Department of Justice

STATEMENT

OF

ATTORNEY GENERAL JOHN N. MITCHELL

BEFORE

SUBCOMMITTEE NO. 5

OF THE

HOUSE JUDICIARY COMMITTEE

ON

H.R. 4249
VOTING RIGHTS ACT OF 1965

JUNE 26, 1969
10:00 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.

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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.

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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. Department of Justice Activity. Under the Act, the main thrust of the Civil Rights Division of the Department of Justice has been to assign federal observers or examiners as necessary for particular elections. Approximately 64 counties have been designated and observers were sent to all of them at one time or another.

For example, in November 1968, approximately 142 observers were sent to six counties in Alabama, 40 observers were sent to four counties in Georgia, 15 observers were sent to one county in Louisiana, 224 observers were sent to 11 counties in Mississippi, and 54 observers were sent to two counties in South Carolina.

In recent years, the need to send examiners to these counties has been reduced. But examiners have still been found necessary and the authority to send them is a valuable weapon in securing voluntary compliance.

Also, approximately 225 voting laws have been submitted to the Attorney General for approval. Only four laws have been disapproved, and three of them were disapproved this year.

Where local officials have passed discriminatory laws, generally they have not been submitted to the Department of Justice.

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Rather, the Department of Justice has had to seek federal court help to void them.

Approximately six additional cases were brought successfully requiring that persons listed by federal examiners be added to the voter registration lists, sustaining the right of illiterate voters to have adequate assistance, and sustaining the right of federal observers to assist illiterates in marking their ballots. Approximately seven more cases have been brought alleging improper conduct by election officials or challenging new election laws. Each of these cases was brought in the state affected.

In short, under the 1965 Act, the emphasis in Justice Department activity has shifted away from county-by-county court litigation and toward the use of effective administrative remedies provided by the Act, particularly the use of examiners and observers.

D. 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.

E. 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.

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

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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.

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.

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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:

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 citizenship 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 first states to make literacy a prerequisite for voting were Connecticut and Massachusetts where such laws were adopted in 1855 and 1857, respectively. During that period, the opposition to immigrants, particularly immigrants from Ireland, was prevalent. The Connecticut and Massachusetts requirements were designed to prevent or limit voting by Irish and other "foreign" groups.[1/]

In subsequent years, other Northern and Western states followed the example of Connecticut and Massachusetts based on similar motives in most instances.[2/] Available information concerning present enforcement of the literacy requirements in states not covered by the Act indicates considerable variance in procedures.

State officials have written that in some of the states -- for example, Delaware and Oregon -- literacy requirements are no longer enforced or are enforced only sporadically.[3/]

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).

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

3/ 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. E3999.

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Moreover, there is information that in many of these states the literacy test is not applied uniformly, but is applied at the discretion of local election officials.[4/] This lack of uniformity would appear to violate Section 101 of the Civil Rights Act of 1964. It specifies that a literacy test must be administered uniformly and in writing to all prospective voters if it is administered to any voter in a state or political subdivision.

C. Today, a total of 20 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 13 states outside the South which have constitutional or statutory provisions for literacy tests.[5/]

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.

4/ E.g., Letter to Congressman Thompson from the Attorney General of California, 115 Cong. Rec. E4000 (Daily ed, May 15, 1969).

5/ These states are Alaska, Arizona, California, Connecticut, Delaware, Hawaii, 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.

The Bureau of the Census estimates that, between 1940 and 1968, net migration of non-whites from the South totaled more than four million persons.[6/] 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.[7/]

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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6/ 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.

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

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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 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 Congress has already suspended literacy tests in seven states and the Gaston County case would appear to extend that suspension for a long time. Thus, as a nation, we are faced with the anomalous situation where illiterate citizens in seven states have a right to vote while illiterate citizens in 43 states could be barred from the polls by literacy tests. Conversely, the state governments of seven states are denied the ability to impose a literacy test while the state governments of the other 43 states have that right.

As a matter of public policy, it seems to me that Congress has an interest in assuring that all citizens have equal rights to vote and that all state governments have equal rights to impose or to be prohibited from imposing certain voting restrictions.

Furthermore, 30 states have no literacy test. This would appear to imply substantial national sentiment that they are not necessary for an effective electoral process.

Nor is there evidence that the 1965 Voting Rights Act suspension has had any significantly adverse effects in those seven states.

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,[9/] Katzenbach v. Morgan,[10/] South Carolina v. Katzenbach,[11/] and Gaston County v. United States.[12/]

H. Strong support for a nationwide ban on literacy tests has been expressed by at least two of the witnesses you have heard in these hearings -- the representatives of the Civil Rights Commission and of the ACLU. Such a ban was proposed by President Kennedy's Commission on Registration and Voting Participation. I think you will find that it has been supported by a variety of private organizations, including the Leadership Conference on Civil Rights and the NAACP. Our proposed ban on literacy tests deserves your support.

9/ 383 U.S. 745 (1966).
10/ 384 U.S. 641 (1966).
11/ 383 U.S. 301 (1966).
12/ --- U.S. ---; 38 Law Week 4478 (1969).

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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 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.

We believe that continuation and broadening of this authority is necessary to make certain that the right to vote is not improperly denied in the future. And the present provision (Sec. 9) for judicial review of the actions of examiners will ensure against any administrative abuse.

Fourth: The Attorney General would be authorized to apply to a United States District Court for a temporary restraining order and a preliminary injunction to temporarily suspend and void -- until final determination of the voting suit -- those election laws which would be denying persons their constitutional

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and statutory right to engage in the electoral process free from racial discrimination.

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.

This proposal conforms to what has, in fact, been the usual practice in the last four years because, in the majority of cases, the Department of Justice has filed suit. It would constitute an adequate safeguard against voting laws based on racial discrimination.

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

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

6. Opposition to Five-Year Extension

I cannot support a simple five-year extension of the 1965 Voting Rights Act in view of the current problem.

The reasoning behind my position is as follows:

A. I cannot support what amounts to regional legislation. While Congress may have sufficient reason to pass regional legislation in the 1965 Act, I do not believe that this justification exists any longer. Circumstances have changed and I believe that our legislative approach must change.

Today, as I pointed out previously, 800,000 Negroes have been registered in the seven states covered by the 1965 Act. More than 50% of the eligible Negroes are registered in every state covered by the Act.

Whatever disparities existed in 1965, there is little statewide disparity between the percentage of eligible Negroes registered in, say, Louisiana -- a state covered by the 1965 Act -- or Florida which is not covered.

To that extent, the 1965 Act, by once again singling out the seven states of 1965, would be unfair and unrealistic. For example,

--There are 15 counties in Florida where less than 50% of the eligible Negro electorate was registered in 1968, but only 13 in Louisiana;

--There are dozens of counties in Texas where less than half of the eligible electorate voted in 1968 but only 9 in Alabama;

--The total 1968 voter turnout in South Carolina was proportionately higher in the heavily Negro lowland counties than in the overwhelmingly white Piedmont counties;

--A higher percentage of voting-age Negroes went to the polls in the Deep South than in Watts or Washington;

--Little more than one-third of the voting-age Negro population cast 1968 ballots in Manhattan, the Bronx, or Brooklyn, New York City, and this amounted to only one-half the local white turnout ratio.

I consider these statistics to be proof that extension of the voting rights legislation aimed at the entire states of Virginia, South Carolina, Georgia, Alabama, Mississippi, Louisiana and 39 counties of North Carolina is unreasonable today, however well intentioned it might have appeared in the past.

As a result of the gains made since 1965, we should no longer single out any entire state or region; nor is there any legitimate ground for using a 50% voting criteria even on a county basis to track down denial of Fifteenth Amendment rights.

Indeed, these facts might well support the conclusion that literacy tests in a state like New York do discourage persons from voting since the ratios of Negro registration are higher in the South.

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Furthermore, our proposal would seem to me to offer all the advantages of the five-year extension and none of the defects.

(1) It would be nationwide in scope and offer protection and encouragement to all citizens and not just those in one area.

(2) It would retain the tested concept of voting observers and examiners in the 1965 Act.

(3) It would expand the authority of the Attorney General to freeze discriminatory voting laws all over the nation, not just in seven states.

(4) It would insure that citizens do not have to choose between moving their residence and voting for their President.

In conclusion, our Voting Rights Act of 1969 preserves all the important protections for voting in the existing Act for the seven covered states and expands those benefits to all our citizens.