Allen: general principle that section 5 to be interpreted as very broadly; in particular, held applied to MS law that changed an elected school superintendent into a county-board appointed school superintendent in ll counties.

Presley v. Etowah: Section 5 generally covers 4 type of cases, one of which is changes affecting the creation or abolition of an appointed office. Here, the case involved reduction in powers of elected county road commissioners (reduced authority over district funds and transfer of authority to appointed county engineer). Shifts in internal operations and changes in distribution of power among officials has no direct relation to voting. Moreover, reduction in authority does not in itself constitute a rule governing voting. Because commissioner retains substantial authority, need not reach whether some kind of change might constitute a de facto replacement of elective office with appointed one.

Texas v. U.S.: Section 5 applies to a case in which state replaced an elected aquifer board with an aquifer board that was appointed.

ORDER

For the reasons stated in the accompanying Memorandum, it is this 13th day of October, 1994, hereby

ORDERED: that in reliance on the solemn representations of the office of the United States Attorney on behalf of the Secretary of Veterans Affairs, the Acting Under Secretary for Health of the Department of Veterans Affairs, and the Director of the Veterans Affairs Medical Center at Hampton, Virginia, in their official capacities, this matter is DENIED AS MOOT, without prejudice to its reopening on motion of plaintiffs in the event that there is any breach of these commitments; and it is further

ORDERED: that plaintiffs' motion for summary judgment is DENIED AS MOOT.

STATE OF TEXAS, Plaintiff,

v.

UNITED STATES of America, et al., Defendants.

Civ. A. No. 94–465 (JWR, JHG, NHJ).

United States District Court, District of Columbia.

Oct. 20, 1994.

Texas sought preclearance for parts of legislation which would replace elected board governing aquifer with appointed regulatory board. The Three Judge District Court held that: (1) section 5 of Voting Rights Act applied to legislation involving creation of district to regulate water in aquifer, and (2) there were genuine issues of material fact, precluding summary judgment for state of Texas, as to specific purpose of legislation necessary to determine whether legislation had discriminatory purpose within meaning of Voting Rights Act.

Motion for summary judgment denied.

1. Elections ⚿12(8)

If legislation effects change with respect to voting, Voting Rights Act requires preclearance either by Attorney General or by court before implementation; if legislation does not effect change, it may be implemented immediately. Voting Rights Act of 1965, § 5, as amended, 42 U.S.C.A. § 1973c.

2. Elections ⚿12(1)

Voting Rights Act applies to state rules relating to qualifications of candidates and to state decisions as to which offices shall be elective. Voting Rights Act of 1965, § 5, as amended, 42 U.S.C.A. § 1973c.

3. Elections ⚿12(1)

Changes in election procedures which concern only allocation of power among government officials are not covered by Voting Rights Act. Voting Rights Act of 1965, § 5, as amended, 42 U.S.C.A. § 1973c.

4. Elections ⚿12(8)

Section 5 of Voting Rights Act applies to portions of Texas legislation, involving creation of district to regulate water in aquifer, which were not administratively precleared; replacement of appointed body with elected one is covered changed under Voting Rights Act. Voting Rights Act of 1965, § 5, as amended, 42 U.S.C.A. § 1973c.

5. Elections ⚿12(8)

Edwards Aquifer Authority, which was created to govern regulation of aquifer, was "replacement" for appointed regulatory body, and, thus, sections of district not administratively precleared were governed by requirements of Voting Rights Act; coverage of two districts, although in some respects different, so extensively overlapped as to make meaningful differentiation impossible. Voting Rights Act of 1965, § 5, as amended, 42 U.S.C.A. § 1973c.

See publication Words and Phrases for other judicial constructions and definitions.

6. Elections ⇨12(1)

Under Voting Rights Act, Texas was required to show that Edwards Aquifer Authority, which was created to govern regulation of aquifer, was free of discriminatory purpose. Voting Rights Act of 1965, § 5, as amended, 42 U.S.C.A. § 1973c.

7. Elections ⇨12(1, 9.1)

For purposes of showing whether legislation is "free of discriminatory purpose" under Voting Rights Act, proof of discrimination may be circumstantial and it need not be shown that discriminatory purpose was primary motivation of legislation as long as it was a motivating factor. Voting Rights Act of 1965, § 5, as amended, 42 U.S.C.A. § 1973c.

See publication Words and Phrases for other judicial constructions and definitions.

8. Federal Civil Procedure ⇨2465.1

Inquiry into purpose or intent is particularly unsuitable for resolution by summary judgment. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

9. Federal Civil Procedure ⇨2481

There were genuine issues of material fact, precluding summary judgment for state of Texas, as to specific purpose of legislation creating district to regulate water in aquifer in order to determine whether legislation had discriminatory purpose within meaning of Voting Rights Act. Voting Rights Act of 1965, § 5, as amended, 42 U.S.C.A. § 1973c; Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

10. Elections ⇨12(8)

Under "no retrogression" rule, administrative preclearance for legislation must be denied under "effects" prong of Voting Rights Act if new system imposed by legislation places minority voters in weaker position than existing system. Voting Rights Act of 1965, § 5, as amended, 42 U.S.C.A. § 1973c.

See publication Words and Phrases for other judicial constructions and definitions.

11. Federal Civil Procedure ⇨2481

There were genuine issues of material fact, precluding summary judgment for state of Texas, as to whether replacement of elected board with appointed one to regulate water in aquifer diminished voting power of minorities and caused retrogression which would be prohibited by Voting Rights Act. Voting Rights Act of 1965, § 5, as amended, 42 U.S.C.A. § 1937c; Fed.Rules Civ.Proc. Rule 56(c), 28 U.S.C.A.

Gregg A. Cooke, Environmental Protection Div., Renea Hicks, Atty. General's Office of Texas, Austin, TX, for State of Tex.

Todd Anthony Cox, Delora L. Kennebrew, Steven H. Rosenbaum, John Kent Tanner, Elizabeth Johnson, Cal G. Gonzales, U.S. Dept. of Justice, Civ. Rights Div., Washington, DC, for the U.S.

Gilberto Mario Moreno, Mexican American Legal Defense & Educational Fund, Washington, DC, Judith Sanders-Castro, San Antonio, TX, pro hac vice, for League of United Latin American Citizens (Lulac), Dist. 15.

Andrew Tanner Karron, Robert Neil Weiner, Arnold & Porter, Washington, DC, for Edwards Underground Water Dist., amicus.

Before ROGERS, Circuit Judge, and NORMA HOLLOWAY JOHNSON and JOYCE HENS GREEN, District Judges.

MEMORANDUM OPINION AND ORDER

Plaintiff, the State of Texas ("Texas" or "State"), commenced this action on March 9, 1994 against the United States pursuant to Section 5 of the Voting Rights Act of 1965, codified as amended at 42 U.S.C. § 1973c ("Section 5"). Texas properly requested that a three-judge Court be convened pursuant to 28 U.S.C. § 2284. This Court subsequently permitted the League of United Latin American Citizens ("LULAC") to intervene as a party defendant.[1]

Texas asks for alternative declaratory relief with respect to Senate Bill 1477 of the

1. The Edwards Underground Water District was permitted to take part as *amicus curiae* after its motion to intervene was denied.

Texas legislature, popularly known as the Edwards Aquifer Authority Act ("S.B. 1477" or "Act"). It seeks preclearance for all parts of S.B. 1477 not already precleared by the Attorney General of the United States. In the alternative, it requests that section 1.41 of the Act, which abolishes the Edwards Underground Water District ("EUWD"), be precleared and that all other parts of S.B. 1477 not already precleared be declared outside the purview of Section 5's preclearance requirements.

Presently pending is Texas' motion for summary judgment. The United States, LULAC and the EUWD filed pleadings in opposition, and the State filed a reply. Oral argument was heard on October 5, 1994. For the reasons expressed below, this motion is denied.

I. *Background*

The Edwards Aquifer ("Aquifer") is a 175-mile long underground body of water that provides ground water to arid portions of south central Texas. Users of the Aquifer are divided into three basic groups: (1) farmers in Uvalde and Medina counties, which are located over the Aquifer on its western end, (2) municipal users in Bexar County, which is centrally located over the Aquifer, and (3) municipal, industrial, and agricultural users in eastern counties serviced by rivers fed from the Comal and San Marcos springs, which are located at the Aquifer's eastern edge and are fed by the Aquifer. These counties include Comal, Hays, Caldwell, Guadalupe, Frio, Atascosa and Wilson.

The counties most directly affected by the Aquifer have created four districts to regulate the water in the Aquifer. The EUWD was established by special legislation in 1959 as a state regulatory body to govern the five counties situated above the Aquifer: Bexar, Comal, Hays, Medina and Uvalde. Medina and Uvalde counties withdrew from the EUWD in 1989, and created the Medina County Underground Water Conservation District ("MCUWCD") and the Uvalde County Underground Water Conservation District ("UCUWCD"), respectively. In addition, the Evergreen Underground Water Control District ("Evergreen UWCD") was created by special legislation in 1965 and operates in Frio, Atascosa and Wilson counties.

After the withdrawal of Medina and Uvalde counties, the EUWD was governed by a twelve-member board, four of whom were elected from single-member districts in Bexar County[2], two at-large from Bexar County, three at-large from Comal County, and three at-large from Hays County. Subsequently, the EUWD was the subject of a lawsuit brought by Hispanic and African-American voters[3] pursuant to Section 2 of the Voting Rights Act. On May 5, 1994, a consent decree was entered in *Williams* providing that the EUWD be governed by a twelve-member board elected from six single-member districts in Bexar County, three single-member districts in Comal County and three single-member districts in Hays County. This new election system was approved by the Attorney General of the United States on July 26, 1994 and is presently being implemented. The first election will be held on November 8, 1994, but several years will pass before the full new system will be in place.

Around 1989, environmental groups and interests dependent on the Comal and San Marcos springs began to complain that low water levels in the Aquifer decreased the water flow in the springs, thereby threatening or killing several endangered species. In May 1991, the Sierra Club and other environmental interests filed suit against the United States Secretary of the Interior and the United States Fish and Wildlife Service ("USFWS").[4] The gravamen of the complaint was that by failing to insure adequate water levels in the Aquifer and, therefore, the springs, the federal government had failed to protect certain endangered species.

2. Two of these districts have majority Hispanic voting age populations.

3. This action is captioned *Williams v. Edwards Underground Water District*, No. SA-92-CA-144, in the United States District Court for the Western District of Texas, San Antonio Division.

4. That action is captioned *Sierra Club v. Babbitt*, No. MO-91-CA-069, and is pending in the United States District Court for the Western District of Texas, Midland-Odessa Division.

Subsequently, three state agencies intervened in this action and were aligned as defendants.

In February 1993, following a bench trial, Judge Lucius D. Bunton, III, found violations of the Endangered Species Act. Judge Bunton directed the USFWS to develop and disseminate information about the springflows necessary to sustain the endangered species in the Comal and San Marcos springs. In addition, the court directed one of the state agencies to prepare a comprehensive management plan for the Aquifer. Judge Bunton invited the Sierra Club to move for further relief after the 1993 session of the Texas legislature if no regulatory plan were in place.

Primarily in response to that Court's directives, the Texas legislature passed S.B. 1477 on June 11, 1993. The principal creation of the Act is the Edwards Aquifer Authority ("EAA"), which would govern the Aquifer in the counties of Atascosa, Bexar, Caldwell, Comal, Guadalupe, Hays, Medina and Uvalde. The EAA will regulate the use, reuse, and conservation of water within or withdrawn from the Aquifer, and it must develop comprehensive management and critical period management plans for the Aquifer. The nine-member board of directors that would govern the EAA—all of whom would be appointed [5]—will have the power to issue orders, including the assessment of administrative penalties, and may seek civil injunctions to enforce its powers.

The Act also repeals the statutory authority for the EUWD and abolishes the EUWD. All files and assets of the EUWD are transferred to the EAA, and the EAA is to be substituted as a party in any litigation in which the EUWD is presently involved.[6]

Texas submitted S.B. 1477 to the United States Department of Justice ("DOJ") for administrative preclearance under Section 5. On November 19, 1993, DOJ issued two letters in response, one of which objected to S.B. 1477 "insofar as it replaces the previously elected governing body with an appointed board." [7] Because the State was uncertain whether DOJ objected to the abolition of the EUWD or the creation of the EAA, representatives of the State and DOJ met on December 20, 1993 to seek clarification. On December 30, Texas sent a letter to DOJ restating Texas' basic view that the creation of the EAA falls outside Section 5.

By order dated February 25, 1994, the *Sierra Club* court appointed a monitor and imposed federal court regulation over the Aquifer. This order is premised in large part on the State's failure to implement a satisfactory regulatory system and will remain in effect until the State implements an adequate plan.

Texas thereafter, on March 9, 1994, commenced this action. It requests that the

5. The board would be comprised of one member appointed by the South Central Texas Water Advisory Committee, a committee created by S.B. 1477; two members appointed by the governing body of the City of San Antonio; one member appointed by the Commissioners Court of Bexar County; one member appointed by the Commissioners Court of Comal County; one member appointed by the governing body of the City of San Marcos; one member appointed by the governing body of the MCUWCD; one member appointed by the governing body of the UCUWCD; and one member appointed on a rotating basis by the governing body of the Evergreen UWCD, the MCUWCD or the UCUWCD.

6. Section 1.41 of S.B. 1477 provides, in pertinent part:

> REPEALER; TRANSFERS; RULES. (a) Chapter 99, Acts of the 56th Legislature, Regular Session, 1959 ... is repealed, and the [EUWD] is abolished.
>
> (b) All files and records of the [EUWD] pertaining to control, management, and operation of the district are transferred from the [EUWD] to the [EAA] on the effective date of this article.
> (c) All real and personal property, leases, rights, contracts, staff, and obligations of the [EUWD] are transferred to the [EAA] on the effective date of this article.
> (d) On September 1, 1993, all unobligated and unexpended funds of the [EUWD] shall be transferred to the [EAA].
>
> * * * * * *
>
> (f) The [EAA] shall be automatically substituted for the [EUWD] in any judicial or administrative proceeding to which, on the effective date of this article, the [EUWD] is a party.

7. The Attorney General precleared S.B. 1477 insofar as it "pertains to the creation of the [UCUWCD] ... [and] requires the District to use five single-member districts to elect the board of directors."

Court give S.B. 1477 Section 5 preclearance, declaring that it does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race, color or minority language status. Alternatively, Texas asks the Court to declare that Section 5 does not apply to any part of the Act except section 1.41, which abolishes the EUWD.

II. *Discussion*

Texas seeks summary judgment on either of its alternative theories. Summary judgment is appropriate when there is "no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). "The inquiry performed is the threshold inquiry of determining whether there is a need for trial—whether, in other words, there are any genuine issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986). In considering a motion for summary judgment, the "evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in [its] favor." *Id.* at 255, 106 S.Ct. at 2513. At the same time, however, Rule 56 places a burden on the nonmoving party to "go beyond the pleadings and by [its] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986).

A. *Applicability of Section 5 to S.B. 1477*

[1] The threshold issue raised in Texas' motion for summary judgment is whether S.B. 1477 [8] effects a change "with respect to voting" within the meaning of Section 5. 42 U.S.C. § 1973c. If the change is covered by Section 5, the Voting Rights Act requires that either the Attorney General or this Court preclear S.B. 1477 before its implementation. *See Clark v. Roemer*, 500 U.S. 646, 652, 111 S.Ct. 2096, 2101, 114 L.Ed.2d 691 (1991); *Texas v. United States*, 785 F.Supp. 201, 203 (D.D.C.1992) (three-judge court). On the other hand, if S.B. 1477 is not covered by Section 5, Texas may implement it immediately. *Texas v. United States*, 785 F.Supp. at 203.

The Supreme Court of the United States first addressed the question of Section 5 coverage in *Allen v. State Board of Elections*, 393 U.S. 544, 89 S.Ct. 817, 22 L.Ed.2d 1 (1969), a series of cases arising out of Mississippi and Virginia election laws and regulations. *Id.* at 547–48, 89 S.Ct. at 822–23. In *Allen*, the Court emphasized that the Voting Rights Act "implemented Congress' firm intention to rid the country of racial discrimination in voting." *Id.*; *see South Carolina v. Katzenbach*, 383 U.S. 301, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966).

[2] Toward this end, the Court "rejected a narrow construction" that would limit Section 5 to voter qualification regulations and "held that the section applies ... to state rules relating to the qualifications of candidates and to state decisions as to which offices shall be elective." *Presley v. Etowah County Comm'n*, 502 U.S. 491, ——, 112 S.Ct. 820, 827, 117 L.Ed.2d 51 (1992); *see Allen*, 393 U.S. at 565, 89 S.Ct. at 831 ("The Voting Rights Act was aimed at the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race"); *see also City of Lockhart v. United States*, 460 U.S. 125, 131, 103 S.Ct. 998, 1002, 74 L.Ed.2d 863 (1983) (Section 5 applies to addition of seats to city commission); *City of Rome v. United States*, 446 U.S. 156, 161, 100 S.Ct. 1548, 1553, 64 L.Ed.2d 119 (1980) (Section 5 governs annexation); *Georgia v. United States*, 411 U.S. 526, 531, 93 S.Ct. 1702, 1706, 36 L.Ed.2d 472 (1973) (Section 5 covers replacement of single-member districts with multi-member districts). This broad construction furthers Congress' intent "to reach any state enactment which altered the election law of a covered State in even a minor

8. Texas concedes that section 1.41 of S.B. 1477, which abolishes the EUWD, is covered by Section 5. It argues, however, that the remainder of the Act does not bring about a change "with respect to voting" sufficient to be covered by Section 5.

way." *Allen,* 393 U.S. at 566, 89 S.Ct. at 832.[9]

[3] Notwithstanding this sweeping interpretation, Section 5 does not have universal applicability. In *Presley,* the Court noted that Section 5 covers "changes in election procedures" and "substantive changes as to which offices are elective." 502 U.S. at ——, 112 S.Ct. at 828. The Court emphasized that these categories of voting changes must have "a direct relation to voting and the election process." *Id.* at —— ——, 112 S.Ct. at 828–29. Changes such as those at issue in *Presley*—those that concern only "the allocation of power among government officials"—are not covered by Section 5. 502 U.S. at ——, 112 S.Ct. at 832.

The State argues that S.B. 1477, with the exception of section 1.41, falls within the province of *Presley.* It asserts that the Act creates the EAA as a new governing body for the Aquifer. Texas' position is based on the fact that the geographic range and regulatory power of the EAA exceed those of the EUWD. For the areas not governed by the EUWD, either because the area is not located within the EUWD's boundaries or because the specific power was beyond the authority granted the EUWD, Texas argues that S.B. 1477 is simply not "a procedure with respect to voting" within the meaning of Section 5. *See Presley,* 502 U.S. at ——, 112 S.Ct. at 832 ("[c]overed changes must bear a direct relationship to voting itself").

From this conclusion, the State avers, two consequences flow. First, the EAA should be permitted to exercise its full powers in those areas outside the geographic reach of the EUWD but within the EAA's boundaries. Second, in those areas within the geographic reach of both the EAA and the EUWD, the EAA should be permitted to exercise those powers that have not been allocated to the EUWD. These powers, according to Texas, constitute merely the State's award of power that was heretofore not allocated.

The State concedes that the Section 5 coverage question is more difficult for those areas in which the powers of the EAA and the EUWD overlap. Texas argues, however, that S.B. 1477 should be analyzed as a statute that creates a new regulatory entity separate from the abolition of the existing governing body, therefore not implicating Section 5. The primary factual basis for this argument is that prior to the creation of the EAA, the Aquifer was governed by four distinct water districts, which had limited powers and imposed few regulations. In contrast, the EAA has unified authority over the Aquifer—it has "teeth" as described by Texas' counsel at oral argument—and leaves three of the original water districts undisturbed.

If anything, the State posits, the EAA may only be a *de facto* replacement for the EUWD, and the Court in *Presley* left unanswered the question of the application of Section 5 to a *de facto* replacement. *See* 502 U.S. at ——, 112 S.Ct. at 831. Any analysis of a *de facto* replacement, however, according to the State, would be premature because the EAA is not functional and there is no way to determine whether it will operate as a *de facto* replacement for the EUWD.

Defendants[10] dispute almost all of Texas' contentions. They assert that *Bunton v. Patterson,* one of the cases decided in the *Allen* opinion, settles the issue of Section 5 coverage. In *Bunton,* the Supreme Court examined a Mississippi law that changed an office in certain counties from an elected

9. Indeed, *Allen* involved four distinct cases, each of which was covered by Section 5. 393 U.S. at 569, 89 S.Ct. at 833. The first, *Allen* itself, involved a change in the procedures for the casting of write-in ballots. *Id.* at 570–71, 89 S.Ct. at 834–35. The second, *Whitley v. Williams,* concerned changes in the requirements for independent candidates seeking office in general elections. *Id.* at 551, 570, 89 S.Ct. at 824, 834. *Fairley v. Patterson,* the third case, arose out of a change from single-district voting to at-large voting. *Id.* at 550, 569, 89 S.Ct. at 824, 833. Finally, in *Bunton v. Patterson,* a statute provided for the appointment of officials who had previously been elected. *Id.* at 550–51, 569–70, 89 S.Ct. at 823–24, 833–34. *See Presley,* 502 U.S. at ——, 112 S.Ct. at 828.

10. The reference to "Defendants" refers to the United States, LULAC and the EUWD, the *amicus.* All three raised substantially identical arguments in their pleadings and will be treated herein as one group.

position to an appointed position. The Court concluded that:

> The power of a citizen's vote is affected by this amendment; after the change, he is prohibited from electing an officer formerly subject to the approval of the voters. Such a change could be made either with or without a discriminatory purpose or effect; however, the purpose of § 5 was to submit such changes to scrutiny.

393 U.S. at 569–70, 89 S.Ct. at 834; *see Robinson v. Alabama State Dep't of Educ.*, 652 F.Supp. 484 (M.D.Ala.1987).

Bunton applies, argue Defendants, because the creation of the EAA cannot be considered in isolation from the abolition of the EUWD. The proper analysis focuses on the *replacement* of the EUWD with the EAA, which is covered by Section 5. *See Georgia v. United States*, 411 U.S. at 531, 93 S.Ct. at 1706 ("Section 5 is not concerned with a simple inventory of procedures, but rather with the reality of changed practices as they affect [minority] voters.").

Defendants assert that one simple fact compels this conclusion: there is only one Aquifer and its regulation is the "reason for being" for both of these boards. United States' Memorandum in Opposition to Texas' Motion for Summary Judgment at 14. Moreover, S.B. 1477 provides for the transfer of complete control over the Aquifer from the EUWD to the EAA and the EAA will assume all liabilities and obligations of the EUWD.[11] Geographically, Defendants assert that the coverage of the two entities is "substantially the same," and that any slight differences are insufficient to take this case out of Section 5. *Id.* at 16 n. 8, 17. Defendants further argue that the State has greatly underestimated the powers available to the EUWD.

[4] We agree with Defendants that Section 5 applies to those portions of S.B. 1477 not administratively precleared. *Bunton* and *Presley* mandate that the replacement of an elected body to an appointed one is a covered change under Section 5. The only inquiry presented in the instant case, therefore, is whether the EAA is properly considered a replacement for the EUWD.

[5] It is. Several factors compel this conclusion. First, there is significant overlap in the geographic range and regulatory power afforded the two boards. Although it is true that the geographic coverage of the EAA is broader[12] and the EAA has more expansive powers than the EUWD[13], the coverage so extensively overlaps as to make meaningful differentiation impossible. In any event, a dispute regarding these issues would clearly preclude summary judgment. Second, and more fundamentally, section 1.41 of the Act transfers all files and records of the EUWD "pertaining to control, management, and operation" of the Aquifer to the EAA; transfers all "real and personal property, leases, rights, contracts, staff, and obligations" of the EUWD to the EAA; transfers all otherwise unobligated or unexpended funds of the EUWD to the EAA; and substitutes the EAA for the EUWD "in any judicial or administrative proceedings to which ... the [EUWD] is a party." It is difficult to conceive of a legislative scheme that would more thoroughly replace an existing body.[14] We conclude, accordingly, that Section 5 applies to those portions of the Act that the Attorney General has not precleared.

B. *Section 5 Analysis*

The State must prove that S.B. 1477 "does not have the purpose and will not have the effect of denying or abridging the right to

11. *See supra* note 6.

12. The total population of the area governed by the EUWD is 1,261,098; the EAA would govern an area of 1,368,402 persons.

13. For example, the EAA has the power to prohibit pumping from the Aquifer. The EUWD does not. *Compare* S.B. 1477 § 1.16(b) *with* EUWD Act § 3A. *See* Texas' Motion for Summary Judgment at 8–9.

14. It also appears that section 1.42 of S.B. 1477 effectively abolishes the other three water conservation districts. *See* S.B. 1477 § 1.42(b) ("An underground water conservation district other than the [EAA] may manage and control water that is a part of the aquifer to the extent that those management activities do not conflict with and are not duplicative of this article").

vote on account of race or color or" membership in a language minority group. 42 U.S.C. §§ 1973c, 1973b(f)(2); *see Texas v. United States*, 785 F.Supp. at 203.

1. The "Purpose" Prong

[6, 7] The "purpose" prong requires the State to show that S.B. 1477 "is free of a discriminatory purpose." *Id.; see City of Richmond v. United States*, 422 U.S. 358, 95 S.Ct. 2296, 45 L.Ed.2d 245 (1975). In evaluating this prong, it is noteworthy that proof of discriminatory purpose may be circumstantial, *Washington v. Davis*, 426 U.S. 229, 242, 96 S.Ct. 2040, 2049, 48 L.Ed.2d 597 (1976), and that it need not be shown that the discriminatory purpose was a primary motivation of the legislation, so long as it was a motivating factor. *See Rogers v. Lodge*, 458 U.S. 613, 618, 102 S.Ct. 3272, 3276, 73 L.Ed.2d 1012 (1982).

Texas makes a three-fold argument to support its position that S.B. 1477 does not have a discriminatory purpose. It claims that S.B. 1477 was enacted in response to a court order. Further, Texas argues that every Hispanic member of the State Senate and 23 of the 25 Hispanic members of the State House of Representatives voted in favor of S.B. 1477. Finally, Texas asserts that Interior Secretary Babbitt endorsed a similar proposal that was the precursor to S.B. 1477 and that Housing and Urban Development Secretary Cisneros wrote DOJ urging the preclearance of S.B. 1477 and stating that it did not have a discriminatory purpose.

Defendants argue that S.B. 1477 clearly had a discriminatory purpose. They challenge Texas' assertion that S.B. 1477 is purely the result of orders in the *Sierra Club* litigation because no court order required the State to replace an elected board with an appointed one. In addition, several state legislators submitted declarations that indicate that they were aware of the discriminatory nature of the Act when they adopted it. Lastly, the United States argues that the declarations of Secretary Babbitt and Secretary Cisneros have no probative value in determining the purpose of the Texas legislature in passing a bill.

[8, 9] An inquiry into purpose or intent is particularly unsuitable for resolution by summary judgment. *See Lipsett v. University of Puerto Rico*, 864 F.2d 881, 895 (1st Cir.1988) (summary judgment "test remains particularly rigorous when the disputed issue turns on motive or intent"); *see also* Charles A. Wright, *et al., Federal Practice and Procedure* § 2730 at 238 (2d ed. 1983 & Supp.1994) ("a determination of someone's state of mind usually entails the drawing of factual inferences as to which reasonable [people] might differ"). This case is no exception to this general rule. As the State concedes, Judge Bunton did not require the State to create an entity governed by appointed officials. Moreover, there is evidence that several Texas legislators believed that the Act had a discriminatory purpose at the time of its passage. Texas' motion for summary judgment will be denied because genuine issues of material fact exist as to the purpose of S.B. 1477.

2. The "Effects" Prong

[10] The "effects" prong requires the State to show that S.B. 1477 "does not lead to retrogression in the position of racial minorities." *Texas v. United States*, 785 F.Supp. at 203; *see Beer v. United States*, 425 U.S. 130, 141, 96 S.Ct. 1357, 1364, 47 L.Ed.2d 629 (1976). In *Beer*, the Supreme Court enunciated the "no retrogression" rule. This rule mandates that preclearance be denied under the "effects" prong of Section 5 if a new system places minority voters in a weaker position than the existing system. *Id.*

The State argues that the "effects" prong of Section 5 does not apply. Texas asserts that retrogression will always be present if an elected system is replaced with an appointed system because minority voters will always have diminished voting power, *i.e.* it will be reduced to zero. Consequently, the State claims, Congress could not have intended to establish Section 5's "effects" prong as a prohibition on eliminating elected offices. Texas also contends that even if the "effects" prong is applicable, no retrogression exists. The State asserts that two of the twelve positions on the EUWD board were subject

ALLEN ET AL. v. STATE BOARD OF ELECTIONS ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA.

No. 3. Argued October 15, 1968.—Decided March 3, 1969.*

Pursuant to § 4 (b) of the Voting Rights Act of 1965 the provisions of § 4 (a), suspending all "tests or devices" for five years, were made applicable to certain States, including Mississippi and Virginia. As a result, those States were prohibited by § 5 from enacting or seeking "to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964," without first submitting the change to the U. S. Attorney General and obtaining his consent or securing a favorable declaratory judgment from the District Court for the District of Columbia. In Nos. 25, 26, and 36, appellants sought declaratory judgments in the District Court for the Southern District of Mississippi that certain amendments to the Mississippi Code were subject to the provisions of § 5 and thus not enforceable until the State complied with the approval requirements. In No. 25 the amendment provided for at-large election of county supervisors instead of election by districts. In No. 26 the amendment eliminated the option of electing or appointing superintendents of education in 11 counties and provided that they shall be appointed. The amendment in No. 36 changed the requirements for independent candidates running in general elections. In all three cases the three-judge District Court ruled that the amendments did not come within the purview of § 5 and dismissed the complaints. No. 3 concerned a bulletin issued by the Virginia Board of Elections instructing election judges to assist qualified, illiterate voters who request assistance in marking ballots. Appellants sought a declaratory judgment in the District Court for the Eastern District of

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*Together with No. 25, *Fairley et al.* v. *Patterson, Attorney General of Mississippi, et al.*, No. 26, *Bunton et al.* v. *Patterson, Attorney General of Mississippi, et al.*, and No. 36, *Whitley et al.* v. *Williams, Governor of Mississippi, et al.*, on appeal from the United States District Court for the Southern District of Mississippi, argued on October 16, 1968.

Virginia that the statute providing for handwritten write-in votes and the modifying bulletin violated the Equal Protection Clause of the Fourteenth Amendment and the Voting Rights Act. In the 1966 election appellants attempted to use labels for write-in candidates, but the election officials refused to count appellants' ballots. Appellants sought only prospective relief, as the election outcome would not have been changed if the ballots had been counted. In the District Court they did not argue that § 5 precluded enforcement of the procedure set out in the bulletin but that § 4 suspended the write-in requirement. The three-judge court dismissed the complaint. *Held:*

1. Since the Virginia legislation was generally attacked as inconsistent with the Voting Rights Act, and there is no factual dispute, the Court may, in the interests of judicial economy, determine the applicability in No. 3 of § 5 of the Act, even though that section was not argued below. P. 554.

2. Private litigants may invoke the jurisdiction of the district courts to obtain relief under § 5, to insure the Act's guarantee that no person shall be denied the right to vote for failure to comply with an unapproved new enactment subject to that section. Pp. 554–557.

3. The restriction of § 14 (b) of the Act, which provides that "[n]o court other than the District Court for the District of Columbia . . . shall have jurisdiction to issue any declaratory judgment pursuant to [§ 5] or any restraining order or temporary or permanent injunction against the execution or enforcement of any provision of this subchapter," does not apply to suits brought by private litigants seeking a declaratory judgment that a new state enactment is subject to § 5's approval requirements, and these actions may be brought in the local district courts. Pp. 557–560.

4. In light of the extraordinary nature of the Act and its effect on federal-state relationships, and the unique approval requirements of § 5, which also provides that "[a]ny action under this section shall be heard and determined by a court of three judges," disputes involving the coverage of § 5 should be determined by three-judge courts. Pp. 560–563.

5. The state statutes involved in these cases are subject to the approval requirements of § 5. Pp. 563–571.

(a) The Act, which gives a broad interpretation to the right to vote and recognizes that voting includes "all action necessary to make a vote effective," was aimed at the subtle as well as the obvious state regulations which have the effect of denying citizens their right to vote because of race. Pp. 565–566.

(b) The legislative history lends support to the view that Congress intended to reach any enactment which altered the election law of a covered State in even a minor way. Pp. 566–569.

(c) There is no direct conflict between the Court's interpretation of this Act and the principles established by the reapportionment cases, and consideration of any possible conflict should await a concrete case. P. 569.

(d) The enactment in each of these cases constitutes a "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" within the meaning of § 5. Pp. 569–571.

6. The Act requires that the State must in some unambiguous and recordable manner submit any legislation or regulation to the Attorney General with a request for his consideration pursuant to the Act, and there is no "submission" when the Attorney General merely becomes aware of the legislation or when briefs are served on him. P. 571.

7. In view of the complexity of these issues of first impression, the lack of deliberate defiance of the Act resulting from the States' failure to submit the enactments for approval, and the fact that the discriminatory purpose or effect of these statutes, if any, has not been judicially determined, this decision has prospective effect only. The States remain subject to the continuing strictures of § 5 until they obtain from the District Court for the District of Columbia a declaratory judgment that for at least five years they have not used the "tests or devices" proscribed by § 4. Pp. 571–572.

No. 3, 268 F. Supp. 218, vacated and remanded. No. 25, 282 F. Supp. 164; No. 26, 281 F. Supp. 918; and No. 36, each reversed and remanded.

Norman C. Amaker argued the cause for appellants in No. 3. With him on the brief were *Jack Greenberg, James M. Nabrit III, Oliver W. Hill, S. W. Tucker, Henry L. Marsh III,* and *Anthony G. Amsterdam. Armand Derfner* and *Elliott C. Lichtman* argued the cause for appellants in Nos. 25, 26, and 36. *Lawrence*

Aschenbrenner was on the brief for appellants in Nos. 25 and 26. With *Mr. Derfner* on the brief for appellants in No. 36 were *Alvin J. Bronstein* and *Richard B. Sobol.*

R. D. McIlwaine III, First Assistant Attorney General of Virginia, argued the cause for appellees in No. 3. With him on the brief were *Robert Y. Button,* Attorney General, *William R. Blandford,* and *William C. Carter.* *William A. Allain* and *Will S. Wells,* Assistant Attorneys General of Mississippi, argued the cause for appellees in Nos. 25, 26, and 36. With *Mr. Allain* on the brief for appellees in No. 25 were *Joe T. Patterson,* Attorney General, and *Dudley W. Conner.* With *Mr. Wells* on the briefs for appellees in Nos. 26 and 36 was *Mr. Patterson.*

Assistant Attorney General Pollak argued the cause for the United States, as *amicus curiae,* urging reversal in Nos. 25, 26, and 36. With him on the brief were *Solicitor General Griswold, Louis F. Claiborne, Francis X. Beytagh, Jr.,* and *Nathan Lewin.*

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

These four cases, three from Mississippi and one from Virginia, involve the application of the Voting Rights Act of 1965[1] to state election laws and regulations. The Mississippi cases were consolidated on appeal and argued together in this Court. Because of the grounds on which we decide all four cases, the appeal in the Virginia case is also disposed of by this opinion.[2]

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[1] 79 Stat. 437, 42 U. S. C. § 1973 *et seq.* (1964 ed., Supp. I).

[2] In all four cases a three-judge court was convened. Nos. 25, 26, and 36 are direct appeals from the United States District Court for the Southern District of Mississippi. No. 3 is a direct appeal from the United States District Court for the Eastern District of Virginia.

suits attacking its constitutionality; there is no further remedy provided by § 5.

In these four cases, the States have passed new laws or issued new regulations. The central issue is whether these provisions fall within the prohibition of § 5 that prevents the enforcement of "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" unless the State first complies with one of the section's approval procedures.

No. 25, *Fairley* v. *Patterson*, involves a 1966 amendment to § 2870 of the Mississippi Code of 1942.[6] The amendment provides that the board of supervisors of each county may adopt an order providing that board members be elected at large by all qualified electors of the county. Prior to the 1966 amendment, all counties by law were divided into five districts; each district elected one member of the board of supervisors. After the amendment, Adams and Forrest Counties adopted the authorized orders, specifying that each candidate must run at large, but also requiring that each candidate be a resident of the county district he seeks to represent.

The appellants are qualified electors and potential candidates in the two counties. They sought a declaratory judgment in the United States District Court for the Southern District of Mississippi that the amendment to § 2870 was subject to the provisions of § 5 of the Act and hence could not be enforced until the State complied with the approval requirements of § 5.[7]

No. 26, *Bunton* v. *Patterson*, concerns a 1966 amendment to § 6271-08 of the Mississippi Code.[8] The amend-

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[6] See Appendix, *infra*.

[7] In all three cases from Mississippi the original complaint contained other grounds for relief; however, before hearing in the District Court, the parties stipulated that the only issue for decision was whether § 5 applied.

[8] See Appendix, *infra*.

ment provides that in 11 specified counties, the county superintendent of education shall be appointed by the board of education. Before the enactment of this amendment, all these counties had the option of electing or appointing the superintendent. Appellants are qualified electors and potential candidates for the position of county superintendent of education in three of the counties covered by the 1966 amendment. They sought a declaratory judgment that the amendment was subject to § 5, and thus unenforceable unless the State complied with the § 5 approval requirements.

No. 36, *Whitley* v. *Williams*, involves a 1966 amendment to § 3260 of the Mississippi Code, which changed the requirements for independent candidates running in general elections.[9] The amendment makes four revisions: (1) it establishes a new rule that no person who has voted in a primary election may thereafter be placed on the ballot as an independent candidate in the general election; (2) the time for filing a petition as an independent candidate is changed to 60 days before the primary election from the previous 40 days before the general election; (3) the number of signatures of qualified electors needed for the independent qualifying petition is increased substantially; and (4) a new provision is added that each qualified elector who signs the independent qualifying petition must personally sign the petition and must include his polling precinct and county. Appellants are potential candidates whose nominating petitions for independent listing on the ballot were rejected for failure to comply with one or more of the amended provisions.[10]

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[9] See Appendix, *infra*.

[10] The suit was first brought in 1966. Pending a decision on the merits, a three-judge District Court ordered appellants placed on the 1966 general election ballot. *Whitley* v. *Johnson*, 260 F. Supp. 630 (D. C. S. D. Miss. 1966). Later, other members of the class

the change, he is prohibited from electing an officer formerly subject to the approval of the voters. Such a change could be made either with or without a discriminatory purpose or effect; however, the purpose of § 5 was to submit such changes to scrutiny.

The changes in No. 36 appear aimed at increasing the difficulty for an independent candidate to gain a position on the general election ballot. These changes might also undermine the effectiveness of voters who wish to elect independent candidates. One change involved in No. 36 deserves special note. The amendment provides that no person who has voted in a primary election may thereafter be placed on the ballot as an independent candidate in the general election. This is a "procedure with respect to voting" with substantial impact. One must forgo his right to vote in his party primary if he thinks he might later wish to become an independent candidate.

The bulletin in No. 3 outlines new procedures for casting write-in votes. As in all these cases, we do not consider whether this change has a discriminatory purpose or effect. It is clear, however, that the new procedure with respect to voting is different from the procedure in effect when the State became subject to the Act; therefore, the enactment must meet the approval requirements of § 5 in order to be enforceable.

In these cases, as in so many others that come before us, we are called upon to determine the applicability of a statute where the language of the statute does not make crystal clear its intended scope. In all such cases we are compelled to resort to the legislative history to determine whether, in light of the articulated purposes of the legislation, Congress intended that the statute apply to the particular cases in question. We are of the opinion that, with the exception of the statement of Assistant Attorney General Burke Marshall, the balance of legislative history (including the statements of the Attorney General and congressional action expanding the language) indicates that § 5 applies to these cases. In saying this, we of course express no view on the merit of these enactments; we also emphasize that our decision indicates no opinion concerning their constitutionality.

V.

Appellees in the Mississippi cases argue that even if these state enactments are covered by § 5, they may now be enforced, since the State submitted them to the Attorney General and he has failed to object. While appellees admit that they have made no "formal" submission to the Attorney General, they argue that no formality is required. They say that once the Attorney General has become aware of the state enactment, the enactment has been "submitted" for purposes of § 5. Appellees contend that the Attorney General became aware of the enactments when served with a copy of appellees' briefs in these cases.

We reject this argument. While the Attorney General has not required any formal procedure, we do not think the Act contemplates that a "submission" occurs when the Attorney General merely becomes aware of the legislation, no matter in what manner. Nor do we think the service of the briefs on the Attorney General constituted a "submission." A fair interpretation of the Act requires that the State in some unambiguous and recordable manner submit any legislation or regulation in question directly to the Attorney General with a request for his consideration pursuant to the Act.

VI.

Appellants in the Mississippi cases have asked this Court to set aside the elections conducted pursuant to these enactments and order that new elections be held under the pre-amendment laws. The Solicitor General has also urged us to order new elections if the State does not promptly institute § 5 approval proceedings. We de-

PRESLEY *v.* ETOWAH COUNTY COMMISSION ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

No. 90-711. Argued November 12, 1991—Decided January 27, 1992*

Section 5 of the Voting Rights Act of 1965 requires a covered jurisdiction to obtain either judicial or administrative preclearance before enforcing any new "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting." In various Alabama counties, voters elect members of county commissions whose principal function is to supervise and control county road maintenance, repair, and construction. In No. 90-711, the Etowah County Commission, without seeking preclearance, passed, *inter alia,* its "Common Fund Resolution," which altered the prior practice of allowing each commissioner full authority to determine how to spend funds allocated to his own road district. The resolution was passed by the four holdover members of the commission shortly after appellant Presley, a black man, and another new member were elected from districts established under a consent decree, the terms of which were precleared by the Attorney General. In No. 90-712, the Russell County Commission adopted a "Unit System," which abolished individual road districts and transferred responsibility for all road operations to the county engineer, a commission appointee. Neither the commission's resolution nor implementing state legislation was submitted for preclearance. Subsequent litigation led to a consent decree, which was precleared by the Justice Department without any mention of the Unit System changes, and under the terms of which appellants Mack and Gosha were elected as Russell County's first black county commissioners in modern times. They, along with Presley, filed suit in the District Court, alleging, among other things, that Etowah and Russell Counties had violated § 5 by failing to obtain preclearance for, respectively, the Common Fund Resolution and the adoption of the Unit System. A three-judge court convened pursuant to 28 U. S. C. § 2284 held that neither matter was subject to § 5 preclearance.

Held: Neither the Common Fund Resolution nor adoption of the Unit System was a change "with respect to voting" covered by § 5. Pp. 500-510.

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*Together with No. 90-712, *Mack et al.* v. *Russell County Commission et al.*, also on appeal from the same court.

Syllabus

(a) *Allen* v. *State Bd. of Elections*, 393 U. S. 544, and this Court's later decisions reveal a consistent requirement that changes subject to § 5 pertain only to voting. Without implying that the four typologies exhaust the statute's coverage, it can be said that the cases fall within one of the following contexts: (1) changes in the manner of voting; (2) changes in candidacy requirements and qualifications; (3) changes in the composition of the electorate that may vote for candidates for a given office; and (4) changes affecting the creation or abolition of an elective office. The first three categories involve changes in election procedures, while all the examples within the fourth category might be termed substantive changes as to which offices are elective. But whether the changes are of procedure or substance, each has a direct relation to voting and the election process. Pp. 500–503.

(b) The Etowah County Commission's Common Fund Resolution was not subject to § 5's preclearance requirement. It is not a change within any of the categories recognized in *Allen* or the later cases; rather, it concerns only the internal operations of an elected body and the distribution of power among officials and, thus, has no direct relation to, or impact on, voting. The view advanced by appellants and the United States—to the effect that any act diminishing or increasing a local official's power would require preclearance—would work an unconstrained expansion of § 5's coverage beyond the statutory language and congressional intent by including innumerable enactments, such as budget measures, that alter the power and decisionmaking authority of elected officials but have nothing to do with voting, and fails to provide a workable standard for distinguishing between governmental decisions that involve voting and those that do not. Some standard is necessary, for in a real sense every decision taken by government implicates voting, yet no one would contend that Congress meant the Act to subject all or even most government decisions in covered jurisdictions to federal supervision. Pp. 503–506.

(c) The Russell County Commission's adoption of the Unit System and its concomitant transfer of operations to the county engineer do not constitute a change covered by § 5. There is not even an arguable basis for saying that the Unit System's adoption fits within any of the first three categories of changes in voting rules that this Court has recognized. As to the fourth category, the argument that the delegation of authority to an appointed official is similar to the replacement of an elected official with an appointed one and is therefore subject to § 5 under *Bunton* v. *Patterson*, decided with *Allen*, *supra*, ignores the rationale for the *Bunton* holding: The practice in question changed an elective office to an appointive one. Here, the citizens of Russell County may still vote for members of the county commission. The fact that those commissioners exercise less authority than they once did is a routine matter of governmental administration that does not in itself render the Unit System a rule governing voting. Because the county commission retains substantial authority, including the power to appoint the county engineer and set his or her budget, this Court need not consider whether an otherwise uncovered enactment might under some circumstances rise to the level of a *de facto* replacement of an elected office with an appointive one, within the *Bunton* rule. Pp. 506–508.

(d) Although the construction placed upon the Act by the Attorney General is ordinarily entitled to considerable deference, this Court need not defer to the United States' interpretation that the changes at issue are covered by § 5, since that section is unambiguous with respect to the question whether it covers changes other than changes in rules governing voting: It does not. See, *e. g., Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–844. Pp. 508–509.

Affirmed.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, SOUTER, and THOMAS, JJ., joined. STEVENS, J., filed a dissenting opinion, in which WHITE and BLACKMUN, JJ., joined, *post*, p. 510.

Edward Still argued the cause for appellants in both cases. With him on the briefs were *Pamela Karlan, Lani Guinier, James U. Blacksher*, and *John C. Falkenberry*.

Robert A. Long, Jr., argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Starr, Assistant Attorney General Dunne, Deputy Solicitor General Roberts, Deputy Assistant Attorney General Clegg*, and *David K. Flynn*.

Paul M. Smith argued the cause for appellees in both cases. With him on the brief for appellee Etowah County Commission were *George Howell (Jack) Floyd* and *Mary Ann Ross Stackhouse*. *James W. Webb* and *Kendrick E. Webb* filed a brief for appellee Russell County Commission.†

JUSTICE KENNEDY delivered the opinion of the Court.

In various Alabama counties voters elect members of county commissions whose principal function is to supervise

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†*Julius L. Chambers, Charles Stephen Ralston*, and *Dayna L. Cunningham* filed a brief for the NAACP Legal Defense and Educational Fund, Inc., as *amicus curiae* urging reversal.

and control the maintenance, repair, and construction of the county roads. See Ala. Code §§ 11-3-1, 11-3-10 (1975). The consolidated appeals now before us concern certain changes in the decisionmaking authority of the elected members on two different county commissions, and the question to be decided is whether these were changes "with respect to voting" within the meaning of § 5 of the Voting Rights Act of 1965, 79 Stat. 439, as amended, 42 U. S. C. § 1973c. These cases have significance well beyond the two county commissions; for the appellants, and the United States as *amicus curiae*, ask us to adopt a rule embracing the routine actions of state and local governments at all levels. We must interpret the provisions of § 5, which require a jurisdiction covered by the Act to obtain either judicial or administrative preclearance before enforcing any new "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting." *

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*As set forth in 42 U. S. C. § 1973c, § 5 provides:

"Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not

I

To determine whether there have been changes with respect to voting, we must compare the challenged practices with those in existence before they were adopted. Absent relevant intervening changes, the Act requires us to use practices in existence on November 1, 1964, as our standard of comparison.

A

We consider first the Etowah County Commission. On November 1, 1964, commission members were elected at large under a "residency district" system. The entire electorate of Etowah County voted on candidates for each of the five seats. Four of the seats corresponded to the four

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have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 and any appeal shall lie to the Supreme Court."

residency districts of the county. Candidates were required to reside in the appropriate district. The fifth member, the chairman, was not subject to a district residency requirement, though residency in the county itself was a requirement.

Each of the four residency districts functioned as a road district. The commissioner residing in the district exercised control over a road shop, equipment, and road crew for that district. It was the practice of the commission to vote as a collective body on the division of funds among the road districts, but once funds were divided each commissioner exercised individual control over spending priorities within his district. The chairman was responsible for overseeing the solid waste authority, preparing the budget, and managing the courthouse building and grounds.

Under a consent decree issued in 1986, see *Dillard* v. *Crenshaw County*, Civ. Action No. 85–T–1332–N (MD Ala., Nov. 12, 1986), the commission is being restructured, so that after a transition period there will be a six-member commission, with each of the members elected by the voters of a different district. The changes required by the consent decree were precleared by the Attorney General. For present purposes, it suffices to say that when this litigation began the commission consisted of four holdover members who had been on the commission before the entry of the consent decree and two new members elected from new districts. Commissioner Williams, who is white, was elected from new district 6, and Commissioner Presley, who is black, was elected from new district 5. Presley is the principal appellant in the Etowah County case. His complaint relates not to the elections but to actions taken by the four holdover members when he and Williams first took office.

On August 25, 1987, the commission passed the "Road Supervision Resolution." It provided that each holdover commissioner would continue to control the workers and operations assigned to his respective road shop, which, it must be remembered, accounted for all the road shops the county had. It also gave the four holdovers joint responsibility for overseeing the repair, maintenance, and improvement of all the roads of Etowah County in order to pick up the roads in the districts where the new commissioners resided. The new commissioners, now foreclosed from exercising any authority over roads, were given other functions under the resolution. Presley was to oversee maintenance of the county courthouse and Williams the operation of the engineering department. The Road Supervision Resolution was passed by a 4-to-2 margin, with the two new commissioners dissenting.

The same day the Road Supervision Resolution was passed, the commission passed a second, the so-called "Common Fund Resolution." It provides in part that

> "all monies earmarked and budgeted for repair, maintenance and improvement of the streets, roads and public ways of Etowah County [shall] be placed and maintained in common accounts, [shall] not be allocated, budgeted or designated for use in districts, and [shall] be used county-wide in accordance with need, for the repair, maintenance and improvement of all streets, roads and public ways in Etowah County which are under the jurisdiction of the Etowah County Commission." App. to Juris. Statement in No. 90–711, p. 49a.

This had the effect of altering the prior practice of allowing each commissioner full authority to determine how to spend the funds allocated to his own district. The Etowah County Commission did not seek judicial or administrative preclearance of either the Road Supervision Resolution or the Common Fund Resolution. The District Court held that the Road Supervision Resolution was subject to preclearance but that the Common Fund Resolution was not. No appeal was taken from the first ruling, so only the Common Fund Resolution is before us in the Etowah County case.

B

We turn next to the background of the Russell County Commission. On November 1, 1964, it had three commissioners. Like the members of the Etowah County Commission before the consent decree change, Russell County Commissioners were elected at large by the entire electorate, subject to a requirement that a candidate for commissioner reside in the district corresponding to the seat he or she sought. A 1972 federal court order, see *Anthony* v. *Russell County*, No. 961–E (MD Ala., Nov. 21, 1972), required that the commission be expanded to include five members. The two new members were both elected at large from one newly created residency district for Phenix City, the largest city in Russell County. Following the implementation of the court order, each of the three rural commissioners had individual authority over his own road shop, road crew, and equipment. The three rural commissioners also had individual authority for road and bridge repair and construction within their separate residency districts. Although funding for new construction and major repair projects was subject to a vote by the entire commission, individual commissioners could authorize expenditures for routine repair and maintenance work as well as routine purchase orders without seeking approval from the entire commission.

Following the indictment of one commissioner on charges of corruption in Russell County road operations, in May 1979 the commission passed a resolution delegating control over road construction, maintenance, personnel, and inventory to the county engineer, an official appointed by the entire commission and responsible to it. The engineer's previous duties had been limited to engineering and surveying services for the separate road shops and running a small crew devoted to pothole repair. Although the May 1979 resolution may have sufficed for the necessary delegation of authority to the county engineer, compare Ala. Code § 23-1-80 (1975) with Ala. Code § 11-6-3 (1975), the commission also requested the state legislature to pass implementing legislation. The Alabama Legislature did so on July 30, 1979, when it enacted Act No. 79-652, 1979 Ala. Acts 1132. It provides in pertinent part:

> "Section 1. All functions, duties and responsibilities for the construction, maintenance and repair of public roads, highways, bridges and ferries in Russell County are hereby vested in the county engineer, who shall, insofar as possible, construct and maintain such roads, highways, bridges and ferries on the basis of the county as a whole or as a unit, without regard to district or beat lines."

The parties refer to abolition of the individual road districts and transfer of responsibility for all road operations to the county engineer as the adoption of a "Unit System." Neither the resolution nor the statute which authorized the Unit System was submitted for preclearance under § 5.

Litigation involving the Russell County Commission led to a 1985 consent decree, see *Sumbry* v. *Russell County*, No. 84-T-1386-E (MD Ala., Mar. 17, 1985), that enlarged the commission to seven members and replaced the at-large election system with elections on a district-by-district basis. Without any mention of the Unit System changes, the consent decree was precleared by the Department of Justice under § 5. Following its implementation, appellants Mack and Gosha were elected in 1986. They are Russell County's first black county commissioners in modern times.

C

In May 1989, appellants in both cases now before us filed a single complaint in the District Court for the Middle District of Alabama, alleging racial discrimination in the operation of the Etowah and Russell County Commissions in violation of prior court orders, the Constitution, Title VI of the Civil Rights Act of 1964, 42 U. S. C. § 2000d, and § 2 of the Voting Rights Act, 42 U. S. C. § 1973. In a series of amended complaints, appellants added claims under § 5. The § 5 claims alleged that Etowah County had violated the Act by failing to obtain preclearance of the 1987 Road Supervision and Common Fund Resolutions, and that Russell County had failed to preclear the 1979 change to the Unit System. Pursuant to 28 U. S. C. § 2284, a three-judge District Court was convened to hear appellants' § 5 claims. The other claims still pend in the District Court.

With respect to the issues now before us, a majority of the District Court held that neither the Common Fund Resolution of the Etowah County Commission nor the adoption of the Unit System in Russell County was subject to § 5 preclearance. The court held that changes in the responsibilities of elected officials are subject to preclearance when they "effect a significant relative change in the powers exercised by governmental officials elected by, or responsible to, substantially different constituencies of voters." App. to Juris. Statement in No. 90–711, pp. 13a–14a. Applying its test, the court found that the Common Fund Resolution in Etowah County did not effect a significant change and adoption of the Unit System in Russell County did not transfer authority among officials responsible to different constituencies. We noted probable jurisdiction. 500 U. S. 914 (1991). We affirm the District Court but adopt a different interpretation of § 5 as the rationale for our decision.

II

We first considered the Voting Rights Act in *South Carolina* v. *Katzenbach*, 383 U. S. 301 (1966). Although we acknowledged that suspension of new voting regulations pending preclearance was an extraordinary departure from the traditional course of relations between the States and the

Federal Government, *id.*, at 334, we held it constitutional as a permitted congressional response to the unremitting attempts by some state and local officials to frustrate their citizens' equal enjoyment of the right to vote. See *id.*, at 308–315.

After *South Carolina* v. *Katzenbach* upheld the Voting Rights Act against a constitutional challenge, it was not until we heard *Allen* v. *State Bd. of Elections*, 393 U. S. 544 (1969), that we were called upon to decide whether particular changes were covered by § 5. There we rejected a narrow construction, one which would have limited § 5 to state rules prescribing who may register to vote. We held that the section applies also to state rules relating to the qualifications of candidates and to state decisions as to which offices shall be elective. *Id.*, at 564–565. We observed that "[t]he Voting Rights Act was aimed at the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race." *Id.*, at 565. Our decision, and its rationale, have proved sound, and we adhere to both.

In giving a broad construction to § 5 in *Allen*, we noted that "Congress intended to reach any state enactment which altered the election law of a covered State in even a minor way." *Id.*, at 566. Relying on this language and its application in later cases, appellants and the United States now argue that because there is no *de minimis* exception to § 5, the changes at issue here must be subject to preclearance. *E. g.*, Brief for United States as *Amicus Curiae* 21–22. This argument, however, assumes the answer to the principal question in the case: whether the changes at issue are changes in voting, or as we phrased it in *Allen*, "election law."

We agree that all changes in voting must be precleared and with *Allen*'s holding that the scope of § 5 is expansive within its sphere of operation. That sphere comprehends all changes to rules governing voting, changes effected through any of the mechanisms described in the statute. Those mechanisms are any "qualification or prerequisite" or any "standard, practice, or procedure with respect to voting."

The principle that § 5 covers voting changes over a wide range is well illustrated by the separate cases we considered in the single opinion for the Court in *Allen*. *Allen* involved four cases. The eponymous *Allen* v. *State Bd. of Elections* concerned a change in the procedures for the casting of write-in ballots. 393 U. S., at 570–571. In *Whitley* v. *Williams*, there were changes in the requirements for independent candidates running in general elections. *Id.*, at 551. The challenged procedure in *Fairley* v. *Patterson* resulted in a change from single-district voting to at-large voting. *Id.*, at 550. The remaining case, *Bunton* v. *Patterson*, involved a statute which provided that officials who in previous years had been elected would be appointed. *Id.*, at 550–551. We held that the changes in each of the four cases were covered by § 5.

Our cases since *Allen* reveal a consistent requirement that changes subject to § 5 pertain only to voting. Without implying that the four typologies exhaust the statute's coverage, we can say these later cases fall within one of the four factual contexts presented in the *Allen* cases. First, we have held that § 5 applies to cases like *Allen* v. *State Bd. of Elections* itself, in which the changes involved the manner of voting. See *Perkins* v. *Matthews*, 400 U. S. 379, 387 (1971) (location of polling places). Second, we have held that § 5 applies to cases like *Whitley* v. *Williams*, which involve candidacy requirements and qualifications. See *NAACP* v. *Hampton County Election Comm'n*, 470 U. S. 166 (1985) (change in filing deadline); *Hadnott* v. *Amos*, 394 U. S. 358 (1969) (same); *Dougherty County Bd. of Ed.* v. *White*, 439 U. S. 32 (1978) (rule requiring board of education members to take unpaid leave of absence while campaigning for office). Third, we have applied § 5 to cases like *Fairley* v. *Patterson*, which concerned changes in the composition of the electorate that may vote for candidates for a given office. See *Perkins* v. *Matthews*, 400 U. S., at 394 (change from ward to at-large elections); *id.*, at 388 (boundary lines of voting districts); *City of Richmond* v. *United States*, 422 U. S. 358 (1975) (same). Fourth, we have made clear that § 5 applies to changes, like the one in *Bunton* v. *Patterson*, affecting the creation or abolition of an elective office. See *McCain* v. *Lybrand*, 465 U. S. 236 (1984) (appointed officials replaced by elected officials); *Lockhart* v. *United States*, 460 U. S. 125 (1983) (increase in number of city councilors).

The first three categories involve changes in election procedures, while all the examples within the fourth category might be termed substantive changes as to which offices are elective. But whether the changes are of procedure or substance, each has a direct relation to voting and the election process.

III

A comparison of the changes at issue here with those in our prior decisions demonstrates that the present cases do not involve changes covered by the Act.

A

The Etowah County Commission's Common Fund Resolution is not a change within any of the categories recognized in *Allen* or our later cases. It has no connection to voting procedures: It does not affect the manner of holding elections, it alters or imposes no candidacy qualifications or requirements, and it leaves undisturbed the composition of the electorate. It also has no bearing on the substance of voting power, for it does not increase or diminish the number of officials for whom the electorate may vote. Rather, the Common Fund Resolution concerns the internal operations of an elected body.

Appellants argue that the Common Fund Resolution is a covered change because after its enactment each commissioner has less individual power than before the resolution. A citizen casting a ballot for a commissioner today votes for an individual with less authority than before the resolution, and so, it is said, the value of the vote has been diminished.

Were we to accept appellants' proffered reading of § 5, we would work an unconstrained expansion of its coverage. Innumerable state and local enactments having nothing to do with voting affect the power of elected officials. When a state or local body adopts a new governmental program or modifies an existing one it will often be the case that it changes the powers of elected officials. So too, when a state or local body alters its internal operating procedures, for example, by modifying its subcommittee assignment system, it "implicate[s] an elected official's *decisionmaking authority.*" Brief for United States as *Amicus Curiae* 17–18 (emphasis in original).

Appellants and the United States fail to provide a workable standard for distinguishing between changes in rules governing voting and changes in the routine organization and functioning of government. Some standard is necessary, for in a real sense every decision taken by government implicates voting. This is but the felicitous consequence of democracy, in which power derives from the people. Yet no one would contend that when Congress enacted the Voting Rights Act it meant to subject all or even most decisions of government in covered jurisdictions to federal supervision. Rather, the Act by its terms covers any "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting." 42 U. S. C. § 1973c. A faithful effort to implement the design of the statute must begin by drawing lines between those governmental decisions that involve voting and those that do not.

A simple example shows the inadequacy of the line proffered by appellants and the United States. Under appellants' view, every time a covered jurisdiction passed a budget that differed from the previous year's budget it would be required to obtain preclearance. The amount of funds available to an elected official has a profound effect on the power exercised. A vote for an ill-funded official is less valuable than a vote for a well-funded one.

No doubt in recognition of the unacceptable consequences of their views, appellants take the position that while "some budget changes may affect the right to vote and, under particular circumstances, would be subject to preclearance," most budget changes would not. Postargument Letter from Counsel for Appellants, Nov. 13, 1991 (available in Clerk of Court's case file). Under their interpretation of § 5, however, appellants fail to give any workable standard to determine when preclearance is required. And were we to acknowledge that a budget adjustment is a voting change in even some instances, the likely consequence is that every budget change would be covered, for it is well settled that every voting change with a "potential for discrimination" must be precleared. *Dougherty County Bd. of Ed.* v. *White*, 439 U. S., at 42.

Confronting this difficulty, at oral argument the United States suggested that we draw an arbitrary line distinguishing between budget changes and other changes, Tr. of Oral Arg. 21–23. There is no principled basis for the distinction, and it would be a marked departure from the statutory category of voting. If a diminution or increase in an elected official's powers is a change with respect to voting, then whether it is accomplished through an enactment or a budget shift should not matter. Even if we were willing to draw an unprincipled line excluding budgetary changes but not other changes in an elected official's decisionmaking authority, the result would expand the coverage of § 5 well beyond the statutory language and the intention of Congress.

Under the view advanced by appellants and the United States, every time a state legislature acts to diminish or increase the power of local officials, preclearance would be required. Governmental action decreasing the power of local officials could carry with it a potential for discrimination against those who represent racial minorities at the local level. At the same time, increasing the power of local officials will entail a relative decrease in the power of state officials, and that too could carry with it a potential for discrimination against state officials who represent racial minorities at the state level. The all but limitless minor changes in the allocation of power among officials and the constant adjustments required for the efficient governance of every covered State illustrate the necessity for us to formulate workable rules to confine the coverage of § 5 to its legitimate sphere: voting.

Changes which affect only the distribution of power among officials are not subject to § 5 because such changes have no direct relation to, or impact on, voting. The Etowah County Commission's Common Fund Resolution was not subject to the preclearance requirement.

B

We next consider Russell County's adoption of the Unit System and its concomitant transfer of operations to the county engineer. Of the four categories of changes in rules governing voting we have recognized to date, there is not even an arguable basis for saying that adoption of the Unit System fits within any of the first three. As to the fourth category, it might be argued that the delegation of authority to an appointed official is similar to the replacement of an elected official with an appointed one, the change we held subject to § 5 in *Bunton* v. *Patterson*. This approach, however, would ignore the rationale for our holding: "[A]fter the change, [the citizen] is prohibited from electing an officer formerly subject to the approval of the voters." *Allen*, 393 U. S., at 569–570. In short, the change in *Bunton* v. *Patterson* involved a rule governing voting not because it effected a change in the relative authority of various governmental officials, but because it changed an elective office to an appointive one.

The change in Russell County does not prohibit voters "from electing an officer formerly subject to the[ir] approval." *Allen, supra,* at 570. Both before and after the change the citizens of Russell County were able to vote for the members of the Russell County Commission. To be sure, after the 1979 resolution each commissioner exercised less direct authority over road operations, that authority having been delegated to an official answerable to the commission. But as we concluded with respect to Etowah County, the fact that an enactment alters an elected official's powers does not in itself render the enactment a rule governing voting.

It is a routine part of governmental administration for appointive positions to be created or eliminated and for their powers to be altered. Each time this occurs the relative balance of authority is altered in some way. The making or unmaking of an appointive post often will result in the erosion or accretion of the powers of some official responsible to the electorate, but it does not follow that those changes are covered by § 5. By requiring preclearance of changes with respect to voting, Congress did not mean to subject such routine matters of governance to federal supervision. Were the rule otherwise, neither state nor local governments could exercise power in a responsible manner within a federal system.

The District Court, wrestling with the problem we now face and recognizing the need to draw principled lines, held that Russell County's adoption of the Unit System is not a covered change because it did not transfer power among officials answerable to different constituencies. Even upon the assumption (the assumption we reject in this case) that some transfers of power among government officials could be changes with respect to voting as that term is used in the Act, we disagree with the District Court's test. The question whether power is shifted among officials answerable to the same or different constituencies is quite distinct from the question whether the power voters exercise over elected officials is affected. Intraconstituency changes may have a large indirect effect on the voters while interconstituency changes may have a small indirect effect, but in neither case is the effect a change in voting for purposes of the Act. The test adopted by the District Court does not provide the workable rule we seek. In any event, because it proceeds from the faulty premise that reallocations of authority within government can constitute voting changes, we cannot accept its approach.

We need not consider here whether an otherwise uncovered enactment of a jurisdiction subject to the Voting Rights Act might under some circumstances rise to the level of a *de facto* replacement of an elective office with an appointive one, within the rule of *Bunton* v. *Patterson.* For present purposes it suffices to note that the Russell County Commission retains substantial authority, including the power to appoint the county engineer and to set his or her budget. The change at issue in Russell County is not a covered change.

IV

The United States urges that despite our understanding of the language of § 5, we should defer to its administrative construction of the provision. We have recognized that "the construction placed upon the [Voting Rights] Act by the Attorney General . . . is entitled to considerable deference." *NAACP* v. *Hampton County Election Comm'n,* 470 U. S., at 178–179. See also *United States* v. *Sheffield Bd. of Comm'rs,* 435 U. S. 110, 131 (1978). But the principle has its limits. Deference does not mean acquiescence. As in other contexts in which we defer to an administrative interpretation of a statute, we do so only if Congress has not expressed its intent with respect to the question, and then only if the administrative interpretation is reasonable. See, *e. g., Chev-*

ron U. S. A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–844 (1984). Because the first of these conditions is not satisfied in the cases before us we do not defer to the Attorney General's interpretation of the Act.

We do not believe that in its use of the phrase "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting," 42 U. S. C. § 1973c, the statute is ambiguous as to the question whether § 5 extends beyond changes in rules governing voting. To be sure, reasonable minds may differ as to whether some particular changes in the law of a covered jurisdiction should be classified as changes in rules governing voting. In that sense § 5 leaves a gap for interpretation to fill. See *Chevron, supra,* at 843. When the Attorney General makes a reasonable argument that a contested change should be classified as a change in a rule governing voting, we can defer to that judgment. But § 5 is unambiguous with respect to the question whether it covers changes other than changes in rules governing voting: It does not. The administrative position in the present cases is not entitled to deference, for it suggests the contrary. The United States argues that the changes are covered by § 5 because they implicate the decisionmaking authority of elected officials, even though they are not changes in rules governing voting. This argument does not meet the express requirement of the statute.

V

Nothing we say implies that the conduct at issue in these cases is not actionable under a different remedial scheme. The Voting Rights Act is not an all-purpose antidiscrimination statute. The fact that the intrusive mechanisms of the Act do not apply to other forms of pernicious discrimination does not undermine its utility in combating the specific evils it was designed to address.

Our prior cases hold, and we reaffirm today, that every change in rules governing voting must be precleared. The

393 U.S. 544, Allen v. State Board of Elections, et al. (1969)

~~No 26~~ Appellants sought declaratory judgments that amendments to MS code were subject to §5 of Voting Rights Act & not enforceable until State complied w/ approval requirements.
One of the provisions eliminated the option of electing or appointing superintendents of education in 11 counties / provided that they be appointed.
District court ruled not w/in §5 & dismissed.

Held that state statutes subject to approval requirement.

563-571 Broad interp of right to vote & recognize that voting includes "all action necessary to make a vote effective" and w/ subtle as well as obvious state regulations which have effect of denying citizen right to vote bcs on race.

Any enactment which altered the election law of a covered State in even a minor way

~~[illegible]~~ Constitutes a voting qualification or pre req. to voting, or standard, practice or procedure with respect to voting w/in meaning of §5.

Karlan
Lott

Presley v. Etowah County Commission et al,
502 US 491 (1992)

Δ from system where indiv. commissioner controlled road $s in their district; abolished districts / transferred respon for all road ops to commission-appointed engineer..

Kennedy, J.

Common Fund Resolution — not w/in §5 preclearance not a Δ w/in any of the categories recognized in Allen or later cases {4 enumerated} — concerns only the internal operation of an elected body & the distribution of power among officials, and has no direct relation to voting.

Unit system/transfer of operation to county engineer not a change subject to §5 — that commission exercises less authority does not render a rule governing voting.

506-508 County commission retains substantial authority, including power to approve budget & set support. need not consider whether other enactment could be de facto replacement of elected official w/ appointed one

507 Bunton was covered not b/c it effected a change in relative authority of various governmental officials, but b/c it changed the

The fact that an enactment alters an elected official's powers does not in itself render the enactment a rule governing voting.

Neither intra- or inter- county changes are covered.

Need not consider whether action against constitution replaced elected official w/ appointed one. [Dx - Presley 1588]

Stevens, Blackmun, O'Connor dissenting

Diminished authority of individual members w/in the body, but did not replace the body & did not take away all authority

Mono | Texas v. U.S., 866 F Supp 20 (DDC 1994)
Moreno | Rogers, Johnson, & Green (Mono Op)
Lulac | Challenged act repealing elected ~~trustee~~ acquisition authority & replacing it by an acquisition authority approved by County Boards w/in district/city of SA & for Mercer.

Held – subject to § 5 bcm replacement of an elected body to an appointed one is a covered & under § 5.

Replacement of elected board w/ an appointed board (also, underlying facts/litigation re: composition of predecessor board).

BOARD OF EDUCATION OF THE CITY OF NEW YORK
RUDOLPH F. CREW, Ed. D., *Chancellor*
OFFICE OF THE CHANCELLOR
110 Livingston Street - Brooklyn, NY 11201

**OFFICE OF THE CHIEF EXECUTIVE
FOR COMMUNITY SCHOOL DISTRICT AFFAIRS, MONITORING
AND MUNICIPAL RELATIONS**

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Civil Rights Division

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97-0641

MAR 0 6 1997

Patricia L. Murray, Esq.
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Albany, New York 12223-1650

Dear Ms. Murray:

We understand that Chapter 720 (1996) contains provisions, including but not necessarily limited to Sections 4, 5, 7, 9, 14, and 15, that result in the *de facto* replacement of the elected community school district boards with appointed entities for the New York City Board of Education in Bronx, Kings and New York Counties, New York. Such replacements are voting changes. See *Allen* v. *State Board of Elections*, 393 U.S. 544 (1969), *Presley* v. *Etowah County Commission*, 502 U.S. 491 (1992), *Texas* v. *United States*, 866 F. Supp. 20 (D.D.C. 1994).

Our records fail to show that these changes affecting voting have been submitted to the United States District Court for the District of Columbia for judicial review or to the Attorney General for administrative review as required by Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, although a number of voting changes enacted by Chapter 720 (1996) were submitted for administrative review on February 10, 1997 (our File No. 97-0459). It is necessary that these unsubmitted changes either be brought before the District Court for the District of Columbia or submitted to the Attorney General for a determination that they do not have the purpose and will not have the effect of discriminating on account of race, color, or membership in a language minority group. Changes which affect voting are legally unenforceable without Section 5 preclearance. *Clark* v. *Roemer*, 500 U.S. 646 (1991); Procedures for the Administration of Section 5 (28 C.F.R. 51.10).

The corporation counsel's office has indicated that at least some of the provisions that affect voting that have not been submitted for Section 5 review took effect immediately after Chapter 720 became final; we understand, furthermore, that the city is preparing to implement these changes. In prior discussions and correspondence between our office and counsel for the city and city school district, we have indicated that preclearance under Section 5 must be obtained prior to implementing changes affecting voting and that unless a declaratory judgment is received from the United States District Court for the District of Columbia or the Attorney General interposes no objection to the proposed changes, they are legally unenforceable.

If the proposed changes are now being implemented without Section 5 preclearance, their implementation is in violation of Section 5. Accordingly, to enable us to meet our responsibility to enforce the Voting Rights Act, please inform us within one week of this letter whether the proposed changes are being implemented and if so, whether they will be submitted to the Attorney General for administrative review or a declaratory judgment will be sought from the District Court for the District of Columbia. If you have any questions, you should call Colleen Kane-Dabu (213-894-2931) of our staff. Refer to File Nos. 97-0459 and 97-0641 in any response to this letter so that your correspondence will be channeled properly.

Sincerely,

Isabella Katz Pinzler
Acting Assistant Attorney General
Civil Rights Division

By: Elizabeth R

Elizabeth Johnson
Chief, Voting Section

cc: Jeffrey D. Friedlander, Esq.
First Assistant Corporation Counsel

Stephen Lewis, Esq.
Senior Legislative Counselor