The Burger Court Opinion Writing Database

Berry v. Doles
438 U.S. 190 (1978)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: MAR 9 1978

1st DRAFT Recirculated: _____

SUPREME COURT OF THE UNITED STATES

H. W. BERRY ET AL. *v.* J. D. DOLES, ETC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA

No. 76-1690. Decided March —, 1978

PER CURIAM.

This appeal presents a challenge to the scope of the remedy allowed by a three-judge District Court for the Middle District of Georgia for failure of appellees to comply with the approval provisions of § 5 of the Voting Rights Act of 1965, 79 Stat. 439, as amended, 42 U. S. C. § 1973c (1970 ed., Supp. V).

In 1968, the State of Georgia enacted a statute intended to stagger the terms of the three members of the Peach County Board of Commissioners of Roads and Revenues. The then existing statute, adopted in 1964, provided that all three posts were to be filled at four-year intervals. By operation of the 1968 amendment, the single at-large member was to be elected to a two-year term in 1968 and to a four-year term at subsequent general elections. Appellees concede, and the three-judge court found, that the 1968 statute constituted a change in voting procedures subject to the provisions of § 5 and that the change had been implemented without first having been submitted for approval either to the United States District Court for the District of Columbia or to the Attorney General as required by § 5.

Four days prior to the August 10, 1976, primary election for the two seats on the Board not including the at-large post, appellants filed this action to enforce the requirements of § 5. Appellants' requests for declaratory and injunctive relief were not acted upon until after the scheduled 1976 primary and general elections.

On February 28, 1977, the three-judge court, without a hearing, enjoined further enforcement of the 1968 statute until such time as appellees effected compliance with § 5. How-

Brennan 77

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 27, 1978

Dear Lewis:

Re: 76-1690 Berry v. Doles

I join your April 20 Per Curiam.

Regards,

WEB

Mr. Justice Powell

cc: The Conference

@ Brennan 77

No changes

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: _____

2nd DRAFT

Recirculated: MAY 16 1978

SUPREME COURT OF THE UNITED STATES

H. W. BERRY ET AL. *v.* J. D. DOLES, ETC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA

No. 76-1690. Decided May —, 1978

PER CURIAM.

This appeal presents a challenge to the scope of the remedy allowed by a three-judge District Court for the Middle District of Georgia for failure of appellees to comply with the approval provisions of § 5 of the Voting Rights Act of 1965, 79 Stat. 439, as amended, 42 U. S. C. § 1973c (1970 ed., Supp. V).

In 1968, the State of Georgia enacted a statute intended to stagger the terms of the three members of the Peach County Board of Commissioners of Roads and Revenues. The then existing statute, adopted in 1964, provided that all three posts were to be filled at four-year intervals. By operation of the 1968 amendment, the single at-large member was to be elected to a two-year term in 1968 and to a four-year term at subsequent general elections. Appellees concede, and the three-judge court found, that the 1968 statute constituted a change in voting procedures subject to the provisions of § 5 and that the change had been implemented without first having been submitted for approval either to the United States District Court for the District of Columbia or to the Attorney General as required by § 5.

Four days prior to the August 10, 1976, primary election for the two seats on the Board not including the at-large post, appellants filed this action to enforce the requirements of § 5, Appellants' requests for declaratory and injunctive relief were not acted upon until after the scheduled 1976 primary and general elections.

On February 28, 1977, the three-judge court, without a hearing, enjoined further enforcement of the 1968 statute until such time as appellees effected compliance with § 5. How-

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated: 3/14/78

Recirculated: _____

Re: No. 76-1690--Berry v. Doles.

BRENNAN, J., dissenting.

Today, the Court decides, summarily and without oral argument, an important question concerning the proper scope of the remedy in a suit brought against appellees for failure to comply with the approval provisions of § 5 of the Voting Rights Act of 1965. The Court is surely correct that the District Court's failure to enter affirmative relief to remedy that violation constituted reversible error. The District Court plainly was foreclosed from reliance upon a belief that the continued implementation of the 1968 voting change did not have a racially discriminatory purpose or effect as the reason for declining to award such relief. See, e.g., United States v. Board of Supervisers, 429 U.S. 642 (1977); Perkins v. Mathews, 400 U.S. 379, 385 (1971). Congress has prescribed that only specified federal designees, the Attorney General and the District Court for the District of Columbia, shall make that determination, and it is imperative that the relief in a case brought for failure to comply with the approval provisions, as here, at a minimum, ensure that these specific designees have

W Brenn 0177

STYLISTIC CHANGES

To:
Mr. Justice S
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

2nd DRAFT

Circulated: _____

SUPREME COURT OF THE UNITED STATES

Circulated: 3/15

H. W. BERRY ET AL. *v.* J. D. DOLES, ETC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA

No. 76–1690. Decided March —, 1978

MR. JUSTICE BRENNAN, dissenting.

Today, the Court decides, summarily and without oral argument, an important question concerning the proper scope of a remedy in a suit brought against state officials who have failed to comply with the approval provisions of § 5 of the Voting Rights Act of 1965. The Court is surely correct that the District Court's failure to enter affirmative relief to remedy such a violation here constituted reversible error. For the District Court plainly was foreclosed from declining to award such relief on the basis of a belief that the continued implementation of the 1968 voting change did not have a racially discriminatory purpose or effect. See, *e. g., United States* v. *Board of Supervisors,* 429 U. S. 642 (1977); *Perkins* v. *Mathews,* 400 U. S. 379, 385 (1971). Congress has prescribed that only specified federal designees, the Attorney General and the District Court for the District of Columbia, shall make that determination, and it is imperative that the relief in a case brought for failure to comply with the approval provisions, as here, should, at a minimum, ensure that these specific designees have the opportunity to assess the voting change and effect a new election if the change is determined to have had a discriminatory purpose or effect.

But while affirmative relief to this extent is mandatory, I dissent from the Court's holding, without the benefit of full briefing and argument, that an order allowing appellees 30 days within which to apply for approval and requiring a new election only if approval is not forthcoming is fully adequate to effectuate Congress' objectives in the Voting Rights Act of

WJB

Circulated
3-20-78

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

H. W. BERRY ET AL. *v.* J. D. DOLES, ETC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA

No. 76-1690. Decided March —, 1978

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, dissenting.

Today, the Court decides, summarily and without oral argument, an important question concerning the proper scope of a remedy in a suit brought against state officials who have failed to comply with the approval provisions of § 5 of the Voting Rights Act of 1965. The Court is surely correct that the District Court's failure to enter affirmative relief to remedy such a violation here constituted reversible error. For the District Court plainly was foreclosed from declining to award such relief on the basis of a belief that the continued implementation of the 1968 voting change did not have a racially discriminatory purpose or effect. See, *e. g., United States* v. *Board of Supervisors,* 429 U. S. 642 (1977); *Perkins* v. *Mathews,* 400 U. S. 379, 385 (1971). Congress has prescribed that only specified federal designees, the Attorney General and the District Court for the District of Columbia, shall make that determination, and it is imperative that the relief in a case brought for failure to comply with the approval provisions, as here, should, at a minimum, ensure that these specific designees have the opportunity to assess the voting change and effect a new election if the change is determined to have had a discriminatory purpose or effect.

But while affirmative relief to this extent is mandatory, I dissent from the Court's holding, without the benefit of full briefing and argument, that an order allowing appellees 30 days within which to apply for approval and requiring a new election only if approval is not forthcoming is fully adequate to effectuate Congress' objectives in the Voting Rights Act of

* Mr. Brennan 3-77

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated: 5/3/78

Recirculated:

No. 76-1690--Berry v. Doles

BRENNAN, J., dissenting.

I dissent. The Court does not and cannot deny that the 1968 Georgia statute may have had the purpose or effect of "denying or abridging the right to vote on account of race", or that the enforcement of that change in the 1976 election was in patent disregard of the clear command of § 5 of the Voting Rights Act of 1965.[1/] Therefore, § 5, as construed in Perkins v. Matthews, 400 U.S. 379, 395-397 (1971), compels the conclusion that the District Court abused its discretion by not, at the very least, ordering the Peach County officials to seek preclearance of the voting change and directing that a new election be held if approval were not forthcoming. Indeed, on the facts of this case, there is a strong argument that § 5 required that the District Court order a new election whether or not federal approval of the change could be obtained.

Section 5, as construed by this Court, prohibits enforcement by covered jurisdictions of any voting change unless there has been prior clearance by either the Attorney General of the United States or the United States District Court for the District of Columbia. See, e.g., United States

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1. It is clear from the terms of § 5 that the duty imposed is a "continuing" one. A voting change is invalid until prior approval is obtained. Allen v. Bd. of Elections, 393 U.S. 544 (1969) and Perkins v. Matthews, 400 U.S. 379 (1971), moreover, plainly required the Peach County official to obtain federal approval of the 1968 change.

@ Wm Brennan 05/17

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated: _____

Recirculated: 5/9/78

STYLISTIC CHANGES throughout
See pp. 3, 4
Footnotes renumbered

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

H. W. BERRY ET AL. *v.* J. D. DOLES, ETC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA

No. 76-1690. Decided May —, 1978

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, dissenting.

I dissent. The Court does not and cannot deny that the 1968 Georgia statute may have had the purpose or effect of "denying or abridging the right to vote on account of race," or that the enforcement of that change in the 1976 election was in patent disregard of the clear command of § 5 of the Voting Rights Act of 1965.[1] Therefore, § 5, as construed in *Perkins* v. *Matthews*, 400 U. S. 379, 395–397 (1971), compels the conclusion that the District Court abused its discretion by not, at the very least, ordering the Peach County officials to seek preclearance of the voting change and directing that a new election be held if approval were not forthcoming. Indeed, on the facts of this case, there is a strong argument that § 5 required that the District Court order a new election whether or not federal approval of the change could be obtained.

Section 5, as construed by this Court, prohibits enforcement by covered jurisdictions of any voting change unless there has been a determination by either the Attorney General of the United States or the United States District Court for the District of Columbia that the change does not have the purpose or effect of abridging the right to vote on the basis of race. See, *e. g.*, *United States* v. *Board of Commissioners*,

[1] It is clear from the terms of § 5 that the duty imposed is a "continuing" one. A voting change is invalid until prior approval is obtained. *Allen* v. *Bd. of Elections*, 393 U. S. 544 (1969) and *Perkins* v. *Matthews*, 400 U. S. 379 (1971), moreover, plainly required the Peach County official to obtain federal approval of the 1968 change.

Ch Brennan 007

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated: _____

3rd DRAFT Recirculated: 11 MAY 1978

P. 3

SUPREME COURT OF THE UNITED STATES

H. W. BERRY ET AL. *v.* J. D. DOLES, ETC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA

No. 76-1690. Decided May —, 1978

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, dissenting.

I dissent. The Court does not and cannot deny that the 1968 Georgia statute may have had the purpose or effect of "denying or abridging the right to vote on account of race," or that the enforcement of that change in the 1976 election was in patent disregard of the clear command of § 5 of the Voting Rights Act of 1965.[1] Therefore, § 5, as construed in *Perkins* v. *Matthews*, 400 U. S. 379, 395–397 (1971), compels the conclusion that the District Court abused its discretion by not, at the very least, ordering the Peach County officials to seek preclearance of the voting change and directing that a new election be held if approval were not forthcoming. Indeed, on the facts of this case, there is a strong argument that § 5 required that the District Court order a new election whether or not federal approval of the change could be obtained.

Section 5, as construed by this Court, prohibits enforcement by covered jurisdictions of any voting change unless there has been a determination by either the Attorney General of the United States or the United States District Court for the District of Columbia that the change does not have the purpose or effect of abridging the right to vote on the basis of race. See, *e. g.*, *United States* v. *Sheffield Bd. of Comm'rs*,

[1] It is clear from the terms of § 5 that the duty imposed is a "continuing" one. A voting change is invalid until prior approval is obtained. *Allen* v. *Bd. of Elections*, 393 U. S. 544 (1969) and *Perkins* v. *Matthews*, 400 U. S. 379 (1971), moreover, plainly required the Peach County official to obtain federal approval of the 1968 change.

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated: _____

Recirculated: 5/17/78

p.1

5th DRAFT

SUPREME COURT OF THE UNITED STATES

H. W. BERRY ET AL. *v.* J. D. DOLES, ETC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA

No. 76-1690. Decided May —, 1978

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, dissenting.

Today, the Court decides, summarily and without oral argument, an important question concerning the proper scope of a remedy in a suit brought against state officials who have failed to comply with the approval provisions of § 5 of the Voting Rights Act of 1965. The Court is surely correct that the District Court committed reversible error by not, at the very least, ordering the Peach County officials to seek preclearance of the voting change enforced in the 1976 election and directing that a new election be held if federal approval were not forthcoming. To permit the results of the 1976 election to stand in the face of the county's failure to persuade the designated federal instrumentalities that the change was racially neutral would subvert § 5's objective of shifting the burdens of delay and litigation from the victims to the perpetrators of unlawful racial discrimination in voting. See *South Carolina* v. *Katzenbach*, 383 U. S. 301, 335 (1966). And the District Court manfestly erred in refusing to order such relief on the basis of its conclusion that the change was "rather technical" with no "apparent discriminatory purpose or effect." Nothing could be clearer than that a district court—other of course than the District Court for the District of Columbia—has no jurisdiction to assess the purpose or effect of any voting change.

But while I agree that the District Court committed reversible, I dissent from the Court's holding, without the benefit of full briefing and argument, that an order allowing appellees 30 days within which to apply for approval and requiring a new

W Brenn 0(7)

See pp. 1, 2

7th DRAFT

SUPREME COURT OF THE UNITED STATES

H. W. BERRY ET AL. *v.* J. D. DOLES, ETC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA

No. 76–1690. Decided May —, 1978

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, dissenting.

Today, the Court decides, summarily and without oral argument, an important question concerning the proper scope of a remedy in a suit brought against state officials who have failed to comply with the approval provisions of § 5 of the Voting Rights Act of 1965. The Court is surely correct that the District Court committed reversible error by not, at the very least, ordering the Peach County officials to seek preclearance of the voting change enforced in the 1976 election and affording appellants the opportunity, if prior approval is not granted, to seek an order that would cut short the terms of the two Commissioners elected in 1976 and require a new election under the pre-1968 law. The District Court manifestly erred in refusing to order such relief on the basis of its conclusion that the change was "rather technical" with no "apparent discriminatory purpose or effect." Nothing could be clearer than that a district court—other of course than the District Court for the District of Columbia—has no jurisdiction to assess the purpose or effect of any voting change. See, *e. g.*, *United States* v. *Board of Supervisors*, 429 U. S. 642 (1977); *Perkins* v. *Matthews*, 400 U. S. 379, 385 (1971).

Although the Court does not reach this issue, it is clear that, if the Peach County officials do not hereafter obtain federal preclearance for the 1968 change, the District Court must order a new election for all three posts at the earliest feasible time—here being the regularly scheduled 1978 election. For if a designated federal entity can not hereafter approve the 1968

Wm Brennan 077

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 5, 1978

RE: No. 76-1690 Berry v. Doles

Dear Thurgood:

The Chief's Per Curiam to remand this, as suggested by the Solicitor General, to require the District Court to order the county officials to seek preclearance, etc. lacks one vote for a court. This is because Lewis apparently is not carrying through on his suggestion at conference that he could join such a Per Curiam.

It seems to me that the cause of Section 5 might be harmed if we were to vote to grant and hear argument. What would you think of changing our vote to join the Per Curiam rather than insist on oral argument but retaining our views as expressed in our dissent recently circulated? I enclose a copy of that dissent with the changes indicated that would be required to accomplish this. I suppose we ought decide before conference on Thursday what to do.

Sincerely,

WJB

Mr. Justice Marshall

Wm Brennan 0177

1, 2, 3

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated: _____

Recirculated: 6-8-78

8th DRAFT

SUPREME COURT OF THE UNITED STATES

H. W. BERRY ET AL. *v.* J. D. DOLES, ETC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA

No. 76-1690. Decided May 7, 1978

26

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, concurring.

I join the Court's opinion. The Court is surely correct that the District Court committed reversible error by not, at the very least, ordering the Peach County officials to seek preclearance of the voting change enforced in the 1976 election and affording appellants the opportunity, if prior approval is not granted, to seek an order that would cut short the terms of the two Commissioners elected in 1976 and require a new election under the pre-1968 law. The District Court manifestly erred in refusing to order such relief on the basis of its conclusion that the change was "rather technical" with no "apparent discriminatory purpose or effect." Nothing could be clearer than that a district court—other of course than the District Court for the District of Columbia—has no jurisdiction to assess the purpose or effect of any voting change. See, *e. g.*, *United States* v. *Board of Supervisors*, 429 U. S. 642 (1977); *Perkins* v. *Matthews*, 400 U. S. 379, 385 (1971).

Although the Court does not reach this issue, I think it clear that, if the Peach County officials do not hereafter obtain federal preclearance for the 1968 change, the District Court must order a new election for all three posts at the earliest feasible time—that here being the regularly scheduled 1978 election. For if a designated federal entity can not hereafter approve the 1968 voting change as racially neutral, it follows necessarily that there is a substantial probability that the 1976 election itself perpetrated racial discrimination in voting. To permit the results of the 1976 election to stand in the face of such a

Brennan 77

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

March 14, 1978

No. 76-1690 - Berry v. Doles

Dear Chief,

I agree with the Per Curiam you have circulated in this case.

Sincerely yours,

P.S.

The Chief Justice

Copies to the Conference

Brennan 77

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

April 21, 1978

Re: No. 76-1690, Berry v. Doles

Dear Lewis,

The Per Curiam you have circulated in this case is satisfactory to me.

Sincerely yours,

P.S.

Mr. Justice Powell

Copies to the Conference

Brennan 77

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

May 16, 1978

No. 76-1690, Berry v. Doles

Dear Chief,

In accord with our Conference discussion, I am glad to rejoin your proposed Per Curiam.

Sincerely yours,

P.S.

The Chief Justice

Copies to the Conference

Brown TT

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

March 10, 1978

Re: 76-1690 - Berry v. Doles

Dear Chief,

Please join me in your suggested per curiam.

Sincerely,

The Chief Justice

Copies to the Conference

Brennan 77

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 8, 1978

Re: 76-1690 - Berry v. Doles

Dear Harry,

Please join me in your dissent in this case.

Sincerely yours,

Mr. Justice Blackmun
Copies to the Conference

Brennan 77

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 16, 1978

Re: 76-1690 - Berry v. Doles

Dear Chief,

Please join me--again.

Sincerely yours,

The Chief Justice

Copies to the Conference

Brennan TJ

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 17, 1978

Re: No. 76-1690, Berry v. Doles

Dear Bill:

Please join me in your dissent.

Sincerely,

T. M.

Mr. Justice Brennan

cc: The Conference

Brennan 77

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 4, 1978

Re: No. 76-1690 - Berry v. Doles

Dear Bill:

Please join me.

Sincerely,

T.M.

Mr. Justice Brennan

cc: The Conference

Wm Brennan 77

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 6, 1978

Relist. WHR

Re: No. 76-1690 - Berry v. Doles

Dear Bill:

I agree with your suggestion of joining the opinion.

Sincerely,

T.M.

Mr. Justice Brennan

Brem 77

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 10, 1978

Re: No. 76-1690 - Berry v. Doles

Dear Chief:

Please join me in the proposed per curiam.

Sincerely,

HAB.

The Chief Justice

cc: The Conference

Brennan 77

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: MAY 5 1978

Recirculated: _____

No. 76-1690 - Berry v. Doles

MR. JUSTICE BLACKMUN, dissenting.

I dissent from the Court's affirmance of the judgment of the District Court. I would grant the relief suggested by the United States as amicus curiae, that is, I would affirm the judgment of the District Court insofar as it holds that appellees have violated the approval provisions of § 5 of the Voting Rights Act, but I would reverse that judgment insofar as it denies affirmative relief. I would then remand the case with instructions to issue an order allowing appellees 30 days within which to apply for approval of the 1968 voting change under § 5.

cc Brennan 77

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: _____

1st DRAFT

Recirculated: MAY 5 1978

SUPREME COURT OF THE UNITED STATES

H. W. BERRY ET AL. *v.* J. D. DOLES, ETC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA

No. 76-1690. Decided May —, 1978

MR. JUSTICE BLACKMUN, dissenting.

I, too, dissent from the Court's affirmance of the judgment of the District Court. I would grant the relief suggested by the United States as *amicus curiae*, that is, I would affirm the judgment of the District Court insofar as it holds that appellees have violated the approval provisions of § 5 of the Voting Rights Act, but I would reverse that judgment insofar as it denies affirmative relief. I would then remand the case with instructions to issue an order allowing appellees 30 days within which to apply for approval of the 1968 voting change under § 5.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 17, 1978

Re: No. 76-1690 - Berry v. Doles

Dear Chief:

I rejoin your proposed per curiam recirculated May 16.

Sincerely,

H. A. B.

The Chief Justice

cc: The Conference

Brennan T

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: 13 APR 1978

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

H. W. BERRY ET AL. *v.* J. D. DOLES, ETC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA

No. 76-1690. Decided April —, 1978

MR. JUSTICE POWELL, dissenting.

I would affirm the judgment of the three-judge court in its entirety.

The Board of Commissioners of Peach County, Ga., is composed of three members, assigned to numbered posts. Posts 1 and 2 are filled by residents of designated districts, and Post 3 is elected at-large. Until 1968, all three posts were elected simultaneously for four-year terms. In 1968, the Georgia Legislature enacted a statute providing for a partial staggering of the Commissioners' terms. Under the statute, the at-large member (Post 3) was to be elected to a two-year term in 1968, and thereafter to four-year terms. No change was made in the terms of the other two Commissioners. The result of the 1968 statutory change was that the election for Post 3 no longer is held at the same time as the election to the other two posts.

Appellants waited nearly eight years, until four days prior to the 1976 primary election, to challenge the validity of the change on the ground that it had not been cleared with the Attorney General of the United States pursuant to § 5 of the Voting Rights Act of 1965. Apparently in view of the tardiness of the suit, the District Court took no action prior to the 1976 elections. A three-judge court subsequently held that the 1968 change should be submitted to the Attorney General, but declined to set aside the 1976 election or to require that all three posts be open for the 1978 election unless the change is approved prior thereto.

The Court today reverses so much of the District Court's

Brennan 8/17

4/20/78

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: 20 APR 1978

Recirculated: _____

No. 76-1690, Berry v. Doles.

PER CURIAM.

Under a state law enacted in 1964, the Board of Commissioners of Roads and Revenues for Peach County, Ga., is composed of three members, assigned to numbered posts. 1964 Ga. Laws § 1, p. 2627. Posts 1 and 2 are filled by residents of designated districts, and Post 3 is elected at-large. Until 1968, all three posts were elected simultaneously for four-year terms. In 1968, the Georgia Legislature enacted a statute providing for a partial staggering of the Commissioners' terms. 1968 Ga. Laws § 2A, p. 2473. Under the statute, Post 3, the at-large seat, was to be elected to a two-year term in 1968, and thereafter to four-year terms. No change was made in the terms of the other two Commissioners. The result is that the election for Post 3 no longer is held at the same time as the election for the other two posts.

Elections for the Board were conducted in 1968, 1970, 1972, and 1974 without challenge to the staggering

Brennan 77

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

1st PRINTED DRAFT Circulated: _____

Recirculated: 25 APR 1978

SUPREME COURT OF THE UNITED STATES

H. W. BERRY ET AL. *v.* J. D. DOLES, ETC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA

No. 76-1690. Decided April —, 1978

PER CURIAM.

Under a state law enacted in 1964, the Board of Commissioners of Roads and Revenues for Peach County, Ga., is composed of three members, assigned to numbered posts. 1964 Ga. Laws § 1, p. 2627. Posts 1 and 2 are filled by residents of designated districts, and Post 3 is elected at-large. Until 1968, all three posts were elected simultaneously for four-year terms. In 1968, the Georgia Legislature enacted a statute providing for a partial staggering of the Commissioners' terms. 1968 Ga. Laws § 2A, p. 2473. Under the statute, Post 3, the at-large seat, was to be elected to a two-year term in 1968, and thereafter to four-year terms. No change was made in the terms of the other two Commissioners. The result is that the election for Post 3 no longer is held at the same time as the election for the other two posts.

Elections for the Board were conducted in 1968, 1970, 1972, and 1974 without challenge to the staggering of the terms. On August 6, 1976, four days before the 1976 primary election, appellants filed a complaint challenging the validity of the change on the ground that it had not been approved by either the Attorney General of the United States or the United States District Court for the District of Columbia, as required by § 5 of the Voting Rights Act of 1965, 79 Stat. 439, as amended, 42 U. S. C. § 1973c (1970 ed., Supp. V). A single judge of the District Court, "seriously question[ing]" whether the change was covered by § 5, and apparently in view of the tardiness of the suit, declined to enjoin the election. Jurisdictional Statement 7a. A three-judge District Court was not

W/ Brennan 4/27

P.3

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: _____

Recirculated: 5 APR 1978

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

H. W. BERRY ET AL. *v.* J. D. DOLES, ETC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA

No. 76-1690. Decided May —, 1978

PER CURIAM.

Under a state law enacted in 1964, the Board of Commissioners of Roads and Revenues for Peach County, Ga., is composed of three members, assigned to numbered posts. 1964 Ga. Laws § 1, p. 2627. Posts 1 and 2 are filled by residents of designated districts, and Post 3 is elected at-large. Until 1968, all three posts were elected simultaneously for four-year terms. In 1968, the Georgia Legislature enacted a statute providing for a partial staggering of the Commissioners' terms. 1968 Ga. Laws § 2A, p. 2473. Under the statute, Post 3, the at-large seat, was to be elected to a two-year term in 1968, and thereafter to four-year terms. No change was made in the terms of the other two Commissioners. The result is that the election for Post 3 no longer is held at the same time as the election for the other two posts.

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Pp. 2, 4

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: _____

Recirculated: 9 MAY 1978

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3rd DRAFT

SUPREME COURT OF THE UNITED STATES

H. W. BERRY ET AL. *v.* J. D. DOLES, ETC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA

No. 76–1690. Decided May —, 1978

PER CURIAM.

Under a state law enacted in 1964, the Board of Commissioners of Roads and Revenues for Peach County, Ga., is composed of three members, assigned to numbered posts. 1964 Ga. Laws § 1, p. 2627. Posts 1 and 2 are filled by residents of designated districts, and Post 3 is elected at-large. Until 1968, all three posts were elected simultaneously for four-year terms. In 1968, the Georgia Legislature enacted a statute providing for a partial staggering of the Commissioners' terms. 1968 Ga. Laws § 2A, p. 2473. Under the statute, Post 3, the at-large seat, was to be elected to a two-year term in 1968, and thereafter to four-year terms. No change was made in the terms of the other two Commissioners. The result is that the election for Post 3 no longer is held at the same time as the election for the other two posts.

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Brennan 77

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 17, 1978

76-1690 Berry v. Doles

Dear Chief:

In accordance with the latest Conference vote (reversing a previous vote), and to avoid arguing a case that does not merit the time of this Court, I will join the judgment of your proposed Per Curiam.

As I stated at Conference, I will write a concurring opinion that includes a good deal of the views that I have previously expressed as to the irrationality (and invalidity, as I view it), of a statute, as construed, that requires from a minority of the states the prior approval by the Attorney General of the change of even a single precinct line affecting a mere handful of voters.

As this case has been consuming our time and attention for nearly a year, I will circulate an opinion dissenting in spirit - that I nevertheless will call a concurrence - by next week's Conference.

Sincerely,

Lewis

The Chief Justice

lfp/ss

cc: The Confernce

Wm Burger
5/17

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: 23 MAY 1978

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

H. W. BERRY ET AL. *v.* J. D. DOLES, ETC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA

No. 76-1690. Decided May —, 1978

MR. JUSTICE POWELL, concurring in part and in the judgment.

I concur in the Court's opinion, except as indicated to the contrary, and in its judgment. Although I believe that the wiser course would be simply to affirm the judgment below, I go along reluctantly with the Court's resolution of this case rather than bring it here for argument. I am willing to do this only because I consider it most unlikely that the Attorney General could find any reasoned basis for denying approval of the change at issue in this case. Thus, it is improbable that the court below ever will have to pass on the request to cut short the terms of the two Commissioners elected in 1976 which the Court allows appellants to "renew" if the change is not approved. *Ante,* at 3. I write to emphasize my view that the three-judge court cannot be faulted for its commonsense handling of this case. I do not understand the Court to disagree with this view.

I

The facts and procedural posture of this case deserve a fuller treatment than the Court gives them. Under a state law enacted in 1964, the Board of Commissioners of Roads and Revenues for Peach County, Ga., is composed of three members, assigned to numbered posts. 1964 Ga. Laws § 1, p. 2627. Posts 1 and 2 are filled by residents of designated districts, and Post 3 is elected at-large. Until 1968, all three posts were elected simultaneously for four-year terms. In 1968, the Georgia Legislature enacted a statute providing for a partial staggering of the Commissioner's terms. 1968 Ga. Laws § 2A, p. 2473. Under the statute, Post 3, the at-large

Brennan
0077

Pp. 5, 7

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: _____

Recirculated: 2 JUN 1978

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

H. W. BERRY ET AL. *v.* J. D. DOLES, ETC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA

No. 76-1690. Decided June —, 1978

MR. JUSTICE POWELL, concurring in part and in the judgment.

I concur in the Court's opinion, except as indicated to the contrary, and in its judgment. Although I believe that the wiser course would be simply to affirm the judgment below, I go along reluctantly with the Court's resolution of this case rather than bring it here for argument. I am willing to do this only because I consider it most unlikely that the Attorney General could find any reasoned basis for denying approval of the change at issue in this case. Thus, it is improbable that the court below ever will have to pass on the request to cut short the terms of the two Commissioners elected in 1976 which the Court allows appellants to "renew" if the change is not approved. *Ante,* at 3. I write to emphasize my view that the three-judge court cannot be faulted for its commonsense handling of this case. I do not understand the Court to disagree with this view.

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W Brennan
677

Pp. 1, 4

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: _____

3rd DRAFT

Recirculated: 12 JUN 1978

SUPREME COURT OF THE UNITED STATES

H. W. BERRY ET AL. *v.* J. D. DOLES, ETC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA

No. 76-1690. Decided June —, 1978

MR. JUSTICE POWELL, concurring in the judgment.

deletions

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Wm Brennan
Oct 77

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 10, 1978

Re: No. 76-1690 - Berry v. Doles

Dear Chief:

I propose to file the following dissent from your presently circulating draft per curiam in the above entitled case:

> "No party to this case has requested this Court to issue an order requiring or allowing appellees to apply for approval of the 1968 voting change under § 5 of the Voting Rights Act of 1965. The United States, when requested by this Court to express its views, made such a request. But the United States is only an amicus curiae in this case, and it has no standing to request relief which has never been requested by the parties. The opinion of the Court goes not merely beyond the scope of any relief sought from the District Court, but also decides questions beyond those presented in the jurisdictional statement of appellants. In so doing, of course, the opinion is contrary to our Rule 15, which provides,

W Brennan 77

'Only the questions set forth in the jurisdictional statement or fairly comprised therein will be considered by the court.'

"I would affirm the judgment of the District Court in its entirety."

Sincerely,

The Chief Justice

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquis

1st DRAFT

Circulated: MAR 13 1978

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

H. W. BERRY ET AL. *v.* J. D. DOLES, ETC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA

No. 76-1690. Decided March —, 1978

MR. JUSTICE REHNQUIST, with whom MR. JUSTICE STEVENS joins, dissenting.

No party to this case has requested this Court to issue an order requiring or allowing appellees to apply for approval of the 1968 voting change under § 5 of the Voting Rights Act of 1965. The United States, when requested by this Court to express its views, made such a request. But the United States is only an *amicus curiae* in this case, and it has no standing to request relief which has never been requested by the parties. The opinion of the Court goes not merely beyond the scope of any relief sought from the District Court, but also decides questions beyond those presented in the jurisdictional statement of appellants. In so doing, of course, the opinion is contrary to our Rule 15, which provides, "Only the questions set forth in the jurisdictional statement or fairly comprised therein will be considered by the court."

I would affirm the judgment of the District Court in its entirety.

Brennan 77

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 21, 1978

Re: No. 76-1690 Berry v. Doles

Dear Lewis:

Please join me in your proposed per curiam.

Sincerely,

Mr. Justice Powell

Copies to the Conference

Brennan 77

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

2nd DRAFT

Circulated: _____

Recirculated: MAY 24 197_

SUPREME COURT OF THE UNITED STATES

H. W. BERRY ET AL. *v.* J. D. DOLES, ETC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA

No. 76-1690. Decided March —, 1978

MR. JUSTICE REHNQUIST, with whom MR. JUSTICE STEVENS joins, dissenting.

No party to this case has requested this Court to issue an order requiring or allowing appellees to apply for approval of the 1968 voting change under § 5 of the Voting Rights Act of 1965. The United States, when requested by this Court to express its views, made such a request. But the United States is only an *amicus curiae* in this case, and it has no standing to request relief which has never been requested by the parties. The opinion of the Court goes not merely beyond the scope of any relief sought from the District Court, but also decides questions beyond those presented in the jurisdictional statement of appellants. In so doing, of course, the opinion is contrary to our Rule 15, which provides, "Only the questions set forth in the jurisdictional statement or fairly comprised therein will be considered by the court."

I would affirm the judgment of the District Court in its entirety.

Wm Brennan
05/77

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 10, 1978

Re: 76-1690 - Berry v. Doles

Dear Bill:

Please join me in your dissent.

Respectfully,

JPS

Mr. Justice Rehnquist

Copies to the Conference

Brennan 77

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

April 21, 1978

76-1690 - Berry v. Doles

Dear Lewis:

Please join me.

Respectfully,

JPS

Mr. Justice Powell

Copies to the Conference

6 Brennan 77