Department of Justice

STATEMENT

OF

ATTORNEY GENERAL JOHN N. MITCHELL

BEFORE

SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS

OF THE

SENATE JUDICIARY COMMITTEE

ON

S. 2507

JULY 11, 1969
11:00 A.M.

1. Introduction

Mr. Chairman, and members of the Subcommittee, I want to thank you for the opportunity to testify today. I appreciate the courtesy you have shown in scheduling the date of this hearing.

The right of each citizen to participate in the electoral process is fundamental to our system of government. If that system is to function honestly, there must be no arbitrary or discriminatory denial of the voting franchise. The President has committed this Administration to the view that it will countenance no abridgment of the right to vote because of race or color or other arbitrary restrictions.

Furthermore, the President is committed to the policy that it is in the national interest to encourage as many citizens as possible to vote and to discourage the application of unreasonable legal requirements.

In the last several months, we have made a thorough review of the possible consequences arising from the expiration of the 1965 Voting Rights Act. We have also examined the general theories and facts underlying voting practices in the nation and the need for federal legislation.

We have come to the firm conclusion that voting rights is no longer a regional issue. It is a national concern for every American which must be treated on a nationwide basis.

OVER

Our commitment must be to offer as many of our citizens as possible the opportunity to express their views at the polls on the issues and candidates of the day.

Therefore, we propose the following amendments to the 1965 Voting Rights Act designed to greatly strengthen and extend existing coverage in order to protect voting rights in all parts of the nation.

First: A nationwide ban on literacy tests until at least January 1, 1974.

Second: A nationwide ban on state residency requirements for Presidential elections.

Third: The Attorney General is to have nationwide authority to dispatch voting examiners and observers.

Fourth: The Attorney General is to have nationwide authority to start voting rights law suits and to ask for a freeze on discriminatory voting laws.

Fifth: The President is to appoint a national voting advisory commission to study voting discrimination and other corrupt practices.

Before describing our proposals in detail, I would like to review the situation at this time.

2. The Voting Rights Act of 1965

A. Background. The Fifteenth Amendment to the Constitution was adopted in 1870. It provides that:

"The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color or previous condition of servitude."

Since the passage of the Fifteenth Amendment, the Congress has been repeatedly told that Negro citizens were subjected to racial discrimination in many areas of the nation, particularly in the South. As a result, Congress enacted the Civil Rights Act of 1957, followed by the Civil Rights Act of 1960 and the Civil Rights Act of 1964.

Each of these three Acts provided additional procedures to assure equality in voting. In 1965, the situation was this:

The Department of Justice was pursuing case-by-case, county-by-county remedies under the Voting Rights Acts. The Congress believed that more progress could be made by the passage of additional legislation.

B. Because the six states which had the lowest voter turnout in the 1964 election also had literacy tests -- and because these states also had the nation's highest ratios of Negro population and the lowest ratios of Negro voter registration -- certain corrections were legislated by the Congress. These corrective measures were contained in the Voting Rights Act of 1965.

OVER

3. The 1965 Voting Rights Act Today

A. Provisions of the 1965 Act. The Act provided for suspension of literacy and similar tests and devices in states and counties where such tests were utilized; and where less than 50 percent of the total voting-age population was registered to vote or voted in the November 1964 election. This suspension could be removed if the state or county could show that it had not used such tests with a discriminatory purpose or effect. (Section 4)

Other provisions of the Act authorize the Attorney General to direct the assignment of federal examiners, who list persons qualified to vote, and election observers to counties covered by the Act. (Sections 6 & 8) Also, covered states and counties are prohibited from adopting new voting laws or procedures unless they have received the approval of the Attorney General or the United States District Court for the District of Columbia. (Section 5)

B. Coverage. Areas now subject to the coverage of the Act are the States of Alabama, Georgia, Louisiana, Mississippi South Carolina and Virginia, 39 counties in North Carolina, one county in Arizona, and one county in Hawaii. These jurisdictions have not applied to federal courts asking for removal of the ban, except for Gaston County, North Carolina, which I will discuss later.

The State of Alaska and some isolated counties elsewhere were within the formula, but sought and obtained judgments indicating that their tests had not been used discriminatorily.

C. Results. The results of the 1965 Act are impressive. Since 1965, more than 800,000 Negro voters have been registered in the seven states covered by the Act.

Moreover, according to the figures of the voter education project of the Southern Regional Council, more than 50 percent of the eligible Negroes are registered in every Southern state.

D. Termination of Coverage. The Voting Rights Act also provides another means by which a state or county within its coverage may seek termination of such coverage. Section 4(a) provides that the suspension of tests will end if the jurisdiction obtains from the United States District Court for the District of Columbia a declaratory judgment that there has been no discriminatory use of a test or device during the preceding five years.

The statute directs the Attorney General to consent to such a judgment if no such test or device was so used. Because no covered jurisdiction will have employed a literacy test since August 1965, under the present terms of the Act, the awarding of the declaratory judgments after August 1970 will be virtually automatic for six states and 39 counties in the South.

OVER

However, Section 4(a) provides that the district court is to retain jurisdiction of the action for five years after judgment and is to reopen the matter upon motion of the Attorney General alleging discriminatory use of a test or device.

Highly relevant to this provision is the recent decision of the Supreme Court in Gaston County v. United States.

4. The Gaston County Decision

Gaston County, North Carolina, filed an action for a judgment to end the suspension of its literacy test under the 1965 Act. The county sought to prove that, when the literacy test was in effect, it had been administered on a non-discriminatory basis.

The United States introduced evidence showing that, in Gaston County, the adult Negro population had attended segregated schools and that these schools were in fact inferior to the white schools. Relying on such evidence, the District Court ruled that literacy tests had the "effect of denying the right to vote on account of race or color" because the county had deprived its Negro citizens of equal educational opportunities in the past and therefore had deprived them of an equal chance to pass the literacy test.

On June 2, 1969, the Supreme Court affirmed the decision of the District Court.

The Supreme Court ruled that offering today's Negro youth equal educational opportunities "will doubtless prepare them to meet future literacy tests on an equal basis." The Court added that equal education today "does nothing for their parents." It ruled that Gaston County had systematically denied its black citizens equal educational opportunity; and that "'Impartial' administration of the literacy test today would serve only to perpetuate those inequities in a different form." Accordingly, the Court held such tests unlawful under the Voting Rights Act.

OVER

Under the Gaston County decision, any literacy test has a discriminatory effect if the state or county has offered not only education which is separate in law, but education which is inferior in fact to its Negro citizens. Evidence in our possession indicates that almost all of the jurisdictions in which literacy tests are presently suspended did offer educational opportunities which were inferior.

Therefore, it is my view that, in regard to most of the jurisdictions presently covered by the 1965 Act, I would be obliged to move, shortly after reintroduction of the literacy test, to have the test suspension reimposed in the seven covered states. I believe that the lower courts, under the Gaston County ruling, would suspend the literacy test and would continue to do so until the adult population was composed of persons who had had equal educational opportunities. In short, in my opinion, the ban on literacy tests would continue for the foreseeable future in the states presently covered by the Act, even if no new legislation were to be enacted by the Congress.

Furthermore, I believe that the Gaston County decision would continue to suspend existing literacy tests or would ban the imposition of new literacy tests in those areas outside of the seven states covered by the 1965 Act where publicly proclaimed school segregation was prevalent prior to 1954. This would include all or part of Florida, Arkansas, Texas, Kansas, Missouri, Maryland, the District of Columbia, Kentucky and Tennessee.

5. Legislative Proposal

To protect against future denials of the right to vote and to encourage fuller utilization of the franchise, I propose the following amendments to the 1965 Voting Rights Act.

First: No state or political subdivision may require any person to pass a literacy test or other tests or devices as a condition for exercising the fundamental right to vote, until January 1, 1974.

The reasoning behind this suggestion is as follows --- and this reasoning not only strongly supports our proposal but shows the inadequacy of a mere simple 5 year extension of the 1965 Act.

A. My personal view is that all adult citizens who are of sound mind and who have not been convicted of a felony should be free to and encouraged to participate in the electoral process. The widespread and increasing reliance on television and radio brings candidates and issues into the homes of almost all Americans. Under certain conditions, an understanding of the English language, and no more, is our national requirement for American citizenship.

Perhaps more importantly, the rights of citizenship, in this day and age, should be freely offered to those for whom the danger of alienation from society is most severe -- because they have been discriminated against in the past, because they are poor, and because they are undereducated. As responsible citizen-

ship does not necessarily imply literacy, so responsible voting does not necessarily imply an education. Thus, it would appear that the literacy test is, at best, an artificial and unnecessary restriction on the right to vote.

B. Literacy Test Background. The history of the literacy test in this country shows quite clearly that it was originally designed to limit voting by "foreign" born and other minority groups.[1/] Available information today shows that present enforcement of literacy requirements in states not covered by the 1965 Act indicates considerable variance in procedures.

In some states literacy requirements are no longer enforced or are enforced only sporadically. In other states the literacy test is not applied uniformly but is applied at the discretion of local election officials.[2/]

1/ Bromage, Literacy and the Electorate, XXIV Amer. Pol. Sci. Review 946, 951 (1930); Porter, A History of Suffrage in the United States, p. 118 (1918).

See, e. g., Katzenbach v. Morgan, 384 U.S. 641 (1966).

2/ Letters to Congressman F. Thompson from Deputy Attorney General of Delaware, 115 Cong. Rec. E3996 (daily ed., May 15, 1969(, and from Assistant Secretary of State of Oregon, 115 Cong. Rec. E 3999

E.g., Letter to Congressman Thompson from the Attorney General of California, 115 Cong. Rec. E 4000 (Daily ed., May 15, 1969).

C. Today, a total of 19 states have statutes prescribing literacy as a pre-condition for voting. This number includes the seven Southern states, where as a result of the 1965 Act, the literacy test is suspended in all or part of the state. Also, there are 12 states outside the South which have constitutional or statutory provisions for literacy tests. 3/

D. The Supreme Court appeared to tell us in the Gaston County case that any literacy test would probably discriminate against Negroes in those states which have, in the past, failed to provide equal educational opportunities for all races.

Many Negroes, who have received inferior educations in these states, have moved all over the nation.

The Bureau of the Census estimates that, between 1940 and 1968, net migration of non-whites from the South

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3/ These states are Alaska, Arizona, California, Connecticut, Delaware Maine, Massachusetts, New Hampshire, New York, Oregon, Washington and Wyoming. Idaho has a good character requirement which is a "test or device" within the meaning of section 4(c) of the 1965 Act.

OVER

totaled more than four million persons.[4] Certainly, it may be assumed that part of that migration was to those Northern and Western states which employ literacy tests now or could impose them in the future; and that, as was true in Gaston County, the effect of these tests is to further penalize persons for the inferior education they received previously. For example, in the South, 8.5% of the white males over 25 have only a fourth grade education as opposed to 30% for Negro males.[5]

Thus, following the Supreme Court's reasoning, it would appear inequitable for a state to administer a literacy test to such a person because he would still be under the educational disadvantage offered in a state which had legal segregation.

E. Furthermore, the Office of Education studies and Department of Justice law suits have alleged that areas outside of the South have provided inferior education to minority groups. Following the general reasoning of the Supreme Court in the Gaston County case, I believe that any literacy test

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4/ Bureau of the Census, Current Population Reports, Series P-23 No. 26, Social and Economic Conditions of Negroes in the United States (July 1968), p. 2.

5/ Bureau of the Census, Current Population Reports, Series P-20, No. 182 (1969), Educational Attainment: March 1968, table 3.

given to a person who has received an inferior public education would be just as unfair in a state not covered by the 1965 Act.

Unfortunately, the statistics appear to support this argument. In the Western states, 3.5% of the white males have only a fourth grade education as opposed to 10.6% of the Negro males over 25 years of age; in the North Central states, 3.1% of the white males have only a fourth grade education as opposed to 14.6% of the Negro males; and in the Northeast, 4.2% of the white males have only a fourth grade education as opposed to 8% of the Negro males. Thus, inferior education for minority groups is not limited to any one section of the country.

F. The proposal for a simple five-year extension of the 1965 Voting Rights Act leaves the undereducated ghetto Negro as today's forgotten man in voting rights legislation.

He would be forgotten both in the 12 states outside the South which have literacy tests now and in the 31 other states which have the ability, at any time, to impose them.

It is not enough to continue to protect Negro voters in seven states. That consideration may have been the justifiction for the 1965 Act. But it is unrealistic today.

I believe the literacy test is an unreasonable physical obstruction to voting even if it is administered in an even handed

OVER

manner. It unrealistically denies the franchise to those who have no schooling. It unfairly denies the franchise to those who have been denied an equal educational opportunity because of inferior schooling in the North and the South.

But perhaps, most importantly, it is a psychological obstruction in the minds of many of our minority citizens. I don't have all the answers. But I suggest to this Sub-Committee that it is the psychological barrier of the literacy test that may be responsible for much of the low Negro voter registration in some of our major cities.

Because records on voter registration and voting are not kept on a racial basis in the North, it is difficult to determine conclusively the level of Negro voting participation.

In most Deep South Counties subjected to literacy test suspension, between 50 and 75% of the Negroes of voting age are now registered to vote. It is clear that this level is higher than Negro voter participation in the ghettos of the two largest cities outside the South - New York and Los Angeles - where literacy tests are still in use. Furthermore, in non-literacy test Northern jurisdictions like Chicago, Cleveland and Philadelphia, Negro registration and voting ratios are higher than in Los Angeles and New York.

Consider, for example, the 1968 voter turnout in New York City. In the core ghetto areas of Harlem, Bedford-Stuyvesant, the South Bronx and Brownsville-Ocean Hill, six nearly all-Negro Assembly districts (55th, 56th, 70th, 72nd, 77th, and 78th) cast an average of only 18,000 votes in 1968 despite 1960 Census eligible voter population of 45,000-55,000. On average, less than 25,000 voters were registered in these districts.

In addition since Congressional districts are roughly equal in population, voting statistics from such districts may be used to compare New York and California Negro voter turnouts with those of other states.

In the nine Northern big city states - Massachusetts, New York, New Jersey, Pennsylvania, Ohio, Michigan, Illinois, Missouri and California - there were only ten congressional districts where fewer than 100,000 votes were cast for Congress in 1968.[6/] Of the ten, one was in California; and eight were in New York. Each of the nine districts -- the 21st California; the 11th, 12, 14th, 18th, 19th, 20th, 21st and 22nd New York - consists largely or partly of Negro ghetto areas.

6/ Congressional Directory for the 91st Congress, pp. 359-366.

OVER

These statistics illustrate a prima facie relationship between Northern literacy tests and low voter participation by Negroes.

G. We clearly believe this amendment to suspend literacy tests and the other amendments we propose are within the jurisdiction of the Congress under its ability to implement the 14th and 15th Amendments, in view of the United States Supreme Court opinions in United States v. Guest,[7] Katzenbach v. Morgan,[8] South Carolina v. Katzenbach,[9] and Gaston County v. United States.[10]

H. Mr. Chairman, I urge this Committee not to permit the Negro citizens outside of the South to be forgotten. I urge this Committee to grant them the encouragement to vote and the protections for voting that are now granted to Negro citizens in the South. This encouragement has proved so successful that there have been 800,000 Negro voters registered since the passage of the 1965 Act.

7/ 383 U. S. 745 (1966).

8/ 384 U. S. 641 (1966).

9/ 383 U.S. 301 (1966).

10/ 37 Law Week 4478 (1969).

Second: No person should be denied the right to vote for President or Vice President if he has resided in a state or county since September 1 of the election year. Persons moving after September 1, who cannot satisfy the residency requirement of the new state or county, should be permitted to vote in the Presidential election, in person or by absentee ballot, in the former state or county.

This proposal would authorize the Attorney General to seek judicial relief against any abridgment of these residency rights.

The reasoning behind this suggestion is as follows:

Our society is mobile and transient. Our citizens move freely within states and from one state to another. According to the Bureau of the Census, in reference to the 1968 Presidential election, more than 5.5 million persons were unable to vote because they could not meet local residency requirements.

A residency requirement may be reasonable for local elections to insure that the new resident has sufficient time to familiarize himself with local issues. But such requirements have no relevance to Presidential elections because the issues tend to be nationwide in scope and receive nationwide dissemination by the communications media. The President is the representative

OVER

of all the people and all the people should have a reasonable opportunity to vote for him.

Third: The Attorney General is to be empowered to send federal examiners and election observers into any county in the nation if he determines that their presence is necessary to protect the rights of citizens to vote.

The reasoning behind this suggestion is as follows:

Our proposal would grant to the Department of Justice the right to send voting examiners and observers to any county in the nation where such action is warranted because of reported violations of the Fifteenth Amendment. Our use of voting observers in the South has provided information to the Department of Justice which has enabled us frequently to ward off infractions of the Fifteenth Amendment. Similarly, in some counties, use of federal examiners to list persons as eligible to vote has been necessary because local officials have refused to register them.

Under the 1965 Act, the Attorney General is required to go to court to request voting examiners and observers in non-Southern states. Under our bill, he has the authority to send the observers and examiners any place without first applying to a court.

Fourth: The courts, on the application of the Attorney General, would be permitted to temporarily enjoin discriminatory voting laws and to freeze any new voting laws passed by the state or county against whom the lawsuit is filed.

The reasoning behind this suggestion is as follows:

Because of the nature of elections and the fact that it is difficult at a much later date to correct the result of any illegal inequities, I believe that the Attorney General should have the discretion, in cases which appear to have serious consequences, to ask the court to temporarily freeze the situation in a particular county.

This was basically the philosophy adopted by the 1965 Voting Rights Act which provided that no election laws passed by states covered by the Act could be changed without approval of either the courts or the Attorney General. In contrast to the 1965 Act, our proposal leaves the decision to the court, where it belongs; and properly places the burden of proof on the government and not the states.

The pre-clearance requirements of Section 5 of the 1965 Act have been difficult to administer effectively. To date there have been some 345 submissions to the Department of Justice. We

OVER

have sixty days to determine if a law has a discriminatory purpose or effect. Unless we are extremely familiar with the political structure of a given jurisdiction or are capable of detailing investigators to make appropriate inquiry, or receive complaints from local sources -- it is virtually impossible to know if changes in the rules of a state election board, relocation of a polling place, consolidation of an election district, or some technical change in the election laws has such a discriminatory purpose or effect.

Despite the terms of the 1965 Act, when local officials have passed discriminatory laws they have usually not been submitted to the Attorney General for approval. Rather, the Department of Justice has had to seek federal court assistance to void them. Since 1965 only ten laws submitted to the Department for approval have been disapproved, six of them this year.

Areas which passed discriminatory voting laws are likely to quickly pass substitutes. Our new proposal would eliminate this practice by giving the courts the authority to issue blanket orders against voting law changes.

The penalty for this violation of the court order would be contempt.

Under the present laws outside of the seven covered states, the Attorney General is limited in voting rights cases to a claim of Constitutional violation. Under our proposal, he could institute a law suit any place in the country based on the broader statutory protection of a discriminatory "purpose or effect" of a particular voting law or set of voting laws.

This would make it clear to the courts that it is unnecessary to prove that the intent of the local or state officials was racially motivated.

For all of these additional safeguards, we have only modified one section of the Act. States and counties would no longer be required to automatically submit all changes in their voting laws.

With the entire nation covered, it would be impossible for the Civil Rights Division of the Department of Justice to screen every voting change in every county in the nation. Furthermore, the evidence indicates that even in the seven covered states officials who wish to pass discriminatory laws do not submit them in advance to the Department of Justice. They put them into effect and require the Justice Department to discover them and bring suit.

OVER

To justify this single modification of Section 5, I would like to point out that the incidence of reported racial discrimination in voting has substantially decreased.

For example, since August 1965, we have received a total of 312 complaints of voter discrimination---231 from the covered states and 81 from the non-covered states.

In fiscal 1966, there were 157 complaints; in fiscal 1967, there were 92 complaints, in fiscal 1968, there were 45 complaints and through April of fiscal 1969, there were 18 complaints.

This sharp decrease would seem to indicate that the dangers to voting rights, which existed prior to the passage of the 1965 Act, appear to have substantially decreased in the seven covered states --- decreased to the point where we no longer think it is necessary for these states to automatically present their voting law changes to the Department after August 1970.

Fifth: A Presidential advisory commission would be established to study the effects which literacy tests have upon minority groups, to study the problem of election frauds, and to report to Congress its findings and recommendations for any new legislation protecting the right to vote.

The reasoning behind this suggestion is as follows:

In order to determine whether additional legislation will be necessary or appropriate, a Presidential advisory commission would study the effects which literacy and similar requirements for voting have upon minorities and upon low-income persons.

The Bureau of the Census would be directed to conduct special surveys regarding voting and voter registration and to make the data available to the commission. The commission would also study election frauds. It would be required to submit to Congress, not later than January 15, 1973, a report containing the results of its study and recommendations for any new federal voting laws.

Our recommendation to study voting fraud stems from our strong interest in insuring that each citizen's vote will count equally with the vote of his fellow citizen. For too long, we have failed to take as aggressive action as we might in view of frequent evidence of false registration, illegal vote purchasing and the misreporting of ballots cast.

My previous testimony concerned encouragement of protection for and the exercise of the franchise prior to entering a voting booth. This fraud study, a logical extension, may help to guarantee the sanctity of the ballot once it is cast. Certainly, if we have a federal interest in encouraging persons to vote, we

OVER

have a federal interest in insuring that their ballot be correctly processed.

6. Opposition to Five-Year Extension

Finally, there has been a suggestion that our proposal is merely a delaying tactic to tie up any attempt to extend the 1965 Voting Rights Act. I must disagree with this assessment.

First: As I said in my previous testimony, the Gaston County case extends the literacy test ban for the foreseeable future in those states which previously maintained segregated and inferior school systems. Second: It would appear that any proposed amendment to this bill-- no matter how well motivated and how comprehensive -- would be open to criticism as a delaying tactic. Under these circumstances, it is difficult for me to see how I can extend the coverage to those citizens who need it in any way. Third: We do not want to see the Act lapse in August 1970. We favor its extensions both in time and in its geographical coverage. I believe there should be sufficient time for the necessary hearings and debate on our proposal prior to the termination of parts of the 1965 Act in August of 1970. I believe that it is worth the extra effort to extend the Act to the entire nation. I would hope that this Committee would support S. 2507, introduced by Senator Dirksen.

We will cooperate with this Committee and with the Congress to assure a strong and timely bill.