In The

Supreme Court of the United States

October Term, 1976

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NO. 76-489

—o—

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

VS.

BOARD OF SUPERVISORS OF WARREN COUNTY, MISSISSIPPI, ET AL.,

Defendant-Appellees.

—o—

Appeal from the Southern District of Mississippi

—o—

MOTION TO DISMISS OR AFFIRM AND BRIEF IN SUPPORT THEREOF

—o—

JOHN W. PREWITT

Attorney for Defendant-Appellees

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MOTION TO DISMISS OR AFFIRM

UNDER Supreme Court Rule 16, Motion by Appellees to dismiss the appeal for failure of a substantial federal question as to Appellant's claims that (1) District Court

lacked jurisdiction to pass on constitutional merits, or (2) to order a new redistricting plan into effect, or (3) that preclearance of the redistricting plan under Section 5 of the Voting Rights Act of 1965 by the Attorney General of plan was necessary.

In the alternative, Appellees move the Court to affirm the final judgment of the Three-Judge Court on the ground that the question raised by Appellant are not of substance and should not require further argument: (1) For reason that the Appellant questions the jurisdiction of the Three-Judge Court, to adopt a redistricting plan, yet, when such action is sanctioned under prevailing authority, particularly where Appellant submitted, without objection of Appellees, a proposed Order, later adopted by the Three-Judge Court, requesting that the Three-Judge Court adopt a redistricting plan. The Appellant is without standing to now complain of this "invited error", if any, under the doctrine of estoppel, (2) For the further reason that the Three-Judge Court had authority and jurisdiction to adopt a redistricting plan where this issue was presented to said Court by the Appellant, without objection by Appellee, and this is true because Appellant made no complaint of such action below but raises "invited error" for the first time here, (3) For further reason that the Three-Judge Panel had jurisdiction of the matter and rightly concluded the matter on what amounted to an agreed Order by both parties, objection thereto is untimely at this juncture.

It is, therefore, respectfully moved that this appeal be dismissed and, in the alternative, that the judgment of the Three-Judge District Court adopting a redistricting plan for Warren County, Mississippi, be affirmed.

Respectfully moved and submitted this 10th day of November, 1976.

BOARD OF SUPERVISORS OF WARREN COUNTY, MISSISSIPPI, ET AL.

By: /s/ John W. Prewitt

Attorney for Appellee Board of Supervisors of Warren County, Mississippi

BRIEF IN SUPPORT OF MOTION TO DISMISS

APPELLEES' VIEW OF STATUTORY AUTHORITY

Appellant is cognizant of requirements of provisions of the Voting Rights Act,[1], which the Federal Congress enacted to protect voting rights of its citizens in certain states, and as it is applied to a local governmental unit. Yet it appears clear under Section 12 (d) and (f) of this Act[2] that the Congress had in mind the situation presented here, by inserting in subsection (d) the phrase "or other order" in protecting the voting rights under the act. The orders of the three-judge district court[3] would fit the category of "other order(s)" as provided by the act. Subsection (f) gives the District Court jurisdiction over such matters.

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PRELIMINARY STATEMENT

The Appellant has reasonably and fairly reconstructed the events occurring in the Court below in its Jurisdictional Statement. However, it is clear from Appellant's State-

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1. Section 5 of the Voting Rights Act of 1965, 79 Stat. 439, as amended, 42 U. S. C. (Supp. V) 1973C.

2. Section 12 (d) and (f) of the Voting Rights Act of 1965, 79 Stat. 444, 42 U. S. C. 1973; (d) and (f).

3. May 13, 1976 (p. 1a Appendix Appellant's Jurisdictional Statement) and July 1, 1975 (p. 13a Appendix Appellant's Jurisdictional Statement).

ment[4] that the Appellant sought relief in the Court below identical to and the same as objection is now being made of. It would appear that the Appellant does not complain of the three-judge district court's jurisdiction in granting summary judgment but when the Appellant invited the Lower Court to commit alleged error, then Appellant's complaint comes too late.[5]

Appellee simply urges that once jurisdiction was properly taken in the principal action by the three-judge court in this case that it could settle all issues, and certainly this is true where the Appellant instigated the very action of which it now complains.

It seems safe to assume that had the Lower Court adopted one of the two (2) plans submitted by the Appellant below that no complaint of such action would have been heard from Appellant.[6]

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ARGUMENT

There is no question that the three-judge court was properly empaneled and had jurisdiction of the parties and

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4. P. 9—Appellant's Jurisdictional Statement wherein the United States requested the Lower Court to adopt a plan, if the parties could not agree on satisfactory plan.

5. **United States v. Hoth,** 207 F. 2d 386 (5th CA 1953); **Chi Sheng Liu v. Halton,** 297 F. 2d 740 (CA 5th 1967); and **Trawick v. Manhattan Life Ins. Co. of New York, N. Y.,** 484 F. 2d 535 (1973).

6. PP. 10-11—Appellant's Jurisdictional Statement wherein Appellant led two (2) plans with Lower Court.

subject matter as pointed out in *Allen v. State Board of Elections,* 393 U. S. 558, 89 S. Ct. 817 (1969) when the Court said:

> "We conclude that in light of the extraordinary nature of the Act in general, and the unique approval requirements of Section 5, Congress intended that disputes involving the coverage of Section 5 be determined by a District Court of three-judges."

When a three-judge court acquires jurisdiction of a case in its entirety, it may exercise jurisdiction to decide other matters raised in the case of which it could not if they were independently presented. Therefore, if the Court has jurisdiction of the principal action then it may exercise ancillary jurisdiction of matters presented therein regardless of any other factor which would ordinarily establish jurisdiction.[7]

Jurisdiction being properly founded in the three-judge court, which was not questioned by Appellant in the Court below, coupled with Appellant's request of the three-judge court to settle the issue of adopting a satisfactory redistricting plan, it is submitted, settles the question of jurisdiction, Appellant submitted an Order requesting that the three-judge court formulate a plan, if the Appellant and Appellees could not submit a plan to the three-judge court satisfactory to both parties, thus having requested that the three-judge court adopt a plan the Appellant cannot complain of such action here, as said three-judge court could

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7. **Krippendorf v. Hyde,** 1884, 4 S. Ct. 27, 110 U. S. 276, 28 L. Ed. 145; **State of Iowa v. Union Asphalt & Roadoils, Inc.,** C. A. 8th, 1969, 409 F. 2d 1239; **Compton v. Jesup,** C. C. A. 6th, 1895, 68 F. 263; and cases cited 1 **Barron & Holtzoff** (Wright ed.), § 23n. 22.

under Section 5 enter "such order" as it deemed necessary incident to its jurisdiction, in keeping with the Voting Rights Act.

In *Hannah v. Larche,* 176 F. Supp. 791 (W. D. La.); 177 F. Supp. 816 (W. D. La.); 361 U. S. 910, 80 S. Ct. 1502; Pet. for Rehearing denied October 10, 1960, this Court adopted the rule that a three-judge court could settle all issues submitted both constitutional and non-constitutional.[8]

Where the federal question is substantial, a three-judge court, under the prevailing rule in the Fifth Circuit, in all but exceptional cases, shall decide the federal issue and other issues in the case. *Alabama v. United States,* 314 F. Supp. 1319, 400 U. S. 954, 91 S. Ct. 355; appeal dismissed for want of jurisdiction Dec. 14, 1970.

As far as can be determined the cases cited by Appellant[9] in support of its position are distinguishable from

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8. "The principal objection and purpose of a three-judge federal court is to decide the constitutional validity of the Act of Congress sought to be enjoined. But where other issues are presented, as they are here, they too should be decided. The parties readily agree that this is so and that all issues, both constitutional and non-constitutional, are before this court.[6]

   [6] **California Water Service Co. v. City of Redding,** 1938, 304 U. S. 252, 58 S. Ct. 865, 82 L. Ed. 1323; **Davis v. Wallace,** 1922, 257 U. S. 478, 482, 42 S. Ct. 164, 66 L. Ed. 325; **Louisville & Nashville R. Co. v. Garrett,** 1913, 231 U. S. 298, 304, 34 S. Ct. 48, 58 L. Ed. 229."

9. **Georgia v. United States,** 411 U. S. 526; **South Carolina v. Katzenbach,** 383 U. S. 301; **Allen v. State Board of Elections,** 393 U. S. 544, 561-563; **Perkins v. Matthews,** 400 U. S. 379, 385; **Bond v. White,** 508 F. 2d 1397, 1400 (C. A. 5); **Pitts v. Carter,** 380 F. Supp. 4 (N. D. Ga.); **Pitts v. Busbee,** 511 F. 2d 126 (C. A. 5) on remand, 395 F. Supp. 35 (N. D. Ga.); **Moore v. Leflore County Board of Election Commissioners,** 351 F. Supp. 848, 851 (N. D. Miss.).

the one at bar, simply because here the three-judge court had jurisdiction and settled all issues submitted. The Appellant submitted to the three-judge court the issue of adopting a redistricting plan for Appellees.

As the three-judge district court had jurisdiction and adopted a plan, as requested and urged by Appellant, *East Carroll Parish School Board and East Carroll Parish Police Jury v. Marshall,* No. 73-861, decided March 8, 1976, obviates pre-clearance under Section 5 of the Voting Rights Act of 1965.[10]

The case cited[11] by Appellant that the question of jurisdiction is properly raised in this Court are not applicable here, as the cited cases clearly reveal failure, at inception, of jurisdiction in the Lower Court, yet in the instant case you find (1) the three-judge district court clearly had jurisdiction of the principal action, and (2) settled the issue of adopting a constitutionally acceptable plan as requested by Appellant.

Had not the Appellant requested the three-judge court to adopt a plan, then possibly Appellant's position here would be more understandable, but Appellant insisted that the three-judge panel adopt a plan and now complains that the Court acted without authority, which action by Appellant now prevents Complaint of such error, if any, in this

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10. **Zimmer v. McKeithen,** 467 F. 2d 1381, 1383 (CA 5 1972) and **Zimmer v. McKeithen,** 485 F. 2d 1297, 1302 N. 9 (CA5 1973) (en banc).

11. Footnote 10 in Appellant's Jurisdictional Statement, **Clark v. Paul Gray, Inc.,** 306 U. S. 583, 588; **Potomac Passengers Assn. v. Chesapeake & Ohio Ry. Co.,** 520 F. 2d 91, 95, n. 22 (C. A. D. C.).

Court. Appellant, even though the United States, cannot complain of error on appeal which it has itself invited.[12]

In *Frischia v. New York Central R. R. Co.*, 279 F. 2d 141 (CA 3rd 1960) wherein a change of position of Defendants as to jurisdiction after trial of case would not be tolerated where Defendant's actions played fast and loose with judicial machinery and deceived the Court. See also *Young v. Handwork,* 179 F. 2d 70, cert. den., 1950, 339 U. S. 949.

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CONCLUSION

From foregoing reasons and authority the Appellees' Motion should be sustained.

Respectfully submitted,

JOHN W. PREWITT,

Attorney for Board of Supervisors of Warren County, Mississippi, et al.

November, 1976

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CERTIFICATE

I, the undersigned, JOHN W. PREWITT, Attorney for the Board of Supervisors of Warren County, Mississippi, et al., certify that I have this day mailed, postage

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12. **United States v. Hoth,** 207 F. 2d 386 (5th CA 1953); **Chi Sheng Liu v. Halton,** 297 F. 2d 740 (CA 5th 1967); and **Trawick v. Manhattan Life Ins. Co. of New York, N. Y.,** 484 F. 2d 535 (1973).

prepaid, a true copy of the following Motion to Dismiss or Affirm and Brief in Support of Said Motion to the following:

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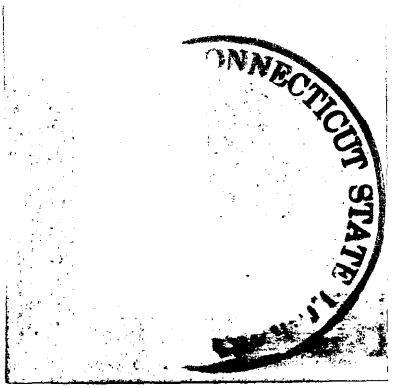
THIS the 10th day of November, 1976.

/s/ John W. Prewitt

Attorney for Board of Supervisors of Warren County, Mississippi, et al.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