No. 72-75

In the Supreme Court of the United States

OCTOBER TERM, 1972

STATE OF GEORGIA, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

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CITATIONS

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OPINION BELOW

The opinion of the district court (A. 72) is not reported.

JURISDICTION

The judgment of the district court (A. 72) was entered on April 19, 1972. On May 17, 1972, a notice of appeal to this Court was filed under 28 U.S.C. 1253 and 2101(b), and under 42 U.S.C. 1973c. This Court noted probable jurisdiction on October 16, 1972 (A. 77).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifteenth Amendment to the United States Constitution provides as follows:

> Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.
>
> Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Sections 4 and 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973b and 1973c respectively, are set forth in the Appendix to appellants' brief, at pp. 50–53.

QUESTIONS PRESENTED

1. Whether the preclearance requirement in Section 5 of the Voting Rights Act is applicable to reapportionment acts of state legislatures and is constitutional as so applied.

2. Whether the 1971 and 1972 Georgia House of Representatives reapportionment plans were election law "changes" that required submission to the Attorney General under Section 5 of the Act.

3. Whether the Attorney General, in determining whether to interpose an objection to the reapportionment plans involved here, properly placed the burden on the submitting jurisdiction to demonstrate that the plans did not have a discriminatory racial effect on voting.

4. Whether the objections interposed by the Attorney General were timely.

STATEMENT

The material facts are not disputed. Following the 1970 decennial census, the Georgia General Assembly, in the autumn of 1971, reapportioned its legislative (state Senate and House) and congressional districts under three separate reapportionment plans, and, on November 5, 1971, it submitted the plans to the Attorney General of the United States for review, pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973(c) (A. 19).[1] Following a preliminary examination, the Department of Justice "determined that the data sent to the Attorney General [were] insufficient to evaluate properly the changes * * * submitted" (A. 39). On November 19, 1971, David L. Norman, Assistant Attorney General, Civil Rights Division, acting pursuant to 28 C.F.R.

[1] Section 5 provides that States and political subdivisions subject to that Section which "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 * * *," shall before enforcement thereof obtain a declaratory judgment from the United States District Court for the District of Columbia that the new law, regulation or procedure is not racially discriminatory in purpose or effect, or, alternatively, may submit the qualification, prerequisite, standard or procedure to the Attorney General for review. See Appellants' Br. 50–51.

On September 10, 1971, the Attorney General promulgated detailed "Procedures for the Administration of Section 5 of the Voting Rights Act of 1965," which serve as procedural and interpretative guidelines for the administration of Section 5. 28 C.F.R. 51.1 *et seq.*

51.18(a),[2] requested the State to provide the Department with additional maps and other information deemed essential for a proper evaluation of all three plans. The letter advised that the 60-day period within which the Attorney General must act on the state plans would commence to run on receipt of the necessary data (A. 39–41).

The requested information was submitted by the State on January 6, 1972 (A. 33, 42–44). On February 11, 1972, the Attorney General interposed an objection to part of the congressional plan, and on March 3, 1972, he objected to various aspects of the legislative plans (A. 9–12). In response to these objections, the Georgia General Assembly adopted modifications to the congressional and state senatorial plans, and, upon resubmission to the Attorney General under Section 5, these plans were approved. They are not involved in the present litigation.

The 1971 reapportionment plan pertaining to the Georgia House of Representatives, which is one of the plans involved here, marked a break with Georgia's long tradition of maintaining the integrity of

[2] The regulation provides. "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." Pursuant to 28 U.S.C. 510, the Attorney General has delegated his authority in this area to the Assistant Attorney General in charge of the Civil Rights Division. 28 C.F.R. 0.50.

county boundaries (compare A. 37 with A. 45). As a result of extensive splitting and regrouping of counties within districts, the plan eliminated a significant number of single-member districts, and provided for more multi-member districts (49), a higher proportion of multi-member districts (49 of 105 districts, or 46.7 percent) and a smaller number of House members (180) than any previous House plan in the State's history (A. 10, 17; and compare *Toombs* v. *Fortson,* 241 F. Supp. 65, 68 (N.D. Ga.)).

The Attorney General's letter of objection stated in part (A. 10–11):

> 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 (run-off) requirement, along with the extensive splitting and regrouping of counties within multimember districts, would occasion a serious potential abridgment of minority voting rights. Accordingly, I am unable to conclude that the plan does not have a discriminatory racial effect on voting.

The letter also pointed out (A. 11–12) that in the east-central portion of the State, the population of which is predominantly nonwhite, the proposed 1971 House plan redrew the "four majority-black, single-member districts in the area" in such a way that they were combined into six districts, only one of which had "a slight nonwhite population majority (50.56 percent)," with the other five "border districts" being located "partly inside and partly outside the majority-nonwhite area,"

giving them "significant, but minority, nonwhite population percentages."

When the Georgia General Assembly received the Attorney General's objections, it promptly repealed the plan submitted on November 5, 1971, and adopted a revised reapportionment plan for the House of Representatives. The new plan (A. 45) redistricted the area in east-central Georgia to increase the number of majority-nonwhite districts there; however, 31 of the 49 multi-member districts under the 1971 House plan were retained, as were the numerical post provision for candidates' qualification and the majority (run-off) requirement for election in primary and general elections (A. 48). On March 9, 1972, the Georgia House of Representatives adopted a resolution (A. 15–18) stating, *inter alia,* that it "lack[ed] the time to satisfy the Attorney General before the upcoming primaries and elections," and resolving "that in order to invoke the remedial powers of the Federal Courts," it would decline to abandon the unaltered aspects of the initial plan which had been considered objectionable (A. 18).

The revised House reapportionment plan (1972 House plan) was submitted to the Attorney General for Section 5 review on March 15, 1972 (A. 33). On March 24, 1972, Assistant Attorney General Norman advised the State "that this reapportionment does not satisfactorily remove the features found objectionable in your prior submission, namely, the combination of multi-member districts, numbered posts, and a majority (run-off) requirement * * *" (A. 13).

Three days later, the United States commenced the present action in the United States District Court for the Northern District of Georgia under Section 12(d) of the Voting Rights Act, 42 U.S.C. 1973j(d). The suit sought to restrain the State of Georgia from implementing either its 1971 or 1972 House plans in the form submitted to the Attorney General, and by him found to be objectionable, and asked that the state legislature be directed to adopt a satisfactory reapportionment plan "which conforms to the Fourteenth and Fifteenth Amendments of the federal Constitution" (A. 8), or, alternatively, that such a plan be devised by the court "through the appointment of a special master or otherwise" (*ibid.*).

The matter was heard before a three-judge court as required by Section 5 of the Act (A. 73).[3] The State argued: (1) that Congress did not intend Section 5 of the Voting Rights Act to apply to reapportionment acts of state legislatures, and the Constitution does not permit the Act to be so applied; (2) that the 1971 and 1972 House reapportionment plans were in any event not "changes" subject to the provisions of Section 5; (3) that the Attorney General did not apply the appropriate standard in reviewing the House plans submitted to him; and (4) that the objections interposed by the Attorney General were untimely.

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[3] The Section reads in pertinent part (Appellants' Br. 51): "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."

At the request of the court, the United States filed an "Interim Report," prepared after consultation with the State (A. 67–71). That Report stated that the Attorney General would no longer object under Section 5 to 10 of the 31 multi-member districts remaining in the 1972 House plan, since they "do not contain cognizable racial minorities within the meaning of the law" (A. 67). Six other multi-member districts containing "larger non-white populations, which probably constitute cognizable racial minorities," were also removed from the objection list because the non-white population in those areas is "so diffused that * * * there is no significant dilution of voting strength attributable to multi-member districting * * *" (A. 68). The other 15 multi-member districts, including one in the east central portion of the State, were deemed to "have significant and cognizable nonwhite population concentrations whose inclusion in a multi-member district, in the context of numerical posts and a majority-win (runoff) requirement, would occasion a dilution or abridgment of voting rights on account of race or color" (*ibid.*).

Following a hearing, the court below held, on April 19, 1972 (A. 72–76), that Congress intended Section 5 to apply to state reapportionment acts, and that, as so construed, the Act is constitutional. Without passing on the merits of the proposed plans (A. 75), the court concluded that they constituted "a change from prior Georgia procedures" (A. 73–74); it upheld the Attorney General's objections as timely.

The State was enjoined "from proceeding to hold elections under the present reapportionment plan" (A. 75).[4] The court retained jurisdiction and, at the request of the Speaker of the Georgia General Assembly (A. 64–65), scheduled a hearing for May 3, 1972, to review any new plan submitted by the State (A. 75–76).[5]

SUMMARY OF ARGUMENT

Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, requires that covered jurisdictions submit to federal authorities state or local legislation which alters their voting laws, practices or procedures that were in force and effect on November 1, 1964. This Court has on several occasions considered the reach of Section 5 coverage, and each time it has construed the provision to have the broadest possible scope. The legislative history of the Act provides strong support for the conclusion that Congress intended the preclearance requirement to apply to every conceivable legislative change affecting voting. Section 5 was enacted to enforce the protections of the Fifteenth Amendment, and its procedures therefore

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[4] As pointed out by the court below (A. 75), the State could not "revert to its previous apportionment statutes [Ga. Laws 1968, p. 209] since [the court had] already declared that the State is malapportioned thereby and [had] ordered the State to reapportion [*Toombs* v. *Fortson*, 277 F. Supp. 821 (N.D. Ga.)]."

[5] On April 21, 1972, this Court stayed the order of the district court (No. A–1106), and, on May 5, 1972, it denied a motion by the United States to vacate the stay.

embrace all changes in election laws having the potential for abridging voting rights on account of race or color.

The Congress that re-enacted the Voting Rights Act was cognizant of this Court's broad interpretation of the Act's coverage and was specifically aware that reapportionment legislation potentially has a discriminatory racial effect. During the legislative hearings in 1969 and 1970 on whether to extend the life of the 1965 Act through 1975, the practice of changing boundary lines and redistricting was repeatedly cited as one of the new devices being used in some of the covered jurisdictions to dilute the voting power of newly-enfranchised Negroes, and the Attorney General specifically informed Congress that he was administering the Act on the premise that it applies to reapportionment legislation. Congressmen both for and against the five-year extension seemed in general agreement that a change in state apportionment laws would be subject to the preclearance requirement if Section 5 were re-enacted, and proponents of the federal legislation to revitalize that provision considered its re-enactment essential to combat effectively the use of such new weapons of discrimination.

It is thus clear that Congress intended no special exemption from Section 5 coverage when the change in election practices and procedures is effected by reapportionment legislation. Nor does the Constitution bar application of the federal preclearance require-

ment in this context. The several arguments to the contrary that are advanced by the appellants here were fully considered and rejected by this Court in *South Carolina* v. *Katzenbach,* 383 U.S. 301, and there is no reason to reach a different result here.

There remains the largely factual question—decided against appellants below—whether the particular reapportionment plans involved here were "different from [the apportionment] in force or effect on November 1, 1964 * * *" (42 U.S.C. 1973c), so as to require their submission to the Attorney General under Section 5. Since the 1971 and 1972 plans for the Georgia House of Representatives were prompted by the 1970 decennial census, it would have been virtually impossible to draw them along the identical lines of the 1964 plans. But the Georgia General Assembly made no apparent effort to preserve old boundaries. Instead, it abandoned the State's traditional policy of using county lines to identify voting districts. In addition to splitting and regrouping counties, it also substantially reduced the number of single-member districts that had existed in 1964, and substantially increased the number and percentage of multi-member districts across the State. The voting population in most areas and the nature of its representation were both significantly altered. Thus, while some of the 1964 procedures were retained, the legislative seats in the State of Georgia were apportioned under the 1971 and 1972 House plans in a manner

very different from the way they had been apportioned previously. The court below therefore correctly held that these plans constituted a "change" within the meaning of Section 5.

While appellants also seek to challenge the objections interposed by the Attorney General to the Georgia House reapportionment legislation on grounds that his determination was based on an erroneous standard and was not timely made, this Court has plainly indicated that such questions are not to be litigated in cases of this sort. Even so, the arguments on these subsidiary points are without substance.

Contrary to appellants' position, the language of Section 5, its legislative history, and the Attorney General's regulations promulgated thereunder, all make it clear that the burden of proof is on the submitting jurisdiction to demonstrate that its legislative change does not have a discriminatory racial effect on voting. Moreover, in meeting that burden, if the State's initial submission lacks relevant information that is necessary to a proper evaluation of its effect on the newly-enfranchised Negro voters, and an itemized request is promptly made by the Department of Justice for the additional information needed, the 60-day statutory period within which the Attorney General is to make an informed decision properly commences to run only after the new materials, completing the State's submission, have been furnished. In any event, the timeliness challenge here relates only to the now repealed 1971 plan, and the issue is therefore moot.

ARGUMENT

I. SECTION 5 OF THE VOTING RIGHTS ACT IS APPLICABLE TO STATE REAPPORTIONMENT LEGISLATION AND IS CONSTITUTIONAL AS SO APPLIED

The State of Georgia is one of seven States to which the provisions of Section 4(a) of the Voting Rights Act (42 U.S.C. 1973b(a)) are applicable (30 Fed. Reg. 9897); it is therefore prohibited under Section 5 of the Act (42 U.S.C. 1973c) from enacting or seeking "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," without first submitting such change to the Attorney General of the United States for review, or, alternatively, securing a favorable declaratory judgment from the United States District Court for the District of Columbia.

In this case, the Georgia General Assembly submitted to the Attorney General for review its proposed 1971 reapportionment plans "pursuant to § 5 of the Voting Rights Act * * * and the regulations [thereunder]" (A. 19). Two of the plans were not objected to; the other was. The Attorney General's objections to the 1971 House plan was not satisfied in the substituted 1972 House plan adopted by the Georgia General Assembly and also submitted under Section 5. Having failed to satisfy the Attorney General that its House plans do not have "a discriminatory racial effect on voting" (A. 10–11), the State now takes the position that

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its submissions under Section 5 were in error because that statutory provision was not intended to reach reapportionment legislation; it further contends that the contrary construction of the Act by the court below is unconstitutional. In both respects, we disagree.

A. The Review Procedures in Section 5 of the Voting Rights Act Apply to State Reapportionment Legislation

1. In determining the reach of Section 5 coverage, this Court is not called upon to write on a clean slate. In 1968, the applicability of the Voting Rights Act approval requirements to new voting procedures enacted by the States of Mississippi and Virginia was established in *Allen* v. *State Board of Elections,* 393 U.S. 544, and three companion cases.[6] There the Court explicitly rejected "a narrow construction" of Section 5, pointing out that "[t]he Voting Rights Act was aimed at the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race" (393 U.S. at 565; footnote omitted). Consistently with the overriding purpose of the federal legislation "to rid the country of racial discrimination in voting" (393 U.S.

[6] *Fairley* v. *Patterson*, No. 25; *Bunton* v. *Patterson*, No. 26; *Whitley* v. *Williams*, No. 36 (all October Term, 1968). The changes in the state election laws held in these cases to come within Section 5 coverage were: (1) changes from district to at-large voting for county supervisor; (2) changes from election of county superintendents of education to the appointment of such officials; (3) changes in the requirements for independent candidates running in general elections; and (4) changes in procedures for casting write-in votes.

at 548), the Court determined that Congress intended Section 5 to be given "the broadest possible scope" (393 U.S. at 567). "The legislative history on the whole supports the view," it stated (393 U.S. at 566), "that Congress intended to reach any state enactment which altered the election law of a covered State in even a minor way." And see *South Carolina* v. *Katzenbach,* 383 U.S. 301, 315–316.

The clear implication of *Allen* is that reapportionment laws adopted by the legislatures of these States are included within the broad coverage of the Act's preclearance requirements. Indeed, in addressing itself to the specific question presented in one of the cases before it, the Court in *Allen* used language which is equally applicable to the State's use of multi-member districts in the reapportionment plan disapproved by the Attorney General in the present case:

> No. 25 involves a change from district to at-large voting for county supervisors. The right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot. See *Reynolds* v. *Sims,* 377 U.S. 533, 555 (1964). Voters who are members of a racial minority might well be in the majority in one district, but in a decided minority in the county as a whole. This type of change could therefore nullify their ability to elect the candidate of their choice just as would prohibiting some of them from voting. [393 U.S. at 569.]

In speaking specifically of reapportionment, the Court in *Allen* stated that Section 5 preclearance in the con-

text of reapportionment might present "some administrative problem[s]" that could well be the subject of future litigation (see *infra,* pp. 25–27); but it indicated that such a prospect affords no basis for giving the statute "a narrow scope" when dealing with reapportionment legislation (393 U.S. at 569).

2. The foregoing quotation from *Allen* reaffirmed that the right to vote can be curtailed "by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds* v. *Sims,* 377 U.S. 533, 555. When state apportionment or districting arrangements are devised so as to dilute and impair the votes cast by newly-enfranchised Negroes—as, for example, was the case here in east-central Georgia under the 1971 House reapportionment plan—they not only contravene the equal protection requirements of the Fourteenth Amendment, but also violate the Fifteenth Amendment prohibition against racial discrimination in voting. Compare *Gomillion* v. *Lightfoot,* 364 U.S. 339, with *Wright* v. *Rockefeller,* 376 U.S. 52; and see *Sims* v. *Baggett,* 247 F. Supp. 96 (M.D. Ala.). It matters not whether boundaries are changed to eliminate districts having a majority, or substantial minority, nonwhite population (cf. *Taylor* v. *McKeithen,* 407 U.S. 191, 194 n. 3), or the State resorts to the device of multi-member districts "to minimize or cancel out the voting strength of racial * * * elements * * *" (*Fortson* v. *Dorsey,* 379 U.S. 433, 439; *Burns* v. *Richardson,* 384 U.S. 73, 88). The Fifteenth Amendment condemns "sophisticated as well as sim-

ple-minded modes of discrimination" (*Lane* v. *Wilson*, 307 U.S. 268, 275; *Gomillion* v. *Lightfoot, supra,* 364 U.S. at 342).[7]

Since the Voting Rights Act was intended to make effective the protections of the Fifteenth Amendment, its reach is no less inclusive. Precisely because "some of the States covered by § 4(b) of the Act had resorted to the extraordinary strategem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees" (*South Carolina* v. *Katzenbach, supra,* 383 U.S. at 335), Congress prescribed in Section 5 "the suspension *of all new voting regulations* pending review by federal authorities to determine whether their use would perpetuate voting discrimination" (*id.* at 315–316; emphasis added). The statutory approval procedure was designed to serve an informing function—to provide "a method of bringing to the attention of the Government changes in State law."[8]

3. It is true, as appellants suggest, that the legislative history of the 1965 Act contains few references to state reapportionment legislation. But, as this Court recognized in *Allen* (393 U.S. at 568), the fact that Congress did not discuss every conceivable type of change within the broad scope of Section 5 provides

[7] For an informative discussion of the manner in which state reapportionment and redistricting has been used to dilute the Negro vote, see *The Shameful Blight*, A Report of the Washington Research Project, Ch. 5 (1972).

[8] Hearings before Subcommittee No. 5 of the House Committee on the Judiciary on H.R. 6400, 89th Cong., 1st Sess., p. 72 (hereafter referred to as *1964 House Hearings*).

no basis for limiting that provision's coverage only to those changes specifically mentioned in the congressional hearings (see, *e.g., 1964 House Hearings,* pp. 60–62). The preclearance requirement was enacted with full recognition of the admonition given by then Attorney General Katzenbach that "there are an awful lot of things that could be started for purposes of evading the 15th Amendment * * *" (*1964 House Hearings,* p. 95), and the language used "was intended to be all-inclusive of any kind of practice" (Hearings before the Senate Committee on the Judiciary on S. 1564, 89th Cong., 1st Sess., p. 192).[9]

Moreover, at the time of the legislative hearings on the 1965 Act, the use of reapportionment as a weapon of discrimination may not have been fully appreciated by the Congress. It was not until June 15, 1964, that this Court announced its landmark decision in *Reynolds* v. *Sims, supra,* condemning the practice of unequal apportionment of state legislative seats. And the *Reynolds* principle was not applied to political subdivisions within the States until 1968, in *Avery* v. *Midland County,* 390 U.S. 474. The *Allen* decision followed a year later.

It is highly pertinent here, however, that the significance of these decisions was specifically discussed

[9] To allay any doubts on this score, Congress, concerned that the word "procedure" was alone "not broad enough to cover various practices that might effectively be employed to deny citizens their right to vote" (*Allen* v. *State Board of Elections, supra,* 393 U.S. at 566), expanded the language in the final version of Section 5 to include any "voting qualification or prerequisites to voting, or standard, practice, or procedure" (42 U.S.C. (1964 ed., Supp. I) 1973c).

in the Congress when, in 1969 and 1970, it considered whether to extend the life of the 1965 Act, including Section 5, from 1970 to 1975. During Senate and House hearings on the proposed extension, this Court's broad construction of Section 5 in *Allen* was a focal point of discussion.[10] And, of particular relevance here, an 18-month study of the operation of the Voting Rights Act of 1965 by the United States Civil Rights Commission, which was before both Houses in 1969, pointed out that "such measures as conversion from elections by district to elections at-large, laws permitting the legislature to consolidate predominantly Negro counties with predominantly white counties, and reapportionment and redistricting statutes" were among the new devices being used in the South to dilute the votes of the increasing number of Negroes registering since enactment of the 1965 Act.[11] The staff director of the Commission, Mr. Howard A. Glickstein, made the same point in testifying at the House hearings (*1969 House Hearings,* p. 17; and see *1969–1970 Senate Hearings,* pp. 47, 427).

Both proponents and opponents of the five-year extension agreed that, in light of *Allen,* such legislative

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[10] See, *e.g.*, Hearings before Subcommittee No. 5 of the House Committee on the Judiciary on H.R. 4249, H.R. 5538, and Similar Proposals, 91st Cong., 1st Sess. (hereafter *1969 House Hearings*), pp. 1, 4, 18, 62, 133, 147–148, 154, 183–184, 402–454. See also Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary on Bills to Amend the Voting Rights Act, 91st Cong., 1st and 2d Sess. (hereafter *1969–1970 Senate Hearings*), pp. 48, 195–196, 369–370, 397, 426–427.

[11] *Political Participation*, A Report of the United States Commission on Civil Rights, p. 21 (1968).

changes plainly came within the scope of the preclearance requirements of Section 5. Mr. Joseph L. Rauh, Jr., General Counsel of the Leadership Conference on Civil Rights, for example, testified before the Senate Subcommittee on Constitutional Rights that changes in "electoral areas so * * * [as to] avoid a voting pattern where a Negro could be elected" are subject to "approval [by] the Attorney General or the district court [of the District of Columbia]" (*1969–1970 Senate Hearings,* p. 132). Congressman McCulloch expressed the same view in the House hearings (*1969 House Hearings,* pp. 3–4; and see *id.* at 150 (remarks of Thomas E. Harris, Associate General Counsel, AFL–CIO)). And it is particularly significant that an official of the Department of Justice specifically advised Congress that the Attorney General in his administration of the Act was of the view "that, from court decisions, all these redistricting plans are going to have to be submitted to the Attorney General for his approval because they are voting changes" (*1969–1970 Senate Hearings,* p. 507; David L. Norman, then Deputy Assistant Attorney General, Civil Rights Division).[12]

Nor did those who testified in behalf of the affected states and political subdivisions ascribe to Section 5

[12] As the Court pointed out in *Perkins* v. *Matthews*, 400 U.S. 379, 391, with reference to the above testimony, "'this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration.' *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965)." See also *Griggs* v. *Duke Power Co.*, 401 U.S. 424; *United States* v. *City of Chicago*, 400 U.S. 8, 10. There is, of course, all the more reason to defer to this interpretation with respect to the re-enacted statute, which Congress chose to extend unchanged after having been specifically informed of the Attorney General's view.

any narrower scope. To the contrary, their opposition to extending the life of the Act beyond 1970 was grounded in part on the fact that the reach of Section 5 under the *Allen* decision included boundary and district changes of the sort involved here. See, *e.g., 1969 House Hearings,* pp. 131–133 (remarks of Mississippi Attorney General Summer). Warning of the "onerous burden" placed on covered jurisdictions because the "1970 census (and recent Supreme Court rulings) will probably require the passage of reapportionment and redistricting acts in all seven states," the opposition complained that under the Act federal approval would be required "to use the left bank of a particular river instead of a certain section line in redefining the boundaries of one of their State's senatorial districts." H. Rep. No. 91–397, 91st Cong., 1st Sess., p. 22 (dissenting views of Hon. Walter Flowers).

The debates on the floor not only contain repeated references to *Allen,*[13] but also show that Congress, in deciding to extend the life of the Voting Rights Act of 1965 an additional five years (Public Law 91–285, 84 Stat. 314), was specifically aware that its decision would affect reapportionment legislation adopted by the covered States. When the question of the 1970 extension was before the Senate, changes in boundary lines and consolidation of counties were repeatedly

[13] See, *e.g.*, 116 Cong. Rec. 6173 (Sen. Hart); *id.* at 6356, 6358 (Sen. Bayh); *id.* at 5546, 6519 (Sen. Ervin)); *id.* at 5521, 5526–27 (Joint Statement of 10 members of Senate Judiciary Committee). *Allen* was also cited in the House Committee Report. See H. Rep. No. 91–397, 91st Cong., 1st Sess., pp. 8, 10.

referred to as among the new "obstructionist weapons" being used to dilute the recently-enfranchised Negro voters. See, *e.g.*, 116 Cong. Rec. 5520 (Joint Statement of 10 members of Senate Judiciary Committee); 116 Cong. Rec. 6168 (Sen. Scott).[14] "[R]eapportionment, redistricting, rearranging of wards, rearranging of commissioner districts * * *" were all understood to be election-law changes subject to prior review by the Attorney General. 116 Cong. Rec. 7105 (Sen. Allen). The emergence in the intervening 5 years of such practices, as well as other " 'disingenuous technicalities and changes in * * * election laws,' " to circumvent the Act, was, indeed, one of the principal reasons given for the need "to extend section 5 with its preclearance obligation." 116 Cong. Rec. 5534–5535 (Sen. Hart). And not once in the course of the debates did any Senator or Representative question or contradict the apparent general understanding that the Act, if extended unchanged, would apply to the reapportionments resulting from the 1970 census.

4. Only two Terms ago, this Court, in *Perkins* v. *Matthews*, 400 U.S. 379, took note of the legislative history of the Voting Rights Act Amendments of 1970 in rejecting a challenge by a political subdivision of a covered State to requiring the submission of its proposed "changes in the municipal boundaries through annexations of adjacent areas" (400 U.S. at 382) to the

[14] The same point was made by Congressman McCulloch on the floor of the House. 115 Cong. Rec. 38486.

Attorney General for preclearance.[15] In holding that such changes were within the intended broad scope of Section 5 coverage, the Court stated (400 U.S. at 388–389):

> Clearly, revision of boundary lines has an effect on voting * * *. Moreover, § 5 was designed to cover changes having a potential for **racial discrimination** in voting, and such potential inheres in a change in the composition of the electorate affected by an annexation. *Gomillion* v. *Lightfoot,* 364 U.S. 339 (1960), provides a clearcut illustration of the potential of boundary changes for "denying or abridging the right to vote on account of race or color."

That, we believe, is precisely the point to be made here with respect to the 1971 and 1972 House reapportionment plans proposed by the State of Georgia. Just as this Court pointed out in *Perkins* (400 U.S. at 390) that "[i]n terms of dilution of voting power, there is no difference between a change from district to at-large election and an annexation that changes both the boundaries and ward lines of a city to include more voters," so, too, a reapportionment plan that alters the state districting lines in such a way as to merge cognizable racial minorities into multi-member districts, and also requires that each candidate run for a stated post and win by a majority vote of the entire district, cannot, we submit, be differentiated. See *Perkins* v. *Matthews, supra,* 400 U.S. at 391–392 n. 10. The potential for infringing the protections

[15] The case also involved changes in the location of polling places and, of significance here, changes from ward to at-large elections of aldermen; these, too, were held to be within the broad coverage of Section 5.

guaranteed by the Fifteenth Amendment is no less real in the latter instance than it is in the two former situations.[16] And it was to guard against just such infringements of the voting rights of "millions of non-white Americans" (*South Carolina* v. *Katzenbach, supra,* 383 U.S. at 337) that Congress initially enacted, and subsequently extended, the Section 5 preclearance requirements.

5. In light of *Allen* and *Perkins,* reapportionment legislation adopted by the affected States, or their political subdivisions, has generally been considered "a state enactment which alters the election law of a covered State" (400 U.S. at 388), within the broad coverage of Section 5. See, *e.g., Sheffield* v. *Itawamba County Board of Supervisors,* 439 F. 2d 35 (C.A. 5); *Howell* v. *Mahon,* E.D. Va., C.A. No. 105–71N, decided May 24, 1971. Cf. *Taylor* v. *McKeithen,* 407 U.S. 191. For the most part, the seven covered States have in recent years followed the course taken by the State of Georgia in the present case and submitted to the Attorney General such proposed changes.[17] As Assistant Attorney General Norman testified in the May 1971 Hearings before

[16] For this reason, the fact that state reapportionment legislation might have been partially motivated by this Court's reapportionment decisions affords no more basis for excepting the plans from Section 5 scrutiny than is afforded when the moving force behind passage of such legislation is "an attempt to comply with the provisions of the Voting Rights Act." See *Allen* v. *State Board of Elections, supra,* 393 U.S. at 565 n. 29.

[17] In its 1971 submission, the State of Georgia stated that its 1968 reapportionment plan had not been submitted to the Attorney General "because at that time, prior to *Allen* v. *Board of Elections,* 393 U.S. 544 (1969), it was believed to be unnecessary to submit reapportionment plans to the United

the Civil Rights Oversight Committee on the Enforcement of the Voting Rights Act (Subcommittee No. 4 of the House Committee on the Judiciary, 92d Cong., 1st Sess.), this Court's expansive interpretation of Section 5 first announced in *Allen,* and later reaffirmed in *Perkins,* "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" (*id.* at p. 7).[18]

In processing these many state and local reapportionment plans, the Attorney General has been cognizant of the potential "administrative problem" to which this Court alluded in *Allen* (393 U.S. at 569). In some instances, a reapportionment submitted to the

States Attorney General pursuant to the Voting Rights Act of 1965" (A. 21). Following this Court's decisions in *Allen* and *Perkins,* however, the State of Georgia submitted, "pursuant to § 5 of the Voting Rights Act of 1965 * * * and the regulations promulgated * * * [thereunder]" (A. 19), not only its 1971 and 1972 House reapportionment plans, but also its congressional and state senate plans; moreover, when the Attorney General interposed objections to the latter two plans, they were modified by the Georgia General Assembly to meet the objections and resubmitted for approval (*supra,* p. 4).

[18] In addition to the submissions by the State of Georgia, legislative and congressional districting plans have been submitted by Louisiana, Mississippi (congressional only), North Carolina, South Carolina, and Virginia. (Alabama and the Mississippi Legislature were reapportioned pursuant to federal court orders; see p. 26, *infra.*) As of December 1, 1972, a total of 381 reapportionment plans have been presented to the Attorney General for Section 5 approval since 1969; 351 of these involve local government bodies, such as counties, parishes and municipalities.

Department of Justice for preclearance has, at the time of submission, also been the subject of pending litigation.[19] In order to avoid a possible conflict, the Department of Justice and the federal courts have developed complementary procedures designed to effectuate the intent of Congress that there be judicial or administrative pre-implementation review of all changes covered by Section 5.

Thus, where a reapportionment plan has been prescribed, not by the legislature of an affected State, or its political subdivision, but by a federal court, that judicial plan is not to be reviewed by the Attorney General. As this Court stated in *Conner* v. *Johnson,* 402 U.S. 690, 691: "A decree of the United States District Court is not within the reach of Section 5 of the Voting Rights Act." Moreover, when a district court is simultaneously considering a challenge to reapportionment on Fifteenth Amendment grounds, the Attorney General's policy has been to defer to the judicial determination concerning whether the particular plan submitted for preclearance has a racially discriminatory effect on voting.[20]

[19] Of the 381 reapportionments considered by the Attorney General since 1969, 42 involved redistricting litigation in which Fifteenth Amendment questions were raised, and another 39 involved redistricting plans being litigated solely on Fourteenth Amendment grounds. The Attorney General has interposed objections to 53 of the 381 submissions: in 19 of these instances the objections related to planned reapportionments involved in lawsuits when the plans were submitted for the Attorney General's consideration.

[20] That policy is presently being contested in *Harper* v. *Kleindienst*, D.D.C., Civ. Action No. 1607–72.

The pragmatic efforts of both the Attorney General and the federal courts to achieve the required review are further evidenced by the sequence of events in this case. When the Georgia Legislature was unable to devise a House plan acceptable to the Attorney General, the issue was submitted to the court below, which had earlier ordered reapportionment,[21] with the assurance that the Attorney General would not thereafter undertake independent Section 5 review of any modifications approved by the court (A. 57). Precisely because of this sort of cooperation, the potential for conflict between the reviewing agency and the courts in scrutinizing state reapportionment laws has been reduced significantly.[22] The "administrative problem" has thus proved to be entirely manageable in the application of Section 5 to reapportionment matters.

B. Application of Section 5 to Reapportionment Legislation of the Covered States Is Constitutional

Appellants contend that Section 5 cannot constitutionally be applied to state reapportionment plans.

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[21] In *Toombs* v. *Fortson*, 277 F. Supp. 821, 823 (N.D. Ga.), the court below had approved apportionment plans "for use pending receipt of the 1970 census which means, as a practical matter, until the 1972 primaries and general election. As we have made clear previously, the General Assembly must be reapportioned after each decennial census."

[22] In several instances, district courts considering reapportionment matters have withheld approval of the state legislation pending submission to, and a decision by, the Attorney General under Section 5. See, *e.g.*, *Bussie* v. *Governor of Louisiana*, 333 F. Supp. 452 (E.D. La.), affirmed, 457 F. 2d 796 (C.A. 5); *Bacote* v. *Carter*, 343 F. Supp. 330 (N.D. Ga.); *Howell* v. *Mahan*, *supra*.

But they suggest no convincing reason why this statutory provision, which has withstood constitutional attack with respect to its application to all other election-law changes (see *South Carolina* v. *Katzenbach, supra; Allen* v. *State Board of Elections, supra,* 393 U.S. at 548), suddenly becomes vulnerable to the identical arguments when made in a reapportionment context.

This Court, in *South Carolina* v. *Katzenbach,* carefully considered the constitutionality of the Section 5 approval requirement and determined that it was "an appropriate means for carrying out Congress' constitutional responsibilities and * * * consonant with all other provisions of the Constitution" (383 U.S. at 308). As we have pointed out (pp. 15–17, *supra*), use of apportionment and districting changes to deprive the Negro voter of casting a meaningful ballot—which is not unknown in some of the covered States and their political subdivisions (see *Political Participation, supra,* pp. 21–23)—is a practice as much condemned by the Fifteenth Amendment as the racially discriminatory tests, devices and boundary changes involved in *South Carolina, Allen* and *Perkins.* Compare *Gomillion* v. *Lightfoot, supra,* 364 U.S. at 347. It, too, has been recognized by Congress as a potential form of frustration and impairment of the right to vote, and is properly subject to that body's "full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting." *South Carolina* v. *Katzenbach, supra,* 383 U.S. at 326.

Contrary to appellants' apparent assertion, subjecting the Georgia reapportionment to the Attorney Gen-

eral's scrutiny under Section 5 does not deny the State the opportunity to devise its own boundary changes and districting plans. The statutory preclearance requirement is designed solely to insure that reapportionment legislation of the covered States and their political subdivisions comports with "the commands of the Fifteenth Amendment" (see *South Carolina* v. *Katzenbach, supra,* 383 U.S. at 337). In performing his review function, the Attorney General does not himself redraw boundary lines or alter the legislative scheme in such a way as to "bypass the State's formal judgment as to the proper size of its legislative bodies" (*Sixty-Seventh Minnesota State Senate* v. *Beens,* 406 U.S. 187, 198). To the contrary, when he interposes an objection on the ground that the State has failed to demonstrate that the reapportionment plan does not have a racially discriminatory effect on voting, the submitting jurisdiction is free to modify it in any manner it wishes to satisfy the objection. And where, as here, certain aspects of the modified plan are still unsatisfactory, the issue is taken to the federal courts which must "accommodate the relief ordered to the appropriate provisions of state statutes relating * * *" to the contested aspects of the reapportionment (*id.* at 197).

Moreover, the fact that these procedures apply only to seven States and their political subdivisions does not render them unconstitutional. "In acceptable legislative fashion, Congress chose to limit its attention to the geographic areas where immediate action seemed necessary" (*South Carolina* v. *Katzenbach, supra,* 383 U.S. at 328). As we have indicated (*supra,*

pp. 19–22), in some of these areas reapportionment and redistricting statutes were employed as a "new device" to circumvent the 1965 Act (see *Political Participation, supra,* p. 21). Such efforts are precisely the target at which Section 5 is aimed. Thus this Court's observation in *South Carolina* v. *Katzenbach,* 383 U.S. at 335, is particularly relevant in the present context: "Congress had reason to suppose that these [covered] States might try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself. Under the compulsion of these unique circumstances, Congress responded in a permissibly decisive manner."

II. THE 1971 AND 1972 PROPOSED REAPPORTIONMENTS FOR THE GEORGIA HOUSE OF REPRESENTATIVES DIFFER SUBSTANTIALLY FROM THE MANNER IN WHICH THE STATE LEGISLATIVE SEATS WERE APPORTIONED ON NOVEMBER 1, 1964

Appellants also contend that, whatever the general application of the Voting Rights Act in the reapportionment context, the 1971 and 1972 House plans involved in this case are not covered by Section 5 because the proposed schemes do not markedly differ from the apportionment of state legislative seats in effect on November 1, 1964, which is the applicable statutory date of comparison.[23] Their position understandably is not that the new plans are identical to the old, for they admit that "the application of many

[23] Section 5 requires, *inter alia*, the submission 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 * * *" (Appellants' Br. 50).

[but not all] multi-member districts had changed * * *" (*Appellants'* Br. 29; see also A. 50–51). Rather, the argument appears to be that the alteration is not sufficiently comprehensive to warrant invoking the Section 5 preclearance requirement.

This argument is, as the district court held (A. 74), "not well founded." We have shown that Congress did not intend the application of Section 5 to turn on whether the "change" in question is significant or insignificant, large or small, subtle or obvious. This Court made it abundantly clear in both *Allen* (393 U.S. at 568) and *Perkins* (400 U.S. at 387), that "Congress chose not to include even * * * minor exceptions in § 5, thus indicating an intention that all changes, no matter how small, be subjected to § 5 scrutiny." That, in itself, sufficiently answers appellants' claim.

Moreover, the changes here involved far more than insubstantial technicalities. In 1971 and 1972, the Georgia General Assembly adopted reapportionment plans for the state legislature that were fundamentally different from the 1964 Georgia procedures (see A. 34–35). For the first time, it departed from the policy that had theretofore been uniformly followed throughout the State of using county lines to define the basic election unit (A. 10).[24] Instead, legislative

[24] Even under the court-ordered interim plan of 1968 (see n. 21, *supra*), the State had ahered to its policy of defining legislative districts by county lines (A. 37); this had resulted in an increase in the number of multi-member districts to meet the requirements of the Equal Protection Clause. But see n. 25, *infra*.

districts were redrawn so that, under the 1971 plan (A. 38), almost half (52 of 105) of the districts were made up of one or more portions of counties, and, when that plan was modified in 1972, only 7 of 128 districts did not cross county lines (A. 45).

Contrary to the expected reduction of multi-member districts that frequently accompanies a patchwork redistricting of the sort involved here, the Georgia House plans actually provided for an increase in the number of multi-member districts. Comparing the 1971 plan (180 members to be elected from 105 districts) with the legislative apportionment in 1964 (205 members to be elected from 159 districts), more than half of the 121 single-member districts (65) that existed in 1964 were eliminated by the new plan. The 49 multi-member districts contemplated in the 1971 reapportionment plan (as compared with 38 in 1964) were composed of 29 two-member districts (compared with 30 in 1964), 16 three-member districts (compared with 8 in 1964), 3 four-member districts (compared with 0 in 1964), and 1 six-member district (compared with 0 in 1964). See *Toombs* v. *Fortson,* 241 F. Supp. 65, 68 (N.D. Ga.).

In addition, under the new scheme, the number of members elected from legislative districts having a majority-nonwhite population would be half (17) the number elected from such districts in 1964 (34). As we stated earlier (*supra,* pp. 5–6), in the east-central area of the State alone, seven counties having a black-majority population, each represented by one member of the House in 1964, were carved up into six new districts in 1971,

and only one of those districts could claim a slight (50.56 percent) black majority (A. 11–12).

When the Attorney General interposed his objections to the 1971 plan, the Georgia General Assembly in 1972 redrew district lines in the east-central portion of the State, not along county lines as in 1964, but in a fashion which would, compared to the 1971 plan, preserve more effectively the voting strength of the nonwhite population in the area (A. 45, 48). While many objectionable features still remained in the 1972 modification (see n. 27, *infra*), what is relevant here is that the resubmitted plan also differed significantly from the plan in effect on November 1, 1964. It provided for 180 members to be elected from 128 districts. Counties and parts of counties were regrouped to form 96 single-member districts (as compared with 121 in 1964), 17 two-member districts (as compared with 30 in 1964), 12 three-member districts (as compared with 8 in 1964), 2 four-member districts (as compared with 0 in 1964), and 1 six-member district (as compared with 0 in 1964).[25]

We therefore believe that the 1971 and 1972 submissions by the State of Georgia "pursuant to § 5 of the Voting Rights Act of 1956 * * *" (A. 19) were entirely proper; the proposed plans unquestionably ap-

[25] Under the interim plan approved in *Toombs* for the 1968 election, 195 members were elected from 118 districts; there were 71 single-member districts and 47 multi-member districts. In the latter category were 29 two-member districts; 11 three-member districts; 4 four-member districts, 2 five-member districts, and 1 seven-member district. Twenty-one members of the state legislature were elected from districts having a majority-non-white population.

portioned the state legislative seats in a manner "different from that in force or effect on November 1, 1964" (42 U.S.C. 1973c). This is not to say that the submitted reapportionment plans were wholly dissimilar to the 1964 Georgia procedures. As appellants point out (Appellants' Br. 26), the State's earlier requirements that each candidate run for a stated post and win by a majority vote of the entire district were retained. And the multi-member district concept had long been a part of Georgia's apportionment scheme (Appellants' Br. 29–30). But in devising its House plans for 1971 and 1972, the Georgia General Assembly did not designate as multi-member districts the same ones that had existed in 1964; it did not save the single-member districts that had then been defined by county boundaries. Rather, it abandoned its past policy and proposed, instead, an extensive splitting and regrouping of counties that would have given the state legislature a whole new cast; legislative districts were completely redrawn so that both the district population and the nature of its representation would be substantially altered.

It need only be added that appellants' effort to remove these "changes" from Section 5 coverage on the ground that they could not properly be objected to by the Attorney General (Appellants' Br. 28–30) misses the essential point of inquiry.[26] As this Court

[26] Appellants suggest that the Attorney General's objections to the 1971 and 1972 House plans were based on a misconception that the law prohibited the use of multi-member districts *per se*. The objection letters themselves, however, clearly reflect that the Department of Justice was concerned only with dis-

pointed out in *Perkins* v. *Matthews, supra,* 400 U.S. at 385, "the determination whether a covered change does or does not have the purpose or effect 'of denying or abridging the right to vote on account of race

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criminatory effect in the particular context of the submitted House plans (see pp. 5–6, *supra*). Many counties and single-member and multi-member districts contained cognizable racial minorities under prior reapportionments, the voting strength of which would be significantly diluted by merging them into a larger multi-member district where each candidate would be required to run for a stated post and win by a majority vote of the entire district.

While specific districts were not particularized in the objection letters, that is not at all unusual. Under Section 5, the Attorney General has authority only to object or not object to a submission; he is not responsible for devising an alternative reapportionment for the State and is not authorized to do so When, at the request of the court below, the Attorney General advised that 15 multi-member districts were a continuing source of objection, that was not a "corrective maneuver," as appellants now suggest (Br. 28). The specification was made "following consultations between attorneys for the United States and for the State of Georgia" (A. 67) in an effort to work out an accommodation that would permit a satisfactory solution to the reapportionment problem before the district court with minimal disruption to Georgia's proposals. Thus, the Attorney General agreed to withdraw his objections to ten multi-member districts since they did not contain "cognizable racial minorities" (A. 67) and to six other multi-member districts having "cognizable racial minorities" because "the non-white population is so diffused" (A. 68). But the fact that the Attorney General agreed with the State of Georgia to permit these 16 multi-member districts, if the State would "subdivide into single-member districts [the remaining] fifteen multi-member districts" (A. 69) under its 1972 plan, in no way undercuts the original objections interposed on the general ground that, based on the State's submissions under Section 5, the Attorney General could not certify that the House plans were without racially discriminatory effect.

or color'" is one that "Congress expressly reserved for consideration by the District Court for the District of Columbia or the Attorney General."[27] Thus, the court below properly declined to "pass on the merits of the Georgia reapportionment plan" (A. 75). This suit presents "only [the] issue * * * whether a particular state enactment is subject to the provisions of the Voting Rights Act, and therefore must be submitted for approval before enforcement" (*id.* at 383; *Allen* v. *State Board of Elections, supra,* 393 U.S. at

[27] The Attorney General interposed objections to the two House plans involved here on the ground 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 abridgment of minority voting rights" (A. 10–11). As this Court observed in *Whitcomb* v. *Chavis*, 403 U.S. 124, 143, multi-member district systems "may be subject to challenge where the circumstances of a particular case may 'operate to minimize or cancel out the voting strength of racial or political elements of the voting population.'" And see *Bussie* v. *Governor of Louisiana*, 333 F. Sup. 452 (E.D. La.), affirmed as to the invalidity of multi-member districts, 457 F.2d 796 (C.A. 5); *Sims* v. *Amos*, M.D. Ala., C.A. No. 1744–N, decided January 3, 1970. Moreover, when multi-member district plans also include stated post and majority (runoff) requirements they become particularly suspect. See *Graves* v. *Barnes*, 343 F. Supp. 704 (W.D. Texas); *Dunston* v. *Scott*, E.D. N.C., No. 2666—Civil, decided January 10, 1972, slip op. 17 n. 9. Compare *Stevenson* v. *West*, D.S.C., C.A. No. 72–45, decided April 7, 1972.

If the State of Georgia is of the view that the Attorney General's objections were unwarranted, either partially or in their entirety, its recourse is to seek "a declaratory judgment that its new voting laws do not have a discriminatory purpose or effect" (*Allen* v. *State Board of Elections*, *supra*, 393 U.S. at 555 n. 19).

558–559). And for the reasons we have already discussed above, that question, considered in the context of the 1971 and 1972 reapportionment plans of the Georgia House of Representatives, was correctly answered in the affirmative by the district court (A. 73–74).

III. THE ATTORNEY GENERAL PROPERLY PLACED THE BURDEN OF PROOF ON THE STATE OF GEORGIA TO DEMONSTRATE THAT ITS HOUSE PLANS WOULD NOT HAVE A DISCRIMINATORY RACIAL EFFECT ON VOTING

In his March 3, 1972 letter of objection, Assistant Attorney General Norman, after advising that he was persuaded "a court would conclude" that the 1971 Georgia House plan "would occasion a serious potential abridgment of minority voting rights," informed the State that he therefore was "unable to conclude that the plan does not have a discriminatory racial effect on voting" (A. 10–11).[28] Because the objection is formulated in negative terms, appellants argue that it is based, not on an affirmative finding of voting discrimination against minorities, but on the failure of the State to demonstrate satisfactorily that its 1971 reapportionment plan is free of such a discriminatory effect. Placing the burden of proof on the submitting

[28] In the letter of March 24, 1972, objecting to the 1972 House plan, Assistant Attorney General Norman wrote (A. 13): "After a careful analysis of the Act redistricting the Georgia House of Representatives, I must conclude that this reapportionment does not satisfactorily remove the features found objectionable in your prior submission, namely, the combination of multi-member districts, numbered posts, and a majority (runoff) requirement * * *."

jurisdiction, they contend, is without statutory basis and contrary to the legislative intent.

The burden of proof question raised here was not considered by the court below, and, we think, for good reason. As we have pointed out, in a suit of this nature the sole issue to be litigated is "whether the new legislation must be submitted for approval" (*Allen* v. *State Board of Elections, supra,* 393 U.S. at 555–556 n. 19; *Perkins* v. *Matthews, supra,* 400 U.S. at 384). Matters unrelated to that issue such as the standard of review used by the Attorney General, the timeliness of his objection (see pp. 42–45, *infra*), or whether the Attorney General's objections were properly interposed, are all outside the permissible scope of judicial inquiry in this procedural context, and thus are not now entitled to consideration by this Court.

Appellants' position on this point is, in any event, without substance. Section 5 provides alternative procedures for the covered States to follow to obtain approval of any change with respect to a voting "qualification * * * standard, practice, or procedure" (42 U.S.C. 1973c). They can, as we have indicated, seek a favorable declaratory judgment in the United States District Court for the District of Columbia, or they can submit the proposed change to the Attorney General. If the judicial route is chosen, this Court held in *South Carolina* v. *Katzenbach, supra,* 383 U.S. at 335, that "the burden of proof [is] on the areas seeking relief."

Nothing in the statute even remotely suggests that the covered jurisdiction is to be relieved of this burden if it chooses the alternative course and makes its

submissions to the Attorney General. To the contrary, this procedure was included in Section 5 as an accommodation to the covered States, providing them with a more accessible and rapid means of implementing their proposed new state election laws. See *Allen* v. *State Board of Elections, supra,* 393 U.S. at 549. If review by the Attorney General is sought, it is recognized that Congress similarly "presumes—a presumption which the Court upholds—that state statutes regulating voting are discriminatory and enjoins their enforcement until the State can convince * * * [the designated federal] officials that the statute is not discriminatory" (*Perkins* v. *Matthews, supra,* 400 U.S. at 406; Black, J., dissenting). And see *Evers* v. *State Board of Election Commissioners,* 327 F. Supp. 640 (S.D. Miss.), appeal dismissed, 405 U.S. 1001.

Appellants agree (Appellants' Br. 32–34) that Section 5 has consistently been so construed by the Attorney General in administering the Act (see n. 12, *supra*). The regulatory "Procedures for the Administration of Section 5 of the Voting Rights Act of 1965," promulgated September 10, 1971, after enactment of the 1970 Amendment extending the life of the Act an additional five years, specifically provide in relevant part (Sec. 51.19) that "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" (see Appellants' Br. 60).

60).

Contrary to appellants' assertion, this is precisely what Congress intended. Indeed, in the 1969–1970 legislative deliberations with respect to re-enactment

of the Section 5 approval procedures for another five years, much of the discussion by those both for and against the statutory extension centered on the fact that it was the States, rather than the Attorney General, which were required by Section 5 to carry the burden of proof upon submission of a change for administrative approval. Thus the majority report of the House Committee on the Judiciary, which strongly favored retention of the preclearance provision through 1975, stated (H. Rep. No. 91–397, 91st Cong., 1st Sess., p. 8):

> The [*Allen*] decision underscores the advantage Section 5 produces in placing the burden of proof on a covered jurisdiction to show that a new voting law or procedure does not have the purpose and will not have the effect of discriminating on the basis of race or color. * * * Failure to continue this provision of the Act would jettison a vital element of the enforcement machinery. It would reverse the burden of proof and restore time-consuming litigation as the principal means of assuring the equal right to vote.[29]

On the other hand, the minority report of the House Judiciary Committee regarded the allocation of the burden of proof under Section 5 as a point in its favor. It, too, construed the provision as imposing the burden on the submitting authority, but cited that as a reason for terminating the preclearance proce-

[29] See also the statement of Committee Chairman Emanuel Celler on the floor of the House to the effect that the statutory provision "* * * places the burden of proof on the covered jurisdiction" (115 Cong. Rec. 38132). And see *1969 House Hearings*, pp. 82, 86, 148, 270.

dure. See H. Rep. No. 91–397, 91st Cong., 1st Sess., pp. 14, 21, 22.

In this regard, the positions taken in the Senate by the proponents of the 1970 legislation, and by their opposition, were essentially no different. A statement by ten members of the Senate Judiciary Committee in favor of extending the 1965 Act an additional 5 years, which was read during the floor debate, itemized as one of the decided benefits of Section 5 that it placed the "burden of proving the nondiscriminatory purpose and effect * * * on the governmental authority seeking exemption * * *" (116 Cong. Rec. 5518); this requirement, it pointed out (116 Cong. 5519), "in effect freezes election procedures in the covered areas unless the changes can be shown to be nondiscriminatory." To eliminate the preclearance provision, and revert back to civil litigation as the sole means of enforcing the Fifteenth Amendment, would, the statement warned (116 Cong. Rec. 5523), "shift the all important burden of proof which now rests on the jurisdiction seeking to implement the new practice or procedure." Those Senators opposed to the bill responded that that is just the result they wished to achieve by defeating an extension of Section 5 to 1975. They fully agreed that Section 5 placed the burden of proof on the covered jurisdictions, and strenuously objected to the legislative presumption (albeit rebuttable) attaching to these few States that all their election law changes were racially discriminatory. See 116 Cong. Rec. 5677–5678 (remarks of Senators Ervin, Allen and Tower).[30]

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[30] See also *1969–1970 Senate Hearings*, pp. 22, 29, 53, 163, 189.

In view of these clear legislative pronouncements directly on point, we submit that the Attorney General—consistent with the statutory language, the newly promulgated regulations following congressional enactment of the 5-year extension of the Act, and the decisions of this Court in *South Carolina* and *Perkins*—properly placed the burden of proof on the State of Georgia to demonstrate that its House reapportionment plans would not have a racially discriminatory effect.[31]

IV. THE QUESTION WHETHER THE ATTORNEY GENERAL'S OBJECTION TO THE NOW REPEALED 1971 REAPPORTIONMENT PLAN WAS TIMELY IS MOOT, AND THE OBJECTION WAS TIMELY IN ANY EVENT

Appellants make one other argument in an effort to avoid the Attorney General's determination with respect to the discriminatory racial effect of the Georgia House plans. They contend that his objection to the 1971 reapportionment is of no force since it was not interposed "within sixty days after * * * submission * * *" (42 U.S.C. 1973c) of the materials received by the Department of Justice on November 5, 1971.[32] Even assuming *arguendo* that appellants can properly raise the timeliness issue in this case, their

[31] Whether its submissions in fact fell short of satisfying that burden, as the Attorney General concluded, is, we repeat, a quite separate issue that is not now before this Court. See *Perkins* v. *Matthews*, *supra*, 400 U.S. at 383–385.

[32] This submission included the enacted plans to reapportion the Congressional and State Senatorial and House districts, plus a narrative description of the boundary changes and maps showing some of the present and the proposed districts (A. 19–23, 32).

point is, at all events, of no practical significance in the circumstances presented here. Following the Attorney General's objection to the 1971 plan on March 3, 1972, the Georgia General Assembly repealed that reapportionment legislation on March 9, 1972, and, in its stead, adopted a new reapportionment plan (see Ga. Senate Bill 690, Sec. 3) which was submitted to the Department of Justice on March 15, 1972 (A. 33). It is undisputed that the Attorney General's letter of objection relating to the 1972 plan (Ga. Senate Bill 690), dated March 24, 1972, was well within the 60-day statutory period. The question whether his objection to the now repealed 1971 plan was also timely is therefore moot.

In any event, the procedures followed by the Attorney General with respect to the repealed 1971 House plan were proper. While the initial "submission" by the State was, in form, adequate to put the Attorney General on notice of a voting change (*Allen* v. *State Board of Elections, supra,* 393 U.S. at 571), its substantive content was insufficient to permit a reasoned judgment with respect to its effect on the newly-enfranchised Negro voters in the State (A. 39). Accordingly, Assistant Attorney General Norman wrote the State Attorney General two weeks after receiving the 1971 reapportionment plans and requested 7 additional items deemed essential for a proper evaluation of the proposed changes (A. 39–41). Such a request is explicitly authorized by Section 51.18(a) of the Procedures for the Administration of Section 5 of the Voting Rights Act of 1965 (36 Fed. Reg. 18189; Appellants' Br. 60). And see Sec. 51.10(a)(6), 36 Fed.

Reg. 18188 (Appellants' Br. 56). The State was, moreover, advised (A. 41): "As is provided in Section 51.18(a) of the [Regulations], the 60-day period will not commence until the above-requested information, completing your submission, is received by the Department."

We believe that this regulation is entirely consistent with what Congress intended in providing in Section 5 for a 60–day administrative review period. Just as the Act does not contemplate "that a 'submission' occurs when the Attorney General merely becomes aware of the [State or local] legislation, no matter in what manner" (*Allen* v. *State Board of Elections, supra,* 393 U.S. at 571), so, too, it does not intend that the administrative reviewing function be undertaken on the basis of a formal "submission" that is uninformative with regard to the crucial Fifteenth Amendment considerations. Since the burden of proof is on the submitting jurisdiction, the Attorney General clearly could object within 60 days to every change that he considers to be inadequately described in the papers submitted, without making any request for additional information. But such a procedure would in many cases cause just the type of undue interference with legitimate state programs that Congress sought to avoid by enactment of Section 5. See *Allen* v. *State Board of Elections, supra,* 393 U.S. at 549.

It thus best serves all the interests concerned to commence the running of the 60-day statutory period on receipt of all relevant information that bears on the decision to be made, as provided in the regulations, Sec. 51.18(a). This, of course, does not mean

that the Attorney General can delay his action indefinitely on the pretext that he needs unspecified materials. But no one has suggested that we have that situation here. The requested information in this case included population statistics by race for prior and proposed districts, additional maps showing old and new district lines in particular areas, election results for the last two elections in contests involving black candidates, and materials reflecting the legislative history of the reapportionment enactments (A. 39–41). Appellants do not dispute that the submission of these materials was necessary before the Attorney General could make an informed judgment with respect to Georgia's reapportionment proposals.

The State provided the additional information on January 6, 1972, more than 60 days after its initial submission to the Attorney General (A. 33, 42–44). Having waited that long to supplement its original filing, and then having furnished the new material with the full understanding that the 60-day period would commence to run as of that date (A. 41), the State is now in no position to complain that the Attorney General's objections, which were interposed on March 3, 1972 (A. 9–12), were untimely. See *Howell* v. *Mahon,* E.D. Va., C.A. No. 105–71N, decided May 24, 1971.[33]

[33] In *Vinik* v. *Smyth*, D. Ariz., No. Civ.–71–89 TUC–WEC, decided October 4, 1971, the district court upheld a timeliness argument similar to the one urged here by appellants. But there, the change involved related to a new statute providing for the re-registration of voters every ten years, and the court determined that the additional information requested by the Attorney General was unnecessary to make an informed evalu-

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed. Since, in accordance with the stay order of this Court entered on April 21, 1972 (see n. 5, *supra*), an election has already been held under the 1972 House plan enacted by the Georgia General Assembly, we believe that the case should be remanded to the district court to give the State an opportunity to revise its present reapportionment plan with respect to the 15 multi-member districts which remain objectionable to the Attorney General (see A. 68–70). A new election should then be held as soon as practicable to select members to the Georgia House of Representatives from the affected districts.

Respectfully submitted.

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JANUARY 1973.

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ation of the new statute's discriminatory effect. Furthermore, contrary to the present case, the court in *Vinik* placed heavy emphasis on the fact that the Attorney General's regulations, particularly 51.18(a), "were not in force and effect as of the date of this submission" (slip op. 5–6).

U.S. GOVERNMENT PRINTING OFFICE: 1973