ORIGINAL

In the

Supreme Court of the United States

DOLPH BRISCOE, GOVERNOR OF THE STATE OF TEXAS, AND MARK WHITE, SECRETARY OF THE STATE OF TEXAS.

PETITIONERS,

V.

GRIFFIN BELL, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,

RESPONDENTS.

No. 76-60

Washington, D. C.
April 19, 1977

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IN THE SUPREME COURT OF THE UNITED STATES

DOLPH BRISCOE, GOVERNOR OF THE STATE OF TEXAS, AND MARK WHITE, SECRETARY OF THE STATE OF TEXAS, Petitioners,	
v.	No. 76-60
GRIFFIN BELL, ATTORNEY GENERAL OF THE UNITED STATES, ET AL., Respondents.	

Washington, D. C.

Tuesday, April 19, 1977

The above-entitled matter came on for argument at 11:50 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:

DAVID M. KENDALL, ESQ., First Assistant Attorney General, State of Texas, P.O. Box 12548, Capitol Station, Austin, Texas 78711; on behalf of the Petitioners.

HOWARD E. SHAPIRO, Office of the Solicitor General, Department of Justice, Washington, D. C. 20530; on behalf of the Respondents.

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 76-60, Briscoe against Bell.

Mr. Kendall, I think perhaps you may proceed now.

ORAL ARGUMENT OF DAVID M. KENDALL, ESQ.,

ON BEHALF OF THE PETITIONERS.

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

I am David Kendall, first assistant to the Attorney General of the State of Texas. With me this morning are Mr. Lonny Zwiener, an Assistant Attorney General; and the Honorable Mark White, Secretary of State of the State of Texas, who is both licensed to practice in this Court and a party to this suit.

Despite the fact that in testifying before the House Committee considering extension of the Voting Rights Bill Mr. Stanley Pottinger, who was at that time Chief of the Civil Rights Division of the Justice Department, testified that there was no need to extend the Voting Rights Act in 1975 to the State of Texas, the Act was amended, and on September 18 of 1975, the Attorney General, Mr. Levi, and Barabba of the Bureau of the Census issued a statement which merely recited the requirements of the Voting Rights Act and then said that the Director of the Bureau of the Census and the Attorney General had made their determinations pursuant

to Sections 4(b) and 4(f)(3) of the Act, and under those determinations, Texas statewide was now covered by the Act, published on September 18, 1975. And that began Texas' saga with the Voting Rights Act.

Now, some 20 months later and many thousands of submissions later, we're still submitting every change made in several thousand voting or election agencies in the State from the State itself on down to water districts to the Attorney General for pre-clearance.

QUESTION: How many does that average a year, do you suppose?

MR. KENDALL: Judge, last night -- Mr. Justice White, last night I looked at the last three notices we've received from the Attorney General and they run 18 to 25 a week from the State of Texas, at this time, 20 months later. In our brief we say --

QUESTION: Did you say several thousand?

MR. KENDALL: Yes, Mr. Justice Brennan. Our estimate in the brief is that there have been 5,000 submissions, and they're going at the rate of 18 to 25 a week. Out of that vast number of submissions, 26 submissions have been disapproved according to Secretary White, at this late date.

Our -- the petitioners in this suit, the petitioners in the lower court were the Governor of the State of Texas, Dolph Briscoe and Secretary White. And it was our complaint

then, as it is now, that the manner in which we were brought under the coverage denied us rights, were unfair, and were not consistent with the statute or with the holdings of this Court.

We have basically two points: first of all, we say that the Justice Department, the Attorney General, has misconstrued and misapplied Section 4 of theAct in his instructions to the Bureau of the Census; that portion of the Act that calls for a determination as to whether fewer than 50 percent of the citizens of voting age were registered in 1972 or whether fewer than 50 percent of such persons voted in the Presidential election of that year; also misconstruing and misapplying Section 4(d), which advises what elements are to be considered in determining whether or not the State has used a test or device within the meaning of the Act.

We also say that we were mistreated, if you will, in that the determinations of the Bureau of the Census and of the Attorney General that Texas came within the factual requirements of the statute were made arbitrarily without affording the State an opportunity to be heard, without considering very much evidence which was available at that time and by which -- had it been considered by the Census Bureau, the determination would have been that Texas was not covered.

I would like to make it clear at the outset that we

do not question the constitutionality of the Voting Rights Act. We recognize that that has been determined in South Carolina against Katzenbach, and we do not raise those issues at this time.

Under the 1975 amendments, I'll repeat if I may, there were two determinations to be made to bring Texas or any other state within the coverage of the Act as amended: first of all, the use -- determination by the Attorney General that in November, 1972, the State or a political subdivision had used a test or device as newly defined by the Act to include voting materials in English only; and the second was that with respect to which state or subdivision the director of the Census found that fewer, or less than 50 percent of the citizens of voting age were registered on November 1, 1972, or thatless than 50 percent of -- and again, the magic words -- such persons voted in the presidential election of November, 1972.

It was interesting to hear the Solicitor General speak about -- in the last argument, speak about the need to determine the questions from the face of the statute. We sort of wish the Solicitor's General Office would accord us the same right, because it is our feeling that when one looks at the face of the statute with which we're concerned, there's no question but that we're correct.

The United States, in making its determination as to

this 4(b) requirement ignores the first language. They don't even make any determination how many voters were registered. They say that's unimportant, because they find that fewer than 50 percent of the citizens of voting age voted, and therefore, coverage is brought in.

We say that the language, such persons, obviously refers to the words, citizens of voting age who registered, and that if it is given that interpretation, without dispute, Texas is not covered.

QUESTION: Of course the face of the statute does say that those determinations and certifications by the Attorney General and by the Director of the Census are unreviewable in any court.

MR. KENDALL: If the Court please, that is correct.

QUESTION: And as I understand it, you're not saying -- arguing that that's unconstitutional.

MR. KENDALL: No, sir, and we're not asking that they be reviewed. We filed this suit before they ever made -- the determinations become effective upon publication.

QUESTION: Right.

MR. KENDALL: And we had -- Secretary of State White had made many efforts to go before them and present to them evidence as to the numbers without success. And before they made any determinations, before any thing was published, we brought this suit asking for injunctive relief and asking

that the District Court instruct them as to what their duty was in making these determinations.

Liek the Dunlop case which I heard yesterdayas to whether or not the Secretary of Labor could reightfully refuse to bring suit, not review of his determination itself but the manner in which it was made, we feel that the courts do have jurisdiction to instruct the Census and the Attorney General's office as to how they are to go about the process of reaching these determinations, which they don't consider determinations at all.

QUESTION: What's your authority for thinking that the courts have that sort of jurisdiction?

MR. KENDALL: If the Court please, I'd like to say, I guess, the easy way out is, that no one has questioned it, the jurisdiction. But we do rely, for instance, on such cases as Dunlop v. Bachowski, the Thermtron Products, and so on. In Thermtron, for instance, where remand of a removed case is not reviewable itself, but the Court could -- this Court held, it could review the fact that the District Judge refused to -- or --

QUESTION: You rely on the same cases as the government relied on in its argument in Gressette , really, aren't you?

MR. KENDALL: Yes, exactly. I was very happy to sit here. As a matter of fact, we didn't have the Dunlop case and heard them cite it and went and read it, found

it quite applicable.

QUESTION: I noticed it wasn't cited in your brief.

MR. KENDALL: Yes, sir, I'm sorry, it is not. But we heard that in the argument.

So we say, we're not asking --

MR. CHIEF JUSTICE BURGER: We'll resume there at 1:00 o'clock, Mr. Kendall.

[Whereupon, at 12:00 o'clock, noon, the Court was recessed, to reconvene at 1:00 o'clock, p.m., the same day.]

MR. CHIEF JUSTICE BURGER: Mr. Kendall, you may continue.

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

It is our contention that Section 4(b) -- subsection 4(b) of the statute should be so construed that the words, such person -- such persons -- refer to persons who are citizens of voting age who had registered in November of 1972. It's uncontroverted that the Census Bureau made no such determination. They completely ignored the earlier language of the Section, that they were to find whether fewer than 50 percent of the citizens of voting age were registered. They pay no attention to that.

It's also uncontroverted that, using Justice Department figures, there were seven million and six hundred

some odd thousand of voting age, and according to our figures, five million, two hundred thousand citizens of the State were registered.

That being so, more than -- way more than 50 percent of the citizens of voting age were registered, and of such persons, those five million two hundred, some three million six hundred thousand, I think it is, voted in the 1972 election which again is well over 50 percent. Under our interpretation, more than 50 percent were registered, and more than 50 percent of such persons voted in 1972, and Texas is not covered by the Act.

The language of the statute is clear and unambiguous. And that was as much as admitted in the Court of Appeals where Judge MacKinnon said at the outside, appellants would seem to have the better argument.

It is a rule of statutory construction that legislative enactments be so construed as to give effect to all parts. And as a matter of fact, the United States in its brief, at page 37, says, whatever force this contention -- referring to our contention -- might have as a purely textual argument. And I don't find it shocking that we would insist that the text of the statute be followed. That is what we ask.

QUESTION: But the Administrative agencies who make these findings have construed the Act this way from the beginning, haven't they?

MR. KENDALL: If the Court please, Mr. Justice White, I'm not at all sure that that question has ever been presented before. They refer to, in their brief, to many statements by this Court. And I can't argue with the fact that this Court --

QUESTION: Well, I'm not talking about statements of this Court. I'm talking about how the Bureau of the Census has construed these --

MR. KENDALL: That's what they say. And if it's true, though, I don't know that it has ever been questioned. In Congress --

QUESTION: Well, it may not have been questioned. But do you deny that that was the practice?

MR. KENDALL: No, I do not.

QUESTION: And do you deny that it was the practice at the time the Act was re-enacted?

MR. KENDALL: It was the practice at the time the Act was re-enacted. And in the Congressional hearings, if we go to those -- of course, we'd say there's no need to go to the hearings, because the statute's not ambiguous -- but if we go to the history, we'll find them saying that this language under our construction -- the Justice Department's construction -- is unnecessary. There was even, I think, an amendment posed to take it out, the language about registration, and that was defeated.

QUESTION: But Congress --

MR. KENDALL: Congress left the language in there.

QUESTION: But Congress certainly was told how that language was being administered.

MR. KENDALL: Yes, it was. If the Court please, I don't know what the Congress could have done if it didn't do if it wanted that language given effect. I'm -- be facetious, perhaps, but put a footnote to the statute and say, note --

QUESTION: We really mean it.

MR. KENDALL: --note to the courts: we really mean it. We've said it before, we'll say it again, we're saying it now, that this is the formula. There's no other way to say it. It couldn't be said any clearer than it was said. And the cardinal rule of construction, followed by this Court and as far as I know, every other court in our nation, is to give full meaning to the language of the statute. You don't disregard any language if you can help it.

And yet to follow their analysis and their interpretation of the statute, you must just disregard the language requiring a finding that fewer than 50 percent of the citizens of voting age were registered.

QUESTION: For whatever it's worth, the doctrine of legislative acquiescence cuts a little bit the other way, doesn't it?

MR. KENDALL: I'm not certain how it cuts in this

case where -- where they knew that there were efforts made to take the language out, where they knew that the Attorney General's office had not been giving it effect, and yet Congress re-enacted it. I think they must have intended -- as I say, I don't know what else they could have done had they intended it. It has some effect.

We submit that there is no need to get into a construction of the Act, because it is so plain --

QUESTION: Of course, the Committee very easily could have used the same language, and then its reports might have said that we really mean it.

MR. KENDALL: Of course, the reports that we have don't reflect -- reflect really what the very few Members of the Congress felt about it -- those who voted. We have statements by a few.

QUESTION: Mr. Kendall, how can you argue that the statute says, fifty percent of such persons; the question is, which persons. You looked at the preceding language, the persons described are persons of voting age. So one could certainly argue that such persons refers back to persons of voting age, can't we?

MR. KENDALL: If the Court please, Mr. Justice Stevens, if you do take that position, then you disregard the language of the first Section, because it becomes meaningless, as the Justice Department says. They don't need to make a

finding as to how many were registered. Because there will always be fewer who voted than there were registered.

QUESTION: Oh, I understand that, I understand that practical effect. But gramatically, one could read it the way your opponents do, I think.

MR. KENDALL: We think that it takes a stretch. Now, the original act as enacted in 1965 talked about the -- the language was 50 percent of persons of voting age. And it was amended in this to say, citizens. And we think the reference here is clearly to citizens of voting age who registered, such persons, did 50 percent of them vote.

We have the same problem with reference to Section 4(d) of the Act. 4(d) -- in Section 4 -- applied -- the language is, for the purposes of this Section, no State or political subdivision shall be determined to have engaged in the use of tests or devices for the purpose or with the effect of denying or abridging the right to vote on account of race or color -- and so on -- if incidents of such use have been few in number and have been promptly and effectively corrected -- and other factors to be considered in determining whether or not a jurisdiction uses tests or devices.

The Justice Department disregards the language that says, for the purposes of this Section, and says that that applies only to a bailout suit under Section 4(a), and not to a determination under 4(b). We don't know how they

make that selection. One of the triggers for coverage of a state under the Act is a determination of the Justice Department that in November, 1972, the State or the political subdivision employed a test or device.

We submit -- we feel that we could meet the tests of 4(d), but in any event, the Justice Department should have been required to maintain or to look into that question.

QUESTION: Well, how would you apply 4(d) to 4(b)? 4(b) just says you -- you make some calculations, and that's the end of it.

MR. KENDALL: One of the triggers, if the Court please, is a prior determination by the Attorney General that the jurisdiction employed in November -- employed a test or device as defined in 4(c) --

QUESTION: Now, where is that? All right, all right, I got that.

MR. KENDALL: I'm sorry.

QUESTION: Maintained on November 1, 1964, any test or device: it says any test or device with respect to which....

MR. KENDALL: Well, if the Court please, I think obviously this Act must be to sustain its constitutionality as the Court did in South Carolina against Katzenbach, it must be aimed at tests or devices which have the purpose or effect of discriminating in voting rights. And it can't be just any

test or device regardless. And we submit that 4(d) is a proper test of how -- of whether or not a jurisdiction is maintaining, did maintain, a test or device, not just for take out.

Again, Congress very easily could have said for the purposes of Section 4(a), a test or device means. It didn't say that. It says, for the purposes of this section. And this section is section 4. And we submit that at least Congress -- the Attorney General's office should have given consideration to whether or not Texas met the tests of 4(d).

QUESTION: When you say they should have given consideration, does that mean anything more than in their internal deliberations they should have maybe considered this and perhaps rejected it?

MR. KENDALL: That, I think -- if they gave good faith attention to it, considered it, I think that would meet the requirement. But they expressly state that they did not, do not, and will not. And that's what we're challenging.

We're not challenging their finding, that Texas maintained a test or device. We're challenging the method in which they arrived at that finding, just arbitrarily reading the statute as they would read it, not paying any attention to 4(d). And we say that the statute requires that they consider those questions and make their determination.

QUESTION: Well, but, can you be certain that at

some time or other the Attorney General of the Civil Rights Division or somebody hasn't at least given some thought to this suggestion of yours and rejected it?

MR. KENDALL: If the Court please, I'm sure they've given thought to our suggestion that they ought to consider it. And I'm equally sure -- and I'm sorry I can't tell you chapter and verse -- but I'm equally sure that they have said that they would not consider it. They say in their brief that they don't consider it, and they're not required to. And we say they are.

The other point I'd like to make very briefly is that they have failed to consider evidence which was readily available to them. Now, using their figures -- and we're not in the numbers game -- but they start out with a figure which they get by interpolation that there were 7,655,000 citizens of voting age in Texas on November 1, 1972. And we don't agree with that figure, but we'll accept it for the sake of this argument.

Then they go, they say there are 140,000 aliens in Texas, despit e the fact that the Immigration and Naturalization Service has published a report saying that in November, 1972, there were 2,600,000 illegal Mexican aliens in the United States. Now, they don't say how many in Texas.

But we submit, they're the ones who determine upon the need to delete, to deduct the number of aliens in arriving

at the citizens of voting age; not we.

QUESTION: As a matter of fact, Mr. Kendall, in your brief on page 24, you suggest that perhaps half of the number were living in Texas, and then on 25, you say, of which it may be estimated that a quarter were living in Texas.

MR. KENDALL: Yes, sir. Mr. Justice Blackmun, we have no way of knowing how many, as I say. That's their responsibility, not ours, I think. But we're saying again, I don't want to say a particular figure, we made some suggestions in our brief as to what it might be, but what we are saying is that they were required to do more than just guess at what the figures might be, and use a figure which I think to any Texan would be absurd, to say that there are only 140,000 aliens, legal and illegal, in Texas, on November 1972 of voting age.

QUESTION: Well, isn't the Immigration Department right in the Department of Justice?

MR. KENDALL: I believe it is.

QUESTION: Well, they could get the figures right there, couldn't they?

MR. KENDALL: This was fromthe Census -- this figure -- there were determinations made by Census .

QUESTION: I mean, how do you assume that the Department didn't have those figures?

MR. KENDALL: They said they didn't.

QUESTION: They didn't have the immigration figures?

MR. KENDALL: They said they did not use -- they used figures from the Bureau of the Census.

QUESTION: They didn't say they didn't have them.

MR. KENDALL: No, they didn't say they didn't have them, I'm sorry. But they didn't use them. Mr. Zitter, in his affidavit which is at the record, I think, page 155 of the Appendix, tells how the determination was made.

QUESTION: Well, wouldn't that be a wash out anyway? The figures would cancel themselves out. If you had -- let's even assume you had 5,000,000 illegal aliens in Texas, and that were added to the total of persons of voting age in Texas. Then the next step would be to subtract that 5,000,000 in order to give you a -- whatever it's called, a subtrahend, no, or -- in any event, a result of citizens of voting age in Texas eligible to vote. Whatever the figure was, it would just cancel itself out, whether it was 1 or 10 million.

MR. KENDALL: That is the position the United States has taken is that the same figure --

QUESTION: Well, isn't that correct, as a matter of fourth grade arithmetic?

MR. KENDALL: Only if the same -- if the illegal aliens and the -- and the legal aliens did not appear in

that first figure, of the population. Then they have to be taken out. There's no effort made to find out, to determine, the citizenship of a person. A person is asked on the -- on his --

QUESTION: You get a gross total, and that includes the illegal aliens.

MR. KENDALL: Maybe.

QUESTION: And let's assume that's x.

MR. KENDALL: Right.

QUESTION: And then the next thing you do is subtract x. And it doesn't make any difference what x is, it's going to be washed right out.

MR. KENDALL: Well, we feel, if the Court please, that they are under an obligation to consider these figures, and they are the ones, as I say, who determine that a figure was necessarily subtracted for illegal aliens. And we submit that they should be required to consider all of the evidence, again, on that factor.

QUESTION: I have a great difficulty in how illegal aliens come in and vouch for the fact that they're illegal and get on the Census rolls.

MR. KENDALL: They don't vouch, if the Court please.

QUESTION: Well, how do they --

MR. KENDALL: Only five percent of the --

QUESTION: Well, how do they get on the census roll?

MR. KENDALL: The census taker says, how many people live here? 15. He puts down 15. How many were born in this state or in this country? All of us. And 15 illegal aliens are on the register as residents of the State and according to Census Department figures, appear as citizens of the State of Texas.

An illegal alien is not going to tell anybody that he is an illegal alien.

QUESTION: Well, if he's going to come forward and vouch for anything, that's my trouble.

MR. KENDALL: Well --

QUESTION: I don't think he's going to admit he lives there or anything else.

MR. KENDALL: Well, he may not have to make the admission that he lives there; somebody may make it for him. He's counted as a person living there. We have to assume that they count everybody.

I'd like to reserve some time for rebuttal.

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

Mr. Shapiro.

ORAL ARGUMENT OF HOWARD E. SHAPIRO, ESQ.,

ON BEHALF OF THE RESPONDENTS.

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

I would like to just describe the Voting Rights Act

Amendments of 1975 as they're relevant to this case, then discuss the statutory preclusion of review of the coverage determinations as contained in Section 4(b) of the statute as it affects the district court's jurisdiction; and then address the merits of the contentions Texas has advanced.

The statute appears in the brief in opposition filed by the respondents at Appendix 1A through 6A. There are one or two provisions which we have not set forth which I will mention briefly.

One preliminary word: the statute was adopted with Texas specifically in mind insofar as the minority language, group guarantee, is concerned. Both the Senate and the House report describe this in detail as did the hearings.

Now, the 1975 amendments contained anumber of titles. In Title II of the amendments, Congress made express findings in Section 4(f)(1) -- that's on page 4A -- that voting discrimination against citizens of certain enumerated language minorities was pervasive and national in scope, a and that to enforce the Fourteenth and Fifteenth Amendments, it was necessary to eliminate that discrimination by prohibiting English only elections as to those people, and by adopting other remedial devices.

The term, language minority, was in turn defined in Section 14(c)(3), of the Act, which we have not printed, to mean persons belonging to American Indian, native Alaskan,

or Spanish heritage groups.

The devices under Title II that Congress adopted included extension of the existing Voting Rights Act prohibitions against the use of testing devices as a prerequisite for voting; a requirement for pre-clearance under Section 5 of changes in the covered jurisdiction's election laws; and where necessary, the assignment of Federal examiners to register voters.

Now, let me distinguish Title II from Title III because there is some material in the record that refers to Title III. In Title III of the amendments, Congress also adopted some separate remedies for jurisdictions in which minority language voters were disadvantaged because of educational deficiencies, but there didn't seem to be evidence of intentional discrimination.

Jurisdictions covered by this provision must also cover -- conduct elections only in English, but the special remedies, such as Section 5 or voting examiners, are not applicable.

Now, we're not concerned with Title III in this case at all.

In this case we are concerned really only with members of the Spanish heritage category of language minority.

In Section 4(f)(2) of the Act, Congress prohibited denial or abridgement of the right to vote because a person

is a member of an enumerated language minority. It added a third sentence to the existing triggering provisions providing that the prohibition against the use of tests and devices contained in the Act would apply in State and political subdivisions as to which the Attorney General determined maintained on November 1, 1972, any test or device, as defined in the Act, and with respect to which the Director of the Census determined that less than 50 percent of the citizens of voting age were registered, or less than 50 percent voted in the presidential election of November, 1972.

Now, this was a change in the coverage formula. The previous coverage formula, in the 1965 Act and the 1970 Act had referred to persons of voting age. Because Congress was addressing the problem of language minorities, for the first time it focused on citizens voting only. And it adopted a change in the third sentence, specifying that only citizens could vote. That's how the alienage problem got into our case.

The term, test or device, had been defined under the old Act as meaning prerequisites for voting requiring demonstration of literacy or educational achievement or knowledge, good moral character, or proof of qualification by some sort of vouchering.

In Section 4(f)(3), Congress amended the definition of test or device to add a new concept, which is what we are

dealing with here. It referred to the provision of voting materials only in the English language where the director of the Census determines that more than 5 percent of the citizens of voting age residing in the State or political subdivision are members of a single language minority.

Now, the 1965 Act, as amended, makes no provision in these triggering sections, for hearing. It also bars review of a determination by an Attorney General or Director of the Census, with respect to the triggering provisions. Now this is contained --

QUESTION: Thatprovision barring review -- was it 4(b)?

MR. SHAPIRO: 4(b), it's in Section 4(b), your Honor, on page --

QUESTION: 4(b). Does that mean that if the Attorney General objects, based on these -- this data, and Texas should file a suit in the Three-Judge District Court here in the District of Columbia, that the figures would not be open to challenge there either? Or does that just mean thatthey cannot challenge the administrative determination?

MR. SHAPIRO: As I understand it, your honor, the bar against review would affect proceedings in the Three-Judge Court in the District of Columbia to bail out of the coverage under Section 4(a) --

QUESTION: In any court?

MR. SHAPIRO: In any court, it says. Now, the determination bythe District Court in the District of Columbia is whether the tests or devices have been maintained for the purpose or with the effect of discriminating or in violation of the language guarantees.

The only way in which the Attorney General's determination that a test or device was maintained could be challenged was if the jurisdiction came in and said, we couldn't be using it for discriminatory purposes because we don't have any.

QUESTION: But aren't they bound by the Attorney General's determinations that they do have it?

MR. SHAPIRO: Well, the nature of the determination thatthe Attorney General makes is such that I don't think there will ever be an issue of that kind.

QUESTION: Yes, but you would certainly say in the District of Columbia Three-Judge Court the provision 4(d) would be open? I mean --

MR. SHAPIRO: Oh, yes, the provisions of 4(d) are open. Now, 4(d) is expressly addressed to whether the test or device was maintained for the purpose or with the -- for a discrimnatory purpose or with a discriminatory effect.

QUESTION: But the question --

MR. SHAPIRO: That is the 4(d) inquiry --

QUESTION: I know, but --

MR. SHAPIRO: -- and it's addressed only -- I'm sorry.

QUESTION: 4(d) says, if the incidence of such use have been a few in number and promptly and effectively corrected.

MR. SHAPIRO: Yes; then the Court is not to hold --

QUESTION: And the continuing effects of such incidents have been eliminated.

MR. SHAPIRO: That's right. So the Court is then to hold that the use of the test or device is not to be treated as discriminatory in purpose or effect.

QUESTION: The State is bound by the finding that they have been using a test and device when they go into the Three-Judge District Court?

MR. SHAPIRO: They are. I think it would be open to them only to say that as part of their proof that they weren't discriminating, that they didn't have the test, and they couldn't go beyond that.

Well, returning to the structure of the statute then --

QUESTION: Before you go on: maybe you've already answered this, Mr. Shapiro, so I missed it. On page 5A of the Appendix to your response in opposition, the very last sentence on page 5A under little 3 there, with respect to section 4(b) the term, test or device, as defined in this subsection, which

is the foreign language subsection, shall be employed only in making the determinations under the third sentence of that subsection. Which is the third sentence, and what does that mean?

MR. SHAPIRO: Thatrefers, your Honor, to the third sentence of --

QUESTION: Of 4(b).

MR. SHAPIRO: -- section 4(b), which set up the new triggering provisions. And that's on page 2A.

QUESTION: 2A?

MR. SHAPIRO: Yes, sir. It actually begins -- let's see where -- let me make sure I've got my pages -- I'm sorry, your Honor, that's 3A.

QUESTION: Which is the third sentence?

MR. SHAPIRO: And that begins -- actually, it's 4A, I beg your pardon.

QUESTION: Top of 4A.

MR. SHAPIRO: Top of 4A: on or after August 6, 1975, that was the date of the enactment of these amendments --

QUESTION: Yeah.

MR. SHAPIRO: And then the new triggering provisions are stated. The preceding two sentences are the original 1965 --

QUESTION: I see, so it's just --

MR. SHAPIRO: -- provisions and the 1970 extension.

Returning then to the structure of the statute, I've just mentioned that under section 4(a) there can be a bail-out suit with respect to a determination of the use of a test or device with a discriminatory purpose or effect. This is the only time that such an inquiry is made with respect to the definition of test or device. There's nothing in section 4(c) defining the original test or device. Nothing in section4(f)(3) defining the new language, test or device, authorizes an inquiry into whether or not test or device has a purpose or effect.

So that when you go back to the triggering provisions, and look at what the Attorney General has to determine, you will see that on page 4A, all that he determines is whether the jurisdiction maintained on November 1, 1975, any test or device. There's no statutory authorization for the triggering determination to inquire into whether it was used with a discriminatory purpose or effect. Congress made that determination, in the exercise of its powers.

Now, I'd like to talk about the jurisdiction, because Section 4(b) bars review in any court of a determination or certification of the Attorney General or Director of the Census under Section 4 and certain other enumerated sections. First I must say that the Attorney General now agrees with the Court of Appeals in construction of section 4(b), which -- the Court of Appeals held that there was a very, very limited ground

for inquiry under this statute, and that this suit is permitted because of that very limited inquiry.

Let me say at the outset that in Gaston County v. the United States, under the old act, in 395 U.S., the Court stated at page 291 that the coverage formula chosen by Congress was designed to be speedy, objective, and incontrovertible. As we read Section 4(b), the only matter that can be open to record -- open to review on this record -- is whether the Attorney General or the Director of the Bureau of the Census, applied some coverage formula other than the formula chosen by the Congress. And that is all that can be reviewed.

Inthe face of an express preclusion of judicial review, worded like Section 4(b), the only inquiry that's available on this record is whether the defendants exceeded their statutory authority.

QUESTION: So if they -- if TExas said, well, they made these calculations, but the -- Census Bureau said, well, we've read the statutes, but we think it just should be 25 percent, instead of 50.

MR. SHAPIRO: That's unreviewable -- well, no, if they said 25 percent instead of 50, that would be reviewable.

QUESTION: Yes.

MR. SHAPIRO: If they said, we will -- although the

statute said, citizens, we're going to count aliens deliberately, that's --

QUESTION: Reviewable.

MR. SHAPIRO: -- reviewable. If, however, as in this case, they say, we know we're not supposed to count aliens. We've made an estimate of the number of aliens we think we should deduct, and we've deducted them from our calculations. That is unreviewable.

QUESTION: Why does the Government concede as much as it does in the light of that express preclusion provision?

MR. SHAPIRO: The -- after some consideration of the precedents, we felt we were bound to. As we assessed that particular provision, we can only see three possible bases for judicial review, if review is the right word, because it isn't really a review: first, if there was a claim that the statute was unconstitutional. Then we think that despite that express preclusion, under Johnson against Robeson in 415 U.S., jurisdiction would exist. That's not before us.

QUESTION: Mr. Shapiro, just to make sure I understand it. If the next time the Attorney General turns down any submission that Texas makes to us, if Texas then went into the Tree-Judge Court, it could have the determinations made under 4(d), and it would go right back to whether or not the Texas -- was legitimately brought under the Act.

MR. SHAPIRO: Well, no, the 4(d) determination goes

to whether the test or device was used with a discriminatory purpose or effect. and the Three-Judge Court would make a determination as to that.

QUESTION: I know. But let's assume --

MR. SHAPIRO: And only that.

QUESTION: -- let's assume that Texas makes a change in voting procedures, and it isn't about a test or device at all, it's something brand new that's never been used before.

MR. SHAPIRO: Section 5 -- that would come before the Attorney General under Section 5 of the Act.

QUESTION: All right. And then they -- the Attorney General turns it down.

MR. SHAPIRO: He objects to it.

QUESTION: He objects to it.

MR. SHAPIRO: That's a different type of suit, your Honor.

QUESTION: All right. But then Texas goes into the Three-Judge Court saying, the Attorney General's dead wrong.

MR. SHAPIRO: As it can. That's completely within --

QUESTION: Well, I know, it may be completely -- but they've never used the test or device, because it's never been in effect -- the one the Attorney General turns down -- so how does 4(d) come into it?

Mr. SHAPIRO: Oh, 4(d) comes in only with respect

to the triggering provisions of Section 4.

QUESTION: That's what I mean. All right, now, Texas could, then, go back and under 4(d) review the -- to the extent 4(d) permits it, could review the triggering decisions, original triggering decisions, that put Texas under the Act.

MR. SHAPIRO: Not completely. There would be --

QUESTION: Well, to the extent that 4(d) permits it.

MR. SHAPIRO: To the extent that 4(d) permits it -- well, the trouble is that the triggering determination by the Attorney General under Section 4 does not inquire whether the test or device was used with discriminatory purpose or effect.

QUESTION: I understand that. But Texas can have that determination made in a Three-Judge Court.

MR. SHAPIRO: In the bail-out suit under Section 4(a).

QUESTION: Exactly. So that the next time that Texas is turned down, it could have that determination made in a Three-Judge Court?

MR. SHAPIRO: Well, when wesay, next time, let's distinguish between two sections of this statute, because it won't come over unless I make the distinction. We're dealing here with Section 4, which extends the coverage of the Act to the jurisdictions that meet the test.

QUESTION: I understand that.

MR. SHAPIRO: Once the jurisdiction is covered by Section 4 --

QUESTION: Yes?

MR. SHAPIRO: -- it is subject to the remedies of Section 5.

QUESTION: Exactly.

MR. SHAPIRO: The Section 5 remedy requires preclearance by the Attorney General.

QUESTION: Exactly.

MR. SHAPIRO: Section 5 has a separate provision, not the same as the bail-out suit, which authorizes a jurisdiction to go into the District Court for the District of Columbia and clear any proposed change in its voting law. And the Section 4(d) has nothing to do with that Section 5 suit.

QUESTION: Well, has Texas -- all right, has Texas ever gone into theThree-Judge Court on a bail-out suit?

MR. SHAPIRO: Not to my knowledge. But Section 4(d) has nothing to do with it.

QUESTION: Well, the argument that it's making about the fact that it had already cleaned itself up by the time the amendments went into effect, that --

MR. SHAPIRO: Yeah, that--

QUESTION: -- argument it could make in a bail-out suit?

MR. SHAPIRO: In a bail-out suit under Section 4,

that is right.

QUESTION: Yes, all right.

MR. SHAPIRO: And only there.

QUESTION: Mr. Shapiro, I'm still not clear. Under 4(d), could Texas have sought relief the day after the Attorney General decided thatit was under the Act?

MR. SHAPIRO: It could.

QUESTION: When is Texas entitled to avail itself of 4(d) relief?

MR. SHAPIRO: Texas may avail itself of a suit under 4(d) at any time it files a bail-out suit under Section 4(a) of the Act, which --

QUESTION: You're saying that 4 --

MR. SHAPIRO: Now, the bail-out formula is under Section 4(a) -- is set forth in pages 1A and 2A of the Appendix, the statutory appendix, and what it provides is that a state as to which a triggering determination has been made, that that's subjecting the state tothe coverage of the Act, can file a suit in a Three-Judge Court in the District of Columbia --

QUESTION: I know they can -- but only there.

MR. SHAPIRO: And only there.

QUESTION: A bail-out suit, only --

MR. SHAPIRO: A bail-out suit; in fact, any suit under this Act can only be brought in the District of Columbia.

There's a venue limitation under Section 14.

The bail-out suit can be brought in the District Court for the District of Columbia, and try to show that no such test or device has been used during the ten years preceding the filing of the action for the purpose or with the effect of denying the right to vote on account of race or color or --

QUESTION: Seventeen years, isn't it?

MR.SHAPIRO: The -- if it was triggered under the Act because of the language, minority provisions, it's only ten.

QUESTION: I see.

MR. SHAPIRO: As set forth on page 2A.

QUESTION: But, now, you're conceding, as I understand it, and correct me if I'm wrong, that the determination or certification of the Attorney General that's referred to on page 4A of the respondent's -- your brief in opposition, is subject to limited review in something other than a bail-out suit; is that right?

MR. SHAPIRO: That's right. And I was about to --

QUESTION: Okay.

MR. SHAPIRO: --outline -- okay. I suggested three possible grounds. One, if Texas was challenging the constitutionality of the statute, that the bar against review would not apply: Johnson against Robeson.

Second, if this were a suit in the nature of an action in mandamus to compel some sort of duty owed to Texas of a -- such as to make a determination under the Act, we -- then we think that there might be relief under 28 U.S.C. 1361, for example, to compel the Attorney General to make up his mind. That's not this case. This is essentially a challenge to determination.

Third, a claim that the action is in plain violation of an expressed statutory requirement or prohibition. And to the extent there is any review, and there is a very limited review, that comes into this case.

QUESTION: This is the government's effort to
233 reconcile its position here with its position in Gressette. I take it.

MR. SHAPIRO: We seek to be consistent in our argument, yes.

QUESTION: Yes.

QUESTION: The second alternative is certainly consistent.

MR. SHAPIRO: Yes. The mandamus action -- I should point out that the mandamus action in Gressette involves a suit to make the Attorney General decide something.

QUESTION: Make up their minds.

MR. SHAPIRO: And this is not that kind of a case. The Attorney General has decided here. Moreover, I point out

that section 4(b) is an espress restriction on judicial review. The action in Gressette is under Section 5. There is no statutory bar of the same kind to the Section 5 mandamus that you might find in Section 4(b).

Well, now, this is the first case to reach this Court under the Voting Rights Act amendments of 1975. And Texas has been brought under the Act for the first time in these amendments. It wasn't under the earlier Act, because it didn't maintain the kind of test or device described in the previous statute.

It's conceded there's no issue as to constitutionality. Now, there's no issue -- it's conceded that Texas used a test or device within the meaning of the language minority definition contained in section 4(f)(3) of the Act, because Texas has more than 5 percent citizens of voting age of Spanish heritage. And it concedes that it furnished election materials only in English.

So there's just no issue as to what the Attorney General was to decide. The statute says the Attorney General decides whether they maintained a test or device within the meaning of section 4(f)(3); they concede that they did. No issue as to that.

They contend, however, that the Attorney General should have considered whether they used it for a discriminatory purpose or effect. The statute doesn't just

authorize the Attorney General to decide that. It's not in there.

QUESTION: Well, Mr. Shapiro, again, so that I'll be clear: your position on the extent of reviewability is that errors of law are not reviewable?

MR. SHAPIRO: Well, I would have to say that to the extent the error of law is one that does not go to whether the Attorney General acted -- whether the official has acted in excess of his authority. It depends on how much discretion he's been given.

QUESTION: So you don't really need to argue what is the right construction of the statute with respect to 50 percent, whether it refers to voting age people or whether it refers to registered voters.

MR. SHAPIRO: Well, we --

QUESTION: You couldn't care less, because it's just an error of law, whatever it is, and the Attorney General's judgment about the statute is final; is that right?

MR. SHAPIRO: That formula is specific enough so that we think it comes within the excess of authority -- test I mentioned.

QUESTION: But you just say it doesn't make any difference whether it's wrong or not.

MR. SHAPIRO: Well, answering the question generally, and answering it --

QUESTION: Well, generally, no, I'm asking you that question.

MR. SHAPIRO: -- specifically are two different things.

QUESTION: I'm asking you that question.

MR. SHAPIRO: All right. Answering your specific question, since the statute expressly says, 50 percent of persons of voting -- of citizens of voting age, the 50 percent work --

QUESTION: But you know it to be construed either way?

MR. SHAPIRO: Well, we couldn't use less than 50 percent without acting in excess of the statute. What I said before was that we can't use a coverage formula different than that specified by Congress.

QUESTION: But you say the issue of the proper construction of that statute is just not open in any review? No court --

MR. SHAPIRO: Well, one could construe 50 percent to mean 25 percent.

QUESTION: Your position is that no court has any business giving a judgment as to what the proper construction of that statute is.

MR. SHAPIRO: Well, no, I think what I said was that if the Attorney General or the Bureau of the Census attempted

to apply a formula different than that expressed in the language --

QUESTION: No, no, no, no, he says, look, I'm applying the statute. Here's my construction of the language. And as long as he says that, and goes that route, isn't that the end of it?

MR. SHAPIRO: As long as it's within a reasonable scope, yes.

QUESTION: As long as it's 50 percent of something.

MR. SHAPIRO: If he chooses 50 percent, and --

QUESTION: Then it's non-reviewable?

MR. SHAPIRO: Right.

QUESTION: If he said 25 percent, you say it would be reviewable?

MR. SHAPIRO: Let me try and illustrate it in this way. Insofar as Texas is arguing that as a matter of law the Director of the Census erred in relying on census data -- you know, he had to determine how many citizens there were, he had to find out from some source where that information came from; he didn't use the Immigration and Naturalization figures, he used his own 1970 decennial census projections.

Now, to the extent that he relied on his own data, and he made a calculation for alienage, that's not reviewable. Congress knew that -- that there's a limitation on how many -- on how you can determine who's an illegal alien and who there

wasn't.

Now, insofar as Texas is contending that it's excluded from the Act because more than 50 percent of its citizens of voting age were registered but less than 50 percent actually voted, it's raising an issue of law as to the meaning of the statute. We think that that much is reviewable. We also think it's contentions are defeated by the plain legislative history. Because Attorney General Katzenbach got up and actually said the words, such persons in this statute means persons who actually voted. The statute has been legislated -- has been re-enacted, it's been construed that way consistently.

Now, finally, there's a claim about a hearing. The issues -- the triggering determinations here involve what the Court called, in South Carolina against Katzenbach, objective statistical determinations by the Census Bureau, and a routine analysis of state statutes by the Department of Justice.

Issues of that kind don't require a hearing. IN any event, the hearing, such as is required, is provided after the fact in the bail-out suit, except to the extent thatthe triggering determination can't be reviewed. But a state can get out from under this statute -- can get out from under 4(a) -- in the bail-out suit in connection with its contention that if the test or device which it concedes in this case was

not used for discriminatory purpose or effect.

QUESTION: What period of limitation, if any, is there against bringing a bail-out suit?

MR. SHAPIRO: There is none.

QUESTION: You can bring one the first day?

MR. SHAPIRO: Could be brought today? It could be brought today, your Honor.

QUESTION: But it would have to be brought in the District of Columbia.

MR. SHAPIRO: It would have to be brought in the District Court for the District of Columbia, as any suit under the Voting -- challenging a determination under the Voting Rights Act must be. Section 14(b) of the Voting Rights Act requires that.

QUESTION: How about your limited review that you're talking about under 4(d), where it started out here with the single judge, went to the Court of Appeals? Any reason why that has to be brought in the District of Columbia?

MR. SHAPIRO: It would have to --the venue provision in 14(b) expressly says that any suit to enjoin or declare an action of an official under this Act must be brought in the District Court for the Distric of Columbia.

QUESTION: So that's a broader provision than the venue provision for the --

MR. SHAPIRO: It's much broader. There are a number

of bail-out provisions in this Act. There are the special bail-out provisions under Section; there's a special provision for challenging Section 5 determinations; there's a special provision under Title III for the more moderate language restrictions. All of those suits, as far as I can recall, must be brought in the District Court for the District of Columbia.

Indeed, the fact that Congress, in Section 14(b) mentions the possibility of a suit to enjoin the action of an official indicates that it anticipated the possibility that there would be some areas where official action could be chal-- lenged, could be reviewed.

Sometimes it specified a Three-Judge Court, as in a bail-out suit, or in a Section 5 suit. Sometimes it did not.

QUESTION: Mr. Shapiro, how many people do youknow that the Attorney General has reviewing submissions from the States from all over the country?

MR. SHAPIRO: The voting -- I don't know the total number of people in the Voting Rights section.

QUESTION: It must be substantial, if there are 20 a week from Texas.

MR. SHAPIRO: Well, of course, Texas has been an unusual problem, because Texas has 254 counties, and an enormous number of election districts of one kind and another: water districts, voting districts, school districts, municipalities.

Despite -- the Act also was retroactive to 1972, so that there has been a large backlog. Most of these changes have been what Attorney General Katzenbach anticipated, rather pro forma changes that don't affect significant rights.

The ones that the Attorney General has been concerned about are those that change at-large elections; some statewide procedures that called, for example, for a purge --

QUESTION: Well, anyway, is it a rather large section that does this?

MR. SHAPIRO: It's quite a large section --

QUESTION: Larger since Texas was covered?

MR. SHAPIRO: I imagine -- I assume it's been expanded, and I think it's still overwhelmed, your Honor.

QUESTION: Doesn't Georgia have 200 counties, too? Georgia has a whole lot of counties.

MR. SHAPIRO: Well, the administration of the Act, particularly Section5, which we're not concerned with in this case, is --

QUESTION: May I ask a question or two. This action was brought before or after the Attorney General ruled that Texas was subject to the Act?

MR. SHAPIRO: The original complaint was filed before the Attorney General had made his determination. I think it was filed just after the Bureau of the Census had made its determination. The Attorney General decided the case

after the District Court ruled, dismissing the complaint. The Court of Appeals noted that fact, but concluded that since the issue was before it, there was no point in sending the case back for what would be a simple formal reconsideration. So it addressed the question of the Attorney General's --

QUESTION: I'm just interested in how Texas and the United States government can come to issue on what seems to be the merits of this case. Texas was brought under this statute by virtue of a test or device that was repealed by Texas before the statute became effective.

MR. SHAPIRO: The language of the statute is whether the State maintained a test or device on November 1, 1972.

QUESTION: I understand that. But it does not maintain that test or device now, or as of the date the statute became effective. And if Texas had instituted this suit the day after they had received the letter fromthe Attorney General, I understand you to say that they could have instituted this suit or another suit as a bail-out action.

MR. SHAPIRO: That's correct.

QUESTION: So what you're saying perhaps is that Texas went to court too soon; is that a possibility?

MR. SHAPIRO: Well, we think that the better remedy would have been for them to file a bail-out suit, if they can demonstrate --

QUESTION: But wouldn't it have been a better

remedy still for the Attorney General to have considered the requirements of 4(d), which starts out by saying, for purposes of this section, in the same section with 4(b)?

MR. SHAPIRO: But the clear implication of 4(d) is that it will apply with respect to the determination for the purposes or with the effect of maintaining a discriminatory test or device. Now, the Attorney General does not make that inquiry.

QUESTION: I'm just wondering why he doesn't.

MR. SHAPIRO: Because the statute doesn't authorize him to. Section 4(b) provides only that he will determine whether the test or device was maintained.

Now, Texas may bring a bail-out suit, within the meaning of the Act. And it may point to its 1975 statute and say, that shows that we are not maintaining a test or device wit discriminatory purpose or effect, and haven't done so and that any incidents of discrimination were sporadic, as described in 4(d).

QUESTION: And I gather they could do that this afternoon?

MR. SHAPIRO: They could do that this afternoon.

QUESTION: In the District of Columbia.

MR. SHAPIRO: And that would be an issue for the District of Columbia; they haven't brought such a suit because I think that the history of discrimination in Texas which led

to the adoption of this act is such that they cannot meet the standard in such a suit, although I'm simply speculating. They may very well prevail in such a suit.

Thank you, your Honor.

QUESTION: But they're free to try?

MR. SHAPIRO: Yes, your Honor.

MR. CHIEF JUSTICE BURGER: Mr. Kendall.

REBUTTAL ARGUMENT OF DAVID M. KENDALL, ESQ.,

ON BEHALF OF THE PETITIONERS.

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

First of all, I'd like to point out that the difference between a bail-out suit and what we're asking here, is, we're asserting that we're not covered and never were covered and had they construed the statute correctly, we would not be covered now. There would be no --

QUESTION: That's what a bail-out suit is for.

MR. KENDALL: If the Court please, a bail-out suit we would have the burden of proving that for ten years -- this suit -- the test goes back to November of 1972; and a bail-out suit, if we filed it today, would go back to 1967. And in Texas, there's a great deal of difference.

But we feel that a bail-out suit at this time would be premature. And we consider the fact that we're not covered inthe first place.

QUESTION: But in a bail-out suit, you get the benefit of 4(d).

MR. KENDALL: We feel that we're entitled to the benefit of 4(d) now.

QUESTION: I know. But in the bail-out suit, you would have the benefit of it.

MR. KENDALL: We would have the benefit of it, as we feel we ought to have the benefit of it now, as Mr. Justice Powell suggested.

I would like to answer, if I may, Mr. Justice Stewart's questions earlier that I couldn't get thinking straight on. According to their statistics, they took the Census Bureau figures for all citizens, all residents of the State.

QUESTION: Of voting age.

MR. KENDALL: Of -- no, I'm sorry. Well, then they deducted from that figure those under 18. So they got a figure for all residents of the State of voting age. And then according to their formula, they then deducted 140,000 as being the number of aliens who were included in thatfigure.

And we submit that by any reasonable means, 140,000 is a ridiculous figure for Texas as the number of aliens who were resident in the State at that time.

QUESTION: How many cross the border every month, legal and illegal?

MR. KENDALL: It's in the hundreds of thousands. I'm not certain of the figures.

QUESTION: What better figures do you have?

MR. KENDALL: I'm sorry?

QUESTION: What better figures do you have?

MR. KENDALL: The Bureau of Naturalization -- Immigration and Naturalization has figures available, we feel. Just recently, of course --

QUESTION: And what are those figures?

MR. KENDALL: I'm sorry?

QUESTION: What are those figures?

MR. KENDALL: That in 1972 there were twomillion, six hundred and some odd-thousand illegal Mexican aliens -- not legal, but illegal Mexican aliens --

QUESTION: In the country.

MR. KENDALL: -- in the United States. We submit --

QUESTION: Well, what better figures do you have for Texas?

MR. KENDALL: None specifically. But we feel that had Census made any effort to determine the number by consulting with Immigration and Naturalization Service it could have determined them.

QUESTION: How does that help you or us now?

MR. KENDALL: We ask that the -- a declaratory judgment, which is our prayer, that the Census Bureau, in

making this determination, be required to use the best information available to determine the number of citizens of voting age in the State; and that they did not do that and the case ought to be remanded to them to make that determination, whatever it may come out to be. They acknowledge, I think, that they didn't use immigration figures or anything else. They used answers to two questions on the Census form, which are at best ambiguous.

Contrary to what Mr. Shapiro said, we do not concede that we used English only for discrimmatory purposes. And we think that this vastly distinguishes this case from the Katzenbach case. In South Carolina against Katzenbach, the Court found that the proceedings were constitutional -- absence of a hearing -- because South Carolina these were figures which were beyond dispute. There was no argument about them. And South Carolina was covered according to Mr. Chief Justice Warren's opinion.

And that is not true here. English -- we submit that statewide in Texas as in every other state of the Union, English-only ballots have been traditionally used, not as a discrimmatory device. And if you read the history set out by the amicus curiae in their brief as to the circumstances this was aimed against, it was aimed against things that had nothing to do with English ballots

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon , at 1:57 o'clock, p.m., the case in the above-entitled matter was submitted.]

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