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 was resumed for argument at 10:11 o'clock, a.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:

[Same as heretofore noted.]

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will resume argument in 1583. Mr. Bell.

ORAL ARGUMENT OF RANDALL T. BELL, ESQ.,

ON BEHALF OF THE APPELLEES -- Resumed

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

We are astonished that anyone could come into this Court and suggest, as we understood counsel yesterday to suggest, first, that South Carolina is deliberately evading the provisions of Section 5 of the Voting Rights Act in this case, and second, that the Attorney General, in 1972, did not look at the submission of our Senate plan.

We believe that both of these suggestions are flatly contradicted by the record in this case. It's been said that after the objection was entered pursuant to court order Harper v. Levi in 1973, that South Carolina has continued to enforce its plan, rather than coming up with a new reapportionment, or submitting to the District Court of the District of Columbia an action seeking a declaratory judgment that the plan is enforceable.

Now, of course, from 1973 until the commencement of this suit, the judgment of that District Court was in litigation. It was appealed by the United States to the Court of Appeals. Judge Greene, in her District Court

order, specifically said that the order was without prejudice to any right of appeal on the issue, and so we fail to see how that constitutes bad faith or evasion on our part.

We feel also that the record of South Carolina's compliance with the Voting Rights Act since its inception should dispel the notion that there's any bad faith or evasion on our part in this case.

We promptly submitted this plan. We mailed it off three days after the Governor signed it into law, which is, I think, a very prompt compliance in 1972. South Carolina has always complied with the Voting Rights Act. We're quite proud that we are the only covered jurisdiction, and this Court has judicially noticed, in Perkins v. Matthews, that we're the only covered jurisdiction that has rigorously and faithfully complied with the Section 5 pre-clearance provision since the beginning. We did so in this case. The Attorney General determined that our submission was complete, which we think was his determination to make. We think that this Court clearly said that in Georgia v. United States. And so we fail to see where the evasion is on our part, where is our bad faith.

In fact, we feel that the record indicates the opposite.

Now, the record also shows that the Attorney General

did look at our submission. All of the testimony in the record, all of the evidence in the record, points in that direction. There's nothing to indicate that agency action was withheld, which was repeatedly suggested yesterday.

Quite obviously, agency action was not withheld. The Attorney General received the submission; he reviewed the submission; he reviewed the plan; and he acted.

It's because he acted, and not because he failed to act, that we have this lawsuit. The plaintiffs disagree with that action, but it simply is not plausible to claim that he did not look at the plan, or that he totally withheld agency action, or that he didn't review it at all. So that's not the case we're arguing here.

It's a case in which the Attorney General did receive the submission. If there's any question about that, I think it's dispelled by looking at the memorandum he filed with the District Court a year later, in which he said, we have again reviewed this submission, and we find that our decision there was sound. That's the same letter in which he went on to say that the plan had a substantial racial effect. But he starts that memorandum by saying, we have reviewed all of this again. That indicates that he had reviewed it once before. And he said we reached the same conclusion, that that conclusion was sound.

QUESTION: That letter is an appendix here somewhere,

isn't it?

MR. BELL: Yes.

QUESTION: I remember seeing it.

MR. BELL: Mr. Justice Stewart, you find that letter is on page -- it's in the Appendix starting at page 51 -- I'm sorry, that's the objection letter. The memorandum which I'm referring to is reprinted in the red brief, the red brief, in the appendix there. You'll find that begins on page 4A of that Appendix. And the language I'm referring to is in the first paragraph of that memorandum. He says there, we have again examined our files to determine whether the conclusion reached and the reasons for that decision are sound. We conclude again that they were.

So we think -- we think that the record, the facts in this case, simply do not support most of the arguments that were being made yesterday in that regard.

It seems to me that to adopt the position which was urged before the Court yesterday is quite clearly going to create significant problems. If the Court decides that review under the Administrative Procedures Act is permitted, I think yesterday's argument gave us a good foreshadowing of what's going to happen. We're going to have a host of collateral issues being raised in lawsuits on this matter. All of these will have to be resolved in future litigation. I don't think those issues are ripe for adjudication in this

Court today. They will have to be resolved in collateral suits in the future. Some of the issues that were raised in questioning yesterday are very difficult issues.

Who can seek review? Private parties? The submitting authority? Both? Can private parties seek review of objections as well as non-objections? And I think the difficulty of that question is shown by the fact that the private parties and the United States disagreed on it. Mr. Wollenberg said private parties cannot; Mr. Turner said they can if there is some fundamental error that led to the objection. That's a difficult question which would have to be resolved.

QUESTION: Suppose the Attorney General does not object, or suppose he specifically says he is not going to object. And he says he's carefully reviewed the plan, and the State statute goes into effect. May a party -- may a private party then bring an independent suit to enjoin the operation of the statute, not on constitutional grounds, but on the grounds that it does not comply with Section 5?

MR. BELL: I think the Act itself does not give a clear answer to that. Obviously the Act says --

QUESTION: Have there been some decisions -- have there been some attempts at private suits to enjoin --

MR. BELL: I think the problem, and I think it's a significant problem, there are certainly reasons why private

parties should be allowed in certain circumstances to litigate that issue. I think the way that has been handled so far, and it seems to be something that is acceptable to Congress, because Congress has not changed the Act --

QUESTION: Well, it's really a question of whether the --

MR. BELL: -- is to have a liberal rule of intervention. Now, private parties have intervened --

QUESTION: Well, I know, but there's no place to intervene, if the Attorney General doesn't enter his objection

MR. BELL: You're quite right, because you're speaking of the case in which he says, I enter no objection.

QUESTION: I had thought that -- I had thought the rule -- I had just assumed, I suppose, the rule in the statute was that private suits were not permitted, that if -- that after a statute went into effect, a private party was remitted to his constitutional remedies.

MR. BELL: Yes, in the case that you're speaking of, Mr. Justice White, I --

QUESTION: Well, are there some decisions that say that once --

MR. BELL: Yes, I think that the Allen -- the Allen decision of this Court says precisely that. It says once the State has obtained successful pre-clearance, the only

remedy parties have is to bring the subsequent contest on the merits. There is no --

QUESTION: Yeah, but on what merits?

MR. BELL: On the merits of the plan. Thatis --

QUESTION: Well, I know; you mean on the constitutional grounds?

MR. BELL: Yes, on the constitutional merits.

QUESTION: Assume the statutory standard is more stringent than the constitutional standard: my question really asks, may a private part bring a private suit to enforce the statutory standard?

MR. BELL: I think Congress has indicated that the constitutional merits are then to be reached; that the purposes of Section 5 have been accomplished.

QUESTION: Well, they should then be reached, but is there some authority for saying that Congress did not intend a private suit such as I described?

MR. BELL: I think the language in the Allen case is the best indication of that.

QUESTION: Well, isn't that some argument for suggesting -- isn't that an argument against allowing review?

MR. BELL: I think quite clearly it is.

QUESTION: Well, I would have supposed you would have made that argument.

MR. BELL: Well, if I haven't, I hope I'm making it

now.

QUESTION: I mean if Congress didn't intend -- intended to bar private parties from bringing independent suits to enjoin on the basis of the statutory standard, it would seem odd that it allowed-- that it would allow review at the behest of purely private parties.

MR. BELL: Yes, I think if we look at the scheme of Section 5, and see how it relates to the traditional constitutional suit, we begin to get some insight into that question.

Now, the reason Section 5 was enacted, and I think this is quite clear, is because traditional suits were considered not to be an adequate remedy. But why weren't they considered to be an adequate remedy? There was a very specific problem that Congress was addressing. It was a practice which they had seen occur, and in some states in the South, on a massive basis, of undercutting successful Fifteenth Amendment litigation. Private parties would have a voting qualification stricken as unconstitutional, they would win their case, and the State would react by changing the qualification. So that there had to be new litigation.

Now pre-clearance and the suspension effect of Section 5 has taken care of that problem, so that the subsequent contest on the merits, the constitutional contest, now is effective.

QUESTION: Well, on the other hand, if Congress has provided a statutory standard which new voting procedures must conform to, what is your argument -- why would you argue thatCongress didn't intend a private party to be able to sue on the basis of the statute?

MR. BELL: I think --

QUESTION: The statute doesn't just say so in so many words, does it?

MR. BELL: I think one of my difficulties with your question, Justice White, is, I don't see any decision of this Court that has yet resolved that question. It's clear that it is a question that has been on your minds. It seems to me that the Court has not yet reached a resolution of that question. I suppose that had the Court reached --

QUESTION: Well, how about -- have suits been brought in District Court? Have they been dismissed or have they been entertained?

MR. BELL: To my knowledge, no suit has been -- a substantive Section 5 suit has not been brought in a local District Court when the Attorney General has not objected.

Now, another reason it's hard to cite authority is because this case is one of the first cases in which someone challenged the Attorney General's non-objection by bringing an action other than the subsequent contest on the merits provided in Section 5 which we think is the remedy

Congress intended to be available. And we think it is an adequate remedy today, because there will be no undercutting of judgments, which was the problem that Section 5 was addressed to in the past.

I think at the time Congress extended the Act in '75, there was no decision of this Court which would indicate that the substantive standard of Section 5 is clearly different from the Fifteenth Amendment standard. Some members of the Court feel that the standard is the same, the substantive standard both under the Fifteenth Amendment and under Section 5. And so I don't think Congress was dealing with the situation in which this Court had announced a clear rule that substantive Section 5 coverage was different from substantive constitutional coverage, so it would have to deal with that issue by amending Section 5 or leaving Section 5 the way it is.

It seems to me that that was the issue in the Beer case, which came after the '75 extension. And as I say, it seems to me from my reading of that case that the Court has not made up its mind on the issue yet. And certainly, it's a difficult question.

I think our view would be that Congress has resolved that question by saying, here is the subsequent suit. Why would Congress take care to preserve that suit if it was not because it foresaw exactly the factual situation we have here:

private parties disagreeing with a non-objection by the Attorney General? It seems to me that's why Congress was careful to preserve that subsequent contest on the merits.

QUESTION: Well, when you say substantive contest on the merits, you're talking about the constitutional -- the suit challenging --

MR. BELL: The subsequent constitutional suit, yes.

QUESTION: Yeah, but that is not as necessarily as broad a remedy as -- in other words, the plaintiffs might lose that suit, and still the Attorney General's objection be sustained in a suit brought by the State challenging it in a Three-Judge District Court here in the District of Columbia, might it not?

MR. BELL: That's true. If the substantive Section 5 standard is an effect-only standard, whereas the constitutional requirement is either a purpose or a purpose and effect standard, which language in the decisions of this Court would indicate, then there would be a difference.

It seems to me, though, that the question of purpose and effect is often one in which no bright line can be drawn, and that the Attorney General, if that standard is different, clearly could object, and if he found a clear discriminatory effect, I think if that standard is different, that that would certainly be a possibility for himto object.

Now, I don't think that's the situation we had in this

case in 1972. There has been some question as to why he deferred, or what was he doing when he deferred in the South Carolina case. Well, it seems to me we have to look at the situation in 1972. I think the reasons are intensely factual in this case. The Attorney General was faced with a situation in which a previous plan similar to the plan which is now before the Court had been objected to in March of that year -- in March of that year -- but the objection was not based on a reasoned decision on the merits. He said, I can't make up my mind. Therefore, in my burden of proof standard in my regulations, I interpose objection. He said, we are unable to reach a conclusion. That's what he said in March to Act 932.

Now, when he received Act 1205, the plan we're talking about now, in June -- in June -- the situation had changed. For one thing, a constitutional court had found that there was no discriminatory purpose behind that plan. And in fact the plaintiffs in that case had conceded that there was no discriminatory purpose behind the plan. So he was dealing with a situation in which parties to that litigation had conceded there was no discriminatory purpose; the Court had found no discriminatory --

QUESTION: Yes, but actually -- I gather the issue here is rather narrow, isn't it? We don't really get to the question of the merits of this action; it's rather

the narrow question of whether his stated reason for not objecting was that he was deferring to the action of the Three-Judge Court. So there's only the narrow question whether or not -- whether or not that much is reviewable, that kind of mistake, if you wish, whatever else it is, not to the merits of why he objected or not; isn't that right?

MR. BELL: I quite agree, Justice Brennan, but I think --

QUESTION: I mean all the other things that we've been discussing with you so far get rather beyond that.

MR. BELL: I think that the reasons that he did defer has something to do with whether we consider that deference unreasonable. And I'm suggesting that in addition tothe fact --

QUESTION: Well, I just want to suggest, that it's not whether it's reasonable or unreasonable --

MR. BELL: Well --

QUESTION: -- it's rather whether there is judicially reviewable, as a matter of law, his reliance on that deferral -- deference, rather, is a reason for not objecting.

MR. BELL: We don't think that when he deferred he was relying only on that Court decision; that's the point I'm trying to make. We don't think that was the only thing.

QUESTION: Where do you get that out of the record?

MR. BELL: Okay, it seems to me that -- that if we look at his letter, if we look at his letter -- and it's in the Appendix --

QUESTION: Are you speaking of the one you referred to before?

MR. BELL: No, that was the memorandum he filed in the District of Columbia court, that if we look at his 1972 letter in which he said he was deferring, and I'm referring to page 48 of the tan -- the tan book, the Appendix -- and if I might invite the attention of the Court to the full paragraph, which is at the bottom half of that page, he first says, we think that our function is to do what the District Court of the District of Columbia would do fif this case were presented to them in a declaratory judgment action; that's the first thing he says.

The second thing he says is, under this standard, that is, under the standard of doing what we think the District Court would do, we feel constrained to defer to the judgment. Then he goes on and explains that a little more. And it seems to me he indicates other factors besides just the fact that that judgment had been entered in the constitutional case. He says also that there is a right of appeal to the Supreme Court. Parties who feel aggrieved have a full right to seek appellate review. He also notes, in the previous

paragraph, that he's considering this under a request for expedited consideration, because the elections are getting near.

QUESTION: Well, but of course, in fact, there was no -- at this stage, there was no determination of the District of Columbia Three-Judge Court.

MR. BELL: No, there was not.

QUESTION: And so the question really is, when he says, under this standard, may he -- may he do what he did; defer the determination of the Three-Judge District Court in South Carolina, merely because he thinks what they did might have been what the District of Columbia Three-Judge Court might do. Isn't that what the issue is?

MR. BELL: Yes, but we think that issue is --

5918 QUESTION: Not whether it's reviewable.

QUESTION: That's the preliminary issue.

QUESTION: Well, to that extent that it's reviewable, there's reliance on that reason for non-objection.

QUESTION: Right.

MR. BELL: Right. He's saying -- I think what he was saying is --

QUESTION: No, but isn't that the only question we have to decide in this case?

MR. BELL: I think that all you have to decide is that Section 5 means whatit says when it says when it says

that if the --

QUESTION: No, no, no, please don't put it that way.

MR. BELL: OKay, I'm sorry.

QUESTION: Isn't that the issue for us to decide? Whether or not his non-objection based on that ground is judicially reviewable?

MR. BELL: I think -- yes it is, quite clearly.

QUESTION: And it's your submission that even though this can be defended as more or less reasonable, at least at the time it was made in the light of the then-state of the law, I thought it was your position that even if he had said, we're interposing no objection because South Carolina voted Republican at the last election, that even that wouldn't be reviewable.

MR. BELL: We think --

QUESTION: Isn't that your position in its ultimate effect?

MR. BELL: If that were his objection, we would be quite confident in coming to the District Court of the District of Columbia ourselves, if he had objected on that basis.

QUESTION: No, I said, he didn't object; he says, we're interposing no objection because your state voted right at the last election. Now what if he did that? Would that

be reviewable? In your submission, it would not be; isn't that correct?

MR. BELL: It would not -- it would not fall within the kind of review being sought here.

QUESTION: Exactly.

MR. BELL: I don't think we want to go so far as to say that what the Attorney General --

QUESTION: Well, your argument does go, and necessarily goes that far, as I understand it; and I don't find that shocking.

MR. BELL: Well, we think that Congress intended to preclude that kind of review.

QUESTION: Exactly, that is your submission, isn't it?

MR. BELL: Yes, and we think that if the Attorney General ever were to do that, Justice Stewart, that the remedy for that is clear, it's what happened in 1971, Congressional oversight.

QUESTION: Exactly.

MR. BELL: Now, if --

QUESTION: That's the reason they put the onus on the Attorney General.

MR. BELL: Exactly. Now before 1971, it's quite clear fromall the evidence in theCongressional hearings that the Attorney General was not reviewing many of these

submissions. Mr. Turner said in his deposition, we were too busy with voting examiners and registrars down in Mississippi to pay much attention to pre-clearance. And it's also clear that in many case he never responded, hundreds of cases.

QUESTION: Well, I suppose then that you would say that his non-objection would not be reviewable even if he just says, we are not interposing an objection because we haven't had time to look at it.

MR. BELL: Yes.

QUESTION: And we're just not able to do the job that the statute contemplates.

MR. BELL: Yes.

QUESTION: You would say, non-reviewable.

MR. BELL: Yes, non-review in that case.

QUESTION: I think you must say that because it sounds to me like that's precisely what happened -- in effect what happened here. Because he never, never looked at it in the light of the Section 5 standard; he simply said, some court has decided it's constitutional. So he's -- so it's just the same as, I've never looked at it from the standpoint of Section 5.

MR. BELL: And we think that proposition is not as shocking as it seems on its face, because there is Congressional oversight --

620 QUESTION: -- it doesn't to you.

MR. BELL: Pardon?

QUESTION: Well -- no it isn't that shocking.

MR. BELL: And it seems to me that in Georgia, in the Georgia case, this Court said that these things are things that are left to the Attorney General. We don't have to find that what he did do is the only thing he could do, or --

QUESTION: Or even the right thing.

MR. BELL: Or even the right thing.

QUESTION: He might have been egregiously wrong. But I thought it was your argument that it's simply not reviewable.

MR. BELL: That's our argument. That's our argument.

QUESTION: Well, I wouldn't back away from it, if I were you.

MR. BELL: And it seems to me that if the Attorney General ever began flagrantly abusing that power, or doing something which was clearly what Congress felt it did not want, Congressional oversight would be the remedy for that case --

QUESTION: And not popular oversight, if you will.

MR. BELL: -- and not -- yes. Of course that hypothesis is completely implausive, because the Act has been very successful in accomplishing its purpose, even in

in all those years that the Attorney General was not reviewing every submission, blacks were making great strides forward in the South. Mr. Pottinger and others have said in the testimony in 1975, this is the most successful piece of Civil Rights Legislation ever passed by the Congress.

And so to talk about these hypotheses I think is implausible as a matter of experience. But even in those situations, Congressional oversight is available, and as you suggest, just public outrage at that kind of behavior, if it occurred, certainly --

QUESTION: Mr. Bell, take a hypothetical. The Attorney General says, I am constrained to pass this up because a Federal court has decided the question. And he sends that letter two days later, he sends a letter, says, I was mistaken in that and I do now object.

MR. BELL: Under his guidelines, if he does both of those things in the 60 day period, the objection will stand, Justice Marshall, and the State could not enforce---- I think that's clear under the guidelines.

QUESTION: The trouble is, he didn't do it within 60 days.

MR. BELL: Here, 434 days later, he entered an objection pursuant to court order.

QUESTION: So you say it's because he didn't do it within 60 days.

MR. BELL: Precisely, and we think that's what Congress has said, and what this Court said in Allen.

Congress knew that the Attorney General did not make a reasoned decision on the merits in 1975. And they didn't change the act.

Mr. Turner suggested yesterday that-- or I understood him to suggest that they always give reasons when they make a response. But his guidelines say that they don't. If he fails to object, or says no objection, 51.20 of the guidelines say nothing about him giving reasons. If he objects under the Section dealing with notification of decision to object, it says, in sub (a), that he will give reasons there.

And Congress knew that the interpretation of Section 5 was that he does not have to give reasons, that he does not have to act. Now there's language of this court in the City of Richmond case which indicates that. And the proponents placed that interpretation on it in '75. Congress knew that's what people thought it meant. And Congress didn't change the language of the Section.

I do think, to return to a point that I was addressing earlier, that all kinds of questions will be raised if this kind of -- if this sort of litigation is opened up, not just the question of who can seek review, but the question of whether venue is in the District of Columbia

or in local courts; whether 14(b) of theAct is a limit on the general venue provisions of the APA; indeed, whether 14(b) requires a Three-Judge Court in an APA determination, since Three-Judge Courts are required elsewhere. Of course, there wasn't a Three-Judge Court in Harper v. Levi. How soon must review be sought? There's great emphasis placed on the timeliness of the Harper v. Levi suit in this case, but what happens if people wait a few months longer?

All of these are collateral questions that I think would be an enormous waste of judicial time. Why not go to the remedies Congress has provided, which gets to the merits of these plans? Either the subsequent contest by parties, or the declaratory judgment action by the State.

If I may, I would like to address myself also to the question of special elections in 1978, and just briefly. Of course we think the issue is entirely hypothetical because the District Court was correct in its decision. But we would note very quickly that under the Attorney General's guidelines, were this objection ultimately to be sustained, we could go before him and ask him to withdraw it if the facts or the law have changed. We believe that they have in this case, and we would want to seek that. And also, everyone admits that we have the right to come into the District of Columbia court and seek the declaratory judgment. We would like that

option left open. The State, yes, the Senate. We note that in Mississippi and Georgia legislators have been allowed to serve out their full terms even after objections have been entered or plans struck down. It's constitutional, and we believe the good faith of our Senate entitles it to that conisderation as well.

As I say, we do basically consider that to be hypothetical. Ofcourse, our position is that the judgment of the District Court should be affirmed. South Carolina promptly submitted its plan in 1972 in full compliance with the Voting Rights Act; there was nothing else we could have done to comply more fully.

The Attorney General did not object within 60 days. Section 5 says, when that happens, the STate is entitled to enforce the plan.

On these facts, we ask this Court to hold that South Carolina may enforce its plan, because Congress said what it meant in Section 5, and Section 5 means exactly what it isays, that we can enforce.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Wollenberg, you have about three minutes left.

REBUTTAL ARGUMENT OF J. ROGER WOLLENBERG, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. WOLLENBERG: If the Court please, I do not

find it reassuring that Professor Bell says that great strides are being made under the Voting Rights Act, because great strides aren't being made with respect to the South Carolina Senate, which remains all white, or the Attorney General in the memorandum that Professor Bell keeps referring to that is in Appendix A in the red brief, in that memorandum the Attorney General found that with proper districts it would be assumed that if there were racial voting, that blacks would elect four or five members of the State Senate.

There may be progress elsewhere in the country, in Georgia, and in Mississippi, and indeed, in the South Carolina House as a result of orders of this Court or objections of the Attorney General, progress has been made.

We're here to try to get progress in the State Senate of South Carolina.

Much has been said about the 1975 reenactment by Congress of the Act, and it must have been accepting the 60 day limit on everything for which Professor Bell has been arguing.

Professor Bell overlooks the language of -- in the House that is set forth in footnote 42 of his brief at page 29 where Mr. Representative Edwards expressed great approval for the Harper v. Levi decision which had just been decided when Congress was reenacting in 1975, and we have to say, I

think, thatCongress in that reenactment was thoroughly aware of the Edwards -- and I want to -- Harper v. Levi -- and I want to refer the Court also to the Senate report No. 94295, the 94th Congress, First Session, page 18, where a reference also was made to what was then -- to the reference to Harper v. Kleindienst and Connor v. Waller.

So Congress in 1975, I think, was well aware of the fact that if the Attorney General got -- went completely out of the statutory scheme and abdicated its function, that some result would be reached.

A lot of concern has been expressed --

QUESTION: The statutory scheme is simply for him to interpose an objection or not to interpose an objection; that's all the statute talks about.

MR. WOLLENBERG: Yes, your Honor, but it is settled under his own regulations and this Court's decision in Georgia that that is to be a considered decision like a Court would reach, and it is not a decision --

QUESTION: Well, that his regulations were permissible, that's what the Georgia case held. I have it right in front of me, and I wrote the opinion.

MR. WOLLENBERG: Yes, your Honor. I think that the kind of determination that the Attorney General is intended to make under Section5 is the kind of determination that the Attorney General -- that would be made by the District of

Columbia Court if the case were presented to it.

And this Court, in the Thermtron case and in Dunlop v. Bachowski, has made very clear that where an agency goes entirely outside of its statutory function, that this Court will fashion a remedy without upsetting the statutory scheme, a limited and narrow remedy. And we are asking in this case, only the most narrow and limited remedy which was applied in Harper v. Levi, which was an order to the Attorney General not to reach a particular result but an order to perform his function and to reach a decision that was independent. And that's what he did. And it was a decision that was entirely negative to the statute, and he indicated that it had been his view for at least a year that the statute was an improper statute.

QUESTION: Mr. Wollenberg, will you pinpoint a little more clearly for me, in what respect did the Attorney General go outside of the statutory authority?

MR. WOLLENBERG: Your Honor, when the Attorney General --

QUESTION: As Mr. Justice Stewart, the statute gives him certain options; he took one of them.

MR. WOLLENBERG: In failing to object, he took an option. But just like the District Court in the Thermtron case which remanded a removed case on a ground that was not authorized in the statute, in that same -- and

was mandamused for that despite statutory language and a history of non-review of remand decisions. Just like that decision in Thermtron, the case here was that the Attorney General, putting aside his own views as to the validity of this statute, feeling that he was compelled, constrained to follow a District Court judgment which wasn't on the Voting Rights Act, which was on the Fifteenth Amendment, and in which the burden of proof had been on the plaintiffs, and where the District Court had disclaimed that it was passing on Section 5 recognizing that that was a function for the D.C. courts or the Attorney General, he felt constrained to follow that.

I cannot think of a clearer case of -- well-intentioned and good faith, no doubt -- but a clearer case of abdication of his clear function under Section 5 to make a judgment under the standards of the Voting Rights Act.

QUESTION: You call it an abdication. Would you also agree -- I take it you would agree -- that he made an error of law?

MR. WOLLENBERG: It was an error of law, your Honor, but it was an error of law of kind and degree that goes far beyond an ordinary review on the merits where factual questions are taken into account, and statutory policy. In other words, anything can be called an error of law. But when the Attorney General says, I won't exercise my own judgment because I can't, and I can't exercise my own

judgment because a District Court reached a conclusion under the Fifteenth Amendment while disclaiming the Voting Rights Act, under those circumstances I say, like in the Thermtron case, he has abdicated his function. And like in Dunlop v. Bachowski, I think that this Court can fashion a remedy which will not open up the chamber of horrors that have been suggested to your Honors, not open up general review, everyone coming in to attack the Attorney General. But after all, the purpose of Section 5 was basically to place the burden on the covered states to demonstrate that their changes of electoral procedures were proper under the standards of the Voting Rights Act. And if the Attorney General, in passing on that, didn't apply the standards of the Voting Rights Act, but applied a standard of a District Court on the constitution, it seems to me that it is legitimate to call that an abdication of function.

MR. CHIEF JUSTICE BURGER: Thank you gentlemen.

The case is submitted.

[Whereupon, at 10:48 o'clock, a.m., the case in the above-entitled matter was submitted.]

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