EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

# LEGISLATIVE REFERENCE DIVISION

## ECONOMICS, SCIENCE, AND GENERAL GOVERNMENT BRANCH

**TO:**

Steve Aitken
Stephen Warnath
Clarissa Cerda

**FROM:** **INGRID SCHROEDER**
**phone: (202) 395-3883**
**FAX: (202) 395-3109**

**DATE:** 4/~~28~~ 27/95

**NUMBER OF PAGES (including this cover sheet):** 7

**COMMENTS:**

Background materials for Voting Rights draft bill meeting - Friday, April 28th room 8103.

Please call (202) 395-3454 to report any difficulties with transmission of this fax.

U. S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

April 13, 1995

Honorable James B. King
Director
Office of Personnel Management
Washington, D.C. 20415

Dear Mr. King:

Thank you for the opportunity to comment on the draft "Voting Rights Amendments of 1995," which would shift responsibility for the Voting Rights Act's federal examiner and observer programs from the Office of Personnel Management (OPM) to the Department of Justice. In our view, the bill's adoption would not be in the best interests of the enforcement of the Act. It would provide Congress with an opportunity to open the entire Voting Rights Act to scrutiny, endangering the substantive protections that now exist. Moreover, the shift in responsibility suggested by OPM would jeopardize the current successful enforcement of the Voting Rights Act without effecting the cost savings hoped for by OPM.

The Voting Rights Act was enacted in 1965 to end the near total exclusion of African-Americans from the political process in much of the South. The Act, among other things, provides for impartial federal examiners to list eligible voters when local registrars remain uncooperative (persons listed by a federal examiner are "federally registered") and for impartial federal observers to monitor elections to assure that the newly enfranchised voters are permitted to vote and that their votes are counted. The Voting Rights Act had an immediate effect in removing barriers to African-American political participation and has had a lasting impact; later amendments have extended and greatly broadened its scope to other areas of the country and to include language minority groups.

The listing or registration of eligible voters by federal examiners (or the threat of such listing), which in the early years of the Act was the most important mechanism for ending the exclusion of African-Americans from the political process, is accompanied by federal protection against discriminatory voter purges. Once listed, voters remain eligible to vote until their names are removed from the federal examiner's list under OPM procedures, set out in 45 CFR Part 801. Such list maintenance

remains a statutory responsibility of OPM and is handled by OPM's Atlanta and Dallas offices with computer support from OPM headquarters in Washington.

Further, the need for federal observer monitoring has expanded in recent years. The use of federal observers to monitor the protection of Native American voters in Arizona, New Mexico, and Utah; of Hispanic voters in New York City, Arizona, and Texas; and of Asian American voters in New York City has been crucial to litigation and administrative enforcement of the Voting Rights Act since the Act was amended in 1975 to protect language minorities.

Thus in Fiscal Year 1994, 458 federal observers were assigned to monitor 13 elections in 19 counties in 6 states (Alabama, Arizona, Georgia, Mississippi, New Mexico, and New York). So far in Fiscal Year 1995, 287 federal observers have been assigned to monitor 4 elections in 14 counties in 9 states (Alabama, Arizona, Georgia, Louisiana, Mississippi, New Mexico, New York, North Carolina, and Utah).

OPM does not deny the importance of its voting rights responsibilities but contends that they fit more under the Department of Justice's "core law enforcement functions" than under OPM's "core human resources functions." However, one reason for the selection of the Civil Service Commission (the predecessor of the Office of Personnel Management) in the first place was that it was *not* a law enforcement agency. It would not be involved in potentially adversarial conflicts between the Department of Justice and state and local governments but could administer the federal examiner and observer programs in a neutral, even-handed way that would be respected by all sides.

Federal observers are potential witnesses in voting rights enforcement actions brought by the Attorney General. The observers are allowed by the Voting Rights Act to enter polling places on election day, and often watch as ballots are marked by voters (state laws usually prohibit person who are not voters, officials, or political poll watchers from entering the polls). The federal observers' reports routinely are used in the preparation of lawsuits and in the monitoring of judicial decrees. The credibility of federal observers as witnesses is enhanced by their being under the supervision and control of OPM and not of the Attorney General.

Election monitoring by federal observers thus remains crucial to the preservation of minority voting rights, and while OPM might save money if it no longer had responsibilities under the Voting Rights Act, the federal budget as a whole would not be reduced, since those responsibilities would remain. For the OPM proposal to be workable, the funds now allocated to OPM for voting rights would need to be shifted to the Department of

Justice. In addition, the transfer of responsibility would itself entail significant expenses, as would the creation of appropriate administrative mechanisms within the Department of Justice. Transferring staff, equipment, and facilities from OPM to the Department would also appear problematical, to the extent that such staff, equipment, and facilities are not now devoted 100% to the voting rights program. Therefore, taken as a whole, the budgetary impact of the proposed legislation would be adverse.

The deployment of such large numbers of federal observers under such sensitive circumstances requires their direct supervision by federal observer captains and co-captains who have had years of experience and specialized training. To recreate this effective cadre of federal observer supervisors would entail a substantial reorientation of Department of Justice resources, which would compromise the Department's law enforcement responsibilities as well as the uninterrupted successful operation of the federal observer program.

In addition, while aspects of our voting rights litigation have become more complex, the role of the federal observers remains unchanged. The observers simply observe and record what they see; the observers are not, and need not be, lawyers or elections experts. Locating persons with appropriate language skills may be difficult for any agency, but OPM already has developed the means for establishing contacts for this purpose.

Nor does the National Voter Registration Act (NVRA) provide an appropriate occasion for the proposed transfer. The NVRA's uniform procedures and standards for removing voters from voter rolls will simplify OPM's maintenance of its eligible voter lists, and contrary to the fears expressed by OPM, neither state voter eligibility standards nor federal examiner sites are affected by the NVRA.

In summary, present enforcement of the Voting Rights Act is effective and efficient. OPM's proposal would not improve such enforcement and might, in fact, negatively affect it. Most importantly, the Voting Rights Act, in its current form, provides essential protections to the right to vote, and congressional debate on this legislation should not be reopened for the purpose of shifting resources within the federal government.

Sincerely,

Kent Markus
Acting Assistant Attorney General

**OFFICE OF PERSONNEL MANAGEMENT RESPONSE TO DEPARTMENT OF JUSTICE COMMENTS ON THE PROPOSAL TO CONSOLIDATE VOTING RIGHTS PROGRAM FUNCTIONS IN THE DEPARTMENT OF JUSTICE**

The administration of the Voting Rights observer program is, first and foremost, a law enforcement responsibility. Whatever the reasons for its original assignment to the Civil Service Commission (CSC), it is clearly not a human resources management function. At a time when the CSC's successor, the Office of Personnel Management (OPM), is undergoing a major redesign and is focusing its dwindling resources on its core functions, we, at OPM, find it difficult to justify retaining responsibility for such an important program which is so obviously not a core function of our agency.

The Department of Justice (DOJ) does not object to OPM's characterization of Voting Rights work as a law enforcement function. Instead, they suggest that the assignment of certain responsibilities to the CSC was because that agency was not a law enforcement agency. While that may indeed have been an important consideration in the discussions leading to the enactment of the Voting Rights Act in the emotionally-charged environment of the 1960's, as DOJ correctly notes, conditions have changed in the last 30 years. Not only are the intergovernmental conflicts more muted, but the nature of the central personnel agency has changed. Of importance equal to the CSC's independent status in 1965, was its structure as one of the few agencies with an office in every State. We, at OPM, no longer have the luxury of the field structure needed to provide the support we traditionally have provided.

For example, as part of OPM's downsizing and streamlining efforts, we are in the process of abolishing our Regional Office structure (including the Regional Director positions), which has traditionally provided front line support to the observer and examiner programs. Moreover, OPM has traditionally relied very heavily on its large number of background investigators to act as observers. As you know, since 1994, OPM has involuntarily separated over 400 investigators, and since the President's December 1994 decision to privatize investigations, we have taken important steps to accomplish this privatization goal by December 31, 1995. This means that nearly 500 investigators will not be available for ready use as observers.

We have always believed, and continue to believe, that the Voting Rights Program is of great importance to the Nation and we wish only to see it continue to operate at a highly effective level. However, due to continued downsizing, OPM managers face tremendous difficulty detailing employees to serve as Voting Rights observers, which take them from their duty stations for 3 or more days, and still manage to accomplish the fundamental human resources management work of the program offices.

DOJ emphasizes that the working relationship between our agencies has been good and that the examiner and observer programs have been both effective and efficiently administered. While we have often felt strains in the relationship as a result of the stringent demands placed on OPM by DOJ on relatively short notice, notwithstanding the administrative and logistical difficulties, we have managed to do what is required.

For example, although the Memorandum of Understanding between our agencies clearly states that OPM should receive six weeks notice prior to an election, DOJ rarely provides the specific details of the personnel needs within this timeframe. Moreover, OPM seldom has any advance notice of DOJ attorneys' pre-election surveys or memoranda to the Attorney General which would provide some indication of potential areas of observer coverage. Additionally, OPM employees who serve in supervisory roles during the elections rarely have any communication with DOJ prior to arriving at the location where the election is held, thereby limiting OPM's ability to adjust to any last-minute changes that DOJ deems necessary.

We believe that if the voting rights functions were housed within the same organization which conducted the pre-election surveys, and made the necessary recommendations to the Attorney General, there would be easier and ultimately more successful coordination of the critical logistical aspects of election coverage.

Although DOJ is correct in noting that a transfer of function entails certain costs, we are confident that the funds allocated to OPM for this function will be adequate to cover the transfer. In future years, we would anticipate that DOJ will have available the same level of financial resources that would have been available to OPM to administer the program.

Insofar as OPM's perceived independence from DOJ relates to the credibility of observers as witnesses in DOJ enforcement litigation, historically, observers have rarely served in that capacity. Further, we would note that although law enforcement agents with the DEA and the INS routinely testify in cases prosecuted by DOJ attorneys, we are not aware that the fact that these witnesses ultimately report to the Attorney General inherently damages their credibility. That must have been the consensus at DOJ last year when the Department proposed that some of its personnel serve as observers.

In addition, although DOJ acknowledges that the protection of language minorities has become an important part of the Voting Rights Act enforcement process, they claim that the role of the observer has not changed. We disagree. Recruiting and training employees to translate from Chinese or a Native American language

to English is quite difficult. Unlike OPM, DOJ has attorneys in the Voting Section who are fluent in some of these languages and could be influential in recruiting potential observers in the languages needed for litigation or for "enforcement of the Act."

Finally, DOJ suggested that, by creating uniform standards and procedures for registering and removing voters from the rolls, the National Voter Registration Act (NVRA) should simplify OPM's maintenance of its eligible voter lists. This has not proven to be the case. Currently, OPM must wait to remove Federally registered voters until DOJ provides an explanation of the applicable provisions of the NVRA. In our view, DOJ personnel who worked on the NVRA would be in a better position to maintain the list of eligible voters since they would already be familiar with the standards and procedures created by the NVRA.

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EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
Washington, D.C. 20503-0001

LRM NO: 437

FILE NO: 488

2/23/95

LEGISLATIVE REFERRAL MEMORANDUM

Total Page(s): _____

TO: Legislative Liaison Officer - See Distribution below:

FROM: James JUKES (for)
Assistant Director for Legislative Reference

OMB CONTACT: Ingrid SCHROEDER 395-3883
Legislative Assistant's line (for simple responses): 395-3454

SUBJECT: Office of Personnel Management Proposed Draft Bill: Voting Rights Amendments of 1995

**DEADLINE: Friday, March 03,1995**

In accordance with OMB Circular A-19, OMB requests the views of your agency on the above subject before advising on its relationship to the program of the President.

**Please advise us if this item will affect direct spending or receipts for purposes of the "Pay-As-You-Go" provisions of Title XIII of the Omnibus Budget Reconciliation Act of 1990.**

**COMMENTS:**

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**RESPONSE TO**
**LEGISLATIVE REFERRAL MEMORANDUM**

**LRM NO: 437**
**FILE NO: 488**

If your response to this request for views is simple (e.g., concur/no comment), we prefer that you respond by e-mail or by faxing us this response sheet.

If the response is simple and you prefer to call, please call the branch-wide line shown below (NOT the analyst's line) to leave a message with a legislative assistant.

You may also respond by:

(1) calling the analyst/attorney's direct line (you will be connected to voice mail if the analyst does not answer); or
(2) sending us a memo or letter.

Please include the LRM number shown above, and the subject shown below.

TO: Ingrid SCHROEDER 395-3883
Office of Management and Budget
Fax Number: 395-3109
Branch-Wide Line (to reach legislative assistant): 395-3454

FROM: _____ (Date)

_____ (Name)

_____ (Agency)

_____ (Telephone)

SUBJECT: Office of Personnel Management Proposed Draft Bill: Voting Rights Amendments of 1995

The following is the response of our agency to your request for views on the above-captioned subject:

_____ Concur

_____ No Objection

_____ No Comment

_____ See proposed edits on pages _____

_____ Other: _____

_____ FAX RETURN of ____ pages, attached to this response sheet

UNITED STATES
OFFICE OF PERSONNEL MANAGEMENT
WASHINGTON, D.C. 20415

OFFICE OF THE DIRECTOR

FEB 22 1995

Honorable Alice M. Rivlin
Director
Office of Management and Budget
Washington, D.C. 20503

Attention: Assistant Director for
Legislative Reference

Dear Ms. Rivlin:

The Office of Personnel Management has prepared the enclosed legislative proposal, "To amend the Voting Rights Act of 1965, as amended, to consolidate in the Department of Justice the responsibility for administering such Act." We request your advice as to whether there is any objection, from the standpoint of the Administration's program, to the submission of this proposal to the Congress.

Sincerely,

James B. King
Director

Enclosures

UNITED STATES
OFFICE OF PERSONNEL MANAGEMENT
WASHINGTON, D.C. 20415

OFFICE OF THE DIRECTOR

Honorable Albert Gore, Jr.
President of the Senate
Washington, D.C. 20510

Dear Mr. President:

The Office of Personnel Management submits herewith a legislative proposal, "To amend the Voting Rights Act of 1965, as amended, to consolidate in the Department of Justice the responsibility for administering such Act." We request that you refer this proposal to the appropriate committee for early consideration.

Since the enactment of the Voting Rights Act of 1965, the Civil Service Commission and its functional successor, the Office of Personnel Management (OPM), have had significant obligations under the program established to ensure that all Americans are afforded an equal opportunity for the unfettered exercise of the right to vote. In addition to being responsible for the promulgation of the procedural regulations necessary for the development and maintenance of lists of eligible voters, OPM continues to appoint examiners, and other persons as necessary, to prepare and maintain such eligibility lists in States or other political subdivisions designated by the Attorney General. In addition, OPM appoints hearing officers to adjudicate challenges to voter eligibility lists, receives complaints from eligible voters claiming denial of the right to vote, and assigns personnel at the request of the Attorney General to observe elections and prepare related reports.

As a part of our ongoing effort to provide more efficient and effective service in this era of declining resources, we, at OPM, have reexamined the appropriateness of the assignment of these Voting Rights Act responsibilities to this agency. We have concluded that it would be more fitting for the Department of Justice to assume these duties as part of its core law enforcement functions. Not only do the statute's law enforcement provisions fall outside OPM's core human resources functions, but, given the increase in complex litigation under the statute and the need to obtain witnesses who have specialized language skills, the Justice Department is better equipped to handle such responsibilities. In addition, litigation recently commenced by the Department to enforce the National Voter Registration Act of 1993 has further complicated our monitoring of voter eligibility lists, and delayed revisions to program regulations.

Accordingly, we have prepared the enclosed legislative proposal which would consolidate in the Department of Justice the responsibility for administering all Voting Rights Act activities.

The Office of Management and Budget advises that there is no objection, from the standpoint of the Administration's program, to the submission of this proposal to the Congress.

A similar letter is being sent to the Speaker of the House of Representatives.

Sincerely,

James B. King
Director

Enclosures

A BILL

To amend the Voting Rights Act of 1965, as amended, to consolidate in the Department of Justice the responsibility for administering such Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Voting Rights Amendments of 1995".

Sec. 2. The Voting Rights Act of 1965, as amended (42 U.S.C. 1973 et seq.) is amended--

(1) in sections 3, 7, and 9(a), by striking out "United States Civil Service Commission", "Civil Service Commission", and "Commission" each place such terms occur and inserting in lieu thereof "Attorney General";

(2) in section 6--

(i) in the first sentence, by striking out "the Civil Service Commission" and "it" and inserting in lieu thereof "the Attorney General"; and

(ii) in the second sentence--

(I) by striking out "Commission" both places it appears and inserting in lieu thereof "Attorney General"; and

(II) by striking out "Civil Service Commission" both places it appears and inserting in lieu thereof "Office of Personnel Management";

(3) in section 8, by striking out "the Civil Service Commission may assign, at the request of the Attorney General," and inserting in lieu thereof "the Attorney General may assign";

(4) in section 9(b), by striking out "the Civil Service Commission and the Commission shall, after consultation with the Attorney General," and inserting in lieu thereof "the Attorney General and the Attorney General shall";

(5) in section 9(c)--

(i) by striking out "its own motion the Civil Service Commission" and inserting in lieu thereof "the Attorney General's own motion, the Attorney General"; and

(ii) by striking out "Commission" and inserting in lieu thereof "Attorney General"; and

(6) in section 13, by striking out "notifies the Civil Service Commission" and inserting in lieu thereof "so determines".

Sec. 3. The amendments made by this Act shall be effective on the date of enactment.

SECTION-BY-SECTION ANALYSIS

To accompany a draft bill

"To amend the Voting Rights Act of 1965, as amended, to consolidate in the Department of Justice the responsibility for administering such Act."

The first section of the bill titles the bill as the "Voting Rights Amendments of 1995."

Section 2 of the bill contains the various amendments to the Voting Rights Act of 1965, as amended, designed to consolidate in the Department of Justice the responsibility for administering that Act.

Paragraph (1) of section 2 amends sections 3, 7, and 9(a) of the Act to replace each reference to "United States Civil Service Commission," "Civil Service Commission," and "Commission" with "Attorney General." These changes shift the responsibility for the appointment of voting rights examiners and hearing officers, the designation of examiners' duty stations, the specification of the form of the application for examiner positions, and the promulgation of regulations governing challenges to voter eligibility listings from the United States Civil Service Commission (now the Office of Personnel Management) to the Attorney General.

Paragraph (2) of section 2 amends section 6 of the Act, in the first sentence, by replacing references to "the Civil Service Commission" and "it" with "Attorney General," and each reference to "Civil Service Commission" with "Office of Personnel Management." These changes complete the shift in responsibility for the appointment of voting rights examiners from the Civil Service Commission to the Attorney General and substitute correct references to the Office of Personnel Management for the outdated references to the Civil Service Commission.

Paragraph (3) of section 2 amends section 8 of the Act to shift the responsibility for the assignment of voting rights observers from the Civil Service Commission (now the Office of Personnel Management), at the request of the Attorney General, to the Attorney General alone. This is accomplished by striking out the phrase "the Civil Service Commission may assign, at the request of the Attorney General," and replacing it with the phrase "the Attorney General may assign."

Paragraph (4) of section 2 amends section 9(b) of the Act to shift the responsibility for the promulgation of procedural regulations and for instructing examiners concerning applicable State law from the Civil Service Commission (now the Office of Personnel Management), after consultation with the Attorney General, to the Attorney General alone. This is accomplished by striking out the

phrase "the Civil Service Commission and the Commission shall, after consultation with the Attorney General," and replacing it with the phrase "the Attorney General and the Attorney General shall."

Paragraph (5) of section 2 amends section 9(c) of the Act to grant subpena power to the Attorney General rather than the Civil Service Commission. This is accomplished by striking out the phrase "its own motion the Civil Service Commission" and replacing it with the phrase "the Attorney General's own motion, the Attorney General shall." The paragraph also substitutes "Attorney General" for "Commission" in specifying before whom a United States District Court may order an appearance by any individual who refused to obey such a subpena.

Paragraph (6) of section 2 amends section 13 of the Act to require that certain listing procedures be terminated whenever the Attorney General so determines rather than whenever the Attorney General notifies the Civil Service Commission. This is accomplished by striking out the phrase "notifies the Civil Service Commission" and replacing it with the phrase "so determines."

Section 3 of the bill provides that the amendments made by the Act shall take effect on the date of enactment of the Act.

EXECUTIVE OFFICE OF THE PRESIDENT

Washington, D. C.

# FAX TRANSMITTAL COVER SHEET

DATE: 05-Apr-93

TO: DONSIA STRONG

SUBJECT: DOJ CONTACT FOR PRESLEY BILL

FROM: GERRI L. RATLIFF (202) 395-3883
OFFICE OF MGMT AND BUDGET, LRD

If there are any problems receiving this transmission, please call the sender, or (202) 395-7370.

You asked for the name of a DOJ Civil Rights Division person who could discuss the practical impact of enactment of the Presley bill. Steven Rosenbaum, 307-3143, was the first name they gave me, but he'll be out until Thursday. If you want to call before then, call Rebecca Wertz, 514-6342.

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ONE HUNDRED THIRD CONGRESS

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## House of Representatives

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MAJORITY—225-3951
MINORITY—225-6906

**To:** Members, Subcommittee on Civil and Constitutional Rights

**From:** Don Edwards, Chairman

**Re:** H.R. 174, Voting Rights Extension Act of 1993

**Date:** March 17, 1993

On March 18, 1993, a hearing will be held to focus on the Presley v. Etowah County Commission decision and the legislative response; this decision has affected the scope of the Voting Rights Act of 1965 (the "VRA"). In the near future, we will hold a second hearing to focus on another decision with voting rights implications, West Virginia University Hospitals, Inc. v. Casey. Both decisions are described below. The hearing will be held at 11:00 AM in 2237 Rayburn.

**Background**

In March 1991 and January 1992, the Supreme Court rendered two decisions that affect the VRA. In January 1992, the Court held in Presley v. Etowah County Commission that when newly-elected Black officials were stripped of their duties by majority white county councils in Etowah County and Russell County, Alabama, these changes were not covered by section 5 of the VRA. The Court found that such changes did not have a "direct relation to voting and the election process." Section 5 of the VRA requires that voting changes contemplated in a covered jurisdiction (Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia, and certain counties in California, Florida, Michigan, New Hampshire, New York, North Carolina, and South Dakota) must be precleared by the Attorney General or the District Court for the District of Columbia.

In March 1991, the Court held in West Virginia University Hospitals, Inc. v. Casey that the fees incurred by experts in civil rights litigation may not be shifted to the losing party as a part of attorney's fees under 42 U.S.C. 1988. The court found that without explicit reference to expert witness fees, such fees were not contemplated by section 1988. The VRA has no such explicit reference; therefore, since the West Virginia decision,

successful voting rights plaintiffs have lost a great deal of money. A fee shifting scheme is critical if the purpose of the Voting Rights Act is to be supported.

**Legislative Response**

H.R. 174, the Voting Rights Extension Act of 1993, was introduced in response to the two Supreme Court decisions. H.R. 174 clarifies and amends the VRA in the following manner:

**ADDITION OF EXPERT EXPENSES.** H.R. 174 amends the VRA to allow the prevailing party, other than the United States, to be reimbursed for reasonable expert expenses. Such expenses include research and travel expenses, as well as expert fees. These expenses are a necessary part of litigating voting rights cases and without expense shifting, parties are unable to contemplate and win voting rights cases.

**ADDITION OF REASONABLE EXPENSES OF LITIGATION.** It is important to amend the VRA so that reasonable litigation expenses are also included in the fee shifting scheme. West Virginia University Hospitals may be construed as excluding other litigation related expenses from the definition of attorney's fees. Such expenses include out-of-pocket litigation expenses which would otherwise be billed to the client.

**CLARIFICATION OF "PROCEDURE WITH RESPECT TO VOTING".** H.R. 174 amends section 5 of the Act to include language that prevents the implementation, prior to preclearance, of a change in procedural rules, voting practices or transfers in the decisionmaking process that would affect the powers of an elected official or position.

**CLARIFICATION OF "STANDARD, PRACTICE, OR PROCEDURE".** Section 2 is amended to clarify that procedural rules, voting practices, or transfers of decisionmaking authority that impair the power of an elected official or position are included in the definition of "standard, practice or procedure."

HOUSE OF REPRESENTATIVES
WASHINGTON, D. C. 20515

DON EDWARDS
TENTH DISTRICT
CALIFORNIA

Donsia -

I have enclosed the following:

1) H.R. 174
2) Report from last year (H.R. 5236)
3) Background Memorandum
4) Department of Justice Presley brief
5) Presley Supreme Court decision
6) West Virginia Hospitals, Inc. case (expenses)
7) Testimony from 3/18/93 hearing

Let me know if and when you need more information.

- Melody

102D CONGRESS
2d Session

HOUSE OF REPRESENTATIVES

REPORT
102-656

# VOTING RIGHTS EXTENSION ACT OF 1992

JULY 8, 1992—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. BROOKS from the Committee on the Judiciary, submitted the following

## REPORT

together with

## DISSENTING VIEWS

[To accompany 5236]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 5236) to amend the Voting Rights Act of 1965 to clarify certain aspects of its coverage and to provide for recovery of additional litigation expenses by litigants, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

### SUMMARY AND PURPOSE

H.R. 5236, the Voting Rights Extension Act of 1992, responds to two Supreme Court decisions. First, the bill amends the Voting Rights Act of 1965 to clarify terms used in sections 2 and 5 that have a significant impact on the scope of the Act. Second, the bill ensures that successful private plaintiffs are reimbursed by the losing party for expert fees.

### HEARINGS

H.R. 5236 is the product of a hearing before the Subcommittee on Civil and Constitutional Rights concerning the Voting Rights Act on April 8, 1992.

59-006

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103D CONGRESS
1ST SESSION

# H. R. 174

To amend the Voting Rights Act of 1965 to clarify certain aspects of its coverage and to provide for the recovery of additional litigation expenses by litigants.

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IN THE HOUSE OF REPRESENTATIVES

JANUARY 5, 1993

Mr. EDWARDS of California introduced the following bill; which was referred to the Committee on the Judiciary

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# A BILL

To amend the Voting Rights Act of 1965 to clarify certain aspects of its coverage and to provide for the recovery of additional litigation expenses by litigants.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "Voting Rights Exten-
5 sion Act of 1993".

6 **SEC. 2. CLARIFICATION OF CERTAIN DEFINITIONS.**

7 Section 14(c) of the Voting Rights Act of 1965 is
8 amended by adding at the end the following:

PHOTOCOPY
PRESERVATION

1 "(4) As used in section 5, the term 'procedure with
2 respect to voting' includes any change of procedural rules,
3 voting practices, or transfers of decision making authority
4 that affect the powers of an elected official or position.
5 "(5) As used in section 2, the term, "standard, prac-
6 tice, or procedure" includes any procedural rule, voting
7 practice, or transfer of decision making authority that im-
8 pairs the powers of an elected official or position.".

9 **SEC. 3. EXPERT EXPENSES.**

10 Section 14(e) of the Voting Rights Act of 1965 is
11 amended by inserting ", reasonable expert expenses, and
12 other reasonable litigation expenses" before "as part of
13 the costs".

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Nos. 90-711 and 90-712

FILED JUL 11 1991

# In the Supreme Court of the United States

OCTOBER TERM, 1991

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LAWRENCE C. PRESLEY, ETC., APPELLANT

*v.*

ETOWAH COUNTY COMMISSION, ET AL.

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ED PETER MACK, ET AL., APPELLANTS

*v.*

RUSSELL COUNTY COMMISSION, ET AL.

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

---

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANTS

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## INTEREST OF THE UNITED STATES

These consolidated appeals present the question whether a transfer of decisionmaking authority from one elected official or set of officials to another official or set of officials is a change "with respect to voting" subject to preclearance under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. Under Section 5, the Attorney General is responsible for reviewing voting changes submitted by covered jurisdictions for administrative pre-

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## QUESTIONS PRESENTED

The ultimate question presented in both cases is whether a transfer of decisionmaking authority from one elected official or set of officials to another official or set of officials is a "change with respect to voting" covered by Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, regardless of whether the officials serve the same or different voting constituencies and regardless of whether the transferred authority is more or less important than other duties of the office.

1. In No. 90-711, the specific question is whether a county commission's decision to transfer authority to determine road work priorities from individual commissioners elected from single-member districts to the entire commission is a change "with respect to voting" under Section 5.

2. In No. 90-712, the specific question is whether a State's transfer of road work authority from county commissioners elected at large from residency districts to a county engineer appointed by the commission is a change "with respect to voting" under Section 5.

clearance. The Attorney General also has authority under the Act to bring actions to prevent unprecleared changes from taking effect. The Court's resolution of these cases will affect the scope of the Attorney General's duties under Section 5.

On April 11, 1991, in response to this Court's invitation, the Solicitor General submitted a brief expressing the views of the United States. The brief generally supported appellants' position and recommended that the Court note probable jurisdiction in both cases. The United States also participated as an amicus curiae in the district court.

## STATEMENT

1. On November 1, 1964 (the date Section 5 of the Voting Rights Act became applicable to appellees, see 42 U.S.C. 1973b(b)), the Etowah County Commission consisted of five members: four commissioners elected at large but required to reside in separate "residency districts," and a chairman elected at large. J.S. App. A4.[1] The four commissioners each exercised complete control over a road shop, crew and equipment in their respective residency districts. *Ibid.* The commission allocated road funds to each district based on projected need. *Ibid.* The four "road commissioners" then unilaterally determined work priorities in their own districts. *Ibid.*

In 1986, the Commission entered into a consent decree resolving litigation under Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973. J.S. App. A4-A5. The decree expanded the Commission to six members, all of whom eventually would be elected from single-member districts. *Id.* at A5. Two commissioners were elected from districts in December 1986; Appellant Presley, the

[1] The district court's opinion is reproduced in the appendices to the Jurisdictional Statements in both No. 90-711 and No. 90-712; references herein to "J.S. App." may be found in the appendix to either filing.



first black commissioner in Etowah County in recent history, is one of these two. Under the decree, two of the at-large holdovers ran from districts and were elected in 1988; the other two were to run from districts in 1990. *Ibid.*

The consent decree specified that the commissioners elected in 1986 were to have the same duties as the four holdovers. J.S. App. A5. In August 1987, however, the Commission passed a "road supervision" resolution providing that each of the four holdover commissioners would continue to exercise authority over road operations in their districts. *Ibid.* The resolution further provided that the "old four" would oversee road work throughout Etowah County. *Id.* at A5-A6. The resolution assigned non-road duties to the two new commissioners. *Id.* at A6. The effect of the resolution was to strip the two new commissioners of any supervisory authority over road operations. Not surprisingly, the road supervision resolution was passed by a vote of four to two, over the opposition of the two new commissioners. *Id.* at A5.

On the same day, the Commission adopted a second resolution by an identical vote of four to two. J.S. App. A6-A7. This resolution abolished the practice of allocating road funds to districts. Instead, the resolution provided that road funds would be retained in a common fund for use without regard to district lines. *Ibid.* The effect of this "common fund" resolution was to transfer authority to determine funding priorities from individual commissioners to the entire commission. Neither the road supervision resolution nor the common fund resolution was submitted for preclearance.

2. On November 1, 1964, the Russell County Commission consisted of three members elected at large from "residency districts." J.S. App. A2. In 1972, as a result of a court order to comply with the one-person, one-vote rule, the Commission was expanded from three to five members. Phenix City, the largest city in the county, became the fourth residency district; two commissioners were required to reside there. *Ibid.*

Under the system adopted in 1972, each of the three rural commissioners exercised authority over a separate road shop. J.S. App. A2. (The two Phenix City commissioners lacked such authority, because Russell County generally does not fund or maintain city roads. See *id.* at A2 n.2). The three rural commissioners each set road work priorities, bought equipment, and hired and managed personnel within their districts. *Id.* at A2-A3. Each commissioner also approved funding for routine work. *Id.* at A3. Funding for new or major construction, however, required Commission approval. *Id.* at A3 n.3. A county engineer, appointed by the Commission, assisted the road commissioners in carrying out their responsibilities. *Id.* at A3.

In 1979, after an investigation uncovered corruption in Russell County's road operations, the Alabama legislature enacted a statute transferring all responsibility for road work to the county engineer. J.S. App. A3. The 1979 statute requires the engineer to perform road work without regard to district lines, thereby establishing what is known as a "unit system." *Ibid.* The 1979 statute was not submitted for preclearance.

In 1985, the Commission entered into a consent decree to resolve litigation under Section 2 of the Voting Rights Act. J.S. App. A4. Under this decree, the Commission was expanded from five to seven members, with each member elected from a single-member district. *Ibid.* Appellants Mack and Gosha were elected to office under this system in 1986, and became the first two black commissioners in recent history. *Ibid.*

3. In 1989, appellants filed suit in federal district court alleging that the conduct of road operations in Etowah and Russell Counties violated previous court orders, the Fourteenth and Fifteenth Amendments, Title VI of the Civil Rights Act of 1964, and Section 2 of the Voting Rights Act. J.S. App. A7. Thereafter, appellants amended their complaint to allege that Russell County's failure to preclear its transfer of road authority to the



county engineer, and Etowah's failure to preclear the road supervision and common fund resolutions, violated Section 5 of the Voting Rights Act. *Ibid.* A three-judge court was convened to consider the Section 5 claims. *Id.* at A7-A8.

The court held that transfers of authority are subject to Section 5 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." J.S. App. A13-A14. Since minority groups often have different levels of voting strength in different constituencies, the court explained, a transfer of authority from an official elected by one constituency to an official elected by another may have a potential for discrimination. *Id.* at A14. Such a potential is unlikely to exist, the court thought, when the officials are elected by the same constituency. *Ibid.* Even when officials with different constituencies are involved, the court added, "minor or inconsequential" transfers of authority do not have a "significant potential impact on voting rights." *Ibid.*

Applying these principles, the court concluded that Russell County's transfer of road supervision authority from the individual commissioners to the county engineer was not a change covered by Section 5, because both the commissioners and the engineer ultimately were answerable to the same constituency—the entire Russell County electorate. J.S. App. A16-A18. Although individual commissioners were required to reside in a particular district, the court explained, they "were elected by, and thus politically responsible to, all the voters of Russell County." *Id.* at A16. Similarly, the county engineer, although appointed, is responsible to the commission, and that body is responsible to all county voters. *Id.* at A16-A17.

The court also concluded that Etowah County's common fund resolution did not require preclearance. The court acknowledged that the common fund resolution transferred authority between officials with different con-

stituencies. Before enactment of the resolution, individual commissioners elected from, or facing election from, single-member districts could determine priorities for road repair in their own districts; afterwards, the entire commission had this authority. J.S. App. A18-A19. The court nonetheless concluded that this change did not affect voting since the power to set internal priorities was "minor and inconsequential" compared to the entire commission's authority, both before and after the resolution, to determine the amount of money to be allocated to each district. *Id.* at A19.

In contrast, the court held that Etowah County's road supervision resolution was covered by Section 5. J.S. App. A20-A21. The court concluded that "[t]he potential for discrimination posed by this change is blatant and obvious." *Id.* at A20. The court explained that "[w]hereas before 1987 all the voters of Etowah County participated in choosing the commissioners responsible for road management, the 1987 resolution stripped the voters in [two] districts * * * of any electoral influence over such commissioners." *Ibid.* Thus, "[a]uthority over the most important aspect of county governance was shifted from officials responsible to the entire county to officials (albeit the same individuals) responsible to only two thirds of the county's voters." *Id.* at A20-A21.[2]

Judge Thompson dissented in part. He agreed with the majority that Etowah County's road supervision resolution was subject to the preclearance requirement, but dissented from the court's conclusion that the common fund resolution did not require preclearance. J.S. App. A27-A33. In concluding that the power to set internal priorities was comparatively insignificant, Judge Thompson said, the majority ignored the realities of road operations in Etowah County. *Id.* at A32. The allocation of funds among districts "has never been a bone of contention." *Ibid.* Instead, a "commissioner's real authority lies * * * in how those funds are used after they are allocated." *Ibid.* In Judge Thompson's view, "[t]he common fund resolution and the road supervision resolution, working together, took this authority away from the two new commissioners and gave it exclusively to the four holdover commissioners." *Ibid.*

[2] Etowah County subsequently repealed the road supervision resolution, and has not cross-appealed from this portion of the district court's ruling. 90-711 Mot. to Aff. 2 n.3.



Judge Thompson also dissented from the court's conclusion that Russell County's transfer of road authority from individual commissioners to the county engineer did not constitute a change affecting voting. J.S. App. A33-A35. According to Judge Thompson, the court's holding ignored the possibility that the commissioners might have been more accountable to voters in their residency districts than to those outside their districts. *Id.* at A34. More fundamentally, Judge Thompson disagreed with the majority's conclusion that transfers of authority are covered by Section 5 only when they occur between officials with different constituencies. Pet. App. A35-A36. The question whether there is a potential for discrimination, he thought, should not be decided on the basis of a rigid rule. *Id.* at A37-A38. If a limiting principle were required, Judge Thompson stated, he would find it sufficient for plaintiffs to show that "there has been a *significant* and *fundamental* change in the nature of the duties traditionally exercised by elected officials." *Id.* at A38.

## SUMMARY OF ARGUMENT

1. A change in the decisionmaking power of an elected official is a change "with respect to voting" covered by Section 5 of the Voting Rights Act. Congress intended Section 5 to be applied broadly. In deciding whether a change is subject to preclearance, the court's inquiry is limited to whether the change has the *potential* for discrimination. See *NAACP* v. *Hampton County Election Comm'n*, 470 U.S. 166, 181 (1985). Moreover, any change with respect to voting, no matter how small or minor, is

subject to preclearance. See *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 566-568 (1969). In addition, it is now firmly established that Section 5 applies not only to practices that directly affect voter registration and balloting, but to all practices that affect "the power of a citizen's vote." *Id.* at 569.

Some reallocations of the power of elected officials plainly affect the power of a citizen's vote. For example, eliminating all the powers of an elected body would reduce citizens' votes for members of that body to a nullity. Because such changes could have a racial purpose or effect, they have the potential for discrimination and are covered by Section 5.

If all reallocations of authority were outside the scope of Section 5, a covered jurisdiction could negate the election of a candidate favored by minority voters simply by reallocating the successful candidate's authority to other elected or appointed officials. That would defeat the purpose of Section 5, which is to bar measures that would "evade the remedies for voting discrimination contained in the Act itself." *South Carolina* v. *Katzenbach*, 383 U.S. 301, 335 (1966). Accordingly, the lower courts and the Department of Justice consistently have recognized that some reallocations of authority are covered by Section 5.

We agree with the district court that not all changes in the powers of elected officials are subject to preclearance. But we disagree with the standard devised by the district court, which requires preclearance only if the change involves (1) officials responsible to different constituencies, and (2) relatively important duties. In our view, transfers of authority are covered by Section 5 when they implicate an elected official's *decisionmaking* authority. Such changes go to the core of a citizen's voting power, and therefore are subject to preclearance.

The district court erred in concluding that transfers between officials who serve the same constituency have no potential for discrimination. Transfers of power from



a larger to a smaller body, or from a body for which single-shot voting is permitted to one for which such voting is prohibited, for instance, obviously have the potential to be discriminatory, even though both bodies are elected by the same constituency. In fact, the Attorney General has objected to transfers of authority between officials serving the same constituency on at least three occasions. In addition, the "same constituency" rule is inconsistent with this Court's decision in *City of Lockhart* v. *United States*, 460 U.S. 125 (1983), which held that expansion of a body from three to five members required preclearance even though both the smaller body and the larger body were elected by the same constituency.

The district court also erred in concluding that relatively unimportant transfers of authority are not subject to preclearance. The statute plainly states that Section 5 applies to "*any* * * * standard, practice, or procedure with respect to voting," 42 U.S.C. 1973c (emphasis added), and it is well settled that there is no *de minimis* exception to the preclearance requirement. See *Allen*, 393 U.S. at 566. An exception for "minor" transfers of authority would be difficult to administer and would undermine the prophylactic purpose of Section 5. The district court's standard also blurs the distinction between the question whether a change is subject to preclearance (which turns on whether changes of that type have the potential for discrimination) and the question whether the change should be precleared (which turns on whether the particular change at issue would have a discriminatory purpose or effect). Because changes in the decisionmaking power of an elected official have the potential for discrimination, all such changes are subject to preclearance. Whether the purpose or effect is present, and the weight to be given the State's legitimate interests, are matters to be considered after the submission has been made.

2. The reallocations of authority at issue here must be submitted for preclearance. In Russell County, decision-

making authority concerning road matters was transferred from individual commissioners elected at large to a county engineer appointed by the commission. Similarly, Etowah County's common fund resolution transferred authority to decide the priority of road projects from individual commissioners elected from single-member districts to the commission as a whole.

## ARGUMENT

### I. A CHANGE IN THE DECISIONMAKING POWER OF AN ELECTED OFFICIAL IS A CHANGE WITH RESPECT TO VOTING REQUIRING PRECLEARANCE UNDER SECTION 5

The central question presented by these appeals is whether a change in the decisionmaking authority of an elected official is a change "with respect to voting" under Section 5 of the Voting Rights Act of 1965. The district court held that such changes are covered by Section 5, but only when they involve a "significant relative change" in power between officials who are "elected by, or responsible to, substantially different constituencies of voters." J.S. A13-A14. We agree that a change in an elected official's authority can be a change with respect to voting. In our view, however, a change in the decisionmaking authority of an elected official is covered by Section 5 even if the officials involved are responsible to the same constituency, and even if the authority at issue may be viewed as relatively minor or inconsequential. Under this standard, the changes at issue here require preclearance.

#### A. Section 5 Applies To All Changes That Affect "The Power Of A Citizen's Vote"

Section 5 of the Voting Rights Act provides that certain States and political subdivisions, including appellees, may not implement "any voting qualification or prerequisite to voting, or any standard, practice, or procedure



with respect to voting" without first obtaining preclearance from the United States District Court for the District of Columbia or the Attorney General. 42 U.S.C. 1973c. To receive preclearance, a covered jurisdiction must show that a proposed change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or [membership in a language minority group]." *Ibid.*

This Court has recognized that Section 5 draws a sharp distinction between the procedural question whether a change is subject to preclearance and the substantive question whether the change should be precleared. In deciding the first question, a court may not inquire into whether the change has a discriminatory purpose or effect. See *NAACP* v. *Hampton County Election Comm'n*, 470 U.S. 166, 181 (1985); *McCain* v. *Lybrand*, 465 U.S. 236, 250 n.17 (1984); *Perkins* v. *Matthews*, 400 U.S. 379, 383-385 (1971). Instead, the inquiry is limited to whether the challenged alteration has the "*potential* for discrimination." *Hampton County*, 470 U.S. at 181; *Dougherty County Bd. of Educ.* v. *White*, 439 U.S. 32, 42 (1978). Moreover, a court may not exempt from preclearance changes it views as insignificant. The plain language of the statute makes the preclearance requirement applicable to *any* change with respect to voting, no matter how small or minor. See *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 566-568 (1969) ("It is significant that Congress chose not to include even * * * minor exceptions in § 5, thus indicating an intention that all changes, no matter how small, be subjected to § 5 scrutiny."). See also *Perkins* v. *Matthews*, 400 U.S. at 387. See generally *Hallstrom* v. *Tillamook County*, 493 U.S. 20, 25 (1989) (Courts "are not at liberty to create an exception where Congress has declined to do so").

The Voting Rights Act defines "vote" and "voting" to include "all action necessary to make a vote effective." 42 U.S.C. 1973*l*(c)(1). Relying on this broad definition, and Congress's refusal to make any exceptions to Section 5's

preclearance requirement, this Court held in *Allen* that Section 5 is not limited to changes directly affecting the casting of a ballot. 393 U.S. at 563-569. The Court explained that "[t]he right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot." *Id.* at 569. *Allen* held, *inter alia*, that a change from district to at-large voting, and a change from an elected county superintendent of education to a superintendent appointed by the board of education, were covered by Section 5.[3] 393 U.S. at 569-570.

In subsequent cases, this Court has reaffirmed the broad definition of Section 5 coverage adopted in *Allen*. In *Perkins* v. *Matthews*, 400 U.S. 379 (1971), the Court held that annexations which enlarge the number of eligible voters are covered by Section 5 because they dilute "the weight of the votes of the voters to whom the franchise was limited before the annexation." 400 U.S. at 388. In *Georgia* v. *United States*, 411 U.S. 526, 532-533 (1973), the Court held that Section 5 applies to legislative reapportionments since they too can dilute minority voting power. And in *City of Lockhart* v. *United States*, 460 U.S. 125, 131-132, 134-135 (1983), the Court held that the preclearance requirement applies to the introduction of numbered posts and staggered terms, because such devices may frustrate the use of single-shot voting, a technique that permits minority voters to concentrate their vote behind a single candidate. *Id.* at 135.

Congress reenacted Section 5 in 1970, 1975, and 1982. With each reenactment, Congress has reaffirmed the validity of *Allen*'s interpretation of congressional intent. See S. Rep. No. 417, 97th Cong., 2d Sess. 6-7 (1982); S. Rep. No. 295, 94th Cong., 1st Sess. 16 (1975); *Dougherty County Bd. of Educ.*, 439 U.S. at 38-39; *Georgia* v. *United States*, 411 U.S. at 533. Thus, it is now firmly established that the preclearance requirement applies not only to prac-

[3] In all, the Court's opinion in *Allen* decided three consolidated cases from Mississippi and one case from Virginia. See 393 U.S. at 547.



tices that directly affect the process by which voters are registered and cast their ballots, but also to all practices that affect "the power of a citizen's vote." *Allen*, 393 U.S. at 569.

### B. Some Reallocations Of Authority Are Covered By Section 5

Some changes in the powers of an elected official plainly affect the power of a citizen's vote and therefore are covered by Section 5. To take an extreme example, a change eliminating *all* of a county commission's powers and making that body purely ceremonial would reduce the citizen's vote for county commissioners to a virtual nullity. Cf. *Allen*, 393 U.S. at 569-570 (change making an elective office appointive is covered by Section 5). Less drastic changes in the authority of an elected body can also affect the power of a citizen's vote. For example, stripping a school board of its power to set the tax rate would diminish the voting power of citizens who vote in school board elections, even if the school board were to retain other significant powers. After the change, a vote for school board members, although not meaningless, would mean less than it did before. And such a diminution in voting power could have a racial purpose or effect and thus have the potential for discrimination.

Although this Court has not yet decided whether changes in the powers of an elected official or group of officials are covered by Section 5, the Court has held that a change from a three-member elected body to a five-member elected body required preclearance, because it changed the voting power of the individual members of the three-member body. *City of Lockhart* v. *United States*, *supra*. As the Court explained in *Lockhart*, "[i]n moving from a three-member commission to a five-member council, [the city] has changed the nature of the seats at issue. * * * For example, [two of the old seats] now constitute only 40% of the council, rather than 67% of the commission." 460 U.S. at 131. Given *Lockhart*'s hold-

ing that reducing the power of an individual *member* of an elected body by increasing the size of the body requires preclearance, it is difficult to see how reducing the power of the entire elected *body* can fall outside the scope of Section 5.[4]

A decision excluding all reallocations of authority from the scope of Section 5 would have far-reaching consequences. Since the enactment of the Voting Rights Act, minority voters in many jurisdictions have elected candidates of their choice to office for the first time in recent history. If transfers of authority were not subject to preclearance, a jurisdiction could negate the election of a minority candidate to a governing body by taking away the official's authority and reallocating it to other officials over whom minority voters have less influence. This would defeat the purpose of Section 5, which is to prevent covered jurisdictions from implementing measures that would "evade the remedies for voting discrimination contained in the Act itself." *South Carolina* v. *Katzenbach*, 383 U.S. 301, 335 (1966).

The Etowah County case illustrates this danger. Immediately after a minority-supported candidate was elected to office for the first time in recent memory, the commission stripped him of all authority over road work. The district court found that the potential for discrimination against minority voters posed by this change was "blatant and obvious." J.S. App. A20.

The lower courts have uniformly concluded that a change in the authority of elected officials can be a change with respect to voting. In *Horry County* v. *United*

[4] In *McCain* v. *Lybrand*, 465 U.S. 236 (1984), state legislation changed the governing body of a county from an appointed commission to an elected council with increased legislative powers. The parties stipulated that this legislation incorporated changes with respect to voting, and the Court therefore was not required to address the issue. The Court nevertheless noted that "several changes are suggested," including "the basic reallocation of authority from the state legislative delegation to the Council." 465 U.S. at 250 n.17.



*States*, 449 F. Supp. 990 (D.D.C. 1978) (three-judge court), a state statute increased the powers of the county commission and provided that commissioners would be elected rather than appointed by the governor. The statute also transferred most of the duties of the county chairman to an administrator appointed by the commission. The court held that the first change "reallocate[d] governmental powers among elected officials voted upon by different constituencies," and therefore was subject to preclearance. *Id.* at 995. The court also concluded that the duties of the chairman "are sufficiently different that in this respect [the statute] constitutes a change in electoral practices requiring preclearance under Section 5 of the Voting Rights Act." *Ibid.* Similarly, in *Hardy* v. *Wallace*, 603 F. Supp. 174 (N.D. Ala. 1985) (three-judge court), a state statute transferred the authority to appoint the Greene County racing commission from the county's state legislative delegation to the governor. The court held that this change was subject to Section 5 preclearance because of "its effect on the power of the voters." *Id.* at 178. The court explained that "the transfer of appointment authority to the governor, over 99.7% of whose constituents are not inhabitants of Greene County, substantially dilutes the power of the voters in Greene County by effectively eliminating the power of such voters over the Commission." *Id.* at 179.[5] See also *County Council of Sumter County* v. *United States*, 555 F. Supp. 694 (D.D.C. 1983) (three-judge court) (transfer

[5] The Department of Justice originally concluded that the legislation at issue in *Hardy* v. *Wallace* was subject to preclearance, relying in part on *Horry County* v. *United States*, *supra*. See 603 F. Supp. at 179-180 (decision letter of June 18, 1984). On reconsideration, the Department concluded that while "it would be wrong to conclude that no reallocation of governmental power can ever be considered a change 'with respect to voting,'" the particular change at issue was not covered by Section 5. See 603 F. Supp. at 181-182 (decision letter of Oct. 31, 1984). Further experience with Section 5 has now led us to the view that we were right the first time, as the court in *Hardy* v. *Wallace* determined. See pp. 17-23, *infra*.

of legislative power formerly shared by county legislative delegation, state legislature, and governor to local governing body requires preclearance); *Robinson* v. *Alabama State Dep't of Educ.*, 652 F. Supp. 484 (M.D. Ala. 1987) (transfer of authority from county school board to city school board requires preclearance).

The Attorney General, whose interpretation of Section 5 is entitled to "considerable deference," *NAACP* v. *Hampton County Election Comm'n*, 470 U.S. at 178-179, has long treated certain changes in the power of elected officials as changes with respect to voting. The Department of Justice first focused on reallocations of authority in 1975, when South Carolina enacted "home rule" legislation authorizing its counties to adopt their own forms of local government and to assume increased powers. The Department precleared this enabling legislation, but notified the State that each implementation of it by a local government would require a separate preclearance. The State sought clarification of whether preclearance would be required in cases in which the county assumed increased powers but retained its existing form of government. In response, the Department stated that "changes in the powers and duties of the governing entity brings the transition within the purview of Section 5 even though the structure of the governing body remains the same." Letter from J. Stanley Pottinger to Daniel R. McLeod (Dec. 19, 1975) *reprinted in* App., *infra*, 2a. Since 1975, the Department of Justice consistently has treated home rule and other similar transfers of authority as changes with respect to voting requiring preclearance under Section 5. During this period, we have objected to transfers of authority on at least eight occasions.[6] In addition, the

[6] The Department has objected to the following transfers of authority: (1) Mobile, Alabama, March 2, 1976, involving a transfer of administrative duties from the entire commission to individual commissioners; (2) Charleston, South Carolina, June 14, 1977, involving a transfer of taxing authority from the legislative delegation to the county council; (3) Edgefield County, South Carolina, February 8, 1979, involving a transfer of increased taxing power to the county council; (4) Colleton County, South Carolina, September 4, 1979, involving a transfer of authority to tax for school purposes from the legislative delegation to the county council; (5) Brunswick and Blynn County, Georgia, August 16, 1982, involving the abolition of separate city and county commissions and the transfer of their powers to a consolidated commission; (6) Hillsborough County, Florida, August 29, 1984, involving a transfer of power over municipalities from the legislative delegation to the county commission (objection was withdrawn because the county made clear that it did not intend to effect such a transfer); (7) Waycross, Georgia, February 16, 1988, involving a change in the duties of the mayor; and (8) San Patricio, Texas, May 7, 1990, involving a transfer of voter registration duties from the county clerk to the county tax assessor.



Department has precleared numerous other transfers of authority submitted by jurisdictions after finding the absence of discriminatory purpose and effect.

### C. Changes In The Power Of Elected Officials Are Subject To Preclearance When The Changes Reallocate Decisionmaking Authority

In our view, the hard question in this case is not whether a change in the power of an elected official can ever constitute a change with respect to voting requiring preclearance under Section 5—it plainly can—but rather whether the district court employed the correct standard to distinguish those changes that require preclearance from those that do not. The Department of Justice considered this question when it amended its Section 5 regulations in 1987, but did not attempt to provide an all-encompassing answer. At that time, we stated that "[w]hile we agree that some reallocations of authority are covered by Section 5 (*e.g.*, * * * 'home rule'), we do not believe that a sufficiently clear principle has yet emerged distinguishing covered from noncovered reallocations." J.S. App. A15 n.13.

Since 1987, several cases, including this one, have forced us to grapple with this issue further and have led us to conclude that transfers of authority that implicate

an elected official's *decisionmaking authority* are covered by Section 5. Changes that affect an elected official's authority to make decisions—to legislate, tax, spend, set school curricula, approve road and bridge projects, and so forth—go to the core of the citizens' voting power. Changes that do *not* affect an official's power to make decisions generally have no such potential to dilute the power of a citizen's vote. Although such changes may be of interest to the officeholders, officeholders are not protected by Section 5. Accordingly, such changes are outside the scope of Section 5.[7]

The district court adopted a different standard for distinguishing between covered and uncovered changes. According to the district court, transfers in authority are covered only when they (1) involve officials who are responsible to different voting constituencies, and (2) the duties transferred are not minor or inconsequential. These limitations cannot be squared with the language and purposes of Section 5.

[7] The decision in *Rojas* v. *Victoria Indep. School Dist.*, Civ. A. No. V-87-16 (S.D. Tex. Mar. 29, 1988), aff'd, 490 U.S. 1001 (1989), illustrates this distinction. In *Rojas*, a school board replaced its rule that any board member could place items on the board's agenda with a rule giving the board president authority to require that items be placed on the agenda only at the request of two board members. This change did not affect the range of matters over which the school board could make decisions. Nor did it affect the power of individual members to influence those decisions, since decisions of the board required a majority vote both before and after the change. Moreover, the board's rules of procedure required a second to initiate discussion or bring a matter to a vote. Accordingly, the new agenda setting policy was not a change "with respect to voting" requiring preclearance under Section 5. For the same reason, a transfer of authority from a legislative body to a committee to make recommendations concerning proposed legislation would not be covered by Section 5, because the entire body retains the authority to decide whether to adopt the legislation. More generally, a transfer of authority to give advice or make recommendations would also be outside the reach of Section 5.



### 1. *The District Court's "Different Constituency" Rule Is Too Narrow*

The district court correctly recognized that transfers between officials with different voting constituencies can create the potential for discrimination, since "identifiable racial or ethnic groups of voters will often have different levels of voting strength in different constituencies." J.S. App. A14. The court erred, however, in concluding that transfers of authority between officials who serve the same constituency have no discriminatory potential.

To cite one example, if two elected bodies serve the same constituency, but one has many members while the other has only a few, minority voters may have a greater opportunity to elect a candidate of their choice to the larger body. See *City of Lockhart*, 460 U.S. at 136 (minority voters elected a candidate of their choice for the first time when the council expanded from three to five members). Consequently, a transfer of authority from the larger to the smaller body would have the potential to discriminate against minority voters. Similarly, if minority voters use single-shot voting to elect their preferred candidate to a county school board, and the authority to tax for school purposes is then shifted to a county commission where single-shot voting is prohibited, there is a potential for diluting minority voting strength, even if both the school board and the commission are elected at large by all residents of the county. Still again, if minority voters elect a mayor of their choice because of special circumstances (*e.g.*, the minority candidate ran unopposed, see *Thornburg* v. *Gingles*, 478 U.S. 30, 51 (1986)), and authority to appoint city officials is then transferred to the city council, the change is potentially discriminatory even where both the mayor and the city council are chosen by the same electorate.

Our disagreement with the district court's "different constituency" rule is by no means academic. On at least three occasions, the Attorney General has objected to transfers of authority between officials serving the same

constituency. In one case (Mobile, Alabama, March 2, 1976), a three-member commission elected at-large sought to transfer administrative responsibilities exercised by the entire commission to individual members of the commission. Our investigation disclosed that the purpose of this reallocation was to forestall any possibility of a change to single-member districts (on the theory that it would be inappropriate to permit one area of the city to elect an official with city-wide responsibilities). In another case (Colleton County, South Carolina, September 4, 1979), the State transferred the authority to levy taxes for school purposes from the county's state legislative delegation to the county council, both of which were elected at-large by county residents. Our investigation uncovered evidence that the representatives to the legislative delegation had sought the support of black voters and had been responsive to their needs, while representatives to the county council had not. In the third case (San Patricio, Texas, May 7, 1990), the Attorney General objected when a county transferred the authority to register voters from the county clerk to the county tax assessor, both of whom are elected at-large by the entire county. Our investigation revealed that the purpose of the change was to retaliate against the county clerk for cooperating in a Section 5 review of an unrelated voting change. These objections demonstrate that the district court's "different constituency" test too narrowly defines the circumstances under which preclearance should be required.

In addition, the district court's "different constituency" rule is inconsistent with *Lockhart*. As discussed above, this Court held that the transfer of power from a three-member body to a five-member body was covered by Section 5, even though both bodies served the same voting constituency. Under the district court's "same constituency" rule, such a change would be outside the scope of Section 5. See also *Horry County*, 449 F. Supp. at 995-996 (transfer of administrative functions from chairman elected at-large to administrator appointed by Council elected at large is a covered change).



### 2. *There Is No Exception To Section 5 For Minor Changes*

The district court also erred in holding that transfers of authority that can be characterized as relatively minor or inconsequential need not be precleared under Section 5. The district court concluded that such transfers do not require preclearance because they do not have "a significant potential impact on voting rights." J.S. App. A14. But that is not the statutory test; as noted above, the preclearance requirement is not limited to changes with a "significant" impact on voting rights. On the contrary, the language of the statute makes the preclearance requirement applicable to "any * * * standard, practice, or procedure with respect to voting," no matter how small or minor. 42 U.S.C. 1973c; see *Allen*, 393 U.S. at 566. When minority voters lose the power to use their vote to affect a governmental decision, their voting power has been diminished. That they retain the power to influence what a court may regard as more important matters does not redeem that loss.

Not only does the district court's approach lack roots in the statute itself, but its standard would be difficult to administer. In many cases, the Department of Justice would find it necessary to conduct an extensive investigation simply to decide whether a change is subject to preclearance. Covered jurisdictions would face a similar burden in deciding whether they are required to submit a change. Even after investigation, it may not be clear on which side of the line a particular change falls. Matters that are very important to some voters may be of no importance at all to others. For these reasons, the district court's standard would invite litigation in every case to determine the question of coverage. That baleful result would defeat the purpose of administrative preclearance, which is "to provide a speedy alternative method of com-

pliance to covered States." *Morris* v. *Gressette*, 432 U.S. 491, 503 (1977). More fundamentally, the district court's standard would undermine the prophylactic purpose of Section 5 by permitting the covered jurisdiction to decide whether a transfer of authority is important enough to require preclearance. See *McCain*, 465 U.S. at 246 (Section 5 must be interpreted "in light of its prophylactic purpose and the historical experience which it reflects").

### 3. *The District Court's Standard Confuses The Questions Whether A Change Is Subject To Preclearance And Whether The Change Should Be Precleared*

The district court's standard also blurs the distinction between the procedural question whether a change must be submitted for preclearance and the substantive question whether the change should be precleared. This Court's decision in *Perkins* v. *Matthews*, *supra*, illustrates the difference between these two inquiries. In *Perkins*, the district court held that a jurisdiction's annexation did not have to be precleared because blacks still constituted a majority of the voters after the annexation. 400 U.S. at 385-386. Similarly, the court did not require the jurisdiction to preclear a change from single-member districts to at-large elections because blacks would still have the power to elect the candidates of their choice in at-large elections. Finally, the district court held that changes in the location of polling places did not require preclearance since the changes were dictated by necessity.

This Court reversed, holding that the district court had effectively inquired into the *merits* of whether the changes had the purpose or effect of discriminating against minority voters—a function reserved for the Attorney General and the United States District Court for the District of Columbia. 400 U.S. at 386. The Court explained that annexations that enlarge the number of eligible voters, changes to at-large election systems, and changes in polling places are practices that can, in particular cases, discriminate against minority voters. Accordingly, this Court held that all such changes must be precleared. *Id.* at 387-394.



That principle applies here. A change in the decisionmaking power of an elected official has an effect on the voting power of those who vote for that official, and that type of change has the potential to discriminate against minority voters. Accordingly, all such changes must be submitted for preclearance, including those that appear innocuous. To be sure, a showing that the officials serve the same constituency, and that the transfer is a minor one, may be important evidence that a transfer of authority is without a discriminatory purpose or effect and should be precleared. But those factors do not eliminate the requirement that the change undergo the preclearance process.[8]

## II. THE CHANGES AT ISSUE HERE REALLOCATED THE DECISIONMAKING POWERS OF ELECTED OFFICIALS, AND THEREFORE ARE SUBJECT TO PRECLEARANCE UNDER SECTION 5

For the reasons discussed above, the reallocations of authority at issue here must be submitted for preclearance under Section 5. In Russell County, decisionmaking authority over road matters was transfered from indi-

[8] We have no quarrel with the district court's observation that Section 5 "is not to be stretched beyond the point of reason and beyond its legitimate purposes." J.S. App. A22 n.21. Congress did not intend to overwhelm the Attorney General with preclearance submissions. Cf. *Clark* v. *Roemer*, No. 90-952 (June 13, 1991), slip op. 11. Nor did it intend to require the States to delay implementation of any and all changes that can be linked to voting through an imaginative exercise in the conceivable. But these concerns are satisfied by limiting Section 5 coverage to changes in an elected official's decisionmaking authority. Unlike the district court's standard, this approach is consistent with the language and legislative history of Section 5, is faithful to its prophylactic purpose, and affords a reasonable degree of certainty about whether a particular change is covered.

vidual commissioners, elected at large from residency districts, to the county engineer, who is appointed by the Commission. The district court held that the change was not covered because it involved officials who serve the same constituency. For the reasons noted above, however, that is not sufficient to eliminate the potential for discrimination and therefore does not place the change outside the scope of Section 5. The public policy reasons for adopting the unit system may well support preclearance once the change is submitted. And the fact that the commissioners are answerable to all the voters of Russell County, and the county engineer is answerable to the commissioners, may also support the County's argument for preclearance.[9] But those facts do not obviate the need to go through the process.

The Etowah common fund resolution also requires preclearance. That resolution removed the power of individual commissioners to decide which road projects in their districts would receive priority. Consequently, it involved a transfer of decisionmaking power concerning "the most important aspect of county governance" (J.S. App. 20) from one set of officials to another. See Ala. Code § 23-1-80 (1975 & Supp. 1990) (principal responsibility of county commissions is to maintain roads and bridges). The district court held that preclearance was

[9] Although the district court concluded that the county commissioners and the county engineer answered to the same constituency, in fact appointed officials generally are not "answerable" to the electorate in the same sense as elected officials. (If they were, changes in the authority of *appointed* officials would be no less subject to preclearance than changes in the decisionmaking authority of *elected* officials.) Appointed officials may be subject to job protection of various kinds that insulates them from elected officials and voters. Even where an appointed official serves at the pleasure of an elected official, moreover, a vote against the elected official does not automatically translate into a "vote" against the appointed official. See *Allen*, 393 U.S. at 569-570 (holding that change from elected superintendent of education to superintendent appointed by the board of education is subject to preclearance).



not required because the power to set internal priorities is not as important as the power to determine overall funding. While this may be so, voters clearly have an interest in how both functions are performed. If the road to a voter's home is one the voter's commissioner would schedule for paving but the county commission as a whole would not, the transfer of authority to set road work priorities from the former to the latter may be—to that voter—an extremely important change.

The Etowah common fund resolution was passed while the Commission was undergoing a transition from an at-large system to single-member districts. Good government considerations might well call for different allocations of powers depending on whether members of an elected body serve specific districts or at large. At-large members may, for example, be expected to have the concerns of the entire county in mind in setting priorities, while members serving only a specific district might have more parochial concerns. The State's legitimate public policy reasons for a change are appropriately weighed in determining whether that change should be precleared. See *Houston Lawyers' Ass'n* v. *Texas Attorney General*, Nos. 90-813 & 90-974 (June 20, 1991), slip op. 6 ("State's justification for its electoral system is a proper factor for the courts to assess in a racial vote dilution inquiry."). But the facts of the Etowah County case illustrate why such justifications should be weighed during the preclearance process. As a result of the common fund resolution, individual commissioners were stripped of their power to determine district funding priorities almost immediately after minority voters were able to elect a commissioner of their choice for the first time. Such a change clearly warrants Section 5 review.[10]

[10] In No. 90-712, appellants contend (J.S. 4-6) that a change with no potential for discrimination at the time it is implemented (and therefore not subject to preclearance), may nevertheless become subject to preclearance at a later date if subsequent changes—here, a change from at large voting to single member districts—create a

## CONCLUSION

The district court's judgment should be reversed, and the case should be remanded for the entry of appropriate relief.

Respectfully submitted.

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JULY 1991

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potential for discrimination. In our view, the changes at issue in this case were subject to the preclearance requirement at the time they were made. Accordingly, the Court need not reach this additional contention. But if the Court were to reach this question, the position of the United States is that a change not subject to preclearance at the time it is implemented may not thereafter become subject to preclearance because of subsequent, unanticipated changes. The rule appellants argue for is not derived from the language or legislative history of Section 5, and would impose an unwarranted degree of uncertainty on state and local governments. Of course, efforts to evade the preclearance requirement by implementing a covered change in two or more steps are subject to preclearance. In addition, if a covered jurisdiction fails to submit a change that is subject to preclearance, and the Department of Justice thereafter reviews it, it will consider intervening developments in determining whether to interpose an objection. See *City of Rome* v. *United States*, 446 U.S. 156, 186 (1980).

## APPENDIX

[Dec. 19, 1975]

Honorable Daniel R. McLeod
Attorney General
State of South Carolina
P.O. Box 11549
Columbia, South Carolina 29211

Dear Mr. Attorney General:

This is in reference to your letter of September 9, 1975, concerning the adoption of a form of government by subdivisions in South Carolina under the provisions of Act R-396, the Home Rule Act. You requested clarification of a statement in my previous letter concerning the need for Section 5 preclearance of assigned forms of government which may include situations where no modification of existing government is involved. I apologize for the delay in responding.

With regard to counties, if a county is either assigned a form of government or retains a form of government which is identical in every respect to that which was in effect, without intervening change, since November 1, 1964, or has been implemented since November 1, 1964, and which has met Section 5 preclearance, then there would not be a change in a voting procedure within the meaning of the Voting Rights Act of 1965. However, Section 14-3701(b) provides that the type of government which will be assigned in the event a county does not elect to adopt another form of government will be a form "most nearly corresponding to the form in effect immediately prior to [July 1, 1976]". It thus appears that the Act anticipates that the exact form of government which is in effect on July 1, 1976, will probably not be assigned by operation of the Act and this

expectation would seem to be warranted at least in most cases in view of the broad new powers bestowed upon the governing body under the Home Rule Act.

In light of the Supreme Court's admonition in *Allen* v. *State Board of Elections*, 393 U.S. 544, 563 (1969), that Congress intended "that all changes, no matter how small, be subjected to Section 5 scrutiny", we believe that changes in the powers and duties of the governing entity brings the transition within the purview of Section 5 even though the structure of the governing body remains the same. However, in the event that procedures under the Home Rule Act should result in a county's retaining its previous form of government with powers and duties unchanged, then, of course, there would not be a change within the meaning of Section 5.

Likewise with regard to municipalities, if the form of government which a municipality adopts under the provision of Part II, Article 2, of the Act is identical to that which exists at the expiration of the period described in Section 6 of the Act, then, there would not be a change in voting under Section 5. However, if the new form of government which is selected by this municipality is different in any respect, including changes in the powers and duties of the affected entities, or if a municipality forfeits its articles of incorporation, then such action will constitute a change under Section 5.

I hope that we have been able to clarify this matter for you. If we may be of further assistance, please do not hesitate to contact us.

Sincerely,

J. STANLEY POTTINGER
Assistant Attorney General
Civil Rights Division

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NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 337.

# SUPREME COURT OF THE UNITED STATES

Syllabus

## 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

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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.

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. 8–18.

(a) *Allen* v. *State Board 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. 8–10.

(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. 11–14.

(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. 14–16.

(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. 16–17.

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.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

# SUPREME COURT OF THE UNITED STATES

Nos. 90–711 AND 90–712

LAWRENCE C. PRESLEY, ETC., APPELLANT
90–711 *v.*
ETOWAH COUNTY COMMISSION ET AL.

ED PETER MACK AND NATHANIEL GOSHA, III, ETC., APPELLANTS
90–712 *v.*
RUSSELL COUNTY COMMISSION ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

[January 27, 1992]

JUSTICE KENNEDY delivered the opinion of the Court.

In various Alabama counties voters elect members of county commissions whose principal function is to supervise 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. The case has 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."[1]

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[1] 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 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

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 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

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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."

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*, 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 4–2 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., March 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, the 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, the 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 the 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. 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 Board 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 proven 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 Board 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 Board 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 Educ.* 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.

The 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 the 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 the appellants and the United States. Under the 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. Post-Argument 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 Educ.* 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: "after 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 affected 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. 166, 178–179 (1985). See also *United States* v. *Sheffield Board 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.*, *Chevron 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 legislative history we rehearsed in *South Carolina* v. *Katzenbach* was cited to demonstrate Congress' concern for the protection of voting rights. Neither the appellants nor the United States has pointed to anything we said there or in the statutes reenacting the Voting Rights Act to suggest that Congress meant other than what it said when it made §5 applicable to changes "with respect to voting" rather than, say, changes "with respect to governance."

If federalism is to operate as a practical system of governance and not a mere poetic ideal, the States must be

# SUPREME COURT OF THE UNITED STATES

Nos. 90–711 AND 90–712

LAWRENCE C. PRESLEY, ETC., APPELLANT
90–711 *v.*
ETOWAH COUNTY COMMISSION ET AL.

ED PETER MACK AND NATHANIEL GOSHA, III, ETC., APPELLANTS
90–712 *v.*
RUSSELL COUNTY COMMISSION ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

[January 27, 1992]

JUSTICE STEVENS, with whom JUSTICE WHITE and JUSTICE BLACKMUN join, dissenting.

In 1986, an important event occurred in each of two Alabama counties with long histories of white-dominated political processes. In Etowah County, a black commissioner was elected to the county commission for the first time in recent history, and in Russell County, two black commissioners were elected to the county commission for the first time in "modern times." App. to Juris. Statement of Appellant Presley 4a. Because of the three resolutions at issue in this case—two adopted in Etowah County after Commissioner Presley's election and one adopted in Russell County before the election of Commissioners Mack and Gosha—none of the three newly-elected black commissioners was able to exercise the decisionmaking authority that had been traditionally associated with his office.

As I shall explain, this is a case in which a few pages of history are far more illuminating than volumes of logic and hours of speculation about hypothetical line-drawing

allowed both predictability and efficiency in structuring their governments. Constant minor adjustments in the allocation of power among state and local officials serve this elemental purpose.

Covered changes must bear a direct relation to voting itself. That direct relation is absent in both cases now before us. The changes in Etowah and Russell Counties affected only the allocation of power among governmental officials. They had no impact on the substantive question whether a particular office would be elective or the procedural question how an election would be conducted. Neither change involves a new "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting." 42 U. S. C. §1973c.

The judgment of the District Court is affirmed.

*It is so ordered.*

problems. Initially, however, it is important to note that a different decision in these cases would not impose any novel or significant burden on those jurisdictions that remain covered under §5 of the Voting Rights Act of 1965, 79 Stat. 439, as amended, 42 U. S. C. §1973c.[1]

Prior to these cases, federal courts had uniformly agreed with the Attorney General's interpretation that §5 covered transfers of decisionmaking power that had a potential for discrimination against minority voters.[2] On at least eight occasions since 1975,[3] the Department of Justice has

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[1] Alabama, like the other States that are covered under §5, was placed in that category because of its history of "substantial voting discrimination." *South Carolina* v. *Katzenbach*, 383 U. S. 301, 329 (1966).

[2] See *Horry County* v. *United States*, 449 F. Supp. 990 (D. C. 1978) (statute providing for election of public officials who were formerly appointed by Governor required preclearance under §5); *Hardy* v. *Wallace*, 603 F. Supp. 174 (ND Ala. 1985) (statute changing appointive power over local racing commission from local legislative delegation to Governor required preclearance under §5); *County Council of Sumter County* v. *United States*, 555 F. Supp. 694 (D. C. 1983) (law that eliminated legal power of Governor and General Assembly over local affairs and vested it in county council elected at large by county voters required preclearance under §5); *Robinson* v. *Alabama State Department of Education*, 652 F. Supp. 484 (MD Ala. 1987) (transfer of authority from Board of Education whose members were elected county-wide to one whose members were appointed by the city council required §5 preclearance).

[3] The Solicitor General has advised us that the Department has objected to the following transfers of authority:

"(1) Mobile, Alabama, March 2, 1976, involving a transfer of administrative duties from the entire commission to individual commissioners; (2) Charleston, South Carolina, June 14, 1977, involving a transfer of taxing authority from the legislative delegation to the county council; (3) Edgefield County, South Carolina, February 8, 1979, involving a transfer of increased taxing power to the county council; (4) Colleton County, South Carolina, September 4, 1979, involving a transfer of authority to tax for school purposes from the legislative delegation to the county council; (5) Brunswick and Blynn County, Georgia, August 16, 1982, involving the abolition of separate city and county commissions and the transfer of their powers to a consolidated commission; (6) Hillsborough

refused to preclear changes in the power of elected officials that had a potentially discriminatory[4] impact on black voters. The Department has routinely precleared numerous other transfers of authority after determining that they had no discriminatory purpose or effect.[5] There is no evidence that the prevailing practice imposed any special burden on covered jurisdictions. For example, in this fiscal year the Attorney General has processed over 17,000 preclearance requests, and has approved over 99 percent of them without any undue delay.[6] It is, therefore, simply hyperbole for the

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County, Florida, August 29, 1984, involving a transfer of power over municipalities from the legislative delegation to the county commission (objection was withdrawn because the county made clear that it did not intend to effect such a transfer); (7) Waycross, Georgia, February 16, 1988, involving a change in the duties of the mayor; and (8) San Patricio, Texas, May 7, 1990, involving a transfer of voter registration duties from the county clerk to the county tax assessor." Brief for the United States as *Amicus Curiae* 16, n. 6.

[4] Whether a change in "any . . . standard, practice or procedure with respect to voting," 42 U. S. C. §1973c, must be precleared under §5 depends, not on whether the change "resulted in impairment of the right to vote, or whether [it was] intended to have that effect," but rather, on "whether the challenged alteration has the *potential* for discrimination." *NAACP* v. *Hampton County Election Comm'n*, 470 U. S. 166, 181 (1985); see *McCain* v. *Lybrand*, 465 U. S. 236, 250, n. 17 (1984); *Dougherty County Bd. of Education* v. *White*, 439 U. S. 32, 42 (1978) (issue "is not whether the provision is in fact innocuous and likely to be approved, but whether it has a *potential* for discrimination"); *Georgia* v. *United States*, 411 U. S. 526, 534 (1973); *Perkins* v. *Matthews*, 400 U. S. 379, 383–385 (1971); *Allen* v. *State Bd. of Elections*, 393 U. S. 544, 555, n. 19, 558–559 (1969).

[5] Brief for the United States as *Amicus Curiae* 16–17.

[6] Tr. of Oral Arg. 27. The Attorney General's percentage has undergone little change even though the number of submissions has increased over time. For example, when *Allen* v. *State Bd. of Elections*, 393 U. S. 544 (1969), was decided, the Department of Justice had received 251 submissions from States covered under §5 and had approved over 99 percent of the submissions. *Id.*, at 549, n. 5. Figures available in 1978 indicated that the Department processed 1800 submissions annually, and had approved over 98 percent of those submissions. *Dougherty County*

Court to suggest that if we adopted the Attorney General's position in this case "neither state nor local governments could exercise power in a responsible manner within a federal system." *Ante*, at 15.[7]

In all of our prior cases interpreting §5 of the Voting Rights Act, the Court has agreed with the Attorney General's construction of this important statute.[8] I share the Court's view that the "considerable deference" to which the Attorney General's construction is entitled[9] does not mean automatic "acquiescence," *ante*, at 16; however, I strongly disagree with the Court that our task in these cases is "to

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*Bd. of Education* v. *White*, 439 U. S., at 41.

[7] In the past, various Members of the Court have objected to the types of changes that require preclearance under §5 in covered States, and have predicted that the Court's construction of the statute would leave it without boundaries. In *Perkins* v. *Matthews*, 400 U. S. 379 (1971), for example, Justice Harlan expressed the view that the Court was mistaken in holding that annexations are within the scope of §5 and that the Court had gone too far in its interpretation of "with respect to voting": "Given a change with an effect on voting, a set of circumstances may be conceived with respect to almost any situation in which the change will bear more heavily on one race than on another. In effect, therefore, the Court requires submission of any change which has an effect on voting." *Id.*, at 398 (opinion concurring in part and dissenting in part). Similarly, Justice Powell, taking the view in *Dougherty* that a "personnel rule" should not fall within the scope of §5 as the Court had held, was concerned that "if the Court truly means that any incidental impact on elections is sufficient to trigger the preclearance requirement of §5, then it is difficult to imagine what sorts of state or local enactments would *not* fall within the scope of that section." 439 U. S., at 54 (dissenting opinion) (footnote omitted). The fears the Court expresses today, see *ante*, at 15, are no more likely to be realized than those expressed by Justice Harlan and Justice Powell years ago.

[8] See, *e.g.*, *Perkins* v. *Matthews*, 400 U. S., at 390–391 ("Our conclusion that both the location of the polling places and municipal boundary changes come within §5 draws further support from the interpretation followed by the Attorney General in his administration of the statute"); *United States* v. *Sheffield Bd. of Comm'rs*, 435 U. S. 110, 131 (1978); *Dougherty County Bd. of Education* v. *White*, 439 U. S., at 39.

[9] *NAACP* v. *Hampton County Election Comm'n*, 470 U. S., at 178–179.

formulate workable rules to confine the coverage of §5 to its legitimate sphere: voting." *Ante*, at 14. For reasons that I shall explain, even if the Attorney General, participating in these cases as *amicus curiae*, has asked the Court to adopt a broader rationale than is necessary or appropriate, a narrower basis for a decision is obviously available in the *Etowah County* case and, in my judgment, in the *Russell County* case as well.

I

The original enactment of §5, the interpretations of the Act by this Court and by the Attorney General, and the reenactment of the statute by Congress in light of those interpretations, reveal a continuous process of development in response to changing conditions in the covered jurisdictions.

The central purpose of the original Act was to eliminate the various devices, such as literacy tests, requirements of "good moral character," vouchers, and poll taxes, that had excluded black voters from the registration and voting process in the southern States for decades.[10] As we explained in *McCain* v. *Lybrand*, 465 U. S. 236 (1984):

> "The Voting Rights Act of 1965, as amended, 42 U. S. C. §1973 *et seq.* (1976 ed. and Supp. V), was enacted by Congress as a response to the 'unremitting and ingenious defiance' of the command of the Fif-

[10] "Tests or devices" include

"any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class." 42 U. S. C. §1973b(c).

As this Court recognized in *South Carolina* v. *Katzenbach*, 383 U. S., at 330, "[t]ests and devices are relevant to voting discrimination because of their long history as a tool for perpetrating the evil."

teenth Amendment for nearly a century by state officials in certain parts of the Nation. *South Carolina* v. *Katzenbach*, 383 U. S. 301, 309 (1966). Congress concluded that case-by-case litigation under previous legislation was an unsatisfactory method to uncover and remedy the systematic discriminatory election practices in certain areas: such lawsuits were too onerous and time-consuming to prepare, obstructionist tactics by those determined to perpetuate discrimination yielded unacceptable delay, and even successful lawsuits too often merely resulted in a change in methods of discrimination. *E. g.*, H. R. Rep. No. 439, 89th Cong., 1st Sess., 9–11 (1965). Congress decided 'to shift the advantage of time and inertia from the perpetrators of the evil to its victims,' 383 U. S., at 328, and enacted 'stringent new remedies' designed to 'banish the blight of racial discrimination in voting' once and for all, *id.*, at 308." *Id.*, at 243–244 (footnote omitted).

During the first few years after the enactment of §5, the federal courts gave its text a narrow literal construction that confined its coverage to the political subdivisions that registered voters and to the practices that directly concerned the registration and voting process. Prior to the Court's decision in *Allen* v. *State Bd. of Elections*, 393 U. S. 544 (1969), only three States submitted any changes to the Attorney General for preclearance and a total of only 323 changes were submitted during the first five years of administration.[11] At that time, the covered jurisdictions were able to respond to the increase in the number of black registered voters by means that prevented the newly

[11] See *United States* v. *Sheffield Bd. of Comm'rs.*, 435 U. S., at 148, n. 10 (STEVENS, J., dissenting); see also U. S. Commission on Civil Rights, The Voting Rights Act: Ten Years After, p. 25, n. 53 (1975) ("In the first 6 years of the act, section 5 was hardly used at all").

registered minority voters from having a proportionate impact on the political process.

In *Allen* and its companion cases,[12] however, the Court held that some of these responses, even if not described in the literal text of the Act, were nevertheless included within the scope of §5. Relying heavily on the statutory definition of voting as encompassing "'all action necessary to make a vote effective,'" 393 U. S., at 565–566, and the broad remedial purposes of the Act, the Court held that a change from district to at-large voting for county supervisors, a change that made an important county office appointive rather than elective, and a change that altered the requirements for independent candidates, were all covered voting practices. *Id.*, at 569–571. Thus, §5 was not limited to changes directly affecting the casting of a ballot. *Id.*, at 569 ("The right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot. See *Reynolds* v. *Sims*, 377 U. S. 533, 555 (1964))." Nothing in *Allen* implied that the Court had defined an exhaustive category of changes covered by the Act.[13] On

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[12] *Allen* was argued along with *Fairley* v. *Patterson*, 393 U. S. 544 (1969) (§5 applied to a change from district to at-large election of county supervisors), *Bunton* v. *Patterson*, 393 U. S. 544 (1969) (§5 applied to change in which the position of county officer became appointive instead of elective), and *Whitley* v. *Williams*, 393 U. S. 544 (1969) (changes aimed at increasing the difficulty for an independent candidate to gain a position on a general election ballot were subject to §5), on appeal from the United States District Court for the Southern District of Mississippi.

[13] Although the majority today agrees that §5 is not limited to only the changes covered in our earlier opinions, see *ante*, at 10, it nevertheless attempts to fit today's changes into one of the earlier models, see *ante*, at 11, 14. The Court's approach today marks a departure from the approach we have taken in the past. For example, in *NAACP* v. *Hampton County Election Comm'n*, 470 U. S. 166 (1985), even though the Court recognized that it had "never addressed itself to alterations in voting procedures that exactly parallel those at issue in this case," *id.*, at 176, it nevertheless concluded that §5 was broad enough to encompass a change in election date. *Id.*, at 182–183.

the contrary, the Court described §5 as "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, and expressed, in no uncertain terms, that §5 should be given "the broadest possible scope." *Id.*, at 567. Aware of the consequences of its decision, the Court gave its broad reading of the Act "only prospective effect." *Id.*, at 572.

The Court's construction of the Act in *Allen*, as requiring preclearance of changes in covered jurisdictions that were responsive to the increase in the number of black registered voters,[14] was consistent with the concern that justified the extraordinary remedy set forth in §5 itself, particularly the concern that recalcitrant white majorities could be expected to devise new stratagems to maintain their political power if not closely scrutinized.

> "The rationale of this 'uncommon exercise' of congressional power which sustained its constitutional validity was a presumption that jurisdictions which had 'resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees' would be likely to engage in 'similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself.' *South Carolina* v. *Katzenbach*, *supra*, at 334, 335 (footnote omitted). This provision must, of course, be interpreted in light of its prophylactic purpose and the historical experience which it reflects.

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[14] U.S. Commission on Civil Rights, The Voting Rights Act: Ten Years After, at 69 ("The end of formal barriers brought about by the Voting Rights Act resulted in an immediate increase in minority registration"); H. R. Rep. No. 94–196, p. 6 (1975) ("Prior to 1965, the black registration rate in the State of Alabama lagged behind that of whites in that state by 49.9 percentage points. In 1972, that disparity had decreased to 23.6 percentage points").

See, *e. g.*, *McDaniel* v. *Sanchez*, 452 U. S. 130, 151 (1981)." *McCain* v. *Lybrand*, 465 U. S., at 245–246.

Thus, §5 was understood to be "a 'vital element' of the Act," and was designed to be flexible enough to ensure that "'new subterfuges will be promptly discovered and enjoined.'" *Id.*, at 248 (citation omitted).[15] Section 5, as construed by the Court, was not limited to a "simple inventory of voting procedures," but rather, was understood to address "the reality of changed practices as they affect Negro voters." *Georgia* v. *United States*, 411 U. S. 526, 531 (1973).

In subsequent cases, this Court has reaffirmed the broad scope of §5 coverage, as first articulated by the Court in *Allen*.[16] The Court has interpreted §5 expansively and has said in the context of candidate qualification that a statute requiring independent candidates to declare their intention to seek office two months earlier than under the previous procedures created a barrier to candidacy and required §5 preclearance, *Hadnott* v. *Amos*, 394 U. S. 358 (1969), and in other contexts, that preclearance is required when there is a change in polling places, *Perkins* v. *Matthews*, 400 U. S. 379 (1971), an alteration in municipal boundaries, *City of Richmond* v. *United States*, 422 U. S. 358 (1975), reapportionment and redistricting plans, *Georgia* v. *United States*, 411 U. S., at 532–533, and the introduction of numbered

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[15] "[I]n modern-day voting rights cases such as this one, . . . racial discrimination will more than likely not show itself in the blatant forms of the past but instead will be subtle and sophisticated . . . ." App. to Juris. Statement of Appellant Presley 37a (Thompson, J., concurring in part and dissenting in part).

[16] See *Dougherty County Bd. of Education* v. *White*, 439 U. S., at 38 ("In subsequent cases interpreting §5, we have consistently adhered to the principles of broad construction set forth in *Allen*"); *NAACP* v. *Hampton County Election Comm'n*, 470 U. S., at 176 ("Our precedents recognize that to effectuate the congressional purpose, §5 is to be given broad scope").

posts and staggered terms, *Lockhart* v. *United States*, 460 U. S. 125, 131, 132, 134–135 (1983).

The reenactment of §5 in 1970, Pub. L. 91–285, 84 Stat. 314,[17] in 1975, Pub. L. 94–73, 89 Stat. 400,[18] and in 1982, Pub. L. 97–205, 96 Stat. 131,[19] reflected congressional approval of *Allen*'s broad interpretation of the Act. Indeed, congressional comments quoted in our opinion in *Perkins* v. *Matthews*, *supra*, expressly endorsed an interpretation of §5 that takes into account white resistance to progress in black registration.

> "One Congressman who had supported the 1965 Act observed, 'When I voted for the Voting Rights Act of 1965, I hoped that 5 years would be ample time. But resistance to progress has been more subtle and more effective than I thought possible. A whole arsenal of racist weapons has been perfected. Boundary lines have been gerrymandered, elections have been switched to an at-large basis, counties have been consolidated, elective offices have been abolished where blacks had a chance of winning, the appointment process has been

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[17] "After extensive deliberations in 1970 on bills to extend the Voting Rights Act, during which the *Allen* case was repeatedly discussed, the Act was extended for five years, without any substantive modification of §5." *Georgia* v. *United States*, 411 U. S., at 533 (footnote omitted); see *Dougherty County Bd. of Education* v. *White*, 439 U. S., at 38–39.

[18] "Again in 1975, both the House and Senate Judiciary Committees, in recommending extension of the Act, noted with approval the 'broad interpretations to the scope of Section 5' in *Allen* and *Perkins* v. *Matthews*." *Dougherty*, 439 U. S., at 39.

[19] "[T]he legislative history of the most recent extension of the Voting Rights Act in 1982 reveals that the congressional commitment to its continued enforcement is firm. The Senate Committee found 'virtual unanimity among those who [had] studied the record,' S. Rep. No. 97–417, p. 9 (1982), that §5 should be extended. And, as it had in previous extensions of the Act, Congress specifically endorsed a broad construction of the provision." *NAACP* v. *Hampton County Election Comm'n*, 470 U. S., at 176 (footnote omitted).

substituted for the elective process, election officials have withheld the necessary information for voting or running for office, and both physical and economic intimidation have been employed.

"'Section 5 was intended to prevent the use of most of these devices.'" 400 U. S., at 389, n. 8.[20]

Since the decision in *Allen*, the debate on reenactment of §5 in 1970, and the issuance of regulations by the Department of Justice,[21] it has been recognized that the replacement of an elective office that might be won by a black candidate with an appointive office is one of the methods of maintaining a white majority's political power that §5 was designed to forestall. As a practical matter, such a change has the same effect as a change that makes an elected official a mere figurehead by transferring his decisionmaking authority to an appointed official, or to a group of elected officials controlled by the majority. Although this

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[20] Congress recognized that "since the adoption of the Voting Rights Act, covered jurisdictions have substantially moved from direct, over[t] impediments to the right to vote to more sophisticated devices that dilute minority voting strength," S. Rep. No. 97–417, p. 10 (1982), and that §5 was intended to be responsive to this shift:

"Following the dramatic rise in registration, a broad array of dilution schemes were employed to cancel the impact of the new black vote. Elective posts were made appointive; election boundaries were gerrymandered; majority runoffs were instituted to prevent victories under a prior plurality system; at-large elections were substituted for election by single-member districts, or combined with other sophisticated rules to prevent an effective minority vote. The ingenuity of such schemes seems endless. Their common purpose and effect has been to offset the gains made at the ballot box under the Act.

"Congress anticipated this response. The preclearance provisions of Section 5 were designed to halt such efforts." *Id.*, at 6.

[21] On September 10, 1971, the Department of Justice first adopted regulations implementing §5's preclearance provisions. S. Rep. No. 94–295, p. 16 (1975); see 36 Fed. Reg. 18186 (Sept. 10, 1971); 28 CFR pt. 51 (1972); see also *Georgia* v. *United States*, 411 U. S. 526, 536–541 (1973) (approving regulations).

type of response to burgeoning black registration may not have been prevalent during the early history of the Act, it has been an active concern of the Attorney General since 1976. See *supra*, n. 3. In my judgment, such a change in the reallocation of decisionmaking authority in an elective office, at least in its most blatant form, is indistinguishable from, and just as unacceptable as, gerrymandering boundary lines or switching elections from a district to an at-large basis.

II

The two resolutions adopted by the Etowah County Commission on August 25, 1987, less than 9 months after the county's first black commissioner took office, were an obvious response to the redistricting of the county that produced a majority black district from which a black commissioner was elected. In my view, it was wrong for the District Court to divorce the two parts of this consolidated response and to analyze the two resolutions separately.[22]

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[22] The District Court was also wrong to exempt the Common Fund Resolution from §5 preclearance on the ground that "the common fund resolution was, in practical terms, insignificant in comparison to the entire Commission's authority . . . ." App. to Juris. Statement of Appellant Presley 19a. This is clearly the wrong test in light of our earlier cases, in which we have said that even "minor" changes affecting elections and voting must be precleared. *Allen* v. *State Bd. of Elections*, 393 U. S., at 566, 568 ("It is significant that Congress chose not to include even . . . minor exceptions in §5, thus indicating an intention that all changes, no matter how small, be subjected to §5 scrutiny"); see also *Perkins* v. *Matthews*, 400 U. S., at 387. For example, the Court has said that §5 preclearance applies to the transfer of a polling place, *Perkins*, 400 U.S., at 388, and the extension of city limits to include uninhabited territory, *Pleasant Grove* v. *United States*, 479 U. S. 462, 467 (1987), even though these changes might, at first blush, appear to be "insignificant." The District Court mistakenly blurred the distinction between whether a change is subject to preclearance, which turns on whether the change has the potential for discrimination, and whether the change should, in fact, be precleared, which turns on whether the change

The characterization of the Road Supervision Resolution as a change with a "potential for discrimination" that was "blatant and obvious," App. to Juris. Statement of Appellant Presley 20a, and that should be enjoined unless subjected to §5 preclearance, *id.*, at 21a, 23a, applies equally to the Common Fund Resolution. Both resolutions diminished the decisionmaking authority of the newly-elected black commissioner, and both were passed on the same day and in response to the districting changes effected by the consent decree.[23]

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would have a discriminatory purpose or effect. The distinction is important because "[t]he discriminatory potential in seemingly innocent or insignificant changes can only be determined after the specific facts of the change are analyzed in context. The present coverage formula allows for such a factual analysis." Hearings on Extension of the Voting Rights Act before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 97th Cong., 1st Sess., 2122 (1981) (testimony of Drew Days, Professor, Yale Law School and former U. S. Assistant Attorney General, Civil Rights Division, Department of Justice); see H. R. Rep. No. 97–227, p. 35 (1981); *NAACP* v. *Hampton County Election Comm'n*, 470 U. S., at 176, n. 21.

[23] The District Court approved a consent decree that provided, *inter alia*, for an increase in the number of Etowah County Commissioners in order to remedy the unlawful dilution of black voting strength caused by the prior at-large election system. See *Dillard* v. *Crenshaw County*, CA No. 85-T-1332-N (MD Ala., Nov. 12, 1986); *ante*, at 4. The decree expanded the Commission to six members, all of whom would eventually be elected from single-member districts. See App. to Juris. Statement of Appellant Presley 5a. The consent decree specified that the commissioners elected in 1986 were to have the same duties as the four holdover commissioners. *Ibid.* (decree provided that the two new commissioners "'shall have all the rights, privileges, duties and immunities of the other commissioners, who have heretofore been elected at large'"). In August, 1987, however, the commission passed the Road Supervision Resolution, which authorized the four holdover commissioners to continue to exercise authority over road operations in their districts, but which assigned non-road duties to the two new commissioners. *Id.*, at 6a. On the same day, the same commission adopted a second resolution, the Common Fund Resolution, which abolished the practice of allocating road funds to districts, and created a common fund, thus transferring authority for

At the very least, I would hold that the reallocation of decisionmaking authority of an elective office that is taken (1) after the victory of a black candidate, and (2) after the entry of a consent decree designed to give black voters an opportunity to have representation on an elective body, is covered by §5.

Similar considerations supported the Court's decision in *Dougherty County Bd. of Education* v. *White*, 439 U. S. 32 (1978). *Dougherty* involved a rule requiring an employee of the school system to take a leave of absence while running for or holding a public office. The Court recognized that the rule in question operated in effect as a filing fee, hitting hardest those who were least able to afford it, and that it implicated the political process to the same extent as had changes in the location of polling places, *Perkins* v. *Matthews*, 400 U.S. 379 (1971), and alterations in the procedures for casting a write-in vote, *Allen* v. *State Bd. of Elections*, 393 U.S. 544 (1969). The *Dougherty* Court also observed that the circumstances surrounding the Rule's adoption were "sufficiently suggestive of the potential for discrimination to demonstrate the need for preclearance." 439 U. S., at 42. The rule had been adopted by an area with a long history of racial discrimination in voting, after the first black to seek public office announced his candidacy. *Ibid.* In the *Etowah County* case, as in *Dougherty*, the circumstances surrounding the adoption of the resolutions

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determining funding priorities from the individual commissioners to the entire commission. *Id.*, at 6a-7a. However, the Common Fund Resolution contained a grandfather clause that permitted each holdover commissioner to maintain control over unspent funds for the 1986–1987 fiscal years, and a provision that required all 1987–1988 road maintenance to be done out of the "'four present road shops.'" *Id.*, at 29a. Thus, the Common Fund Resolution, when combined with the Road Supervision Resolution, which gave the four holdover commissioners exclusive control over the road shops, meant that the four holdover commissioners could effectively have complete control over all road and bridge funds.

are similarly suggestive of the potential for discrimination and should require §5 preclearance.

Although the test I propose here may not adequately implement §5, it would certainly provide a workable rule that would result in the correct disposition of this case without opening the Pandora's box that the Court seems to fear.[24]

III

The record indicates that the resolution challenged in the *Russell County* case may well have had a nondiscriminatory, anticorruption purpose.[25] It would not be covered by the narrow standard that I have proposed as a "workable rule" for deciding the *Etowah County* case. I would, however, adopt a broader standard that would require preclearance in this case as well. The proper test, I believe, is suggested by the examples of resistance to the increase in black registration that were noted in our opinion in *Perkins* v. *Matthews*, *supra*.[26]

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[24] The Court is strangely silent about the first half of the Etowah County majority's response to the election of Commissioner Presley. The logic of its analysis would lead to the conclusion that even the Road Supervision Resolution is not covered by §5, but one cannot be sure because the Court recognizes that an otherwise uncovered enactment "might under some circumstances rise to the level of a *de facto* replacement of an elective office with an appointive one." *Ante*, at 16. Despite the Court's overriding interest in formulating "workable rules to confine the coverage of §5 to its legitimate sphere," *ante*, at 14, the scope of that exception must await future cases.

[25] According to one judge on the three-judge District Court, the change "was adopted to eliminate a practice that had proved inefficient and conducive to abuses . . . [and] eventually resulted in a criminal indictment of one of the commissioners." App. to Juris. Statement of Appellant Presley 25a (Hobbs, J., concurring).

[26] In addition to the comment by Congressman McCulloch quoted, *supra*, at 10–11, the Court also quoted from a then recent study of the operation of the Voting Rights Act by the United States Civil Rights Commission, as follows:

Changes from district voting to at-large voting, the gerrymandering of district boundary lines, and the replacement of an elected official with an appointed official, all share the characteristic of enhancing the power of the majority over a segment of the political community that might otherwise be adequately represented. A resolution that reallocates decisionmaking power by transferring authority from an elected district representative to an official, or a group, controlled by the majority, has the same potential for discrimination against the constituents in the disadvantaged districts.[27] The Russell County Resolution satisfies that test, and therefore, like both Etowah County Resolutions, should have been precleared. To hold otherwise, as the Court does today, leaves covered States free to evade the requirements of §5, and to undermine the purpose of the Act, simply by transferring the authority of an elected official, who happens to be black, to another official or group controlled by the majority.

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"'The history of white domination in the South has been one of adaptiveness, and the passage of the Voting Rights Acts and the increased black registration that followed has resulted in new methods to maintain white control of the political process.

"'For example, State legislatures and political party committees in Alabama and Mississippi have adopted laws or rules since the passage of the act which have had the purpose or effect of diluting the votes of newly enfranchised Negro voters. These measures have taken the form of switching to at-large elections where Negro voting strength is concentrated in particular election districts, facilitating the consolidation of predominantly Negro and predominantly white counties, and redrawing the lines of districts to divide concentrations of Negro voting strength.'" *Perkins* v. *Matthews*, 400 U. S., at 389.

[27] In Russell County, the voters continue to elect county commissioners, but the most significant power previously held by those commissioners has been shifted to the county engineer, who is appointed by the Commission. The effect of this change, as in *Bunton* v. *Patterson*, 393 U. S., at 550–551 (change in which office is made appointive rather than elective is subject to §5 preclearance), and *McCain* v. *Lybrand*, 465 U. S., at 250, n. 17, was less power for the voters over local affairs.

The Court today rejects the Attorney General's position that transfers of authority are covered under §5 when "they implicate the decisionmaking authority of elected officials." *Ante*, at 17. It does so because it fears that such a rule creates line-drawing problems and moves too far afield from "voting." Whether or not the rationale advocated by the Attorney General in this case is appropriate, his judgment concerning the proper disposition of these two cases is unquestionably correct.

I would therefore reverse in both cases.

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U. S. 321, 337.

# SUPREME COURT OF THE UNITED STATES

Syllabus

## WEST VIRGINIA UNIVERSITY HOSPITALS, INC. *v.* CASEY, GOVERNOR OF PENNSYLVANIA, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 89-994. Argued October 9, 1990—Decided March 19, 1991

After petitioner West Virginia University Hospitals, Inc. (WVUH), prevailed at trial in its suit under 42 U. S. C. § 1983 against respondent Pennsylvania officials over medicaid reimbursement rates for services provided Pennsylvania residents, the District Court awarded fees pursuant to § 1988, which, *inter alia*, gives the court in certain civil rights suits discretion to allow the prevailing party "a reasonable attorney's fee as part of the costs." WVUH's award included fees attributable to an accounting firm and three doctors specializing in hospital finance hired to assist in the preparation of the suit and to testify. The Court of Appeals affirmed as to the merits, but reversed as to the expert fees, disallowing them except to the extent that they fell within the $30-per-day fees for witnesses provided by 28 U. S. C. §§ 1920(3) and 1821(b).

*Held:* Fees for services rendered by experts in civil rights litigation may not be shifted to the losing party as part of "a reasonable attorney's fee" under § 1988. Pp. 2-18.

(a) Sections 1920 and 1821(b) define the full extent of a federal court's power to shift expert fees, whether testimonial or nontestimonial, absent "explicit statutory authority to the contrary." *Crawford Fitting Co.* v. *J. T. Gibbons, Inc.*, 482 U. S. 437, 439; see *id.*, at 441. This Court will not lightly infer that Congress has repealed those sections through a provision like § 1988 that does not refer explicitly to witness fees. See *id.*, at 445. Pp. 2-4.

(b) Statutory usage before, during, and after 1976 (the date of § 1988's enactment) did not regard the phrase "attorney's fees" as embracing fees for experts' services. Pp. 4-8.

(c) At the time of § 1988's enactment, judicial usage did not regard the phrase "attorney's fees" as including experts' fees. Pp. 8-13.

(d) Where, as here, a statute contains a phrase that is unambiguous, this Court's sole function is to enforce it according to its terms. See, *e. g.*, *United States* v. *Ron Pair Enterprises, Inc.*, 489 U. S. 235, 241. Although chronology and the remarks of some sponsors of the bill that became § 1988 suggest that it was viewed as a response to *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U. S. 240 (1975), the text of § 1988 is both broader and narrower than the pre-*Alyeska* regime. The best evidence of congressional purpose is the statutory text, which cannot be expanded or contracted by the statements of individual legislators or committees during the enactment process. WVUH's argument that Congress would have included expert fees in § 1988 if it had thought about it, as it did in the EAJA, and that this Court has a duty to ask how Congress would have decided had it actually considered the question, profoundly mistakes the Court's role with respect to unambiguous statutory terms. See *Iselin* v. *United States*, 270 U. S. 245, 250–251. Pp. 13–18.

885 F. 2d 11, affirmed.

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

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

# SUPREME COURT OF THE UNITED STATES

No. 89-994

## WEST VIRGINIA UNIVERSITY HOSPITALS, INC., PETITIONER *v.* ROBERT CASEY, GOVERNOR OF PENNSYLVANIA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[March 19, 1991]

JUSTICE SCALIA delivered the opinion of the Court.

This case presents the question whether fees for services rendered by experts in civil rights litigation may be shifted to the losing party pursuant to 42 U. S. C. § 1988, which permits the award of "a reasonable attorney's fee."

I

Petitioner West Virginia University Hospitals, Inc. (WVUH), operates a hospital in Morgantown, W. Va., near the Pennsylvania border. The hospital is often used by medicaid recipients living in southwestern Pennsylvania. In January 1986, Pennsylvania's Department of Public Welfare notified WVUH of new medicaid reimbursement schedules for services provided to Pennsylvania residents by the Morgantown hospital. In administrative proceedings, WVUH unsuccessfully objected to the new reimbursement rates on both federal statutory and federal constitutional grounds. After exhausting administrative remedies, WVUH filed suit in Federal District Court under 42 U. S. C. § 1983. Named as defendants (respondents here) were Pennsylvania Governor Robert Casey and various other Pennsylvania officials.

Counsel for WVUH employed Coopers & Lybrand, a national accounting firm, and three doctors specializing in hospital finance to assist in the preparation of the lawsuit and to

testify at trial. WVUH prevailed at trial in May 1988. The District Court subsequently awarded fees pursuant to 42 U. S. C. § 1988,[1] including over $100,000 in fees attributable to expert services. The District Court found these services to have been "essential" to presentation of the case—a finding not disputed by respondents.

Respondents appealed both the judgment on the merits and the fee award. The Court of Appeals for the Third Circuit affirmed as to the former, but reversed as to the expert fees, disallowing them except to the extent that they fell within the $30-per-day fees for witnesses prescribed by 28 U. S. C. § 1821. 885 F. 2d 11 (CA3 1989). WVUH petitioned this Court for review of that disallowance; we granted certiorari, 494 U. S. ——.

II

28 U. S. C. § 1920 provides:

> "A judge or clerk of any court of the United States may tax as costs the following:
>
> "(1) Fees of the clerk and marshal;
>
> "(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
>
> "(3) Fees and disbursements for printing and witnesses;
>
> "(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
>
> "(5) Docket fees under section 1923 of this title;
>
> "(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title."

[1] 42 U. S. C. § 1988 provides in relevant part: "In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

28 U. S. C. § 1821(b) limits the witness fees authorized by § 1920(3) as follows: "A witness shall be paid an attendance fee of $30 per day for each day's attendance. A witness shall also be paid the attendance fee for the time necessarily occupied in going to and returning from the place of attendance. . . ."[2] In *Crawford Fitting Co.* v. *J. T. Gibbons, Inc.*, 482 U. S. 437 (1987), we held that these provisions define the full extent of a federal court's power to shift litigation costs absent express statutory authority to go further. "[W]hen," we said, "a prevailing party seeks reimbursement for fees paid to its own expert witnesses, a federal court is bound by the limits of § 1821(b), absent contract or explicit statutory authority to the contrary." *Id.*, at 439. "We will not lightly infer that Congress has repealed §§ 1920 and 1821, either through [Fed. Rule Civ. Proc.] 54(d) or any other provision not referring explicitly to witness fees." *Id.*, at 445.

As to the testimonial services of the hospital's experts, therefore, *Crawford Fitting* plainly requires, as prerequisite to reimbursement, the identification of "explicit statutory authority." WVUH argues, however, that some of the expert fees it incurred in this case were unrelated to expert *testimony*, and that as to those fees the § 1821(b) limits, which apply only to witnesses in attendance at trial, are of no consequence. We agree with that, but there remains applicable the limitation of § 1920. *Crawford Fitting* said that we would not lightly find an implied repeal of § 1821 *or* of § 1920, which it held to be an express limitation upon the types of costs which, absent other authority, may be shifted by federal courts. 482 U. S., at 441. None of the categories of expenses listed in § 1920 can reasonably be read to include fees for services rendered by an expert employed by a party in a nontestimonial advisory capacity. The question before us, then, is—with regard to both testimonial and nontestimo-

[2] Section 1821(b) has since been amended to increase the allowable per diem from $30 to $40. See Judicial Improvements Act of 1990, Pub. L. 101-650, § 314.

nial expert fees—whether the term "attorney's fee" in § 1988 provides the "explicit statutory authority" required by *Crawford Fitting*.[8]

III

The record of statutory usage demonstrates convincingly that attorney's fees and expert fees are regarded as separate elements of litigation cost. While some fee-shifting provisions, like § 1988, refer only to "attorney's fees," see, *e. g.*, Civil Rights Act of 1964, 42 U. S. C. § 2000e–5(k), many others explicitly shift expert witness fees *as well as* attorney's fees. In 1976, just over a week prior to the enactment of § 1988, Congress passed those provisions of the Toxic Substances Control Act, 15 U. S. C. §§ 2618(d), 2619(c)(2), which provide that a prevailing party may recover "the costs of suit and reasonable fees for attorneys *and expert witnesses*." (Emphasis added.) Also in 1976, Congress amended the Consumer Product Safety Act, 15 U. S. C. §§ 2060(c), 2072(a), 2073, which as originally enacted in 1972 shifted to the losing party "cost[s] of suit, including a reasonable attorney's fee," see 86 Stat. 1226. In the 1976 amendment, Congress altered the fee shifting provisions to their present form by adding a phrase shifting expert witness fees *in addition to*

[8] JUSTICE STEVENS suggests that the expert fees requested here might be part of the "costs" allowed by § 1988 even if they are not part of the "attorney's fee." We are aware of no authority to support the counter-intuitive assertion that "[t]he term 'costs' has a different and broader meaning in fee-shifting statutes than it has in the cost statutes that apply to ordinary litigation," *post* at 2. In *Crauford Fitting* we held that the word "costs" in F. R. Civ. P. 54(d) is to be read in harmony with the word "costs" in 28 U. S. C. § 1920, see 482 U. S. at 441, 445, and we think the same is true of the word "costs" in § 1988. We likewise see nothing to support JUSTICE STEVENS' speculation that the court below or the parties viewed certain disbursements by the hospital's attorneys as "costs" within the meaning of the statute. Rather, it is likely that these disbursements (billed directly to the client) were thought subsumed within the phrase "attorney's fee." See, *e. g.*, *Northcross* v. *Bd. of Ed. of Memphis City Schools*, 611 F. 2d 624, 639 (CA6 1979) ("reasonable out-of-pocket expenses incurred by the attorney" included in § 1988 "attorney's fee" award).

attorney's fees. See Pub. L. 94-284, § 10, 90 Stat. 506, 507. Two other significant acts passed in 1976 contain similar phrasing: The Resource Conservation and Recovery Act of 1976, 42 U. S. C. § 6972(e) ("costs of litigation (including reasonable attorney and expert witness fees)"), and the Natural Gas Pipeline Safety Act Amendments of 1976, 49 U. S. C. App. § 1686(e) ("costs of suit, including reasonable attorney's fees and reasonable expert witnesses fees").

Congress enacted similarly phrased fee-shifting provisions in numerous statutes both before 1976, see, *e. g.*, Endangered Species Act of 1973, 16 U. S. C. § 1540(g)(4) ("costs of litigation (including reasonable attorney and expert witness fees)"), and afterwards, see, *e. g.*, Public Utility Regulatory Policies Act of 1978, 16 U. S. C. § 2632 (a)(1) ("reasonable attorneys' fees, expert witness fees, and other reasonable costs incurred in preparation and advocacy of [the litigant's] position"). These statutes encompass diverse categories of legislation, including tax, administrative procedure, environmental protection, consumer protection, admiralty and navigation, utilities regulation, and, significantly, civil rights: The Equal Access to Justice Act (EAJA), the counterpart to § 1988 for violation of federal rights by federal employees, states that "'fees and other expenses' [as shifted by § 2412(d)(1)(A)] includes the reasonable expenses of expert witnesses . . . and reasonable attorney fees." 28 U. S. C. § 2412(d)(2)(A). At least 34 statutes in 10 different titles of the U. S. Code explicitly shift attorney's fees *and* expert witness fees.[4]

[4] In addition to the provisions discussed in the text, see Administrative Procedure Act, 5 U. S. C. § 504(b)(1)(A) (added 1980) ("reasonable expenses of expert witnesses . . . and reasonable attorney or agent fees"); Unfair Advertising Act, 15 U. S. C. § 57a(h)(1) (added 1975) ("reasonable attorneys' fees, expert witness fees and other costs of participating in a rulemaking proceeding"); Petroleum Marketing Practices Act, 15 U. S. C. §§ 2805(d)(1)(c), 2805(d)(3) ("reasonable attorney and expert witness fees"); National Historic Preservation Act, 16 U. S. C. § 470w—4 (1980 amendments) ("attorneys' fees, expert witness fees, and other costs of participat-

The laws that refer to fees for nontestimonial expert services are less common, but they establish a similar usage both before and after 1976: Such fees are referred to *in addition to* attorney's fees when a shift is intended. A provision of the

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ing in such action"); Federal Power Act, 16 U. S. C. § 825q—1(b)(2) (added 1978) ("reasonable attorney's fees, expert witness fees and other costs of intervening or participating in any proceeding [before the commission]"); Tax Equity and Fiscal Responsibility Act of 1982, 26 U. S. C. § 7430(c)(1) ("reasonable expenses of expert witnesses . . . and reasonable fees paid . . . for the services of attorneys"); Surface Mining Control Act, 30 U. S. C. § 1270(d) (enacted 1977) ("costs of litigation (including attorney and expert witness fees"); Deep Seabed Hard Mineral Resources Act, 30 U. S. C. § 1427(c) (enacted 1980) (same); Oil and Gas Royalty Management Act of 1982, 30 U. S. C. § 1734(a)(4) ("costs of litigation including reasonable attorney and expert witness fees"); Longshoremen and Harbor Workers' Compensation Act Amendments of 1972, 33 U. S. C. § 928(d) ("In cases where an attorney's fee is awarded . . . there may be further assessed . . . as costs, fees and mileage for necessary witnesses"); Federal Water Pollution Control Act Amendments of 1972, and 1987 Amendment, 33 U. S. C. §§ 1365(d), 1369(b)(3) ("costs of litigation (including reasonable attorney and expert witness fees)"); Oil Pollution Act of 1990, 33 U. S. C. A. § 2706(g) (same); Marine Protection, Research, and Sanctuaries Act of 1972, 33 U. S. C. § 1415(g)(4) (same); Deepwater Port Act of 1974, 33 U. S. C. § 1515(d) (same); Act to Prevent Pollution from Ships, 33 U. S. C. § 1910(d) (enacted 1980) (same); Safe Drinking Water Act, 42 U. S. C. § 300j—8(d) (enacted 1974) (same); National Childhood Vaccine Injury Act of 1986, 42 U. S. C. § 300aa—31(c) (same); Noise Control Act of 1972, 42 U. S. C. § 4911(d) (same); Energy Reorganization Act of 1974, 42 U. S. C. § 5851(e)(2) (same); Energy Policy and Conservation Act, 42 U. S. C. § 6305(d) (enacted 1975) (same); Clean Air Amendments of 1970, 42 U. S. C. §§ 7604(d), 7607(f), 7413(b) (same) and 42 U. S. C. § 7622(b)(2)(B) (1977 amendments) ("all costs and expenses (including attorneys' and expert witness fees) reasonably incurred"); Powerplant and Industrial Fuel Use Act of 1978, 42 U. S. C. § 8435(d) ("costs of litigation (including reasonable attorney and expert witness fees)"); Ocean Thermal Energy Consersion Act of 1980, 42 U. S. C. § 9124(d) (same); Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U. S. C. § 9659(f) (added 1986) (same); Emergency Planning and Community Right-to-Know Act of 1986, 42 U. S. C. § 11046(f) (same); Outer Continental Shelf Lands Act Amendments of 1978, 43 U. S. C. § 1349(a)(5) (same); Hazardous Liquid Pipeline Safety Act of 1979, 49 U. S. C. App. § 2014(e)

1964 Criminal Justice Act, 18 U. S. C. § 3006A(e), directs the court to reimburse appointed counsel for expert fees necessary to the defense of indigent criminal defendants—even though the immediately preceding provision, § 3006A(d), already directs that appointed defense counsel be paid a designated hourly rate plus "expenses reasonably incurred." WVUH's position must be that expert fees billed to a client through an attorney are "attorney's fees" because they are to be treated as part of the expenses of the attorney; but if this were normal usage, they would have been reimbursable under the Criminal Justice Act as "expenses reasonably incurred"—and subsection 3006A(e) would add nothing to the recoverable amount. The very heading of that subsection, "Services *other than* counsel" (emphasis added), acknowledges a distinction between services provided by the attorney himself and those provided to the attorney (or the client) by a nonlegal expert.

To the same effect is the 1980 EAJA, which provides: "'fees and other expenses' [as shifted by § 2412(d)(1)(A)] includes the reasonable expenses of expert witnesses, *the reasonable cost of any study, analysis, engineering report, test, or project* which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees." 28 U. S. C. § 2412(d)(2)(A) (emphasis added). If the reasonable cost of a "study" or "analysis"—which is but another way of describing nontestimonial expert services—is by common usage already included in the "attorney fees," again a significant and highly detailed part of the statute becomes redundant. The Administrative Procedure Act, 5 U. S. C. § 504(b)(1)(A) (added 1980), and the Tax Equity and Fiscal Responsibility Act of 1982, 26 U. S. C. § 7430(c)(1), contain similar language. Also reflecting the same usage are two railroad regulation statutes, the Regional Rail Reorganization Act of 1976, 45 U. S. C. §§ 726(f)(9), 741(i) ("costs

("costs of suit, including reasonable attorney's fees and reasonable expert witnesses fees").

and expenses (including reasonable fees of accountants, experts, and attorneys) actually incurred"), and the Railroad Revitalization and Regulatory Reform Act of 1976, 45 U. S. C. § 854(g) ("costs and expenses (including fees of accountants, experts, and attorneys) actually and reasonably incurred").[5]

We think this statutory usage shows beyond question that attorney's fees and expert fees are distinct items of expense. If, as WVUH argues, the one includes the other, dozens of statutes referring to the two separately become an inexplicable exercise in redundancy.

## IV

WVUH argues that at least in pre-1976 *judicial* usage the phrase "attorney's fees" included the fees of experts. To support this proposition, it relies upon two historical assertions: first, that pre-1976 courts, when exercising traditional equitable discretion in shifting attorney's fees, taxed as an element of such fees the expenses related to expert services; and second, that pre-1976 courts shifting attorney's fees pursuant to statutes identical in phrasing to § 1988 allowed the recovery of expert fees. We disagree with these assertions. The judicial background against which Congress enacted § 1988 mirrored the statutory background: expert fees were regarded not as a subset of attorney's fees, but as a distinct category of litigation expense.

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[5] WVUH cites a House Conference Committee report from a statute passed in 1986, stating "The conferees intend that the term 'attorneys' fees as part of the costs' include reasonable expenses and fees of expert witnesses and the reasonable costs of any test or evaluation which is found to be necessary for the preparation of the . . . case." H. R. Conf. Rep. No. 687, 99th Cong., 2d sess. 5, *reprinted in* 1986 U. S. Code Cong. & Admin. News 1798, 1808 (discussing the Handicapped Children's Protection Act of 1986, 20 U. S. C. § 1415(e)(4)(B)). In our view this undercuts rather than supports WVUH's position: The specification would have been quite unnecessary if the ordinary meaning of the term included those elements. The statement is an apparent effort to *depart* from ordinary meaning and to define a term of art.

Certainly it is true that prior to 1976 some federal courts shifted expert fees to losing parties pursuant to various equitable doctrines—sometimes in conjunction with attorney's fees. But they did not shift them *as an element of* attorney's fees. Typical of the courts' mode of analysis (though not necessarily of their results) is *Fey* v. *Walston & Co.*, 493 F. 2d 1036, 1055–1056 (CA7 1974), a case brought under the federal securities laws. Plaintiff won and was awarded various expenses: "Included in the . . . costs awarded by the [district] court were the sum of $1,700 for plaintiff's expert witness, expenses of an accountant in the amount of $142, and of an illustrator-diagrammer for $50 . . . and attorneys' fees of $15,660." The court treated these items separately: the services of the accountant and illustrator (who did not testify at trial) were "costs" which could be fully shifted in the discretion of the district court; the expert witness fees also could be shifted, but only as limited by § 1821; the attorney's fees were not costs and could not be shifted at all because the case did not fit any of the traditional equitable doctrines for awarding such fees. *Id.*, at 1056. See also *In re Electric Power and Light Co.*, 210 F. 2d 585, 587, 591 (CA2 1954) ("[Appellant] applied for an allowance for counsel fees of $35,975 and expenses . . . , and also for a fee of $2,734.28 for an expert accountant"; court permitted part of the attorney's fee but disallowed the expert witness fee), rev'd on other grounds, 348 U. S. 341 (1955); *Kiefel* v. *Las Vegas Hacienda, Inc.*, 404 F. 2d 1163, 1170–1171 (CA7 1968) (itemizing attorney's fee and expert witness fee separately, allowing part of the former and all of the latter permitted by § 1821); *Burgess* v. *Williamson*, 506 F. 2d 870, 877–880 (CA5 1975) (applying Alabama law to shift attorney's fee but not expert witness fee); *Henning* v. *Lake Charles Harbor and Terminal District*, 387 F. 2d 264, 267–268 (CA5 1968), on appeal after remand, 409 F. 2d 932, 937 (CA5 1969) (applying Louisiana law to shift expert fees but not attorney's fee); *Coughenour* v. *Campbell Barge Line, Inc.*, 388 F. Supp 501, 506 (WD Pa.

1974) ("Plaintiffs' claim for counsel fees is denied [because defendant acted in good faith and thus equitable shifting is unavailable]. Plaintiff's claim for costs of medical expert witnesses is deemed proper insofar as they were necessary in establishing the claim . . . ") (citations omitted).

Even where the courts' holdings treated attorney's fees and expert fees the same (*i. e.*, granted both or denied both), their analysis discussed them as separate categories of expense. See, *e. g.*, *Wolf* v. *Frank*, 477 F. 2d 467, 480 (CA5 1973) ("The reimbursing of plaintiffs' costs for attorney's fees *and* expert witness fees is supported . . . by well established equitable principles") (emphasis added); *Kinnear-Weed Co.* v. *Humble Oil & Refining Co.*, 441 F. 2d 631, 636–637 (CA5 1971) ("[Appellant] argues that the district court erred in awarding costs, including attorneys' fees and expert witness fees to Humble"); *Bebchick* v. *Pub. Util. Comm'n*, 115 U. S. App. D. C. 216, 233, 318 F. 2d 187, 204 (1963) ("It is also our view that reasonable attorneys' fees for appellants, . . . reasonable expert witness fees, and appropriate litigation expenses, should be paid by [appellee]"); *Lipscomb* v. *Wise*, 399 F. Supp. 782, 798–801 (ND Tex. 1975) (in separate analyses, finding both attorney's fees and expert witness fees barred). We have found no support for the proposition that, at common law, courts shifted expert fees *as an element of* attorney's fees.

Of arguably greater significance than the courts' treatment of attorney's fees *versus* expert fees at common law is their treatment of those expenses under statutes containing fee-shifting provisions similar to § 1988. The hospital contends that in some cases courts shifted expert fees as well as the statutorily authorized attorney's fees—and thus must have thought that the latter included the former. We find, however, that the practice, at least in the overwhelming majority of cases, was otherwise.

Prior to 1976, the leading fee-shifting statute was the Clayton Act, 38 Stat. 731, as amended, 15 U. S. C. § 15 (shifting

"the cost of suit, including a reasonable attorney's fee"). As of 1976 four Circuits (six Circuits, if one includes summary affirmances of district court judgments) had held that this provision did not permit a shift of expert witness fees. *Union Carbide & Carbon Co.* v. *Nisley*, 300 F. 2d 561, 586–587 (CA10 1961) (accountant's fees); *Twentieth Century Fox Film Co.* v. *Goldwyn*, 328 F. 2d 190, 223–224 (CA9 1964) (accounting fees); *Advance Business Systems & Supply Co.* v. *SCM Co.*, 287 F. Supp. 143, 164 (Md. 1968) (accountant's fees), aff'd 415 F. 2d 55 (CA4 1969); *Farmington Dowel Products Co.* v. *Forster Mfg. Co.*, 297 F. Supp. 924, 930 (Me.) (expert witness fees), aff'd 421 F. 2d 61 (CA1 1969); *Trans World Airlines, Inc.*, v. *Hughes*, 449 F. 2d 51, 81 (CA2 1971) (expert fees), rev'd on other grounds 409 U. S. 363 (1973); *Ott* v. *Speedwriting Publishing Co.*, 518 F. 2d 1143, 1149 (CA6 1975) (expert witness fees); see also *Brookside Theater Co.* v. *Twentieth Century-Fox Film Co.*, 11 F. R. D. 259, 267 (WD Mo. 1951) (expert witness fees). No court had held otherwise. Also instructive is pre-1976 practice under the federal patent laws, which provided, 35 U. S. C. § 285, that "[t]he court in exceptional cases may award reasonable attorney fees to the prevailing party." Again, every court to consider the matter as of 1976 thought that this provision conveyed no authority to shift expert fees. *Specialty Equipment & Machinery Co.* v. *Zell Motor Car Co.*, 193 F. 2d 515, 521 (CA4 1952) ("Congress having dealt with the subject of costs in patent cases and having authorized the taxation of reasonable attorney's fees without making any provision with respect to . . . fees of expert witnesses must presumably have intended that they not be taxed"); accord *Chromalloy American Corp.* v. *Alloy Surfaces Co.*, 353 F. Supp. 429, 431, n. 1, 433 (Del. 1973); *ESCO Co.* v. *Tru-Rol Co.*, 178 USPQ 332, 333 (Md. 1973); *Scaramucci* v. *Universal Mfg. Co.*, 234 F. Supp. 290, 291–292 (WD La. 1964); *Prashker* v. *Beech Aircraft Co.*, 24 F. R. D. 305, 313 (Del. 1959).

WVUH contends that its position is supported by *Tasby* v. *Estes*, 416 F. Supp. 644, 648 (ND Tex. 1976) and *Davis* v. *County of Los Angeles*, 8 FEPC 244, 246 (CD Cal. 1974). Even if these cases constituted solid support for the proposition advanced by the hospital, they would hardly be sufficient to overcome the weight of authority cited above. But, in any case, we find neither opinion to be a clear example of contrary usage. Without entering into a detailed discussion, it suffices to say, as to *Davis* (where the expert fee award was in any event uncontested), that the opinion does not cite the statute, 42 U. S. C. § 2000e–5, as the basis for its belief that the expert fee could be shifted, and considers expert fees in a section separate from that dealing with attorney's fees. Given what was then the state of the law in the Ninth Circuit, and the District Court's citation, 8 FEPC, at 246, of at least one case that is avowedly an equitable discretion case, see *NAACP* v. *Allen*, 340 F. Supp. 703 (MD Ala. 1972), it is likely that the District Court thought the shifting of the fee was authorized under its general equitable powers, or under Federal Rule Civ. Proc. 54(d). As for *Tasby*, that case unquestionably authorized a shift of expert witness fees pursuant to an attorney's-fee-shifting statute, 20 U. S. C. § 1617 (1976 ed.). The basis of that decision, however, was not the court's own understanding of the statutory term "attorney's fees," but rather its belief (quite erroneous) that our earlier opinion in *Bradley* v. *Richmond School Bd.*, 416 U. S. 696 (1974), had adopted that interpretation. Thus, WVUH has cited not a single case, and we have found none, in which it is clear (or in our view even likely) that a court understood the statutory term "attorney's fees" to include expert fees.[6]

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[6]The hospital also cites *Fairley* v. *Patterson*, 493 F. 2d 598 (CA5 1974), and *Norris* v. *Green*, 317 F. Supp. 100, 102 (ND Ala. 1965). But in *Fairley* the court, remanding for reconsideration of the fee award, was explicitly equivocal as to whether "court costs" other than the ones normally assessable under § 1920 were awardable under the statute in question (the Voting Rights Act of 1965, whose fee-shifting provision parallels § 1988), or

In sum, we conclude that at the time this provision was enacted neither statutory nor judicial usage regarded the phrase "attorney's fees" as embracing fees for experts' services.

V

WVUH suggests that a distinctive meaning of "attorney's fees" should be adopted with respect to § 1988 because this statute was meant to overrule our decision in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U. S. 240 (1975). As mentioned above, prior to 1975 many courts awarded expert fees and attorney's fees in certain circumstances pursuant to their equitable discretion. In *Alyeska*, we held that this discretion did not extend beyond a few exceptional circumstances long recognized by common law. Specifically, we rejected the so-called "private attorney general" doctrine recently created by some lower federal courts, see, *e. g.*, *La Raza Unida* v. *Volpe*, 57 F. R. D. 94, 98–102 (ND Cal. 1972), which allowed equitable fee shifting to plaintiffs in certain types of civil rights litigation. 421 U. S., at 269. WVUH argues that § 1988 was intended to restore the pre-*Alyeska* regime—and that, since expert fees were shifted then, they should be shifted now.

Both chronology and the remarks of sponsors of the bill that became § 1988 suggest that at least some members of Congress viewed it as a response to *Alyeska*. See, *e. g.*, S. Rep. No. 1011, 94th Cong., 2d Sess. 4, 6, *repr. in* 1976

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rather "should have to meet the harder discretionary standards" applicable to the award of fees pursuant to equitable discretion. 493 F. 2d, at 606, n. 11. In any event, *Fairley* did not consider expert witnesses explicitly, and there is no indication that the court necessarily included expert fees within its (undefined) category of "court costs."

As for *Norris*, that case awarded fees pursuant to 29 U. S. C. § 501(b), which is *not* parallel to § 1988, since it authorizes the shifting of "fees of counsel . . . *and* . . . *expenses necessarily paid or incurred*" (emphasis added). There is no indication in the opinion that the court thought the expert fees were part of the former rather than the latter—and the court discussed them separately from attorney's fees.

U. S. Code Cong. & Admin. News 5911, 5913. It is a considerable step, however, from this proposition to the conclusion the hospital would have us draw, namely, that § 1988 should be read as a reversal of *Alyeska* in all respects.

By its plain language and as unanimously construed in the courts, § 1988 is both broader and narrower than the pre-*Alyeska* regime. Before *Alyeska*, civil rights plaintiffs could recover fees pursuant to the private attorney general doctrine only if private enforcement was necessary to defend important rights benefiting large numbers of people, and cost barriers might otherwise preclude private suits. *La Raza Unida*, 57 F. R. D., at 98-101. Section 1988 contains no similar limitation—so that in the present suit there is no question as to the propriety of shifting WVUH's *attorney's* fees, even though it is highly doubtful they could have been awarded under pre-*Alyeska* equitable theories. In other respects, however, § 1988 is not as broad as the former regime. It is limited, for example, to violations of specified civil rights statutes—which means that it would not have reversed the outcome of *Alyeska* itself, which involved not a civil rights statute but the National Environmental Policy Act of 1969, 42 U. S. C. § 4321 *et seq.* Since it is clear that, in many respects, § 1988 was not meant to return us precisely to the pre-*Alyeska* regime, the objective of achieving such a return is no reason to depart from the normal import of the text.

WVUH further argues that the congressional purpose in enacting § 1988 must prevail over the ordinary meaning of the statutory terms. It quotes, for example, the House Committee Report to the effect that "the judicial remedy [must be] full and complete," H. R. Rep. No. 1558, 94th Cong. 2d sess. 1 (1976), and the Senate Committee Report to the effect that "[c]itizens must have the opportunity to recover what it costs them to vindicate [civil] rights in court," S. Rep. No. 1011, 94th Cong. 2d Sess. 2, repr. in 1976 U. S. Code Cong. & Admin. News 5908, 5910. As we have observed before, however, the purpose of a statute includes not only

what it sets out to change, but also what it resolves to leave alone. See *Rodriguez* v. *United States*, 480 U. S. 522, 525–526 (1987). The best evidence of that purpose is the statutory text adopted by both Houses of Congress and submitted to the President. Where that contains a phrase that is unambiguous—that has a clearly accepted meaning in both legislative and judicial practice—we do not permit it to be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process. See *United States* v. *Ron Pair Enterprises, Inc.*, 489 U. S. 235, 241 (1989) ("[W]here, as here, the statute's language is plain, 'the sole function of the court is to enforce it according to its terms.'"), quoting *Caminetti* v. *United States*, 242 U. S. 470, 485 (1917). Congress could easily have shifted "attorney's fees and expert witness fees," or "reasonable litigation expenses," as it did in contemporaneous statutes; it chose instead to enact more restrictive language, and we are bound by that restriction.

WVUH asserts that we have previously been guided by the "broad remedial purposes" of § 1988, rather than its text, in a context resolving an "analogous issue": In *Missouri* v. *Jenkins*, 491 U. S. 274, 285 (1989), we concluded that § 1988 permitted separately billed paralegal and law-clerk time to be charged to the losing party. The trouble with this argument is that *Jenkins* did *not* involve an "analogous issue," insofar as the relevant considerations are concerned. The issue there was not, as WVUH contends, whether we would permit our perception of the "policy" of the statute to overcome its "plain language." It was not remotely plain in *Jenkins* that the phrase "attorney's fee" did not include charges for law-clerk and paralegal services. Such services, like the services of "secretaries, messengers, librarians, janitors, and others whose labor contributes to the work product," 491 U. S., at 285, had traditionally been included in calculation of the lawyers' hourly rates. Only recently had there arisen "the 'increasingly widespread custom of separately billing for

[such] services,'" *id.*, at 286 (quoting from *Ramos* v. *Lamm*, 713 F. 2d 546, 558 (CA10 1983). By contrast, there has never been, to our knowledge, a practice of including the cost of expert services within attorneys' hourly rates. There was also no record in *Jenkins*—as there is a lengthy record here—of statutory usage that recognizes a distinction between the charges at issue and attorney's fees. We do not know of a single statute that shifts clerk or paralegal fees separately; and even those, such as the EAJA, which comprehensively define the assessable "litigation costs" make no separate mention of clerks or paralegals. In other words, *Jenkins* involved a respect in which the term "attorney's fees" (giving the losing argument the benefit of the doubt) was genuinely ambiguous; and we resolved that ambiguity not by invoking some policy that supersedes the text of the statute, but by concluding that charges of this sort had traditionally been included in attorney's fees, and that separate billing should make no difference. The term's application to expert fees is not ambiguous; and if it were the means of analysis employed in *Jenkins* would lead to the conclusion that since such fees have not traditionally been included within the attorney's hourly rate they are not attorney's fees.

WVUH's last contention is that, even if Congress plainly did not include expert fees in the fee-shifting provisions of § 1988, it would have done so had it thought about it. Most of the pre-§ 1988 statutes that explicitly shifted expert fees dealt with environmental litigation, where the necessity of expert advice was readily apparent; and when Congress later enacted the EAJA, the federal counterpart of § 1988, it explicitly included expert fees. Thus, the argument runs, the 94th Congress simply forgot; it is our duty to ask how they would have decided had they actually considered the question. See *Friedrich* v. *City of Chicago*, 888 F. 2d 511, 514 (CA7 1989) (awarding expert fees under § 1988 because a court should "complete . . . the statute by reading it to bring

about the end that the legislators would have specified had they thought about it more clearly").

This argument profoundly mistakes our role. Where a statutory term presented to us for the first time is ambiguous, we construe it to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law. See 2 J. Sutherland, Statutory Construction § 5201 (3d F. Horack ed. 1943). We do so not because that precise accommodative meaning is what the lawmakers must have had in mind (how could an earlier Congress know what a later Congress would enact?) but because it is our role to make sense rather than nonsense out of the *corpus juris*. But where, as here, the meaning of the term prevents such accommodation, it is not our function to eliminate clearly expressed inconsistency of policy, and to treat alike subjects that different Congresses have chosen to treat differently. The facile attribution of congressional "forgetfulness" cannot justify such a usurpation. Where what is at issue is not a contradictory disposition within the same enactment, but merely a difference between the more parsimonious policy of an earlier enactment and the more generous policy of a later one, there is no more basis for saying that the earlier Congress forgot than for saying that the earlier Congress felt differently. In such circumstances, the attribution of forgetfulness rests in reality upon the judge's assessment that the later statute contains the *better* disposition. But that is not for judges to prescribe. We thus reject this last argument for the same reason that Justice Brandeis, writing for the Court, once rejected a similar (though less explicit) argument by the United States:

> "[The statute's] language is plain and unambiguous. What the Government asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions

transcends the judicial function." *Iselin* v. *United States*, 270 U. S. 245, 250–251 (1926).[1]

* * * * *

For the foregoing reasons, we conclude that § 1988 conveys no authority to shift expert fees. When experts appear at trial, they are of course eligible for the fee provided by § 1920 and § 1821—which was allowed in the present case by the Court of Appeals.

The judgment of the Court of Appeals is affirmed.

*It is so ordered.*

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[1] WVUH at least asks us to guess the preferences of the *enacting* Congress. JUSTICE STEVENS apparently believes our role is to guess the desires of the *present* Congress, or of Congresses yet to be. "Only time will tell," he says, "whether the Court, with its literal reading of § 1988, has correctly interpreted the will of Congress," *post*, at 14. The implication is that today's holding will be proved wrong if Congress amends the law to conform with his dissent. We think not. The "will of Congress" we look to is not a will evolving from Session to Session, but a will expressed and fixed in a particular enactment. Otherwise, we would speak not of "interpreting" the law but of "intuiting" or "predicting" it. Our role is to say what the law, as hitherto enacted, *is;* not to forecast what the law, as amended, *will be*.

# SUPREME COURT OF THE UNITED STATES

No. 89-994

WEST VIRGINIA UNIVERSITY HOSPITALS, INC., PETITIONER *v.* ROBERT CASEY, GOVERNOR OF PENNSYLVANIA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[March 19, 1991]

JUSTICE MARSHALL, dissenting

As JUSTICE STEVENS demonstrates, the Court uses the implements of literalism to wound, rather than to minister to, congressional intent in this case. That is a dangerous usurpation of congressional power when any statute is involved. It is troubling for special reasons, however, when the statute at issue is clearly designed to give access to the federal courts to persons and groups attempting to vindicate vital civil rights. A District Judge has ably put the point in an analogous context:

> "At issue here is much more than the simple question of how much [plaintiff's] attorneys should receive as attorney fees. At issue is . . . continued full and vigorous commitment to this Nation's lofty, but as yet unfulfilled, agenda to make the promises of this land available to all citizens, without regard to race or sex or other impermissible characteristic. There are at least two ways to undermine this commitment. The first is open and direct: a repeal of this Nation's anti-discrimination laws. The second is more indirect and, for this reason, somewhat insidious: to deny victims of discrimination a means for redress by creating an economic market in which attorneys cannot afford to represent them and take their

cases to court." *Hidle* v. *Geneva County Bd. of Ed.*, 681 F. Supp. 752, 758–759 (MD Ala. 1988) (awarding attorney fees and expenses under Title VII).

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[March 19, 1991]

JUSTICE STEVENS, with whom JUSTICE MARSHALL and JUSTICE BLACKMUN join, dissenting.

Since the enactment of the Statute of Wills in 1540,[1] careful draftsmen have authorized executors to pay the just debts of the decedent, including the fees and expenses of the attorney for the estate. Although the omission of such an express authorization in a will might indicate that the testator had thought it unnecessary, or that he had overlooked the point, the omission would surely not indicate a deliberate decision by the testator to forbid any compensation to his attorney.

In the early 1970s, Congress began to focus on the importance of public interest litigation, and since that time, it has enacted numerous fee-shifting statutes. In many of these statutes, which the majority cites at length, see *ante*, at 4-8, Congress has expressly authorized the recovery of expert witness fees as part of the costs of litigation. The question in this case is whether, notwithstanding the omission of such an express authorization in 42 U. S. C. § 1988, Congress intended to authorize such recovery when it provided for "a reasonable attorney's fee as part of the costs." In my view, just as the omission of express authorization in a will does not preclude compensation to an estate's attorney, the omis-

[1] 32 Hen. VIII, ch. 1 (1540).

sion of express authorization for expert witness fees in a fee-shifting provision should not preclude the award of expert witness fees. We should look at the way in which the Court has interpreted the text of *this statute* in the past, as well as *this statute's* legislative history, to resolve the question before us, rather than looking at the text of the many other statutes that the majority cites in which Congress expressly recognized the need for compensating expert witnesses.

I

Under either the broad view of "costs" typically assumed in the fee-shifting context or the broad view of "a reasonable attorney's fee" articulated by this Court, expert witness fees are a proper component of an award under § 1988. Because we are not interpreting these words for the first time, they should be evaluated in the context that this and other courts have already created.[2]

The term "costs" has a different and broader meaning in fee-shifting statutes than it has in the cost statutes that apply to ordinary litigation.[3] The cost bill in this case illustrates the point. Leaving aside the question of expert witness fees, the prevailing party sought reimbursement for $45,867 in disbursements, see App. to Pet. for Cert. C-1, which plainly would not have been recoverable costs under 28 U. S. C. § 1920.[4] These expenses, including such items as travel and long-distance telephone calls, were allowed by the District Court, and were not even questioned by respondent. They were expenses that a retained lawyer would ordinarily bill to his or her client. They were accordingly considered proper "costs" in a case of this kind.

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[2] My view, as I have expressed in the past, is that we should follow Justice Cardozo's advice to the judge to "lay [his] own course of bricks on the secure foundation of the courses laid by others who had gone before him." B. Cardozo, The Nature of the Judicial Process 149 (1921).

[3] See, *e. g.*, 28 U. S. C. § 1920; see also Fed. Rule Civ. Proc. 54(d).

[4] Cited in full *ante*, at 2.

The broad construction typically given to "costs" in the fee-shifting context is highlighted by the CHIEF JUSTICE's contrasting view in *Missouri* v. *Jenkins*, 491 U. S. 274 (1989), in which he argued that paralegal and law clerk fees could not even be awarded as "costs" under 28 U. S. C. § 1920. One of the issues in *Jenkins* was the *rate* at which the services of law clerks and paralegals should be compensated. The State contended that actual cost, rather than market value, should govern. It did not, however, even question the propriety of reimbursing the prevailing party for the work of these nonlawyers. Only the CHIEF JUSTICE—in a lone dissent the reasoning of which is now endorsed by the Court—advanced a purely literal interpretation of the statute. He wrote:

> "I also disagree with the State's suggestion that law clerk and paralegal expenses incurred by a prevailing party, if not recoverable at market rates as 'attorney's fees' under § 1988, are nonetheless recoverable at actual cost under that statute. The language of § 1988 expands the traditional definition of 'costs' to include 'a reasonable attorney's fee,' but it cannot fairly be read to authorize the recovery of all other out-of-pocket expenses actually incurred by the prevailing party in the course of litigation. Absent specific statutory authorization for the recovery of such expenses, the prevailing party remains subject to the limitations on cost recovery imposed by Federal Rule of Civil Procedure 54(d) and 28 U. S. C. § 1920, which govern the taxation of costs in federal litigation where a cost-shifting statute is not applicable. Section 1920 gives the district court discretion to tax certain types of costs against the losing party in any federal litigation. The statute specifically enumerates six categories of expenses which may be taxed as costs: fees of the court clerk and marshal; fees of the court reporter; printing fees and witness fees; copying fees; certain docket fees; and fees of court-appointed experts and interpreters. We have held that this list is exclusive.

> *Crawford Fitting Co.* v. *J. T. Gibbons, Inc.*, 482 U. S. 437 (1987). Since none of these categories can possibly be construed to include the fees of law clerks and paralegals, I would also hold that reimbursement for these expenses may not be separately awarded at actual cost." *Id.*, at 297–298.

Although the CHIEF JUSTICE argued that charges for the work of paralegals and law clerks were not part of the narrowly defined "costs" that were reimbursable under § 1920, nor were they part of an "attorney's fee" reimbursable under § 1988, the Court did not reach the CHIEF JUSTICE'S point about costs because it held in *Jenkins* that such expenses were part of a "reasonable attorney's fee" authorized by § 1988, and thus, could be reimbursed at market rate. In the Court's view, a "reasonable attorney's fee" referred to "a reasonable fee for the work product of an attorney." *Id.*, at 285. We explained:

> "[T]he fee must take into account the work not only of attorneys, but also of secretaries, messengers, librarians, janitors, and others whose labor contributes to the work product for which an attorney bills her client; and it must also take account of other expenses and profit. The parties have suggested no reason why the work of paralegals should not be similarly compensated, nor can we think of any. We thus take as our starting point the self-evident proposition that the 'reasonable attorney's fee' provided for by statute should compensate the work of paralegals, as well as that of attorneys." *Ibid.*

In *Jenkins*, the Court acknowledged that the use of paralegals instead of attorneys reduced the cost of litigation, and "'by reducing the spiraling cost of civil rights litigation, further[ed] the policies underlying civil rights statutes.'" *Id.*, at 288. If attorneys were forced to do the work that paralegals could just as easily perform under the supervision of an attorney, such as locating and interviewing witnesses or com-

piling statistical and financial data, then "it would not be surprising to see a greater amount of such work performed by attorneys themselves, thus increasing the overall cost of litigation." *Id.*, at 288, n. 10.

This reasoning applies equally to other forms of specialized litigation support that a trial lawyer needs and that the client customarily pays for, either directly or indirectly. Although reliance on paralegals is a more recent development than the use of traditional expert witnesses, both paralegals and expert witnesses perform important tasks that save lawyers' time and enhance the quality of their work product. In this case, it is undisputed that the District Court correctly found that the expert witnesses were "essential" and "necessary" to the successful prosecution of the plaintiff's case,[5] and that their data and analysis played a pivotal role in the attorney's trial preparation.[6] Had the attorneys attempted to perform the tasks that the experts performed, it obviously would have taken them far longer than the experts and the entire case would have been far more costly to the parties. As Judge Posner observed in a comparable case:

> "The time so spent by the expert is a substitute for lawyer time, just as paralegal time is, for if prohibited (or deterred by the cost) from hiring an expert the lawyer would attempt to educate himself about the expert's area of expertise. To forbid the shifting of the expert's fee would encourage underspecialization and inefficient trial preparation, just as to forbid shifting the cost of paralegals would encourage lawyers to do paralegals' work. There is thus no basis for distinguishing *Jenkins* from the present case so far as time spent by these experts in educating the plaintiffs' lawyer is concerned . . . ." *Friedrich* v. *Chicago*, 888 F. 2d 511, 514 (CA7 1989).

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[5] App. to Pet. for Cert. C-2; App. 117.

[6] The expert witnesses here played a pivotal role in their non-testimonial, rather than simply their testimonial, capacity. See Pet. for Cert. 6-7; App. 120-139.

In *Jenkins*, we interpreted the award of "a reasonable *attorney's* fee" to cover charges for paralegals and law clerks, even though a paralegal or law clerk is not an attorney. Similarly, the federal courts routinely allow an attorney's travel expenses or long-distance telephone calls to be awarded, even though they are not literally part of an "attorney's *fee*," or part of "costs" as defined by 28 U. S. C. § 1920. To allow reimbursement of these other categories of expenses, and yet not to include expert witness fees, is both arbitrary and contrary to the broad remedial purpose that inspired the fee-shifting provision of § 1988.

## II

The Senate Report on the Civil Rights Attorneys' Fees Awards Act explained that the purpose of the proposed amendment to 42 U. S. C. § 1988 was "to remedy anomalous gaps in our civil rights laws created by the United States Supreme Court's recent decision in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U. S. 240 (1975), and to achieve consistency in our civil rights laws."[7] S. Rep. No. 94-1011, p. 1 (1976). The Senate Committee on the Judiciary wanted to level the playing field so that private citizens, who might have little or no money, could still serve as "private attorneys general" and afford to bring actions, even against state or local bodies, to enforce the civil rights laws. The Committee acknowledged that "[i]f private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover *what*

[7] In *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U. S. 240 (1975), the Court held that courts were not free to fashion new exceptions to the American Rule, according to which each side assumed the cost of its own attorney's fees. The Court reasoned that it was not the judiciary's role "to invade the legislature's province by redistributing litigation costs . . . ," *id.*, at 271, and that it would be "inappropriate for the Judiciary, without legislative guidance, to reallocate the burdens of litigation . . . ." *Id.*, at 247.

*it costs them* to vindicate these rights in court." *Id.*, at 2 (emphasis added). According to the Committee, the bill would create "no startling new remedy," but would simply provide "the technical requirements" requested by the Supreme Court in *Alyeska*, so that courts could "continue the practice of awarding attorneys' fees which had been going on for years prior to the Court's May decision." *Id.*, at 6.

To underscore its intention to return the courts to their pre-*Alyeska* practice of shifting fees in civil rights cases, the Senate Committee's Report cited with approval not only several cases in which fees had been shifted, but also all of the cases contained in Legal Fees, Hearings before the Subcommittee on Representation of Citizen Interests of the Senate Committee on the Judiciary, 93rd Cong., 1st Sess., pt. 3, pp. 888–1024, 1060–1062 (1973) (hereinafter Senate Hearings). See S. Rep. No. 94-1011, p. 4, n. 3 (1976). The cases collected in the 1973 Senate Hearings included many in which courts had permitted the shifting of costs, including expert witness fees. At the time when the Committee referred to these cases, though several were later reversed, it used them to make the point that prior to *Alyeska*, courts awarded attorney's fees and costs, including expert witness fees, in civil rights cases, and that they did so in order to encourage private citizens to bring such suits.[8] It was to this

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[8] See, *e. g.*, *Beens* v. *Erdahl*, 349 F. Supp. 97, 100 (Minn. 1972); *Bradley* v. *School Board of Richmond*, 53 F. R. D. 28, 44 (ED Va. 1971) ("Fees for expert witnesses' testimony likewise will be allowed as an expense of suit. It is difficult to imagine a more necessary item of proof (and source of assistance to the Court) than the considered opinion of an educational expert"), rev'd, 472 F. 2d 318 (CA4 1972), vacated, 416 U. S. 696 (1974); *La Raza Unida* v. *Volpe*, No. 71-1166 (ND Cal., Oct. 19, 1972), reprinted in Senate Hearings, pt. 3, pp. 1060, 1062, (expert witness fees allowed because experts' testimony was "helpful to the court"); *Pyramid Lake Paiute Tribe of Indians* v. *Morton*, 360 F. Supp. 669, 672 (DC 1973) ("The plaintiff's experts played a vital role in the resolution of the case, their work and testimony going to the heart of the matter. Accordingly, it seems entirely appropriate to award their fees as scheduled in the total amount of

pre-*Alyeska* regime, in which courts could award expert witness fees along with attorney's fees, that the Senate Committee intended to return through the passage of the fee-shifting amendment to § 1988.

The House Report expressed concerns similar to those raised by the Senate Report. It noted that "[t]he effective enforcement of Federal civil rights statutes depends largely on the efforts of private citizens" and that the House bill was "designed to give such persons effective access to the judicial process . . . ." H. R. Rep. No. 94-1558, p. 1 (1976). The House Committee on the Judiciary concluded that "civil rights litigants were suffering very severe hardships because of the *Alyeska* decision," and that the case had had a "devastating impact" and had created a "compelling need" for a fee-shifting provision in the civil rights context. *Id.*, at 2-3.

According to both Reports, the record of House and Senate subcommittee hearings, consisting of the testimony and written submissions of public officials, scholars, practicing attorneys, and private citizens, and the questions of the legislators, makes clear that both committees were concerned with preserving access to the courts and encouraging public interest litigation.[9]

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$20,488.72 . . . ."), rev'd, 163 U. S. App. D. C. 90, 499 F. 2d 1095 (1974), cert. denied, 420 U. S. 962 (1975).

[9] A frequently expressed concern was the need to undo the damage to public interest litigation caused by *Alyeska*. See, *e. g.*, Awarding of Attorneys' Fees, Hearings before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary, 94th Cong., 1st Sess., pp. 2, 41, 42, 43, 54, 82-85, 87, 90-92, 94, 103, 119-121, 123-125, 134, 150, 153-155, 162, 182-183, 269, 272-273, 370, 378-395, 416-418 (1975) (hereinafter House Hearings). Many who testified expressed the view that attorneys needed fee-shifting provisions so that they could afford to work on public interest litigation, see, *e. g.*, *id.*, at 66-67, 76, 78-79, 80, 89, 124-125, 137-142, 146, 158-159, 276-277, 278-280, 306-308; see also *id.*, at 316-326; Senate Hearings, pts. 3, 4, pp. 789-790, 855-857, 1115, and private citizens needed fee-shifting provisions so that they could be made whole again. See, *e. g.*, House Hearings, pp. 60, 189, 192, 254-55, 292, 328; see also *id.*, at 106-111, 343-345, 347-349. For ex-

It is fair to say that throughout the course of the hearings, a recurring theme was the desire to return to the pre-*Alyeska* practice in which courts could shift fees, including expert witness fees, and make those who acted as private attorneys general whole again, thus encouraging the enforcement of the civil rights laws.

The case before us today is precisely the type of public interest litigation that Congress intended to encourage by amending § 1988 to provide for fee shifting of a "reasonable attorney's fee as part of the costs." Petitioner, a tertiary medical center in West Virginia near the Pennsylvania border,[10] provides services to a large number of medicaid recipients throughout Pennsylvania. In January 1986, when the Pennsylvania Department of Public Welfare notified petitioner of its new medicaid payment rates for Pennsylvania medicaid recipients, petitioner believed them to be below the minimum standards for reimbursement specified by the Social Security Act. Petitioner successfully challenged the adequacy of the State's payment system under 42 U. S. C. § 1983.

This Court's determination today that petitioner must assume the cost of $104,133.00 in expert witness fees is at war with the congressional purpose of making the prevailing party whole. As we said in *Hensley* v. *Eckerhart*, 461 U. S.

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ample, the private citizen who was brought into court by the Government and who later prevailed, would still not be made whole because he had to bear the costs of his own attorney's fees. The Senate Hearings also examined the average citizen's lack of access to the legal system. See, *e. g.*, Senate Hearings, pts. 1, 2, 3, pp. 1–2, 3–4, 273 (addressing question whether coal miners were receiving adequate legal coverage); *id.*, at 466, 470–471, 505–509, 515 (addressing question whether veterans were denied legal assistance by $10 contingent fee); *id.*, at 789, 791–796, 808–810 (Indians' access to lawyers); *id.*, at 1127, 1253–1254 (average citizen cannot afford attorney).

[10] A "tertiary" hospital provides a level of medical services that is generally complex and not provided by community hospitals. Brief for Petitioner 3, n. 1.

424, 435 (1983), petitioner's recovery should be "fully compensatory," or, as we expressed in *Jenkins*, petitioner's recovery should be "comparable to what 'is traditional with attorneys compensated by a fee-paying client.' S. Rep. No. 94-1011, p. 6 (1976)." 491 U. S., at 286.

III

In recent years the Court has vacillated between a purely literal approach to the task of statutory interpretation and an approach that seeks guidance from historical context, legislative history, and prior cases identifying the purpose that motivated the legislation. Thus, for example, in *Christiansburg Garment Co.* v. *EEOC*, 434 U. S. 412 (1978), we rejected a "mechanical construction," *id.*, at 418, of the fee-shifting provision in § 706(k) of Title VII of the Civil Rights Act of 1964 that the prevailing defendant had urged upon us. Although the text of the statute drew no distinction between different kinds of "prevailing parties," we held that awards to prevailing plaintiffs are governed by a more liberal standard than awards to prevailing defendants. That holding rested entirely on our evaluation of the relevant congressional policy and found no support within the four corners of the statutory text. Nevertheless, the holding was unanimous and, to the best of my knowledge, evoked no adverse criticism or response in Congress.[11]

[11] Other examples of cases in which the Court eschewed the literal approach include *Steelworkers* v. *Weber*, 443 U. S. 193 (1979), and *Johnson* v. *Transportation Agency, Santa Clara County*, 480 U. S. 616 (1987). Although the dissenters had the better textual argument in both cases, and urged the Court to read the words of the statute literally, the Court, in both cases, opted for a reading that took into account congressional purpose and historical context. See *Steelworkers* v. *Weber*, 443 U. S., at 201 (Court rejected "literal construction of §§ 703(a) and (d)" and held that the statute must "be read against the background of the legislative history of Title VII and the historical context from which the Act arose"); *Johnson* v. *Transportation Agency*, 480 U. S., at 627 (legality of employer's Affirmative Action Plan to be assessed according to criteria announced in *Weber*). Neither decision prompted an adverse congressional response.

On those occasions, however, when the Court has put on its thick grammarian's spectacles and ignored the available evidence of congressional purpose and the teaching of prior cases construing a statute, the congressional response has been dramatically different. It is no coincidence that the Court's literal reading of Title VII, which led to the conclusion that disparate treatment of pregnant and nonpregnant persons was not discrimination on the basis of sex, see *General Electric Co.* v. *Gilbert*, 429 U. S. 125 (1976), was repudiated by the 95th Congress;[12] that its literal reading of the "continuous physical presence" requirement in § 244(a)(1) of the Immigration and Nationality Act, which led to the view that the statute did not permit even temporary or inadvertent absences from this country, see *INS* v. *Phinpathya*, 464 U. S. 183 (1984), was rebuffed by the 99th Congress;[13] that

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Although there have been those who have argued that congressional inaction cannot be seen as an endorsement of this Court's interpretations, see, *e. g.*, *Johnson* v. *Transportation Agency*, 480 U. S., at 671–672 (SCALIA, J., dissenting); *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 175, n. 1 (1989), that charge has been answered by the observation that "when Congress has been displeased with [the Court's] interpretation . . . , it has not hesitated to amend the statute to tell us so. . . . Surely, it is appropriate to find some probative value in such radically different congressional reactions to this Court's interpretations . . . ." *Johnson* v. *Transportation Agency*, 480 U. S., at 629–630, n. 7; see *Patterson* v. *McLean Credit Union*, 491 U. S., at 200 (Brennan, J., concurring in judgment in part and dissenting in part) ("Where our prior interpretation of congressional intent was plausible, . . . we have often taken Congress' subsequent inaction as probative to varying degrees, depending upon the circumstances, of its acquiescence"). Since Congress has had an opportunity, albeit brief, to correct our broad reading of attorney's fees in *Jenkins* if it thought that we had misapprehended its purpose, the Court has no reason to change its approach to the fee-shifting provision of § 1988, as the majority does today.

[12] See Pregnancy Discrimination Act of 1978, Pub. L. 95–555, 92 Stat. 2076, 42 U. S. C. § 2000e(k) (overturning *General Electric Co.* v. *Gilbert*, 429 U. S. 125 (1976)).

[13] Immigration Reform and Control Act of 1986, Pub. L. 99–603, Sec. 315(b), 100 Stat. 3359 (1986) ("An alien shall not be considered to have

its literal reading of the word "program" in Title IX of the Education Amendments of 1972, which led to the Court's gratuitous limit on the scope of the antidiscrimination provisions of Title IX,[14] see *Grove City College* v. *Bell*, 465 U. S. 555 (1984), was rejected by the 100th Congress;[15] or that its refusal to accept the teaching of earlier decisions in *Wards Cove Packing Co.* v. *Atonio*, 490 U. S. 642 (1989) (reformulating order of proof and weight of parties' burdens in disparate-impact cases), and *Patterson* v. *McLean Credit Union*, 491 U. S. 164 (1989) (limiting scope of 42 U. S. C. § 1981 to the making and enforcement of contracts) was overwhelmingly rejected by the 101st Congress,[16] and its refusal to accept the widely held view of lower courts about the scope of fraud, see

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failed to maintain continuous physical presence in the United States . . . if the absence from the United States was brief, casual and innocent and did not meaningfully interrupt the continuous physical presence").

[14] See *Grove City College* v. *Bell*, 465 U. S. 555, 579 (1984) (STEVENS, J., concurring in part and concurring in result) (Court should refrain from deciding issue not in dispute).

[15] See Civil Rights Restoration Act of 1987, Pub. L. 100-259, 102 Stat. 28, 20 U. S. C. § 1687. Congress was clear in expressing the need for the subsequent legislation:

"Congress finds that—

"(1) certain aspects of recent decisions and opinions of the Supreme Court have unduly narrowed or cast doubt upon the broad application of title IX of the Education Amendments of 1972 . . . ; and

"(2) legislative action is necessary to restore prior consistent and long-standing executive branch interpretation and broad, institution-wide application of those laws as previously administered." 20 U. S. C. § 1687 note.

[16] See H. R. Conf. Rep. No. 101-856, p. 1 (1990) (Civil Rights Act of 1990). Again, Congress was blunt about its purposes:

"The purposes of this Act are to —

"(1) respond to the Supreme Court's recent decisions by restoring the civil rights protections that were dramatically limited by those decisions; and

"(2) strengthen existing protections and remedies available under Federal civil rights laws to provide more effective deterrence and adequate compensation for victims of discrimination." *Ibid.*

*McNally* v. *United States*, 483 U. S. 350 (1987) (limiting mail fraud to protection of property), was quickly corrected by the 100th Congress.[17]

In the domain of statutory interpretation, Congress is the master. It obviously has the power to correct our mistakes, but we do the country a disservice when we needlessly ignore persuasive evidence of Congress' actual purpose and require it "to take the time to revisit the matter"[16] and to restate its purpose in more precise English whenever its work product suffers from an omission or inadvertent error. As Judge Learned Hand explained, statutes are likely to be imprecise.

> "All [legislators] have done is to write down certain words which they mean to apply generally to situations of that kind. To apply these literally may either pervert what was plainly their general meaning, or leave undisposed of what there is every reason to suppose they meant to provide for. Thus it is not enough for the judge just to use a dictionary. If he should do no more, he might come out with a result which every sensible man would recognize to be quite the opposite of what was really intended; which would contradict or leave unfulfilled its plain purpose." L. Hand, How Far Is a Judge Free in Rendering a Decision?, in The Spirit of Liberty 103, 106 (I. Dilliard ed. 1952).

The Court concludes its opinion with the suggestion that disagreement with its textual analysis could only be based on the dissenter's preference for a "better" statute, *ante*, at 17. It overlooks the possibility that a different view may be more

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The fact that the President vetoed the legislation does not undermine the conclusion that Congress viewed the Court's decisions as incorrect interpretations of the relevant statutes.

[17] See Pub. L. 100-690, § 7603, 102 Stat. 4508, 18 U. S. C. § 1346 ("[T]he term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services").

[18] *Smith* v. *Robinson*, 468 U. S. 992, 1031 (1984) (Brennan, J., dissenting).

faithful to Congress' command. The fact that Congress has consistently provided for the inclusion of expert witness fees in fee-shifting statutes when it considered the matter is a weak reed on which to rest the conclusion that the omission of such a provision represents a deliberate decision to forbid such awards. Only time will tell whether the Court, with its literal reading[19] of § 1988, has correctly interpreted the will of Congress with respect to the issue it has resolved today.

I respectfully dissent.

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[19] Seventy years ago, Justice Cardozo warned of the dangers of literal reading, whether of precedents or statutes:

"[Some judges'] notion of their duty is to match the colors of the case at hand against the colors of many sample cases spread out upon their desk. The sample nearest in shade supplies the applicable rule. But, of course, no system of living law can be evolved by such a process, and no judge of a high court, worthy of his office, views the function of his place so narrowly. If that were all there was to our calling, there would be little of intellectual interest about it. The man who had the best card index of the cases would also be the wisest judge. It is when the colors do not match, when the references in the index fail, when there is no decisive precedent, that the serious business of the judge begins." B. Cardozo, The Nature of the Judicial Process 20–21 (1921).