IN THE

Supreme Court of the United States

October Term, 1972

No.

THE STATE OF GEORGIA; THE GENERAL ASSEMBLY OF THE STATE OF GEORGIA; JIMMY CARTER, Governor; BEN W. FORTSON, JR., Secretary of State and Member of the State Election Board; WILLIAM F. BLANKS, M. M. SMITH, MATTHEW PATTON, and MELBA WILLIAMS, Members of the State Election Board,

Appellants,

v.

THE UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

This is an appeal from the order of the United States District Court for the Northern District of Georgia, entered on April 19, 1972, enjoining the State of Georgia from holding elections under the 1972 and 1971 reapportionment acts for its House of Representatives. Appellants submit this Statement to show that the Supreme Court has jurisdiction, and that a substantial question is presented.

OPINION BELOW

The opinion of the District Court is not yet reported. A copy of the opinion is attached hereto as Appendix A.

JURISDICTION

This suit was instituted on behalf of the United States based upon Sections 5 and 12(d) of the Voting Rights Act of 1965, Pub. L. 89-110, 79 Stat. 437, 42 U.S.C. §§ 1973c and 1973j(d), to enjoin the State of Georgia and the other appellants (defendants) from holding elections pursuant to the reapportionment acts for the House of Representatives adopted by the Georgia General Assembly on March 9, 1972, and October 14, 1971.

A three-judge court was sought and convened, based upon 28 U.S.C. 2284 and Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c.

The injunction of the three-judge District Court was entered on April 19, 1972, and was stayed by this Court on April 21, 1972 (No. A-1106). Notice of Appeal was filed in the District Court on May 17, 1972 (Appendix C).

The jurisdiction of this Court to review that order and decision by direct appeal is conferred by 28 U.S.C. § 1253 and 28 U.S.C. § 2101(b), as well as Section 5 of the Voting Rights Act of 1965 (42 U.S.C. § 1973c). The decision in *Allen v. State Board of Elections*, 393 U.S. 544 (1969), sustains the jurisdiction of this Court to review this case on direct appeal.

STATUTES AND REGULATIONS INVOLVED

Section 4 of the Voting Rights Act of 1965, as amended (42 U.S.C. § 1973b), which provides the formula for determination of which States and political subdivisions are subject to the Act, is set forth in Appendix B hereto.

Section 5 of the Voting Rights Act of 1965, as amended (42 U.S.C. § 1973c), the statute directly involved in this appeal, provides as follows:

> "Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, prac-

tice, or procedure: *Provided,* That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court."

The Attorney General adopted "Procedures for the Administration of Section 5 of the Voting Rights Act of 1965" which were printed in the Federal Register (Vol. 36, No. 176—Friday, September 10, 1971, pp. 18186-18190). Two provisions thereof directly involved in this appeal are as follows:

"§ 51.18 Obtaining information regarding submissions.

(a) If the submission does not satisfy the requirements of § 51.10(a), the Attorney General shall request such further information as is necessary from the submitting authority and advise the submitting authority that the 60-day period will not commence until such information is received by the Department of Justice. The request shall be made as promptly as possible after receipt of the original inadequate submission."

[The provisions of § 51.10(a), referred to in the above

quotation, are lengthy, include by reference the provisions of § 51.10(b), and both are set forth in Appendix B.]

"§ **51.19 Standard for decision concerning submissions.**

Section 5, in providing for submission to the Attorney General as an alternative to seeking a declaratory judgment from the U.S. District Court for the District of Columbia, imposes on the Attorney General what is essentially a judicial function. Therefore, the burden of proof on the submitting authority is the same in submitting changes to the Attorney General as it would be in submitting changes to the District Court for the District of Columbia. The Attorney General shall base his decision on a review of material presented by the submitting authority, relevant information provided by individuals or groups, and the results of any investigation conducted by the Department of Justice. If the Attorney General is satisfied that the submitted change does not have a racially discriminatory purpose or effect, he will not object to the change and will so notify the submitting authority. If the Attorney General determines that the submitted change has a racially discriminatory purpose or effect, he will enter an objection and will so notify the submitting authority. If the evidence as to the purpose or effect of the change is conflicting, and the Attorney General is unable to resolve the conflict within the 60-day period, he shall, consistent with the above-described burden of proof applicable in the District Court, enter an objection and so notify the submitting authority."

Other pertinent provisions of the Attorney General's Procedures ("Authority", § 51.3, § 51.10, § 51.26a) are set forth in Appendix B.

QUESTIONS PRESENTED

This appeal raises four questions, all relating to Section 5 of the Voting Rights Act of 1965, and each dependent upon an affirmative answer to the preceding question or questions.

1. Is Section 5 of the Voting Rights Act applicable to State legislative reapportionment acts, and if so, is Section 5 constitutional as thus applied?

2. Does Section 5 empower the U.S. Attorney General to disapprove the use of multi-member legislative districts, in combination with designated posts and the majority (runoff) election requirement, when a State subject to Section 5 (Georgia) was using all three prior to November 1, 1964 (the effective date of Section 5); i.e. can the Attorney General disapprove an election system, in principle, when there has been no change, in principle, in such election system?

3. Does Section 5 empower the Attorney General to disapprove a State law which he does not find to be discriminatory, but about which he says: "Accordingly, I am unable to conclude that the plan does not have a discriminatory racial effect on voting"; i.e., about which the Attorney General is unable to reach a decision?

4. Does the Attorney General have the power to extend the 60 day time limit Congress placed on him in Section 5 of the Voting Rights Act of 1965?

STATEMENT OF THE CASE

Following receipt of the 1970 Census, the Georgia General Assembly, one of the defendants herein, met in extraordinary session in the fall of 1971, to reapportion its legislative and congressional districts. The 1971

reapportionment act for the Georgia House of Representatives was submitted to the United States Attorney General, with explanatory maps and data, on November 5, 1971. On November 19, 1971, the Attorney General requested additional information, which was supplied on January 6, 1972.[1]

On Friday, March 3, 1972 (approximately 120 days after the November 5 submission, appellants contend), the U.S. Attorney General objected to the combination of multi-member districts, numbered posts and majority (runoff) requirement, saying:

> "Accordingly, I am unable to conclude that the plan does not have a discriminatory racial effect on voting."

This objection was received by the General Assembly on Monday, March 6, at which time the legislature had only four days remaining in its 1972 regular (40 day) session. In those four days, the House of Representatives divided such multi-member districts into single member districts as it was able to (dividing 18 multi-member districts and leaving 32). It also adopted a resolution, addressed to the Attorney General, pointing out that it had not "changed" in its use of multi-member districts, designated posts, and majority (runoff) re-

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[1]The District Court stated that this additional information was "withheld" by the State until the 60-day period elapsed. As will be seen, the record is void of any evidence whatsoever that the State "withheld" the information. The United States did not even contend that it was "withheld". It took from November 19, 1971, to January 6, 1972, working Thanksgiving and during the Christmas holidays, to program the University of Georgia computer to obtain the mass of information requested by the Attorney General; e.g., "The 1970 Census population, by race, for the 1964, 1968, and submitted (1971) State House and Senate districts, and for the old (1964) and new (submitted) Congressional districts."

quirement. The amended House reapportionment act (1972) also was submitted to the Attorney General, and was objected to by him on March 24, 1972, on the ground that it continued to use multi-member districts, numbered posts and majority (runoff) requirement.

The State of Georgia commenced using multi-member districts in its House of Representatives as early as 1880 (Ga. Const. 1877, Art. III, Sec. III, Par. I; Ga. Laws 1880-81, p. 51). It began designating posts in multi-member districts in Fulton County in 1925 (Ga. Laws 1925, p. 205), and as more and more such local laws were enacted, a state-wide designated post law was adopted in 1953 (Ga. Laws 1953, Nov. Sess., p. 269; Ga. Code Ann. § 47-119; see also Ga. Laws 1964, Ex. Sess., p. 26 at p. 89, approved June 24, 1964). Georgia's majority (runoff) election requirement, which had commenced as to some offices as early as 1917 (Ga. Laws 1917, pp. 183-184), was made applicable to legislators in primaries in 1962, and in elections in 1964 (Ga. Laws 1962, p. 1217 at p. 1218; Ga. Laws 1964, Ex. Sess., p. 26 at pp. 174-175, approved June 24, 1964)[2].

Thus, prior to November 1, 1964, the effective date of Section 5 of the Voting Rights Act of 1965 (42 U.S.C. § 1973c), Georgia was and had been using multi-member districts, designated posts and the majority (runoff) election requirement as to its House of Representatives. The Attorney General objected to Georgia's use of an election system which has not changed.

This suit was instituted March 27, 1972, in the United

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[2]See *Bond v. Fortson,* 334 F.Supp. 1192 (N.D. Ga. 1971), aff'd 404 U.S. 930 (1971).

States District Court for the Northern District of Georgia seeking to enjoin the State from implementing its reapportionment acts of 1971 and 1972. Defendants raised four special defenses, which defenses appear as the questions presented in this appeal.

Hearing on those four questions was held on the afternoon of April 14, 1972. The court reconvened on the afternoon of April 18, announced that the State's four defenses would be overruled, called for discussion as to the relief to be granted, and received the Interim Report of the Government.[3]

In its Interim Report, the Government withdrew its objection to 17 multi-member districts it previously had objected to, retaining its objection as to 15 such districts. This corrective maneuver came too late to be acted upon by the General Assembly, which had already adjourned. Moreover, the Government volunteered that the District Court should consider requiring that all multi-member districts be subdivided, even those 17 not then objected to.

The District Court expressed the view at the April 18 hearing that if the 17 districts not then objected to by the Justice Department were subdivided, the multi-member question would be moot, and that it would be risky to have a special session of the legislature, to commence

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[3]Appellants do not consider that the United States of America, except as a legal entity, instituted this action. We do not consider that the United States Attorney General, occupied with many matters, disapproved Georgia's reapportionment plans. (He did not sign the letters of disapproval.) Thus, plaintiff-appellee will be referred to herein occasionally as the Government, and the Attorney General as the Justice Department, in accord with the facts of the case.

April 24, and not subdivide those 17 districts (Transcript, pp. 21-23).

The order of the District Court was issued on April 19, 1972. The Court did not rule on the Government's suggestion that all multi-member districts be subdivided (see Appendix A, footnote 4). It did, however, enjoin the State from conducting elections under the 1971 and '72 House of Representatives reapportionment acts. Unsure of how much would be required, the General Assembly prepared to convene in extraordinary session on April 24, 1972.

This Court granted a stay of that injunction on April 21, 1972 (No. A-1106), and the Government's motion to vacate the stay was denied on May 5, 1972.

(In a companion case, *Millican v. Fortson,* the District Court ordered reapportionment of the Georgia Senate, which order was stayed by this Court, No. A-1105, also on April 21, 1972. The Jurisdictional Statement in the appeal of that case is being filed simultaneously with the filing of this one.)

THE QUESTIONS ARE SUBSTANTIAL

1. Is Section 5 of the Voting Rights Act Applicable to Reapportionment, and if so, Is It Constitutional as Applied?

The primary purpose of this appeal is to determine whether Section 5 of the Voting Rights Act of 1965 (42 U.S.C. 1973c) is applicable to State legislative reapportionment acts, and if so, whether Section 5 is constitutional as applied. This question is of vital importance to the states covered by Section 5, Georgia, Alabama, Louisiana, Mississippi, South Carolina and

Virginia. It is also of vital importance to Arizona, California, Hawaii, Idaho, New York, North Carolina and Wyoming, which have political subdivisions subject to Section 5. The latter States could have their legislative reapportionment plans upset by failing to submit their reapportionment plans to the Justice Department (and being challenged as in *Allen v. State Board of Elections,* 393 U.S. 544), or by failing to convince the Justice Department that their reapportionment plans do not have a discriminatory racial effect on voting in the affected political subdivisions.

In *Allen v State Board of Elections,* 393 U.S. 544 (1969), this Court expressly declined to decide whether Section 5 is applicable to reapportionment, saying (393 U.S. at 569):

> "Also, the question of whether § 5 might cause problems in the implementation of reapportionment legislation is not properly before us at this time. There is no direct conflict between our interpretation of this statute and the principle involved in the reapportionment cases. The argument that some administrative problem might arise in the future does not establish that Congress intended that § 5 have a narrow scope; we leave to another case a consideration of any possible conflict."

The question properly left unanswered in *Allen* is the primary question in the case at bar.

In *Allen,* the Government took the position that the applicability of Section 5 to reapportionment need not be decided in that case and, moreover, that the Court's decision of *Allen* would not be tantamount to concluding that Section 5 did apply to reapportionment (Brief of the United States in *Fairley v. Patterson,* decided with

Allen, supra; brief pages 22, 24). Yet the Government now contends that *Allen, supra,* and *Perkins v. Matthews,* 400 U.S. 379 (1971), made Section 5 applicable to reapportionment.

Appellants submit that the legislative history of the 1965 Voting Rights Act shows that Congress did not intend that it apply to reapportionment. See *Allen, supra.* If Congressmen had thought that the Act applied to congressional redistricting, they certainly showed an unusual lack of interest in the subject.

Moreover, one of the drafters of the '65 Act, Assistant Attorney General David L. Norman, testified before a Congressional subcommittee that before *Allen* and *Perkins:* "We didn't formerly think that reapportionment as such had to be submitted, or annexation." (Hearings before the Civil Rights Oversight Committee on the Enforcement of the Voting Rights Act, pp. 5, 6, 68, 1971.) Mr. Norman's testimony demonstrates the importance of the questions presented by this appeal. He testified as follows (Ibid at 7):

> "Our experience in the enforcement of Section 5 shows a considerable increase now in the number of submissions from States and political subdivisions, which are covered by the Voting Rights Act.
>
> This is largely, I think, a consequence of the Supreme Court holdings in two very important cases, one this year and one in 1969. More and more changes are covered by Section 5, so that now, for example, matters of reapportionment, redistricting, and even matters of annexation must be submitted either to the District Court for the District of Columbia for a declaratory judgment, or in the alternative, to the Attorney General of the United States.

> That fact, coupled with the 1970 decennial census which necessitates reapportionment and redistricting almost everywhere, has led to a substantial increase in the submissions to the Attorney General."

The "administrative problems" referred to by the Court in *Allen* have arisen. There are needless conflicts and pressures between the District Courts and the Attorney General's office in the reapportionment field. A State adopts a reapportionment plan and submits it to the Justice Department. A citizen's suit is filed in the local District Court alleging either too much deviation from one man - one vote, or racial gerrymandering, or both. The plan is not effective until approved by the Justice Department. Thus the court may delay decision for 60 days (or more) to see if Justice disapproves the plan. The court is likely to want to delay decision, apprehending that if the court approves the plan and Justice disapproves it, the court will look bad. The Justice Department, on the other hand, feels some pressure to disapprove the plan for fear that if they approve it and the court then disapproves it, the Department will look bad. Yet what would happen if the court approves the plan and Justice disapproves? Is the plan in effect under *Connor v. Johnson,* 402 U.S. 690 (1971), or is the plan not in effect pursuant to *Perkins v. Matthews,* 400 U.S. 379 (1971)? The conflicts and pressures between the District Courts and the Justice Department can be avoided by this Court's decision of this case.

Reapportionment is, in the first instance, a matter for State legislatures, and secondly, a matter for the courts. *Burns v. Richardson,* 384 U.S. 73, 85 (1966). There is no room for the federal executive branch. Unlike a

court, the Attorney General cannot formulate a reapportionment plan, nor withhold relief where an election is imminent.

The inability of the Attorney General to formulate a plan, and to withhold relief until after an election, causes serious problems, which were avoided in this case only by resort to the court. As was stated to the court below by Mr. Harry Piper, Justice Department attorney, Georgia adopted two reapportionment plans, neither of which was found to be satisfactory. Mr. Piper continued, saying (Transcript, p. 13):

> "We have asked that the new plan be submitted to this Court, or that the Court draw a new plan itself. Because of the time element, we couldn't keep having plans go back and forth between Georgia and Washington like ping-pong balls."

Ping-pong may be a fine beginning point for international relations but it is undignified in our federal system. Without this suit, Georgia could still be adopting and submitting reapportionment plans, in its effort to satisfy Washington, right through the campaign and election. If litigation is the best solution, then the solution should be applied sooner rather than later. The federal courts, which are properly equipped to deal with reapportionment, should be allowed to proceed without interference from the federal executive branch.[4]

This Court has not held that reapportionment acts are subject to Section 5. Such a decision was expressly left to another case. *Allen, supra,* 393 U.S. at 569.

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[4]The simplest solution would be for the covered States to abdicate their duties and let the District Courts formulate reapportionment plans, thereby avoiding the Justice Department altogether. (*Connor v. Johnson,* 402 U.S. 690).

We respectfully submit that this case is the one. Most Section 5 cases are brought by private litigants against a State (see *Allen, Fairley* and *Perkins, supra.*). The United States is a party to this case and can explain (defend) in person its contention that Section 5 applies to reapportionment, and its procedures used in evaluating reapportionment plans under Section 5.

If Section 5 is to be applied to reapportionment, the question remains, is it constitutional as applied? The "as applied" question was not decided in *South Carolina v. Katzenbach,* 383 U.S. 301 (1966).

The facial constitutionality of the Voting Rights Act and of Section 5 was upheld in *Katzenbach.* But the selective coverage formula (Section 4) was upheld as being appropriate legislation authorized by the 15th Amendment; i.e., a rational means of attacking the problem of voter registration tests and devices found to exist in the covered states, 383 U.S. at 325, 329-331. Reapportionment is a national problem, not limited to the covered states, and the appropriate legislation and rational means tests which authorized the selective coverage formula are not applicable to national problems such as reapportionment.

Moreover, the facial validity of the prior approval requirements of Section 5 was upheld in *Katzenbach* as a means of preventing the covered states from resorting "to the extraordinary stratagem of contriving new rules" in the face of adverse court decrees (383 U.S. at 334-335). States do not reapportion as an extraordinary stratagem contrived to avoid court decrees. The opposite is true. States reapportion to comply with court decrees, not to avoid them. Almost invariably, reappor-

tionment plans are litigated, whereas the denial of an individual's right to register to vote rarely was. The reasons announced in *Katzenbach* for upholding Section 5 simply do not exist in the field of reapportionment.

Let us assume for the moment that Congress enacted a law, entitled the Reapportionment Approval Act of 1965, requiring certain covered states to submit their reapportionment acts to either the District Court in Washington or to the Justice Department for approval. Would that be appropriate legislation as authorized by the 15th Amendment? We submit that the answer clearly is "No". Yet the court below in effect has held that such an Act would be valid.

Such an Act clearly would not be "appropriate" under the 15th Amendment and clearly would violate the constitutional guarantee to the States of a Republican Form of Government, by suspending State legislative apportionment acts, pending approval, and by authorizing disapproval of such acts. Compare *Bauers v. Heisell,* 361 F.2d 581 (C.A. 3, 1966).

Whether or not Section 5 is applicable to reapportionment, and constitutional if applicable, these questions are nevertheless worthy of decision by this Court. The covered states and the other affected states are entitled, we respectfully submit, to have such questions decided by the highest authority.

2. Does Section 5 Empower the Attorney General to Disapprove an Election System Which Has Not Changed?

If Section 5 of the 1965 Voting Rights Act is applicable to reapportionment and if it is constitutional as

thus applied, then the interpretation and construction of Section 5 become critical to the thirteen covered and affected States.

The first of these questions involves the scope of review by the Justice Department.

It is clear beyond doubt that the Justice Department objected to Georgia's use of multi-member districts. Mr. Harry Piper, speaking for the Government, stated to the court below (Transcript, p. 11):

> "The United States does not contest that there was a majority-win, or runoff, provision in the Georgia Election Code as of November 1, 1964. We also do not contest that in 1964 a candidate had to qualify for a particular post by naming the incumbent he would run against. We had suggested removing the post provision and majority requirement as a way of alleviating our real objection, which was to the multi-member districts in the submitted plan."

It is equally clear that Georgia was using multi-member districts continuously from 1880 to date (Ga. Const. 1877, Art. III, Sec. III, Par. I; Ga. Laws 1880-81, p. 51), and was using both designated posts and majority election prior to November 1, 1964.

It is also clear that Section 5 requires submission only of voting laws ". . . different from that in force or effect on November 1, 1964. . . ." In other words, Section 5 suspends only "new" voting regulations. *South Carolina v. Katzenbach, supra,* 383 U.S. at 334. It requires submission of any "change" in election laws. *Allen v. Board of Elections,* 393 U.S. at 549.

It should be noted that we have said that Section 5 clearly suspends, and requires submission of, "new" vot-

ing laws; i.e., "changes" in election laws. We contend that Section 5 is equally clear that it authorizes the Justice Department to disapprove only the "change", because, as was stated in *South Carolina v. Katzenbach, supra,* 383 U.S. at 335, the purpose of Section 5 was to prevent the contrivance of new rules to evade the suspension of literacy tests. However, the Justice Department interprets Section 5 differently. They contend that the "change" only "triggers" the requirement of submission and ". . . does not necessarily limit the standards of review or the permissible range of objection resulting from such review." (Plaintiff's Brief to the District Court, pp. 12-13.)

Now, if Section 5 does not limit the Justice Department's "standards of review" or its "range of objection", then the covered and affected States certainly should be advised as to what does.

The Justice Department's contentions made it imperative that Georgia raise the question: Does Section 5 empower the Attorney General to disapprove a law which has not "changed" within the meaning of that Section?

In the case at bar, the Justice Department notified the Georgia General Assembly, in the closing days of its session, that the use of multi-member districts, in combination with the designation of posts and majority elections, was disapproved. The Justice Department did not say to the General Assembly that multi-member districts numbered 62, 65, 74, 76, 77, 85-89, 102, 114, 115, 122, 124 and 128 were disapproved as being new multi-member districts, or as being multi-member districts with changed boundaries, or as having had the number of

members changed. By disapproving the use of multi-member districts as such, the Justice Department told the Georgia General Assembly to subdivide, into single member districts, all multi-member districts, including 17 which the Government later conceded in court either contained no cognizable racial minorities at all or had such dispersed minorities that the subdividing of those districts would not increase their voting strength.

The Justice Department objected to the use of multi-member districts in principle, notwithstanding *Whitcomb v. Chavis,* 403 U.S. 124 (1971). They objected to the system, not to its application in particular changed circumstances. Although the application of many multi-member districts had changed, the use of multi-member districts as an election system has not changed (since 1880). Thus, Georgia seeks review of the scope of the Attorney General's power under Section 5.

Glynn County, Georgia, offers a perfect example of the point we hope to make. Glynn County was a 2 man multi-member district in 1961 (Ga. Laws 1961, p. 111), a 2 man multi-member district in the reapportionment of 1965 (Ga. Laws 1965, p. 133), a 2 man multi-member district in the reapportionment of 1967 (Ga. Laws 1967, p. 192), a 2 man multi-member district in the reapportionment of 1968 (Ga. Laws 1968, p. 214), a 2 man multi-member district in the reapportionment of 1971, and a 2 man multi-member district in the reapportionment of 1972. Not since 1941 has there been any change whatsoever in the 2 man multi-member representation of Glynn County in the Georgia House of Representatives (see Ga. Laws 1951, pp. 26-27, Ga. Laws 1941, pp. 348-349), yet that district was disapproved by the Justice Department.

The Attorney General's objection to the use of multi-member districts, as such, is invalid, we submit, because Georgia was using multi-member districts, as such, in 1961, and continued to do so, with District Court approval, throughout the 1960's and in its 1971 and '72 reapportionment plans.

Permit us momentarily to assume a hypothetical situation for the purpose of illustrating the awesome scope of the power claimed by the Justice Department. The Georgia House of Representatives had 205 members in 1961. It had 205 members in the reapportionment of 1965. Assume that the 1972 reapportionment plan called for 205 members, but that the district lines were changed considerably as compared to 1961 and 1965. Under the Justice Department's interpretation of Section 5, the Attorney General could object to the continued use of 205 members because the change in district lines "triggered" the requirement of submission, but the Attorney General was not limited to objecting to that which had "changed". *Cf. Sixty-Seventh Minnesota State Senate v. Beens,* 92 S.Ct. 1477 (1972).

We submit that the Justice Department exceeded its authority in objecting to laws as to which there had been no change. We submit, moreover, that this Court should make the determination if the Justice Department is to be allowed to make such objections. We further submit that the covered and affected States deserve to know the scope of the Justice Department's power of review of state voting and election law changes.

3. Does Section 5 Empower the Attorney General to Disapprove a State Law Which He Does Not Find to Be Discriminatory, But About Which He Is Unable to Reach a Decision?

In his March 3, 1972, letter disapproving Georgia's 1971 reapportionment plan, Assistant Attorney General David L. Norman wrote as follows:

> "An analysis of several recent federal court decisions, dealing with similar issues persuades me that a court would conclude with respect to this plan that the combination of multi-member districts, numbered posts, and a majority (runoff) requirement, along with the extensive splitting and regrouping of counties within multi-member districts, would occasion a serious potential abridgement of minority voting rights. Accordingly, I am unable to conclude that the plan does not have a discriminatory racial effect on voting."

This indecisive policy of denial is wrong, we respectfully submit. It is based upon Section 51.19 of the Attorney General's regulations (quoted above). However, those regulations have no statutory basis.

Although the Attorney General's regulations (§ 51.19) assert that in reviewing voting law changes, he is performing a judicial function, the Attorney General cannot set himself up as a court. Const. Art. III, Sec. 1 and Sec. 2.

In *Allen v. Board of Elections, supra,* 393 U.S. at 549, this Court said:

> "The Attorney General does not act as a court in approving or disapproving the state legislation."

If he were a court, the Attorney General could im-

pose a burden of proof on the submitting states, and he then perhaps could disapprove submissions (as his regulations provide) if he is unable to reach a decision within 60 days. But he is not a court, *Allen, supra,* and Congress could not and did not, in Section 5 or elsewhere, establish him as a court. Const. Art. III, Sec. 1, and Sec. 2.

If we are wrong in our contention and if the Attorney General is indeed a court, ". . . a surrogate for the District Court for the District of Columbia when he passes on Section 5 submissions . . .", as counsel for the Government argued to the court below (Transcript, p. 9), then as Government counsel argued, "If that be so, the burden of proof should not be different just because the state chooses to go through the Attorney General instead of through the District Court. . . ." (Transcript, p. 9). But, if the Government is correct in its contentions and regulations, then the *Allen* statement (quoted above) was wrong, and *Katzenbach, supra,* was wrong and Section 5 is unconstitutional as an attempt to ordain and establish the Attorney General as a court, with power extending to cases in law arising under the constitution and laws, to which the United States is one party and a State is the other party, all in violation of Article III of the Constitution.

In *Whitcomb v. Chavis,* 403 U.S. 124, 144 (1971), the Court reiterated its insistance that the challenger carry the burden of proof that multi-member districts unconstitutionally operate to dilute or cancel the voting strength of racial elements. The Justice Department has resorted to a new regulation (§ 51.19) for the purpose of perpetuating discrimination against the covered States, in the face of *Whitcomb.*

We submit that the validity of the Justice Department's judicial burden of proof standard, resulting in its indecisive denial policy, should be reviewed by this Court. In fact, we cannot imagine that the Justice Department does not want this issue, as well as the other questions to be raised on appeal, decided by this Court.

4. Does the Attorney General Have the Power to Extend the 60 Day Time Limit Congress Set in Section 5?

By letter dated March 24, 1972, the Justice Department disapproved the House of Representatives reapportionment plan adopted on March 9, 1972, the last day of the 1972 regular session. The ground for disapproval was Georgia's failure to satisfy the Justice Department's earlier objection to multi-member districts combined with designated posts and majority (runoff) election requirement.

If Section 5 is applicable to reapportionment and valid as applied, and if the burden of proof standard and indecisive denial policy are valid, then the March 9, 1972 reapportionment plan was timely disapproved and thus is suspended.

However, the reapportionment plan adopted at the 1971 special session was submitted, appellants contend, to the Justice Department on November 5, 1971. Its disapproval by letter dated March 3, 1972, was not within the 60 day time limit Congress placed on the Attorney General in Section 5, and hence the 1971 plan is in effect, appellants contend.

The Justice Department contends however that the 60 day time limit did not commence until January 6,

1972, by virtue of the Attorney General's regulations, Sections 51.18(a) and 51.10. If that be so, the March 3, 1972 objection was timely.

The Justice Department's argument assumes, however, the validity of the Attorney General's regulations, whereas none of the cited authorities (5 U.S.C. 301, 28 U.S.C. 509-510, 42 U.S.C. 1973c, and Chapter I of Title 28 of the Code of Federal Regulations) authorizes the Attorney General to extend, by regulation or otherwise, the 60 day limit fixed by Congress for the suspension of State election laws.

Section 5 itself provides that the covered and affected States may enforce changes in their voting laws if the change has been submitted to the Attorney General and he ". . . has not interposed an objection within sixty days after such submission. . . ." The purpose of the provision was to limit the time in which changes in voting laws were held in abeyance, and to expedite effectuation of those changes. *Allen v. Board of Elections, supra,* 393 U.S. at 549. If it had seen fit to do so, Congress could have put no time limit on the Attorney General, providing that a change would be effective when and if approved by him. Congress did not do so. Instead it enacted a time limit.

The Government has argued that Congress certainly did not expect that changes as complex as reapportionment plans could be reviewed within 60 days and without supplying the Attorney General with such other information as he might request. Our response to that argument is that Congress did not intend for the Attorney General to be reviewing reapportionment plans in the first place. If Congress did so intend, then the At-

torney General should ask Congress for additional time, and funds to employ researchers and statisticians to compile the information he wants. Section 5 is onerous enough without burdening the States with additional duties under it.

CONCLUSION

It is submitted that the District Court erred in its reading of *Katzenbach, Allen* and *Perkins* and in accepting the arguments of the Government. Moreover, it is submitted that the covered and affected States deserve the consideration of this Court, no matter what the outcome, on these issues of federal-state relationships. Even States not presently affected may be concerned in the future by extensions of the Voting Rights Act or similar uncommon exercises of power.

We believe that the questions presented by this appeal are substantial and that they are of such public importance as to warrant consideration by this Court.

Respectfully submitted,

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July, 1972

APPENDIX

APPENDIX A

OPINION AND ORDER OF THE DISTRICT COURT:

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION FILE NO. 16373

UNITED STATES OF AMERICA

V.

THE STATE OF GEORGA, ET AL.

BEFORE: BELL, Circuit Judge; O'KELLEY, District Judge; and FREEMAN, District Judge

PER CURIAM

ORDER

The Acting Attorney General of the United States brings this action under Section 12(d) of the Voting Rights Act of 1965 [42 U.S.C. §1973j(d)] alleging a violation of Section 5 of the Act [42 U.S.C. §1973c]. Section 5 requires that either the Attorney General or the United States District Court for the District of Columbia approved the enactment of "any voting qualification or prerequisite to voting or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964." The Attorney General here alleges that the 1972 Georgia House reap-

portionment plan[1] was rejected by the Attorney General under Section 5 within the required 60-day statutory period and asks that this three-judge court, convened pursuant to 28 U.S.C. §2284, enjoin the State from proceeding to hold elections under the current reapportionment plan.

In 1971, the State of Georgia reapportioned its Congressional, State Senate and State House districts and presented its proposed plans to the Attorney General for Section 5 review. The Attorney General requested additional information as to all three plans and such information was furnished by the State. Thereafter, objections were made by the Attorney General as to portions of each of the plans. As a result, new Congressional and Senatorial plans were subsequently adopted by the General Assembly and were approved by the Attorney General. Although the State of Georgia adopted a new House plan in response to the Attorney General's first objection, that plan failed to eliminate the features of the first plan [i.e., multi-member districts, numerical posts and majority runoffs] to which the Attorney General had objected. For that reason, the Attorney General rejected this second House plan and subsequently, filed this action.

The legislative history of the Voting Rights Act does not clearly indicate that Congress intended Section 5 to apply to reapportionment acts. In view of *Allen v. State Board of Elections,* 393 U.S. 544, 22 L.Ed.2d 1, 89 S.Ct. 817 (1969) and *Perkins v. Matthews,* 400 U.S. 379, 27 L.Ed.2d 476, 91 S.Ct. 431 (1971), this Court holds that Section 5 is applicable to such plans. More-

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[1]1972 Act No. 877.

over, this reapportionment plan is subject to Section 5 because the plan constitutes a change from prior Georgia procedures in that it redraws district lines and in some instances, replaces single-member districts with multi-member districts. The State's contention to the contrary is not well-founded.

Therefore, under the Voting Rights Act, the sole question before this Court is whether this plan, having been presented to the Attorney General for review, was rejected by him within 60 days. If so, this Court, without determining the merits of the State's proposed plan, must enjoin the State from operating under it.

In looking at the timetable of events in this case, we find that the Attorney General objected to the State's plan within the requisite 60 days. The first House reapportionment plan was submitted to the Attorney General on November 5, 1971. By letter dated November 19, 1971, the Attorney General requested further information from the State to aid in his Section 5 review. At that time, the Attorney General advised the State that the 60-day period for objection would commence running when the additional information was received by the Justice Department. That additional information was received on January 6, 1972 (more than 60 days after the State first submitted its plan), and the United States made its objection to the plan on March 3, 1972. Since the Attorney General's objection of March 3, 1972, was made within 60 days of his receipt of the additional information, we find that there was compliance with the 60-day time limit by the Attorney General. Likewise, the Attorney General's March 24, 1972 objection to the second House reapportionment plan dated March 9, 1972 was within the 60-day period. The Court

will not allow the State to withhold additional information sought by the Attorney General until after the 60-day period has elapsed and thereafter contend that the Attorney General failed to object within the statutory period.

The 1971 and 1972 plans were disapproved by the Acting United States Attorney General. The State cannot revert to its previous apportionment statutes[2] since this Court has already declared that the State is malapportioned thereby and has ordered the State to reapportion.[3]

This Court specifically does not pass on the merits of the Georgia reapportionment plan.[4] We determine, however, that the Attorney General had jurisdiction over the matter and that within the proscription of Section 5, he disapproved Georgia's reapportionment plan. We further find that Section 5 of the Voting Rights Act is constitutional as applied.[5] Therefore, while retaining jurisdiction of this matter, the Court hereby enjoins the State of Georgia from proceeding to hold elections under the present reapportionment plan. The Speaker of the Georgia House of Representatives was present in Court

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[2]Ga. Laws 1968, p. 209.

[3]*Toombs v. Fortson,* 277 F.Supp. 821 (N.D. Ga. 1967).

[4]An Amicus Curiae Brief has been filed in this case making a 14th Amendment attack on the 4th district. The Acting Attorney General also points out 'Equal Protection' problems as to multimember districts in general and a separate complaint has been filed making a 14th Amendment attack on the 56th Senatorial District in DeKalb County. The Court has also received correspondence and complaints about other districts and gerrymandering. One of these was from the Ordinary of Paulding County. This Order does not pass on these questions.

[5]Cf. *South Carolina v. Katzenbach,* 383 U.S. 301, 86 S.Ct. 803, 15 L.Ed.2d 769.

and announced that the General Assembly would comply with the Court's Orders. Also, the legal aide to the Governor indicated that a Special Session of the General Assembly would be called immediately.

The Court will reconvene at 2:00 P.M. on May 3, 1972, to review any plan submitted by the State of Georgia or in the alternative to hear argument as to such action as may be required by the Court.

IT IS SO ORDERED this 19 day of April, 1972.

APPENDIX B

STATUTES AND REGULATIONS INVOLVED

I.

Section 4 of the Voting Rights Act of 1965, as amended; pertinent provisions of (42 U.S.C. § 1973b):

(a) To assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color, no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under subsection (b) of this section or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia in an action for a declaratory judgment brought by such State or subdivision against the United States has determined that no such test or device has been used during the ten years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color: *Provided,* That no such declaratory judgment shall issue with respect to any plaintiff for a period of ten years after the entry of a final judgment of any court of the United States, other than the denial of a declaratory judgment under this section, whether entered prior to or after the enactment of this subchapter, determining that denials or abridgments of the right to vote on account of race or color through the use of such tests or devices have occurred anywhere in the territory of such plaintiff.

An action pursuant to this subsection shall be heard

and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court. The court shall retain jurisdiction of any action pursuant to this subsection for five years after judgment and shall reopen the action upon motion of the Attorney General alleging that a test or device has been used for the purpose or with the effect of denying or abridging the right to vote on account of race or color.

If the Attorney General determines that he has no reason to believe that any such test or device has been used during the ten years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color, he shall consent to the entry of such judgment.

(b) The provisions of subsection (a) of this section shall apply in any State or in any political subdivision of a state which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964. On and after August 6, 1970, in addition to any State or political subdivision of a State determined to be subject to subsection (a) of this section pursuant to the previous sentence, the provisions of subsection (a) of this Section shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1968, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum

of the persons of voting age residing therein were registered on November 1, 1968, or that less than 50 per centum of such persons voted in the presidential election of November 1968.

A determination or certification of the Attorney General or of the Director of the Census under this section or under section 1973d or 1973k of this title shall not be reviewable in any court and shall be effective upon publication in the Federal Register.

(c) Definition of test or device.

The phrase "test or device" shall mean any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter. (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.

II.

Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, pertinent provisions of (Fed. Register, Vol. 36, No. 176, Sept. 10, 1971, pp. 18186-18190):

AUTHORITY: The provision of this Part 51 issued under 5 U.S.C. 301, 28 U.S.C. 509, 510 and section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, as amended, 84 Stat. 315 (1970), Chapter I of Title 28, Code of Federal Regulations.

§ 51.3 Computation of time.

(a) The Attorney General shall have 60 days in

which to interpose an objection to a submitted change affecting voting.

(b) The 60-day period shall commence upon receipt by the Department of Justice of a submission from an appropriate official, which submission satisfies the requirements of § 51.10(a). Procedures for requesting additional material and for determining the commencement of the 60-day period when a submission is inadequate are described in § 51.18.

§ 51.10 Contents of submissions.

(a) Each submission shall include:

(1) A copy of any legislative or administrative enactment or order embodying a change affecting voting, certified by an appropriate officer of the submitting authority to be a true copy.

(2) The date of final adoption of the change affecting voting.

(3) Identification of the authority responsible for the change and the mode of decision (e.g., act of State legislature, ordinance of city council, redistricting by election officials).

(4) An explanation of the difference between the submitted change affecting voting and the existing law or practice, or explanatory materials adequate to disclose to the Attorney General the difference between the existing and proposed situation with respect to voting. When the change will affect less than the whole State or subdivision, such explanation should include a description of which subdivisions or parts thereof will be affected and how each will be affected.

(5) A statement certifying that the change affecting voting has not yet been enforced or administered, or an explanation of why such a statement cannot be made.

(6) With respect to redistricting, annexation, and other complex changes, other information which the Attorney General determines is required to enable him to evaluate the purpose or effect of the change. Such other information may include items listed under paragraph (b) of this section. When such other information is required, the Attorney General shall notify the submitting authority in the manner provided in § 51.18(a).

(b) In addition to the requirements listed in paragraph (a) of this section, each submission may include appropriate supporting materials to assist the Attorney General in his consideration. The Attorney General strongly urges the submitting authority to include the following information insofar as it is available and relevant to the specific change submitted for consideration:

(1) A statement of the reasons for the change affecting voting.

(2) A statement of the anticipated effect of the change affecting voting.

(3) A statement identifying any past or pending litigation concerning the change affecting voting or related prior voting practices.

(4) A copy of any other changes in law or administration relating to the subject matter of the submitted change affecting voting which have been put into effect since the time when coverage under section 4 of the Voting Rights Act began and the reasons for such prior changes. If such changes have already been submitted

the submitting authority may refer to the date of prior submission and identify the previously submitted changes.

(5) Where any change is made that revises the constituency which elects any office or affects the boundaries of any geographic unit or units defined or employed for voting purposes (e.g., redistricting, annexation, change from district to at-large elections) or changes the location of a polling place or place of registration, a map of the area to be affected showing the following:

(i) The existing boundaries of the voting unit or units sought to be changed.

(ii) The boundaries of the voting unit or units sought by the change.

(iii) Any other changes in the voting unit boundaries or in the geographical makeup of the constituency since the time that coverage under section 4 began. If such changes have already been submitted the submitting authority may refer to the date of the prior submission and identify the previously submitted changes.

(iv) Population distribution by race within the existing units.

(v) Population distribution by race within the proposed units.

(vi) Any natural boundaries or geographical features which influenced the selection of boundaries of any unit defined or proposed for the new voting units.

(vii) Location of polling places.

(6) Population information: (i) Population before and after the change, by race, of the area or areas to

be affected by the change. If such information is contained in the publications of the U.S. Bureau of the Census, a statement to that effect may be included.

(ii) Voting-age population and the number of registered voters before and after the change, by race, for the area to be affected by the change. If such information is contained in the publication of the U.S. Bureau of the Census, a statement to that effect may be included.

(iii) Copies of any population estimates, by race, made in connection with adoption of the proposed change, preparation of the submission or in support thereof and the basis for such estimates.

(iv) Where a particular office or particular offices are involved, a history of the number of candidates, by race, who have run for such office in the last two elections and the results of such elections.

(7) Evidence of public notice or opportunity for the public to be heard. In examining submissions, consideration may be given, where appropriate, to evidence of public notice and opportunity for interested parties to participate in the decision to adopt or implement the proposed change and to indications that such participation in fact took place, or to evidence of notice to the public that a submission has been made soliciting comment by the public to the Department of Justice. Examples of materials demonstrating public notice or participation include:

(i) Copies of newspaper articles discussing the proposed change.

(ii) Copies of public notices (and statements re-

garding where they appeared, e.g., newspaper, radio, or television, posted in public buildings, sent to identified individuals or groups) which describe the proposed change and invite public comment or participation in hearings, or which announce submission to the Attorney General and invite comments for his consideration.

(iii) Minutes or accounts of public hearings concerning the proposed changes.

(iv) Statements, speeches, and other public communications concerning the proposed changes.

(v) Copies of comments from the general public.

(vi) Excerpts from legislative journals containing discussion of a submitted enactment, or other materials revealing its legislative purpose.

(8) Where information requested herein is relevant but not known and not believed to be available, submissions should so state.

(9) Where information furnished reflects an estimation, submissions should identify the individual and state his qualifications to make the estimate.

(10) Submissions should identify in general the source of any information they supply.

(11) When a submitting authority desires the Attorney General to consider any information which has been supplied in connection with an earlier submission, incorporation by reference may be accomplished by stating the date and subject matter of the earlier submission and identifying the relevant information therein.

§ 51.26 Records concerning submissions.

(a) Section 5 files: The Attorney General shall maintain a section 5 file for each submission, containing the submission, related written materials, correspondence, notations concerning conferences with the submitting authority or any interested individual or group and a copy of any letters from the Attorney General concerning his decision whether to object to a submission. Communications from individuals who have requested confidentiality or with respect to whom the Attorney General has determined that confidentiality is appropriate under § 51.12(c) shall not be included in the section 5 file. Investigative reports and internal memoranda shall not be included in the section 5 file.

APPENDIX C

(Filed in Clerk's Office May 17, 1972; Claude L. Goza, Clerk; By: PJE, Deputy Clerk)

NOTICE OF APPEAL

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA, *Plaintiff,* V. THE STATE OF GEORGIA; THE GENERAL ASSEMBLY OF THE STATE OF GEORGIA; JIMMY CARTER, Governor; BEN W. FORTSON, JR., Secretary of State and member of the State Election Board; WILLIAM F. BLANKS, M. M. SMITH, MATTHEW PATTON, MELBA WILLIAMS, Members, *Defendants.*	CIVIL ACTION FILE NO. 16373

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the State of Georgia, the General Assembly of the State of Georgia, Governor Jimmy Carter, Secretary of State Ben W. Fortson, Jr., and members of the State Election Board William F. Blanks, M. M. Smith, Matthew Patton, Melba Williams, the defendants in the above styled case, hereby appeal to the Supreme Court of the United States from the order

holding Section 5 of the Voting Rights Act of 1965 to be constitutional and enjoining the State of Georgia from proceeding to hold elections to the House of Representatives under the present reapportionment plan, entered in this action on April 19, 1972.

This appeal is taken pursuant to 28 U.S.C. § 1253.