The Battle for an Undiluted Black Vote in Louisiana: Recollections of a White Southern Civil Rights Lawyer

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INTRODUCTION

In 1970, there were only sixty-four state and local Black elected officials in Louisiana.[1] By 1984, there were 408 and by 1990, 527.[2] The increase came about in two steps. First, under the 1965 Voting Rights Act, federal voting registrars were sent to Louisiana and other Southern states

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[1] These included mostly minor offices usually in Black majority jurisdictions (26 aldermen, 13 constables and marshals, 7 Justices of the Peace). *See* JACK BASS & WALTER DEVRIES, THE TRANSFORMATION OF SOUTHERN POLITICS: SOCIAL CHANGE AND POLITICAL CONSEQUENCE SINCE 1945 51 (Univ. of Georgia Press, 1995).

[2] *See* Gerald M. Boyd, *Sharp Gain Found for Black Elected Officials*, N.Y. TIMES, Jan. 9, 1984, at B8 (confirming 408 Black elected officials were elected in Louisiana as of 1984); *see also* JOINT CTR. FOR POL. AND ECON. STUDIES, BLACK ELECTED OFFICIALS: A NATIONAL ROSTER 195 (1990).

to directly register voters.[3] This strategy replaced earlier, vain attempts to get the white Louisiana registrars to apply their rules equally.

In 1960, Black voter registration in Louisiana was only 30.9%; it doubled by 1970 to 61.8%.[4] Yet, due to widespread racial gerrymandering, this significant advance in the Black electorate had not produced many Black elected officials. The second step leading to the increase in Black elected officials, therefore, was the more complicated task of removing this obstacle. I became active in this arena and contributed to it.

The Voting Rights Act included a strong remedy to combat racial gerrymandering: Section 5, which required federal preclearance for all changes in voting procedures after 1965.[5] Section 5, however, was not self-executing. Litigation was often necessary to force jurisdictions to comply. Moreover, in some cases, the changes predated the 1965 Act, and traditional constitutional litigation was required. The federal courts frequently had to be employed to devise a neutral plan to replace the discriminatory one.

There were few changes in districting arrangements until the decennial census results became available around 1972. At that juncture, most governmental legislative bodies were compelled by the "one-person, one-vote" principle and enforcement litigation to modify their election systems to create districts of equal population under the new census. This created a great opportunity for gerrymandering away the newly won Black vote.

There were virtually no private lawyers in Louisiana at that time with the will and specialized voting rights litigation skills to perform this needed link to Black electoral success. The United States' Department of Justice could do a few cases, but they were spread thin throughout the South. Thus, enforcing the constitutional and statutory prohibitions against racially discriminatory districting in Louisiana became my project for the decade. Before it was over, I had litigated more than fifty cases challenging racial gerrymandering against Louisiana's school boards; police juries, the counterpart of county commissions; cities; towns; the state legislature; and, ultimately, Congressional districts.

This is a view from the trenches of a white civil rights lawyer native to the South. In addition to describing many of the cases and their outcomes, it provides insight into the litigation tactics and strategies employed, the political and demographic context, and some of the moral and ethical issues unique to being a white lawyer representing Black plaintiffs in class actions. I try to relate the experiences of a civil rights lawyer on the ground level, functioning as an implementer of rules and legal precedents established by the legal heroes of the civil rights movement.

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[3] *Editor's Note*: As this piece is a memoir, unless otherwise stated, the source for all assertions and alleged statements is the Author's own memories and experiences.

[4] Edward G. Carmines & Robert Huckfeldt, *Party Politics in the Wake of the Voting Rights Act*, *in* CONTROVERSIES IN MINORITY VOTING 128 (Bernard Grofman & Chandler Davidson eds., 1992).

[5] 52 U.S.C. § 10304.

Hopefully, my story will fill a gap in the saga of obtaining effective Black voting rights, the last step in converting the law on books to law in action. It is not the story of landmark cases in voting rights law—although some became significant—but of one lawyer and lots of little cases, which finally led to a payoff for Black community members, enabling them to elect officials of their choice in Louisiana. I like to think of it as the story of a parish priest, not a bishop.

There are three models of using law to effect social change: the movement support model, the law reform model, and the legal aid model. The movement support model supported the activities of the civil rights movement by removing the legal shackles on their activities, such as getting demonstrators out of jail so they could demonstrate again. This was the approach of civil rights legal organizations such as Lawyers Constitutional Defense Committee (LCDC), in its early days, and the Lawyers Guild. The law reform model favors affirmative lawsuits to change the law in a systematic way to advance the social and legal interests of a large class of people. For example, *Brown v. Board of Education*, and many of the cases brought by the Legal Services Program in the early days of the war on poverty, took this approach. The legal aid model takes an individual's legal problems and addresses them directly using the existing legal systems, such as getting an individual a divorce or preventing an eviction.

Some of my early work with LCDC employed the movement support model. However, as direct action for civil rights waned and the courts became more receptive to law reform, I moved in the direction of this model, particularly in voting rights cases. Although these cases reformed the law, making elections fairer, the result was to empower the movement by protecting the vote, through which the Black community could effect change.

In this context, I believed my special role as a civil rights lawyer was not to create major landmark law reform doctrines, but rather to implement and enforce those rulings. Throughout the South, including Louisiana, racial gerrymandering ran rampant after the 1970 census results. The methods, first labeled by my colleague Frank Parker of Lawyers Committee for Civil Rights under Law in Jackson, Mississippi, were: "packing, cracking, and stacking." "Packing" referred to the practice of packing as many Black voters as possible into one district to leave a minority of Black voters in neighboring districts. "Cracking" referred to dividing a concentration of Black voters into two or more minority-Black districts, classic line-drawing gerrymandering. "Stacking" referred to stacking or adding white voters to a district to dilute the Black vote resulting in yet another minority-Black district, accomplished by the use of multi-member districts or at-large, parish-wide elections. I confronted all of these in Louisiana.

I. ONE BLACK MEMBER OF THE LOUISIANA LEGISLATURE

My first voting case was a big one: challenging the Louisiana State Legislature. At that time, Dorothy Taylor was its only Black member. Oretha Hailey was a community activist and acted as an assistant to Taylor. I remember riding my motorcycle, my long hair draping out of my helmet, to Taylor's district headquarters to meet with them and look over maps. I would guess they saw me as an unconventional lawyer, but I had been recommended by Bob Collins of the Black firm Collins, Douglas, and Elie, whom they trusted, so they trusted me. Representative Taylor's district was an hourglass-shaped figure in New Orleans's Central City. It was virtually 100% Black. A similar district had elected Earnest "Dutch" Morial as the first Black member of the Legislature since reconstruction. The shape of Representative Taylor's district guaranteed her election indefinitely, but she and Hailey had other concerns. They believed that more Black people could be elected if Black voters were not so concentrated into a single district. We also observed that the legislature used multi-member districts in a number of areas with significant Black population concentrations, submerging them in majority-white districts. These were classic examples of the "packing" and "stacking" gerrymandering techniques.

I drafted a suit under the Fourteenth Amendment's Equal Protection Clause, which challenged not only the packing of Representative Taylor's district, but also the stacking of white people using multi-member districts in areas with high concentrations of Black voters, as well as "cracking" of Black concentrations by line drawing in both the Louisiana House and Senate. The case had to be filed in the capital city, Baton Rouge, where the only Federal Judge was E. Gordon West. Judge West, who got his appointment as the former roommate of powerful United States Senator, Russell Long, was notoriously opposed to civil rights. A companion case was filed by attorney Camille Gravel, a Democrat and bona fide white liberal who was representing union leader Victor Bussie. His co-counsel was Murphy Bell, a Black lawyer with an outstanding reputation for handling civil rights cases. He was one of my heroes and an early inspiration.[6] Bell argued that Black voters, like unions, would benefit from multi-member districts. Unions preferred multi-member districts because, with a minority bloc in these districts, they could control the election of several legislators. They apparently convinced Murphy Bell that Black voters could do the same.

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[6] Once, as a college student in Lafayette, I recall traveling thirty miles north to observe a "sit-in" case in Opelousas City Court. In those days, before the public accommodation provision of the Civil Rights Act of 1964, demonstrators attempting to desegregate lunch counters and the like were routinely charged and convicted of trespassing. Murphy Bell was presenting a brilliant argument on behalf of the sit-in demonstrators to an unconvinced Judge Dejean. I resolved that was what I wanted to do.

The fallacy of this, I believed, was that union candidates and Black candidates were treated differently by the majority. Any time a Black candidate ran, the white majority would vote as a bloc against that candidate, assuring regular defeat of the Black candidate of choice. With labor union candidates, by contrast, the majority would not necessarily vote against their candidate, they might have other, more important interests that would drive their vote. In other words, race was a defining characteristic and, when present, would totally control the white vote. Marty Feldman, who later became a judge on the Fifth Circuit, was there for the Republicans, who had not yet gained ascendency in Louisiana politics. They preferred single-member districts, because, especially in the suburbs, they could control more districts.

The plan was submitted for federal preclearance pursuant to Section 5 of the Voting Rights Act. It was no surprise that the Justice Department objected. In fact, the plan was so blatant that even Judge West, at an early hearing, commented that he would have found the plan unconstitutional for—among other reasons, "employing gerrymandering in its grossest form."[7] I seriously doubt that Judge West was as devoted to ending racial discrimination in districting as he was interested in stymying labor and benefiting the Republicans. We were seeking single-member districts as a remedy, even though this was contrary to the interests of our sometime allies, Democrats and unions, and beneficial to our usual adversary: Republicans. This was my clients' call, the class of Black voters represented by our named plaintiffs. I agreed with their position. Up to that point, the Democratic Party in the South, including Louisiana, sought Black votes and rewarded them with token patronage. However, it failed to slate Black candidates and failed to support Black people who ran for office. I think the Democratic Party got what it deserved. Similarly, unions remained largely segregated, limiting the advancement of Black workers. Single-member districts, with their resulting Black majorities, but overall reduction in the number of Democrat-majority districts, were a significant factor in the Democratic Party's demise and the Republican Party's rise in the South. But it was also responsible for the dramatic increase of Black elected officials.

Section 5 could invalidate discriminatory redistricting, but it did not give the Justice Department authority to provide a replacement remedy. The importance of our lawsuit was that we could impact the remedy. Initially, we were concerned because of Judge West's history of recalcitrance in civil rights cases, but he went along with our choice of single-member districts. This was probably not because of a desire to end racial discrimination, but rather because of his lack of love for unions and Democrats. An added benefit of having our suit in place was that, due to the short time before the elections and with the legislature out of session, Judge West did

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[7] Bussie v. Governor of La., 333 F. Supp. 452, 454 (E.D. La. 1971).

not give the state another bite at the apple in drawing another plan. Rather, he appointed a Special Master to draw one. He appointed Ed Stimel, head of the Louisiana organization, Public Affairs Research (PAR). The group was business-oriented but was not rabidly opposed to civil rights. The Special Master's appointment was not unusual. When called on to develop a remedy in redistricting cases, judges do not themselves push the pencil, but always appoint a Special Master. Stimel also did not push the pencil himself but delegated the task to his assistant, Riley Stonecipher.

The Special Master called for any interested party to come in and meet with Stonecipher about how the remedial plan should look. In these cases, the plaintiff's first step was to draw their own plan, not only to see the possibilities, but also to advocate a specific remedy. A model plan also demonstrated the plaintiff's required standing in the litigation. Standing requires a plaintiff to show that they suffered an actual, concrete injury, and that the injury is redressable. The Black plaintiffs' injury was that the redistricting illegally reduced their ability to elect representatives of their choice. Redressability required showing that a plan could be devised that corrected this defect. We also could use our plan as part of our allowable comment to the Justice Department while it considered an objection. The analysts on the Section 5 review team would also draw plans to determine if an objection was warranted.

In those days, the Special Master's task of pencil pushing was just that—drawing with a pencil. Plan drawing had not developed into today's computerized operations, which can generate an unlimited number of plans in short order, with any criteria one might imagine, such as: percentage of registered voters, race, age, participation level, and the like.

Census data was also not very detailed in the 1970s, especially in rural areas. In areas outside of the major metropolitan centers, data was not available by block, but rather by enumeration districts, which could be quite large. These factors limited the plan drawer who had to come up with districts approximating population equality pursuant to the one-person, one-vote constitutional mandate.

We met with Stonecipher and pitched our plan with its single-member district concept. If the legislature had adopted a second plan, it would have to be approved by the Justice Department. At the time, it was not clear whether this was required of a court-drafted remedial plan. Nevertheless, it was likely that the Special Master and Judge West felt that the Justice Department was looking over their shoulders. The plan devised by the Special Master did indeed set forth single-member districts for both the House and Senate that were similar to ours, although not quite as beneficial to Black voters.

Judge West approved the Special Master's plan and ordered it into force. The state declined to appeal, but four New Orleans area senators intervened and appealed to the Fifth Circuit about the redrawing of their districts. I recall on oral argument, Judge Coleman, in his Mississippi

twang, commenting to the senators: "I guess you are going to let the rest of the state root-hog for itself." I think Republican and conservative politics were seriously involved in the State's decision not to appeal.

The four senators were the most liberal (or the least conservative) members. Over the Taylor plaintiff's objection, they successfully got the Fifth Circuit to return the configuration of their districts to an approximation of their old lines, running "from the river to the lake" following the old plantation configuration, which had a small river front access with an elongated attached acreage.[8] The court affirmed the rest of the plan as we requested. The Supreme Court declined to review either part of the decision.

The upshot was that, by the end of the decade, Black candidates were successful in being elected to ten House and two Senate districts. Then, in its 1974 constitution, Louisiana made single-member districts permanent. The single-member district requirement, and some Justice Department action under Section 5, produced eighteen Black-majority House seats and five Senate seats after the 1980 redistricting.

II. How I Became a Civil Rights Lawyer

While this work chronicles the struggle for undiluted Black franchise in a crucial period of the civil rights movement, it does so from the personal and professional point of view of a white southerner. I've often been asked how and why I became a civil rights lawyer at a time when so few white southerners joined the movement or were even willing to support it, and when so many were violently opposed to it.

There was not a single moment of epiphany that convinced me of the moral, human urgency of the cause. Although the disparity between the rights and privileges of the races was in full view, my awareness of its injustice evolved over time, beginning in childhood, under the influence of a few, good role models.

I grew up in Lafayette, Louisiana, a small town—at the time— in the heart of Cajun country. Life in Lafayette in the 1940's was a boy's dream. Our safe and pleasant middle-class neighborhood was a perfect setting for children and their dogs to run free, play ball in the neighborhood vacant lot, and explore the woodsy area nearby, called in Cajun parlance, "the coolee." "Downtown" and school were an easy bike ride away.

It was a time when small business owners could afford such a life. My father owned a small clothing store. Nobody in the neighborhood seemed rich, except maybe the family who lived behind us. The fact that they owned one of the few department stores downtown was enough to

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[8] Taylor v. McKeithen, 499 F.2d 893, 900 (5th Cir. 1974).

prove their wealth. What really convinced me was the Cadillac in their driveway—complete with automatic transmission and electric windows—the TV in their living room, and the antenna tower in the backyard. Every Saturday morning, the neighborhood kids gathered before the TV to watch *Howdy Doody*. Even with poor reception and a snowy screen, it was a thrill.

My mother worked downtown as a stenographer. Each workday, my dad would pick her up in our family car to have lunch together at home while all of downtown was closed. Like most of our neighbors, we had a Black housekeeper, Gussie. At age fourteen, Gussie began working for my maternal grandmother. When I was born, she began working for my parents, looking after me like a second mother, while my mother and father worked. She even moved with us to New Orleans when my parents relocated there for a short time. Though I was too young to remember that time, my father told a story from those days that began to enlighten me about how Gussie, and all "Colored" people—the polite term then—were subject to very different rights and rules than the rest of us.

According to my father's story, when they first arrived with Gussie in New Orleans, he went with her on the streetcar, to show her how to get to the Black Catholic church. Gussie was very light-skinned, and though she proudly asserted her Blackness, she was often mistaken for white. Upon boarding the streetcar, my father paid their fares, and Gussie started walking to the back behind the movable "Colored Only" sign. The conductor warned her loudly, "Ma'am, you are supposed to sit here in the front." Gussie replied even louder, "Child, I'm Colored." The story was a funny one because of my father's embarrassment—miscegenation being the capital sin in the South.

This story also created questions in my mind as a child. Why did it matter where Gussie sat? And why was Lafayette strictly segregated—its schools, busses, theaters, cafes, bathrooms, water fountains, and even coke machines? No one even thought they were worth a comment.

Gussie usually remained quiet on such matters, until one day, when the injustice was plain before us, she confided in me: "*Sonny, it's just not right.*" Her words sensitized me and stayed with me as I grew older, so that I was not able to miss seeing the inequality and the contradictions going on around me. One notable example was observed at my Catholic school, where I was taught to value charity and equality among all. I was led to understand that everyone had a soul—even Black people. At the same time, the institution was thoroughly segregated. Although I wasn't ready to speak out about this at the time, the injustice of it stuck with me through high school.

My father was another strong influence on my growing awareness of the wrongfulness of racial discrimination. From his earliest days growing up as the adopted son of single mother, who was dirt-poor, and who lived on the margins between Black and white townsfolk, he comfortably

interacted with Black people and white people alike. But he was aware that the world around him didn't grant equality to all.

As a young man, he moved to New Orleans and got a job as a "barker" standing on the sidewalk of the Rampart Street tailor shops trying to pull business in. Most of these shops were owned by Jews and a few Italians whose customers on Rampart Street were mostly Black. His boss suggested that he move to Lafayette and set up a shop. So he hocked his high school ring—never to be recovered—and moved. He worked briefly for a shop called "New York Tailors" promoting it as "big-city styles" and then opened his own store—"Chicago Tailors." He sold made-to-measure suits to white people working in the depression-era Civilian Conservation Corps camps (CCC) and to Black people working on the cotton farms, taking orders with a deposit, sending the measurements to New Orleans wholesalers, and receiving the finished product on the Greyhound bus—the primary shipping vehicle at that time. He generally had a Black man helping in the store, first operating a shoeshine chair and later as a salesman. Business was mixed, but Black patrons were always a significant part of the clientele. It was a comfortable place for Black customers to come and hang out—located, I think purposely, on a principal street leading to the Black section of town. My father participated in the white community's civic activities such as Veterans organizations, Rotary Club, and Boy Scouts. He continued to have white patrons—especially those hard to outfit off the rack or who liked the prestige of a tailor-made suit—while keeping his Black customers. Privately, he would tell me that he believed that segregation and discrimination were not right. But he was careful not to speak publicly for fear of losing his white trade.

After renting tuxedos became the brunt of my father's business, he amusedly confided to me: "Fortunately, it does not dawn on the white people getting married on Saturday morning that the same suit was on a Black man Friday night." My father continued to be a great influence on me. He always privately counseled racial fairness. When the schools, faced with substantial white opposition, began to desegregate, he commented to me that he thought it was right. He absolutely never used racially pejorative terms referring to Black people and I could tell that he cautioned his hunting and fishing partners not to do so either when I was along. I would sometimes walk to his store after school to hang out and ride home with him at five. There were often several Black men hanging out and visiting in the store and I was aware of the warm respect he gave them all. He and my mother were also good employers to Gussie and I never heard either of them utter a harsh word to her, or to any other Black person. However, they did pay her the standard low wage for housekeepers at the time. This enabled my mother to work and earn substantially more, which grew my family's wealth at Gussie's expense.

While I was living at home, and sometimes later when visiting, I was careful not to be too outspoken. This was partly to protect my father's careful business balance and follow his lead, but also because of general

societal pressures. In my segregated, Catholic high school, little was said of race despite the clear injustices all around us. The local myth was that racism was minimal in southwest Louisiana due to the influence of the Catholic Church and the dominance of the French culture—about 80% of the people were both at that time. Indeed, the culture was different in north Louisiana as compared to the rest of the South, but these moderating forces were overstated. People had conveniently forgotten the region's history of lynching, as well as the rides of the Knights of the White Magnolia and the Ku Klux Klan. By the time I was growing up in the 1940s and '50s, things had improved, but it was still miserable for Black people. Everything remained segregated. The Black schools were massively underfunded, a confederate general's statue reigned in front of city hall, and decent jobs were non-existent for Black people. I was not aware of violence against Black people, but I am sure it existed.

I lived at home during college, to save money, and because it was common.

My big eye-opening experience was initiated by my political science professors. There were four or five of them—mostly with "all but dissertation" (ABD) from decent universities—probably hired because they would work for cheap while finishing their graduate work. This was the early 1960s, and the State was full-throated in its opposition to desegregation. One of the devices used to disrupt the movement was to equate it with the current bugaboo: Communism. Billboards showed photos of Martin Luther King sitting next to alleged Communists, and the Louisiana legislature passed a law ordering all public colleges in the state to require a one-hour course called "Democracy and Communism." The required textbook was Carleton Putnam's *Race and Reason,* which purported to prove that Black people were biologically inferior to white people. This was a political science course and the young liberal professors made hash of it, much to my delight.

I was still mostly listening and learning but doing little about civil rights. The college had been nominally desegregated—peacefully, they bragged—after a court order, but internally it remained segregated. My longtime friend, as a member of the student council, managed to get the intramurals desegregated—no doubt to the chagrin of his John Bircher father. He and I, along with a Black student, were recruited by one of the political science professors to represent the school at a model United Nations conference in Austin at the University of Texas, the first time the university was represented by an integrated group. We were to be Haiti and were told to just vote with the United States.

We left in the middle of the night in the car of the Black student, Eddie Jackson. Eddie would later get his Ph.D. in political science and eventually become Chancellor of Southern University. This was a life changing experience. I had witnessed segregation and discrimination but had not lived it. When we had to stop to eat, Eddie knew the routine. He was driving, and he found a drive-in. When the server came to the car, she

carefully avoided the usual service at the driver's window and came to the passenger side. Finding restrooms was also a task. Federal services stations had them—segregated of course. Others took keys and were "out of order" when they spotted Eddie. When we arrived at the University of Texas, they directed us to a fraternity house for the night, but they sent Eddie over to the YMCA. Eddie said, "Let's just roll with it," even though he was probably humiliated.

Back at college, I took John Morgan's political science course in constitutional law. The cases I studied were exciting and opened my eyes to what I could do about civil rights as a lawyer. It was the early 1960s, the Warren Court was in full bloom, and the law was developing fast. I knew I could do little with a Political Science degree—I had taken most of the college courses I wanted—but if I did not stay in school, I would be drafted. I took the law school entrance exam, did pretty well, and applied to Tulane Law School on a program allowing entrance after three years of college, with the college accepting the first year of law school as the last year of college. My mother had put away her secretarial salary to pay my tuition and I entered in 1962 and finished in 1965 at twenty-three years old.

The civil rights movement was raging, and Tulane Law School was still all white with only two women out of a class of 100. Other than one plowed-under and eccentric professor, Mitch Franklin, who was labeled a Communist, little was said of the historical watershed going on outside of the university. I was thoroughly intimidated in law school; the state, including the legislature and the bar association, was in full-tilt opposition to the civil rights movement, and I feared that I would be denied a law license. Indeed, while I was in law school, the state raided the law office of Ben Smith and seized his files. Ben was the only white lawyer taking civil rights cases at the time. The raid was instigated by the Louisiana legislature's Un-American Activities Committee, clearly controlled by the White Citizens' Council, which contended that the civil rights movement was infiltrated with Communists including Ben Smith. Smith and his client organizer sued in federal court and were represented by the famous radical lawyer, William Kunsler. The novel suit sought to enjoin the state criminal prosecution in advance. Ordinarily, the prosecution would need to run its course and any conviction would be appealed afterward. The allegation was that the prosecution was acting in bad faith—designed only to stifle constitutional rights. Ultimately, after I was out of law school, the Warren Court enjoined the prosecution. I used this theory later—mostly unsuccessfully.

My law school classmates were largely oblivious to the emerging civil rights movement—with the exception of two students. The three of us formed the membership of the Tulane Law School chapter of the Law Students Civil Rights Research Council (LSCRC), but we did not do anything that I recall. One of these students, Don Juneau, was active in the movement and would cut class to attend demonstrations in Louisiana and

nearby states. I was scared and laid low.

As graduation neared, I was faced with the decision of what to do next. The Vietnam[9] War was raging, and my student deferment would run out. At that time, I was not particularly opposed to the war, but I did not want to get shot either. With my law degree I could easily get a commission in the Judge Advocates Corps and carry a law book instead of a rifle for a few years. Another option was to stay in school and work on a graduate degree. This appealed to me, because I was interested in constitutional law and, at that time, the discipline of political science seemed to have a better approach to the subject. Law schools leaned hard on positivism—what the law said—and inquired little into underlying norms or political context. Also, I could probably get into a graduate program in political science more easily than one in law—my law school grades were not that great. My old undergraduate professor, John Morgan, had moved up to George Washington University, and I contacted him. With his mentoring, I was admitted directly into their Ph.D. program, without first getting a master's, and was given a teaching fellowship. I enjoyed the coursework and the teaching, and I managed to pass my general exams in about three years.

Trying to write a dissertation was getting dismal, and I was now old enough to be excluded from the draft. At George Washington in the District of Columbia, I continued to follow the civil rights movement and, in particular, the legal efforts to support it. I had written a short article for a little publication in Louisiana on miscegenation and noticed that the *Loving* case was to be argued in the Supreme Court, so I went down to hear it. What a racist outrage to deny these people their right to marry and that it took a lawsuit this late in the game to invalidate this law. I determined to use my law degree to get involved in the fight to eradicate these laws. I crossed the river into northern Virginia to the law office of Philip Hershcoff and Bernie Cohen (who had argued the *Loving* case), showed them my little miscegenation article, and applied for a job. They were willing to hire me but wanted me to do real estate work to free them up to do more civil rights work. I wanted to do civil rights cases myself, so I declined. Had I taken the job, I would have soon been a multi-millionaire because real estate in northern Virginia boomed in the following years.

I was now determined to become a civil rights lawyer, and I kept looking. The civil rights movement in Louisiana was now heating up. Being out of Louisiana for a few years had given me some perspective. Also, my father had just died. I am not sure, but maybe this removed my fear of hurting him or his business. I knew that my old friend and classmate, Don Juneau, was working in New Orleans doing cases with LCDC, and I contacted him. He referred me to Armand Derfner who was then Chief Counsel, and was located at the Jackson, Mississippi office. I drove to Jackson

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[9] *Editor's Note*: Though its citizens refer to their nation as Việt Nam or Viet Nam, the Bluebook uses the English spelling of Vietnam.

and told Derfner that I wanted a job. I am not sure why he hired me, except that I would work cheap, was an available member of the Louisiana Bar, and seemed motivated. Later, he confided that he thought I looked like a "cracker." I guess I did with my short combover hair, clean shave, and shiny suit.

LCDC seemed to be going through a transformation, from using short term volunteers to permanent lawyers, and from short term criminal defense to longer term reform litigation challenging discriminatory laws and practices. Derfner sent me to New Orleans where Richard Sobol had just left to go to the District of Columbia to work with the Children's Defense Fund and Don Juneau had left to go to Alaska Legal Services. George Strickler had been the lone lawyer in the New Orleans office and would be my boss. I was on my way to becoming a civil rights lawyer with this thinly-staffed organization charged with dealing with the still massive problems of racial discrimination in Louisiana in 1969.

III. THE ATTACK ON DISCRIMINATORY LOCAL ELECTION SCHEMES

With the legislative success whetting my appetite, I turned to parish, school board, city, and town elections, which I approached in a systematic way, imitating the legal campaign to end segregation by Charles Hamilton Houston, Thurgood Marshall, and the NAACP Legal Defense Fund, Inc. (LDF or the "Inc. Fund"). I began with an analysis of the census data released in '72 and maps I had obtained for the *Taylor* litigation and identified the parishes with the highest Black populations. These, as expected, followed the "Black belt" of alluvial soil where the slave plantations had been located.

Three of the largest of these parishes were in the northeast corner of the state: East Carroll, Madison, and Tensas parishes. East Carroll turned out to be the longest and most involved litigation that I worked on, and eventually became my third Supreme Court argument. The parish was majority-Black in population, but not in registration, and only one Black person had ever been elected to a police jury or the school board.

LCDC had a history in the area, litigating cases on behalf of Zelma Wyche for devious voting practices by Madison Parish officials. I had also represented Black clients in East Carroll against the town of Lake Providence, which had annexed a heavily white peninsula-like area around the lake, while excluding a pie cut area of heavy Black population. The action charged that this was a discriminatory change in voting regulations which required Section 5 review.

The Lake Providence annexation case began when I drove the LCDC's old 1966 Mustang to the northeast corner of the state to witness the city election. The night before the election, I went to the church where the young Black pastor and Mayoral candidate, L. B. Jackson held forth.

It was a great sermon, but it was his singing brought the house down. There wasn't a dry eye in the house including mine. The next night, after the Black candidates lost due to the white area's annexation, a crowd formed at the end of Main Street next to the Mississippi River levee. Using bad judgement, and violating the LCDC ethical rules, I mounted the hood of a car and addressed the crowd, saying something like "The election was illegal, and the lawyers (me) will file suit to invalidate it." A disturbance ensued with Black citizens roaming the streets of the small town. Stewart Marshall, not yet the Chief of Police, took a leadership role and walked the streets, calming the crowd along with Chief of Police Deal; Chief Deal was from a Mississippi town across the river headed by the brother of the slain Medgar Evers. The crowd eventually dissipated after leaving only a few broken windows. The local police and sheriff wisely stayed away, and I suspect Stewart Marshall talked to them.

Although it was the early days of Section 5, Armand Derfner, my mentor and head of LCDC, had already won a landmark suit holding that annexations indeed qualified as a "change in voting procedure" subject to preclearance requirements.[10] This gave me an easy victory. The Court required submission of Lake Providence's annexation, the Justice Department entered a Section 5 objection barring its further use. The district, without the annexation, resulted in the election of L.B. Jackson as Mayor and Stewart Marshall as Chief of Police. Thus, the police's repression of Black residents came to an end, but white residents still controlled the parish government and the school board. As a result, discrimination in those aspects of life in Lake Providence continued unabated. Stewart Marshall was determined to do something about it.

Prior to the 1970 Census, East Carroll's school board and police jury, the parish's general governmental body, were elected from wards, which were initially single-member districts. This was a common practice in Louisiana parishes. Later, additional members were added to some of the districts to somewhat balance their populations. With the Supreme Court's opinion in *Avery v. Midland County*, requiring equal population of local governmental bodies under the one-person, one-vote rule, East Carroll became pressured to revise its districting arrangement.[11]

A suit was filed by a white school board member, Charles Zimmer, that alleged population malapportionment of the wards, which also controlled the school board election districts. Judge Dawkins quickly signed a consent decree, approving at-large elections as a remedy. This remedy—making it so all members are elected by the same number of people—proved effective for preserving inequality. However, it was disastrous for the Black voters submerged in wards where the majority of registered voters were white, despite these wards being majority-Black. The at-large

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[10] Perkins v. Matthews, 400 U.S. 379, 388 (1971).

[11] Avery v. Midland County, 390 US. 474, 475 (1968).

election was, therefore, a handy solution for the defendant police jury and school board. Not only because it solved the one-person, one-vote problem, but also because it completely impaired the power of registered Black voters, who had greatly increased in number due to Federal Registrars dispatched under the 1965 Voting Rights Act.

My client, Stewart Marshall, like so many of my Black clients, was selfless and wholly devoted to changing the discriminatory system under which he lived. He engaged in advocacy despite the threat, and sometimes even the reality, of personal consequences. On behalf of Stewart Marshall, I filed an intervention in the case on the grounds that essential parties of interest were not adequately represented by the existing parties. Judge Dawkins granted the intervention, but ultimately approved the at-large elections.

I appealed his order to the Fifth Circuit on grounds that the parish-wide elections were racially discriminatory and violated the Equal Protection Clause. In a strange move, Judge Dawkins attempted to change his order to disallow at-large elections, but he had lost jurisdiction in the case due to the appeal. A three-judge panel of the Fifth Circuit approved the at-large election order two to one. I then moved for a hearing en banc before all fifteen of the Fifth Circuit judges. After a full briefing, including a great amicus brief by Frank Parker of the Lawyers' Committee for Civil Rights under Law in Jackson, Mississippi, the en banc court issued a landmark opinion invalidating the at-large elections on Constitutional grounds.

This ruling was particularly useful in our future efforts because, at the time, the Fifth Circuit covered *all* of the Deep South states from Texas to Georgia, where most of the discriminatory districting was being enacted. Most significant was its holding that Black plaintiffs could establish unconstitutional action by proving solely a discriminatory effect, rather than discriminatory intention—the more difficult element to establish.

The court outlined specific items of proof to guide the lower courts in their evaluation of an unconstitutional discriminatory effect. It was not enough to merely show that Black people had not been elected in proportion to their voting strength. Rather, this was one factor among a panoply of factors that, under the "totality of circumstances," could demonstrate Black voters were denied equal access to the political process. These factors were called the *Zimmer* factors because that name was retained in the en banc case.[12] Not all of these factors need be present, it held, but the trial court considering such a case must conclude as a factual matter that under the totality of circumstances, Black voters were denied equal access to the political process.[13] The en banc *Zimmer* decision was announced on September 12, 1973. It was particularly influential until 1980, when the Supreme Court explicitly held in *Mobile v. Bolden* that proof of

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[12] Zimmer v. McKeithen, 485 F.2d 1297, 1305 (5th Cir. *en banc* 1973).

[13] *See id.* at 1306–09 (describing how the circumstances point to the fact that these at-large elections had the effect of disenfranchising Black voters.)

discriminatory intent was required in constitutional at-large challenges.[14] Fortunately, before long Congress rejuvenated the effect standard of *Zimmer* in the 1982 Voting Rights Act amendments, which accepted proof under the *Zimmer* factors (now sometimes called the "Senate factors") for the hearings approving them. These factors in full were:

The extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;

The extent to which voting in the elections of the state or political subdivision is racially polarized;

The extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance that opportunity for discrimination against the minority group;

If there is a candidate slating process, whether the members of the minority group have been denied access to that process;

The extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

Whether political campaigns have been characterized by overt or subtle racial appeals;

The extent to which members of the minority group have been elected to public office in the jurisdiction.

Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are: [W]hether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group [and] whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous. While these enumerated factors will often be the most relevant ones, in some cases other factors will be indicative of the alleged dilution.[15]

For me and my litigation in Louisiana, the *Zimmer* decision, and later Section 2 as amended, provided clear guidance and a winning strategy in numerous cases. Most of the parish cases involved changes required by the one-person, one-vote standard and the new census. Some of those parishes had retained malapportioned districts and had to be sued under the one-person, one-vote rule. Then, I had to convince the federal court to order Section 5 submission and to provide a non-discriminatory remedy. Some of the towns had set up at-large elections prior to the 1965 enactment

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[14] City of Mobile v. Bolden, 446 U.S. 55, 68, 73 (1980).

[15] S.REP. No. 97-417, at 28–29 (1982) (footnotes omitted).

of the Voting Rights Act and were immune to the submission requirement. These towns had to be sued for violating the constitutional effect standard, set forth by *Zimmer* until 1980, and then sued for violating the intent standard until the 1982 Section 2 amendment.

A typical example of the many at-large cases I litigated in the 1970s was the case against the aldermen of the town of Ferriday in Concordia parish, decided in June of 1974. Titled *Wallace v. House*, it was reported, unlike most other cases of this type.[16] It was decided by Judge Dawkins, after he was reversed by the en banc decision in *Zimmer*, and it is an excellent illustration of the application of the *Zimmer* factors to the facts established in the case. For example, with respect to the "lack of Black success" factor, the opinion read:

On only one occasion, a Black, Henry Montgomery, was elected to the Board of Aldermen, for a single four-year term. The evidence, however, indicates that his election on this occasion was due to a mere 'stroke of luck' in that there were originally seven white candidates and Montgomery vying for five seats on the Board. Shortly before the election, one of the strongest white candidates withdrew because of a ruling that, as the Town's Fire Chief, he could not hold a second public office. His name remained on the ballot, however; and, because white voters divided their votes between this unqualified white candidate and the seventh white candidate, Montgomery, by obtaining a large percentage of the Black vote within the Town, was able to place within the first five, and thus was elected.[17]

With respect to failure to slate Black candidates, the judge found:

Further testimony at the trial indicated that the present selection process for Aldermen in Ferriday creates additional problems for its Black citizens. To maximize exposure throughout the Town of Ferriday, and to gain other benefits from joining forces, white aspirants for Aldermen frequently form informal tickets to campaign essentially as a team. There have been no instances where any Black candidate has been included upon any of these teams, and Black citizens running for office are hampered by both their general, more individualistic political philosophies, and their more limited financial resources.[18]

And on single-shot voting:

The 'anti-single shot' law provides that if two or more offices are to be filled, as, for example, the five at-large seats for the Board of Aldermen, a voter must vote for candidates equal in numbers to the number of offices at stake, or his ballot will be invalidated with respect to all of those offices. As further amplified by plaintiffs' expert, Dr. Engstrom, although a voter wishes to support but one aspirant for an at-large seat, he must cast a vote

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[16] Wallace v. House, 377 F. Supp. 1192, 1192 (W.D. LA 1974).

[17] *Id.* at 1197.

[18] *Id.*

against his candidate in order to have his vote for that candidate counted. The effect of this is that Black voters are unable to run a single candidate and urge that Black voters only vote for that candidate.[19]

After applying each of the factors to the facts, the court concluded that under the totality of circumstances, the at-large elections in Ferriday had the effect of denying Black voters equal access to the political process.

I was able to make similar application of the *Zimmer* factors, which led to the Constitutional invalidation of at-large elections in many parish cases and in a number Louisiana towns including St. Martinsville, New Iberia, and my hometown of Lafayette. In the Lafayette city, police jury, and school board cases, I represented the Black Alliance for Progress (BAP), which the Black priest, Father McKnight, had organized. He was a charismatic and inspirational figure who also had organized an influential multi-state Black farmers' organization, and the Bishop tolerated him until he painted all of the statues in his Opelousas church Black.

By this time my father had died, and I had been away from Lafayette long enough not to fear personal recriminations. The local federal judge, Judge Putnam, knew me and my family well and tried to reel me back into the club. In a break in one trial, he invited me to lunch.

"Sure, I will bring my clients," I replied.

"Now Stanley, this is just for the lawyers," he said.

"Then why is the defendant school board member invited!" I retorted.

He got the message that I was not going to join their "white boys' club." They went off to lunch, and I ate with my clients. The case against the Lafayette City Board of Trustees, which was the first of the Lafayette cases, he managed to get off the case and it was tried by Judge Dawkins. This case was unique in that it was the first to challenge the Trustee system, which its defenders argued was a quasi-executive system with trustees of Safety, Finance, and Public Utilities and not subject to districting. I was glad to have Judge Dawkins, who by now had ruled for me in a number of cases challenging at-large elections; and after a full trial, he did so again, not deterred by the trustee system.

By far most of redistricting cases I litigated in Louisiana were against the parish police juries and school boards.[20] This type of litigation involved a variety of issues. Some cases were litigated to compel Section 5

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[19] *Id.* at 1198.

[20] *See* Baker v. St. Helena Parish Police Jury (unreported, E.D. La., Dec. 1, 1972, E. Gordon West, J., C.A. No. 71-293); Clark v. DeSoto Parish Police Jury (unreported, W.D.La., Jan. 28, 1972, Ben C. Dawkins, Jr., J., C.A. No. 17,266); Fain v. Caddo Parish Police Jury, 312 F.Supp. 54 (W.D.La., 1970, Ben C. Dawkins, Jr., J.); London v. East Feliciana Parish Police Jury, 347 F.Supp. 132 (E.D.La., 1972, West, J.), reversed and remanded on other grounds, 476 F.2d 637 (5th Cir., 1973); Bailey v. Washington Parish Police Jury (unreported, E.D.La., June 19, 1972, Edward Boyle, J., C.A. No. 70-2861); Hargrove v. Caddo Parish School Board (unreported, W.D.La., June 7, 1972, Dawkins, J., C.A. No. 17,630); Johnson v. St. Martin Parish School Board (unreported, C.A. No. 16,965 W.D.La., June 5, 1972, Richard J. Putnam, J.); Briscoe v. Jefferson Davis Parish Police Jury (unreported, C.A. No. 17,392 W.D.La., Apr. 5, 1972, Edwin F. Hunter, Jr., J.).

submission against jurisdictions that had failed, or refused, to comply. Generally, these were straightforward and summarily ordered by the court. Sometimes, cases were more complicated, as in the case of the notorious Plaquemines Parish school board, discussed later. Some were one-person, one-vote cases compelling equi-populous districting, again these involved straightforward calculations of the current districts under the 1970 Census data. Some involved intervention by Black voters in sweetheart lawsuits creating at-large elections like East Carroll, discussed above. Some were constitutional challenges to discriminatory election systems that had somehow evaded Section 5 review, again, like East Carroll. Most involved developing a non-discriminatory remedial plan. A few were to require invalidation of elections under an illegal plan and the setting of new elections.

In all of these cases, but particularly in those requiring proof of the *Zimmer* factors, the key to success was a good expert witness. Shortly after the *Taylor* legislative districting cases, I began teaching political science as an adjunct professor at the University of New Orleans, where I met Dr. Richard Engstrom. This was the best luck of my career. He and I became friends, talked a lot about racial discrimination in districting, and wrote an early article on Section 5 of the Voting Rights Act. Most significantly, he agreed to be an expert witness in the voting cases I was working on and continued to be my prime expert witness in virtually all the cases I litigated for the next twenty years. His reputation grew as he continued to publish in the area, and as he testified in numerous significant cases. Later, he was much in demand by other voting rights lawyers and testified in cases throughout the country.

In our early cases he would provide "color" to political science testimony, explaining to the court how the elements of the *Zimmer* factors fit together to effectively deny Black voters access to the political process. This was an important element of "educating" the judge. For example, he would explain how past discrimination had a present effect, how educational and employment discrimination lessened the ability of Black candidates to raise campaign funds, and how this made competing in parish-wide at-large elections more difficult. He would also explain how structural factors like the majority run-off requirement and anti-single shot voting laws further disadvantaged Black voters and candidates.

In some of these early cases, I noticed how effectively he convinced Judge Dawkins. As Dr. Engstrom first took the stand, Judge Dawkins joked that an expert witness "was someone from out of town with a briefcase," indicating his disdain for expert witnesses. But as Dr. Engstrom testified, I could see him listening attentively and nodding. Because Judge Dawkins would sit in a great many subsequent voting rights cases, his understanding was particularly important, and it stuck. In these early cases, the data and methodology were rudimentary. Dr. Engstrom would look at data for all-white and all-Black precincts and infer the likelihood of severe bloc voting that would demolish Black candidates in the majority-white

at-large elections.

In later cases, Dr. Engstrom would perform a computer driven multi-regression analysis to prove the existence of bloc voting. In simple terms, he would not only look at heterogeneous precincts, but also at those with any percentage of Black voters. Then he would compare that result to the percentage of votes for the Black candidate and compare the white percentage to the percentage of votes for the white candidate. The multi-regression analysis would sort out other factors, such as political party, to demonstrate that race was the causal factor. This evidence was so compelling and bullet-proof that after his testimony, the judge would sometimes call counsel to chambers and give the defendants the "you have a hard row to hoe" speech, resulting in their capitulation.

In some of the early cases Dr. Engstrom would also draw the plaintiffs' proposed remedial plan by hand without the aid of a computer program. In many of these cases, my secretary or I, along with the clients, would draw our proposed plan. This plan was designed to, at a minimum, establish the second prong of standing—that the discriminatory at-large elections could be remedied. The defendants would usually also offer a plan that the court would either evaluate itself for discrimination or, more properly, direct that it be submitted to Justice Department for Section 5 scrutiny. In other cases, the court would appoint a special master to draw a plan.

In some cases, once the court had declared that the previous districting or at-large elections were invalid, I would negotiate with the defendants for a remedial plan. I grew quite adept at this process. In most of these parishes, Black people comprised a minority of 15 to 45%, meaning that we were shooting for about that percentage of majority-Black districts. Because Black voter registration still lagged, our hope for results had to be gauged by either registration or Black voting age population. The defendants' prime, maybe only, interest was dictated by "incumbent-itis." Thus, if we could propose a plan that gave us our desired number of Black-majority districts, while protecting a majority of the incumbents, we had an easy deal. Because the plan did not discriminate against the Black population, it was sure to receive Section 5 approval if sought. In the early days, because of the limited census enumeration district (ED) data, these settlement plans were often comprised of some multi-member districts, which were not as optimal as single-member districts. As drawn, though, they did the job.

Somewhere along the line of litigating these cases, a man named Earl Kenneth Selle appeared. I think he was first brought to Judge Dawkins' court by one of the defendants as a plan drawer. Selle's great virtue was that several parishes had used him to conduct a "tobacco census." Under Louisiana law, the tobacco tax money was distributed to the parishes in accordance with their population. As the years since the last census passed, some parishes believed that their populations had grown. The tobacco census was accepted by the state as an alternative to the federal census, and

the parish would receive additional funds.

These were crude "windshield surveys," i.e., driving around and counting houses. But from our point of view, they were quite useful, because they provided block data enabling the drafting of single-member districts. Plus, the plaintiffs, and others in the Black community, could confirm the relative accuracy of the counts. We agreed to the court appointing Selle as special master to draw single-member district plans in a number of these cases. He knew that as special master, with the Court and the Justice Department's Section 5 review board looking over his shoulder, racial discrimination was not an option. From then on, especially in Judge Dawkins' court, these remedial plans were non-discriminatory single-member districts. This illustrates how the impact of Section 5 review was enhanced by the accompanying litigation in the early days of voting rights challenges.

In a number of cases, I was able to convince the federal court to invalidate elections conducted under discriminatory plans and to order new elections; thus, significantly speeding up the ability of Black voters to elect candidates of their choice. I was successful in achieving this remedy in at least seven of these cases: *St. Helena Parish*; *Caddo Parish Police Jury*; *Caddo Parish School Board*; *Washington Parish*; *Desoto Parish*; *East Feliciana Parish*; *St. Martin Parish School Board*; and *Jefferson Davis Parish*. Sometimes, by negotiations or court orders, the number of members would be increased, which allowed districts to be smaller and enabling a Black majority in more districts.

By the end of the decade, I had succeeded in more than fifty police, jury, school board, town, and city cases. Four of the most significant cases in terms of their impact on the law were against East Carroll parish, the Plaquemines Parish Council and its school board, the City of New Orleans, and the 1980 Congressional Districting in the New Orleans region.

IV. STEWART MARSHALL IN THE SUPREME COURT

After the Fifth Circuit ruled en banc, the defendants appealed the *Zimmer* case and the case became *East Carroll Parish v. Marshall*, now reflecting my client's name. This became my third United States Supreme Court argument, in January 1976.

In *Zimmer*, the Fifth Circuit held that proof of a plan's discriminatory effect was sufficient.[21] The fear was that the Supreme Court would reverse and hold that proof of intent was required in cases challenging racial discrimination in voting under the Fourteenth Amendment's Equal Protection Clause. I was scheduled to argue the same day as my old LCDC

[21] *See* Zimmer v. McKeithen, 485 F.2d 1297, 1305 (1973).

colleague, Richard Sobol, who would argue a case challenging employment discrimination in the District of Columbia Police Department. The issue in that case was whether intent was required under the Constitution to prove employment discrimination.

Before my argument, I was terrified as usual. I remember walking to the Capitol from my hotel, climbing the steps, looking out over the District of Columbia, and praying that I would be spared the coming ordeal. The terror lasted until I stood up to argue, then abated as I focused on the case. As I was told to expect, I was barely into my argument when the questions from the Court began to fly. The Court sits with its most senior members and the Chief Justice in the middle and the newer appointees on the ends. With the increasingly conservative appointments, the tough questions came from the ends. Warren Burger was the Chief Justice.

My task was either to convince the Court that the *Zimmer* effect standard was appropriate for voting cases, or to persuade it to avoid the issue and allow the Fifth Circuit rule to stand. The most desirable dodge was to get the Court to hold that any plan ordered by a federal district court had to be submitted to Section 5 scrutiny. I argued that the federal district courts, especially Judge Dawkins' court, were allowing discriminatory plans to go into effect in "sweetheart," white-on-white lawsuits without Section 5 preclearance. I cited several cases in addition to *East Carroll* where Judge Dawkins allowed this and argued that Congress's intent in Section 5 was regularly being undermined. Alternatively, the Court could hold that in its equitable discretion, federal district courts should order single-member districts when providing a remedy for unconstitutional election schemes.

When the ruling came down later that year, the Court took the latter path and ordered that when district courts provided a remedy, "[S]ingle member districts were to be preferred absent unusual circumstances."[22] This was a definite win not only for this case, but also as a precedent that helped a great deal in obtaining the effective remedy of single-member districts in subsequent cases. I know of no case in which "unusual circumstances" were found.

This ruling, along with Earl Selle's tobacco tax census data, produced single-member districts in the remainder of my cases. Unfortunately, from then on, court-decreed plans were held immune from Section 5 review. This meant I had to protect against discriminatory plans in the local federal courts unless I could convince the judge to voluntarily submit the plan. I was able to do this with Judge West in the Middle District, Judge Putnam in the Lafayette Division of the Western District, Judge Hunter in the Lake Charles Division of the Western District, and Judge Boyle in the Eastern District. I think these judges were glad to get these cases off their dockets. When the court devised its own remedy and did

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[22] E. Carroll Parish Sch. Bd. v. Marshall, 424 U.S. 636, 639 (1976).

not order Section 5 review, I was able to get the court to use non-discriminatory single-member districts fairly easily under my Supreme Court ruling in *East Carroll*. These cases also became easier on all issues because the federal judges in Louisiana were now accustomed to ruling for me in voting cases, aware of Section 5, and the position of the Justice Department. Judge Dawkins, who was one of the most recalcitrant judges, hated his role in school desegregation. His comments led me to conclude that he believed if these school boards had some Black members, these disputes could be resolved at that level instead of in his court.

In its *East Carroll* decision, the Court did not hold that voting discrimination cases required proof of discriminatory intent. Unfortunately, my colleague, Richard Sobol, lost his case. In employment discrimination cases, the Court held that the Constitution required proof of discriminatory intent.[23] In his case, *Washington v. Davis*, the Court noted its disagreement with cases holding that proof of intent was not required.[24] In a footnote, the Court listed a number of cases that included racial discrimination in zoning, municipal services, and urban renewal, but did not mention the voting cases where intent was not required.[25] This provided us with a strong argument that the holding in *Zimmer*, allowing proof of effect, still stood.

Unfortunately, this argument was finally precluded five years later in *Mobile v. Bolden* (1980).[26] That decision stimulated the civil rights lobbying forces to seek an amendment to Section 2 of the Voting Rights Act, which was added in 1982. The amendment allowed either intent or effect to prove a violation of the Act. As discussed above, to indicate what kind of effect proof was necessary, Congress cited in the Senate Report the factors of the *Zimmer* case, which lived again.[27] These factors were also rejuvenated by various federal court holdings that they were relevant to proving intentional discrimination. So, if a trial court reviewing the factors found intentional discrimination, that satisfied the Constitutional rule.[28] This is well illustrated by Judge Heebe's decision in the *Plaquemines Parish* case discussed below.

The saga was not over in the *East Carroll* case, however. The defendants continued to push for a plan allowing white control of this majority-Black parish. Judge Dawkins accommodated them, which led to two more rounds in the Fifth Circuit. Back in Judge Dawkins' court after the Supreme Court remand, the defendant proposed a nine, single-member district plan that would produce five white members. We offered a plan with five Black-majority districts. Earl Selle, the man who conducted a

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[23] *See* Washington v. Davis, 426 U.S. 229, 244–48 (1976).

[24] *Id.* at 244–45.

[25] *Id.* at 244 n.12.

[26] City of Mobile v. Bolden, 446 U.S. 55, 68, 73 (1980).

[27] S.REP., *supra* note 15 at 28–29.

[28] *See id.* at 28–30.

tobacco census, reappeared as the defendants' expert plan drawer, and testified that he used a "fairness" standard based on white registration rate of 51.8% in his special 1976 Census. Selle did not know enough about the law to recognize that this smacked of an automatic quota, which is forbidden by the courts.

We pointed out that his key district used jagged lines to divide the Black population's concentration in Lake Providence and join it with the white population outside of the town. Nevertheless, Judge Dawkins ordered this plan into force, and we were back in the Fifth Circuit in *Marshall v. Edwards*.[29] The panel was headed by Judge John Minor Wisdom; he now knew me well, as I had argued many voting cases before him. I remember an oral argument exchange with Judge Wisdom where he recalled the *Taylor* case, on which he'd also sat, in which the senate districts Judge West drew in New Orleans were in question. He recalled that the *Taylor* court ruled that Judge West's use of jagged lines to achieve proportionality was held equitably inappropriate. I responded, "Yes, just like this case." He agreed, and the case was reversed and remanded to Judge Dawkins to devise an appropriate plan that "should give more weight to the neutral values of rational boundaries, and to districts of equal voting population, and less weight to the political objective of proportional racial representation."[30]

When we went back to Judge Dawkins, he approved a plan similar to the one that had led to the reversal, which was again reversed by the Fifth Circuit. It was now 1980, and I suggested in oral argument that the district court be directed to draw a plan based on the new census, which complied with the Fifth Circuit's directive. The court did so through the following language:

On remand, the trial judge should evaluate any plans submitted in light of the 1980 census results, devise its own plan or order new plans to be developed if necessary, and adopt or approve a plan following the instructions in our prior mandate. Specifically, the trial judge should avoid approving a plan that has odd-shaped districts (such as district five in the plan adopted by the Parish Police Jury and School Board) that are explainable only in terms of racial proportionality.[31]

Finally, after a decade of litigation, Marshall had prevailed, and East Carroll Parish had a non-discriminatory electoral system.

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[29] *See* Marshall v. Edwards, 582 F. 2d 927, 928–29 (5th Cir. 1978) (describing the litigation history before the current case).

[30] *Id.* at 938.

[31] Zimmer v. Edwards, 629 F.2d 425, 426 (5th Cir. 1980).

V. PEREZ, PEREZ, PEREZ

"Judge" Leander Perez controlled Plaquemines Parish like a Latin American *cadillo*, an all-powerful local dictator. His sons Leander "Lea" Perez Jr., District Attorney, and Chalin Perez, head of the Plaquemines Parish Council, succeeded their father—now deceased—with similar ruthlessness. The Perezes were not descendants of migrants from Latin America. Rather the name, like many in Louisiana, was a hold-over from Spanish rule. The Judge, as he liked to be called long after leaving the bench, not only ruled the parish with an iron fist, but held considerable power in the state and was a militant segregationist and white supremacist, responsible for much of Louisiana's racial discrimination and brutality.

I represented Black voters challenging Chalin Perez, the commission council, and the school board for using parish-wide elections to dilute the Black vote. Plaquemines Parish LCDC had a long history of battles with Perez. Perez had previously arrested LCDC's lawyer, Richard Sobol, for defending Gary Duncan in a case in Plaquemines Parish. The incident sparking the case arose out of a minor incident where Duncan stopped his truck when he saw what appeared to be an altercation brewing between some white kids and his young nephew, probably relating to the recent school desegregation in the parish. Duncan lightly touched one of the white kids on the arm. He was arrested and charged with misdemeanor assault. When Sobol came down to the parish to represent Duncan, Perez threw him in jail for allegedly practicing law without a Louisiana license. Sobol eventually took the Duncan case to the United States Supreme Court and won a landmark constitutional victory applying the Sixth Amendment right to a jury trial to the states in the case *Duncan v. Louisiana*.[32]

Sobol also sued Perez for the arrest, alleging that Louisiana could not constitutionally bar out-of-state lawyers from practicing because it would deny civil rights workers and demonstrators access to lawyers. White lawyers in Louisiana would not take civil rights cases, and the few Black lawyers could only devote part of their attention to civil rights cases because they had to make a living. The case was litigated by a number of outstanding civil rights lawyers including Al Bronstein (who at that time was head of LCDC located in Jackson, Mississippi) and Anthony Amsterdam.

The case eventually ended when the three-judge, federal court panel determined that Sobol had been properly associated with the Black Louisiana lawyers Robert Collins, Nils Douglas, and Lolis Elie; thus, ducking the issue of lawyer availability in civil rights cases.

I had returned to Louisiana toward the end of that case, in late 1968, and began practicing with LCDC. My name was added to the papers, but I never really did any work on the case. Sobol had left LCDC for the

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[32] Duncan v. La., 391 U.S. 145, 148–50 (1968).

Children's Defense Fund in the District of Columbia, but continued to work on LCDC cases including *Duncan* and a major employment discrimination case against the Crown-Zellerbach paper mill in Bogalusa, Louisiana.

I continued the LCDC's battle with the Perez family several years later, after I left LCDC and was in private practice. Plaquemines Parish lies south of New Orleans in the marshy deltas formed by the convergence of the Mississippi River and the Gulf of Mexico, with one road leading down each side of the river and a ferry the only connection between them.

Not in the Black belt,[33] Plaquemines was only 25% Black in the 1970s. Yet as the political home of Judge Perez, the leading segregationist and white supremacist of the day, the racial discrimination practiced in the parish was thorough and brutal. It is no surprise that the parish's struggle against redistricting arrangements favored by Black people was both uncompromising and devious. Judge Perez saw his destiny as maintaining segregation and white supremacy—not only in his parish, but throughout Louisiana and beyond.

He personally waged a most vehement, though sometimes silly, opposition to the passage of the Voting Rights Act. In congressional hearings, he testified against its provisions with the Constitution of the U.S.S.R. and a picture of Martin Luther King, Jr. with "known Communists." The Judge's history of bigotry and power, along with his battle with LCDC's Richard Sobol and the story of *Duncan* is well detailed in the book *Deep Delta Justice.*[34]

By the time of my voting rights suit, the Judge was gone, and his sons ran the parish. Also, unlike most places in Louisiana at that time, there were some white citizens who opposed the Perezes' dictatorial operation, which also excluded them. Some joined with Black citizens in this enterprise—most notable among them was Lawrence "Larry" Rousselle, who had run against Chalin Perez and continued to foment resistance against him. A meeting was organized in the parish, probably by Rousselle, with a mostly-Black group that was interested in ending the at-large elections that guaranteed the defeat of any Black candidates.

This was one of my later voting rights cases in Louisiana. By this time, I had won a number of cases abolishing at-large elections in parishes, cities, and school boards across the state. Plaquemines was a little different than most because its commission council had both executive and legislative authority. Typically, there were three commissioners, the: Commissioner of Public Safety, Commissioner of Public Utilities, and

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[33] *See generally* V.O. KEY JR., SOUTHERN POLITICS IN STATE AND NATION (1949) (The usual pattern in the South was that the heaviest areas of discrimination were in the Black belt. That is, the belt of alluvial soil where slavery was most predominant and where a significant portion of Black people remained.)

[34] *See generally* MATHEW VAN METER, DEEP DELTA JUSTICE: A BLACK TEEN, HIS LAWYER, AND THEIR GROUNDBREAKING BATTLE FOR CIVIL RIGHTS IN THE SOUTH (2020).

Commissioner of Finance. It could be argued that because the council was charged with specific administrative functions, it was not subject to the usual constitutional rules of districting. Fortunately, I had already litigated against a commission form of government in the City of Lafayette and won, so this did not appear to be a substantial obstacle. Another potential obstacle was the relatively small Black population. The threshold question in attacking at-large systems as discriminatory was whether it was possible to draw districts in which Black voters comprised the majority of voters—otherwise, no effective remedy would exist.

There were a substantial number of Black voters in the meeting—maybe thirty or so. I explained that the lawsuit would try to invalidate the present parish-wide election of commissioners and replace it with a plan consisting of equally populated districts, of which at least one would have a Black majority. There were a few questions, then I explained, "We would need a few Black, named plaintiffs to represent the entire class of Black voters in the parish." I also told them that Chalin Perez and his brother could be counted on to oppose the suit with all they had, because it would likely end their stranglehold on the Parish. I asked for volunteers. No one raised their hand.

One person said, "I would, but the levee board lets me graze my cattle on the levee, and they would stop that if I was on the suit." The levee board was an extremely powerful entity, which regulated flood protection, but more significantly, a substantial amount of public land that produced oil. Perez controlled the board, to whom most of the oil interests had been allegedly transferred. He added, "last week, I found one of my cows dead on the levee." Unsaid was that he knew in his heart that the Perez family was behind it. Another person said he would, but "[his] son has a criminal charge pending before Lea Perez." One after the other, I heard stories of how the Perezes maintained control through fear and retribution. Finally, there were two left: Earnest Johnson and Merlis Broussard. They became the named plaintiffs, brave souls who worked for companies not too likely to fire them at the whim of the Perez brothers.

The council put up a hard battle, led by Baton Rouge attorney, Gordon Kean, Jr., who headed one of the largest and most prestigious law firms in Louisiana. We drew federal judge Fred Heebe, good fortune for us as he had ruled favorably in a number of civil rights cases, many brought by the LCDC and was quite sensitive and aware of racial discrimination in southeast Louisiana.

Because the change from police jury to parish council had predated the Act, Section 5 preclearance was not required. The plaintiffs' had the burden of proof in claiming a constitutional violation. As discussed above, this burden was considerable, even under the *Zimmer* effect standard, and was much more than simply establishing that no Black candidate had ever been elected despite Black voters making up 25% of the population. Under *Zimmer*, the plaintiff had to establish a number of factors that demonstrated under the totality of circumstances that Black citizens were

excluded from the political process. Among these circumstances was the history of discrimination by a parish where a white voting bloc systematically defeated Black voters' candidates of choice. This could be established with actual voting data, if there were sufficient instances of races with Black candidates. Actual voting data was scarce in Plaquemines Parish, because there had been few Black candidates due to the Perez family's dominance and its long and continuous suppression of Black registration and voting.

Another element of a discriminatory effects claim was to show that the council failed to respond to the needs of the Black community. For example, by showing the lack of paved streets, streetlights, fire plugs, and the like, in the Black community. The defense, who controlled the data, hit this point hard. Plaintiffs had to rely on "windshield surveys" counting these facilities. "Judge" Perez was proud of the governmental services, buildings, etc. that he had provided, and I suspect he wanted his lawyers to emphasize this. But the considerable amount of other history of discrimination overwhelmed it.

The parish lawyers' argument that the council was composed of members with specific administrative functions—justifying at-large elections—was undercut by the requirements that the candidates be residents of each district and that there be residency districts for each commissioner, which made no sense for a parish-wide function. I was able to prove that the council also had a large legislative function, much like the case I had won against the City of Lafayette.

At the time of trial, it seemed that plaintiffs did not have to prove racially discriminatory intent but just discriminatory effect per *Zimmer*. But by the time Judge Heebe ruled, the Supreme Court had held in *Mobile v. Bolden* that proof of intent *was* necessary.[35] A major part of the defense was that the council, which replaced the old, districted police jury in governing the parish, was created in response to the need for a strong government to deal with hurricanes. Its creation was, in fact, specifically motivated by the disastrous Galveston, Texas storm in 1961—which occurred a few years before the council was formed. Also, the council was created before the 1965 Voting Rights Act, when few Black people were registered to vote. Therefore, the parish argued, the intent could not have been to discriminate against Black voters through at-large elections. The idea that the parish's past racial discrimination in voter registration would immunize it from the current dilution of Black voting strength was an ironic argument.

Although proof of intent was required by the time Judge Heebe ruled, he correctly anticipated another case by holding that discriminatory intention could be shown by purposeful continuation of the discrimination as well as by its initiation. When our case reached the Fifth Circuit, that case

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[35] City of Mobile v. Bolden, 446 U.S. 55, 68, 73 (1980).

had been decided, resulting in an easy affirmance that the trial court had properly examined the *Zimmer* factors and concluded that the at-large system *currently operated as a purposeful device* to further racial discrimination.[36]

The Fifth Circuit opinion quoted extensively from Judge Heebe's findings,[37] including his specific conclusion from application of the *Zimmer* factors:[38]

The original establishment of the at-large scheme was part of a change in government aimed chiefly at achieving a more responsive and efficient parish government rather than at diluting Black votes, but the system *is maintained for an invidious purpose.*[39]

A districted council was put in place and Chalin Perez was pushed out. Some of the opposition, including Larry Rousselle and plaintiff Earnest Johnson, were elected. Although, at least one of Perez's old team, Luke Petrovich, was also elected, claiming to change sides. Chalin did not run again; I am not sure why. Maybe he was afraid of losing in his district, or he believed that he had enough power and money without public office, much like his father, who liked to be called "Judge," but had not held a political office in years.

The suit's challenge against the school board had been prosecuted before the action against the council because it looked like a quick win. This was a different kind of case. The one against the council was based on the Constitution, where the burden was on the plaintiffs to prove intentional discrimination—difficult, or at least more complex.

The school board case was based on Section 5 of the Voting Rights Act of 1965, under which changes had to be precleared by the Justice Department or a special three-judge court in the District of Columbia. The school board claimed that it had submitted the change and the Justice Department had not objected.

We moved for summary judgment, as did the defendants. The Justice Department records revealed the true facts. The school boards as well as the police juries lacked authority under state law to use at-large elections until the state legislature passed Acts 445 and 561 of 1961. However, these Acts were subject to Section 5 scrutiny and were objected to by the Attorney General. When the Plaquemines School Board submitted its change to at-large elections, the Attorney General's letter stated that it could not consider this change because it was not valid under state law. The parish claimed that this meant the law was approved. With no difficulty, Judge Heebe found that the parish had not obtained preclearance under Section 5 and enjoined further use of at-large elections.

Needless to say, the Perezes and the board were not happy with this

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[36] Rogers v. Lodge, 458 U.S. 613 (1962).

[37] *See* Broussard v. Perez, 686 F.2d 320, 321–22 (5th Cir. 1982).

[38] Zimmer v. McKeithen, 485 F.2d 1297, 1305 (5th Cir. 1973).

[39] *Broussard*, 686 F.2d at 321 (emphasis added).

decision and appealed. The story then becomes more complex. The defendants appealed directly to the Supreme Court without going to the Court of Appeals first. Their claim that the Court should take jurisdiction of the appeal was that a three-judge court was statutorily required to hear and decide the case and that Judge Heebe could not act alone. Indeed, the language of the Voting Rights Act required a three-judge court, not in the District of Columbia, but in the local federal district, when a plaintiff seeks to compel a jurisdiction to submit for preclearance.

Now the Perezes brought out the really big guns. They hired Abe Fortas—the former Supreme Court justice who resigned after being disgraced when Lyndon Johnson sought to appoint him Chief Justice—to file the certiorari petition arguing that the case should have been heard by a three-judge court rather than solely Judge Heebe. Fortas was a "super lawyer" with substantial liberal credentials, having been counsel in the *Gideon* case, which established that the right to counsel under the Sixth Amendment applied to the states.[40] Another irony was that Abe Fortas' law firm was where my predecessor at LCDC, Richard Sobol, came to practice civil rights law in New Orleans, and Fortas was on the Supreme Court when it ruled favorably in Richard's case challenging the lack of a jury trial in *Duncan*.[41]

Why was Fortas willing to represent the Perezes? For one, they could afford him. But he probably had also been convinced that there was a point of law to be made which would *strengthen* the Voting Rights Act. Also, the Justice Department's Appellate Division filed a brief in support of a three-judge court, which may have helped persuade him. The Justice Department's fear was that a single local federal judge might well protect the local jurisdictions by ruling that they need not submit voting changes. Indeed, this was probably Congress's reason for the requirement.

I did not see it this way. For one thing, Judge Heebe was the best judge I could get; I had already won with him and did not want to change the mix with two additional judges. Also, this so clearly violated the Section 5 submission requirement that requiring formation of a three-judge court would create an opportunity for delay, a frequent tactic of white supremacist officials.

I argued successfully, in opposing Supreme Court review, that *Bailey v. Patterson* should be applied by analogy.[42] In *Bailey*, the Court held that requiring a three-judge court in cases challenging a statewide statute was inapplicable where it was clear that the statute was unconstitutional—which was often the case during the history of the South's massive resistance to segregation.[43] I got a nice letter from Abe Fortas saying that his application for discretionary review by certiorari had been denied. I was a

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[40] Gideon v. Wainwright, 372 U.S. 335, 344–45 (1963).

[41] Duncan v. La., 391 U.S. 145 (1968).

[42] *See* Bailey v. Patterson, 369 U.S. 31 (1962).

[43] *Id.* at 33.

bit proud of beating a former Supreme Court Justice, so I framed the letter. The school board was forced to create districts and Black politicians won offices for the first time in Plaquemines Parish—in spite of all of the Perezes's efforts, who were no longer all powerful.

VI. THE NEW ORLEANS CITY COUNCIL AND RETROGRESSION

In the 1970 Census, New Orleans's Black population stood at 45%, but its voter registration rate was only about 35%. The city's first attempt at redistricting was met with a Section 5 objection by the Justice Department. A further objection was lodged against the second attempt to redistrict, and this objection culminated in my first two arguments before the Supreme Court. Since 1954, the city council had been elected from five single-member districts and two at-large seats. No Black politician had ever been elected to the city council or in any parish-wide election. The second plan had drawn two districts with a majority-Black populations of 64 and 51%, respectively. The latter district had a bare Black voter registration majority of 53%, which at that time was not enough for an electoral win.

New Orleans's Black population was concentrated in the center of the city with white concentrations surrounding it. This plan cut through the Black concentration and joined its pieces with white areas. The Justice Department objected to the plan for the simple reason that the north to south districts split and dispersed the east to west, Black-voter concentrations. As permitted by the Voting Rights Act, New Orleans filed suit in a three-judge United States district court for the District of Columbia in *Beer v. United States*,[44] urging that the plan did not have the purpose or effect of discriminating against Black voters.

I represented a group of Black, New Orleans plaintiffs, Johnny Jackson Jr., et al., who had first sued in the local federal district court challenging the plan under the Fourteenth Amendment and then intervened in the *Beer* suit in the District of Columbia. This was the first instance of such a suit in the District of Columbia court under the Act. I was joined on the papers by Charles Cotton, a local Black attorney, and by LDF lawyers who aided me significantly, especially in briefing the case as well as consultation and advice.

Justice Department lawyers representing the United States took the lead defending the case, but when our plaintiffs were accepted as intervenors, I was able to participate fully in the litigation in the District of Columbia and Supreme Court. We had a very fortunate draw of the three-judge panel: Circuit Judge Spotswood Robinson and District Judge

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[44] *See* Beer v. U.S., 374 F. Supp. 363 (D.D.C. 1974).

Corcoran were Black judges who, I believe, both worked for LDF at some time, and District Judge Waddy, who also had a liberal reputation. Our main claim was essentially the same as the United States'—that the city could not meet its burden of proving the plan combining districts and at-large elections had a non-discriminatory effect. Unlike the United States, we also claimed that the at-large elections standing alone were discriminatory.

After an extensive trial in the District of Columbia, including admission of depositions and other discovery, the Court ruled unanimously for us. We won all of the marbles, as they say. But maybe we and the lower court flew too close to the sun, given the increasingly conservative Supreme Court of that era. Judge Robinson's reasoning included a methodology for determining effect discrimination under Section 5. While not fully relying on it, his language suggested a standard based on the "potential entitlement" of 3.42 seats out of the total seven based on the Black population of 35%. This language and its implication of a quota, I think, possibly irked some Supreme Court Justices, since it suggested that they needed to articulate a different standard.

New Orleans appealed to the Supreme Court and, after briefing, the Court set an oral argument for March 26, 1975. I wanted to argue for the intervenors, who were entitled to present an argument along with the principal appellee, the United States. LDF invited me to their New York headquarters for a dry run argument. Some of my colleagues warned that the agenda might be to talk me out of arguing the case and substitute an LDF lawyer experienced in Supreme Court arguments. In New York, I was asked to present my argument to a table of the most experienced civil rights lawyers in the country. These lawyers had argued a number of significant cases before the Supreme Court. I remember that group included Jack Greenberg, LDF's famous director, who had worked alongside Thurgood Marshall. I think it also included Eric Snapper, Wiley Branton, Charles Williams, James Nabrit, and others. I was more terrified of arguing before them than before the Supreme Court. I was nervous and did not think that I did very well. Apparently, they decided that at least I had guts, some potential, and familiarity with voting discrimination in Louisiana as a local. They supported my arguing the case and assigned Eric Snapper to prepare me and even sit with me at the counsel table in the Supreme Court—in case I fainted. Snapper was terrific. He explained that rather than have a complete argument prepared, which the Court would never let me get through, I should prepare segments on cards in response to likely questions from the Court. He helped me formulate these answers and rehearsed them over and over with me. Thanks to this, I felt prepared and confident when I stood up to argue—I did not faint. Sometime after this first argument, we were notified that the Court had set November 12, 1975, for a re-argument—a rather rare event—which gave me the opportunity for yet another Supreme Court argument.

In the second oral argument, the Court was clearly focusing on the

standard to be applied to determine a discriminatory effect under Section 5. The Court came up with a retrogression standard, which I do not recall being mentioned in any of the briefs or during oral argument. We did not argue for the lower court's population equivalence standard, because it sounded too much like an automatic quota based on the Black population percentage, to which this increasingly conservative Supreme Court was likely to have an "allergy." Also, that approach did not consider the geographical distribution of the Black population, which could affect whether the plan was in fact discriminatory.

Our proposal was to evaluate whether there was a systematic division of Black voter concentrations, which smacked of traditional gerrymandering. We also had a pretty good argument that it characterized the drawing of the city council districts, which ran an elongated path north to south, whereas the Black concentration ran east to west. I emphasized this at LDF's suggestion. This point of my oral argument was quoted by Justice Marshall in his dissenting opinion, stating:

Counsel for intervenor Jackson vividly described the effect of this division at oral argument:

"You can walk from Jefferson Parish throughout the city for eight or ten miles through the St. Bernard Parish line and not see a white face along that band, that Black belt, that parallels the river in a curve fashion throughout the city. White people live in the very wealthy sections of town out by the lake and along St. Charles Avenue to the river. The rest is left over for Blacks, and these are heavy concentrations, and that plan devised by the City Council slices up that population like so many pieces of bologna . . . ." Tr. of Oral Arg. 30.[45]

I am still not sure why the Court wanted the case reargued. I guess it felt that announcing a standard to measure Section 5 discrimination was of great significance, and it wanted that issue thoroughly briefed and argued. Without explanation, Justice Stevens did not participate. Also, that morning, when I was awaiting my argument, Justice Douglas was sitting, but when I argued that afternoon, he was missing. In the taxi back to my hotel, we heard over the radio that he had retired. Was some kind of a deal cut so that Justice Douglas would not vote on this case? He had sat through the first argument and could have voted if the case had not been reargued. In any event, the Court held four to three that Section 5 was now to be governed by whether the change in voting procedure was ameliorative or a "retrogression" in the position of Black voters.[46]

This was a bad loss. Not only was New Orleans stuck with a discriminatory plan, but we were now stuck with the retrogression rule, which would hamper the effectiveness of Section 5. I believe that there were significant problems with this rule, particularly with how it applied to the

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[45] Beer v. U.S., 425 U.S. 130, 161 (1976) (Marshall, J., dissenting).

[46] *Id.* at 141.

New Orleans facts. For one thing, the retrogression standard would allow for a permissible amelioration based on the previous system. Thus, the more discriminatory the plan was, the less likely the change would be worse and, as such, it would be allowed. This meant jurisdictions with the greatest discriminatory history would be rewarded. Also, as New Orleans illustrated, calculating the registration or even the population of the previous districts using the 1960 Census, which reported a Black population of 17%, and then calculating the new plan under the 1970 Census when Black population was 35%, predictably would yield a retrogression of Black strength in the districts. Thus, the retrogression test stacked the deck against Black challenges. Until the 1982 Amendment allowing proof of discriminatory effect under Section 2, my best option was to challenge the non-retrogressive plans under the *Zimmer* standard, which quite arguably was an effect standard before the 1980 *Bolden* case. However, unlike litigation under Section 5, my plaintiffs had the burden of going forward and proving their case.

VII. A BLACK CONGRESSMAN FOR LOUISIANA

By the time the 1980 Census was complete, the Black population of New Orleans had grown to 55% and if the City was left intact, it would have been close to the ideal population for a congressional district. Instead, New Orleans's sizable Black population was split, and its parts joined with suburban areas to form white-majority districts.

No Black person had been elected to Congress from Louisiana since Reconstruction. Legislators met in the basement of the Capitol without Black members and drafted a Congressional plan to continue this discriminatory tradition. I was asked to join a team of lawyers to challenge the plan. Lani Guinier, then with LDF, was de facto in the lead and played the most significant role in the strategy: briefing and trying the case.

By time the Census had been reported and the plan concocted, Congress had amended Section 2 of the Voting Rights Act to forbid redistricting that had a discriminatory effect and dictated that the courts determine this by employing the *Zimmer* factors, now rejuvenated as the "Senate Report" factors. This was the first case under the revised act, and we hoped it would set an important precedent. Our case challenged the districting on grounds of both purpose and effect. The plan had been submitted to the Justice Department under Section 5, but the political leaders of the Department overruled the recommendation of their staff and approved the plan. Thus, the new Section 2 was the only barrier to continued denial of a Black Congressional seat through discriminatory redistricting.

The stakes were high, and the state fought hard. Marty Feldman, a prominent Republican lawyer, represented the state and later parlayed his performance into an appointment to the federal bench. In his confirmation

hearing he said it was his most significant case.

The trial was before a local three-judge court then required by statute. The panel was composed of Circuit Judge Politz and District Judges Cassibry, a former labor lawyer, and Collins, a Black former civil rights lawyer and my frequent co-counsel. This was a pretty good panel in our view. After extensive discovery—including many depositions—the case came to trial. My co-counsels selected me for the opening argument, probably because of my experience with Louisiana's dismal history of vote denial, especially by racially discriminatory districting. This was my limited role, along with presenting some witness testimony from our side, which included Representative Mary Landrieu and our expert witness. Crucial expert testimony involved statistical analysis that clearly demonstrated racially polarized voting, the bottom-line result of many of the *Zimmer* factors. For example, a history of discrimination tends to promote bloc voting. The indisputable evidence of splitting New Orleans's Black concentration into majority-white districts was also compelling.

Lani handled the evidence of purposeful discrimination. In addition to the suspect basement meeting, she was able to uncover a virtual smoking gun meeting with the Nixon administration's politically appointed Head of the Justice Department's Civil Rights Section, Jeris Lenard, and Republican Governor Treen, promoting the interest of Louisiana Congressman Robert Livingston. The Court did not ultimately rely on the intent prong, but this evidence helped set the mind of the Court that the districting was highly suspect, and the Court added it to other evidence of the results test. It was also especially helpful in explaining why the Justice Department gave Section 5 approval and increased the Court's comfort with its ruling of racial discrimination. The Court upheld the constitutionality of the new Section 2. It applied the resurrected *Zimmer* factors, which usually had been used to challenge at-large elections, to this instance of line drawing of single-member districts where the Black concentration had been "cracked."

It invalidated the plan but gave the legislature an opportunity to try again, which it did. The new plan left New Orleans's Black-voter concentration intact, but the incumbent Lindy Boggs, a liberal Congressman with significant Black support, continued in office for a while, until she retired in 1990. At that point the first Black congressman since reconstruction was elected, William Jefferson, who coincidentally served as my law clerk in the summer before he graduated from Harvard Law School. Section 2, as amended in 1982 to include the results test as interpreted in our case *Major v. Treen*,[47] became the principal tool of voting rights challenges when Section 5 did not apply, or when it was evaded. It was responsible for many later victories in the federal courts.

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[47] Major v. Treen, 574 F. Supp. 325, 341 n.20 (E.D. La. 1983).

VIII. POSTSCRIPT: MAKING A LIVING AS A CIVIL RIGHTS LAWYER

A civil rights lawyer's main challenge is figuring out how to make a living while continuing to litigate cases. Many in private practice who consider themselves civil rights lawyers only pursue these cases part-time and devote a major part of their practice to other types of cases that more easily produce income, like personal injury or criminal law, or even a general practice involving wills, divorces, and contracts. Often these other pursuits become so lucrative that they abandon more and more of their civil rights docket.

On the other hand, I chose to devote my practice exclusively to civil rights cases. I never drafted a will or a contract and worked on only one divorce and one child custody case for friends, and I regretted working on both. The issue was how to make these civil rights cases pay enough, so that I could continue practicing them exclusively. Few lawyers could maintain these cases exclusively. One of my colleagues managed to make a living exclusively litigating civil rights police brutality cases where, if she won, she would recover a percentage of the damages. These types of cases were extremely difficult in the 1960s and '70s because juries are required in damages cases. In those days, juries were usually sympathetic to the police and believed whatever they said. Police brutality cases are also procedurally complex and require specialized litigation skills.

Although I worked as a salaried employee of a civil rights or poverty rights organization from time to time, most of my years were spent in private practice. My first job, working for the LCDC, gave me the opportunity to develop my civil rights litigation skills without risking starvation. I also learned the skill of obtaining court awarded attorney's fees. Traditionally, the "American rule" was that parties bore their own attorney's cost regardless of whether they won or lost. In the 1960s, the Civil Rights Bar began to convince the federal courts that in certain circumstances losing defendants should pay the prevailing plaintiff a reasonable attorney's fee. These were court-made rules based on several different theories. The first rule established required the bad faith defendant to pay. This should have been easy in the days of massive resistance to desegregation but was not because of unsympathetic Southern federal judges. Another rule was the "common fund" theory. If the litigation created a common fund, then the plaintiff's fee could come from the fund. Unfortunately, this applied to few civil rights cases. The theory that worked the best was the "private Attorney General" approach. The idea was that the private plaintiff took on the public interest task that the Attorney General would ordinarily litigate. The implication was that there were more of these cases than the Attorney General could reasonably pursue, so it was in the public interest to encourage private lawyers to take them.

This theory worked quite well for me. Of great help was the work of Mary Frances Derfner, the wife of Armand Derfner the former director of

the LCDC and my most influential mentor. Mary Frances collected federal decisions, many not reported, awarding attorney's fees under each of the theories, and distributed them to interested civil rights lawyers. After a while, these theories, especially the private Attorney General theory, became well established in the federal courts and the rule became that ordinarily attorney's fees should be awarded to the prevailing plaintiff, but not to the defendant. The idea was to encourage plaintiffs and their lawyers to take on the difficult burden of going forward with litigation despite the risk of loss.

As my practice developed, it turned more and more to voting rights cases. Not only did I see the need unfulfilled by the Justice Department and other lawyers, but I had also become quite skilled and knew I could win these cases and earn a court-awarded fee. The fee was to be "reasonable," which left quite a bit of discretion with the judge. The appellate courts provided some guidelines, such as the "lodestar" was to be calculated by using the lawyer's reasonable hourly rate multiplied by the number of hours reasonably spent. Unsympathetic judges could still reduce the requested fee substantially, which, if not outrageous, would escape reversal. The upshot was that, although I usually got a fee, the amount of the award rarely fully compensated me for the time I had expended, and the money often took a while to come in. Nevertheless, I was able to earn a modest living and continue to do mostly voting rights cases.

The court-created attorney's fee rule saw me through most of the voting rights cases I took throughout the 1970s, which I litigated in Louisiana from my New Orleans office. However, by the late 1970s, when I still had a number of fee awards pending, the Supreme Court came down with a bombshell. Lawyers litigating other types of public interest cases had begun to employ the attorney's fee rulings and in an environmental law case, *Alyeska v. Wilderness Society*,[48] the Court ruled that courts could not modify the American rule that the parties bear their own attorney's cost in the absence of statutory authorization.

The civil rights lobbying forces got to work in a sympathetic Congress generating the Civil Rights Attorney's Fees Awards Act of 1976.[49] These amendments were held to be retroactive, and I eventually collected all the outstanding fees in my Louisiana cases and used the statutes to win attorney's fees in later cases.

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[48] Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 269–70 (1975).

[49] *See* Michael H. Lipson, *Beyond Alyeska—Judicial Response to the Civil Rights Attorneys' Fees Act*, 22 ST. LOUIS U.L.J 243, 253–61 (1978).