No. 670

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969 70

ERNEST PERKINS, ET AL., *Appellants,*

v.

L. S. MATTHEWS, Mayor of the City of Canton, ET AL., *Appellees.*

On Appeal from the United States District Court for the Southern District of Mississippi (Three-Judge Court)

BRIEF FOR APPELLANTS

ARMAND DERFNER
603 North Farish Street
Jackson, Mississippi
Attorney for Appellants

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.
9

INDEX

CITATIONS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 670

ERNEST PERKINS, ET AL., *Appellants,*

v.

L. S. MATTHEWS, Mayor of the City of Canton, ET AL., *Appellees.*

On Appeal from the United States District Court for the Southern District of Mississippi (Three-Judge Court)

BRIEF FOR APPELLANTS

OPINIONS BELOW

The opinion of the three-judge district court, vacating the temporary restraining order and dismissing the complaint, is reported at 301 F.Supp. 565 and is reprinted at Appendix 31. The earlier opinion of Judge Nixon, granting the temporary restraining order, is not reported, but is reprinted at Appendix 13.

JURISDICTION

This is a suit to enforce the provisions of section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, against the use by the City of Canton (a subdivision

of the State of Mississippi) of a voting practice or procedure different from that in effect on November 1, 1964.

The judgment from which the appeal is taken was entered by the United States District Court for the Southern District of Mississippi on July 24, 1969, and the Notice of Appeal was filed in that court on July 30, 1969.

The jurisdiction of the court below to hear the case was based on 28 U.S.C. §§ 1343(3), 1343(4), and 2201, and 42 U.S.C. § 1973c. *Allen* v. *State Board of Elections,* 393 U.S. 544 (1969). A direct appeal to this Court is authorized by 42 U.S.C. § 1973c, as well as by 28 U.S.C. § 1253, which provides for direct appeals from judgments in cases required by Act of Congress to be heard by three-judge district courts.

This Court noted probable jurisdiction on February 24, 1970.

STATUTE INVOLVED

The statute involved in this case is section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c:

> "Whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) [1973b(a)] 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, 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, practice, 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 of the United States Code and any appeal shall lie to the Supreme Court."

QUESTIONS PRESENTED

1. Whether a change in a city's municipal election procedure which (a) extends the boundaries to increase the percentage of white voters within the city limits, (b) provides for electing aldermen at large rather than by wards, and (c) moves the polling places, is a change dealing with a "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting," within the meaning of section 5 of the Voting Rights Act of 1965.

2. Whether the United States District Court for the Southern District of Mississippi had jurisdiction, in a section 5 case, to determine whether the voting laws were discriminatory in purpose or effect, or whether this authority is wholly committed to the United States

District Court for the District of Columbia or to the Attorney General of the United States.

3. Whether any relief short of ordering new elections held forthwith will adequately vindicate the important fourteenth and fifteenth amendment rights violated here?

STATEMENT OF THE CASE

The City of Canton is the county seat of Madison County, Mississippi, and has a population of slightly over 10,000, of whom about 60 percent are black and 40 percent are white. As a subdivision of the State of Mississippi, the City is subject to the Voting Rights Act of 1965, 42 U.S.C. § 1973. App. 90-91. Under section 5 of that Act, if it seeks to adopt "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," it must obtain a declaratory judgment that the new 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." The City may also use the new procedure if it is submitted to the Attorney General of the United States and he fails to object within sixty days.

By the most recent count in the record, as of April 25, 1969, there were 3,042 black voters and 2,953 white voters registered in Canton, divided into four wards which have the following registration totals:

	White	Black	Total
Ward I	839	37	876
Ward II	992	174	1,166
Ward III	418	1,481	1,899
Ward IV	702	1,257	1,959
Unlisted Ward	2	93	95[1]

[1] App. 103.

For most of the 3,000 blacks, the 1969 elections (originally scheduled to begin on May 13, 1969) were the first city elections in which they would vote, since the last elections took place in 1965, just before the passage of the Voting Rights Act, at a time when there were no more than about 200 black voters. Transcript of May 9 hearing 61.

On November 1, 1964, and at the time of the 1965 elections, the boundaries of the City of Canton were as shown on the map introduced at trial, App. 95; the polling places were as shown in paragraph 13 of the Stipulation, App. 93; and four of the five aldermen were elected by individual wards. Since that time, the City has adopted the changes which form the subject of the instant lawsuit: (1) the boundaries have been extended three times, in 1965, 1966 and 1968, so that a substantial number of people and prospective voters (predominantly white) live in areas which are now for the first time within the City; (2) the polling places have been moved; and (3) the aldermen are now to be elected by the voters of the City at large. It is stipulated that the City of Canton has neither obtained the declaratory judgment required by section 5 of the Voting Rights Act nor submitted the new changes to the Attorney General. App. 90-94.

On May 1, 1969, the plaintiffs filed a suit attacking the annexations and the change in polling places, and seeking to prevent the City from holding elections in accordance with these changes.[2] On May 9, 1969, the plaintiffs' motion for a temporary restraining order

[2] When the original complaint was filed, plaintiffs were not aware that the earlier elections had been held by wards, so the change to at-large elections was added in an amendment on May 30, 1969. When the original complaint was filed, plaintiffs were also unaware of the 1965 annexation, so it, too, was omitted.

was heard by the Honorable Walter L. Nixon, Jr., United States District Judge, Southern District of Mississippi.

May Hearing. Evidence at the hearing included testimony that the annexations had brought in several hundred people (predominantly white), while adjacent areas with similar numbers of black people were not annexed. Transcript of May 9 hearing 23-29, 49-51. There was also testimony about the polling places, particularly those in the two heavily black wards, which indicated that the polling place for Ward 4 had been moved some distance from its former location in the City square, and was now located near the annexed white area, App. 43-44, and that the polling place in Ward 3 had been moved to the former City Jail. App. 44-45, 57-59. Evidence of black people's fear of the jail, based on previous history, was excluded. Transcript of May 9 hearing 40-42. The defendants sought to establish that the changes had been made in good faith and without any intent to discriminate, App. 49-56, but this was excluded (except for testimony that proprietors of the former polling places had refused permission to use these places again, App. 53) on the ground that neither Judge Nixon nor the three-judge court, when it heard the merits, had the "function or prerogative" of determining the motives of the City in making the changes:

> "The only questions to be decided by this three judge court in the final analysis, the three judge court to be designated, is whether or not the State of Mississippi or any of its political subdivisions have acted in such a way as to cause or constitute a voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting within the meaning of Section 5 of the

> Voting Rights Act of 1965, which changed the situation as it existed as of November 1, 1964, and whether or not prior to doing so the City had filed a request for declaratory judgment with the United States District Court for the District of Columbia or asked the approval of the Attorney General of the United States as required by Section 1973." Transcript of May 9 hearing 127.

Judge Nixon went on to hold that the boundary extension was comparable to the shift from individual district elections to countywide elections for county supervisors, which was held by this Court in *Fairley* v. *Patterson* (*sub nom. Allen* v. *State Board of Elections*), 393 U.S. 544 (1969), to come within section 5 of the Voting Rights Act of 1965. Finding that the City had obtained neither the declaratory judgment nor the Attorney General's approval, Judge Nixon held that there was a sufficient probability that the full three-judge court would hold section 5 barred the boundary extensions to justify enjoining the elections; accordingly, he entered a temporary restraining order postponing the elections.[3]

On June 2, 1969, the case came on for hearing before the three-judge court (Coleman, Cir. J., and Cox and Nixon, Dist. JJ.), with the issues now including all three boundary extensions and the change from ward elections to at-large elections (added by amendment on May 30, 1969), as well as the removed polling places.

June Hearing. Additional evidence at the June hearing focused primarily on establishing more detailed population and registration figures for the City

---

[3] Judge Nixon did not deal directly with the question of the removed polling places in his opinion.

as a whole and for the annexed areas. This evidence showed that, on about January 12, 1969, shortly before the deadline for qualifying to vote in the 1969 elections, there were 2,794 black voters registered and 2,052 white voters. On April 25, 1969, shortly after the deadline for voting in 1969, there were 3,042 black voters and 2,953 white voters (broken down by wards according to the figures shown *supra.*) App. 103.

There was also evidence about the number of black and white persons who live in the areas brought into the City by the respective annexations:[4]

Annexation Year	Blacks	Whites
1965	46 (est.)	0
1966	28	187
1968	8	144[5]

The three-judge court, unlike Judge Nixon, allowed a defense witness to testify about the reasons for changing the polling places. App. 78-83. Finally, there was argument, but no testimony, that the change from ward elections to at-large elections was done to comply with the 1962 amendments to Mississippi Code § 3374-36, which had been in effect but not followed at the previous municipal elections in 1965.

On July 17, 1969, the three-judge court rendered its opinion, discussing each of the changes in turn, and

[4] There was also testimony concerning the number of people residing in the annexed areas at the time they were brought in, which figures were later cited in the court's opinion.

[5] The figure of 46 blacks added by the 1965 annexation was a stipulated estimate. App. 66. The 1966 and 1968 figures are based on the actual physical examination by the City's witness, App. 100-01, and superseded earlier stipulated estimates.

holding that no injunction was warranted as to any of them. The court accordingly set aside the temporary restraining order and dismissed the complaint. In contrast to the approach of the single judge, the three-judge court examined the motives of the City in making each change, and concluded that since no improper motive had been shown, there was no violation of section 5:

(1) As to the expansion of boundaries, the court asked whether section 5 was intended to cover boundary extensions where black voters remained in the majority, and concluded in the negative:

> "Applying the full reach of the Act, Congress could not have intended such a result unless it were shown to be a strategem deliberately designed to overturn a black majority at the municipal polls." [6]

(2) As to the change from individual ward elections to at-large elections, the court held that the 1962 state statute requiring at-large elections could not have been passed to thwart the 1965 Voting Rights Act, and that the City was therefore justified in complying with it in 1969 (while noting that there was no evidence in the record showing why the City had not complied in 1965 nor why the City wished to change).

(3) Finally, as to the polling places, the court held that the changes had been necessary because two of the former polling places were too crowded and the other two were on private property whose owners had withdrawn their permission to use the space.

---

[6] In determining the validity of the annexations, the court used the number of people living within the affected area at the respective times of their annexations, rather than the number of people living within those areas at the time of the election.

In thus holding that the plaintiffs' contentions were not well taken, the court did not at any point hold that any of the changes was not a "voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting."

Judgment was entered on July 24, 1969, dismissing the complaint and authorizing the City of Canton to proceed with its elections. This appeal followed.[7]

SUMMARY OF ARGUMENT

In *Allen* v. *State Board of Elections, supra,* this Court reversed three cases in which the United States District Court for the Southern District of Mississippi had so narrowly interpreted section 5 of the Voting Rights Act as to render the section virtually useless. Now, a scant year later, this Court is again faced with a holding of the same district court again emasculating section 5.

The changes in this case are threefold: (1) extending boundaries to increase the percentage of white

---

[7] After the notice of appeal was filed, the City of Canton set new election dates beginning with the first primary to be held on October 7, 1969. On September 5, 1969, plaintiffs moved to stay that portion of the order authorizing the elections to proceed and to enjoin the elections pending the appeal to this Court. This motion was denied, Coleman, J., by an order filed September 23, 1969, which expressly reserved the appellants' right, in the event of a reversal on appeal by this Court, to apply in the district court for an order setting the election aside.

On September 25, 1969, appellants filed a motion for a stay and injunction pending appeal with the Circuit Justice, which was denied on October 1, 1969.

The elections went forward, and none of the appellants was elected, although some won majorities in their wards and would therefore have been elected if the City had not changed from ward elections to at-large elections.

electors; (2) moving the polling places; and (3) shifting from individual ward elections to at-large elections for alderman. The district court did not hold that any of these was not a change in "voting qualification or prerequisite to voting, or standard practice, or procedure with respect to voting." It could hardly have done so, especially after a single judge had already enjoined the election because the boundary extension had not been cleared under section 5. Rather, the district court went into the motives for the changes and pronounced each one valid.

Yet the law is clear that that determination is not within the power of a local district court, but is committed entirely to the United States District Court for the District of Columbia and to the Attorney General of the United States. By holding, as it did, that these voting changes were valid unless the appellants could show they were discriminatory, the district court stood section 5 on its head, and simply proved that Congress acted wisely when it took that question out of the local district courts' hands.

This Court must therefore reverse the judgment below and make it clear that when Congress put the burden on states covered by the Voting Rights Act to prove their voting law changes were non-discriminatory, it meant what it said.

Moreover, this Court should set aside the elections which have been held in violation of section 5, and order new elections held under the voting practices and procedures in effect on November 1, 1964. There is no justification, as there may have been in *Allen* v. *State Board of Elections, supra,* for any lesser form of relief. The violations were crystal-clear and be-

spoke nothing more nor less than an intent to ignore the law. Unless the elections are set aside, there will never be any reason to obey section 5, and that law, for which Congress held such high hopes, will become a museum piece.

ARGUMENT

I. The Merits

This Court can rarely have seen a case in which an Act of Congress was as cavalierly ignored by a district court as this one. Appellants sought an order from the district court in Mississippi requiring the city of Canton to obey section 5 of the Voting Rights Act of 1965. They got that order from the single district judge, in the form of a temporary restraining order stopping the elections because of the City's failure to obtain clearance from the Attorney General or from the district court in Washington, D. C. When the three-judge court convened, however, it not only arrogated the function of judging the validity of the new voting practices and procedures, but completely reversed the Act by placing the burden of proof on the appellants: "Applying the full reach of the Act, Congress could not have intended such a result *unless it were shown to be a stratagem* deliberately designed to overturn a black majority at the municipal polls." App. 34 (emphasis added).

The merest glance at the language or history of section 5, of course, will show that Congress not only could have intended such a result but did, and said so in the plainest way possible.

Those states, including Mississippi, which have traditionally deprived blacks of the right to vote have displayed great ingenuity in raising new barriers of

discrimination to circumvent successive checks imposed by Congress and the courts. In passing the Voting Rights Act of 1965, Congress therefore barred these states and their subdivisions both from using "any test or device" as a prerequisite to voting and from making any changes in their voting and election procedures without first satisfying federal authorities that the changes would not have the purpose or effect of discriminating against black people.

Only last Term, this Court exhaustively examined section 5 in *Allen* v. *State Board of Elections, supra,* which involved three cases from Mississippi and another from Virginia. The Court examined the background, legislative history and structure of the Act, and concluded that section 5 covered each of the cases before the Court:

> "We must reject a narrow construction that appellees would give to § 5. The 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. Moreover, compatible with the decisions of this Court, the Act gives a broad interpretation to the right to vote, recognizing that voting includes 'all action necessary to make a vote effective.' 79 Stat. 445, 42 U.S.C. § 1973*l*(c)(1). . . .
>
> "The legislative history on the whole supports the view that Congress intended to reach any state enactment which altered the election law of a covered State in even a minor way." 393 U.S. 544, at 565-66 (footnote omitted).

The Voting Rights Act was an attempt to enforce the guarantees of the fifteenth amendment fully, after earlier measures had failed. The coverage is thus as broad as that of the fifteenth amendment itself. This

Court's fifteenth amendment cases make it clear that "[t]he Amendment nullifies sophisticated as well as simple-minded modes of discrimination. It hits onerous procedural requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race." *Lane* v. *Wilson,* 307 U.S. 268, 275 (1939). And, as this Court held in *Reynolds* v. *Sims,* 377 U.S. 533, 555 (1964), "the right of suffrage can be denied 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."

The two most significant changes involved in this appeal are familiar from earlier cases dealing with voting rights. The change from individual ward elections to at-large elections was explicitly held to be covered by section 5 in one of the cases decided with *Allen: Fairley* v. *Patterson, supra.* The expansion of the boundaries is an equivalent dilution of the votes of City residents, including blacks, of the sort held to violate the fifteenth amendment's voting guarantees in *Gomillion* v. *Lightfoot,* 364 U.S. 339 (1960). Finally, the change in polling places clearly has a direct effect upon voting, of a sort that might well have a discriminatory purpose or effect.[8]

The appellees do not appear to claim that the new provisions were not changes in voting practices or pro-

[8] Both the boundary extension and the change in polling places were described by high Justice Department officials as examples of changes coming within section 5. Hearings Before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, on Amendments to the Voting Rights Act of 1965, held in July 1969 and February 1970, at pp. 248, 506 [hereinafter Senate Hearings].

cedures. Rather, the burden of appellees' argument seems to be that since various cities often extend their boundaries or shift polling places in good faith and without racial motive or effect, the same should be assumed here, without question. The short answer to that theory is that Congress decided otherwise. There is more than one way to skin a cat, or extend a boundary, and section 5 puts it up to the city or state to prove that it has done it properly. And what the city does to solidify the change, such as extending municipal services to the newly-annexed areas, can in no way cure the city's failure to obey section 5.

Nor did the district court hold that these were not changes in voting practices or procedures. Rather, the court examined the motives and effects of the three changes and held that they were all nondiscriminatory changes made in good faith. Yet, it is abundantly clear under the statute that this inquiry is beyond the functions and prerogatives of the local district court, and is committed solely to the jurisdiction of the United States District Court for the District of Columbia or of the Attorney General of the United States.

This limited function was recognized by the single judge when he granted the temporary restraining order. Referring to the changes he said:

> ". . . I don't think they were done for the reason that the Plaintiffs or Petitioners herein allege they were done for, but at the same time that question or that matter of determination by me has been completely taken away by the laws enacted by the Congress and by the decision of the United States Supreme Court in Allen versus State Board of Elections. I am not to determine that. All I can determine under the law is whether or not there

has been such a change in standard, practice, or procedure of voting qualifications or prerequisites than those that existed on November 1st, 1964, and after that—without approval, which has been stipulated that that has not been requested and without that we can't go any further in this case." App. 52-53.

"I am powerless to decide this case on the question of motive. That is a matter that the Congress and the United States Supreme Court has said is left up to the Attorney General of the United States and the District Court for the District of Columbia. It completely deprives the United States District Courts of the districts in which these matters come up and arise from making a determination in the matter." App. 55-56.

". . . the three judge court in my opinion has no more power than I do at this particular time to determine whether or not this was done in good faith or what the effect will be. Once it is not [*sic*] determined that there has been a change in voting qualifications, standards, practice or procedure, that is as far as that court can go. If the three judge court finds that there is, or has been a change in the voting qualifications or standard or practice or procedure with respect to voting by the annexation of these new areas by the City of Canton, a political subdivision of the State, then the three judge court is duty bound in that event to issue an injunction and enjoin the holding of this election by participation of the voters in the newly annexed area." (Transcript of May 9 hearing 96.

The single judge also correctly held that in presenting its case to the Attorney General or to the District of Columbia court, the City of Canton would bear

the burden of showing a nondiscriminatory purpose and effect:

> ". . . At that time the City of Canton then has the burden of going to the Attorney General of the United States and seeking his approval to hold that election by allowing the voters in the newly annexed areas to participate in the election of the City of Canton, or by filing an action in the District Court of the United States for the District of Columbia to obtain a declaratory judgment that this annexation was not had for the purposes prohibited by the Voting Rights Act of 1965.
>
> "That's the time the City would be required and should put on its proof with respect to why this was done and what was intended and whether or not it was normal business of the City and whether or not it was designed to deprive any citizen of his rights under the Fourteenth and Fifteenth Amendments of the United States Constitution." Transcript of May 9 hearing 96.

The three-judge court, however, went into the purpose and effect of the City's changes, and assumed the function, as Judge Coleman observed, of deciding their validity. App. 73-74. But this is precisely the question which section 5 says must be decided in the District of Columbia. Thus the lower court here had no power under section 5 to decide whether the annexations were made in good faith, nor whether annexing white areas while leaving out surrounding black areas showed a discriminatory purpose or effect; and, of course, the lower court had no power to decide, as it did, that decreasing a black majority without wholly erasing it is not discriminatory.

Similarly, the lower court had no power to decide that the City's decision to obey the 1962 statute which

it had previously ignored was nondiscriminatory.[9] Finally, the lower court had no power to decide that the reasons advanced for moving the polling places were acceptable.[10]

---

[9] Sudden adherence to previously ignored laws is a familiar discriminatory device that has been enjoined in many "freeze doctrine" cases, *see* Louisiana v. United States, 380 U.S. 145 (1965), including at least one brought under section 5. Vanover v. Maloney, Misc. No. 581 (4th Cir. July 16, 1969) (Opinion of Butzner, J., denying a stay pending appeal), in which the court enjoined the enforcement of the party loyalty oaths of Virginia Code §§ 24-253, 24-367 and 24-368, in Dickenson County, Virginia, on the ground that they had never been enforced there before November 1, 1964, and therefore must be approved under section 5.

[10] The polling places in the two heavily black wards were moved to the old, dilapidated jail (Ward III) and to a location close to the newly annexed, predominantly white area (Ward IV). *Compare* the remarks of Representative McCulloch (one of the floor leaders of the Voting Rights Act) during the 1969 hearings on extending the Act:

> "Mr. Chairman, I should like to make the comment that in due course it is my intention to introduce legislation that will meet this problem in some of the Northern states. You know, most of us never took the position that we are without sin. The movement of voting places on short notice in certain sections of the North has been notorious of late." Hearings Before Subcommittee No. 5 of the House Committee on the Judiciary, on H.R. 4249 and Similar Measures, held on June 19, 1969, at p. 133.
>
> * * * * *
>
> "We hope to prevent that by general election-reform legislation, which I intend to offer very shortly. I have received some indication that in some cities in the North this last-minute change of polling places might have been intended to deprive some of their right to vote on account of race, but often the deprivation is on account of political affiliation." Hearings Before Subcommittee No. 5 of the House Committee on the Judiciary, on H.R. 4249 and Similar Measures, held on June 19, 1969, at p. 135.

2. Relief

The central question in this case is not the merits, which can hardly be in doubt, but the nature of effective relief. In *Allen* v. *State Board of Elections, supra,* the novelty of the statute and the uncertainty of its meaning led this Court to give only prospective relief. There is no basis for such a holding in this case. The proper relief, and the only relief that will carry out the legislative purpose underlying section 5, is to order immediate new elections, to be held under the practices and procedures in effect before the adoption of the changes involved in this case. The appropriateness of such relief was implicitly recognized by the district court when the order denying a stay pending appeal included express leave to apply for new elections in the event that court's judgment be reversed.

In *Allen, supra,* the Justice Department, asked for its views on the question of relief, believed it appropriate to allow the state a brief time to submit the pending changes for clearance under section 5, *nunc pro tunc,* with the elections to stand if the statutes were approved. This suggestion was guardedly made "on balance—taking into account the fact that the new provisions in suit are not so clearly within the scope of section 5 that the failure to submit them for clearance amounts to deliberate defiance." Supplemental Memorandum for the United States as Amicus Curiae, p. 3 (October 1968). Appellants believe that suggested course was wrong in *Allen,* and would be doubly so here, where any claim of good faith misinterpretation of section 5 would be wholly untenable.

No close analysis is required to show why limiting the relief as suggested by the Justice Department in

Allen would emasculate section 5. If the City of Canton may remedy its clear-cut violation of section 5 by a belated submission, there would never be any reason for any state or subdivision to obey section 5: a holding of section 5 coverage would require nothing more than the submission that should have been made at the start.

This interpretation was suggested in recent hearings by Deputy Assistant Attorney General Norman, who recognized that it made section 5 a dead letter:

> "Now, it has been said, I think, by some that section 5 had advantages because the Attorney General could bring lawsuits in order to enjoin the operation of a voting change and he wouldn't have to prove anything except that the law was not submitted to him. He would just simply file a paper in the Court saying that Alabama has changed one of the laws to affect voting and they haven't submitted it to him and, therefore, he would ask for an order of the Court requiring the State to do so, or enjoining the State from using this voting change until it has been approved by the Attorney General or by the District Court for the District of Columbia.
>
> "I think that idea overlooks a very important practical fact. There are, in my judgment, no such lawsuits and cannot be such a lawsuit because when the Attorney General goes into Court and says to the Court, 'I have a defendant here, the State of Alabama, or another State, and I am complaining because they didn't submit a change to me, which I know about or I couldn't have brought the suit,' and any judge that I know of would say, 'That is right, Mr. Attorney General, now that you are here tell us whether you object or don't object to this change, because if you do object to it, we will litigate; but if you don't object to it, then you are out of court anyway.'

> "In my judgment as a practical matter, there could be no such thing as that type of lawsuit by the Attorney General under section 5.
>
> "I think the private citizen is no better off, really, because while there have been some suits under section 5 by private citizens, as a practical matter his relief would be to require the election officials or the defendant to submit the change to the Attorney General for his approval.
>
> "I do not have any decision by the courts setting aside an election because a voting change was not submitted to the Attorney General. I would be very surprised if any court ever would do that.
>
> "So, that in a private citizen's suit under section 5 his proof would be easy, it would be an easy lawsuit, but his remedy is very little. He hasn't much of a remedy." Senate Hearings 506.

With all due respect to Mr. Norman's familiarity with the Act, appellants submit that his reading of section 5 is a palpable repudiation of what Congress itself regarded as a major achievement in guaranteeing the civil rights of black voters. His reading proceeds from the same assumption undoubtedly shared by the appellees in this case: that section 5 is merely a formal procedure for informing the Justice Department of the existence of state laws and practices that may violate the constitution and that violation of section 5 means nothing unless there is also a constitutional violation. This limited view of section 5 wholly ignores the frustration that Congress felt in 1965 over its inability to secure compliance with the fifteenth amendment and its desire to take strong action to force obedience. It is hardly likely that a Congress recalling the inadequacies of its voting rights laws of 1957, 1960 and 1964,

could have intended to pass a law as meaningless as the one Mr. Norman described.

A construction under which section 5 provides strong rights and remedies even in the absence of clear constitutional violations, on the other hand, is precisely in accordance with the legislative mandate of the Voting Rights Act of 1965. Such a result is consistent both with the Supremacy Clause of the Constitution of the United States and with the final sections of the fourteenth and fifteenth amendments, which give Congress the power to pass appropriate legislation enforcing those amendments.

The short of it is that allowing the City of Canton to cure its violations now would render section 5 a harmless clause which creates no incentive to obey the fifteenth amendment and which adds nothing to the self-enforcing capabilities of the fifteenth amendment. New elections must therefore be ordered if section 5 is to play the role plainly intended by Congress, that of "appropriate legislation," U.S. Const., XV amend., § 2, adopted to enforce the fifteenth amendment.

CONCLUSION

This case is critical in achieving the Congressional purpose underlying the Voting Rights Act. Until this Court decided the Virginia case and the three Mississippi cases involved in *Allen* v. *State Board of Elections, supra,* no court had ever enforced section 5. In *Allen,* this Court made its ruling prospective; thus relief was impossible, even though the Attorney General of the United States has since found that each of the three Mississippi statutes involved in *Allen* is discrim-

inatory. Letter, Jerris Leonard to A. F. Summer, May 21, 1969.[11]

The changes in the instant case, as Judge Nixon recognized, are crystal clear changes in voting practices or procedures, and no court or judge has held at any time they are not. Relief, however, has been denied. Unless this Court reverses the judgment in this case, requires the enforcement of the clear mandate of section 5, and orders new elections forthwith, Mr. Justice Harlan's prophecy in *Allen* will come to pass, and the Voting Rights Act will never play the full role Congress intended for it.

For the reasons stated above, this Court should reverse the judgment below, set aside the elections held in October 1969, and order new elections held forthwith in which the changes in voting procedure involved in this case may not be enforced.

Respectfully submitted,

ARMAND DERFNER
603 North Farish Street
Jackson, Mississippi
Attorney for Appellants

---

[11] The burden on the states is not heavy where *legitimate* statutes are involved. As of January 29, 1970, only 22 of the 436 statutes submitted to the Attorney General had been disapproved. Senate Hearings 505.