IN THE SUPREME COURT OF THE UNITED STATES

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| DOUGHERTY COUNTY, GEORGIA, BOARD OF EDUCATION, ET AL., Appellants, | : | |
| v. | : | No. 77-120 |
| JOHN WHITE, Appellee | : | |

Washington, D. C.
Tuesday, October 3, 1978

The above-entitled matter was continued at 10:04 o'clock, a.m.

BEFORE: (As previously stated)

APPEARANCES: (As previously stated)

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will resume arguments now in the pending case.

Mr. Walters, you may proceed.

ORAL ARGUMENT OF JESSE W. WALTERS, ESQ., (RESUMED)

ON BEHALF OF THE APPELLANTS

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

I believe that when we recessed on yesterday afternoon I was discussing with the Court the Sheffield case that arose in Sheffield, Alabama. I believe that I had just advised the Court that a three-judge district court had unanimously ruled that the City of Sheffield did not fall within the definition of a political subdivision as defined in the Voting Rights Act.

This Court in a split decision reversed the District Court and as I read and understand the majority opinion this Court is holding, in effect, that any political entity that has power over some aspects, or any aspect of the electoral processes within a designated jurisdiction is covered by the Act.

Now, I really don't know that I have any real basic quarrel with the decision of this Court, but I do say that it becomes necessary to review the Dougherty County Board of Education under the decision in Sheffield and inquire as to

whether or not the Dougherty County Board of Education does, in fact, have any power over any aspect of the electoral process in Dougherty County, Georgia.

It is submitted that the answer to this inquiry is in the negative.

There are many political subdivisions in the State of Georgia that have no control, no power, nothing to do with the electoral processes. And we say that the Dougherty County Board of Education is one of these. Others would be hospital authorities, payroll development authorities, county boards of health and the like, none of whom have any function whatsoever in connection with the political processes.

In the absence of control of power over the electoral process, neither the Dougherty County Board of Education or any other entity which has no responsibility or control respecting elections is, we submit, required to seek the approval of Federal authorities on a purely and simply personnel matter.

QUESTION: What if the State legislature passed a law that said that all employers must give an hour off for elections? Would that have to be submitted?

MR. WALTERS: Yes, sir, because the State has the power over the electoral process.

QUESTION: What if the legislature delegated the decision with respect to that to a school board?

MR. WALTERS: I would say, Mr. Justice White, that if the Legislature delegated that decision to the board, then the board would have power over the electoral process.

QUESTION: What if there was no state law about it, but an individual school board did pass a rule limiting or some way bearing on how much time people get off to go to the polls, and it was challenged and the state court said the school board has that power under state law?

MR. WALTERS: If the state law gave to the school board such power over the electoral process, under the Sheffield decision, I would say that the board would be a public subdivision.

QUESTION: Is there much different impact if the board then, within its powers, passed a resolution that said that any teacher who declares himself for public office must resign?

MR. WALTERS: Yes, I think it is, Mr. Justice White, simply and concisely. Maybe such school official or school employee would have some other course of action, but I do not believe so, under the Voting Rights Act of 1965, because -- I go back to the question that I do not believe under the laws of the State --

QUESTION: You may be quite right. Even so, it is hard to deny that the board's rule would have an impact on who is going to run for office and who isn't.

MR. WALTERS: Well, of course, Mr. Justice White, in response to that --

QUESTION: Maybe that isn't a test under Section 5, but it does have the impact.

MR. WALTERS: I would have to say that I know of no guaranteed federal right or state right that says a man is entitled to a position with a board of education.

QUESTION: What if the state legislature passed this same rule, saying no public employee may run for office?

MR. WALTERS: I would say that the state, being a covered subdivision under the Act and specifically under Section 4(b) of the Act and under the Attorney General's designation of the State of Georgia as being covered by the Act --

QUESTION: What if the legislature delegated that power to the school board, but said, "In the case of school boards, we will leave it up to individual school boards"?

MR. WALTERS: I think if the State of Georgia did that and delegated that power to the school boards, then the school board would be exercising control over some part of the electoral process.

QUESTION: Suppose the legislature doesn't pass such a law but it is determined by a court that the school board does have that power under state law?

MR. WALTERS: Well, of course, Mr. Justice White, I

think in response to that inquiry that the question would arise as to whether or not under the laws of the State of Georgia -- and frankly and truthfully I do not believe that there is any law in the State of Georgia that gives to the Dougherty County Board of Education or any other board of education any control over --

QUESTION: What if it is determined by a state court that the board has that power?

MR. WALTERS: I would certainly say, in response to that, that it may be but this suit --

QUESTION: How can we decide the case? If they have the power under state law, would you concede that it is covered by Section 5?

MR. WALTERS: If the board of education was charged under the state law with the responsibility of having some control or power over the electoral process, then I would have to say, under the decision in Sheffield, even though they may not register voters, that they would be a covered subdivision. Yes, Your Honor.

QUESTION: Mr.Walters, is there any question at all that your clinet had the power to adopt the rule that it did adopt in this case?

MR. WALTERS: Not in my opinion. No, sir.

QUESTION: Then doesn't the real issue become whether or not the rule that was adopted is a standard

practice or procedure with respect to voting?

MR. WALTERS: No, sir. I would differ with you, with all due respect, Your Honor. I do not believe that Rule 58 is anything other than a personnel rule.

QUESTION: Well, then, isn't the issue whether or not it is a standard practice or procedure with respect to voting?

MR. WALTERS: No, sir, because --

QUESTION: Excuse me, Counsel, Do you mean your negative answer to the question or to the merits of the question?

MR. WALTERS: I think I mean it to the merits of the question, Mr. Chief Justice.

If an employee of the board of education went to register for elective office of the House of Representatives, he would not be asked the question, "Are you getting a leave of absence from the board of education?" He would not be asked anything. He would automatically be qualified and would be permitted to run.

Now, the question then arises -- may it please Your Honor -- as to whether or not after he does this, after he says, "I am running. I am offering for the office of Georgia House of Representatives," then as to whether the board of education, who has contracted with this man for his services for a twelve-month period, has the right to

demand that this person fulfill his contract which he has previously entered into. And we submit that this has absolutely nothing to do with voting.

QUESTION: Isn't that the real issue, since you concede that the school board had power under state law to adopt the rule it did adopt?

MR. WALTERS: Yes, Your Honor, certainly if the issue as to whether or not the rule is a standard practice or procedure.

QUESTION: But you have already also conceded that if the state legislature adopted the same rule it is a standard and covered by Section 5.

MR. WALTERS: Yes, because a state legislature could say before, "Do you qualify for office?"

QUESTION: I asked you if a state legislature said that no public employee may run for office. I thought you conceded that that would be covered by Section 5, because it was a standard.

MR. WALTERS: Yes, I think so, because, as I said, the State of Georgia is specifically designated under Section 4(b) of the Act, and by the Attorney General.

QUESTION: The state does have control of the electoral process.

MR. WALTERS: It does have absolute control in Georgia over the elections. The Dougherty County Board of

Education cannot enact any regulation --

QUESTION: It did adopt this rule.

MR. WALTERS: Yes, but we --

QUESTION: And there was no question of its power to do so.

MR. WALTERS: No, sir, I do not believe there is any question of its power to adopt reasonable rules and regulations pertaining to its employees. I do not believe there is any.

QUESTION: What if the State of Georgia or Dougherty County adopted a rule saying that no person who is physically absent from his place of potential employment as a county employee or state employee shall be paid his wages, and that was applied to someone who ran for the United States Senate from Georgia?

MR. WALTERS: I would not construe that as being a voting rule.

QUESTION: That is simply saying you have got to be there and perform your services.

MR. WALTERS: Yes, sir.

QUESTION: And wouldn't you agree that whether that was adopted as a rule of the school board or adopted as a law by the state legislature the test would be the same?

MR. WALTERS: I would not, Your Honor, because, again, I have to go back to the fact that I concede that the

State of Georgia does have control over their electoral processes.

QUESTION: Certainly, but the question would be that it's legislating of a rule such as was described by my brother, Rehnquist, would be the legislation of a standard practice or procedure with respect to voting.

MR. WALTERS: No, sir. If I understood Mr. Justice Rehnquist's inquiry, it would not be a rule pertaining to a standard practice, but it would be a rule pertaining to whether or not that man was paid --

QUESTION: That's what Justice Stewart is asking you. Would such a rule be a standard practice?

MR. WALTERS: No, sir, not in my judgment.

QUESTION: Then it would not be covered by Section 5 whether it was passed by the state legislature or the school board.

In any event, that would be the question; wouldn't it?

MR. WALTERS: Yes, sir.

QUESTION: Mr. Walters, do you see any difference between a law or rule which says that any officer who doesn't work won't be paid and a rule that says any county officer who doesn't work because of elections won't be paid? They are two different animals, aren't they?

MR. WALTERS: No, sir, Mr. Justice Marshall, I --

QUESTION: Why do you need an additional rule to limit to his working for election? Why don't you just pass a rule which says if he doesn't do his work he doesn't get paid?

MR. WALTERS: I think that this would have been, Mr. Justice Marshall, an answer to this without litigation. I think that the board of education would have been properly within its powers and authorities --

QUESTION: You said it is now within its authority.

MR. WALTERS: Yes, but I say I think they would have been properly within their powers if Mr. White, upon election and not serving in any job for which he had contracted, to have terminated his employment without any rule, without any regulation. But the board, I think, chose to deal with this matter in a more reasonable and moderate fashion, and they prescribe, simply and concisely, how a man could enter the political arena and continue in his employment with the board of education.

QUESTION: Under the present rules, is there anything to prevent a person in this man's position from working for a liquor store?

MR. WALTERS: Is there anything to prevent him from working for a liquor store?

QUESTION: Yes, sir, or doing anything else.

MR. WALTERS: There is certainly nothing in the rule

that would prevent him --

QUESTION: The only prevention is if he worked for election?

MR. WALTERS: Well, if I may, Mr. Justice Marshall, I think if the board, when they contract with an employee, are entitled to expect his full attention and full time to the duties he has contracted to perform --

QUESTION: Are you saying that's an implied condition of his contract?

MR. WALTERS: Yes, sir, I am, Mr. Chief Justice.

QUESTION: Well, you don't need the rule.

MR. WALTERS: This may be true, but I think we need the rule so that it would spell out to any employee then or in the future --

QUESTION: Well, it wouldn't be covered by Section 5 if it wasn't a change, but I didn't know you were contending that it wasn't a change.

MR. WALTERS: Yes, sir, I am contending it was not a change.

QUESTION: The legal decision below is against you on that.

MR. WALTERS: Yes, I think the legal decision in the three-judge court --

QUESTION: With respect to what Georgia law is, that this was a change.

MR. WALTERS: I asked this question,myself, "What modification and what change?"

Now, the lower court decision says -- and if I may quote: "By imposing a financial loss on its employees who choose to become candidates, it makes it more difficult for them to participate in the democratic process and consequently restricts the field from which the voters may select their representatives."

Now, this, I think, is the holding of the lower court. And this is what they say is the modification.

QUESTION: Mr. Walters, may I interrupt you.

Mr. White, as I understand it, was Assistant Coordinator of Student Personnel Services.

MR. WALTERS: Correct, sir.

QUESTION: What were his duties?

MR. WALTERS: His duties were counseling of students, selecting, maybe, their curriculum -- physically counseling, as I understand it, Mr. Justice Powell.

QUESTION: The board had a coordinator and Mr. White was an assistant. How many other assistants were there?

MR. WALTERS: I do not know, Mr. Justice Powell. It could be determined right fast, I believe. I have the Superintendent of the Board --

QUESTION: It is not essential either way.

MR. WALTERS: I do not know how many others there were.

Thank you.

MR. CHIEF JUSTICE BURGER: Counsel, we have questioned you extensively. We have enlarged your time five minutes and have enlarged your friend's time five minutes. You may reserve it, if you wish, for rebuttal.

MR. WALTERS: I would like to.

MR. CHIEF JUSTICE BURGER: Mr. Myer.

ORAL ARGUMENT OF JOHN R. MYER, ESQ.,

ON BEHALF OF THE APPELLEE

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

The statement of facts as presented by Counsel for Appellant is correct insofar as it goes. I would, however, like to add certain additional facts that I think are relevant to the Court's inquiry.

First is that in May of 1972 when Appellee John White announced intention to run he was the first black candidate, at least in living memory and perhaps since Reconstruction Era time, to run for the State General Assembly.

QUESTION: Does this make a difference? Does race make a difference in this case?

MR. MYER: It makes a difference not in this case but it does, we think, in terms of the substantive Section 5

question which, if this had been submitted, is the inquiry of the Attorney General or the District Court of the District of Columbia. And we are suggesting this as well as certain other circumstances surrounding the adoption of the rule because it is apparent that there is a potential in this case.

QUESTION: Suppose there were no such circumstances, would this Rule 58 have to be precleared?

MR. MYER: Yes, Your Honor, it would.

QUESTION: Why are you arguing the surrounding circumstances?

MR. MYER: Because this simply is an illustration, I think, Your Honor, of the kind of change that can be made in a circumstance which raises some suspicion, without determining whether or not in fact it violates Section 5 standards of purpose or effect; but rather in the concept of this case I think it is relevant that immediately upon announcing the rule was adopted.

QUESTION: If the only people who had ever announced they wished to run had been white would it make any difference?

MR. MYER: Mr. White was also, so far as any records show -- and the record is clear that he is the first also ever to announce to run.

QUESTION: I understand that. I was putting a difference case to you.

MR. MYER: But the issue before the court below is not the substantive determination. It is a question of whether or not Rule 58 is a covered change under Section 5, and b) as the second question in the jurisdictional statement, whether or not the Dougherty County Board of Education is a covered entity.

QUESTION: And you are saying that discriminatory intent or effect is immaterial for Section 5 --

MR. MYER: For Section 5 coverage questions, that's correct. Although that is the nature of the inquiry which would be made upon submission to the Attorney General.

QUESTION: Did you consider bringing the 1983 suit rather than proceeding this way?

MR.MYER: Your Honor, the complaint is filed in five counts and there is a 1983 count, there is a Fourteenth Amendment Due Process and Equal Protection count as well as a Fifteenth Amendment count. The case was disposed of on cross-motions for partial summary judgment on the Section 5 issue. And, that having been resolved in favor of the Plaintiff, it rendered it unnecessary then to reach the other counts in the complaint.

QUESTION: What if the Ford Motor Company had a plant in Albany, Georgia, and the first time a black employee sought to run for political office it adopted exactly the same rule that the Dougherty County Board of Education had adopted?

Your argument as to the potential for abuse would be just as good there as in the case of the Dougherty County Board of Education, wouldn't it?

MR. MYER: The only difference there, Your Honor, is that as a private employer they are clearly not covered by Section 5, that is, the Voting Rights Act only extends to those designated jurisdictions and, as this Court has clarified in Sheffield, state actors within that designated jurisdiction, whether it is a state or a political subdivision --

QUESTION: Potential for discrimination really isn't any part of the statutory test, is it?

MR. MYER: I believe it is, but it is only applicable to state actors, not the private sector of the country.

QUESTION: As a matter of statutory coverage.

MR. MYER: As a matter of what Congress intended when it adopted the Voting Rights Act of 1965.

QUESTION: So, you feel that it isn't enough that it be a standard plan or practice, it has to have a potential for discrimination.

MR. MYER: The question is: What is a standard practice or procedure? That is the substantive determination that the Attorney General makes once it is submitted; that is, whether it has the potential --

QUESTION: But in deciding whether it is to be

submitted or not, is there any inquiry or not?

MR. MYER: No. The answer is no.

QUESTION: Is it your submission that any kind of an official rule that has some kind of an impact on an election, or is it just any standard or practice? I can see why it would be a qualification for candidacy, or something, but this wasn't qualification for candidacy.

MR. MYER: This was qualification for candidacy insofar as public employees of Dougherty County Board of Education -- in that it imposed a very substantial financial barrier.

QUESTION: I know, but there wasn't any disqualification from running imposed on them.

MR. MYER: That's correct. There was a disincentive for running, just as, for example, in Whitley there were disincentives and there were increased barriers to qualifying as an independent candidate.

QUESTION: But if a school teacher went over and filed as a candidate, they wouldn't reject his papers because he was employed by the board.

MR. MYER: That's correct. And indeed the school board's policy --

QUESTION: The school board might fire him, but I don't know.

MR. MYER: No, in fact, under the school board's

policy, they wouldn't fire him. They would arrange for him to take a leave, even though during the time he was running he was ready, able and willing to perform his contractual duties.

QUESTION: It is not unknown in political life that people who leave their employment to campaign for public office have an arrangement with their campaign committee that their living costs or regular salary is supplanted by their supporters. Suppose the record in this case or any case would show that the campaign committee had provided a substitute for the salary. Suppose that were shown in this case. Would you be here?

MR. MYER: Yes, sir, because I think that is an irrelevant factor insofar as --

QUESTION: He should get two salaries then? He should get the salary from his committee and the salary from the public also?

MR. MYER: Well, he should get the salary so long as he is certainly performing his duties. And that, for example, suggests, I think, the question Mr. Justice Marshall asked of Mr. Walters, that is, if instead of an electoral context we have a liquor business that he was operating on the side, he could obviously have two incomes. But I think the question of whether or not he would receive some supplemental in a particular case is not a relevant factor --

QUESTION: But the question isn't whether he gets paid for no services, he wanted to perform the services and get paid for them.

MR. MYER: That is correct, and was ready, willing and able to do so --

QUESTION: Mr. Myer, you are addressing yourself now, I gather, to the first question presented, i.e., whether this rule is a, quote, "standard practice or procedure with respect to voting," unquote, not with respect to the second issue.

MR. MYER: That is correct.

QUESTION: And that's the only issue to which you are addressing yourself?

MR. MYER: That is correct, exactly.

QUESTION: Mr. Myer, we are not giving you very much chance to argue your own case. I will ask you one more question and then try to keep quiet.

This goes back to something that your adversary was asked. Let's assume that the Legislature of Georgia enacted a statute of general application to all state employees and all employees of local subdivisions of the state that said, in substance, that while any such employee could run for state or local office, that if one did and wished to receive compensation during that period, he would have to work at least half time. Would that require preclearance?

MR. MYER: Let me make sure I understand the hypothetical. It is a state statute that says, "During the time you are campaigning, in order to receive pay you must be willing to work half time."

QUESTION: Yes.

MR. MYER: I think, clearly, that that is a change in the election law insofar as it sets forth standards, practices or procedures with respect to campaigning and offering for candidacy --

QUESTION: May I ask you a second question.

MR. MYER: -- And as this Court has defined the voting language within Section 5, that encompasses candidacy.

QUESTION: May I ask you another question to follow up on that one, without violating my suggestion I wouldn't ask you too many.

Let's assume the Attorney General in those circumstances decided not to preclear. In other words, he said, "Georgia, you must go ahead and pay these people whether they work at all." That means the public would have to pay for people who run for office, regardless of whether they performed any services. Do you think the Congress of the United States intended any such result?

MR. MYER: Well, Mr. Justice Powell, I think that Congress intended -- and certainly if there were any question in the '65 Act the ratification of this Court's decision in

Allen and the companion cases in both 1970 and 1975 make it abundantly clear that it is Congress' intention that this Act shouB apply in the most minor way. And I think that where there is any alteration, as this Court has said, that has to be submitted.

Now, the Court has posed the question of whether or not, if the Attorney General objected so that that state statute could not go into effect, Congress intended it. I think Congress intended for that kind of scrutiny and has provided not only an expedited consideration, under the 60-day provision of the submission to the Attorney General, but where there is an objection the State of Georgia could then come into the District Court of the District of Columbia and raise that issue as to whether or not that's a violation of the substantive standards, as there have been a number of cases such as Beer in this Court.

QUESTION: How many people are affected by this rule, Mr. Myer?

MR. MYER: Your Honor, the record does not contain what the racial composition of Dougherty County Board of Education is. If, for example, however, and we do have census information in the brief that show that in excess of 53% of those listed in the 1970 census were black.

QUESTION: I am talking about those who work for the board and are affected by this rule, not the voting

population.

MR. MYER: That I do not know.

QUESTION: Is it likely that a majority of them are whites?

MR. MYER: It is likely.

QUESTION: Very likely, isn't it?

MR. MYER: Correct.

QUESTION: Well, then the rule has a greater impact on whites than on anyone else.

MR. MYER: Well, Mr. Chief Justice, that may be true, except that, I would submit, the philosophy behind the kind of remedy that Section 5 represents was not to focus on the discrimination issue alone. That is, if there was a standard practice or procedure in effect in June of 1964 that is patently discriminatory, it escapes Section 5 inquiry. And if subsequent to the effective date of the Act any covered entity makes any change -- no matter how ameliorative or how discriminatory -- that change should be submitted. And that was based upon 100 years of Congress trying to deal with voting rights discrimination, starting with Section 5 of the 1870 Voting Rights Act, continuing in the 1957 Act, continuing in the 1960 Act and included in the 1964 --

QUESTION: Mr. Myer, I want to take another hypothetical. If Georgia passed -- and we now assume that most state employees are white in Georgia, for the purpose of this

question -- and the Legislature passed an act saying that no state employee can run for office. Wouldn't that have to be cleared?

MR. MYER: It would, Your Honor, if it represents a change --

QUESTION: Is there any question?

MR. MYER: There is no question in my view if it represents a change from what was in effect November 1, 1964.

QUESTION: And then its impact would be a matter for the Attorney General to determine.

MR. MYER: Under the substantive inquiry --

QUESTION: Under the substantive inquiry that he makes.

MR. MYER: That's correct.

And to return to the hypothetical that Mr. Justice White was posing to Counsel for Appellant, I think there is no question that if the Georgia General Assembly adopted Rule 58, but simply made it applicable to every employee, or even every board of education employee, and in fact made it a part of the electoral statute of the State of Georgia, Title 34, that would have to be submitted.

Given that, and given this Court's decision in Sheffield -- and I think this case demonstrates the soundness of that analysis -- you have a delegated power. Under Georgia Code 32-1011, the local boards of education are granted the

authority to conduct their affairs. And they have done, on a localized basis, what clearly if the state did on a state-wide basis, would be submitted.

QUESTION: Mr. Myer, can I ask you a question?

You've got two issues, the standard or practice issue and whether this unit is covered. I would like to direct your attention to the coverage of the school board. Now, supposing, instead of the school board action you had, say, the social science department of the high school thought it would be desirable to have some teachers in the legislature and the head of the social science department adopted a rule, without clearing it with the county board, that those who run for election during the fall will have a half teaching schedule in the fall and a double teaching schedule during the spring, something like that. Would that unit have to get clearance? It would surely be a standard or practice because it would have the same effect, only it would be encouragement. Why wouldn't they have to clear?

MR. MYER: At least, in the hypothetical as you have posed it, Mr. Justice Stevens, that would be a state law question and could, in fact, be challenged on the grounds that only the state board of education --

QUESTION: Assume that this is the kind of thing that the head of the department has scheduling authority and he just decides he would like to have this teacher run for

election in the fall. So he says, "Our rule will be if you run for election in the fall you take an extra course in the spring and one less in the fall."

MR. MYER: Assuming arguendo that the social science department had the authority to do it, then quite clearly, under Sheffield, you would have to submit. That is, as Sheffield determined the designations in 14(c)(2) are related to designation: "Once designated, any state actor within" --

QUESTION: Supposing the coach of the football team says, "You can be excused for practice on Friday." That would have to be precleared too. The line coach doesn't have to show up on Friday. He has an extra day to campaign.

MR. MYER: And that as a state actor if that altered any standard practice or procedure which affected -- and assuming that it was also a covered change, assuming that as well, and so that the only inquiry is the entity, if that entity, through any of its subagents has made a change that would have to be as under the operation of Section --

QUESTION: That's what Sheffield holds, isn't it?

MR. MYER: Sheffield holds that any state actor, exercising control, within a designated jurisdiction, must submit.

QUESTION: And that would be true in a local firehouse, if the man in charge of that firehouse said, "Any one of you firemen want to campaign for office, we will take you

off duty here. You have to take a leave of absence."

MR. MYER: Again, assuming that in the distribution of the power, control and regulation over the fire department --

QUESTION: Assuming the head of that firehouse has the authority to do that.

MR. MYER: That's correct. Again, so long as the change is a covered change, any state actor, under this Court's decision in Sheffield, must submit. And I think that is a sound rule because in this case, indeed, in Dougherty County, there is the decision that is cited, Paige v. Gray. And in that the district judge there last year in a White v. Regester case involving Albany, described the entire history of segregation in Albany and Dougherty County, and stated that like most and many cities in the South segregation has been eliminated in government very slowly and generally only by court order. So that the potential to circumvent what Section 5 was intended to do is very substantial, and that where we have it enacted at a state law level it would be covered to say that the entity ought to escape it because it is only at the local level, I think --

QUESTION: I have to amend my example, because he doesn't really have to preclear. He could come to the District of Columbia and file a lawsuit to get authority --

MR. MYER: That is correct, although he always has

that option. And I would say that the burden in Section 5 -- Congress intended to shift the burden, that is, the case by case approach had not worked for 100 years.

QUESTION: But your answers would apply not just in Dougherty County where you say they have been very slow in eliminating segregation, but in every other conceivable municipal corporation in a covered state.

MR. MYER: Well, that's correct insofar as --

QUESTION: So, really, it doesn't make any difference if they have been slow in eliminating segregation in Dougherty County so far as the legal test is concerned.

MR. MYER: That's correct. The legal test would be if you are a state actor and assuming it is a covered change it must be precleared.

QUESTION: So then, the basic issue is whether or not this is a covered change?

MR. MYER: That is correct.

QUESTION: And if your submission is correct, because there is no question about the fact that the school board is a state agency.

MR. MYER: That is correct.

QUESTION: Mr. Myer, is the option you mentioned of coming to the District Court in the District of Columbia really a feasible option for a small rural school board or a small board of health in El Paso, Texas, for example? What

abou the cost in time and delay?

MR. MYER: Your Honor, I would submit that, pending before this Court right now on jurisdictional statements filed in July is a jurisdictional statement by both the Wilkes County, Georgia, Board of Education and the Wilkes County Board of Commissioners of Roads and Revenues, where pursuant to Section 5 cases they filed changes, state law changes from district to at-large. The Attorney General objected. Wilkes County, Georgia, both entities have filed lawsuits in the District Court of the District of Columbia and engaged in a trial and there was a suit in adverse,and they are then bringing the case here. The 1970 census shows that Wilkes County, Georgia, has a population of 8,000 people. They have clearly made the determination and clearly have the resources to bring that action. Just as, in this case, Dougherty County Board of Education has determined that rather than submit Rule 58 they have the resources to bring the case to the Supreme Court for its determination.

So, I think, as a practical matter, my answer is yes. And those are certainly examples in the State of Georgia.

QUESTION: Do you know how many of these cases are submitted to the Attorney General each year?

MR. MYER: I do not have the current figures. As I recall the testimony in the '75 extension, it was

approximately 1,000 a year. And I am sure that Mr. Wallace may well have that information.

QUESTION: And that would be three or four a working day, or more, wouldn't it?

MR. MYER: That's right.

QUESTION: Do you think it is feasible for all of those to come to the District of Columbia -- I know they have the right under law and I know Congress passed it and you didn't, but you said it was feasible.

MR. MYER: Oh. Well, clearly -- and I think Mr. Wallace may have the figures -- I would assume that 99% of the submissions made to the Attorney General are approved. That is, they are nondiscriminatory. So that, we are not talking about three lawsuits a day. And, indeed, the number of cases brought in the District of Columbia, I am sure, is relatively small. Just as, for example, the number of cases the Attorney General has brought enforcing Section 5 -- that is, between 1970 and the testimony in 1975 there were 26 lawsuits brought by the Attorney General to enforce the Voting Rights Act. So that, the burden, I think, on the courts has, at least empiracly, not been shown. And I am sure that at some point, if Congress were to be convinced of that,as they will have the opportunity in 1982, that alteration can be made.

One additional argument I would like to submit is

that this kind of change -- and in terms of where is the line drawn -- I think that Congress in enacting Section 5 contemplated or was trying to deal with all sorts of changes. And, therefore, it was the intent, in fact, by the submission process not to say specifically and not to be able to define specifically every conceivable change. And, indeed, there was Attorney General Burke Marshall's testimony about the infinite variety of eays that school districts around the country had found to come up with new devices to delay desegregation.

So that, whatever -- and there are all kinds of hypotheticals that can be submitted -- the standard and line to draw in this case is, I think, very clear. And that line is where there is a rule or change which directly addresses the electoral system, as this does, then that clearly -- whatever the other kinds of potential hypotheticals and potential factual situations would arise -- but that clearly is covered. And that insofar as this case is concerned that provides the kind of standard or rule to set in this case, that is where the action directly addresses the electoral process, then at least, although that's not the final line, that's as far as this Court needs to go.

QUESTION: Mr. Myer, let me ask you another hypothetical. What if the sanitation department that's in charge of picking up garbage around the city and often employs

people who have been precinct captains, and the like, adopted a rule that we won't pick up garbage two days before election so everybody can get out and circulate in the precincts. Frankly, the reason is to enable people to participate in the electoral process. I assume that would be covered, wouldn't it?

MR. MYER: Absolutely. And even if, for example, in the sanitation department if the majority of the workers there were black --

QUESTION: Forgetting black, or not -- Supposing they just let them off an hour early to vote. The sanitation department did.

MR. MYER: I think, technically, that would be submitted. I think there is a modicum of common sense that does enter into operation of the Act, in that it is essentially those changes which are goring someone's ox that are the ones that come to -- There are many, but as a technical matter I would agree that would have to submitted.

QUESTION: The opposing candiate feels that most of those people driving the trucks are apt to vote for his opponent, I suppose he could challenge it.

MR. MYER: Indeed he could.

My final argument is that I think, under this Court's decision -- that is to return to the question of covered standard practice or procedure -- that I think the Court's

decisions in Whitley and subsequently Hadnott v. Amos show very clearly that where there is a change concerning qualification and increased barriers to candidacy, those kinds of changes are contemplated.

QUESTION: Do you think this is about as far as Section 5 has been stretched in the sense that you are frankly saying just any substantial impact on the possibility of somebody running for an office is covered? There aren't any other cases just like this, are there?

MR. MYER: This is the first case coming up like this, at least to my knowledge. But Section 5, Mr. Justice White, does not look at the degree of control. That is, if you begin to talk about control -- moving a polling place 25 feet is not a major impact.

QUESTION: I know, but you could read Section 5 as saying that we are really dealing with laws that are intended to deal directly with the electoral process, the voting or the electoral process. And if some school board just for efficiency says, "Look, you've got to work but you can have an hour off," why should that be covered?

MR. MYER: Well, I think that your question was Section 5 was intended to deal with those changes which address the electoral process. And my response is at least insofar as Rule 58 is concerned --

QUESTION: If you are going to make a rule about how

much time you can have off for voting -- they are really dealing directly with the voting. This one doesn't, though. This case doesn't do that. It is outside of that process.

MR. MYER: It directly deals with voting as voting has been defined by this Court.

QUESTION: How does it directly deal with it?

MR. MYER: Well, this Court has defined the language, the term "voting" --

QUESTION: How does it directly deal with candidacy?

MR. MYER: Because it imposes a very substantial economic bsrrier to --

QUESTION: But it doesn't impose a qualification.

MR. MYER: It does not impose a technical qualification as the prior colloquy involved of disqualifying. However --

QUESTION: It isn't intended to disqualify, either, as far as you can tell. It is intended to promote the efficiency of the service.

MR. MYER: That goes to the substantive question, Mr. Justice White. It seems to me it may well be intended to do that. That is, even though an employee is willing to work it has a discouraging effect. That is, you need income and it has that obvious impact of saying, even though during the time you are running for office you are ready, able and

willing to perform the work contemplated under the contract.

QUESTION: Suppose the rule, instead of as it was here, was that any employee who engaged in any other activity which occupied a significant amount of his time would be required to take a leave of absence. I am not speaking now of campaigning. I am speaking of his serving for 90 days or whatever it may be in Georgia in the Legislature. Would you say that rule would have to be cleared -- if they applied it to people who wanted to take three months off to go to the university or three months off to sit in the Legislature?

MR. MYER: I think that in those circumstances where it does not directly affect, it may well be that that would not be covered.

QUESTION: Doesn't it have the same effect on this man?

MR. MYER: Well, except that where standards -- where it directly addresses and constitutes a change, then those would be covered. And, indeed, if that -- that would also cover if instead of directly addressing it it did it in an across-the-board fashion, I think that in certain circumstances that also would have to be submitted. And there are a number of hypotheticals that I think would have to be determined on a case by case basis. But I think that this case is at least clear on its facts, that insofar as the rule directly addresses, where it is clearly the intention

of the Dougherty County Board of Education to affect running for office, that is a covered change.

QUESTION: Isn't it also true that the Attorney General might let them do it?

MR. MYER: All we are saying, Mr. Justice Marshall, is that it ought to be submitted. And that substantive inquiry is one the Attorney General makes.

QUESTION: And he could very well say fine.

MR. MYER: He could approve it as he does most of the submissions which he receives.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Wallace.

ORAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ.,

AMICUS CURIAE

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

The key to this case, in our view, is to be found in this Court's statement five years ago in Georgia v. United States, that Section 5 of the Voting Rights Act is not concerned with a simple inventory of voting procedures, but rather with the reality of change practices as they affect the Negro voter.

The problem in this case came to our attention as a result of the complaint filed on behalf of Mr. White. We took a look at it, and there is a stipulation in this record

that as a result of the adoption of Rule 58 Mr. White was required to take a leave of absence of approximately three months time without pay in 1972, of approximately five months in 1974 and approximately three months in 1976. It was only in 1974 that he was involved in contested general election campaign as well as the primary campaign. And in the printed Appendix on page 24A, at the bottom of the page, there is listed in his affidavit the sums of money that he lost in compensation as a result of the application of this rule to him.

QUESTION: Mr. Wallace, what if the school board had had this rule in 1965 and then abolished it, so that it made it easier for candidates to run? Under your co-counsel's submission, it nonetheless would have had to have been submitted to the Justice Department.

MR. WALLACE: Of course. The result might be different, but the question is whether it is a rule covered by Section 5.

QUESTION: So it really doesn't make much difference whether it deters someone or encourages him.

MR. WALLACE: What makes a difference, as we view the purpose of Section 5, as explained by the Court in the quotation that I started my argument with -- what makes the difference is the potential impact on the reality of affecting voting rights and we have to look to see what is involved here

and compare it with the experiences that we have had under Section 5, which is what I am attempting to do here for the benefit of the Court.

As we look at the figures at the bottom of page 24A, we see, first of all, that these figures suggest that Mr.White is probably not a very affluent individual, since three months of salary in 1972 amounted to $2810, and so forth. The second thing we notice is that these are rather substantial sums to have to be forfeiting in order to be able to run for office in comparison with the closest analogy that we have been dealing with under the Voting Rights Act, in our experience, and that is changes in the size of filing fee.

QUESTION: Mr. Wallace, suppose he had been the richest man in the county. What difference would it have made?

MR. WALLACE: We are looking at potential impact.

QUESTION: But if this case is decided in accordance with the position of the Department, the hypotheticals that have been asked and answered here today would have to follow this precedent, without regard to who was rich and who was poor and what the consequences were.

MR. WALLACE: Of course. I am merely trying to follow this Court's admonition in Georgia v. United States, that the Act is to be determined with regard to the realities of changes in voting rights as they affect Negro voters and

candidates.

QUESTION: So we view each case, then, on its facts to determine what the reality --

MR. WALLACE: We are trying to determine whether this is a change that is covered. And in order to determine whether it is a change that is covered, we first look to see what kind of a change it is and compare it with other changes that we know are within the coverage of the Act that we have been dealing with. And increases in filing fees were singled out for mention in the 1975 Committee reports in both the House and the Senate as examples of changes for which the Attorney General has properly interposed objections under the Voting Rights Act which Congress was extending.

QUESTION: I think really the problem in the argument you are making -- You are going to the merits of the question that the Attorney General would be required to decide were this submitted to him; because, as my brother, Rehnquist, has indicated, the repeal of such a rule as this would be, under your submission, a standard practice or procedure with respect to voting.

MR. WALLACE: I am not attempting to argue the merits.

QUESTION: And that's the issue before us -- not the merits.

MR. WALLACE: I understand. I am not attempting to

argue the merits, Mr. Justice. I am merely trying --

QUESTION: Whether it has an affect on Negro voters is a matter for the Attorney General to decide, if this is required to be submitted to him under this statute.

MR. WALLACE: That is right.

QUESTION: But we are concerned with that question, not the merits of this.

MR. WALLACE: That is correct, and the statute applies to changes as they, in reality, affect opportunities to exercise voting rights and to run for office. We looked at Department of Justice records with respect to increases in filing fees shortly before -- the fact that we had to interpose objections to some of them was approved by both committees of Congress as proper administration of the Voting Rights Act to see what kind of changes, what kinds of financial burden had required us, in our view, to interpose objection because of the burdens that they placed on the ability of individuals to run for office.

And what we saw, as a few examples, in 1973, is that we saw fit to interpose an objection to an increase in Osilla, Georgia, of the filing fee to run for mayor from $10 to $125, and to run for the council from $10 to $100. We had similar examples --

QUESTION: Wouldn't the reduction in the filing fee come equally within --

MR. WALLACE: Of course, but the point is the questions from the bench have suggested that this case threatens to deflect us into trivia; but we are talking about a case in which, on its face, on the allegations of the complaint, a burden of several thousand dollars has been imposed on the ability of a candidate to run for office, where we have been required to review burdens of less than $100 that have been imposed in a change in filing fees.

It is true that this is not in form a filing fee, but the economic impact on the face of it is very similar as a disincentive to run for office. Somehow this money must be found. He has to do without it, whether he has to pay it as a filing fee or not. If the State Legislature were to adopt a rule of local legislation that employees of the Dougherty County Board of Education, in order to run for the State Legislature, must pay a filing fee of $3,000, or must pay a filing fee equivalent to three months salary, it would be obvious that that would be a change covered by the Voting Rights Act.

QUESTION: Equally obvious if they only required 25 cents; wouldn't it?

MR. WALLACE: That is correct, but the point is that Congress -- the fundamental premise of the Voting Rights Act is that Congress believed it could not anticipate the form that new obstacles to voting rights and to running for office

might take. And, therefore, as the Court said in Sheffield, it shifted the advantages of time and inertia from the perpetrators of discrimination to its victims.

QUESTION: If this rule had been in effect since 1890, let us say, there wouldn't be any Section 5 case at all, would there?

MR. WALLACE: If the rule had been in effect? Of course not.

QUESTION: He might have relief somewhere else, you suggest, but he wouldn't have any here.

MR. WALLACE: That is correct.

QUESTION: But if they then abolished the rule, you have told us, that it would have to be submitted?

MR. WALLACE: There are many submissions that are approved very readily. The question was asked what number of submissions are we getting. The latest figures indicate that it is approximately 2,000 submissions a year, involving approximately 4,500 changes, because the number of submissions involves multiple changes. Less than 2% of those resolved in an objection being interposed, and in about 91% the preclearance is given without any further interchange of correspondence. There are many routine submissions.

QUESTION: Mr. Wallace, the Attorney General has to pass on 2,000 of these a year?

MR. WALLACE: That is correct. That is the way the

numbers are running.

QUESTION: That has to be done with all the other important business of the Attorney General of the United States?

MR. WALLACE: The Voting Rights Act Section of the Civil Rights Division of the Department of Justice is staffed to implement the policies reflected in this Act which has been one of the most successful civil rights acts in history. And the fact that the percentage of objections interposed is small doesn't detract from the fact that the Act has resulted in great changes in voting and candidacy in the covered jurisdictions. Where the objections are interposed, they often amount to very important safeguards, whereas, as my co-counsel said, 100 years of trying to deal with these matters after the fact, case by case, had proved unsuccessful.

MR. CHIEF JUSTICE BURGER: Your time has expired, Mr. Wallace.

Mr. Walters.

REBUTTAL ORAL ARGUMENT OF JESSE W. WALTERS, ESQ.,

ON BEHALF OF THE APPELLANTS

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

I think we have gone far afield and I think, as I sat listening, that if we ask ourselves one question: Suppose the Rule 58 had simply and concisely provided that if elected

you will take a leave of absence while you are in Atlanta, Georgia, in the Legislature earning another salary from another governmental unit; would anyone seriously contend that that rule was a standard, practice or procedure with respect to voting? Or would it be obvious, on its face, that it was a rule, a standard, a practice or procedure with respect to employment of the Board of Education?

QUESTION: Could I ask you again: Do you want to change your answer to my earlier question?

MR. WALTERS: Maybe I misunderstood you, Mr. Justice White.

QUESTION: Well, I asked you if the legislature had said -- had passed a state rule, applicable to all public employment or to all school boards, whether it would be a covered -- And you said it was.

MR. WALTERS: Well, I misunderstood the question, Mr. Justice White.

QUESTION: Do you want to change your answer?

MR. WALTERS: I would not say it was a standard practice or procedure with respect to voting. And unless it is a standard practice or procedure with respect to voting --

QUESTION: I agree with you. I just thought that earlier in the argument you had said that if the state legislature had adopted this rule it would be covered.

QUESTION: You simply intended to say that the state legislature would have been a covered entity under Section 4.

MR. WALTERS: That would be a covered entity, yes, sir. But all state laws, just because they are covered entities, do not have to be submitted to the Attorney General.

QUESTION: I'll accept your latest answer to the same question.

QUESTION: Mr. Walters, supposing the rule increased the amount of filing fee for candidates; would that be a standard or practice with respect to voting?

MR. WALTERS: I would have to answer that, Mr. Justice Stevens, that the Board of Education of Dougherty County could not.

QUESTION: No, no, no, but would you agree that if whatever state entity had the authority to do it passed some rule that increased the filing fee and, therefore, made the candidates' choice of whether to run or not more difficult; would that be a standard or practice with respect to voting?

MR. WALTERS: Under the decisions of this Court, I would say yes.

QUESTION: Well, how is this different?

MR. WALTERS: Because this is not -- It does not increase anything. It says to a member who has contracted to perform services for Dougherty County --

QUESTION: "You cannot earn $3,000 this fall if you run for office."

MR. WALTERS: It is not in the record and no one has said anything about it, but what about the $7500 a year that Mr. White has been making from the State Legislature for his 45 days of service? Not even Mr. White's counsel contends that they are entitled to recover the money for leave of absence while he was there.

This is an employment practice, I submit, Mr. Justice Stevens.

QUESTION: Is it possible for a practice to be both to be an employment practice and at the same time to be a standard practice, affecting voting, within --

MR. WALTERS: I do not believe so.

Now, I would say, in conclusion, that in my judgment the outer limits for the applicability of the Voting Rights Act have been already reached. And I say that the restrictions imposed by the Voting Rights Act, on a lengthy number of selected Southern States, are unique in the history of this Nation.

One of the members of this Court has said that the "preclearance requirement" of the Act is a substantial departure from ordinary concepts of Federal systems. Its encroachment upon state sovereignties is significant and undeniable."

Another has recently said that "there is a need to

bring a commonsense approach to its application."

QUESTION: Those are arguments that you make to the Congress, aren't they, Mr. Walters?

MR. WALTERS: No, sir, I think these are statements that have been made in decisions, Mr. Justice.

QUESTION: Yes, I know they are made in decisions, but aren't they arguments you make to the Congress, rather than to this Court?

MR. WALTERS: I certainly do not intend to make an argument that is not properly before the Court.

QUESTION: I didn't imply that. I just think they are policy questions, aren't they, basically? Despite the fact that Justices up here have made the utterances.

MR. WALTERS: Well, I would say, Mr. Justice Blackmun, that a commonsense approach to an act of Congress and to a construction of an act of Congress is a significant factor in a judicial determination of the intent of that act. And I would say that, after all is said and done, and all the rhetoric is over, a commonsense look at Rule 58 will reveal that it is not a standard practice or procedure with respect to voting, as Congress intended. Congress, I do not believe, intended for a situation such as this to have to come to Washington to get clearance.

Thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 11:06 o'clock, a.m., the case was submitted.)