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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1968

J. C. Fairley, et al.,

Appellants,

v.

Joe T. Patterson, et al.,

Appellees.

No. 25

Levi Marsaw, III, et al.,

Appellants,

v.

Joe T. Patterson, et al.,

Appellees.

Charles L. Bunton, et al.,

Appellants,

v.

Joe T. Patterson, et al.,

Appellees.

No. 26

Vernon Tom Griffin, et al.,

Appellants,

v.

Joe T. Patterson, et al.,

Appellees.

Seth Ballard, et al.,

Appellants,

v.

Joe T. Patterson, et al.,

Appellees.

No. 26 (cont.)

Clifton Whitley, et al.,

Appellants,

v.

John Bell Williams, et al.,

Appellees.

No. 36

Washington, D. C.
Wednesday, October 16, 1968

The above-entitled matter came on for argument at 10:15 a.m.

BEFORE:

EARL WARREN, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
ABE FORTAS, Associate Justice
THURGOOD MARSHALL, Associate Justice

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P R O C E E D I N G S

THE CLERK: Counsel are present.

MR. CHIEF JUSTICE WARREN: Next are cases 25, 26 and 36, J. C. Fairley, et al., versus Joe T. Patterson, et al.

Mr. Derfner will address the court.

ORAL ARGUMENT OF ARMAND DERFNER, ESQ.

ON BEHALF OF APPELLANTS

MR. DERFNER: May it please the court, the question in these three consolidated cases from the Southern District of Mississippi is how much room Congress intended to leave when it passed the Voting Rights Act of 1965, to allow the Southern States covered by the Voting Rights Act to continue evading the guarantees of the 15th Amendment.

The answer, we believe, is found in the provision of that Act which involves this case, Section 5, in which Congress after having Section 4 outlaw any tests or devices, went further and said that no State covered by the Act might enact or seek to administer any voting qualifications or change its voting standards, practice, or procedure with respect to voting different from that in effect in 1964, or November of 1964, without seeking prior approval from either the Attorney General of the United States or getting a declaratory judgment from the United States District Court for the District of Columbia, establishing that that new statute and regulation did not have discriminatory purpose or effect.

The three cases here all involve statutes which the State of Mississippi passed in 1966, at its First Legislative Session after the passing of the Voting Rights Act which we claim have the purpose and effect of discriminating in voting by reason of race, and which voting laws are in Section 5; and as to which there is no dispute, these statutes were not submitted to the Attorney General or for a declaratory judgment.

In No. 25, the Legislature allowed the county to shift its manner of appointing the Board of Supervisors from district elections to at large elections, thus allowing a county that might have one or more Negro majorities to elect all white supervisors.

In No. 26, the Bunton Case, the Legislature changed the Office of County Superintendent of Education which had previously been elective, to appointive, and appointive, and did so with respect to 11 counties of which 9 had Negro majorities.

In No. 36, Whitley versus Williams, the Legislature adopted an amendment to Section 3260 which provides the manner by which independent candidates may get on the ballot, and in effect set up an obstacle course which was designed and had the effect of forcing independent candidates at great trouble an effort to go into the Democratic Primary or a party primary, and to avoid seeking to run as independents.

Q Mr. Derfner, would you mind speaking up a little

bit or getting a little closer to the microphone.

A I am sorry.

No. 36, Whitley versus Williams arose in 1966. The statute involved an amendment to Section 3260 which was passed in June of 1966 after Reverend Whitley and one other person had run in the Democratic Primary, having run for the Office of United States Senator, and having lost in the Primary and then indicating he was interested in running in the General Election.

At that point the amendment was passed which had this effect: It multiplied the number of signatures that a person must gain to gain a place on the ballot .

In the case of Reverend Whitley, the number of signatures was multiplied or changed from 1,000 to 10,000, since it was a state-wide office.

Q How many registered voters are there in that State?

A In Mississippi, at that time there were probably in the neighborhood of 400,000 or 500,000 registered voters.

The second thing it did was to require that these signatures be submitted at a much earlier date than formerly. The former practice or former statute had provided that the required number of signatures be submitted 40 days before the General Election.

In practical effect it was the end of September. The new regulation or the new statute required the signatures

be submitted all at the same time as one would qualify for running in the Party Primary.

Now, the statutes governing running in the Party Primaries require that 60 days before the primary a candidate must submit his notice of intention to run and a filing fee of a small amount to the Executive Secretary of his Party, which means that under the new statute whereas someone wanting to run in a Party Primary had to submit by some date in April, say $100 or $200 plus a notice of intention to run, Reverend Whitley or whoever wished to run as an independent had to submit petitions with 10,000 or some lesser number of signatures depending on what office was involved.

The third, and in some ways the most significant, effect was to impose a new requirement that one who had voted in a Party Primary could not thereafter run as an independent.

Q Anyone who has ever voted in a primary?

A No, I think the statute means one who has voted in the primary that year, the primary for the same office for which he is running.

Q Is that an uncommon provision throughout the States?

A I am not familiar with that, Mr. Chief Justice, but I do know that that was not the provision of Mississippi before and there had been a number of instances of people being unsuccessful in primaries, and running in General Elections.

There is a case called Bowen versus Williams, cited in the brief, where precisely that happened and the Supreme Court of Mississippi held there was no impediment to that being done.

Q I suppose that was under existing law?

A There is a Section 3129 of the Mississippi Code which imposes a pledge of loyalty on anyone voting in a Party Primary, but that has been held not to be enforceable in connection with his running as an independent candidate.

Q Mr. Derfner, what is the prohibition against, running as an independent if you voted in the Primary?

A There is no prohibition against running as an independent if you had merely run but not voted in the Primary. Nonetheless, the record shows at least one of the people who was kept off the ballot in 1967 was kept off because he had run in the primary, although he had not voted.

That does not appear to be what the statute says.

Q Do you attack both the merits of the situation as well as the fact that they should have gone to the Attorney General or do you just say that they should have gone to the Attorney General?

A Oh, no, we believe, and in fact I don't think we would be here if we did not believe that this was a statute that violates the 15th Amendment of the United States Constitution.

Q Is that before us?

A No, your Honor.

All that is before you is whether this is a law that imposes voting qualifications or standard practice and procedure with respect to voting.

If you decide that it is, then the statute could not have been and cannot be put into effect until the Federal clearance.

Q That is the sole issue in the case?

A That is the sole issue.

Q You did originally rely on the 15th Amendment also?

A The 15th Amendment was in our pleading.

Q Why did you take it out?

A We took oit out, Justice Marshall, because in 1967 when this case came up for the second time, the case came up in September and we did not believe we had enough time at that time to put on a case with respect to the 15th Amendment, and so at that time although the 14th and 15th Amendment claims remain in the case, we entered a stipulation with the Appellees that the only issue before the District Court at that time was the issue of Section 5.

This means by the way, as we maintain, that the constitutional issues are still in the case, and that Section 23 did and does apply, and that wholly apart from any question of Section 5 we were and are entitled to a three judge court

and this court would have jurisdiction by direct appeal. We did not mean in any way to take those issues out of the case, and we believed that we could prove that if we were put to it.

Q But you actually did it. What did the stipulation say?

A The stipulation which is in the record, in an appendix to the opinion of the three judge court, appearing on page 39 of the record here, paragraph 5, that the only issue before the court at this time is whether or not House Bill 68 is an attempt by the State of Mississippi to enact or seek to enact or administer any voting law of Section 5.

There is nothing in the stipulation, and nothing else anywhere in the case that indicates that the constitutional issues are no longer in the case.

The final requirement of the new Section 3260 was that every signature on the petition had to be in the petitioner's own hand, his own handwriting. While it is not clear, while this specific provision has not been at issue or been a specific issue involved in any of the cases of record, and it is not clear just how far this goes, we think it is open to the interpretation that this would prohibit illiterates from signing petitions for independent candidates.

After the statute was passed, Reverend Whitley and two others who were kept off the ballot, submitted petitions to run as independent candidates in the fall of 1966. They

were ruled off the ballot not because they had not complied in time or because they had voted in the Primary, as to both of which this would have been ex post facto law, but because they had not submitted sufficient signatures.

At that point in the fa-l of 1966, we filed this suit as a class action on behalf of Reverend Whitley and the two others in their capacity as voters and as candidates and a three judge court without going into any of the statutory or constitutional issues, as an exercise of its equity jurisdiction and discretion, ruled that these three candidates should be placed on the ballot.

In 1967, the situation arose again. At that point, as the record shows, there were at least 16 candidates ranging from people who were running for Justice of the Peace all of the way to Mrs. Hammer who sought to run for the State Senate who had been ruled off the ballot.

I should mention that in the 1967 elections, which were State-wide elections, they were virtually all State offices being chosen.

This was the first time in modern history that any substantial number of Negro candidates had run or sought to run. It was the first time in modern history that with the exception of a single Negro community in Mississippi that any candidates had been elected.

These 16 people were kept off the ballot for various

reasons although they had complied or would have complied with the old provisions of Section 3260.

At that time we brought the suit on again, and this time the three judge court ruled against us, and it was that decision that held that Section 3260 dealt only with elections or candidates but not with voting.

The point of this appeal, we submit, is much like the point in Williams versus Rhodes decided by this court yesterday, dealing with the right of the American Independent Party to be on the ballot.

It spoke of the Ohio provision as a verging on the right of qualified voters regardless of their political persuasion to cast their votes effectively.

I think it is significant that Section 3260 is the first or one of the first major attempts by the State of Mississippi to deal in any significant way with the problem of General Elections.

Mississippi as perhaps one of the most confirmed one-party States of this nation, has always paid a great deal more attention to regulation of primary elections than regulation of general elections.

The two outstanding examples of that are the Corrupt Practices Act which in Mississippi applies only to primary elections and not the general elections, and the requirement of the run-off which again applies only to primary elections

and not the general elections.

The position of Mississippi has always been that whoever wins ethe primary is essentially the winner of the general election, and in most cases or many cases in recent history there has not been any opposition in general elections.

At the same time with the passage of the Voting Rights Act of 1965, a new factor came into politics and this was the Negro voter.

Prior to 1965, according to figures by the Civil Rights Commission, only a small percentage of Negroes voted.

Q Am I right in saying that the precise issue is the scope of the provision of the statute which refers to qualifications or prerequisites to voting or standards and practices and procedures?

A That is right, your Honor.

Q It is a question of the interpretation of the coverage, or the sweep of that provision?

A Yes, sir.

Q And your argument so far it seems to me is on the merits of the thing?

A No.

Q What do you contend that the statute covers?

A We believe that Section 5 was intended to cover or to be every bit as broad as the 15th Amendment itself, that when Congress passed the Voting Rights Act of 1965 they

knew full well that they had been relatively unsuccessful in guaranteeing the provisions of the 15th Amendment before that.

They tried in 1957, and in 1960, and in 1964. We believe that what Congress sought to do in 1965 was to insure that they would not have to pass a Voting Rights Act of 1966 because they knew that on each occasion when they had passed legislation before that, the States that they were aiming at had then come up with another new provision that had not been covered by the Act, and so we think that Section 5 was passed very broadly in order to cover everything possible that could be covered under the 15th Amendment.

Q Would it encompass things in your view that would not be unconstitutional under the 15th Amendment?

A Well, under Section 5, the final determination of the United States District Court for the District of Columbia would cover only things that were -- no, let me put it this way: With the exception of the placing of the burden of proof, I believe that Section 5 would prohibit after clearance only things that were in violation of the 15th Amendment.

Q A good faith literacy test itself would not in and of itself violate the 15th Amendment?

A A good faith one, yes.

Q Obviously it would come under Section 5.

A Well, it would come under Section 5 in the sense it would have to be cleared under the provisions of Section 5.

I took Justice Harlan's question to be, what would be cleared and what would not be cleared. A good faith test would be cleared.

Q I was asking what you consider to be the sweep of the Act. My question had to do with what question came to the District of Columbia Court.

A That is any question relating to voting, whether it discriminates or not.

Q And whether it violates the Constitution?

A That is right.

Q A reapportionment provision would be one?

A Yes, any situation in which the State does anything which has the potential of depriving someone from the right to vote on the basis of race.

Q The constitutionality of reapportionment statutes would have to go to the District of Columbia.

A Not all reapportionment cases. I think Mr. Lightman will be dealing in somewhat more detail with that question.

Q What wouldn't?

A Only reapportionment cases from the covered States would have to go through.

Q All reapportionment cases from the covered States would have the constitutionality passed upon by the District of Columbia Court?

A That is true. Every reapportionment case would have

to be passed on, not necessarily by the District of Columbia Court. In most cases it could be done and I believe it has been done by the Attorney General, and I think the Attorney General's Office indicates there has been a good many submissions and all of these have been approved.

So that we think it is quite proper that where you have a reapportionment plan you have in a sense the most convenient opportunity for a State to discriminate in voting with respect to race in a way which seems innocent.

We believe that where that is in fact innocent that there would be no trouble. Where it is not in fact innocent, it is perfectly proper to have the State be required to pass muster by submitting to the Attorney General and if he disapproves, to seek a declaratory judgment.

Q What words in the act do you think cover your case?

A In my own case, No. 36 would be covered by standard practice or procedure with respect to voting.

Q With respect to voting?

A Yes, we think as in Williams v. Rhodes, the question of who gets on the ballot is so closely related to the question of who the voter can vote for and how he can make his vote effective that it is a question of standard practice or procedure.

Q Why doesn't it cover qualifications, too?

A I believe it does, Justice Harlan. That is if, for example --

Q If a man ran in the primary, he is no longer eligible.

A That is the sort of question which should be submitted to the Attorney General. I think quite possibly in that situation if there was not a racial cast to it, that that is the sort of thing the Attorney General would approve.

Q We are not concerned with whether he approves it or not.

A No, I think a statute like that should be submitted and it is covered by Section 5. You can think of examples. Suppose, or take the grandfather clause before this

Court. Suppose the statute said not simply that one who was eligible to vote in 1867 or was the ancestor of one entitled to vote, and suppose the statute said one who was eligible to vote in 1867 may run for office as an independent, or may run for office if he was not so eligible to vote or his ancestor was not he could not run for office.

We think that is the sort of thing that is precisely covered by the statute. I might say in this connection that the appellees have talked about the language of Section 5 as being somewhat narrow. They talk about the use of the word "comply", in the second sentence of Section 5, and said unless and until clearance is obtained no person shall be denied the right to vote for failure to comply.

We think there that the words "comply" were not intended to be and should not be read as limiting the terms "voting standard practice, procedure and so on."

The word "comply" taken in its logical sense would apply to the qualification or prerequisite. It would not be an apt limiting phrase with respect to the phrases of standard practice or procedure which were inserted in the Act after its introduction.

For example, we can think of examples that I think were even more critical than these cases, as to why the word "comply" would not be an appropriate word. These have to do, for example, with various actions of the election

officials. For example, a law changing the counting of ballots from public counting to secret counting, or a law changing the polling places from public buildings or public places to private places, thus allowing polling places to be held on plantations or stores or what have you.

Or for example, a law that abolished poll watchers. All of these, I believe, would clearly come within Section 5 and these do not fit as coming within the use of the word "comply".

I think that those are good examples showing why the phrase should not be limited in the statute.

I think the coverage of Section 5 is the fact that all of these statutes may have to be submitted for approval, is not one that should be regarded as a reason to narrow the scope of Section 5. Certainly it is strong medicine.

Congress knew when it passed Section 5 that it was dealing with a virolent disease, and the very fact that great numbers of submissions have come to the Attorney General, in almost every case from states under the law, which indicates that Congress meant for the easy statutes, the obvious statutes and the statutes that were constitutional to sail through and they have sailed through, but Congress meant to put a block on the states from monkeying around with the Fifthteenth Amendment and doing the things that they

had been doing, that previous statutes had failed to curb.

Q Do you know whether Mississippi submitted anything to the Attorney General under this statute?

A I think the Attorney General's records indicate according to my information that only one matter has ever been submitted from the State of Mississippi and that was not done by the State of Mississippi, but by the Board of Supervisors of a single county.

MR. CHIEF JUSTICE WARREN: Mr. Lichtman, you may proceed.

ORAL ARGUMENT OF MR. LICHTMAN

MR. LICHTMAN: May it please the Court, in November of 1963, five white persons were elected members of the Board of Supervisors, the principal governing officials, in Adams and Forrest Counties, Mississippi, the counties involved in Fairly v. Patterson, No. 25.

At that time, Negores were almost totally disenfranchised in Mississippi. In August of 1965, the Voting Rights Act was passed, and by June of 1966 it was estimated that 132,000 Negroes were registered to vote in Mississippi.

About the same time, the Mississippi Legislature amended Section 2870 of the Code, and presented those five supervisors in Adams and Forrest Counties with a vehicle or a device to continue themselves in office. That is the

Legislature gave those supervisors the option or the power to adopt and order switching from a district by district election system to an at-large system in the county.

Therefore, in Adams County, where census figures show that Negroes have a majority in Sections 2 and 4, and where census figures show whites have a county-wide majority, the supervisors who were elected in November of 1963 were given a vehicle by which they could stay in power.

In Forrest County, the other county involved in Fairly v. Patterson, where the district was closely divided in 1960 and where Negroes now claim a slight voting majority, and where whites have a heavy county-wide voting majority, the supervisors who were elected in 1963 also chose in 1966 an at-large system.

A close look at this statute, Section 2870 as amended in 1966, shows that a simple majority of the supervisors, three out of five, may order an at-large election where it serves their interests.

In other words, suppose a Negro were elcted supervisor in one of those two counties. For the next election, the remaining supervisors, those remaining supervisors could adopt a county-wide at-large system and insure the defeat of that Negro supervisor elected prior to the at-large system.

To be sure, the statute, if you look carefully at it,

contains a referendum provision but it is hardly a safeguard here for we can expect the county-wide white majority in that referendum to ratify the decision of the supervisors to go at-large.

Mississippi answers "Look how malapportioned we were, and our population districts were very uneven in population terms, and we are only complying with the one-man, one-vote mandate of the United States Constitution."

First of all, as Justice Harlan indicated earlier, the issue before this Court is not the precise motivation of the supervisors. That is the question for the Attorney General upon submission or upon the District Court for the District of Columbia. The question for this Court is, given the real possibility that this amendment to Section 2870 is a vehicle or a device to perpetuate the disenfranchisement of Negroes, does Section 5 in its broad sweep cover the new law?

Appellants in Number 25 submit that this is exactly what Congress intended. Congress intended once and for all to make the Fifteenth Amendment effective, that to do so Congress concluded that any new statute relating to the effectiveness of the right to vote, that any new statute such as this must be scrutinized by the Attorney General before it becomes operative.

In number 26, the second case about which I shall

speak, the Bunson case, we are dealing with a 1966 amendment for which Mississippi has offered no explanation. The old law was simply that all county Superintendents of Education, surely the most important single educational official in the county, the person charged with carrying out the mandate of this Court and of the Constitution to integrate schools, the old law was this official was elected unless 20 percent of the voters petitioned for an election on the question of whether or not to make it appointive.

Suddenly, 10 months after the passage of the Voting Rights Act in August of 1965, 11 of Mississippi's 82 counties were in effect told, "Your county Board of Education shall appoint your Superintendent of Education."

The record shows that nine of those 11 counties have Negro majorities.

Q Supposing the law had been across-the-board, that Mississippi had said we are going to an appointive system of school Superintendents throughout the state?

A Our position, Justice Harlan -- pardon me -- would be that that, too, should be submitted to the Attorney General of the United States. I think that the changes are excellent that if Mississippi had complied with Section 5 and had submitted that law, the Attorney General would not have objected within 60 days and the law would have gone into effect.

Q Is there any population relationship to these 11 counties with the others? In other words, are they the 11 largest or the 11 smallest or anything of that kind?

A The counties, I believe, are spread throughout the state, but Negroes only constitute 43 percent of the population in all of Mississippi.

Q That wasn't the question I asked. Can it be said that this was done because of the size of the county, the mere size? Do these 11 happen to be the largest counties of the state or the smallest?

A I think that they do not, Chief Justice Warren. The only common element is that Negroes happen to be in the majority in nine of the 11 counties.

Q Are they the majority in the other counties?

A In a few others. They have 43 percent of the population in the total state.

Q Well, is it very relevant?

A Our point, Mr. Justice White, is that this statute withdrew the right to vote from the electors of those counties. Our position is that given the rather strong possibility that there may have been a discriminatory motive, this is just the kind of statute that Congress wanted submitted to the Attorney General for his scrutiny.

Q It wouldn't make any difference to the population that wasn't affected?

A I think that that is correct, but I think the particular facts are illustrative of what Mississippi is trying to do. But technically, even if the counties were split evenly black and white, the new law would still have to be submitted to the Attorney General.

Q Mr. Lichtman, when you answered Justice Harlan that you thought a statute submitted to the Attorney General would have been approved, would that answer apply in relation to the question he put to you, to a state-wide statute or are you saying this statute?

A I was answering, I thought, his hypothetical question which referred to a state-wide statute.

Q Is that your view, is it the same?

A In this case I would allow the Assistant Attorney General to answer the question. My guess is that he will want to scrutinize this very carefully. I don't know what position he will take on it.

Q You are not making any submission that that is involved?

A No.

Q On the other hand, I don't see why you need to make any submission that this may be violative of the Fifteenth Amendment , or anything else. It seems to me, as you read Section 5, any change from the statute quo of November 1, 1964, no matter how enlightened, no matter how

well motivated and no matter how trivial is covered by the language of the statute.

From then on it is up to the Attorney General. If he is not satisfied with it, it is up to the United States District Court for the District of Columbia. Why do you have to submit to us that this may be discriminatory or evilly motivated change. If you are right about the meaning of the Section 5, it could be the most purely motivated and progressive and enlightened or the most trivial change in the world, and yet it is under Section 5.

A I think that that is correct, Justice Stewart. Our point in going into the facts at all is that we know why Congress passed this statute. The language of Section 5 is very broad. We are trying to show that this is the kind of thing Congress had in mind. But I agree with you that the statute could be very enlightened and nevertheless the State of Mississippi, one of those half a dozen states or so covered by the Act, would have to submit it to the Attorney General.

Q You would be making the same argument if Mississippi just repealed its Act.

A That is right.

Q Suppose that the Attorney General delegated that to the Supreme Court?

A I think our position would be the same, Mr. Justice

Black. I think the Attorney General is particularly equipped since he has the Civil Rights Division to make this type of inquiry, but our position would be the same if the statute had been so written.

Q Suppose it was this Court instead of the Attorney General?

A Of course, Mississippi could appeal from the District Court for the District of Columbia up to this Court.

Q Suppose instead of the District of Columbia, the Act had said that it was first the District Court?

A Well, Justice Black, I would agree that the point here is that someone is scrutinizing these statutes before they go into effect.

Q That would be all right, wouldn't it, if the Court was named?

A I think so, Your Honor.

Q Suppose another section provided that it be submitted to a District Judge in Mississippi?

A Congress in its wisdom could do that, I believe.

Q I agree that they could do that.

A Mr. Justice White asked Mr. Derfner earlier about reapportionment.

A And I would like to address myself to that for a few moments. Appellants in Fairly make no attempt to distinguish our case or to distinguish Section 5 from

reapportionment cases. Our position is that Section 5 was intended to cover any new statute which relates to the effectiveness of the right to vote. Section 5 was drafted because of the constant attempts by the state, by the southern states, to "outguess" the federal courts, the Justice Department and the Congress.

Q You agree the statute isn't worded that broadly. If that is what Congress had in mind, it would have been very easy to say so.

A We are reading essentially Section 14 which defines voting, with Section 5. Section 14 defines voting as all action necessary to make a vote effective in an election. We are reading that language into 5 to justify our broad reading.

Voting cases prior to the passage of the Voting Rights Act of 1965 were very difficult to prove, they were monumental to try, and let us say it, the old laws were not working, and Negroes were not getting enfranchized in the southern states.

A reapportionment case is precisely the same kind of case. It is difficult to prove and it is monumental to try. Moreover, because the state can justify its new law as an attempt to comply with the one-man, one-vote mandate of the Constitution, there is the constant danger that this justification will be only a facade, that the real purpose will be a discriminatory purpose, and there is

a special need to scrutinize those statutes which appear to be reapportionment plans.

I am sure this Court would be concerned about any potentially destructive or burdensome effect on reapportionment plans, but we don't think there will be any. The local district court and the Legislature will create the reapportionment plan just as before. There will be no change. The only change is that in those states that are covered by the Act, before the plan goes into effect, it must be submitted to the Attorney General.

Q Are you suggesting that, for example, a District Court in Mississippi, if he directed a reapportionment plan it could not be effective until it was cleared by the Attorney General?

A That is our position. I think Mr. Pollak, the Assistant Attorney General, will relate to you --

Q I am speaking not of a reapportionment plan enacted by the State Legislature, but in the absence of one, an apportionment plan directed by a United States District Court.

A I think the statute can be read not to cover those type of reapportionment plans. I don't think that this court needs to reach that question. I think the question in this case is merely a statute passed by the Legislature.

Q But that you say would have to be submitted to the Attorney General.

A If I had to reach that question, my position would be that before the state makes that new plan effective, it would have to clear it with the Attorney General. But I think that this Court can avoid reaching that question. It is not presented in this case.

Q On the question of court-made plans, but legislative plans, you think would have to be presented?

A I think that is presented by the Fairly case.

Q Legislative or clearly any political subdivision.

A Yes, that is correct.

I think Mr. Pollak will say that South Carolina and other states have submitted reapportionment plans and that none have been objected to so far.

Q Well, has the District of Columbia Court got exclusive jurisdiction to pass on new apportionment plans in the covered states?

A I would phrase it this way, Mr. Justice White --

Q Regardless of the jurisdiction of all of the other courts.

A The local court in Mississippi will play the same role it played before. It will work out the plan if the Legislature is unable to. Before the new plan goes into effect, it must be submitted to the Attorney General of the United States.

Q Or the District Court.

A Yes, and if the Attorney General objects, only in that case does the question go before the District Court for the District of Columbia.

Q Let us assume a Legislature adopted a plan and a challenge to the it in the Federal District Court of Mississippi is made, and ultimately let us assume an approval of the plan. Suppose it has been taken directly here to a three-judge court.

A You mean approval by the Attorney General?

Q Oh, no, by the three-judge district court. It comes here and we affirm it. Now, you say nevertheless Mississippi can't make it effective without going to the Attorney General for his approval, and thereafter if he denies the getting of a declaratory judgment from the District of Columbia, and then coming back to us.

A Except, Your Honor, I just can't conceive in a situation like that, of the Attorney General objecting. Everyone has scrutinized the plan for both Fifteenth Amendment violations as well as Fourteenth Amendment violations.

Q We don't have any such case before us. The Fairly case is not the usual kind of reapportionment case because that was a case in which just a selected number of counties were involved, isn't that right?

A I think that that is right, Mr. Justice Fortas.

Q And is it stated that that statutory change in the Fairly case was adopted to comply with any requirements of this court?

A No, I am addressing myself only to this because appellees in Fairly claimed that that is why they did it.

Q Is there anything in the legislative history of Mississippi, in the adoption of this statutory change that would say that?

A I think the legislative history is silent on the point.

Q You have only a few counties, and aren't there other counties in Mississippi which are divided into districts for this purpose?

A All counties are divided into districts, yes.

Q And so only a few of them were affected by this statutory change.

A The statute created the option for all of the counties to do this. To my knowledge only a half dozen or so of them have done it, and two of those are involved in this case.

Q It is the state's contention that giving all of the counties the option to adopt this was compelled by decisions of this Court.

A They suggest that in June of 1966 when they did this, that was their motivation and that is why I am addressing

myself to these issues. But they have injected the reapportionment question into the case, and I feel that it may trouble the Court and for that reason, I am addressing myself to it.

Q What relief is asked?

A Mr. Justice Black, our relief is based on several cases, principles brought forth in several cases.

Q What is it?

A We ask that this Court order Mississippi to comply with Section 5.

Q And submit it to the Attorney General?

A That is correct. We could also ask --

Q But then what?

A Well, the question arises, should they set aside the old elections and should they have new elections.

Q What election was it?

A In November of 1967. In the two counties affected in Fairly, they held at-large elections.

Q They would have to wait until the Attorney General passed upon it and then it goes up to the Court of Appeals and then to us. By that time, it would probably be moot.

A Mr. Justice Black, if the Attorney General does not object within 60 days, I think that is the end of the matter. If he does object within 60 days, he will have good reasons for doing so, I am sure, and I think the District

Court for the District of Columbia in that case ought to scrutinize it, and I think new elections ought to be held as soon as the Attorney General objects.

Q And couldn't the Court of Appeals review the District Court?

A Well, if we wait that long we will get into a 1971 election. For that reason, our position is that number one, this Court should order Mississippi to comply with Section 5.

Q How can that be done before the Court makes a ruling? The Act authorizes the Attorney General to nullify the state law.

A The Court has two alternatives.

Q He can't render a final decision, can he?

A He can render a final judgment that the state law is okay.

Q Suppose that he says it is void?

A In that event, it is not final. Mississippi has two alternatives. They can cease operating the new law, or they can go to the District Court for the District of Columbia to seek to have the new law approved.

Q To get them to approve the law as constitutional.

A That is correct, in effect, or as not having a discriminatory purpose.

Q What happens if Mississippi passes a law and the

Attorney General reads in the newspaper that the law was passed and he got the U.S. Attorney in Jackson to get him a copy of the law, could he take any action?

A Certainly.

Q He could?

A Yes, sir.

Q What is the magic that Mississippi has to submit it?

A He could take action under the Voting Rights Act and he could also take action under the Fifteenth Amendment. I thought your question was addressed to the Voting Rights Act. He could compel Mississippi to submit the law to him.

Q What is the magic of submitting it, other than he gets it?

A The magic is that he has an opportunity to object, and if he does object --

Q He did have a copy of the bill, I think, as it was passed, a certified copy. That gives him everything that he needs to start with, doesn't it?

A Yes.

Q What difference does it make whether he gets it that way or from the State of Mississippi?

A It differs that the burden is on Mississippi when it goes before the District Court for the District of Columbia. Mississippi must prove that its purpose was not discriminatory and its effect was not discriminatory.

Q I misunderstood you. I thought you said the only relief you wanted was that Mississippi should submit a copy of this bill to the Attorney General.

A That is step one. If the Attorney General does not object, as far as we are concerned it is a harmless error. If the Attorney General does object then we submit--

Q We don't get any of that. All you asked us to do was to tell Mississippi that you must submit this to the Attorney General, and you must give to the Attorney General a copy of the law that he has drawn a brief on.

A We still have the problem of what happens to those people who were injured back In November of 1967. They should have had elections in Forrest and Adams County, and should have had elections for the county Superintendent. What happens to those people? Our position is --

Q Then you are asking more than we just rule that he submit this. Now, exactly what are you asking?

Q You are not asking us to pass on the validity of the Act.

A Of course not. Our position is that the law should not have gone into effect in November of 1967. We could ask you to do that, but we think it is unrealistic because it would take more than 60 days to hold a new election and during that period of time Mississippi could submit to the Attorney General.

We are not asking you to set these aside because we think it is unrealistic. If they submit and the Attorney General objects, then new elections must be held. If the Attorney General does not object then that is the end of the matter.

Q You mean if the Attorney General objects or any court rules on it, they have to set it down and have new elections? No court ever holds that.

A This court in South Carolina virsus Katzenbach interpreted Section 5 as meaning that when a new law goes into effect, it is automatically suspended. It does not go into effect.

Mississippi should not have had elections in November of 1967 under these new laws because it failed to clear these new laws.

Q The result of that is that the Attorney General of the United States, who is not a judge, and is not a court, can object to any state law regarding elections and he can immediately require that state to have another election, is that right?

A That is right. Mr. Justice Black, Congress as faced with an extraordinary problem ---

Q I am not talking about extraordinary, there are many extraordinary things. The Constitution is an extraordinary thing.

A The issue was raised in South Carolina in the Katzenbach case, and the majority of this court held that Section 5 was constitutional, and Section 5 immediately suspended the new law, and that until the covered state clears the new law the law cannot go into effect.

Q What you are saying now about the effect of the Attorney General in his holding it bad, that immediately requires the state to hold a new election, which means that the Attorney General is permitted to do this without submitting it to any court on the legality of a state law?

A The appropriate remedy, Mr. Justice Black, in our view, would be to immediately undo what was done incorrectly in November of 1967, and we should ask you to set these aside.

Q But the situation is like I said it is. Here is the Attorney General, you are giving him the power, if he holds a thing is bad, that that is binding on the state and it must have a new election right away?

A I would phrase it this way, Justice Black ---

Q Well, is that what it would be?

A That is the effect, but Congress aid the new law was bad, and the Attorney General merely has the power --

Q The Congress didn't say the new law was bad. What the Congress aid was that this state law shall not be effective unless such and such is done. Isn't that what Congress said?

A That is right.

Q If that is so, whether or not the Attorney General approves or disapproves, whether or not if the Attorney General disapproves, if the District Court of the District of Columbia says it is valid, nevertheless there was no state law in effect on the date of this election.

A That is correct.

Q I don't understand under any submission you make, you can take any other position other than there was no valid election in November of 1967.

A That is all I have done this morning is to suggest that it is unrealistic for us to expect you to order a new election in 60 days when they may submit. But logically your position is correct and I am very happy to take that position.

The November 1967 elections were not properly held because the new law was not properly cleared.

Q Because there was no law?

A The old law presumably would still be in effect.

Q But the law under which it was held could not have any effect by the state whatsoever, isn't that right?

A That is right.

Q If that Congressional enactment of Section 5 was constitutional?

A Yes, and therefore, this court could order Mississippi to hold elections pursuant to the old law, and

we would be delighted if you would order that.

I think I will save, if Your Honors permit me, the remaining few minutes for rebuttal.

MR. CHIEF JUSTICE WARREN: Mr. Pollak.

ORAL ARGUMENT OF MR. POLLAK

MR. POLLAK: Mr. Chief Justice and may it please the court, the issue this morning is a statutory interpretation and it involves the responsibilities of the states and the rights of citizens under Section 5 of the Voting Rights Act of 1965.

As has already been presented before the court, the major and overriding issue is whether failure to comply with the procedures of Section 5 precluded enforcement of the changed laws concerning the election of county supervisors, the appointment of county school superintendents, and the requirements for qualifications of independent candidates.

The argument thus far has focused on one of four issues which the appellees have projected in the case, and which we believe are in the case.

I would like to state them and I am prepared to present argument on each of them.

The first is whether Section 5 is limited to the qualifications for registration to vote or whether it reaches beyond that scope to cover changes which effect voting and

may violate the Fifteenth Amendment.

The second issue, not yet discussed, is whether where a state fails to comply with the procedures of Section 5, a person whose vote is effective has a private right of action to seek to enjoin the enforcement of that changed law.

The third issue is whether if such a private right of action is authorized by Section 5 it must be brought as the suits here were brought before a three-judge court. In the last issue, it is whether these appeals are mooted because when the Clerk of this court requested the Attorney General for his views on March 11 of this year, he gave the Attorney General notice of the changes and the Attorney General has not made formal objection or at least that is how the issue is stated in the appellees' briefs.

I believe the facts of these cases bear witness to the prophetic vision of the Congress in enacting the Voting Rights Act. It was concerned as the reports of the committees and the debates indicated, that once the barriers to registration were down, the states covered by the Voting Rights Act might resort as they had resorted through previous 100 years to other stratagems, to preclude effective votes by Negroes.

The Voting Rights Act was essentially a statute which, one, suspended literacy tests and devices which had

been used to discriminate, and two, as had the courts in the previous years, sought to freeze the presently existing statutes, so that when the literacy tests were out of the way, and Negroes were able to register, those then existing statutes would remain in effect until the Attorney General or a court of three judges and in turn, this court, had reviewed the change to determine that the change was not a violation of the Fifteenth Amendment.

It did not put any final powers in the Attorney General as we read it.

Q Did you say until someone had reviewed it to determine whether it was a violation of the Fifteenth Amendment? Who was that person?

A The court of three judges of the United States District Court for the District of Columbia. It was logged in a court, and the only role of the Attorney General -- there is no requirement as we read the Section 5 that the state must make a submission to the Attorney General.

It may move to the three-judge court immediately when it wishes to enact or enforce a changed law. The only provision for the Attorney General is that if the state believes it has a change which is not violative of the Fifteenth Amendment and wishes to move through this procedure established by Section 5 faster than it believes it can move to the District Court, it may submit it to the Attorney

General.

Q In either case, whether the case moves directly to the District Court for the District of Columbia, or after the refusal of the Attorney General to approve, must this court get into that?

A We read it to require a three-judge court in either event.

Q Can it appeal directly?

A That would be true.

Q So, we don't involve the Court of Appeals?

A No, Mr. Justice.

Q In the Katzenbach case, if that merely approved the constitutionality of the law and that is as far as it went, do you say in that case that we hold that it governs however it is applied?

A I believe the decision of this court validated the constitutionality of Section 5.

Q To the extent of what? Is that any way it is applied?

A Well, I believe the first issue that I articulated this morning, the scope of Section 5, is still open for this court to rule in this case.

Q That only ruled that it was constitutional so far as requiring that the submission be made. Could it hold at that time that however it was applied this was

constitutional?

A Your Honor, the court had Section 5 before it when that South Carolina statute changing the hours of voting from six o'clock in the evening to seven o'clock in the evening was presented and the Attorney General adverted to it in the course of the argument.

The court makes reference to that change in its opinion, in the text and also in a footnote on page 320. It also makes the statement that there are indications in the record that other sections of the country listed above have also altered the voting laws since November 1, 1964.

But the court did not have before it the procedures which would be followed by the Attorney General or beyond that by the court if there were any unusual procedures.

Q Do you think that it held in that case that it would be constitutional, if it would be the result of submitting it to the Attorney General, that that would nullify state elections?

A I believe the court made this holding ---

Q That wasn't the issue.

A I want to stay away from a statement or an argument that the court held if the Attorney General said it was bad, I believe those were Your Honor's words ---

Q Or whatever was held.

A The point that the court ruled upon was this, and

I believe it did hold this, that the Act suspends new voting regulations pending scrutiny by federal authorities to determine whether their use would violate the Fifteenth Amendment.

I believe that the Voting Rights Act, as I have used the word before, froze the laws at the time it was passed or as of November 1, 1964.

Q Without any court passing upon it?

A It froze those laws and said if the state wished to change them ---

Q Was that the decree?

A No, the Congress of the United States froze them.

Q Well, the Act says, as I understand it, not that it did, but it did if it wasn't submitted to the Attorney General.

A I believe the scheme of the Act, and I am prepared to advert to the legislative history, which I think is relevant ---

Q I have no doubt about what they intended. We passed on the constitutionality of it.

A I believe that the court in South Carolina in the Katzenbach case, on pages 334 and 335 of 383 U.S. did pass on the constitutionality of the suspension of changes by the Congress.

Q In that case,on those facts, to the extent that it was filed that way?

A I would respectfully ---

Q Do you think that the opinion would be that in any way it was applied it would be constitutional? You don't think that, do you?

A Your Honor, the application of the Act follows after the freezing. In other words, that the application of the Act is the procedure by which the state may put into effect a change. The courts of the United States -- and I don't believe it reached this court because the Voting Rights Act was passed in the intervening time -- but the lower courts of the United States in voting rights sections had adopted the freezing principal.

They had said that the laws under which whites were permitted to vote and Negroes were denied the vote --- those laws or those procedures would be frozen in effect for a period of time which would allow the Negroes equal rights to register.

That was the principal which Congress embodied in Section 5.

Q It was the principal to let the Attorney General of the United States look at it, and he is not a judge, to look at it and see if it violated the Fourteenth Amendment.

A I don't believe that was the principal. The

principal was that Congress said any change shall be suspended, the present law as of November 1, 1964 shall remain in effect. Negroes shall have five years -- the Voting Rights Act is a five-year Act -- and during that five years these laws were to be frozen.

The past discrimination was to be there, and Negroes were to be able to vote and not as has occurred in this case, to have to litigate the changes during that brief five-year period while the changes were in effect.

Q Do you think it was the object of the Congress to suspend any new law and leave the old Mississippi laws that had been on the books a long time in effect?

A I believe that is what the Congress did, and it provided a speedy mechanism to meet that situation which Your Honor poses, by presentation of those laws to the Attorney General or the state, of course, has the option not to present them to the Attorney General, but to go right to the three-judge court of the District of Columbia.

In that event, the suit would be against the Attorney General of the United States and I would respond at this point that I would not be prepared to concede Your Honor that the suit if logged in the District Court wouldbe an appropriate location.

Q Why wouldn't it, if the Constitution permitted it?

A I believe the decisions of this court

invalidating a suit in the District of Columbia, where the suit was brought against officials of the United States Government, and this is their domain ---

Q The District Court of the United States is the District Court of the United States.

A I believe the procedure must be appropriate to enforce the first clause of the Fifteenth Amendment, and I think the appropriatness here called for speed and called for the Attorney General to relieve that action and defend that action in the District of Columbia.

Q I am not asking you any questions with any idea that I think Congress does not have full power to pass its own laws, and to have its courts judge their constitutionality.

A I had no such thought in mind. We do not read the law to lodge a power in the Attorney General which is an absolute power.

Q He suspends the law, doesn't he?

A The suspension of the law is in the hands of Congress which did do it in Section 5. The law was suspended and the change was suspended the day the law was passed. That is if there had been changes.

Q The action of Mississippi in 1966 was suspended by Congress, you mean?

A Your Honor, the Act was passed effective August 6, 1965, and the change between Novmeber 1, 1964 and August 6 was suspended and the changes for the five years after

the effective date were suspended.

Q And it returned them to the tender mercies of the old law?

A Except for certain provisions. Those were suspended by Section 4 of this Act.

Q Suppose Congress didn't sanctify the old Mississippi law. They were still open to attack in the courts, were they not, by anybody?

A They were open to attack and the Department of Justice was presently litigating them in 77 voting rights cases in the south, and not all in Mississippi. Those cases were all pending, and this court had before it earlier that year in January of 1965, the full records of the devices which had been used to discriminate, and the way of Judge John Brown of the Fifth Circuit, "The barring of one contrivance has too often caused no change in result, and only a change in methods."

That was Judge Brown's dissent, and this court in the case reversed in 380 U.S. just earlier in the year.

Q The court took care of the device, didn't it?

A Yes, but the problem presented to the Congress in passing a five-year remedial measure of the Voting Rights Act was that the period of time, as Judge Brown said, the change resulted only in adoption of a new contrivance.

The Congress met the situation whereby Negroes

litigated for four to five years sometimes and ultimately prevailed.

Q But you say it suspended any new law, and left the old laws in effect. A suspension would do that, would it not? That would sanctify the old law at that time?

A Congress did not sanctify them, no.

Q They suspended the law?

A Yes. We believe that the words, and the legislative history, and the initial interpretation of the statute by the Department of Justice, and the interpretations given the statutes by three states who have submitted and by my review of our files endeavored to comply with Section 5, that is South Carolina, Virginia and George, the interpretation of those states indicate that the coverage that is contended for in these three proceedings is the proper coverage.

The opposition position, that is, that the statute reaches only the qualifications for registration, has little support. The appellees cite a statement by Assistant Attorney General Burke Marshall, whose information and knowledge of the statute I would very much regard -- Mr. Marshall responded to a question of Congressman Corman, who asked him, "Mr. Marshall, has the Department of Justice given any consideration to the question of whether the statute should address itself to the qualifications of candidates for office?"

And Mr. Marshall responded, "The main problem the bill addresses is the qualifications of voters."

Now, that I think must be understood in the context in which Mr. Marshall made the statement, and I think it makes the point. The bill addressed the problem that the registration requirements had been implemented and used to preclude registration by Negroes. There were few Negroes qualified to vote.

In Holmes County, one of the counties that is involved in No. 26 here, one of the school superintendent counties -- in Holmes at the time the Voting Rights Act was passed, there were 100 plus percent of the whites registered, and .23 percent of the Negroes.

I looked at the figure for early this year, 1968, and in Holmes, today, it is still 100 plus percent of the whites, but it is now 72 percent of the Negroes, and the Negroes have a majority.

In any event, Congress was suspending or excluding the use of tests and devices to discriminate, but it was also saying that no changes in the laws which would affect the Fifteenth Amendment rights would be permitted. That is what it passed Section 5 for.

Q I would be perfectly satisfied with your argument if you said that certain things were devices and put them into an Act. What disturbed me was Congress delegating

something at least for a time to the Attorney General.

A Mr. Justice Black, we don't read that as the delegation.

Q What could it be except that?

A The body that Congress called upon to make that determination of whether the suspension should be lieft, and if thereis a controversy, there is the three judge court for the District of Columbia.

Q Whether the suspension could be lifted? Until that time, the suspension was in effect by reason of the determination of the Attorney General?

A No, by reason of Congress.

Q How can you draw a distinction?

Q Isn't the Attorney General merely and option to the states for short circuit litigation?

A Justice Harlan, that is our understanding of the law, and that is what we r[illegible] Chief Justice to say in the first sentence on this subject in South Carolina versus Katzenbach.

The Act suspends new voting regulations. There it is.

Q It suspends it on conditions, isn't that so? Wasn't it suspended on conditions?

A The STate of Mississippi had full 360 degrees scope to bring a law suit in the three judge district court

for the District of Columbia on the day they enacted these changes. The Congress made the judgment. Whether it was wise or not is not mine to argue or review and I don't think it is relevant unless it were a violation of the Constitution.

It made the judgment that on the basis of this record of history and discrimination, 100 years of it, that the present laws of these six covered states and the counties in three others were to remain in effect with the exception of the suspended ones, the tests and devices, and Congress said we prefer those laws until any changes are validated in a law suit in the District Court for the District of Columbia.

Q If it had said that unconditionally, that would be okay?

A I think it did say it unconditionally.

Q You do think that the Act said unconditionally, and we could construe that Act as suspending every effort of the state to amend election laws?

A I think the reach of the law is broad, because as Mr. Katzenbach said ---

Q Do you think that the question I asked -- can you answer that one?

A That all of those changes which the state may wish to make?

Q That is that he has been given no power, and you can read that Act to say that no state cna change its election laws or any southern state is barred from changing any of its election laws that they have indefinitely?

A For five years, Your Honor. I think that is what the statute means.

Q It suspends it for five years without any action by the Attorney General? Do you think that Act means that?

A I do. I think the Attorney General has a duty, if one is submitted to him, and of course the time runs against the Attorney General for 60 days.

Q If that is true, the Congress froze all of the election laws of the south, froze them for five years.

A That is the way I read it.

Q That would raise a different question in my mind. I can't quite read it that way.

A The background of this is indicated ---

Q Mr. Pollak, are you going to get to the next question that you put, which is the private right of action?

A Yes, Mr. Justice Fortas. The private right of action, I believe, is indicated by the changes in the wording of the statute, which were made by the Congress. As submitted by the President and the Administration, the bill and I am quoting here, "prohibited enforcement of any new law or ordinance imposing qualifications or procedures for

voting."

It was a prohibition in those words. It made no reference in Section 5 to persons. It prohibited enforcement of a new provisions.

Congress reframed Section 5 and broadened it and inserted the words that"until a state complies, no person shall be denied the right to vote for failure to comply with such new qualifications."

Our understanding of Section 5 is that in adding the words, "No person shall be denied the right to vote for failure to comply," Congress recognized it created a right in private persons to bring a suit to enjoin the enforcement of one of these suspended statutes. Without that provision, the private party would have to live under the changed provision, and would have to travel the long route of litigatic in a suit under 42 U.S.C. 1983, in which he would live under the changed law and litigate it while the change was in effect.

The private right of action permitted the plaintiff to bring suit, to recognize the suspension of the statute.

There is no problem about the jurisdiction for the private right of action in 28 U.S. Code, 1343, Section 4, which authorizes relief under any Act of Congress protecting civil rights including the right to vote.

We are here contending that there is an implied right

of action. This is what the court recognized last term in Johns versus Mayor, saying the fact that 1982 is couched in declaratory terms and provides no explicit method of enforcement, does not of course prevent a federal court from fashioning an effective equitable remedy.

Now, of course, there are procedures in the Voting Rights Act that provide for the enforcement procedures of Section 5. In a number of cases under the Securities and Exchange laws, the fact that one agency has an enforcement responsibility has not prevented the court from recognizing and implied right of private action.

I would like to take a moment with respect to the three judge court provision where again a question of statutory interpretation is raised. The evolution of the words of the statute we believe again shows that Congress recognized that there would be other actions besides the three judge action in the District of Columbia.

As the Senate passed the bill, Section 5 referred to the three judge court -- or to the declaratory action required to be brought, and then concluded in the last sentence, "Such an action shall be before three judges."

I would have read that law, had it become the law passed by the Congress, as limiting the requirement of three judges to the district court. Indeed, I might also have read it to limit or exclude any private right of action.

However, the House did not accept the Senate version, that such an action shall be before three judges, and changed that language to read as it now reads in the states, "Any action under this section", and my understanding of the change in the language is that the Congress recognized that there would and could be implied private actions, and provided that any such private action would be before a three judge court.

Q Suppose we don't agree with that, and suppose we think that although a right was conferred by Section 5 upon the individual, the individual has to look elsewhere for his cause of action?

A That he has to bring it before a one judge court.

Q Not necessarily. We then could say he would have to bring it before a one judge court. If as I take it the situation is here, he is also challenging the constitutionality of the state statute.

A No, I would believe as Mr. Derfner said, that in the case where he combines a section 5 claim with a claim of unconstitutionality under the Fifteenth Amendment, that the three judge court is properly convened.

Q It is a sort of dependent jurisdiction?

A The problem is not fully resolved in these three cases Mr. Justice Fortas, because in No. 25 and No. 26 the plaintiffs dismissed the constitutional claim, so those cases

would not properly be here if a three judge court is not required.

Q So they have to derive a three judge court provision from the four corners of Section 5?

A That is right. Those two cases must find it within Section 5. We don't rely on contentions as an amicus that the general doctrines of this court ennunciated in Swift versus Wickam or other cases would validate a three judge court here if it can't be found.

Q You could say that Section 5 gives the petitioners in 25 and 26 a right of action, or gives them a right. But it might follow that that right would have to be vindicated before a single judge, except for the language you pointed to in Section 5?

A That is correct.

Q Would you say that you did know about this as of March of this year?

A We would say the state is correct, and we knew of these changes as of that date, but we would say that the Attorney General must rely upon the formal procedures, and that the submission of the change as submitted by the chief legal officer of the state or the county, and that we follow those formal procedures.

In the argument on South Carolina versus Katzenbach, the question of the six o' clock to seven o'clock change by

South Carolina was raised in this, and Mr. Katzenbach said that the United States has no objection to that change. It is argued by appellees, that that exchange with this court was an approval by the Attorney General of that change and under the terms of Section 5.

In fact, I have reviewed the files of the Department, and South Carolina, 15 days after the argument, submitted that change in writing to the Attorney General, and the Attorney General responded in writing on April 1, 1966, saying that he had no objection to that change.

We must rely on the procedures that are established by Section 5 and we do not feel called upon, and indeed would have considered it out of order to have expressed an objection in a response to the clerk's request for our view. That is not the issue here as has come out in the argument.

The merits of the changes are not an issue. We have said in our brief, and I would say in oral argument, that each of these three changes imposes a serious question of the Fifteenth Amendment violations.

Q Mr. Pollak, if there is a private right of action before a single judge, why shouldn't the question be limited to just whether or not the statute in question is coming by Section 5?

A Rather than the Fifteenth Amendment, you mean?

Q Because otherwise, doesn't the Act contemplate that

the validity of that be passed upon by the Attorney General or the District of Columbia court?

A Yes, I believe that the posing of the validity of the statute is envisioned by Section 14 of the law, to be determined in the District Court for the District of Columbia.

Q Let us assume that in one of these cases that a federal district court in Mississippi, the plaintiffs asked that the statute be declared unconstitutional. Do you think that the district judge should dismiss it?

A I do. I thought you meant Section 5.

Q No, a statute, a state statute, so that any new state laws are unattackable on constitutional grounds in any of the covered states in any of the district courts.

A I don't think that the statute withdraws power. I will change my answer upon better understanding. The statute does not mean to remove the power of the right of a private citizen to sue under 1983, where his rights are deprived by an unconstitutional statute. He can still go into the three judge court, and he can litigate the constitutionality.

Q Why should the federal court do that? I would agree if the Attorney General approved the statute or 60 days went by and he didn't approve it, I would think that a citizen could still challenge it. But until it is approved, or 60 days have gone by, it isn't any statute at all?

A I would agree with that, it is not an effective statute and the courts should understand it and dismiss it. You are correct. So that the jurisdiction would only suppose -- logic would say that there is no case in controversy until the 60 days has elapsed.

Q In one of these cases, you have a Fifteenth Amendment claim, but you are not suggesting that, as I now understand?

A Mr. Justice White has analyzed that to correctly, I believe, answer the question.

Q There is no statute, and therefore there is no place for a claim on that. Therefore, that does come down that you have to find in that case the justification for the three judge court.

A On that analysis you would, and that analysis strikes me as correct.

Q So, you say there should be a three judge court in any of these cases?

A That is the way we understanding it, yes, sir.

Q Mr. Pollak, before you sit down, would you mind telling us what the extent of the relief should be in this case?

A The Department of Justice has in prior cases sought not to upset elections that have previously been held, and therefore, we would be loath to urge this court to

order the school superintendents who were appointed or the county supervisors who were elected at large in Adams and Forrest Counties that their elections be upset.

We would ask this court to declare the changed laws ineffective respectively and to remand to the district court for requirement of new elections.

Q Thank you.

Q Could I ask you a question? This is beyond, I think, the purview of what we have before us, but I am just interested as to what the Department's view is.

Do you think that the measure of an illegal device is the constitutionality of the Fifteenth Amendment or do you think it is broader?

A I believe the issue, if I understand your Honor, in the three judge court for the District of Columbia, is the constitutionality under the Fifteenth Amendment.

Q You do?

A Yes, sir.

Q And the Act is broader than that?

A Yes, and the Attorney General should apply Fifteenth Amendment standards in offering that avenue. There is one statement by Mr. Katzenbach in the hearings in response to a question posed by Senator Ervin. He said and this is at page 237 of the Senate hearings, "But the effort here was to get at things that were not included within the words 'tests an

devices', and the thought that other things that violated the Fifteenth Amendment by a state should also be subjected to judicial review."

It might help the court if I just related a statistic which I assembled before I came, and it came up in argument and it was alluded to by our counsel.

The Department has received 251 submissions under Section 5. It has received one submission in November of 1965 from Alabama, a submission from the county in Mississippi in 1966, and no submissions from the State of Louisiana. We have received a number of submissions from the State of George, a number or a few submissions from the State of Virginia, and a rather large number of submissions from the State of South Carolina.

The only occasions that the Department has had to state that it could not consent was one case from the State of George where the change was contrary in our judgment to a prior court decision on the same issue.

The court decision was made after the Voting Rights Act. There were two other cases from the State of Georgia where inadvertently the changed statute incorporated another section of the Georgia law by reference, and that other section provided for a test or device.

Q How promptly has the Attorney General been able to act on these applications?

A Well, we have in no case -- we must act within 60 days -- and in no case on the first submission have we ever received any request to speed up our reaction. I believe we could do that. Generally matters being what they are, we take most of the 60 days. But there is no necessary requirement that we do so.

The question was raised in the argument on Section 5 aspect of the Allen case, which Your Honors heard yesterday, as to the speed in which it could be done. It seems to me that the Department of Justice ought to be capable of dealing with these things promptly.

Q Mr. Pollak, let us assume that as you said frankly, with respect to one or more of the changes which are involved here, you had no objection to them. If it was submitted you would approve it.

In that particular case, would you think that there ought to be new elections? Let us assume that in the qualification case, you thought that was a perfectly good provision. Let us assume that tomorrow the State of Mississippi submitted it to you and you approved it in writing, What do you think this court or the district court should do if it was no law until you approved it?

A I do think that a remand order of this court could incorporate that provision, that if the state wishes to submit the provision promptly to the Attorney General, and if

the Attorney General states no objection, then the provision would have been effective and it is effective.

Q Certainly if there were new elections, it would be held under the new law, because it is a law then, but what if the Attorney General turned it down and the state promptly filed suit the same day with the District of Columbia court?

A I believe that the proper procedure would be for the state to have available to it all of the powers of state authority and injunctive authority pending a hearing on the merits in the three judge court in the District of Columbia.

If my prior statements would indicate that the remand of this court ought to preclude the state from that, I suppose that I would want to change that. But I don't think that I can stray from the fact that in the state of matters here it was entered into by the State of Mississippi with knowledge of the court's decision in South Carolina, and with knowledge that the court had ruled that the law was suspended and therefore, the court really faces a situation, as Your Honor has already mentioned, that these laws have not been in effect down there and they are not in effect now under our reading of the statute.

Q That brings us back to the question asked by the Chief Justice.

If the court should agree with you on the basis of the merits, I didn't quite understand what you think the

proper disposition of these cases should be. It is to remand it to the district court, you said, and then what?

A Well, I stated that it should remand the case or respectfully suggest that it remands the case to the district court with directions that the district court declare the law not in effect until procedures of Section 5 are formed.

Q People now hold office as a result of these laws, so we have to think a little bit beyond that.

A Well, perhaps I will answer your question, but perhaps I should also ask to frame a paper and submit it to the court with a careful statement of what the relief should be.

Not being the plaintiff parties in the case, the government has not spelled out that.

Q That would be helpful to me, if you would like to do that in your position as amicus.

Q Would you do that for us?

A Yes, Mr. Chief Justice, we will do that.

Q Of course, serve it on the other side, too.

A Oh, yes.

ORAL ARGUMENT OF WILLIAM A. ALLAIN

ON BEHALF OF APPELLEES

MR. ALLAIN: **Mr. Chief Justice, and may it please the court, we are a little bit concerned ourselves about the type of relief which the appellants want to ask for.**

We were under the impression at first they wanted to set aside the elections held in November and have new elections. In view of the position they have taken today, we feel that maybe one of the most important questions before the court is whether or not this issue is moot, whether or not the submission by this court to the Attorney General and in the submission by us in our response brief to their brief, gave them the information and gave them the notice that is required by Section 5 of the 1965 Voting Rights Act.

We say it is. We know of no formal submission that has to be made to the Attorney General's office.

Q Do you think anything of the Attorney General's statement, that indicates that he approved or disapproved of these laws?

A No, sir, I think that there is nothing in the brief and in fact, he states in his brief that he is reserving unto himself the right to approve or disapprove at a later date.

We say to that assertion, he cannot reserve unto himself longer than 60 days which Congress itself has placed in the Act as the time in which he must make some kind of determination.

Now, he speaks of a formal writing. I know of no directive that the Attorney General's office has put out on how we shall submit to the Attorney General our new laws.

And just because some of the other states have submitted them in one manner or the other is not binding upon the State of Mississippi, nor is it controlling as to what Congress really intended to do.

Q But this case can't be moot unless you lose the first.

A Your Honor, it would be moot if they have withdrawn their request for the relief which they have asked for. It was my understanding of the position taken by counsel opposite, counsel for the appellant and not the amicus in this case, that as far as they were concerned what they were really asking for, was for this court to tell Mississippi, submit this to the Attorney General's office and let him approve or disapprove.

Now, we say this court cannot command nor direct the State of Mississippi to do something which is beyond the scope of the Act itself. We say at this late day, this has already been done, exactly what appellant wants. It has been submitted to the Attorney General of the United States and he has not exercised his prerogative within the 60 days.

Q The State of Mississippi has not yet submitted it. I think that your position as stated in your brief is that this court submit it to the Attorney General?

A That is correct.

Q That was not what the statute says. The statute

says that the state shall submit it.

A When we submitted our response to their brief, at that time, we put them on notice through the Attorney General's office.

Q It doesn't say, "Put on notice." It says "submit".

A That is true, Your Honor, and I do not know what the statute really means by "submit". Does it mean by telephone conversation, or does it mean by in a brief or does it mean by passing on the street and we met the Attorney General and saying, "We have a new law."

Q Has Mississippi done anything?

A Yes.

Q By March of this year, to get in touch with the Attorney General by meeting him on the street or mailing or anything else?

A We have submitted, Your Honor, in our brief, and he has been put on notice, and that is the only submission that we have made. Your Honor, let me refer to one thing that did happen, and this is a submission or at least the Attorney General's office accepted it as so. We passed a constitutional amendment in which we have lowered the residence statute in Mississippi from two years to one year.

They sent registrars into the State of Mississippi recently here to register individuals under the Act.

I was sitting at my desk one day. A telephone call comes in from Mr. Bob Moore, of the Justice Department, asking me, and he said, "We have known through the paper or otherwise that this constitutional amendment had been approved."

We have never submitted it. He said, "Is that true?" And I said, "Yes."

And he said, "Is it in the Constitution?"

And I said, "Yes".

And he said, "We will now notify the federal registrars to use that as a qualification."

That is submission and that is approval.

Your Honor, I don't know of any formality. I don't see how the Attorney General's office can stand here today and say there is some formality when they have acquiesced in a change which came about after November 1, 1964, when I have submitted it over a telephone conversation, and they through their officials and agents have put it into effect.

That, Your Honor, we think, is actually Section 5, it is more of an informal thing, and it must be tied into whether or not a private suit can be brought. We think actually the legislative history shown from, as we quote in our brief, the Attorney General didn't want to roam all over the southern states.

Q This is on the assumption that it applies to the changes?

A That is true, and if that was deciding a mooted question, you would not have to reach these other questions.

Q If you take the position that this change has been submitted to the Attorney General of the United States by or on behalf of Mississippi, then I take it that you haven't got anything to argue about here. You still say that the Act does not apply?

A Yes, we could say that because it would be a mooted question and we would have no case of controversy here because the relief requested, so I think, has been withdrawn as far as the appellants are concerned.

Q Do you agree that the Act covers the various alleged tests and devices that are in issue in these cases?

A No, Your Honor.

Q Therefore, you don't agree that they have been submitted to the Attorney General?

A What we are saying, Your Honor, is this: We don't believe we had to submit.

Q Do you or do you not?

A No, but we do not believe we had to submit it, but it was submitted, and therefore, it is a mooted issue, and there is nothing left for this court to decide.

Q It was submitted by the Clerk of the Court, if that is what you mean.

A And also through our response brief which brought

attention to the Attorney General informally, or in this case very formally in writing that we had such a law, and he had 60 days, and he has done nothing about it.

MR. CHIEF JUSTICE WARREN: We will recess at this time.

(Whereupon, at 12 o'clock, the oral argument was recessed.)

AFTERNOON SESSION

12:30 p.m.

MR. CHIEF JUSTICE WARREN: You may proceed.

MR. ALLAIN: Mr. Chief Justice, I do not intend to belabour the point any longer, your Honor, in regard to the mootness question though we do feel it is a very serious question in this case.

I would like to refer the court to our brief in which we have quoted from the memorandum submitted by the Attorney General in this particular case.

"Since Section 5's approval procedure was designed to serve an informing function--to provide 'a method of bringin to the attention of the Government changes in state law'."

We again submit that this was merely to keep the Attorney General from roaming all over the Southern States affected by the '65 Voting Rights Act and trying to find out every time when a new law in regard to voting was put into effect in these States.

It is page 15 of our brief. That is in No. 25. It means that we seriously urge to the court that the informing that the Attorney received in this case was sufficient by the legislative history, by the intent of Congress, by the interpretation placed upon that section by the Attorney General's Office themself, that there was no need for any formal type of notice given to the Attorney General's Office.

We would further invite the court's attention to page 22 of the Memorandum of the United States amicus in which in this particular brief and on page 22 thereof they admit or seem to admit that the Section 5 applies to reapportionment or to redistricting like we have in this particular case before the court today.

Then they say, "The most that can be assumed from past silence is that the Attorney General was not prepared to impose an objection to the changes being effected and, thus, declined to seek to compel a state or political subdivision to comply with what would have in all likelihood be a wholly formalistic step that would merely have delayed final implementation of a constitutional required restructuring of government."

They are admitting there that so far as they are concerned there may be other areas in which there has been a restructuring of Government and they didn't feel that they should make them take the formalistic step.

This, your Honor, does not tie in or does not fit in with Mr. Justice Brennan's remarks and I think Mr. Justice White's remarks that it is not for the Attorney General to make that decision whether or not they are going to be suspended.

If they are suspended, they are suspended until if they come within the purview of Section 5, they submit to the

Attorney General's Office and if approved or disapproved then it is appealed to the Washington, D. C. court.

What they are saying here is that there might be other areas throughout the Southland but we didn't feel that we ought to take any steps to make them do that.

If you are going to be consistent and say that Section 5 says that the Act suspend these, what he is saying is that we have got laws there that are being suspended.

We know they are being enforced but we will not do our duty under Section 12(d) of the Act in Section 12 which says that the Attorney General can bring injunction proceedings to keep those States from doing what Section 5 says they can not do.

Q I assume if we accepted your argument that the Attorney General really has been informed when 60 days has gone by, then the plaintiffs are in shape to challenge these laws directly in the District Court as to their constitutionality?

A I would take that position, Mr. Justice White, because we take the position that they do not come under the '65 Voting Rights Act.

This court was to hold or if the position was taken as the Appellants apparently are taking that it does come under the '65 Voting Rights Act, then they could not challenge it in a local District Court.

Q Once the Attorney general has approved it, they could.

A Excuse me. I misunderstood your question.

Q You are saying that the 60 days has gone by.

A We submit in our brief, your Honor, that they have that right, then they have the right on the local level to bring the suit under the 15th Amendment. I would like to clear this up in the Marshaw Case and the Fairly Case which is the at-large supervisors.

We don't have in that case a 15th or 14th Amendment question. That was taken out not by stipulation as in the other two cases. That was taken out by a petition or motion filed on the part of the appellants an order granting that that second claim be taken out of the lawsuit entirely.

So we stand before the court today resting entirely upon the jurisdiction of this court and the three-judge District Court, the trial of the District Court, upon the Act in and of itself.

Q Assuming that these acts are covered by the Civil Rights Act of '65, which I know you don't agree with, but assuming that for a moment, then is it your position that up until March of this year these particular Mississippi statutes were suspended and then 60 days after March because the Attorney General didn't take any action they get new life? That would be an anomalous situation?

A No, I think it would be more of the fact that they didn't take any action, more or less approval of it, and Congress intended it to be more or less retroactive, that they would become effective as of that date.

Q There is nothing that you have shown me so far that says the Attorney General knew about this before March?

A That is right.

Q So he hadn't approved it before March?

A To my knowledge, he had not, sir.

Q So then it was suspended because it hadn't been submitted to him?

A My feeling in it, your Honor, would be that if a law was passed or put into effect and it was submitted to him and he has the 60 days, that even if he didn't act within that time or he approved it that it would be more or less retroactive and that it would become effective as of the time in which it was put into effect.

Q But you are relying on the fact that he didn't disapprove it within 60 days?

A To my argument, your Honor, yes.

Q His 60 days according to your position didn't start until March?

A No, sir.

Q Of this year?

A According to my position, it was in the last term,

your Honor, first when the court had requested that this amicus be filed. I am not sure of the date.

Q As of whatever date that is?

A Whatever date it is.

Q So he had not passed on it one way or the other?

A At that time.

Q He had not had an opportunity under the statute to pass on it because it hadn't been quotes submitted?

A Until submitted by this court.

Q So then it was suspended?

A But he is not acting upon it, your Honor. We think Congress intended it would be retroactive and it be effective as of the date in which it was passed whether he approved it or whether he didn't do anything about it.

We think you would almost have to read that into the Act to keep it from being a suspension in that period of time when nothing would be really in effect.

Your Honor, we would like to say this.

Q Mr. Allain, do you want this court to say that any way that the information about the Act comes to the Attorney General from the State, by telephone, by word of mouth, or any other way, that that triggers the Act so far as the Attorney General is concerned?

Or do you concede that the Congress had an intention to have some kind of formal notice from the State to the

sible from that time on.

A If the court please, they had accepted apparently

in that manner. I would place the same instruction they placed on it.

Q I am asking if you think that ought to be our rule? In other words, you would want the courts to determine whether the Attorney general had been adequately notified to look into collateral litigation and things of that kind to find out if there was any word which came from the States to the Attorney General rather than to have a direct communication with him to that effect?

A If the court please, at this time, that is really -- in other words, I would rather limit it to what happened in this particular case which was a formal. I would not want to foreclose it as a case argued earlier in this court.

It might just be around the corner. But this court does not have to make that decision. This court doesn't have to go that far. This court can merely say, "In this case this was a formal" or was all that was necessary under Section 5.

Q You used an illustration at the beginning of your argument that went farther. You told us about telephone conversations between somebody in the Attorney General's Office and somebody in the State of Mississippi?

A Yes.

Q Do you contend that that was sufficient compliance under the Act?

A I contend it was, your Honor. I contend the Government intended it to be.

Q And that we should recognize it in our decision, the informal telephone call?

A I do think so, your Honor.

I would like to say this: In the outset, counsel for the opposite placed quite a bit of their time and effort discussing the ratio of Negro to white, discussing the counties how the make-up was, and so forth.

I would be less than honest with this court if I was to stand before it and say, "There is no ratio overtones here; that until I came here today I didn't realize that race was one of the prime movements of this particular lawsuit."

But I will say this: Before this court, race is not a question. As Justice Stewart said earlier, we only have a question before this court first of the jurisdiction which there has been limited discussion of as of this time and secondly whether or not this aAct -- I don't care where it was.

I don't care if there were all whites, all Negro -- whether or not this type of Act in the Marshaw case, in the Fairly Case -- I would like to limit my argument to that.

Mr. Wells will discuss the other cases -- whether or not it came within the purview of the '65 Voting Rights Act. I think I would like to make that clear. Because there is no need to discuss in this case ratio. I would like to say this

regard to a question posed by Mr. Justice Fortas: We know that this court decided in the Aubrey versus Midland County, Texas, case that the rationale of the Reynolds versus Sims goes down to the local level.

That was the first time this court had actually made that pronouncement.

April 11, 1966, shown in Appellee's brief at page 15 in No. 35 -- let us get these dates, your Honor, -- April 11, 1966, the Chief Judge of the Southern District of Mississippi, Judge Harold Cox, in the case of Crosby versus Pearl River, Pearl River County in which a suit was filed to command that supervisor to redistrict, the motion to dismiss was filed on the grounds that the rationale of the Reynolds did not come that far down.

He found that it did. On April 11, 1966, he found that it did and he directed Pearl River County to redistrict. Other suits were filed, and the legislature did not pass this Act until May 27, 1966.

Having put on notice that the District Courts of the Southern District of Mississippi felt that the reapportionment decision did go down to the county level.

Your Honors would have to be familiar with some of the counties of Mississippi to realize. We don't have any debates in the legislative history which we can bring before the court. But many of the counties in Mississippi cannot be

redistricted for the simple reason that the population might be grouped up in the Southern area or the Northern area like in Hines County, the Jackson group up in the Northeastern section.

So the legislature felt that they must do something, put on notice by the District Court that they were going to apply this court's decision in the Reynolds Case to allow these counties to do something to comply with it.

There is just an impossibility in many of the Mississippi Counties, I would say in many counties throughout the United States, to actually draw off lines, rational lines, and put the population where they would not be within a certain percent of the ratio in the districts.

Q Why would that be?

A Because of the way that the population is grouped up in one area -- we must not only take into consideration I think this court has said we don't have to take into consideration the complete population -- you would have all the county grouped up there and the people down here having very little representation.

Q Because they have very few people?

A There are a number of people scattered throughout that area, your Honor, but of different, diverse and types of economics, maybe farmers and blue-collared workers here and up in this area white collared workers and your wealthier people.

It has been shown just by surveys through survey companies that it is almost ian impossibility in some of the counties for us to really redistrict. Of course, this court as I read the decisions have placed in the Virginia Beach Case its stamp of approval upon the very things which these two counties have done and also made mention and I guess reapproved the Virginia Beach Case in the Aubrey versus Midland County, Texas Case.

So what I was trying to get before the Court was that irrespective of what counsel might have thought was a reason for doing there, was good, concrete reasons existing in Mississippi's District Courts ---

Q As you say, this is all really irrelevant?

A That is true.

Q Why do we waste your time on it?

A Your Honor, because the counsel I guess spent so much time on it that there were quite a number of questions from the Court and the Bench in that regard.

Q We will never get to the merits.

A I was merely answering a question posed by Justice Fortas when he was I think asked if there had been any commands by the District Courts or by any courts to redistrict.

I was answering that question and on July 27, 1966, the three-judge district court had called upon one of the counties. That was prior to what was done in Adams and in

Forest Counties.

Moving on from that question, your Honor, we come to the question which was actually raised or not raised but urged by this court and that is the jurisdictional question, one in which the Government was asked to file a brief; whether or not this court has jurisdiction because there was properly convened a three-judge district court in Mississippi.

We are all in accord, I think, on this one principle. How do you read the last sentence of Section 5 of the '65 Voting Rights Act? It is just that simple, "Any action under this section -- I am quoting from page 6 of our brief -- "Any Action under this section shall be heard and determined by a court of three judges."

We say that that sentence was merely referring to the subject matter that is referred to in Section 5. The only subject matter referred to in Section 5, the only action referred to in Section 5 by the court, is a declaratory judgment in the District Court of Washington, D. C.

That is when if first we have submitted our new laws to the Attorney General's Office and he has refused to approve them and then we file our case in the Washington, D. C. Court, or if we wanted to bypass for some reason -- I don't know what reason we might have -- the Attorney General's Office, we proceed originally in the Washington, D. C. Court.

That is the only court action which Section 5 or the

subject matter of Section 5 is concerned with. We say to the court that that terminology under this section was referring to the declaratory relief or declaratory judgment in the Washington, D. C. court and this court does not have jurisdiction because the three-judge district court in the Southern District of Mississippi was improperly convened.

If any action lies at all, forgetting about all the other technicalities, the jurisdiction would have been in a one-judge district court.

As I say, of course, we will admit that it does not necessarily compel as Justice Harlan said, in the Swift Case a reading of that but it is a more appropriate reading.

The rationale of the Swift Case was in construing 2281 that any time we construe any section which gives jurisdiction through a three-judge court we should construe it in a limited manner to keep from placing the burden upon three judges and the Appellate Court.

Counsel opposite says that it is appropriate. Why is it appropriate? Because of the rationale of 2281 and the concern of Congress that we have here a clash between the State of Mississippi and Appellants on what we can enforce and what we cannot enforce.

Of course, that isn't true. That was laid to rest in the Swift Case. We are not really concerned with a clash between the State of Mississippi and its laws on a constitutional ground.

We are merely concerned with the same clash that you found in the Swift Case, whether there is a supremacy clause and whether or not what we have done in Mississippi is in disregard to an Act of Congress.

So it does not rise to the dignity of what Congress was worried about when they enacted 2281. It does not rise to the dignity of a one-judge district court enjoining the operation of a state law on unconstitutional grounds and as this court held in the Phillips Case, if we are merely talking about what an individual was unconstitutionally applying the law, even in that case we would not have this situation.

Q Why do you think they require a three-judge court in the district under the same Act instead of having a one-judge court?

A In the District Court of D.C.?

Q Yes.

A Your Honor, when you go to the Washington, D. C. Court, you go up there as a petitioner. But you have to prove this: The burden of proof rests on you. You have to prove that this law was not passed for the purpose and effect of denying someone their constitutional voting rights because of race. It is a Fifteenth Amendment question in that sense.

You would think that 2281 would give you jurisdiction. There is a colloquy between Senator Ervin and Attorney General Katzenbach which we have cited in our brief

in which they say, "Even though you have the same effect, even though that court is denying your declaratory judgment, in essence they are saying this: You have not proved that the purpose and effect of this Act is not unconstitutional."

Q I thought the reason was they didn't want one single judge to pass on life and death of a State's statute, one; and, two, rapid access to this court was the reason for the three-judge court in the District of Columbia?

A You are absolutely correct.

Q I think that counters a little on your other argument.

A All deference to your Honor, it does not because it does not draw into question the same type of action. It does not draw into question unconstitutionalities. It does not draw into question the constitutionality of the Fifteenth Amendment.

It merely draws into question what was drawing into question in the Swift Case, the supremacy clause, in which this court says that does not reach the dignity with which Congress was concerned with.

I think that colloquy between those two gentlemen in the hearings recognized that it is actually what you are doing is the same thing.

Q The difficulty with the argument is that it seems to me that if there is a private right of action to determine

coverage in the first place, it is either going to be under Section 5 or it isn't going to be anywhere? The right of these parties to be in court at all to determine the coverage of Section 5?

A That is right.

Q Their right either arises out of Section 5 or it doesn't exist?

A If they have a right, your Honor, it is not really -- I hate to get into rights because we have made the distinction in our brief between the remedies and rights. If they have some kind of a right to enforce Section 5, they have another jurisdictional statute which they have alluded to which they have asserted in their complaint; that they have been denied some right given to them by Congress.

But we are merely talking about what did Congress mean about "Is that a right under this pursuant to, or is it pursuant to a general jurisdictional statute of a right which was investigated under Section 5?"

Q Forgetting rights, do they have a cause of action which arises under Section 5 as individuals? For get the word right.

A They don't.

Q They don't at all?

A They don't.

Q It wouldn't matter whether it was a single judge or

a three-judge court?

A Justice White assumed they had a right under Section 5.

Q I don't care what words he used. I just want to know whether -- what does Section 5 say? Any action under this section will be heard by a three-judge court?

If these people can stay in court at all with this cause of action, is it an action under Section 5?

A Not in the intent of Congress and the way the language is written.

Q How would they get into court at all then?

A Jurisdiction is what we are speaking of.

Q Where does their cause of action come from?

A It comes from the jurisdiction statute which allows them to seek ---

Q The jurisdictional statutes don't relate to cause of action? Really, what they are asking is -- I understand it. You have isolated this to a single question. They are asking that it be adjudicated, that Section 5 covers these Mississippi statutes. So it is a question of coverage within or under Section 5, isn't it?

A Yes, your Honor.

Q Isn't that really what they are asking for? They wanted to determine, they want a court to say, that these Mississippi statutes come within the purview of Section 5?

A That is right.

Q That is all they are asking? Why isn't that, I ask, a cause of action under Section 5?

A They are asking for more. They are asking for the language that any action brought under ---

Q Essentially isn't that what they are after?

A Essentially, that is what they are after.

Q That is what this lawsuit is all about and whether or not there might be a three-judge court is determined isn't it about what their pleadings ask for?

A I don't think if we found that they had a right existing or given to them by Section 5, in deference to your Honor, that the action under Section 5 which Congress was referring to is that action. I think that is under a general jurisdiction statute.

Q I think Congress did say any action under Section 5, it limited it as you suggest to an action brought under the District of Columbia District Court?

A Right.

Q But nevertheless it is certainly arguable that if their cause of action, namely whether Mississippi statutes are covered by Section 5, is an action under Section 5, that when Congress said any action under Section 5 shall be before a three-judge court, it is certainly arguable?

A Yes. This language did not compel that reading. It

was more appropriate reading of it; with the rationale of the Swift Case. I wouldnot stand before this court and say this court would be off b ase if it did so hold.

But I think our interpretation and the legislative history and the type of action we are talking about and the three-judge situation would lead to the more appropriate reading which we say should be ----

Q Does the legislative history in that connection with that sentence -- that came in pretty late?

A Yes. The legislative history is rather weak.

Q It doesn't appear that it came in in connection with some other investigations of only to the District of Columbia course of action, does it?

A I am not too sure of that, your Honor.

Q The language as originally drafted says such action which would seem to infer to the action brought in the District of Columbia Court. That was later changed according to the United States to any action under this section. Do you have any observations on that?

A Your Honor, I don't give a lot of weight to the changing of the language. I don't really see how it changes necessarily the reading of the language. We all know, of course, somebody in Congress might have thought one language would be better to bring about something.

I hate to get into reasons why somebody brought in

the language. I don't think the reading itself necessarily means that.

Q You don't have any offsetting?

A No. I don't have any offsetting legislative history.

We say that the private parties lack standing for this simple reason: I think it is illustrative of what we have been doing here today. The 1965 Voting Rights Act is rather like a jigsaw and it must be read together and like a jigsaw when you pull one piece of it out and is late and say what does this section say, that is when you find yourself in trouble.

We think the entire Act as we have said before was remedies and not rights.

As this court said in the South Carolina Case speaking through the Chief Justice, that this Act created new and stringent remedies, that this Act and Congress had marshaled an array of weapons to be used effectively by the United States.

Q For what purpose?

A For the purpose, your Honor, of, one, seeing that no one is denied in the future any of their constitutional rights, and to eradicate what rights had been denied in the past.

Q Rights. We are getting right back to rights.

A That is true, your Honor, but as your Honor stated, the Act itself -- we are talking about the Fifteenth Amendment.

That is where the rights come from. In South Carolina, your Honor, said that the Fifteenth Amendment itself is executed, that these people had certain rights at that time. We passed the 1957 Voting Rights Act. We passed the 1960 Voting Rights Act. We passed something in '64 and yet their rights under the Fifteenth Amendment have not been vindicated.

So what has Congress done? Congress has created new and stringent remedies, not rights, but remedies.

Q For the vindication of those?

A For the vindication and placed them in the hand of what body? The Attorney General. Why? Because it is a public interest we are talking about here and not just an individual interest.

It is rather odd that the Government at this time takes the position that a private party can bring a lawsuit when in the Apache County, Arizona Case which we have cited in our brief, they say the responsibility, the complete responsibility, rests with the Government and in that particular case, they tried to keep some of the Indians in Arizona from intervening because they said, "No, you don't have any right in this lawsuit. We are vindicating a public right."

In their brief they took the position that the responsibility rests in the Attorney General. They set out as one of the sections, Section 5.

As Justice Black said in his dissent in regard to

Section 5, this is something new in the law. This is something that is harsh in the law. As this court said, it is harsh.

But harsh means when necessary. Therefore, we don't believe that Congress would have placed this type of action, this type of remedy in just at the whim of any individual who wanted to bring a lawsuit and say, "Look, you haven't gone up to the Attorney General's Office for it."

Look at the ramifications that might come from there. Let us assume we went to the Attorney General's Office and said with the Act itself. "Mr. Attorney General, here is the Act, read it and give us a written opinion."

And he says after he reads it, "That is fine, I have no objection to it."

I dont know of any publication of that. I don't know how any citizen is going to know about that. But every citizen in Mississippi or Alabama, Virginia or anybody who comes within the Act, can then say, "I am going to bring a lawsuit because I don't think you have gone through the '65 Voting Rights Act."

Q What happens if the Attorney General never hears of the Act? What does the person who is injured, what can he do about it?

A Bring it to the attention of the Attorney General of the United States.

Q How?

A By letter. I hate to say telephone conversation but

by any method to relay to the Attorney General's Office.

Q But he couldn't go to court about it?

A He could not go to court about it under Section 5, your Honor. He could go to court about it on the fact that it was unconstitutional under the Fifteenth Amendment.

Q It was just a violation of the Act?

A No, your Honor, you couldn't.

Q So that the people the Act was passed to protect would be out of luck?

A They would not be out of luck, your Honor, because we would have to assume and Congress assume that the Attorney General would do his duty.

Q Couldn't they assume and couldn't Congress assume that the State of Mississippi would have submitted it?

A We would have submitted it if we felt, your Honor, that was within the purview of the '65 Voting Rights Act. But getting back to your Honor's question, what would the individual have to do, he could submit that to the Attorney General's Office not for approval.

Q Suppose he submits it to the Attorney General's Office and the Attorney General's Office doesn't pay any attention to it? What rights does the citizen have after 60 days?

A As to the '65 Voting Rights Act and to the suspension, none, your Honor, because that is not a right of his. It is not really a right he has got to do anything about it.

Q What good is it to him?

A There is a section in the Act that says if a man is denied to actually vote and have it counted that he can submit that to the Attorney General and the Attorney General may bring an action, may bring an action.

Q If you are saying this is a thoroughly uncooperative Attorney General, then the individual citizen is without remedy? Since you say that this is the remedy, he is now without a remedy?

A He is without remedy to see that the State of Mississippi first submit it. This is something new. It is not something that he had as under the Constitution. It was something Congress came up with.

If Congress wanted to limit who they were allowed to sue ---

Q What happens if some court disagrees with you and the State of Mississippi as to whether or not this is covered by the Civil Rights Act? The Attorney General does nothing, nobody else does anything, and then we have a right without a remedy or a remedy without anything?

A You have a remedy, your Honor.

Q What is the remedy?

A That is the remedy, your Honor, what I am trying to say is there was created no right in the private citizen. The private citizen says, "I have got a right and no remedy."

The remedy was created by Congress, and it gave it to the Attorney General.

The man standing over here has not been heard, because we are not talking about constitutionalities of the 15th Amendment. We are talking about a mere process that Congress felt was necessary to inform the Attorney General.

Q If the man is denied the right to vote because of race, he is slightly injured?

A He can bring an independent lawsuit, Your Honor, based on that.

Q In what court?

A As we said in the Court here today, if we extend the law as the appellants attempt to extend it --

Q You say he has a remedy in a court. Which court?

A If he had a remedy in the District Court of Washington, D. C. --

Q Where did he get that from? From Section 5?

A I get that from the section which says that as far as a declaratory judgment, it must be by --

I think it is in Section 12.

Q You say if these appellants in this case had filed the case before a three-judge court of the District of Columbia, it would have been all right?

A That is right.

Q That is your position?

A Yes, because it is not Section 5 that takes away the authority. It is I think Section 12, which says no declaratory judgment shall be entered except in the Washington, D.C. courts.

But that is talking strictly of Section 5, and in Section 4. But I think we must tie this, or the whole thing is that the Government themselves have stated that the responsibility of enforcing this Act is in them.

Let's take under Section 4, we have a teaser device. The Act is brought in Washington, D. C. You can't go through the Attorney General's office, under Section 4. You bring it in Washington, D. C. You have the burden of proving that there has been no purpose of effect of discriminating in the last five years.

There is no right of intervention for a private party. That is the position that the Attorney General's office took in the Apache County case.

So we have here again something which you might say is a remedy, but no right in this private individual to come in and say, "Yes, there has been some discrimination."

In the Apache County case, the District Court did allow intervention, but under its adherent powers, but the Attorney General's office took the opposite view.

The next question we come to, if the Court did not buy argument on all of these others, and felt that jurisdiction

lies here, and the private citizen does have the right --

We are talking about redistricting, reapportionment, in Adams and Forest Counties.

The legislative intent had absolutely nothing to do with reapportionment. We say that the intent of the Act had only to do with things which went directly to the vote of the registration, and nothing, absolutely to do --

"It shall be selected." Here they are talking about a dilution of vote. There has been no dilution of vote in this particular case. Instead of voting for one supervisor, then they vote for five supervisors.

The counties have only done what this Court has commanded in the Aubrey case, to give the vote, to be weighed across the board.

We don't think there is anything in the legislative history, in the debates, in this case, in this Court's decision in South Carolina, that would ever say that reapportionment cases or redistricting cases were contemplated under the provisions of Section 5 of the Voting Rights Act.

And it is to look at the hearings themselves -- this is merely what we call a freezing. We have got a legislative freezing, here.

On several occasions the Attorney General alluded to the fact that this is nothing more than like a reapportionment case where the Court says, "This plan is wrong. Go back and

and get another plan and come in here and let's look at it. If we like it, fine. Stamp of approval."

But nobody, nobody asked the next question, the very next logical question, if it was ever in the mind of anybody, reapportionment had been in the mind of Congress.

They have been trying to get an Act passed so they can take it out of the Court's hands. The next logical question would have been, "Mr. Attorney General, does this apply to reapportionment cases?"

He was talking about the same type of authority, the same type of freezing principle. Yet nobody asked the next logical question.

Why didn't they ask the next logical question? Because everybody in those hearings, the President on down, knew that they were not talking about redistricting and reapportionment, that they were talking about things which directly affected the vote.

They were talking about tests and devices and then putting something else in that effect.

We note here that Section 4 and Section 5 are connected. Section 5 goes out of the window, once Section 4 is no more applicable.

Why? We are talking about tests and devices in Section 4, and the same type of thing they were talking about in Section 5 was things that you are going to supplant for the

tests and devices.

We say to the Court that if this Court finds that this type of action comes within the purview of the Voting Rights Act of 1965, you have almost stymied the reapportionment.

You have taken out of the District Court the right to look at any plan and approve that plan, and have placed it in Washington, D. C.

There has been a lot of talk here this morning about, "If you submit your plan, if it is good, you will get it approved."

Suppose the State doesn't want to submit the plan? Suppose the county doesn't want to submit the plan? What are you going to do about it? What are you going to do about it?

This was completely stymied, what the Reynolds case says, what the 14th Amendment case says.

Q What are you suggesting?

Supposing this Court goes in for your opponent, and suppose the Court decides that the statute commands that it would be incumbent upon the State to submit these plans, and suppose the State doesn't do it. Is that what you are putting up to us?

A You mean the relief to be granted by this Court?

Q Yes. I am asking if you are suggesting to us the

state of facts in which this Court holds that Congress required that in issuing these matters, that they be submitted to the Attorney General. Are you telling us what happens if the State doesn't comply?

A I am only using that argument because I don't believe Congress ever intended to impair or put an obstacle in the path of the rationale of the Reynolds case and the Aubrey versus Midland, Texas.

Q I just wanted to make sure that you were not suggesting that considering what happens, the State does not comply.

A No, Your Honor. I was suggesting the more or less absurdity of the fact that the Congress is concerned with the 14th Amendment and redistricting would come along here with the 1965 Voting Rights Act.

Q I am talking about one particular case.

A That is right, Your Honor, ever intend that that be taken out of that particular case.

Mr. Wells will direct his remarks basically to the other cases which we have.

Thank you.

ORAL ARGUMENT OF WILL S. WELLS, ESQ.

ON BEHALF OF APPELLEES

MR. WELLS: Mr. Chief Justice, may it please the Court, the first matter I wanted to discuss is No. 36, if the Court please.

This case was originally brought, challenging the amendment of the section involved on two grounds: One, that it was unconstitutional, and the other was that it was a violation of Section 5.

The constitutional issue was completely taken out of the case in its entirety by stipulation.

I believe Mr. Justice Marshall asked counsel this morning first why he took it out. He said, "We took it out at that time because we were trying to get a hurried decision."

The present counsel was not member of the counsel at the time this matter was brought and heard at that time.

I heard it from its inception, but this stipulation was entered into at the request of plaintiffs themselves, and was actually drawn by plaintiffs' counsel at that time. Mr. Derfner came along after all of those matters were passed.

So the only question here, as I see it, in this case, is this: Does this statute come within the purview of Section 5 of the Voting Rights Act?

It was not submitted to the Attorney General, nor was it submitted to the Court of theDistrict of Columbia, because we did not feel that it came within the purview of the Act, or required to be.

The Court might note in the stipulation which is found on pages 38 and 39 of the Appendix in No. 36, but I was willing to stipulate with the counsel that theState of

Mississippi, in enacting the bill of 1968, Mississippi Laws of 1966, which amended Section 326 of this Code, did not comply with the provisions of 42 USC 1973C, which is Title 5.

It has not been submitted to the Attorney General or to the District of Columbia.

This is not to be construed as a concession by the defendants that the State of Mississippi was under any lawful obligation to so comply with the provisions of that section.

Q What page is that?

A That is at the bottom of page 38 in Appendix A, Appendix in No. 36.

In other words, we took that position from the start.

Q May I ask, Mr. Wells, how does that affect this case right at the present time, the fact that you refused to acknowledge that it should go to the Attorney General?

A Because I have taken the position as I go through to explain why I don't think it is.

Q You are going to explain now?

A Yes, sir.

In the hearings, and all of the hearings, if the Court please, before Congress, everything was talked about with voting, people's rights to vote, to register to vote.

The only place that I can find after a complete reading of everything, the Congressional Record, all of the

hearings both in the Senate and in the House, and the debates on the floor, and I have read them all -- the only place we find anything said about candidates running for office as against a person's right to vote for office, which is cited in Appellee's Brief No. 36, at pages 10 and 11, wd find this, which is found on page 74 of the hearings before the Sub-committee No. 5 of the Committee on the Judiciary in the House of Representatives of the 89th Congress:

"Mr. Corman" -- he was talking to Mr. Burt Marshall, who at that time was an Assistant Attorney General and one of the chief architects of this very Civil Rights Act, which was drawn as a matter of common knowledge at the recommendation and at the request of the President of the United States, as he told the Joint Session of Congress.

"Mr. Corman. We have not talked at all about whether we have to be concerned with not only who can vote, but who can run for public office, and that has been an issue in some areas in the South in 1964.

"Have you given any consideration to whether or not this bill ought to address itself to the qualifications for running for public office, et cetera?

"Mr. Marshall. The problem that the bill was aimed at was the problem of registration, Congressman. If there is a problem of another sort, I would like to see it corrected, but that is not what we were trying to deal with in this bill."

Nowhere else have I been able to find any sort of discussion that would indicate any other different question.

Section 3260, which has been amended, sets some different qualifications for people running for office.

They raised a number of signatures that a candidate has to have on a petition running for a Statewide office from 1,000 to 10,000 at a time and in answer to the Chief Justice's question this morning when there was in excess of 650,000 registered voters in this area.

It provided further, because it had been invited by the Supreme Court of Mississippi to call attention in the Court's opinion in this case at an earlier time where a man had run or had taken part in a primary election and then had run as an independent, and the Court said he had a right to do that as a candidate, because there was no statute against him.

It had to be done by legislation, so it was that if you vote in a primary election that is going to nominate candidates to run for office, you have got to run in that primary if you want to, but if you vote in that primary, then you yourself can't qualify as an independent candidate in the general election to try to beat the very man --

Q Isn't that at least a burden upon one's primary election vote?

A Sir, it is a burden upon --

Q It says here:

"You can vote in the primary election, whether you do or not. If you vote in the primary election, thenyou may not stand for office as an independent candidate."

Yes.

Q Isn't that at least a qualification upon his right to vote as freely as he wishes in a primary election, because you would have to stop and think, "I had better not vote in this primary election because if I do, now I can't be an independent candidate for office."

Isn't it to that extent, at least?

A Let's take the rest of the sentence and coupled with it.

Q I am only looking at what you have.

A Let's take the rest of the statute.

Q Isn't that, at least on the face of it, a burden on the right to vote?

A It is a burden on his individual right to vote.

Q If it is, isn't it, then, a standard practice of the procedure with respect to voting different from that enforced or in effect in November, 1964?

A For that individual, it would be a difference, as far as that individual was concerned.

Q Why doesn't that automatically bring it within the coverage of Section 5?

A If the Court please, it doesn't prohibit him from voting.

Q I know it doesn't. I don't read the statute, Mr. Wells, as having prohibitions from voting. It is only whether or not a given standard practice or procedure with respect to voting is different from that in force or in effect on November 1, 1964.

I have just suggested if there was no such burden on the right to vote in a primary election on November 1, 1964, then it seems to me the new statute imposes a different standard than that in November, 1964.

A If the Court please, I don't think it goes that far. I think it affects his right to run for office, but not his right to vote.

Q It may be that your legislature intended to affect his right to run for office, but if the device they choose to elect his right to run for office is his vote in the primary election, I find it hard to see how that doesn't come within the coverage or the purview of Section 5.

A If the Court please, I don't view it, with all deference to Your Honor, in that vein. I think it has affected his right to run for office, yes, sir, but it hasn't changed the standard of his right to vote originally in the primary election.

If you are going to vote in the primary election,

and take part, this is not --

If the Court please, it might be interesting. I happen to know the reason for part of that which is not in the record, and it was trying to keep Republicans from getting out in the Democratic primary and supporting the weakest man, and then running somebody against him in the general election.

That was what was happening. That is actually what brought about the statute, if the Court please. It had no racial view at all.

But that had been happening. They deliberately say, and said, "Let's get together. He is the weakest man. We will vote for him in the primary, and then run somebody else in the general."

Q The Republicans have constitutional rights, too.

A Yes, sir, they do.

I want to say in that connection that I think this election is going to show they also are a little bit stronger than they were.

If the Court please, we go to the other legislative history in this matter.

All their hearings, everything, the whole colloquy, we are talking about through this thing, is the right to vote, the right to vote, the right to vote, the right to register to vote,

The right to run for office -- that is the distinction

that we make, as far as this case is concerned.

As to the Bunton ballot case, which has to do with the appointment of superintendents of education, I can say to the Court quite honestly that that has given me quite a lot of concern.

Q May I just ask -- I take it to the extent that this problem of reapportionment in any of these cases, Bunton does not raise it, does he?

A No.

Q When you change from election -- I mean when a statute that changes from an elected method to an appointed method, would not be a reapportionment case?

A Not whatsoever.

Here is the situation, if the Court please.

First, I call the Court's attention in those cases you have not the three counties involved. Although they are alluded to as 11, you have got three counties, Clayburn, Jefferson, and Holmes.

The pleadings themselves said, "We are registered voters in Jefferson County, and desire to run for superintendent of education in Jefferson County. We bring this suit on behalf of ourselves and in place of all other voters and potential candidates in Jefferson County."

The other suit says in Clayburn County, the other says in Holmes County. They don't even attempt to represent a class

in any county except those.

Q How many counties are there in Mississippi?

A Eighty-two, sir.

Q How many are covered by the statute?

A One, I believe, if the Court please.

Q Why?

A Mr. Justice Marshall, I cannot answer that to save my life, except to suggest this: The statute originally provided where the matter could be presented to a vote of the people to determine whether that would be done, and if an election was held, and they voted, then it could be dome.

Somebody comes along and doesn't want to go through that in his country, and introduces an amendment to amend it, and provide that in my county it will be automatic, and somebody else says, "I want to get included, too," and that is the way those things go.

Q You don't know, and I don't know, and nobody in this room knows: would it be wise for somebody to find out whether or not it was for a reason of race?

I am not saying it is, but don't you think it would be worth finding out? Would Mississippi be happier, too?

A If the Court please, if I had been a member of the legislature, I would never have voted for it.

It so happens that the legislature acts very independently of the Attorney General, and quite often not in

conformity with our recommendations.

I frankly must say that it is a close question, in my mind. Of course, the constitutionality of that is not involved. It is a question of whether or not it comes under the Act.

I am frank to say that if this Court finds that this three-judge court was properly convened and had jurisdiction to determine that question in those cases, it is a close question in my mind, and I cannot, and I will not insist that I think that that statute or those statutes do not come within the purview of Section 5.

I think as an attack on constitutionality grounds before the Court, on the basis of the unconstitutionality, I think that that statute is in violation of Mississippi's own laws.

I think it is local and private legislation attempted to have been enacted under a general statute, and I think if it were attacked in the Mississippi courts, I think it would be stricken down in the Mississippi State courts.

I think the courts would have stricken it down on the grounds that it is local and private legislation intended to be enacted as general legislation right in the face of the Constitution.

Q I think that really is apparently not at issue here before this Court.

A It is irrelevant to the issues of this Court, and I am saying to this Court quite frankly and quite honestly that it is a much closer question as to whether it comes under Section 5, in my opinion.

I am not going to say to this Court, and urge this Court to say that I take the absolute position that it doesn't. It is in the area, there.

I do think that in the Whitley case that that protection has to do with candidates. I don't believe it is within the purview of Section 5.

If the Court please, I know there are some questions that the Court wants. I think the rest of the matters have been covered.

Q Very well.

Mr. Derfner.

REBUTTAL ARGUMENT OF ARMAND DERFNER, ESQ.

ON BEHALF OF APPELLANTS

MR. DERFNER: If it please the Court, the position of all the appellants on the question of relief is as follows: We believe that Section 5 imposed an additional requirement for putting into effect the State statute within its coverage, that in the absence of fulfilling that requirement, the statute was not in effect, and it was as if no statute had been passed.

Therefore, we believe that since the statutes in

these cases have been void and are now void, that we are entitled to new elections with respect to relief, as well as prospective relief the day this Court reverses the judgments below.

At that point, the proper relief would be for the Court to remand the Court below toward new elections.

We don't think it is the job of this Court or the Court below to tell the State what to do about whom to submit the statute to, about whether to submit the statute at all, about what to do if it wishes to put the statute into effect.

If the State wishes to submit the statute to somebody and come back to the Court before such time as was fixed promptly for holding a new election, then that court might within the exercise of its discretion decide to, if there were a favorable determination to the State, not to hold a new election.

But we think that the court below should proceed expeditiously to hold new elections, that those new elections should be held.

Q Do you think there is any analogy -- you know in many reapportionment cases, the Court has thought it was malapportionment, when an election was coming up, where the Court has sanction of the conduct of the election, although under a malapportioned system, because of the difficulty of getting these corrected before the election came along -- we

did have that in several cases.

A Yes.

Q Don't you suppose here you have situations which are now past?

A Yes, but at the time these cases were brought, in each case the proper thing for the court below to have done, and the convenient thing, in all cases, would be to grant.

Q The court didn't. We are faced with a fact and theory.

I am wondering. My question was: don't you see any analogy at all as to what we have done in the reapportionment cases?

A Yes, I do, but I think as Hamer versus Campbell, Fifth Circuit case, one of the considerations in exercising the equitable jurisdiction of the court is how difficult it would have been at that time, how disruptive it is now, but we think it is quite within the equity jurisdiction of this Court and the court below to be ordered to go back to the situation as it stood at that time.

Q You think we should do that? We should order the District Court to restore the status quo as quickly as can be?

A Yes.

Q Which necessarily involves, I suppose, the ousting of the people and a new election under the old laws?

A That is right.

Q Don't you think, Mr. Derfner, that it is arguable, at least, that there is less reason for doing that in this case than in the reapportionment cases, for the simple reason that in reapportionment cases we held that the apportionment was unconstitutional, yet we gave them a chance to remedy it.

In this case, where all that is asked is that the procedure be submitted to the Attorney General, without regard to whether it is unconstitutional or not, it might be a better judgment to make our remedy prospective in this case, and because the Attorney General might say, "No, that is all right. There is no constitutional infirmity here. Therefore, the election is all right."

A I think we have to look at what the statute is meant to do.

The submission to the District Court for the District of Columbia, or to the Attorney General, is not regarded as a formalistic matter.

Q No. I didn't mean that.

A It was regarded as something of great substance. It was regarded as a way of making certain that this statute has had as close as possible to the automatic effect, as we said in South Carolina versus Katzenbach.

It doesn't seem to me that Congress in seeking to pass as automatic as possible a trigger statute which would have meant to allow these rights to be delayed so long.

I might say, what I tried to say before in connection with the lower court's equity jurisdiction, if the Court orders new elections, I think if the State would go to the Attorney General and get the favorable determination before those elections took place, it would be well within the equitable jurisdiction of the court below to set aside the elections.

I am saying the Court's procedures should go on, and whatever can be done by the States within such reasonable time as exists before the election, which almost certainly would include the time to get a favorable response, if one were forthcoming from the Attorney General, could be effective.

But I don't think that the Court should wait until the State has a chance to seek a declaratory judgment in the District of Columbia and then appeal that to this Court.

By that time, what we have had is close to the five years of the operation of the statute eaten up by the States.

I don't think that is what Congress intended.

Q Is it your position, then, that if we follow you, that we remand this case and require the matter to be submitted to the Attorney General and call for elections?

A No, Your Honor. I believe this Court in its proper order should direct the court below to call for new elections.

What the State wishes to do in the way of submissions, or to whom it wishes to submit, is up to the State.

If the State wishes to submit, it may do so. If it

gets an answer in time before the election, it would certainly have time to do that, that is fine, but if the State does not wish to submit -- it might decide, as in the Bunton case, it doesn't need to submit.

It is not up to this Court or the court below to suggest to the State what it should do by its obligations under Section 5.

Q If we order elections, and the Attorney General approved it, then they would be statutes operating under mandate, wouldn't they?

A No. I think in that event, if the court below decided that in its equitable discretion that the approval, even at this late date, indicated that the State's error was in effect harmless, I think that would be quite consistent with this Court's mandate, because it would say that this great duty of the State is not merely formalistic duty, though it had not been done before, had been done now, in the way that showed that the statute was proper, and could be put into effect.

But we are talking about in a sense some of these things don't fit tightly into logical boxes, but we think we are talking about the most practical way of solving the statute problem.

Q May I ask you if this is another way of getting at it: The possible directive might be that unless the State

chooses to submit the matter to the Attorney General, or the United States District Court in the District of Columbia, and unless after said submission a favorable response is given to the State by the Attorney General or the courts, rather than calling the District Court to order a new election.

Is that a proper way?

A No, Justice Fortas, not quite, because we are willing to do that in connection with the Attorney General, submission to the Attorney General, because as a practical matter, there would be time to get a response from the Attorney General before any new election were held.

We are willing to do that, because we don't believe that would hold anything up.

We are not willing to agree that relief should be held up until a submission --

Q You are raising a question as to whether or not we should in effect, as a penalty, with regard to the State action here, compel the State to go to the Attorney General rather than to pursue what is the statutory alternative, namely, to go to the District Court for the District of Columbia?

A We think the baseline, Justice Fortas, is that the State is not entitled to put this statute in effect, and the State had no statute until such time as it complied.

We think the Court has equitable discretion to essentially give the State more than it is entitled to, but not

where that might result in frustrating applellants' rights for an additional year or two.

(Whereupon, the above-entitled oral argument was concluded at 1:45 p.m.)