In the

Supreme Court of the United States

FRANCES MORRIS, ET AL.,

APPELLANTS

V.

L. MARION GRESSETTE, ET AL.,

APPELLEES.

No. 75-1583

Washington, D. C.
April 18, 1977

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IN THE SUPREME COURT OF THE UNITED STATES

FRANCES MORRIS, ET AL., Appellants	:	
v.	:	No. 75-1583
L. MARION GRESSETTE, ET AL. Appellees.	:	

Washington, D. C.

Monday, April 18, 1977

The above-entitled matter came on for argument at 2:12 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
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
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

J. ROGER WOLLENBERG, ESQ., 1666 K Street, N.W., Washington, D.C. 20006; on behalf of the Appellants.

JAMES P. TURNER, ESQ., Deputy Assistant Attorney General, Civil Rights Division, Department of Justice, Washington, D.C. 20530; on behalf of the United States as amicus curiae.

RANDALL T. BELL, ESQ., University of South Carolina, School of Law, Columbia, S.C. 29208; on behalf of the Appellees.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 75-1583, Morris against Gressette.

Mr. Wollenberg, I think you may proceed.

ORAL ARGUMENT OF J. ROGER WOLLENBERG, ESQ.,

ON BEHALF OF THE APPELLANTS.

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

This case has spawned procedural complexity, but what is at stake here is not at all complex.

Nearly four years ago the Attorney General of the United States objected under Section 5 of the Voting Rights Act to South Carolina Act 1205, a 1972 enactment reapportioning the South Carolina State Senate.

That enactment included three aspects which have been hallmarks of discriminatory effects, namely, multi-member districts, numbered seats and a majority run-off requirement.

The Attorney General found that Act No. 1205 has a clear and substantial racial effect.

Following the Attorney General's objection, South Carolina never availed itself of the alternate pre-clearance procedure open to it under Section 5, namely, a declaratory action before a District Court in the District of Columbia.

Instead, the State has simply continued to give

effect to Act 1205 without Section 5 clearance. And it is that situation for which we seek redress here, the Court below having refused our request for injunctive relief against continued enforcement of the statute.

Basically, as we see it, we seek compliance by South Carolina with the Voting Rights Act, compliance which has generally been forthcoming in covered states. Indeed, South Carolina itself complied with the Voting Rights Act in responding to an objection by the Attorney General to its House of Representatives apportionment plan, and it enacted a new plan which ultimately met with approval. So that today the South Carolina House is apportioned in accordance with the law; and today, in the South Carolina House, there are a number of black members. Today, in the South Carolina Senate, there are no black members.

Now, the situation which I have described came about as a result of an error, the legal error of the Attorney General of the United States in 1972. He first declined to objection to Act 1205, not because he thought the Act was valid, but because he thought he was compelled to defer to a District Court judgment in South Carolina sustaining the constitutionality of Act 1205 but disclaiming any intention to pass on the validity of the Act under the Voting Rights Act.

Now, I have referred rather flatly to this ruling

of the Attorney General as an error. I do so because it was determined to be an error in Harper against Levi, because the United States has conceded the error both in this Court and in the Court below.

QUESTION: That determination isn't binding on us, I suppose. South Carolina wasn't a party to the litigation in that case?

MR. WOLLENBERG: You're speaking of Harper v. Levi?

QUESTION: Right.

MR. WOLLENBERG: The determination of Harper v. Levi is not binding on this Court, your Honor, but we do suggest in addition to arguing that the Harper and Levi ruling was correct in determining that the limited reviewability that took place here was proper.

We also argue, as an alternate ground, that the Harper v. Levi Court, having jurisdiction to enter the interlocutory orders that it issued, and the Attorney General's time to object, having been tolled under those interlocutory orders, the objection of the Attorney General was a valid act. And if it were ultimately determined that Harper v. Levi reached the wrong result, this would simply free the Attorney General to withdraw his objection, but would not nullify his objection nunc pro tunc.

QUESTION: When you say that the Attorney General's time to object . . was tolled by the Court orders, actually

the Court orders themselves were issued after the expiration of the 60 day period, were they not?

MR. WOLLENBERG: We --

QUESTION: Can you answer that yes or no?

MR. WOLLENBERG: I can answer that it is our position that they were not entered after the expiration of the 60 day period. It was the finding of the District Court in the District of Columbia that they were not entered after the expiration period.

I'm speaking now of the preliminary order that was entered by the District Court that extended the Attorney General's power.

QUESTION: But isn't it a fact that that order itself was entered after the expiration of 60 days following the submission of South Carolina's plan?

MR. WOLLENBERG: Your Honor, it is our position that it was not entered after the 60 days effectively began to run. You will remember that this Court held in the Georgia case that the Attorney General's regulations extending the beginning of the 60 day period until he had complete information on the submission before him was a valid exercise of authority on his part. And it was our contention in Harper which was agreed to by the District Court, that the Attorney General's time for acting had been extended by him in connection with requesting additional submissions up to June of 1972, so that

when we went before the District Court on August 10, 1972, the 60 days had not expired.

We believe, if your Honor please, that that whole 60 day question is immaterial to the issues that are before this Court. But I'm --

QUESTION: Well, what if you're wrong on that? If you say it's immaterial, you must mean that even if you're wrong on that, and the Attorney General's 60 day period had expired before there was ever any Court order, you can nonetheless prevail?

Is that right?

MR. WOLLENBERG: Precisely, your Honor.

Now, the -- I was saying why the Attorney General's action was an error, and I had mentioned that it was held to be an error in Harper v. Levi, and the United States has now conceded in the Court below and in this case, it was an error.

I also add that this Court's controlling subsequent decisions, in Connor v. Waller and most recently , United States against Board of Supervisors of Warren County, establish, we think, that if anything the deferral should have gone in the other direction. In other words, the District Court in South Carolina should not have been passing on the constitutional issue until the Attorney General had passed on the Section 5 of the Voting Rights issue.

Now the Court below never reached this question. The Court below found that the Attorney General's ruling on Act 1205 was improperly reviewed in Harper against Levi. And on that premise, it treated the Attorney General's definitive objection to the statute as a nullity.

I think the parties here, including the United States which is here as amicus, are in agreement that the central issue here is whether the Attorney General's initial determination --

QUESTION: May I interrupt you just for a second?

Does the full text of the letter of June 30, 1972, appear in the papers before us anywhere?

I know it's referred to as Exhibit 5 to the complaint, but that wasn't reprinted.

MR. WOLLENBERG: It appears at page Appendix 47, Justice Stevens.

QUESTION: Thank you very much.

MR. WOLLENBERG: As I was indicating, the central issue here is reviewability. If the limited reviewability that we're talking about here, which is not reviewability on the merits, it is not review of whether the Attorney General should have found the Act objectionable or not, but only review of his legal statement that he was compelled not to enter his own objection.

If it was reviewable as we contend, as the United

States agree, and as Harper v. Levi squarely held, then we submit the sole basis of the decision below is destroyed.

And I turn now to the limited reviewability issue. Mr. Justice Rehnquist, with reference to your earlier question, the reason that we regard the 60 days as immaterial to the present case is that it is established law, we think, under the Administrative Procedure Act, under this Court's decision in Dunlop, that -- and the International Harvester case which we cited in our brief, that where there is judicial review, the statutory period, which is created and imposed on an administrative agency for its action is not governing the Court in engaging in judicial review.

The present case is a perfect example of why that has to be necessary. If the Attorney General remains silent until 11:00 o'clock on the night of the 60th day, there would hardly be time for a judicial review. If there is judicial review, then the courts have uniformly held that the power exists within a reasonable time after the agency has committed the action complained of.

Now, in this case, there can be no question of
121 laches. Obviously, the case was brought very quickly, either just before the expiration of the 60 days, Mr. Justice Rehnquist, or immediately after it, depending on how you calculate the 60 days. In either case, it was brought in a timely fashion.

The reviewability, we think, is essentially undebatable. The Administrative Procedures Act was designed to fill the interstices in statutes which created review but which for some reason did not create review complete enough to deal with a critical situation.

And as the Court is well aware, there are three well established exceptions stated in the Administrative Procedures Act, but none of them applies here. One of them is where Congress in so many words has precluded judicial review. Congress has simply said, of this particular action, there will be no judicial review. Congress knows exactly how to do that, and that Congress remembered how to do it in this case is established by the fact that it used that kind of language in Section 4 but did not use it in Section 5.

A second major area of exception is where the matter is committed to agency discretion. The action here of the Attorney General is not in any sense committed to agency discretion. The Attorney General's own regulations recognizes that he acts in a quasi-judicial capacity, that he is in effect acting to pass on a submission of a covered state in lieu, if he finds affirmatively, in lieu of the Three-Judge Court. His own regulations state that he will apply the same standards that the Court does, and this court reviewed his activities in that regard in the Georgia

case, and made clear its view that the Attorney General does not act on a discretionary basis.

Finally, there is the recognition even by the appellees that it is well settled -- I'm referring to their note 68 in their brief at pages 37 and 38 -- where appellees say, the Courts may determine whether an official is acting beyond the scope of his statutory authority, even in those cases where they cannot review the manner in which he exercises his authority.

And that, we suggest, is what occurred here in substance.

So in sum, then, on the reviewability question, we submit that it is clear that Congress did not preclude judicial review. It is clear that the action involved was not committed to agency discretion. And finally, we think it is clear that there is not an adequate remedy at law.

Now, appellees --

QUESTION: Mr. Wollenberg, may I give you a hypothetical that's been troubling me as I think about this case?

Supposing the Attorney General after 30 days had run wrote a letter saying, my office is terribly busy, these are awfully complicated matters; I don't have a big enough staff to handle it intelligently. Therefore, I will not issue a letter. Could that be reviewed?

MR. WOLLENBERG: I believe, Mr. Justice Stevens, that that issue was considered in the Evers case, that a District Court held that a failure to object on the grounds that he wasn't ready to decide whether to object was not a valid ground; that it was reviewable; that this Court never -- as a Court, never reached the issue because the appeal was dismissed for failure to perfect in time, although I believe Mr. Justice Harlan --

QUESTION: If that kind of a disposition would be reviewable, wouldn't that be a way in which he could get additional time, to make such an announcement, have somebody bring a suit saying you shouldn't do it on that basis? Then he'd have all the time in the world to study the matter, wouldn't he?

MR. WOLLENBERG: Well, if your Honor please, I think this Court upholding in Georgia the Attorney General extending his own time beyond the 60 days literally stated in the statute in order to get the full information he needs already is something of an open Sesame for him to extend a little.

QUESTION: I see.

MR. WOLLENBERG: But I think basically if you'll consider the purpose of this provision for Attorney General approval, it's provision for approval of routine statutes that don't raise serious questions, the State always has the

opportunity to go to the Three-Judge District Court in the District of Columbia. So that if the Attorney General for some reason is not prepared to act promptly, the state always has the alternative remedy. And there's no suggestion, I think, that the Attorney General ever has or ever would abuse that point.

QUESTION: The Attorney General's always free to simply say on the 60th day, I object, because your plan doesn't quite convince me -- ask for more information.

MR. WOLLENBERG: I believe that to be true, your Honor. I think that the particular formulation in Evers suggested that he wasn't making the decision one way or the other on the merits which the District Courts in Evers thought he should make.

I was addressing the adequacy of the remedy at law, or the adequacy of other remedies. The appellees, and to some degree, the Court below, have made a great deal of the notion that really not having the Attorney General perform his function really doesn't damage anyone, because Section 5 has reserved the rights of plaintiffs to go to Three-Judge District Courts in the states, and pursue the matter under the Fifteenth Amendment, so the fact that the Attorney General has cleared the statute really doesn't hurt anyone. And these otherremedies are accurate.

The short answer to that we believe to be given

rather eloquently in the amicus brief for the United States in this Court which we respectfully adopt in that respect.

And I would say here only that this kind of a defense or this kind of an argument flies in the face of the whole philosophy of the Voting Rights Act, which was adopted by Congress, and upheld by this Court in South Carolina v. Katzenbach.

The Congress of the United States did not think that the Fifteenth Amendment remedy that existed before that and still exists and were preserved in the Act were adequate. That's why the Voting Rights Act. The Voting Rights Act placed the burden on covered states; required them to show that their new proposed legislation would not be discriminatory in purpose or effect; and gave them an opportunity of getting their clearance either in a District of Columbia court or with the Attorney General.

If they can get it with the Attorney General without his performing his duty, then we submit that that destroys, basically renders nugatory, the whole essential structure of the Voting Rights Act.

QUESTION: Would the plaintiffs in this case have been limited in venue to the District Court of the District of Columbia, or could they have brought suit anywhere?

MR. WOLLENBERG: The plaintiffs in Harper?

QUESTION: In Harper, yes.

MR. WOLLENBERG: I think it is arguable, and persuasively so on the basis of legislative history, as the government has indicated in its brief amicus to this Court, that under the language of Section 14(b) of the Administrative Procedure -- excuse me, of the Voting Rights Act, that any challenge of this sort would have had to have been brought in the District of Columbia.

QUESTION: But of course you're -- the Administrative Procedure Act allows you to sue the Attorney General anywhere, that either a plaintiff -- plaintiff resides.

MR. WOLLENBERG: Yes, and I am not saying it is a closed question. I'm saying that the Voting Rights Act, Section 14(b), in indicating a venue directive for the District of Columbia, might have been deeming to be controlling, had a suit been brought against the Attorney General elsewhere despite the Administrative Procedure Act. And it might have been argued, under kind of arguments that prevails to some degree in the recent decision of this Court, in Sanders v. Califano, it might have been argued, the Administrative Procedure Act doesn't creat substantive jurisdiction and that the substantive jurisdictions that ordinarily would prevail had been limited by 14(b) of the Voting Rights Act.

I think it's at least a grave question as to whether it could have been brought anywhere else, and it seems to

me quite clear that it was highly appropriate to bring it here.

QUESTION: Well, it certainly would be unusual if it could be brought somehwere else, wouldn't it? If a State is limited to the District of Columbia, and yet the plaintiffs in Harper v. Levi in a review of the Attorney General's action under the Administrative Procedure Act could sue in any venue in the country.

MR. WOLLENBERG: But your Honor, the symmetry argument that has been made in the Court below and the appellees I think doesn't fit this statutory scheme. It is not a symmetrical statute. The complainants aren't passing laws; the states are. The covered states have been found to be in a special category which requires them to go through procedures before they can create a valid law. And they're given choices of procedures. They can go directly to the District Court in the District of Columbia, or they can come to the Attorney General.

And in view of the fact that Section 5 explicitly preserves the right of plaintiffs to bring Three-Judge District Court actions, which would be in the state where you get jurisdiction of the state, and indeed, the very case that you know have before you is such a case. The South Carolina having elected to treat Harper v. Levi as a nullity, and having continued to enforce the statute which we say has not been

cleared, the plaintiffs followed the only remedy available to them, which was to bring a suit in a Three Judge District Court in South Carolina to enjoin it.

QUESTION: I take it you say that a state law would not be in effect during this review period?

MR. WOLLENBERG: Well, your Honor, I think that the question of whether the law would go into effect in the review period might depend on the procedures along the way.

I can conceive --

QUESTION: In any event, any court -- I take it, you say, could extend the time of the Attorney General. And any time they extended the time, it just hasn't expired, and the law hasn't gone into effect.

MR. WOLLENBERG: Well, I think, your Honor, that a cour t with jurisdiction, and assuming of course that the action is brought properly, because I cannot conceived that someone could come along years later and attempt to stop enforcement, but any court which had jurisdiction and which issued an order extending the Attorney General's time for objection I think would properly toll the enforceability of the statute. There was no effort made in the Harper case to stop the pending election. The statute has in fact been enforced by the South Carolina -- first in the 1972 Senate election, and then in the 1976 Senate election.

QUESTION: If the Attorney General says, I don't want

any more time, I'm not going to object, may a court with jurisdiction, as you say, extend his time at the suit of some private party?

MR. WOLLENBERG: We think, your Honor, that if there is judicial review, it is clear that there has to be a power in the Court to grant effective relief.

QUESTION: So your answer is yes, that the state law would not be in effect throughout this review period on appeal maybe to this court?

MR. WOLLENBERG: Well, I think your Honor that I hedged the answer before by saying that it would depend on the procedure. If no stay of the Act was asked, and if the Act had gone into effect before the Court issued the order extending the time for objection, then I assume that the Act would stay in effect until litigation was resolved, or until the stay order was issued.

If the objection was tolled while the 60 day period had not been completed, as we contend was the case here, then we would agree that properly the Act should not have been given effect during that period.

QUESTION: If the Attorney -- if the State chooses to go to the Three-Judge Court in the District of Columbia, what about intervention by private parties?

MR. WOLLENBERG: I assume that interested private parties --

QUESTION: Well, do you know, or has there been law on it or not?

MR. WOLLENBERG: Yes, I'm informed there has been intervention of private parties permitted, for example, in the Richmond case.

QUESTION: But when the State sues, the State just -- who's the defendant in that case?

MR. WOLLENBERG: The United States is the defendant.

QUESTION: Not the Attorney General; just the United States?

MR. WOLLENBERG: Right.

In other words, the Attorney General's role is the special role created by the statute, and what we think were intended to be routine and easy cases, where the state is saved the difficulty and burden of going through a whole court proceeding.

QUESTION: Now, your standard -- your interest in the case, I take it, is that you think the standards of the Voting Rights Act are considerably different than the constitutional standards?

MR. WOLLENBERG: We think that there are certain clear differences. Perhaps the most significant difference is the burden of proof. The State is required to come forward and to establish that its law will not be discriminatory in purpose or effect. In a Fifteenth Amendmentcase the

plaintiffs have the burden of coming forward and establishing a violation of at least effect and possibly also purpose. And that difference in burden of proof is a very, very major difference.

QUESTION: Well, there's a difference in the substantive standard, also, isn't there?

MR. WOLLENBERG: I beg your pardon.

QUESTION: Isn't there a difference also in the substantive standard? Doesn't the Beer's case indicate that?

MR. WOLLENBERG: I think that it does your Honor, yes. I think that the Voting Rights Act as part of constitutional power --

QUESTION: It's more difficult -- in the matter, who has the burden of proof. The standard of the Voting Rights Act has a more stringent standard than that of either the Fourteenth or Fifteenth Amendment, isn't it?

MR. WOLLENBERG: I believe that it is, and I believe that ithas -- that in upholding that Act, that this Court has clearly recognized that Congress had power to implement the Fifteenth Amendment by going somewhat beyond that.

I should like, if I may, to reserve the rest of my time for reply.

MR. CHIEF JUSTICE BURGER: Mr. Turner.

ORAL ARGUMENT OF JAMES P. TURNER, ESQ.,

ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

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

We believe that the petitioners should prevail in this case because the Attorney General's objection to Act 1205 reapportioning the South Carolina State Senate was a valid objection under the Voting Rights Act.

Although the Attorney General initially determined himself to be without authority to express his independent view that this act deluded minority voting rights because of the Three-Judge rapportionment court in the Twiggs case, the matter was promptly brought to the attention of the District Court for the District of Columbia which ordered the Attorney General to use his discretion, and he did so.

Subsequent decisions of this Court confirm that the District of Columbia courts in Harper were right, and that the Attorney General's deferral policy was wrong.

The fundamental question here then is whether the Attorney General's mistake of law was properly and legally corrected by the Harper Court. If so, the objection stands and Act 1205 may not be implemented legally under the Act; if not, the Court below was right, and its judgment should be affirmed.

In the limited time available, I would like to address

the following issues: first, whether the Voting Rights Act contemplates an independent review by the Attorney General of submitted legislative changes; secondly, whether the Voting Rights Act properly construed permits the traditional remedy in the nature of mandamus to compel the exercise of administrative discretion; and third, whether relief such as that granted by the Harper Court would be disruptive to the administration of the Act.

The independent review is contemplated by the Act, we argue, because it is inherent in the statutory scheme which Congress has provided us. The Attorney General is a substitute or surrogate for a declaratory judgment proceeding. It's a quick 60 day review, but it's a review on the merits. Whether the change is discriminatory is the issue for the Attorney General.

Certainly Congress believed, and had the right to believe, that the Attorney General would do some reviewing, and not merely look at it or decide that he wasn't going to review anything. He was, after all, given the job to be a surrogate for the District Court, for the District Court of -- for the District of Columbia.

QUESTION: What do you have to say, Mr. Turner, about the argument advanced by your friends on the other side of the table, at page 27 of their brief, that one of your predecessors testified before the Congress -- I assume

the Judiciary Committee -- asking for an amendment, first, to give more time to the Attorney General under Section 5, and second, to provide for judicial review?

MR. TURNER: That --

QUESTION: The Congress declined that invitation.

MR. TURNER: That -- there are two comments there, Mr. Chief Justice. First, the proposal was for review on the merits. Here we are talking about a much more limited kind of review. So I don't think the two proposals are parallel.

And secondly, Congress rejected it, so it was not passed, that the Attorney General's decision on the merits should be reviewed. And that, I again stress, is not what we're talking about in this case. We're talking about very limited mandamus type review in the District Court for the District of Columbia.

QUESTION: But if I understand it, the essence of your argument is that it's reviewable because it was an erroneous determination. Does that not have something to do with the merits?

MR. TURNER: It has in this sense, your Honor, that as we advised this Court in the Georgia litigation, if you recall that, and footnote six in that opinion sets forth how the Attorney General and the Courts were trying to accomodate at the intersection of reapportionment

litigation and Section 5 litigation. And one of the policies that we expressed at that time was one of deferral. In our brief -- in our brief in that case, we indicated that that policy of deferral was under attack from Harper litigation.

Since then, the Harper litigation has decided that that policy was wrong, and we were ordered to stop it. And this Court confirmed that judgment in Connor v. Waller, and we now accept it.

We've always thought this multi-member system was delusive and abridged minority voting rights. We did not express that opinion solely out of deference to the Three-Judge Court in the Twiggs litigation. That deference -- it turned out we were not only wrong, we were dead wrong. The deference should have gone the other way, and in Waller this Court said the District Courts, in that situation, should defer to the Attorney General until his determination has been made.

So that it's a basic mistake of law to defer, I think, Mr. Justice, that we're talking about here; and not review of particular decisions made by the Attorney General.

The record here indicates that this is the only case in which the Attorney General followed this policy of deferral. On page 31 of the Appendix, deposition of the chief of the voting section of the Civil Rights Division, established that this Harper case, or this South Carolina Act

1205, is the only one in which that deferral policy, a very short-lived policy, was followed. So the case is one of a kind.

The Voting Rights Act --

QUESTION: Well, I wonder why we granted certiorari.

MR. TURNER: I think it important -- and I'm not in a position to --

QUESTION: No.

MR. TURNER: -- know why you accepted the appeal -- but I think it's important to establish whether or not there is this limited kind of mandamus or arbitrary and capricious review potential over the Attorney General's administration of this Act.

The Harper suit was based on 28 U.S.C. 1361; that's recited in the complaint and recited in the Court of Appeals' opinion. That very unequivocally gives the District Courts jurisdiction to compel the performance of official duties owed to the plaintiffs.

This kind of action has been described and recognized in this Court's opinions as "a familiar rule that a Court may exercise its equity powers or equivalent mandamus powers to comple courts, boards or officers to act in a matter with respect to which they may have jurisdiction or authority", although, to address your concern, Mr. Chief Justice, the Court will not assume control or guide the exercise of that

authority. That's out of Virginian Railway Co. and 300 U.S.

This is explicitly -- this kind of review is explicitly recognized in the Administrative Procedures Act, Section 706(1), which says the reviewing court shall compel agency action unlawfully withheld.

And courts require, as you know, convincing evidence before that kind of review is withheld.

So unless the Voting Rights Act precludes such relief, this rule ought to control this case, in our view. And to address the venue question, I think 14(b) suggests strongly that this District of Columbia Court was the only one that had proper venue.

But we have found nothing either in the terms of the Act or its purpose, or the legislative history, that indicates a view that Congress intended to foreclose this kind of limited review. It's true that a great amount of discretion is vested in the Attorney General. But the distinction is that mandamus compels him to exercise it, and doesn't tell him how.

QUESTION: Do you think, Mr. Turner, that if the states submit a plan to the Attorney General, he rejects it, objects to it in 60 days, then the state doesn't bring any suit in the District Court, it just kind of accepts the Attorney General's rejection, that private plaintiffs in the State could bring an action to review the Attorney General's

objection under the Administrative Procedures Act?

MR. TURNER: I know of no precise authority or precedent on that, Mr. Justice. The nearest there has been was an attempt by New York legislators to come to Washington and seek relief from an objection that the Attorney General had entered. And the District Court for the District of Columbia in that case indicated that they had no standing to seek such relief.

That's as close as the hypothetically posed has been addressed.

QUESTION: Mr. Turner, does the statute require the Attorney General to give a statement of reasons for either an objection or a non-objection? I know he does as a matter of policy.

MR. TURNER: He does as a matter of policy. He has announced that policy in the guidelines. The statute does not require it.

QUESTION: If he should change that policy, would you say that the existence of review would compel him to adopt the policy?

MR. TURNER: I think it probably would. I'm thinking of the Bachowski type litigation where -- and certainly under the Administrative Procedures -- or, excuse me, the Freedom of Information Act, this kind of information underlying administrative rulings are available to the public

regardless of whether the attorney general announced or didn't announce this policy.

QUESTION: If in his letter that he did write here, instead of saying he was constrained to follow the Three-Judge Court, if instead of that he had said, I think as a matter of discretion it's sound policy to do the same thing the District Court did. Would that have been reviewable?

MR. TURNER: If that was his independent judgment. That's what we're talking about here. Because we have --

QUESTION: Your position depended on a reading of that letter that he felt legally bound to follow the --

MR. TURNER: Well -- and that's correct. And if you recall, Act 1205 was preceded by Act 932.

QUESTION: Right.

MR. TURNER: Act 932 has the same features as Act 1205. Act 932, the Attorney General objected to because there was no intervening court decision. When there was a court decision, and we had gone down to South Carolina at the court's invitation and told them of our view, and told them of the basis for theobjection, and the courtrejected our views, and said that there wasn't any Fifteenth Amendment violation here. So we were right at the intersection that I was trying to describe to the Chief Justice, where we had to decide whether to follow the court or to try to overrule the court. And we decided to try to follow it. Later, under this

court's rules, the precedents and -- whose to defer to whom -- has been made quite clear. And we have no interest in pursuing that further.

QUESTION: May I repeat the question I thought Mr. Justice Stevens was asking?

Let's assume that the Attorney General had written a letter within the 60 day period in which in substance he said, I think the reapportionment plan fully comports with the law. You have my authority to proceed with it. Is it your contention that there would still be review by these parties under the APA?

MR. TURNER: No, sir.

QUESTION: Your answer would be the same if the Attorney General did nothing during the 60 days?

MR. TURNER: That's -- if he did nothing within the 60 days, it depends why he did nothing.

QUESTION: Well, suppose he just said nothing, he just let the 60 days go by --

MR. TURNER: Well --

QUESTION: -- like an ordinary statute of limitations.

MR. TURNER: The whole administrative practice under this is to say something. So it's very hard for me to cope with a question that says the Attorney General stands mute. We have a whole section that analyzes each one of these things as they come in and reaches a determination on it.

I suppose --

QUESTION: But it could happen?

MR. TURNER: -- if it fell in somebody's wastebasket on the first day that the submission came in and was never picked up, and the 60 days expired, it might be a more understandable hypothetical for us. In that situation, I think mandamus would lie because the Attorney General had not done the kind of independent review that Congress envisioned in the statute. And I hope that that comes closer.

QUESTION: Let's take another hypothetical. Suppose the Attorney General had ruled in favor of Harper plaintiffs originally within the 60 day period. I agree that the State of South Carolina would have had no remedy other than as described by the Act to come before a Three Judge Court in the District. Let's assume that, say a State Senator from South Carolina who would lose his seat decided that the Attorney General had made a gross error of law. Would he have the same right that Mr. Harper had to institute an action under the Administrative Procedure Act, challenging the Attorney General's decision on a legal ground?

MR. TURNER: The -- it seems to me that if the objection was made for a very fundamentally wrong reason, I mean, like we have in this case, where the Attorney General mistakenly thought himself without authority to rule, if

somehow a basic mistake such as that resulted in objection, and the person injured by the Attorney General's failure to do his duty, I think, would have the same kind of limited restricted review that we're talking about in this case.

QUESTION: Would that right be limited by any period of limitation? Could it have been brought a year later?

390 MR. TURNER: I think the normal rule of laches has to apply here, and I can't probe the outer limits of that, because this was filed within 30 days of even the day the 60 days expired, if it expired.

QUESTION: Mr. Turner, can I just ask one more question because Mr. Justice Powell followed up on a thought that I had. You answered by saying that if the letter by the Attorney General said, I am not going to object because I find that the plan is lawful in all respects, that would not be reviewable, I understood you to say. What if he made a clear error of law, and he was wrong. Somebody came in and said, legally your answer was just dead wrong, as it was here. Why would that be different?

MR. TURNER: It's different because of the distinction we see in the cases dealing with mandamus, where they say the issue is whether the discretion has been exercised --

QUESTION: But the question of whether it's lawful or unlawful isn't a question of discretion, is it?

MR. TURNER: No, and that's what we're saying.

This is a threshold kind of thing. The Attorney General said, I have no discretion to review this, in effect. Because of --

QUESTION: Well, he says, I have discretion to review it; I've reviewed it, and I find that it's lawful.

MR. TURNER: Then I think that's the discretion that Congress gave him, and it ought to stand.

QUESTION: Even though he's made a plainly erroneous ruling of law.

MR. TURNER: If that was shown, I still think in that case Congress has presumed that the Attorney General is going to exercise his discretion, he will exercise it correctly, and in those few cases where he doesn't exercise it correctly, the constitutional litigation is the proper remedy.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Turner.

Mr. Bell, we'll at least let you tell us what you're going to tell us tomorrow morning.

ORAL ARGUMENT OF RANDALL T. BELL, ESQ.,

ON BEHALF OF THE APPELLEES.

MR. BELL: It looks as though I'll haveto save most of my argument until then, Mr. Chief Justice. And if it please the Court, I think that perhaps in the short time I have allotted -- I'm sorry, perhaps I misunderstood you, do you wish me to proceed for five minutes?

MR. CHIEF JUSTICE BURGER: Oh, yes, yes.

MR. BELL: Perhaps that time could be most profitably used in answering some questions that have been posed while they're fresh on the minds of the Court.

We find it very puzzling that the -- United States taking some of the positions it has taken here this afternoon, because the opposite positions are being taken in other litigation at this time, or have been taken since the Harper two case was decided.

For example, the question of whether a mistake of law is reviewable was presented in a case called Harris v. the United States here in the District of Columbia District Court; that case is reported in 415 Federal Supplement. And the Attorney General in that case, which is a post-Waller case, took exactly the opposite position. Several questions were raised as to whether he had committed fundamental errors of law. Among the allegations were that he had addressed himself to the question of the one-person-one-vote standard in a Section 5 review. It was claimed that Section 5 does not authorize him to get into the one-person-one-vote standard of the Fourteenth Amendment --

QUESTION: Does that involve the threshold question of the reviewability of his failure to object?

MR. BELL: It involved the question of his withdrawing an objection. And the basic claim being made by the plaintiffs, Mr. Justice Stewart, was that he'd withdrawn

an objection with no new evidence being placed before him.

QUESTION: Well, was there any question as to whether that was reviewable? His withdrawn --

MR. BELL: Yes, that was the threshhold question which was presented. The Attorney General said, no, this is not reviewable; the position we're taking in this case. The court found against him in part, citing Harper v. Levi, and for him in part. But we see no distinction between the questions raised in Harris, and the kind of question that was raised in Harper v. Levi. We do see an inconsistency of position.

Now, I also understood Mr. Turner to say that if an objection is fundamentally wrong, an objection, the opposite case from Harper v. Levi where the Attorney General said, no objection, but if an objection is fundamentally wrong, I understood him to say that, yes, in that case, private parties could seek review of that.

Now, of course, the same judge that ruled against the Attorney General on that issue in Harper v. Levi found the other way when that case was presented in Griffith.

But beyond that, in a case called Robinson v. Pottinger, we find that the Attorney General took the opposite position on that as well. There, some officials in Montgomery, Alabama were again raising some of these questions. He said in that case, we can't even be made parties to this suit; that's how immune we are from court

review; much less getting into these questions.

MR. CHIEF JUSTICE BURGER: We'll resume there at 10:00 o'clock tomorrow morning.

[Whereupon, at 3:00 o'clock, p.m. , the Court was recessed, to reconvene at 10:00 o'clock, a.m., Tuesday, April 19, 1977.]