In the

Supreme Court of the United States

GEORGIA, et al.,)
)
Appellants,)
)
v.) No. 72-75
)
UNITED STATES)

Washington, D. C.
February 21, 1973
February 22, 1973

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v.	:	No. 72-75
UNITED STATES	:	

Washington, D. C.

Wednesday, February 21, 1973
Thursday, February 22, 1973

The above-entitled matter came on for argument at 2:13 o'clock, p.m. on February 21 and at 10:12 o'clock, a.m. on February 22

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

LAWRENCE G. WALLACE, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C.
for the Appellee

HAROLD N. HILL, JR., ESQ., Deputy Assistant Attorney General of Georgia, Atlanta, Georgia
for the Appellants

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 72-75.

Mr. Hill, you may proceed.

ORAL ARGUMENT OF HAROLD N. HILL, JR., ESQ.,

ON BEHALF OF THE APPELLANTS

MR. HILL: Mr. Chief Justice and may it please the Court:

This case is on appeal from the decision of a three-judge court in Georgia. The appeal involves the possible applicability of Section 5 of the 1965 Voting Rights Act to state legislative reapportionment acts and I think it would also necessarily involve congressional redistricting acts. But it particularly involves the Reapportionment Act, particularly the use by a state of multi-number districts.

It also involves the Attorney General's regulations for administering Section 5 of the Voting Rights Act.

Briefly stated, the fact is that the Attorney General disapproved two reapportionment plans for the Georgia House of Representatives. He objected to Georgia's use of multinumber districts which Georgia has been using since at least 1880. When the Georgia legislature met on the last night of its regular 1972 legislative session and it was unable to divide all the multi-number districts into single number districts, it passed a resolution seeking to invoke the

aid of the Federal District Court and this suit was filed by the United States.

There are four questions presented by the appeal. The first is, is Section 5 of the Voting Rights Act applicable to state legislative reapportionment acts and, if so, is Section 5 constitutional as thus applied?

It is the contention of the State of Georgia with respect to this question that a reapportionment act is not a voting change within the meaning of Section 5, such that it has to be submitted to the Justice Department for approval.

If we are in error in this contention, then it is our contention that Section 5, as applied to reapportionment, is unconstitutional in that it is not appropriate legislation within the meaning of Section 2 of the 15th Amendment, the 15th Amendment, of course, being the source of authority for the passage of the 1965 Voting Rights Act and the question determined in Katzenbach versus South Carolina having said that the Voting Rights Act was appropriate legislation in the context of that case within the meaning of the 15th Amendment.

The second question raised is, does the prior submission requirement of Section 5 limit the Attorney General to disapproving the change in state law or can he, under Section 5, disapprove things which have not changed such as Georgia's use of multi-number districts?

The third question is, does Section 5 empower the

Attorney General to disapprve a state law which he does not find to be discriminatory but about which he is unable to reach a decision?

There are other questions subsidiary to the third question, such as , does the Attorney General have the authority to promulgate regulations, any regulations, particularly regulations placing the burden of proof on the submitting state, thereby establishing his civil rights division as a court without providing the submitting state with notice of any charges and opportunity to examine the material on which his decision is to be based.

The final question is, does the Attorney General have the power to extend the 60-day time limit Congress placed upon him in Section 5 of the Act? Does he have the power to adopt regulations, and if he does have that power -- which we submit he does not -- does that power include the power to amend a law of Congress?

The lower court ruled in favor of the government on all of these issues.

Georgia began using multi-member districts in its House of Representatives in 1880. In 1917 it adopted the majority vote requirement as to certain offices. That is the requirement that a candidate, in order to be nominated in the primary or elected in the election, must receive a majority of the votes as opposed to some states using

plurality. As a consequence, Georgia has a run-off. In case nobody gets a majority in the first election, there is a second election, a run-off election, in which the two top candidates compete against each other so that one of them ends up with a majority -- in most cases.

In 1953, Georgia adopted the designated post requirement, that is to say, that if you are a candidate for a multi-member district, you must designate one of those multi-member seats that you'd want.

In 1962, the majority vote requirement was made applicable to the legislators in primaries. It had not theretofore been applicable to House of Representatives members.

In 1964, June the 24th of 1964, the majority requirement was made applicable to legislators in elections as well as primaries so that, as of June the 24th of 1964, Georgia was using multi-member districts, designated posts and majority run-off requirements as to its House of Representatives.

Q Let me make sure I understand this Designated post requirement. It would mean that even though you got a greater vote than somebody else who got elected to another post, if that wasn't your designated post, you'd still lose?

MR. HILL: That is correct, your HOnor. Assuming you had, say, a three-man multi-member district.

Q That's what I'm assuming, more than two candidates.

MR. HILL: You would, on today's situation, you would designate that you want either post one or post two or post three.

Q Right.

MR. HILL: And you are running against the people who have designated pose one, if that is your selection.

Q Right.

MR. HILL: Not against the people who have designated the other post.

Q So you might get 49 percent of the vote for post one and if your two opponents would divide 51 percent, you'd -- you'd have a run-off then, wouldn't you?

MR. HILL: Yes, you would.

Q Between you and the highest?

MR. HILL: Yes, sir.

Q The higher of the other two?

MR. HILL: That is correct.

Q You may select your own post?

MR. HILL: Yes, your Honor.

Q How?

MR. HILL: You designate it. Now, I might say that prior to 1965, actually, we didn't use numbers. You designated the name of the man holding that seat that you wanted

but as a result of the Reapportionment Act of 1965 --

Q Even if the incumbent weren't running?

MR. HILL: That is correct. It was designated --

Q John Smith's seat?

MR. HILL: Yes, sir. If he was running, he got his name on there twice, running for his own seat.

Q Right.

MR. HILL: But at that time, we only had -- the most we had was a three-man multi-member district and as a result of the Reapportionment of 1965, one district went to 64 -- excuse me, to 24 members, a 24-member district and it was necessary to discontinue the use of names because there were 21 seats that had no names.

Q Right.

MR. HILL: And used numbers. But we did change our designated post situation in 1965 from designating by naming the incumbent to designating by numbers. But as I understand the position of the government, that change is not the change that is in issue here.

The reason I emphasize that June the 24th, 1964, we had multi-member districts, numbered posts and designated post requirement is that that was prior to the introduction of the 1965 Voting Rights Act in March of 1965. It was also prior to the retroactive effective date of the Voting Rights Act, November 1, 1964.

This Court decided Whitcomb versus Chavis in June of 1971. Thereafter, the 1970 census for Georgia became available. The Governor called the legislature into special session the latter part of September and early October and Georgia adopted the reapportionment plan for its House of Representatives, as well as for its Senate and as well as for Congress. Those two plans are not at issue in this case.

The House Reapportionment Plan was submitted to the Attorney General on November the 5th, 1971 along with a mass of information. I would refer the Court to the record to show the letter which requested seven categories of information.

On November the 19th, the Attorney General requested these 17 additional categories of information which required until January 6, 1972 to compile and to submit.

The Attorney General, on March the 3rd of 1972, a Friday, objected to the 1971 reapportionment plan. Now, that objection was within 60 days of January the 6th, when the additional information had been submitted, but it was approximately 120 days from the date of the November 5th submission of the 1971 Reapportionment Act.

The General Assembly received that letter of objection on Monday, March the 6th, at which time it had four days remaining in its regular 1972 session. During those four days, it subdivided into single-member districts -- I believe 18 multi-member districts, leaving it with 32

multi-member districts. It adopted the resolution seeking to invoke the aid of the Federal District Court and adjourned.

That second plan, the 1972 Reapportionment Plan, was disapproved on the ground that it continued the use of multi-member districts, numbered posts and majority run-off requirements. That had been the ground, basically, of the objection to the first plan, Georgia's combination use of multi-member districts, numbered posts and majority run-off requirements.

The suit was filed. There was a hearing on April the 18th at which time the government said, our only objection at this time is as to 15 multi-member districts -- not 32.

As we see it, the government abandoned its objection to numbered posts, abandoned its objection to the majority run-off requirement and said, our real objection is the multi-member districts and we only object to 15 of those, not the whole 32.

As to 10 of the multi-member districts which it previously had objected to, the government said that the number of minority members living in those districts is so small as to not be cognizable.

As to 6 of those districts which it abandoned its objection to, the government said that the non-white population is so dispersed throughout these areas that the fact that they are a multi-member district has no impact. You

could not put it into a single-member district and significantly affect their voting impact.

The government also withdrew its objection to the Fulton County multi-member district which has got single-member districts throughout Fulton County with three at-large above it and they had objected to those three and then they removed or eliminated their objection to that because the difficulty of forcing those three districts down into -- 21, I believe, is quite considerable and would have had no great racial impact.

Now -- but then the government said, but we think all of these 17 districts that we've -- as I see it, that we are now conceding that we should have objected to on Section 5 grounds, we think that all ought to be subdivided on 14th Amendment grounds because of Equal Protection problems and the court said, that it would be mighty risky to have a special session and not subdivide all of these multi-member districts. Its decision came out on April the 19th, the following day, did not deal with the government's suggestion that all multi-member districts be subdivided and the General Assembly was faced with a special session for reapportionment not knowing whether to subdivide 15 districts or 32 districts.

We applied for a stay which this Court granted on April the 21st, 1972.

Section 4 of the Voting Rights Act contains the

formula for determining which states and political subdivisions are subject to the Act. As served to the Section 4 formula, there are six states covered by the Act, Alabama, Georgia, Louisiana, Mississippi, South Carolina and Virginia/ and there are six states which have political subdivisions subject to the act. Arizona has eight of 12 counties, has one-third of its population covered by the Act. California has two counties. Hawaii has 80 percent of its people covered by the Act. One county, but it happens to be, oh, I believe, Honolulu County. Idaho has one county. North Carolina has 39 of 100 counties. Wyoming has one county. New York had three counties. I believe the Court is going to have a case involving that situation here shortly. Alaska has, I believe, petitioned and been removed from the Voting Rights Act.

But of these states affected by the Act, only North Carolina and New York have ever submitted -- these are the affected states, not the covered states -- only these -- only New York and North Carolina have ever submitted their reapportionment plans to the Attorney General. Arizona, California, Hawaii, Idaho and Wyoming apparently do not know that the Justice Department is just waiting for them to submit their reapportionment plans before those reapportionment plans can go into effect.

Basically, our argument on nonapplicability is this, there are voting laws relating to voters. There are

laws relating to candidates. There are laws relating to the composition and organization of state government.

Reapportionment is a law relating to the composition of a legislative body. Reapportionment is not a voting law required to be submitted to Washington within the meaning of the Voting Rights Act, we submit.

That is, we think what the government had in mind when it filed its brief in Fairley, a companion to Allen versus the State Board of Elections, in the government's brief in Fairley, it, in effect, said to this Court that your holding Section 5 applicable in Fairley would not be tantamount to concluding that Section 5 applied to reapportionment and redistricting.

Now, you may inquire of me how can Georgia argue that Section 5 is not applicable to reapportionment when she submitted her reapportionment laws to the Attorney General?

I think the question relates only to applicability, not to constitutionality because I think we are entitled to take the position that below is not constitutional as applied.

A Do you have any trouble with -- which case was it, was it Perkins?

MR. HILL: No, your Honor, I do not.

Q Well, whatever case it was, it said a change from ward elections to at-large elections for a legislative body was within the reach of subsection 5.

MR. HILL: It was just such a case in which the government said, your holding the Section 5 applicable in this case will not be tantamount to holding Section 5 applicable in reapportionment.

Q Well, I understand that frequently happens but, now, how about the principle of it?

MR. HILL: Well --

Q You don't have any trouble at all with that?

MR. HILL: I have this, I've adopted the position the government had in that case, you might say, your Honor. But the Court in Allen said, "We do not here reach the question of whether Section 5 is applicable to reapportionment.

Q I agree with that, but how about the principle of it? How can you really sensibly distinguish the two cases?

Other than by just saying they are different?

MR. HILL: I cannot.

Q So you really have to cut back on Perkins a little?

MR. HILL: No, your Honor, I think that in this instance, it is a reapportionment case and I do not see -- let me think further on that and answer it this way, to me, there are voting laws --

Q Now, if you really can't distinguish them and if Perkins is still the law, you lose on this point.

MR. HILL: Let me undertake to retract my quick concession, if I may.

There are voting laws and there are election laws. Now, to me, Katzenbach dealt with voting laws. Allen and Perkins dealt with election laws.

Now, if reapportionment is not even an election law, then it's not covered by Allen and Perkins because --

Q So what is it? It's an apportionment.

MR. HILL: It is an apportionment.

Q It's an apportionment, not an election law at all.

MR. HILL: It is a law relating to the operation of government, the structure of government. For example, I would not think that whether or not you have a backhammer legislature is an election law.

Q Well, why is Perkins an election law, then?

MR. HILL: It related to a municipality.

Q Well, it had to do with whether you are going to elect the members of a legislative body in wards or at large.

MR. HILL: that is correct.

Q And a multi-member district as against single-member districts presents the identical question, whether you are going to elect them in wards or at large in a defined area. Isn't it?

MR. HILL: Yes, your Honor. Then I'm at a loss to

understand why the Court restricted itself from getting into the reapportionment field in Allen.

Q Well, they just didn't -- they just didn't reach the question we are now dealing with. But now we have to deal with them.

MR. HILL: Yes, your Honor.

Let me proceed by saying that the the people who made the decision to submit Georgia's reapportionment plan are not obstructionists. They know that to make government work you need to cooperate whenever you can and litigate only when necessary and they did not know when they submitted the 1971 plan that the Attorney General would disapprove the use of multi-number districts and make this litigation necessary.

Now, if Section 5 is applicable to reapportionment, if it is an election law, if it is covered by Allen and Perkins, then we contend that as applied, Section 5 is not appropriate legislation authorized by Section 2 of the 15th Amendment.

For these two reasons, there is no rational relationship between reapportionment and the Section 4 coverage formula of registration tests plus low voter participation in a Presidential election.

The problem of alleged racial gerrymandering exists in states not subject to the Act; Texas, New York, Indiana and Delaware have had alleged gerrymandering problems and those states are not subject to the Act so that the Act simply

offers no rational relationship to covering reapportionment laws.

With respect to the second question, let me make it clear that I am not arguing now, at this point, that Georgia's reapportionment plan was not a change. That was the first question. I am contending now that what the Attorney General disapproved was not a change.

Let me, to illustrate what I am trying to get across, say that Georgia has an election code, a comprehensive body of law on elections. If we change ten code sections and send them to Washington, we think that the Attorney General is not entitled to disapprove all the sections in Georgia's election code. But here, the Attorney General disapproved Georgia's use of multi-member districts in combination with the majority run-off requirement and numbered posts and Georgia had not changed that.

If we changed the system, the Attorney General could object to our changing the system. But if we changed the lines in a reapportionment, we don't think that the Attorney General is entitled to object to the system.

Q What about changing the voting locations in a precinct?

MR. HILL: Yes, your Honor, voting laws, it affects the law.

Q Well,you haven't changed any law. You haven't

changed anything except by changing a line, we've changed where the voting machines are going to be.

MR. HILL: I believe that this is a voting law within the meaning of the Voting Rights Act.

Q But it isn't a voting law as to which voting machine you go to?

MR. HILL: I'm not sure what --

Q More like drawing a line, a district line. It depends on where you draw it, which machine you go to.

MR. HILL: Well, but this is effect on the voter.

Q If you draw the -- it changes the location of my voting machine if you draw the line on the other side of the street.

MR. HILL: Well, excuse me. I am talking about changing the location of a polling place. This affects the voter.

Q So am I. It affects me --

MR. HILL: Yes, sir.

Q -- if I get put in another district, I have to go to another school. It changes my voting place.

MR. HILL: Oh, I'm sorry. I don't believe that we necessarily change the location of polling places. The polling places stay the same.

Q I agree, but it changes -- it affects me as a voter, because I have to go to another place.

MR. HILL: Well, but in Georgia, we do not have to go to another place. We go to the same polling place and vote for different numbered seats in the legislature. But the effect on the voter is not in whether he goes to the same poll to vote or not.

Our argument as to the third question is that the Attorney General has, without statutory authority, adopted regulations imposing a burden of proof standard on the state to satisfy him and we believe that this is contrary to what this Court had in mind in Allen when it said that the Attorney General does not act as a court in approving or disapproving state legislation.

We believe that his procedures are contrary to Morgan versus the United States in 304 U.S. and the cases which followed it through Hannah versus Larche in 363 U.S.

And the final question raises the issue as to whether the Attorney General can promulgate regulations, any of them at all, but particular regulations changing the 60-day time limit which Congress placed on him.

The government's brief cites no authority for him being able to adopt regulations. They cite his need for additional information. We submit that the argument based on need should be addressed to the Congress.

The Attorney General of the United States, above all, owes the submitting states obedience to the time limits

fixed by Congress.

In conclusion, if I may take a hint from the gentleman who opened the City of Burbank case yesterday, in his opening argument he referred to the Declaration of Independence and pointed out that one of the grievances against the King was, "That he has forbidden his Governors to pass laws of immediate and pressing importance and left suspended in their operation till his assent should be obtained."

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Hill.

Mr. Wallace.

ORAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ.,

ON BEHALF OF THE APPELLEES

MR. WALLACE: Mr. Chief Justice and may it please the Court:

Following the 1970 census, Georgia legislature, in the fall of 1971, enacted three separate reapportionment statutes, one each for the State Senate and House and one for the Congressional Districts. Each of these statutes repealed the previous districting.

The state separately submitted the three reapportionment plans to the Attorney General for review under Section 5 and the state submission for the Georgia House is what is directly at issue here. It is in the Appendix at page 19. We think it rather significant that on page 21 of

the Appendix, the state explained that the Georgia House of Representatives also reapportioned in 1968. This change was not submitted because at that time, prior to Allen v. Board of Elections 393 U.S. 544, it was believed to be unnecessary to submit reapportionment plans to the United States Attorney General pursuant to the Voting Rights Act.

Following a preliminary examination, the Attorney General determined that the data sent were insufficient for proper evaluation of the proposed changes and requested specific additional information in accordance with the Department's published guidelines which the state then submitted and within 60 days of the submission of that additional information, the Attorney General interposed objections to all three plans, objections to apparent racial gerrymandering in the Congressional and State Senate plans and to certain aspects of the house plan including the use of multi-member districts coupled with numbered posts and the majority run-off requirement which has the effect of requiring each candidate, in order to be elected, to win a majority of all the voters in the entire multi-member district.

In response to these objections, the Georgia Legislature enacted modifications to the Senate and Congressional plans, eliminating the racial gerrymandering objected to and upon resubmission, those plans were found acceptable by the Attorney General and those resubmitted

districts were used in the 1972 elections and as a matter of fact, one of the Congressional districts reconstituted after the Attorney General's initial objection, elected the first black Congressman from Georgia since Reconstruction and those Congressional and State Senate reapportionments are not presently the subject of any litigation and are not directly at issue in this case but they could, of course, possibly be affected in the future.

With respect to the Georgia House which is in issue, I believe the history was recounted by Mr. Hill of how the House found it -- that they could not satisfy all of the objections raised by the Attorney General and although they abandoned some of the multi-member districts, they specifically declined to abandon others and adopted a resolution saying that they were going to invoke the remedial power of the federal courts.

Nine days after submission of this 1972 plan that the state sent in, the Attorney General interposed an objection and three days later, the United States commenced the present action in the District Court to restrain the state from implementing either of the submitted House plans and asking that the Legislature be directed to adopt a satisfactory plan that conforms to 14th and 15th Amendment requirements or, in the alternative, that such a plan be devised by the District Court and the three-judge court unanimously granted the

relief requested by the government that its judgment was stayed by order of this Court and the 1972 elections were held under the 1972 plan to which the Attorney General objected with respect to the House.

The other elections were conducted under the reconstituted plan. The plan was reconstituted in response to the Attorney General's objection.

Now, we contend first that there is no substantial basis for doubt that the Congress that reenacted the Voting Rights Act in 1970 understood and intended that the Act would apply to reapportionment legislation as well as to other changes in voting election laws.

The legislative history of the 1965 Act had been in some respects equivocal with respect to coverage and this Court examined that history in detail in Maryland against the State Board of Elections which was decided early in 1969 and it concluded in that case that Congress intended Section 5, in the words of the Court, "To have the broadest possible scope"and that the legislative history on the whole supports the view that Congress intended to reach any state enactment which altered the election law of the covered state in even a minor way and that the Court, in Allen, used this language to refer not only to changes in state law that would deprive persons of their franchise altogether, but also to changes that would abridge the effectiveness of that franchise

by diluting their voting power was made clear by the holding in one of the four cases decided in the Allen opinion, the first of the districting or at-large decisions in this Court.

Q When was it, Mr. Wallace, that the Attorney General first started passing on strictly reapportionment plans?

MR. WALLACE: It was after the decision in Allen that they began to be submitted.

Q When was that?

MR. WALLACE: In early 1969 --

Q In '69.

MR. WALLACE: -- in March of 1969.

Q So there had been a year or more of that when the statute had been reenacted?

MR. WALLACE: Correct, your Honor.

Q And is there any express reference to that situation in the legislative history?

MR. WALLACE: The legislative history is replete with references to Allen and to the interpretation of the Act in Allen.

Q With respect to reapportionment? Does it ever mention that?

MR. WALLACE: Well, it's replete with references to reapportionment also and the two sometimes are tied together and sometimes are not but what I was about to point out to the Court was that, as recounted on page 15 of our

brief, one of the cases decided in Allen, a case called Fairley against Patterson, was what was referred to as number 25 in this quotation. Number 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, citing Reynolds against Sims and then noting that voters who were 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 and that this type of change is within the coverage of the Act.

That was part of the holding in Allen along with much general language in the opinion broadly interpreting the coverage of the Act.

Q Can you tell us, in the discussions leading up to the 1970 Act, the references to reapportionment, were those references expressions of doubt whether reapportionment was covered by the Act or the contrary?

MR. WALLACE: In the legislative history of the reenactment, no one raised any question or doubt that reapportionment legislation would be covered. The entire discussion was to the contrary. The Deputy Assistant Attorney General testifying on behalf of the Attorney General at the hearings, who was testifying in opposition to the extension of Section 5 specifically said that under Section 5 all of these

reapportionments and redistricting plans would have to be submitted. That was his interpretation of what the duty would be under the Allen decision.

Many proponents of the Act referred specifically to reapportionment or redistricting or drawing of new boundary lines in some instances as among the new devices that had come to the fore that could adversely affect minority voting rights and as a reason for extending the pre-clearance, the pre-implementation review provisions of Section 5.

As a matter of fact, the most contested issue in the legislative history of the 1970 enactment was whether Section 5 would be extended or not. This was the major bone of contention. This was not merely a pro forma reenactment of a statute about to expire. The administration had proposed that Section 5 should not be continued, that the Act should be revised in a way that Congress, after extensive deliberation, after hearings in both houses and after extensive floor debate, concluded not to accept.

Instead, Congress decided that the remedy porvided in Section 5 was needed and the President signed that enactment into law. It is difficult to review this legislative history without coming to the conclusion that Congress knowingly, in effect, ratified the Allen interpretation of the statute and acted on the premise and on the assumption that if Section 5 were reextended, which it decided to do, the reapportionments

resulting from the 1970 census would be covered insofar as they were reapportionments put into effect as changes by the state. There is another problem when a federal court has decreed a specific reapportionment, as has arisen in the Conner case but the legislative history, and it's recounted in some detail in our brief and in the Amicus brief in our support, all looks in the one direction to the extent that it sheds light on this issue and we think it sheds very considerable light on this issue.

And Perkins against Matthews, which was decided under the 1965 Act subsequent to the reenactment, by this Court, made clear that the reasoning of Allen also extends to other changes in boundary lines, in that case an annexation change in the boundary lines and not merely to a change from districting to at-large elections as a change in boundary lines.

The opinion of the Court relied extensively in the case on the reasoning of Allen and in separate concurring opinion by Mr. Justice Blackmun joined by the Chief Justice found one sentence sufficient to decide the question, one sentence saying that given the decision in Allen, we concur in the judgment of reversal and the order of remand here because this change in boundary lines was indistinguishable from the reasoning in Allen which, in our view, Congress clearly ratified. As a matter of --

Q Justice Blackmun still wasn't reconciled with

that, was he?

MR. WALLACE: Well, he wrote an opinion saying that-- in Allen he said that the Court -- he agreed with the way the Court interpreted the Act, but he still was dissenting on the constitutional issue of the submission and, to my knowledge, the most effective statement of that position on the constitutional issue has been his dissenting opinion starting in South Carolina against Katzenbach. I haven't seen anything more forceful on that subject but he has always been alone in this Court. His dissenting view on the constitutionality is ultimately premised largely on a review of the history of the Constitutional Convention and a majority of the Court decided that that view takes too restrictive a view of the remedial powers which were later conferred on Congress under Section 2 of the 15th Amendment. We see no novel constitutional issue presented here. We think the issue is fully considered and decided in South Carolina against Katzenbach and reaffirmed in Allen and Perkins and, since the state is not asking that those cases be overruled, we don't intend to argue the constitutional issue at length.

There is also a dictum in Allen with respect to reapportionment itself and here I differ with Counsel for the State that that dictum really reserves the question whether reapportionment should be covered by the Act. Instead, what it says is that administrative problems may arise with respect

to application of the Act to reapportionment and we leave those administrative problems and how to resolve them to another day, but that paragraph ends on page 569 of 393 U.S. the argument that some administrative problem might arise in the future does not establish that Congress intended that Section 5 have a narrow scope, or speaking in the context of reapportionment --

Q Although the government thought that that case could have been decided without reaching the reapportionment issue.

MR. WALLACE: Well, the government thought that, but the Court adopted a very broad interpretation of the Act in Allen. Whether the government would have taken that position had it known how the Court would reason in its opinion, I have no way of saying. But the upshot of Allen --

Q So the Court didn't adopt the government's narrow view?

MR. WALLACE: Well, I think the Court implied very strongly that reapportionment, like other changes, was covered. Whether -- I don't want to characterize the government's view in degree.

The upshot of Allen was that it became widely understood that reapportionment law should then be submitted and starting in 1969 to 1972 381 such laws have been submitted to the Attorney General and the federal courts that

have passed on the subject, including the Court below and others that we cite on page 24 of our brief have taken the position that reapportionment laws, like other changes in the election laws, like other changes in district lines, are covered by the Act, and we have found in the course of passing on these 381 submissions that while some administrative problems undeniably have arisen, they have not proved to be insurmountable. There has been --

Q But, apparently, sometimes you can't make up your mind.

MR. WALLACE: I don't know what time you have in mind, Mr. Justice White.

Q Well, like in this case.

MR. WALLACE: Well --

Q Like in this case, you essentially say you really can't -- in effect you say you can't decide it one way or the other and therefore you object to it.

MR. WALLACE: That was merely a polite way of saying that the state had not met its burden of proof. It wasn't that we couldn't make up our minds. The state has a burden of showing that it wouldn't have a discriminatory purpose or effect. The change would not have such an effect and --

Q Is that your characteristics statement?

MR. WALLACE: Well, it is sometimes phrased in

different ways. There is a certain politeness used in correspondence with the state which is preferred to using the strongest possible language in the situation.

Q I thought you said the statute says you are supposed to object in 60 days or it goes into effect?

Or "disaprove," it says, doesn't it?

MR. WALLACE: Within 60 days of the submission to the Attorney General.

Q Yes, well, all right, but you are supposed to disapprove -- it goes into effect unless you what?

MR. WALLACE: Unless we interpose an objection which these matters were. No one had any doubt --

Q So you could say --

MR. WALLACE: -- but what these letters were in objection by the Attorney General.

Q So you could just say, "We object" and that is the end of it, never say a word?

MR. WALLACE: That is correct. We don't have to say on what basis and it is not for the Attorney General to redraw the apportionment in some way. The procedures that took place in the District Court in this case were at the request of the District Court in an effort by counsel on both sides to expedite a resolution that would be acceptable to the Attorney General and that would enable the Georgia House to reapportion itself in time for the upcoming primary

elections after two unsuccesful submissions to Washington with respect to the House. The other matters have been straightened out.

MR. CHIEF JUSTICE BURGER: Mr. Wallace, let me interrupt you a moment to ask General Hill, would it be a particular accommodation to you if you could leave to get back to Georgia tonight?

If so, we'll go on to finish today. But if you are willing, we will terminate at 3:00 and finish tomorrow morning.

GENERAL HILL: That would be fine, your Honor.

MR. CHIEF JUSTICE BURGER: Very well, then you may proceed until 3:00 o'clock, which is only a minute longer.

MR. WALLACE: Well, I -- well, just to open the question of whether this was a change, the logical extension of the state's argument here would be that it could reapportion by electing all members of the Georgia House at large and this would not be a change that would have to be submitted to the Attorney General even though the effect on minority voting rights would obviously be a very drastic one.

MR. CHIEF JUSTICE BURGER: We'll resume in the morning.

(Thereupon, at 3:00 o'clock, p.m., the Court adjourned, to reconvene the following morning at 10:00 o'clock a.m.)

MORNING SESSION 10:11 a.m.

MR. CHIEF JUSTICE BURGER: We will resume arguments in the case we closed down yesterday. I believe -- Mr. Wallace, were you at the lectern?

MR. WALLACE: Yes, sir.

MR. CHIEF JUSTICE BURGER: And you have a few minutes remaining.

ORAL ARGUMENT OF MR. WALLACE CONTINUES

Q What would you like to add about this 60-day delay on the law? Can you help me?

MR. WALLACE: Well, that relates to the submission of the now-repealed 1971 plan. This Court's own experience in dealing with the complexities of matters such as racial discrimination and reapportionments surely instructs that if the Act is meaningfully to be applied, the necessary information must be submitted to the reviewing authority so that he can make a meaningful determination of whether the implementation of the proposed change would have the prohibited effect.

Q The time starts when the information is in?

MR. WALLACE: Well, that is the position that the Attorney General came to in the guidelines which were adopted after publication in the Federal Register and commentary and are now in the Code of Federal Regulations. Those guidelines interpret the word "submission" in the Act to

mean the submission of the information that is needed in order for a determination to be made and when less than that information is initially submitted, the Attorney General specifies within 60 days of the initial submission what additional is needed and after all the information that is needed to make a meaningful determination is submitted, then within 60 days of what constitutes submission within the meaning of the Act, the Attorney General acts.

Q Well, then, who is to decide whether there has been a sufficient submission? Is that entirely in the Attorney General's unreviewable discretion? IF so, he could just string this thing along forever, while the statute requires him to object within 60 days.

MR. WALLACE: Well -- that -- there is -- judicial review of any action taken and it is always open to the state --

Q Where? Where under the statute is there judicial review?

MR. WALLACE: In the District Court for the District of Columbia --

Q That's an alternative, isn't it? That's an alternative.

MR. WALLACE: That is correct. That alternative is open to the state before or after the Attorney General has interposed any objection.

Q Well, here he hasn't. The point is, he just could. As I understand your theory, you could just say, I'm

sorry, I don't have enough information. Give me some more."

MR. WALLACE: Well, he specifies --

And you give him some more, "I'm sorry, that is not sufficient. Give me some more"and he could drag it out forever.

MR. WALLACE: He specifies what is needed in the regulations themselves. The guidelines specify what is needed and this just hasn't occurred that there have been successive requests for additional information. Here there is no problem of that kind at all. The state did submit the additional information after one request for it and that additional information was adequate for a determination to be made with respect to all three of the state's plans and the determination was promptly made thereafter.

Q What the statute requires is a submission of the, as the statutue says, qualifications, prerequisites, standard, practice or procedure.

Not a lot of explanatory material.

MR. WALLACE: Right.

Q Isn't it up to the Justice Department within 60 days after that submission required by the statute to object and if it hasn't objected, then it becomes the law of the state. That is what the statute contemplates, isn't it?

MR. WALLACE: One way to look at the request for additional information is an objection that the state has not

met its burden of proof on the basis of the information submitted and that alternative would be open, as Counsel for the State said in the District Court here, if the state were to win on this issue, it would be a Pyrrhic victory, he said, because it would be open to the Attorney General when insufficient information for him to say that it was acceptable as submitted to him simply to say he objects until a new submission containing more information is forthcoming.

Q But that is going on the assumption it is enough for the Attorney General to say "I object." That is another issue in the case.

Q Yes.

Q Because your position is the statute is presumptibly unconstitutional or invalid unless the state carries the burden of proving that it is valid.

MR. WALLACE: Well, that was the basic purpose of the Act that the state has had the burden of proof.

Q I know that is your position. You would equate the Attorney General with a court and I'm not so sure of that, whether a state necessarily has to march up to an Executive Branch of the Federal Government and prove it's --

MR. WALLACE: The Act does not require the state to make a submission to the Executive Branch of the government. That alternative was put in as an accomodation to the states, if they would prefer that to going to the District Court for

the District of Columbia, which is open before or after they make their submission to the Attorney General if that is what they choose to do. But the basic purpose of the Act was to say that in those states covered by the Act where there has been presumably discrimination in the past, the heavy burden reflected in decisions such as Whitcomb v. Chavis in this Court, the heavy burden of complainants to litigate under the 15th Amendment will be shifted to the state if the change in the state laws is made.

The House report is very specific on that subject in referring to the Allen decision it says -- the court there discussed the history of the enforcement of Section 5 and clarified its scope. The 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.

That basic purpose of the Act would be entirely emasculated if the alternative were open to the state to make the submission to the Attorney General and not have to bear that burden of proof. It would completely get around the basic objective of the Act.

Q Mr. Wallace, what specific provision of the Act, in your view, puts this burden on the states? In terms?

MR. WALLACE: The -- well, let's look at the Act's

provision. I think the legislative history makes it very interesting.

Q Well, let's look at the Act. If the Act is clear, we don't need to look at the legislative history. Or if the Act is silent.

MR. WALLACE: Well, the Section 5 is set forth on page 50 of the brief for the Appellants and it says that, the reading / line just below the middle of the page, "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..... and unless and until the court enters such a judgment, no person shall be denied ....the vote, the right to vote....." because of not having complied with that and a party seeking a declaratory judgment would ordinarily carry the burden of proof that he is entitled to the declaratory judgment, a judgment that it does not have the purpose and will not have the effect and then the alternative procedure that is open to the state is submitted to the Attorney General and if he does not interpose an objection, then the state can put it into effect without getting the declaratory judgment.

Q Now, is this provision that you are going to be talking about equally applicable to the procedure before

the Attorney General and to the proceeding in the District Court? Is the burden the same way in each instance in your view?

MR. WALLACE: Well, it doesn't specify. The proviso doesn't specify anything about the burden if the alternative is accepted that it be submitted to the Attorney General and the Attorney General doesn't object but it doesn't specify any standards at all that the Attorney General must adhere to in order to object. So far, on the face of the statute, the Attorney General has complete discretion to interpose an objection and --

Q It was explicit on the burden with respect to the District Court. It is certainly considerably more explicit than the --

MR. WALLACE: That is correct, Mr. Justice.

Q -- ordinary rule of instruction when it was silent with respect to the Attorney General.

MR. WALLACE: It said that the Attorney General is free to interpose an objection on any basis he pleases so far as the statute is concerned and if he interposes an objection, then the state can go to the District Court in the District of Columbia. The statute specifies no standard at all that the Attorney General must adhere to.

Q Has anything in our opinions, Allen or Perkins or any other, had to say anything about the burden of proof

on the submission to the Attorney General?

MR. WALLACE: They did emphasize the importance of the shifting of the burden of proof as a basic purpose of the Act. That is why preimplementation review is required.

Q On the opinion of the Attorney General?

MR. WALLACE: Well, those opinions didn't deal specifically to the Attorney General. That's what they didn't involve, submission to the Attorney General. But it is difficult for us to see how if the state doesn't have the burden of proof on such a submission, the purpose of the Act can be accomplished.

The fact is, the states have almost invariably made their submissions to the Attorney General. There have been 381 submissions to the Attorney General and so far as we can recollect, only three suits brought in the District Court for the District of Columbia, two of those after the Attorney General interposed objections.

Q Well, maybe the reason was that the states thought that they had a lower burden of proof when they were submitting it to the Attorney General.

MR. WALLACE: Well, the Attorney General specified otherwise in published guidelines.

Q How long ago?

MR. WALLACE: Those were published in 1970.

Q After the enactment of the -- after the present

amendments to the legislation and after Allen and Perkins.

MR. WALLACE: That is correct, Mr. Justice.

Q Wasn't that due to the -- what was, in ancient times, a general understanding that the legislative act of the state had a certain presumptive validity?

MR. WALLACE: Well --

Q This pretty well undercuts it, doesn't it?

MR. WALLACE: Well, this was the basic controversy about the enactment of the law in 1965 and its reenactment in 1970 and the opponents of Section 5 said that it was not a good idea for Congress to take away the presumption of validity of state acts and to single out certain areas of the country where that would apply and a majority in Congress took the other view that because of the background of racial discrimination and administration of voting and state election laws, there would be areas where the presumption would be against the validity of new election laws until the state has met a burden of proof that the change will not have the purpose or effect of causing racial discrimination.

Q But you have already indicated that that was true with respect to the proceedings in the District Court of the District of Columbia, but it is virtually standardless with respect to the procedure before the Attorney General, isn't it?

MR. WALLACE: Well, if he specifies no standard, but

the basic controversy in Congress was about whether this presumption of validity would be taken away in the covered states and in the 1970 Reenactment in particular, the position of the administration and of the administration's proposal is that this presumption of validity should be restored and Section 5 should not be extended and the entire country should be treated the same and Congress refused to accept that view after much controversy and the President decided to sign the measure into law and accepted Congress' point of view which --

Q Would you agree that sometimes, though, this Court has taken a rather dim view of standardless discretion committed to administrative processes?

MR. WALLACE: Well, I -- of course, it has, your Honor, but I believe that was in situations where there was some finality of some dispositive nature to the exercise of that discretion.

Q Well, isn't it pretty final when the Attorney General --

MR. WALLACE: Well, it's open to the state to bring a completely de novo proceeding in the District Court for the District of Columbia and make its case under this statute.

Q Not with the background of the Attorney General's disapproval.

MR. WALLACE: The Attorney General hadn't specified

anything except that he wasn't persuaded that it wouldn't have that purpose or effect and the action in the District Court for the District of Columbia is now to review the validity of his determination or whether that determination on a rational basis is a completely de novo proceeding.

MR. CHIEF JUSTICE BURGER: Mr. Wallace, we've taken up quite a bit of your time since you got here this morning and maybe you had something on your mind when you got here, so we'll give you a little bit of time to tell us about that.

MR. WALLACE: Thank you, your Honor.

Q Mr. Wallace, I have a question, too, I've been waiting to ask. Is it your position -- we have in Georgia a number of districts and is it your position that even if no change is made by the state in a particular district, that the Attorney General can approve or disapprove that district if changes are made in other districts of the state?

MR. WALLACE: Well, we took that position in the District Court and we adhere to it in the context of the pervasive reapportionment that was enacted here. The prior apportionment was repealed and the state reconsidered every district and drew new district lines and reapportioned every-one.

As a matter of fact, the changes were very pervasive here. Most districts had new boundary lines under both the 1971 and 1972 plans and many of those that did not have new

boundary lines had a different number of representatives and there was really a change even in the few districts that had the same boundary lines and the same number of representatives because they were sending representatives to a State House of Representatives which would have 25 total fewer numbers.

So on the facts of this case it should merely be said that there is no district which remained unaffected by the reapportionment legislation and we did take the position that the entire reapportionment was up for review.

Now, as I understand the position of the state, they say yes, there were changes that were subject to review under Section 5 but that the Attorney General's objection is invalid because what he objects to is an aspect that really wasn't changed and we have two answers to that.

In the first place, as we understand it, that is the contention that the objection is not well-founded, that the objection is lacking in merit and under Allen and Perkins, Congress has specified that that question can be litigated only in the District Court for the District of Columbia that that is a contention that goes to the merits and not to whether there was a change which had to be submitted here.

But we believe that the objection is well-founded. We see no way to administer the Act other than to consider the implementation -- the effects of the implementation and change in the context in which they will be used. The Act says

that if implementation of that change will have the purpose or the effect of denying or abridging the right to vote on account of race, then that change should not be implemented. It doesn't say that it has to deny or abridge the right to vote more than it has previously been denied or abridged and in South Carolina against Katzenbach, the Court, I think, very carefully specified that preimplementation review was required by Congress so that changes in the election laws could not be used to perpetuate -- the word used in there was "perpetuation" -- to perpetuate discrimination on account of race in voting and elections and so, while we believe the matter is not really before this Court, we think the objection was well-founded here.

Unless there is a further question, I think that presents our case.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Wallace.

Mr. Hill, you have about nine minutes now.

REBUTTAL ARGUMENT OF HAROLD N. HILL, JR., ESQ.,

ON BEHALF OF THE APPELLANTS

MR. HILL: Mr. Chief Justice and may it please the Court:

I am somewhat at a loss for words to learn that the United States takes the position that they can sue the State of Georgia in the Federal District Court in the State of Georgia and one of our defenses can only be raised in the

District Court for the District of Columbia.

I would have thought that when they sued us, we would be entitled to all available defenses and would not be required to raise any of those defenses in a forum other than the one that the United States had chosen.

Q Mr. Hill, what would you say of Allen in th s?

MR. HILL: Allen brought the situation where a citizen is suing for a declaration or a determination --

Q Yes, but you never get to the merits of the law where there has been no submission.

MR. HILL: There has been a submission here, may it please the Court and the question is the validity of the objection when it was turned down. Those factors were not present in Allen and in Perkins because there had been no submission and no objection by the Attorney General.

In the reapportionment context --

Q So your suggestion is that in this case you should be allowed to do what?

MR. HILL: To raise the defense that the objection was invalid, that the Attorney General objected to things which had not changed.

In the reapportionment context, the District Court for the District of Columbia is not really a viable alternative for this reason: As I understand it, the United States would have 60 days in which to answer the complaint, were a

complaint for declaratory judgment filed in the D. C. District Court and then it might take a considerable period of time for the District Court to make a determination and the District Court for the District of Columbia would not be able to formulate a plan, would not be able to permit the holding of elections in the meantime and therefore, is just not the good way for a state to go to submit its reapportionment plans to the District Court of the District of Columbia because of the time involved and the lack of remedial power that that court would have.

Q There is no power under the statute, are you saying, no power in the District Court to, in effect, stay the negative action of the Attorney General?

MR. HILL: It would -- perhaps a suit not under the Act, but a suit for injunction or something of that type might accomplish it but --

Q What about under the Act?

MR. HILL: But if it was under the Act, I think that the only issue before the District Court of the District of Columbia would be whether or not the change had the purpose or effect of racial voting discrimination.

It has been suggested that the 1972 plan repealed the 1971 plan and that now the question of timeliness is moot, but the 1972 plan was disapproved. It is not in effect. The repealer clause contained in the 1972 plan is not in effect,

so if the 1972 plan is not in effect, the '71 plan is and we think that the case is not moot, or the question is not moot.

Now, I'd like to refer to just one other matter and that is the Allen decision. The Court is, of course, familiar with several lines in Allen dealing with reapportionment. I would like to complete the last portion of the sentence read to the Court yesterday.

The Court there said, "We leave to another case a consideration of any possible conflict." Therefore I submit --

Q What page is that?

MR. HILL: On Allen it's at page 569.

Q Thank you.

MR. HILL: I submit that if Congress did adopt Allen when it was considering the 1972 Amendments, that Congress did not adopt anything that this Court had not yet decided and that they clearly, the Court, left some matters, at least, with respect to reapportionment undecided in Allen and that Congress has not adopted those undecided matters.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Hill.

Thank you, Mr. Wallace.

The case is submitted.

(Whereupon, at 10:35 o'clock a.m., the case was submitted.)