situation here, this can only mean that the City is required to somehow purge itself of the *purpose* by showing that the *effect* of its voting change will be disproportionately favorable to the black voting population. The Intervenors Crusade and Holt both attempt to support this "extra burden" requirement, but in fact fail to do so, and in failing to do so, they, as did the Court below, gave no weight whatever to the fact that the 9-Ward Plan presented by the proposed Consent Judgment herein had and has the approval of the Attorney General of the United States.

As the City has stated in its brief (p. 38-39), this is an improper amendment to the Act, formulated by the

Court. Nowhere in the Act, or the legislative history, does such a requirement appear, and nowhere there is it suggested that two distinct violations as to "purpose" and "effect" could occur.

In reaching its conclusion, the Court below has ignored the view of the Attorney General, the officer charged with enforcement of the Act. (United States' Motion For Modification Of Master's Report, [in Court below] pp. 4-6; Brief For The Federal Parties, p. 13, 27-29).

The Attorney General's opinion is entitled to great deference, and should not be ignored. This Court stated in *Perkins v. Matthews,* 400 U.S. 379, 390-391:

> "Our conclusion that both the location of the polling places and municipal boundary changes come within § 5 draws further support from the interpretation followed by the Attorney General in his administration of the statute. '[T]his Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration.' Udall v. Tallman, 380 US 1, 16."

In *Udall v. Tallman,* 380 U.S. 1, in considering the effect of an Executive Order upon the Secretary of the Interior's authority to issue oil and gas leases, the Court upheld the Secretary's interpretation of the order. Quoting *Power Reactor Co. v. Electrical Union,* 367 U.S. 396, 408, the Court added:

> " 'Particularly is this respect due when the administrative practice at stake "involves a contemporaneous construction of a statute by the

men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." ' "

This is our situation in the instant case. The Act itself, of course, is not new, but the application to the factual situation here is most certainly so.

The Attorney General's opinion is entitled to equal deference as to his approval of the City's 9-Ward Plan, at issue here. (MCX 15, J.A. 161). As pointed out in the City's brief (p. 62), the Court below gave no weight to his approval. Intervenor Holt's assertion that, aside from endorsing the Plan, the Attorney General's role was a passive one (Brief for Appellee Holt, p. 55) cannot be supported.

Indeed, the Attorney General and the United States are, with the City, the real parties herein. It is the Attorney General's duty to enforce the Act, and he is given equal responsibility with the District Court for an initial decision upon voting changes. He is the only "expert" we have in this area. His interpretation is entitled to great deference. *Perkins v. Matthews,* 400 U.S. 379, 390-391; *City of Petersburg v. United States,* 354 F. Supp. 1021, 1031 (D.D.C. 1972), *aff'd,* 460 U.S. 962.

THE CRUSADE'S RELIANCE ON *GOMILLION V. LIGHTFOOT* IS MISPLACED

The Crusade's attempt to characterize this case as one similar to *Gomillion v. Lightfoot,* 364 U.S. 339, (Brief p. 11, 13), is misplaced. That case established

that redistricting done with a purpose of completely excluding black voters from a city violates the Fifteenth Amendment. There is nothing of that sort involved here.

This case is a progeny of *Perkins v. Matthews,* 400 U.S. 379, involving a dilution of black voting strength. *Id.* at 390. That case rested upon the concept of voting set out in *Reynolds v. Sims,* 377 U.S. 533, an equal protection, Fourteenth Amendment consideration. *Perkins v. Matthews, supra* at 390.

Indeed, here the redistricting – the annexation plus the 9-Ward Plan, not only does not exclude blacks from the City or from the political process, it enhances black voting strength. (Appellant's Brief, p. 42, 43; Brief of the Federal Parties, p. 24).

The Crusade, in fact, effectively adopts the Master's conclusion that an impermissible purpose can never be cured, since dilution cannot be more effectively eliminated than is done by the 9-Ward Plan. If the 9-Ward Plan does not effectively eliminate dilution, what can? Anything further would be racial gerrymandering in itself, causing a disproportionate number of black seats on the City Council, and would appear to run afoul of both the Act and the Constitution.

THE OBJECTIVELY VERIFIABLE, LEGITIMATE PURPOSES OF THE ANNEXATION HAVE BEEN PROVEN, AS SHOWN BY THE RECORD

Both Intervenors Holt and the Crusade continue to argue in their Briefs that the City has shown no

legitimate purpose for the annexation. (Crusade Brief, p. 14; Holt Brief, p. 25, 28). We do not repeat here the arguments, based on the extensive record, which totally refute that contention. (Brief For the Appellant, pp. 51-59; Brief for the Federal Parties, pp. 30-35). We are constrained to point out the following misconceptions of the Crusade and Holt.

Intervenors belittle the effect of the annexation decree of the Virginia Court (J.A. 40). The duty of that Court was to determine whether there was any "necessity for and expediency of annexation", the statutory guide. § 15.1-1032 *et seq.*, Ch. 25, Code of Va. To do this, the City had to prove the legitimate purposes and needs for annexation. The Intervenors speak only of the compromise in drawing the boundary line. That was not a compromise as to the essential issue – the necessity for annexation of some territory from Chesterfield County. The Annexation Court found that "the evidence overwhelmingly convinces us of the necessity for and expediency of some annexation. . . ." (J.A. 42). The Annexation Court did, indeed, decide this question.

Further, Intervenors rely upon the District Court decision in *Holt v. City of Richmond,* 334 F. Supp. 228 (E.D. Va. 1971), *rev'd,* 459 F.2d 1093 (4th Cir. 1972), *cert. denied,* 408 U.S. 931 (*Holt I*), for the finding of impermissible purpose. Indeed, the only evidence of purpose is from that record, the District Court having found that the compromise agreement, affecting the 1970 election, was wrong. (It is a fact that, given the racial make-up of the population, any annexation, with any boundary line, would involve a greater majority of white persons, and a small minority

of blacks). However, that District Court also found that annexation was necessary and that the City would ultimately prevail in annexation. 334 F. Supp. 234, 236.

The necessity for, and legitimate purposes of, the annexation were thus apparent to the *Holt I* District Court.

The Crusade cites Thomas Muller, *Fiscal Issues of Local Growth,* PUBLIC MANAGEMENT, May 1974, for the proposition that annexation of a suburban area may cause a fiscal deficit. (Brief p. 16). This is, of course, a general statement. However, Thomas Muller, co-author with Grace Dawson, of "The Impact of Annexation on City Finances: A Case Study in Richmond, Virginia," The Urban Institute, May, 1973, a study specifically concerning Richmond, found that Richmond realized a surplus from the annexation. We are concerned with the actual case of Richmond, not generalities.

THE PURPOSE OF THE HEARING BEFORE THE MASTER WAS TO TAKE TESTIMONY ON DILUTION ONLY

There is a great deal of argument in the briefs as to whether the City did, or was required to, introduce further evidence on the economic and administrative aspects of the annexation at the Hearing Before the Master. (Crusade Brief, p. 14; Holt Brief, p. 27-28; Brief for the Federal Parties, p. 35). The Court below, as well, assumed that the City should have done so, stating:

> "The Master concluded that the 'City has failed to establish any counterbalancing economic or administrative benefits of the annexation.' The Master's conclusion was predicated upon findings of fact supported by direct testimony before him." (J.S. App. B, p. 20).

The City has fully discussed this issue in its Brief, p. 51.

However, to put the question to rest as to the scope of the hearing before the Master, the order of the Court below, dated July 23, 1973, is reproduced below:

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITY OF RICHMOND, VIRGINIA	)	
	)	
Plaintiff	)	
vs	)	Civil Action
	)	No. 1718-72
UNITED STATES OF AMERICA and RICHARD KLEINDIENST	)	
	)	
Defendants	)	Filed
and	)	Jul 23 1973
	)	James F. Davey, Cle
CURTIS HOLT, SR., et al	)	
	)	
and	)	
	)	
CRUSADE FOR VOTERS OF RICHMOND, et al	)	
	)	
Defendant-Intervenors	)	

ORDER

It is, this 23rd day of July 1973,

ORDERED that this matter is referred to United

States Magistrate Lawrence S. Margolis to act as Special Master under Rule 53(c) of the Federal Rules of Civil Procedure for a hearing on the merits and to take testimony on the issue of whether the City of Richmond annexation plan as amended has the purpose or the effect of diluting the black vote in that City. The Master will file his report, making findings of fact and conclusions of law. The Master shall have all the powers stated in Rule 53(c); and it is

FURTHER ORDERED that the Master is hereby authorized to employ a stenographic reporting service with the cost of such service to be paid by the City of Richmond, including transcript; and it is

FURTHER ORDERED that the Master proceed with all reasonable expedition in completing his assignment.

/s/ J. Skelly Wright

/s/ Wm. B. Jones

/s/ June L. Green

Later, at a prehearing conference before the Special Master, this issue was expanded to include whether the initial annexation had the purpose or effect of diluting the black vote. There was no order entered.

Nowhere does it appear that the economic or administrative aspects of the annexation were even the subject of the hearing before the Master, and both the United States and the City objected to the economic testimony offered by Holt and declined to cross-examine. (MTR 668-672).

THERE IS NO DECREASE IN VACANT LAND AREA

Holt's contention that the annexation resulted in "AN ACTUAL DECREASE" in vacant land (Holt Brief, p. 31) is simply a numbers game, relying on percentages of vacant land to total land area. To annex at all, Richmond must annex suburban land, contiguous to the City, which is very developed. That is the only area available, and that is part of the rationale of the annexation standards. C. Bain, *Annexation in Virginia,* Univ. Press of Va., 1966. It is necessary to annex a large area in order to acquire some vacant land, because suburban areas are developed. Actually, 7,701 acres (approximately 12 of the 23 square miles annexed) was vacant land. (HPX 15). It is, of course, impossible to *add* vacant land to a city, and by doing so, *decrease* the vacant land in the city.

CHRONOLOGY OF EVENTS

The long history of the Annexation, and the proceedings related thereto, have been described in detail in the Brief of the Appellant, as well as the other parties. Because of the complexity of the events, and the various actions and lawsuits involved, it seems proper and helpful to set out a simple chronology of events.

1. In the 1950's studies showed that expansion of Richmond's boundaries was a necessity, because of large

population movement, especially of the young and affluent to the suburbs (JA 365, 369, 370); the need for vacant land for commercial and industrial development (JA 364, 370); and the increasing cost of government, directly related to growth of low income population. (JA 370).

2. In 1960, the City and Henrico County entered into an agreement for consolidation of the two governing bodies.

3. On December 12, 1961, a referendum was held on the agreement. Voters in the City approved the plan, but voters in Henrico County disapproved, and the plan failed. *Holt v. City of Richmond,* 450 F.2d 1093, 1094, (4th Cir. 1972), *cert. denied,* 408 U.S. 931.

4. On December 26, 1961, City Council adopted two annexation ordinances requesting convening of three-judge annexation courts and seeking the award of approximately 150 square miles of Henrico County and approximately 51 square miles of Chesterfield County.

5. In 1962, suit proceeded against Henrico County; the Chesterfield County suit held in abeyance.

6. In 1965, the annexation court awarded the city approximately 16 square miles of land area, from Henrico County, which contained 42,690 white persons and 660 black persons.

7. In March, 1965, City Council rejected the award, because the financial burden imposed on the city, $55 million, was out of proportion to the amount of territory awarded. (*Holt v. Richmond, supra*, 459 F.2d at 1095). (These actions took place prior to the Voting Rights Act of 1965, which became law on August 6, 1965).

8. The suit against Chesterfield County was then reactivated.

a. In September, 1968, after jurisdictional delays, the case came on for trial. In January, 1969, one judge disqualified himself, resulting in a mistrial.

b. In May, 1969, trial began anew and continued through June, 1969.

9. On July 12, 1969, the final order of the annexation court awarded approximately 23 square miles of land area, which contained 47,072 people, of which 1,389 were black and 45,683 were white. The population of Chesterfield County prior to the annexation was 102,633 white and 9,845 black persons. (MCX 1,2,3, MTR 210,233).

10. The annexation court adopted a compromise agreement between the City and county, the City having been fearful of another unpalatable award as with the *Henrico* suit (HTR 362, Vol. II, and 455, Vol. III, of 4 Volumes). The Court found the "necessity for and expediency of some annexation. . ." (JA 42).

11. Appeals instituted by intervenors were denied by the Court of Appeals of Virginia. A motion for stay of the effective date of annexation and a petition for certiorari were filed in this Court.

Prior to January 1, 1970, the effective date of annexation, the motion for stay was denied separately by Justices Douglas, Marshall, and Brennan. On April 20, 1971, the petition for certiorari was denied. *City of Richmond v. County of Chesterfield*, 208 Va. 278, 156 S.E.2d 586, *cert. denied, sub. nom. Deerbourne Civic & Recreation Ass'n v. Richmond*, 397 U.S. 1038.

12. January 1, 1970, pursuant to the annexation decree, the City took jurisdiction over the area.

13. On June 10, 1970, election for City Council was held in the enlarged City, with voting on the at-large basis in effect since 1948.

14. January 14, 1971, this Court decided *Perkins v. Matthews*, 400 U.S. 379, holding that the provisions of §5 of the Voting Rights Act extended to annexations which expanded the electorate, causing "dilution" of the weight of votes of the voters to whom the franchise was limited before the annexation.

15. January 28, 1971, the City Attorney, on behalf of the City, sought approval from the Attorney General, pursuant to §5, of the annexation with the at-large voting procedure. (Ex. A to Complaint, JA 20).

16. February 16, 1971, the Assistant Attorney General replied that the request was being considered, and that he would determine if any further materials were necessary for a determination.

17. February 24, 1971, a class action was instituted in the United States District Court for the Eastern District of Virginia, by Curtis Holt, Sr., alleging that the voting rights of the Plaintiff class, guaranteed by the Fifteenth Amendment, had been violated by the annexation.

18. March 5, 1971, the City submitted additional material to the Attorney General.

19. May 7, 1971, the Attorney General declined to approve the voting change resulting from annexation, in light of the at-large voting procedure (MTR 50, 53, Ex. B of the Complaint, JA 23), and referred the City to the lower court decision in *Chavis v. Whitcomb*, 305 F. Supp. 1364 (S.D. Ind. 1969). This case was reversed by this Court, on June 7, 1971, *Whitcomb v. Chavis*, 403 U.S. 124.

20. August 2, 1971, the City requested the Attorney General to reconsider his objection in view of the reversal of *Chavis*.

21. September 20, 1971, trial began in *Holt v. Richmond*, 334 F. Supp. 228 (E.D. Va. 1971) (*Holt I*).

22. September 30, 1971, the Attorney General refused to lift his objection, again suggesting, as he had previously done, that the adoption of non-racially drawn single-member districts was a means of minimizing the racial effect. (Ex. D to Complaint, JA 31).

23. November 23, 1971, the District Court in *Holt I* held that the annexation had the purpose of abridging the right to vote on account of race or color in violation of the Fifteenth Amendment. The Court found that annexation in some form was "inevitable", but found the compromise agreement, resulting in annexation, was improper (See Item 10 above) and that some City representatives were racially motivated in bringing about annexation so as to affect the upcoming 1970 elections. (334 F. Supp. 228).

24. The Court, holding that de-annexation was not required or appropriate and was impractical, (334 F. Supp. at 238), ordered a new election of City Councilmen, seven to be elected at-large by residents of the pre-annexation, or old, City, and two elected primarily from the newly annexed area.

25. December 8, 1971, this order was stayed by the United States Court of Appeals for the Fourth Circuit.

26. December 9, 1971, Curtis Holt, Sr. instituted another suit in the United States District Court for the Eastern District of Virginia (*Holt II*), alleging, *inter alia*, that the City had not complied with Section 5 of the Voting Rights Act.

27. The three-judge court in *Holt II* refused to enjoin the council election scheduled for May, 1972, and upon application to the Chief Justice of the United States, on April 24, 1971, that election was stayed until further order. 406 U.S. 903.

28. Trial of *Holt II* was continued on motion of the City and Plaintiff pending the decision of the Court of Appeals in *Holt I.*

29. May 3, 1972, the Court of Appeals rendered its decision in *Holt I*, reversing the District Court, finding that no violation of the Fifteenth Amendment was worked by the annexation. Certiorari was denied by this Court. *Holt v. City of Richmond*, 459 F.2d 1093,1100 (4th Cir. 1972), *cert. denied,* 408 U.S. 931.

30. July 5, 1972, the City again asked the Attorney General, by letter, to reconsider his objection, because it felt the decision in *Holt I* had determined the issues.

31. August 25, 1972, having received no reply from the Attorney General, and with the *Holt II* trial pending, the City filed this suit.

32. September 21, 1972, Attorney General replied to the City's request of July 5, 1972, (Item 30 above), stating that since the matter was pending before the court, reconsideration was discontinued. (Ex. A to Answer of Defendants, JA 38).

33. October 12, 1972, the Court in *Holt II* enjoined further elections.

34. March 5, 1973, this Court affirmed *Petersburg v. United States,* 354 F. Supp. 1021 (D.D.C. 1972), *aff'd* 410 U.S. 962.

35. March 8, 1973, at a preliminary hearing in this Case, the presiding judge of the court asked counsel for the City whether *Petersburg* controlled this case,

indicating he thought it was very similar. Counsel replied in the affirmative, as did counsel for the United States. (Tr. of March 8, 1973 hearing, p. 3,6).

36. The City Attorney advised City Counsel that, in the opinion of the attorneys, the City should submit a 9 - ward election plan, following *Petersburg*. (JA 394).

37. Plans were prepared and submitted to the Department of Justice. (JA 394).

38. The Department of Justice suggested modification of the plan. City Council approved the plan as modified by the Department of Justice (JA 394; MCX 15, JA 161).

39. May 15, 1973, Motion of City to consider Consent Judgment, jointly presented by City and United States, filed. (JA 5).

40. October 15, 1973, trial begun before special Master (JA 9).

41. January 21, 1974, Findings of Fact and Conclusions of Law of special Master filed. (JA 10, JS App. C).

42. March 21, 1974, hearing before three-judge court (JA 11).

43. June 6, 1974, order denying declaratory judgment.

CONCLUSION

The Act is concerned with voting changes, and that alone.

Here, the voting change is twofold:

1. An expansion of the electorate from the annexation, with predominantly white voters, thereby diluting black voting strength in the old City; and

2. A 9-Ward plan, which eliminates the dilutive

effect of the expansion of the electorate, by guaranteeing black voters 4 seats, corresponding to black voting strength (voting age population) prior to the annexation.

That is the change in voting practice or procedures which is before the Court. Although the form of the election system will be changed, in substance there will be no change at all in black voting strength. Therefore, the change as approved by the Attorney General of the United States should be approved by this Court as not abridging or denying the right to vote on account of race or color. Such a decision will leave the future of Richmond where it belongs - in the control of the votes of its citizens.

For the reasons stated herein, and in the City's brief, it is respectfully submitted that the judgment of the Court below should be reversed, and the case remanded with instructions to grant the City's request for declaratory judgment to the effect that the change in voting procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color.

Respectfully submitted,

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