(39874)

IN THE

Supreme Court of the United States

October Term, 1970

Nos. 43, 44, 46 and 47, Original

STATE OF OREGON, *Plaintiff,*

—v.—

JOHN N. MITCHELL,
Attorney General of the United States, *Defendant.*

STATE OF TEXAS, *Plaintiff,*

—v.—

JOHN N. MITCHELL,
Attorney General of the United States, *Defendant.*

UNITED STATES, *Plaintiff,*

—v.—

STATE OF ARIZONA, *Defendant.*

UNITED STATES, *Plaintiff,*

—v.—

STATE OF IDAHO, *Defendant.*

MOTION TO INTERVENE BY NEW YORK CITY BOARD OF ELECTIONS IN SUPPORT OF THE CONSTITUTIONALITY OF TITLE III OF THE VOTING RIGHTS ACT AMENDMENTS OF 1970

J. LEE RANKIN
Corporation Counsel
Attorney for
New York City Board of Elections
Office & P. O. Address
Municipal Building
Borough of Manhattan
City of New York 10007

NORMAN REDLICH
LEONARD BERNIKOW
PAULA OMANSKY
Of Counsel

IN THE

Supreme Court of the United States

October Term, 1970

Nos. 43, 44, 46 and 47, Original

STATE OF OREGON, *Plaintiff,*

—v.—

JOHN N. MITCHELL,
Attorney General of the United States, *Defendant.*

STATE OF TEXAS, *Plaintiff,*

—v.—

JOHN N. MITCHELL,
Attorney General of the United States, *Defendant.*

UNITED STATES, *Plaintiff,*

—v.—

STATE OF ARIZONA, *Defendant.*

UNITED STATES, *Plaintiff,*

—v.—

STATE OF IDAHO, *Defendant.*

MOTION FOR LEAVE TO INTERVENE BY NEW YORK CITY BOARD OF ELECTIONS

1. The New York City Board of Elections moves to intervene as defendant in Nos. 43 and 44 of the above-captioned cases in support of the constitutionality of Title III of the Voting Rights Act Amendments of 1970, which confers the right to vote on citizens between the ages of 18-21. Even though all of the above-captioned actions raise in some form the question of the constitutionality of Title III, the Board intervenes only in Nos. 43 and 44 because the Board's interest is to defend the constitutionality of

the federal statute. The affirmative duty to enforce the statute lies with the Attorney-General and forms the basis of Nos. 46 and 47 in which the Board of Elections has not moved to intervene. Moreover, intervention by the Board of Elections as a defendant removes any questions which might be raised under the Eleventh Amendment, since that Amendment prohibits a suit against a state by citizens of another state and does not deal with suits brought by a state itself.

2. The original cases, consolidated for hearing by this Court on October 19, 1970, test the constitutionality of the Voting Rights Act Amendments of 1970, P.L. 91-285, 84 Stat. 314 (1970). In *Oregon* v. *Mitchell,* No. 43 Original, and *Texas* v. *Mitchell,* No. 44 Original, the states are asserting the invalidity of Title III of the Amendments. In *United States* v. *Arizona,* No. 46 Original, and *United States* v. *Idaho,* No. 47 Original, the Government seeks to compel those states to comply with Title I, II and III of the Amendments. Title I eliminates literacy tests in counties where less than 50% of the persons of voting age residing therein were registered on November 1, 1968, or voted in the Presidential election of November, 1968. Title II abolishes the durational residency requirement as a precondition to voting for electors for President and Vice-President.

3. Pursuant to Rule 9(2) of the rules of this Court, the Federal Rules of Civil Procedure are to be applicable in original actions in this Court where appropriate. Rule 24 of the Federal Rules of Civil Procedure provides for "Intervention of Right" when

1. The applicant has an interest in the subject matter of the action;

2. An adverse decision will as a practical matter impair or impede the intervenor's ability to protect that interest;

3. The intervenor's interest will not adequately be represented by the existing parties.

Applicant for intervention, New York City Board of Elections, maintains that it meets all three requirements for intervention of right and, on this basis, respectfully requests leave of this Court to intervene in the original cases pending before the Court.

4. Applicant, as a party to a pending suit which challenges the validity of the Voting Rights Act Amendments of 1970, has an interest in the subject matter of the original actions. The New York City Board of Elections and Attorney General John N. Mitchell have been named as parties defendants in an action pending before the District Court of the District of Columbia [*Christopher, et al.* v. *Mitchell, et al.,* Civil Action No. 1862-70 (D.C.D.C.)]. That case challenges the validity of Titles I, II, and II of the Voting Rights Act Amendments of 1970, and, in relevant part, asserts that Title III renders unenforceable New York State constitutional and statutory provisions (Art. II, § 1 of the State Constitution and § 150 of the Election Law) which prescribe the voting age to be 21 years. The New York City Board of Elections had announced that it intended to comply with the federal legislation lowering the voting age to 18 years notwithstanding the conflict with the New York State constitutional and statutory provisions setting the voting age at 21.

5. Issue has been joined in the District Court action. Both defendants Mitchell and the New York City Board of Elections have moved for summary judgment. Argument

has been scheduled before a three judge federal panel on September 10, 1970. As a party to a pending suit which challenges the validity of Titles I, II and III of the Voting Rights Act Amendments of 1970, the identical issues presented before this Court, the interest of the New York City Board of Elections is clear.

6. The Supreme Court will decide the validity of the Voting Rights Act Amendments of 1970 in the original actions presently before it. New York* will be bound by this decision. In a real sense, New York thus meets the requirements of Rule 24 prior to the 1966 amendments of that Rule, ". . . the applicant is or may be bound by a judgment in the action." The practical effect on New York is that any appeal from the District Court's possible adverse decision in the pending case is foreclosed if this Court decides adversely to the Attorney General. New York is thus denied the opportunity to protect its interest in a suit which it has been compelled to defend. In the words of Rule 24 as amended, the "disposition of the action may as a practical matter impair or impede his ability to protect" the applicant's interest.

7. New York's interest is not adequately represented by the existing parties.

---

* While all states will be equally bound, New York's special interest derives from its being named a party defendant in the District Court suit presently pending. The Attorney General has recently brought suit against New Hampshire and North Carolina to force compliance with the Amendments. As reported in the New York Times, August 20, 1970, these suits were brought to "assure court consideration at lower levels if the Supreme Court should refuse to accept the Arizona and Idaho cases . . . The Justice Department strategy was to have the constitutionality of the law tested in the Supreme Court . . ." Presumably, these suits, unlike the suit against New York, will be stayed on motion of the Attorney-General.

a. The Attorney General argues that § 5 of the Fourteenth Amendment gives to Congress the power to override state laws setting the voting age at 21 in the absence of a judicial determination that the state law is invalid. The Attorney General does not raise the issue of whether state laws which set the voting age at 21 are constitutional in the absence of Congressional legislation (see Memorandum in Support of Motion of Defendant John N. Mitchell attached hereto). Furthermore, the Justice Department has indicated to counsel for the New York City Board of Elections that the brief before the Supreme Court will be substantially the same as the one submitted in the District Court action in which the New York City Board of Elections has been named a party defendant. Finally, it is widely believed that the Attorney General takes the position that state laws setting the voting age a 21 *are* constitutional in the absence of Congressional enactment of legislation lowering the voting age.

b. The New York City Board of Elections, while agreeing with the arguments advanced by the Attorney General in support of the Amendments, adopts a broader position. In its brief in the District Court action, the Board contends that the provisions of the New York Constitution and Election Law which set the voting age at 21 create arbitrary and invidious classifications in violation of the Equal Protection Clause of the Fourteenth Amendment. Thus, it is argued, the action by Congress is justified to correct a law which was unconstitutional in the absence of the new legislation.

c. Accordingly, if this Court rejects the sole argument advanced by the Attorney General, this Court can uphold the Amendments on the ground that state laws setting the voting age at 21 are, in fact, unconstitutional. This is the second prong of the New York City Board of Election's

argument. The Attorney General has not, and, presumably, will not make this argument. In this motion to intervene, New York seeks the opportunity to raise all the constitutional arguments in favor of the legislation and we herewith respectfully submit a brief to be considered by the Court if the motion to intervene is granted.

d. Thus, the Attorney General does not adequately represent those states which intend to comply with the Voting Rights Act Amendments of 1970 but which go a step further to maintain that laws setting the voting age at 21 are unconstitutional. "... Interests need not be wholly 'adverse' before there is a basis for concluding that existing representation of a 'different' interest may be inadequate." *Nuesse* v. *Camp,* 385 F. 2d 694, 703 (D.C. Cir. 1967). New York has an interest which, though not wholly adverse to that of the United States Government's in the pending original cases, presents a basis for concluding that the existing representation is inadequate.

8. The New York City Board of Elections has demonstrated a compelling and abiding interest in upholding Congress' power to expand the franchise. The Board of Elections was named a defendant in *Morgan* v. *New York City Board of Elections,* the companion case to *Katzenbach* v. *Morgan,* 384 U.S. 641 (1966) which, it is believed, will be controlling as to the issues in the cases before this Court. In *Morgan,* New York argued that Section 4(e) of the Voting Rights Act of 1965 was appropriate legislation to enforce the Equal Protection Clause of the Fourteenth Amendment. There, too, the legislation conflicted with the New York requirement of literacy in English.

The Board of Election had challenged the constitutionality of the 21 year old voting requirement, even before Congress acted. In *WMCA Vote at 18 Club* v. *Board of*

Elections, Civil No. 70-1814 (S.D.N.Y., June 23, 1970), a case which raised the issue of the constitutionality of the provisions of New York's laws setting the voting age at 21, the New York Board of Elections, though named a defendant, asserted the position that such laws violated the Equal Protection Clause of the Fourteenth Amendment.

Applicant for intervention respectfully requests this Court to consider the New York City Board of Election's proven interest and experience in litigation in the very issues which are the subject matter of the present cases in determining whether to permit the New York City Board of Elections to intervene.

CONCLUSION

The New York City Board of Elections has an interest in the subject matter of the original action, the Voting Rights Act Amendments of 1970, because it is a party to a pending suit which challenges these same Amendments; as a practical matter, the Board will be bound by this Court's disposition of these actions; and applicant's interest will not adequately be represented by the existing parties. "... (T)he just, orderly, and effective determination of such issues requires that they be adjudicated in a proceeding in which all the interested parties are before the Court." *United States* v. *Louisiana,* 354 U.S. 515, 515-516 (1957). The New York City Board of Elections respect-

fully requests permission to intervene as a defendant in Nos. 43 and 44, Original.

September 4, 1970

Respectfully submitted,

J. Lee Rankin
Corporation Counsel
Attorney for Applicant
for Intervention,
New York City Board of Elections
Municipal Building
New York, N. Y. 10007
212-566-4517

Norman Redlich
Paula J. Omansky
Of Counsel

EXHIBIT

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 1862-70

FREDERICK J. CHRISTOPHER, JR., *et al.*,

Plaintiffs,

v.

JOHN N. MITCHELL, *et al.*,

Defendants.

MEMORANDUM IN SUPPORT OF MOTION OF DEFENDANT JOHN N. MITCHELL

JERRIS LEONARD
Assistant Attorney General

DAVID L. NORMAN
Deputy Assistant Attorney General

DAVID B. MARBLESTONE
JEREMY I. SCHWARTZ
Attorneys
Department of Justice
Washington, D. C. 20530

Attorneys for Defendant
John N. Mitchell

THOMAS A. FLANNERY
United States Attorney

INDEX

Cases Cited: PAGE

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 1862-70

FREDERICK J. CHRISTOPHER, JR., *et al.*,

Plaintiffs,

v.

JOHN N. MITCHELL,
as Attorney General of the United States, *et al.*,

Defendants.

Memorandum in Support of Motion of Defendant John N. Mitchell

This suit was commenced by plaintiffs, five New York City residents who are registered voters, on June 23, 1970. The defendants are the New York City Board of Elections and John N. Mitchell, Attorney General of the United States. Plaintiffs challenge the constitutionality of four portions of the Voting Rights Act Amendments of 1970.

Defendant John N. Mitchell has filed a motion for sum-judgment as to counts 1 to 6 of the complaint and for dismissal (or alternatively summary judgment) as to counts 7 and 8. This memorandum is submitted in support of that motion.

I. STATEMENT

The Voting Rights Act Amendments of 1970, Public Law 91-285, 84 Stat. 314, were signed by the President

on June 22, 1970.[1] The new law extends for five years operation of section 4(a) of the Voting Rights Act of 1965, the provision whose primary effect was to suspend the use of literacy tests in six southern states and part of a seventh state. Also, the 1970 Amendments add two new titles to the Voting Rights Act. Title II contains provisions which (1) suspend the use of literacy tests in all states and counties not already subject to suspension by virtue of the 1965 Act and (2) abolish durational residency requirements with respect to voting for President and Vice President. Title III, the other title added by the 1970 law, reduces to 18 the minimum age for voting in all elections. Another provision of the new statute makes section 4(a) of the Voting Rights Act applicable to literacy-test jurisdictions determined to be within a coverage formula based upon participation in the 1968 presidential election.

The present suit attacks the validity of the provisions regarding suspension of tests (section 201 of the Voting Rights Act as amended),[2] elimination of durational residency requirements (section 202), reduction of voting age (section 302) and use of the 1968 coverage formula (section 4). Plaintiffs seek declaratory and injunctive relief against enforcement of the challenged portions of the statute.

---

[1] A copy of this statute is included in the Appendix (hereafter referred to as "Ap."), p. 1. Also included are certain of the sections of the Voting Rights Act of 1965, Ap., p. 7.

[2] The term "Voting Rights Act as amended" refers to the 1965 Act as amended by the 1970 law.

Exhibit—Memorandum in Support of Motion of Defendant John N. Mitchell

The jurisdiction of this Court is invoked on the basis of section 14(b) of the Voting Rights Act.[3] This provision was the basis for a suit, similar in nature to the present one, which was brought in this Court and which attacked section 4(e) of the 1965 Act. See *Katzenbach* v. *Morgan*, 384 U.S. 641, 645-646 (1966).[4] Considering the policy underlying section 14(b), that is, confining specialized litigation to a single tribunal,[5] it seems clear that section 14(b) applies to suits challenging the amendments to the Voting Rights Act of 1965, as well as to suits concerning the original provisions of the 1965 Act.[6]

Defendant John N. Mitchell does not dispute the standing of plaintiffs to bring the causes of action set forth in counts

---

[3] Section 14(b), 79 Stat. 445, 42 U.S.C. 1973*l*(b) (Supp. V, 1965-69), provides as follows:

> *No court other than the District Court for the District of Columbia* or a court of appeals in any proceeding under section 9 *shall have jurisdiction to issue* any declaratory judgment pursuant to section 4 or section 5 or *any restraining order or* temporary or permanent *injunction against the execution or enforcement of any provision of this Act* or any action of any Federal officer or employee pursuant hereto. (Emphasis supplied.)

[4] See also *O'Keefe* v. *New York City Bd. of Elections*, 246 F. Supp. 978 (S.D.N.Y., 1965), where the court held that, under section 14(b), the United States District Court for the District of Columbia had exclusive jurisdiction over actions to enjoin enforcement of provisions of the Voting Rights Act.

[5] *Cf.* the discussion of section 14(b) in *South Carolina* v. *Katzenbach*, 383 U.S. 301, 331 (1966).

[6] Cf. 116 Cong. Rec. 3288-92 (daily ed., March 9, 1970), where the Senate rejected an amendment which would have granted the local federal district courts (rather than the District Court for the District of Columbia) jurisdiction over actions brought under sections 4 and 5 of the Voting Rights Act.

1 to 6 of the complaint.[7] Plaintiffs assert that enforcement of the various statutory provisions in regard to the State of New York would have the effect of diluting their votes. The same theory of standing was utilized in and was sustained in the *Morgan* case. See 247 F. Supp. 196, 198 (D.D.C., 1965), *rev'd on other grounds,* 384 U.S. 641 (1966).

Moreover, except with respect to plaintiffs' challenge to the 1968 coverage formula (section 4(b) of the Voting Rights Act as amended),[8] the case is ripe for adjudication. Section 201, pertaining to suspension of literacy tests, took effect immediately upon enactment, *i.e.*, on June 22, 1970. Section 202, concerning residency requirements, relates only to presidential elections. However, well before the 1972 election, the states must implement section 202 by bringing state laws into conformity with it and by establishing proper registration practices. It seems clear that there is valid controversy at present. *Cf. Moore* v. *Ogilvie*, 394 U.S. 814, 816 (1969);[9] *Pierce* v. *Society of Sisters*, 268 U.S. 510, 536 (1925). Should adjudication be delayed, there is little or nothing that the litigants on either side could add with

---

[7] However, as explained *infra,* in part E of the Argument, we maintain that plaintiffs' attack upon use of the 1968 coverage formula should be dismissed, on the ground that the provision in question has not been determined to be applicable to New York County.

[8] This matter—the prematurity of plaintiffs' attack upon the amendment to section 4 of the Act—is discussed *infra* in part E of the Argument.

[9] In *Moore* v. *Ogilvie, supra,* a suit challenging an Illinois statute regarding nomination of independent candidates for the offices of electors of President and Vice President, the Court held that a justiciable controversy was presented, despite the fact that the 1968 presidential election had passed. The Court noted that the statute would control future elections.

regard to the power of Congress to adopt section 202. On the other hand, judicial determination now of the validity of the statute will benefit the states and all others concerned.

Title III, which lowers the voting age, is to take effect with respect to any primary or election held on or after January 1, 1971. See section 305, 84 Stat. 319. To comply with the mandate that 18-year-olds be permitted to vote in any election held in 1971, the states may be required to begin registering such persons during 1970, at least after completion of this year's elections. In any event, the analysis made above with regard to section 202 shows that there is a valid controversy at present and that prompt adjudication is essential to avoid the possibility that the legality of elections held in 1971 will be thrown into question.

II. Questions Presented

The basic issue presented is whether Congress had authority to adopt the challenged provisions of the Voting Rights Act Amendments of 1970.[10] The specific questions raised are as follows:

(1) whether Congress had authority to enact section 201 concerning suspension of tests;

---

[10] As noted above, plaintiffs are residents of the State of New York. This memorandum is not limited to the effects which the 1970 Amendments have upon New York, but deals with the over-all purpose and effect of the legislation.

Certain of the provisions, i.e., section 202 and Title III, apply to the District of Columbia, as well as to the states. With respect to the District of Columbia, there can be no dispute as to the power of Congress to legislate in regard to voting rights. United States Constitution, Article I, section 8.

(2) whether Congress had authority to adopt the provisions of section 202 eliminating durational residency requirements in presidential elections;

(3) whether Congress had authority to enact section 302 which reduces voting age; and

(4) whether plaintiffs' attack upon the 1968 coverage formula (sections 4 and 5) is premature or, in the alternative, whether that attack is without merit.

III. Summary of Argument

A. The Fifteenth Amendment, which prohibits denial of the right to vote on account of race, and the Fourteenth Amendment, which forbids denial of the equal protection of the laws, limit the authority of the states to establish qualifications for voting. Furthermore, each of the Amendments empowers Congress to implement its provisions by means of appropriate legislation.

The Supreme Court has held that, in exercising the authority granted by the Fourteenth and Fifteenth Amendments, Congress has broad discretion to determine the need for corrective legislation and the type of remedies which are appropriate. *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966); *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966). The power of Congress to prevent enforcement of a state law restricting suffrage is not confined to situations in which the state law would be held by a court to be unconstitutional. *Katzenbach* v. *Morgan, supra.* The question in such a case involving federal legislation which overrides state voting qualifications is not whether the state laws are nullified by the Fourteenth or Fifteenth Amendment itself, but whether the federal statute is "appropriate

legislation" within the meaning of the *McCulloch* v. *Maryland* standard. In *Katzenbach* v. *Morgan, supra*, the Court held that an act of Congress implementing the Equal Protection Clause is to be sustained if the judiciary can "perceive a basis" for the legislation.

The several provisions of the Voting Rights Act Amendments at issue in the present case differ in terms of subject matter, but essentially the same legal theory underlies each part of the statute. That is, in each instance, Congress determined that no "compelling state interest" [see *Kramer* v. *Union Free School District*, 395 U.S. 621 (1969)] warranted the disfranchisement resulting from the affected state qualifications and that, for this and other reasons, such restrictions on the franchise constituted invidious discrimination. The congressional findings were proper and are entitled to acceptance by the Court. At the very least, the provisions of the federal statute are sustainable on the ground that bases for them can be perceived. *Katzenbach* v. *Morgan, supra.*

B. The suspension of tests effected by section 201 of the Voting Rights Act as amended is authorized by both the Fourteenth and Fifteenth Amendments.

First, Congress properly determined that such suspension (affecting primarily states in the Northeast and the West) was necessary to remedy the discriminatory effects which literacy requirements have upon Negroes, Mexican-Americans and other minorities. Congress utilized the rationale of *Gaston County* v. *United States*, 395 U.S. 285 (1969), the case holding that a literacy test, regardless of whether it is administered impartially, has racially discriminatory effect when applied to Negroes who were lim-

ited to inferior, segregated schools. The Court stated in *Gaston County* that its ruling as to the inequity of imposing literacy requirements upon persons denied equal educational opportunity applied, regardless of whether such denial was caused by the government seeking to use the literacy test or by some other government.

Congress had an ample basis for utilizing the *Gaston County* rationale with respect to states other than those, in the southern and border regions, which had de jure school segregation. Over the past several decades, millions of Negroes migrated from the South to the other sectors of the United States. Moreover, as a result of racial isolation and related conditions, denial of equal educational opportunity has occurred in all parts of the country, including the northeastern and western literacy-test states.

Congress had, in addition to the facts supporting use of the *Gaston County* principle, other substantial evidence that the impact of literacy tests falls disproportionately upon minority groups and the poor.

Secondly, it was within congressional discretion to determine, as Congress did, that no interest of the state was sufficient to justify disfranchisement of persons unable to read and write. It was pointed out, for example, that, with the extensive news coverage afforded by radio and television, one need not be able to read in order to be adequately informed. Especially significant in regard to assessing state interest is the fact that most states have never made literacy a precondition for voting.

Accordingly, Congress had a firm basis for suspending, until August 6, 1975, the use of tests and devices in all states and counties not already subject to suspension by virtue of the 1965 Act.

Exhibit—Memorandum in Support of Motion of Defendant John N. Mitchell

C. Section 202, concerning durational residency requirements in regard to voting for President and Vice President, is a proper means of implementing the Fourteenth Amendment.

Under section 202, any otherwise qualified person who has resided in a state or political subdivision for at least 30 days prior to a presidential election must be treated as eligible to vote there in such election. A person who changes his residence within 30 days of the election and who is ineligible to vote in his new location is to be allowed to vote for President and Vice President, by absentee ballot or in person, in the place from which he moved.

The effect of these provisions is to remedy a situation in which, because of state and local durational requirements (ranging as high as one or even two years) imposed by various states, several million citizens have been prevented from voting in presidential elections.

Congress determined that, with respect to voting for President and Vice President, no compelling interest of a state warranted the imposition of lengthy residence requirements. The notion that voters must be familiar with local conditions and issues does not apply to voting in a presidential election, and it is clear that citizens may not be disfranchised because of the way they might vote. *Carrington* v. *Rash*, 380 U.S. 89 (1965).

Nor do the logistical needs of the states justify requiring periods of residence, in the state or locality, in excess of 30 days. The provisions of the federal statute are based upon practices already used in some states and thus have been shown to be workable. 116 Cong. Rec. 3539 (daily ed., March 11, 1970) (statement of Senator Goldwater).

Exhibit—Memorandum in Support of Motion of Defendant John N. Mitchell

With regard to prevention of double voting and other fraudulent practices, methods of safeguarding the integrity of the electoral process—short of wholesale disfranchisement of person who move—are available to the states. The federal statute itself prescribes criminal sanctions for false registration and other fraudulent acts.

In short, section 202 is a valid means of remedying the effects of state laws which deprive large numbers of citizens of the right to vote in a presidential election, merely because they moved within a state or from one state to another. Certainly, the Court can find a rational basis for the measures adopted by Congress. *Katzenbach* v. *Morgan, supra.*

D. Title III, which reduces voting age to 18, is a proper exercise of the power of Congress to implement the Equal Protection Clause.

An analysis similar to that employed by Congress with regard to literacy and residency requirements was used with respect to the matter of voting age. In 46 states, the minimum age for eligibility to vote is 21. The prescribed age is 18 in two states, 19 in one and 20 in one.

In adopting Title III, Congress considered, on the one hand, the needs and interests of persons aged 18, 19 and 20 and, on the other, interests of the states in restricting suffrage to persons 21 and older. Thorough debate took place on the question of the maturity of the 18 to 21 age group, as well as on the propriety of reducing voting age by statute. Congress concluded that citizens between 18 and 21 were sufficiently mature to be entitled to vote; that, in view of the absence of any compelling state interest, disfranchisement of that group contravened the guarantees of the Fourteenth Amendment and that correction by statute was necessary and proper.

Exhibit—Memorandum in Support of Motion of Defendant John N. Mitchell

The legislative record supports the action of Congress. It was shown that the vast majority of persons between 18 and 21 have completed high school and that, as a general matter, their educational level is significantly higher than that of previous generations. Also, Congress had evidence that men and women now reach physical and mental maturity several years earlier than was the case, *e.g.*, 100 years ago. Other indications of the responsibility of persons aged 18, 19 and 20 included their high degree of participation in the labor force and the fact that many of them are married and raising families.

Furthermore, the experience in Georgia and Kentucky, where 18-year-olds have been eligible to vote for many years, demonstrated that such persons are fully capable of taking part in and contributing to the electoral process.

Congress also relied upon the obligations which the governments place upon persons between 18 and 21, particularly the national defense responsibilities. In light of the fact that men included in that age group are the persons affected most directly by the draft and that a substantial perecentage of the members of the armed forces is attributable to the 18-to-21 category, Congress was fully warranted in determining that such persons should be allowed to vote for the officials who determine selective service and defense policies.

Applying the standards of *Katzenbach* v. *Morgan, supra,* it follows that Title III is appropriate legislation enforcing the Fourteenth Amendment and that it supersedes conflicting state laws, irrespective of whether a court would be required to hold unconstitutional denial of the vote to persons between 18 and 21. Considering the special competence of Congress with regard to evaluating "matters of

popular political participation" [see *Katzenbach* v. *Morgan, supra,* 384 U.S. at 670 (dissenting opinion)] and the substantial legislative record supporting Title III, acceptance by the Court of the congressional findings as to deprivation of equal protection would be entirely in order. Alternatively, if the Court applies the more limited standard of judicial review expressed by the majority in *Katzenbach* v. *Morgan,* Title III is readily sustainable; for, without question, the Court can "perceive a basis" for the federal statute.

E. No justiciable controversy is presented in regard to the amendments to sections 4 and 5 of the Voting Rights Act; and, in any event, plaintiffs' attack upon those provisions is without merit.

These amendments will have the effect of bringing within the scope of subsection 4(a), regarding suspension of tests, states and counties (not already subject to the 1965 Act) which maintained a voting "test or device" in November 1968 and with respect to which the Director of the Census determines that less than 50 percent of the voting-age population was registered for or voted in the 1968 presidential election. The determinations of the Census Bureau have not been made and will not be made until population data from the 1970 census is available. Accordingly, neither New York County nor any other jurisdiction has been determined to be within the scope of the 1970 amendments to section 4 or section 5.[11] It follows that plaintiffs' attempt to challenge those provisions is premature. Further-

[11] The applicability of section 5 to a state or county is dependent upon the jurisdiction's being covered by subsection 4(a). Section 5 does not apply to states or counties whose suspension of tests is based upon section 201.

more, in *South Carolina* v. *Katzenbach, supra,* the Supreme Court upheld the validity of subsection 4(b) and section 5. That decision supports the validity of the amendments to those provisions.

Our conclusion is that summary judgment for defendant Mitchell should be entered with regard to plaintiffs' attack upon section 201, section 202 and Title III. The attack upon sections 4 and 5 as amended should be dismissed or, in the alternative, summary judgment in favor of defendant Mitchell should also be granted in regard to that part of the suit.

IV. ARGUMENT

A. *The Fourteenth and Fifteenth Amendments authorize Congress to remedy unwarranted restrictions on the right to vote.*

1. Both the Fifteenth Amendment, which provides that the right to vote shall not be abridged on account of race, color, or previous condition of servitude, and the Fourteenth Amendment, which forbids the states to deny persons within their jurisdiction of the equal protection of the laws, limit the power of the states to establish qualifications for voting. For, notwithstanding plaintiffs' assertion to the contrary, it is settled that, just as the Fifteenth Amendment prohibits racially discriminatory abridgment of the franchise, the Fourteenth Amendment prohibits restrictions on the right to vote which violate the Equal Protection Clause.[12]

[12] The courts have struck down, on the ground of inconsistency within the Equal Protection Clause, a variety of limits on the right to vote. See, *e.g., Baker* v. *Carr,* 369 U.S. 186 (1962) and *Reynolds* v. *Sims,* 377 U.S. 533 (1964) (improper apportionment of legisla-

Exhibit—Memorandum in Support of Motion of Defendant John N. Mitchell

Each of the Amendments empowers Congress to enforce its provisions by "appropriate legislation." See Fifteenth Amendment, section 2 and Fourteenth Amendment, section 5. The nature of the congressional authority was considered by the Supreme Court in *South Carolina* v. *Katzenbach,* 383 U.S. 301 (1966) and *Katzenbach* v. *Morgan, supra,* both of which are pertinent to issues raised in the present case.

In *South Carolina* v. *Katzenbach,* the Court upheld the constitutionality of provisions of the Voting Rights Act of 1965, including subsection 4(a) which suspended the use of tests in states and counties which came within a specified coverage formula.[13]

Regarding the authority of Congress, the Supreme Court stated (383 U.S. at 326-327):

> The basic test to be applied in a case involving § 2 of the Fifteenth Amendment is the same as in all cases concerning the express powers of Congress with relation to the reserved powers of the States. Chief Justice Marshall laid down the classic formulation, 50 years before the Fifteenth Amendment was ratified:

---

tures); *Carrington* v. *Rash,* 380 U.S. 89 (1965) (disfranchisement of persons in military service); *Harper* v. *Virginia Bd. of Elections,* 383 U.S. 663 (1966) (poll tax in state elections); *Kramer* v. *Union Free School District,* 395 U.S. 621 (1969), *Cipriano* v. *City of Houma,* 395 U.S. 701 (1969) and *City of Phoenix* v. *Kolodziejski,* 38 Law Week 4596 (June 23, 1970) (property and other qualifications regarding special elections); *Moore* v. *Ogilvie, supra,* and *Williams* v. *Rhodes,* 393 U.S. 23 (1968) (burdens placed upon independent candidates or third parties); and *Evans* v. *Cornman,* 38 Law Week 4511 (June 16, 1970) (disfranchisement of persons living on federal enclave).

[13] Subsection 4(a), 42 U.S.C. 1973b(a) (Supp. V). The coverage formula is set forth in subsection 4(b), 42 U.S.C. 1937b(b) (Supp. V).

Exhibit—Memorandum in Support of Motion of Defendant John N. Mitchell

> "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *McCulloch* v. *Maryland,* 4 Wheat. 316, 421.
>
> * * *
>
> We therefore reject South Carolina's argument that Congress may appropriately do no more than to forbid violations of the Fifteenth Amendment in general terms—that the task of fashionng specific remedies or of applying them to particular localities must necessarily be left entirely to the courts. Congress is not circumscribed by any such artificial rules under § 2 of the Fifteenth Amendment. * * *

Similar reasoning was utilized in *Katzenbach* v. *Morgan,* where the Court held subsection 4(e) of the Voting Rights Act of 1965[14] to be a proper exercise of the power granted Congress by section 5 of the Fourteenth Amendment. The Court expressly rejected the view that congressional authority, under section 5, to prohibit enforcement of a state law, was restricted to situations where a court had found or would find the state law to be unconstitutional. The majority stated the following (384 U.S. at 648-649):

> Neither the language nor history of § 5 supports such a construction. As was said with regard to § 5 in *Ex parte Virginia,* 100 U.S. 339, 345, "It is the power of Congress which has been enlarged. Congress is

[14] Subsection 4(e), 42 U.S.C. 1973(e) (Supp. V), is the provision which in effect prohibited the application of English language literacy tests to persons educated in Puerto Rico.

authorized to *enforce* the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendments fully effective." A construction of § 5 that would require a judicial determination that the enforcement of the state law precluded by Congress violated the Amendment, as a condition of sustaining the Congressional enactment, would depreciate both congressional resourcefulness and congressional responsibility for implementing the Amendment. It would confine the legislative power in this context to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional, or of merely informing the judgment of the judiciary by particularizing the "majestic generalities" of § 1 of the Amendment. See *Fay* v. *New York,* 332 U.S. 261, 282-284.

Thus our task in this case is not to determine whether the New York English literacy requirement as applied . . . [to persons educated in Puerto Rico] violates the Equal Protection Clause. * * * [The question before the Court is:] Without regard to whether the judiciary would find that the Equal Protection Clause itself nullifies New York's English literacy requirement as so applied, could Congress prohibit the enforcement of the state law by legislating under § 5 of the Fourteenth Amendment? * * * [Footnotes omitted.]

The Court held (384 U.S. at 650) that, in determining whether federal legislation based upon the Fourteenth Amendment is "appropriate," the applicable standard is that set forth in *McCulloch* v. *Maryland*—the same test relied upon, in regard to the Fifteenth Amendment, in *South Carolina* v. *Katzenbach, supra.*

Exhibit—Memorandum in Support of Motion of Defendant John N. Mitchell

In *Katzenbach* v. *Morgan,* the Court stressed the affirmative role which Congress has with respect to making effective the guarantees of the Fourteenth Amendment. Section 5 was described (384 U.S. at 651) as a "positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." [15]

In *Katzenbach* v. *Morgan,* the Court considered two bases for subsection 4(e). The first was to enable Puerto Ricans in New York and the other states to obtain, through increased voting strength, nondiscriminatory treatment in public services (e.g., schools). The Court stated that it was for Congress to weigh the various conflicting considerations, including alternative means of remedying discrimination in governmental services, and to determine whether subsection 4(e) was needed to further the aim of the Equal Protection Clause. As to judicial review, "It is enough that . . . [the Court] be able to perceive a basis upon which the Congress might resolve the conflict as it did." 384 U.S. at 653.

The same approach—granting deference to the congressional judgment—was used in regard to the second basis

[15] It should be noted that the Court added the following (384 U.S. at 651, footnote 10):

> . . . § 5 does not grant Congress power to exercise discretion in the other direction and to enact "statutes so as in effect to dilute equal protection and due process decisions of this Court." We emphasize that Congress' power under § 5 is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees. Thus, for example, an enactment authorizing the State to establish racially segregated systems of education would not be—as required by § 5—a measure "to enforce" the Equal Protection Clause since that clause of its own force prohibits such state laws.

for subsection 4(e), *i.e.*, elimination of invidious discrimination in establishing voter qualifications. After referring to the fundamental importance of the right to vote, on the one hand, and possible interests of the state in requiring English literacy on the other, the majority opinion[16] said (384 U.S. at 655-656):

> Since Congress undertook to legislate so as to preclude the enforcement of the state law, and did so in the context of a general appraisal of literacy requirements for voting . . . to which it brought a specially informed legislative competence, it was Congress' prerogative to weigh these competing considerations. Here again, it is enough that we perceive a basis upon which Congress might predicate a judgment that . . . [the New York requirement violated the Equal Protection Clause]. [Footnote omitted.]

The foregoing analysis of Congress' role in determining whether limitations on the right to vote are consistent with the Equal Protection Clause is directly pertinent to the present case.

---

[16] Two members of the Court dissented in *Morgan*. See 384 U.S. at 659. While they differed with the majority with respect to such matters as the adequacy of the legislative record in the particular case, the dissenting justices recognized that (384 U.S. at 668):

> Decisions on questions of equal protection and due process are based not on abstract logic, but on empirical foundations. To the extent "legislative facts" are relevant to a judicial determination, Congress is well equipped to investigate them, and such determinations are of course entitled to due respect. [Footnote omitted.]

In effect, therefore, all members of the Court agreed that congressional findings in the area of equal protection, including in particular "matters of popular political participation" (384 U.S. at 670), are to be given substantial weight by the judiciary.

Exhibit—Memorandum in Support of Motion of Defendant John N. Mitchell

However, before turning to the specific statutory provisions at issue here, further consideration should be given to the equal-protection standard used by the judiciary—and by Congress—in testing the validity of state laws restricting the franchise.

The courts have emphasized repeatedly the critical importance of the right to vote. For example, in *Evans* v. *Cornman, supra,* 38 Law Week at 4512, the Court stated: "... the right to vote, as the citizen's link to his laws and government, is protective of all fundamental rights and privileges." See also, *e.g., Reynolds* v. *Sims, supra,* 377 U.S. at 562.

Consequently, state laws limiting the right to vote are subjected to a stricter test than are laws affecting other areas (such as economic regulation). The special scrutiny applied in cases involving voting rights was explained as follows in *Kramer* v. *Union Free School District,*[17] *supra,* 395 U.S. at 626-628:

> This careful examination is necessary because statutes distributing the franchise constitute the foundation of our representative society. Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government.

[17] The statute at issue in *Kramer* v. *Union Free School District, supra,* limited eligibility to vote in school district elections in certain New York school districts to citizens who were (1) residents of the district, (2) at least 21 years of age and (3) either the owners (or lessees) of real property within the district or the parents of children enrolled in the public schools. No issue was raised as to the residency or age qualifications. The additional requirements—(3) above—were challenged and were held to be unconstitutional. 395 U.S. at 623, 633.

Exhibit—Memorandum in Support of Motion of Defendant John N. Mitchell

* * * Therefore, if a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest. See *Carrington* v. *Rash, supra,* at 96.

And, for these reasons, the deference usually given to the judgment of legislators does not extend to decisions concerning which resident citizens may participate in the election of legislators and other public officials. Those decisions must be carefully scrutinized by the Court to determine whether each resident citizen has, as far as is possible, an equal voice in the selections. Accordingly, when we are reviewing statutes which deny some residents the right to vote, the general presumption of constitutionality afforded state statutes and the traditional approval given state classifications if the Court can conceive of a "rational basis" for the distinctions made are not applicable. *See Harper* v. *Virginia Bd. of Elections,* 383 U.S. 663, 670 (1966). The presumption of constitutionality and the approval given "rational" classifications in other types of enactments are based on an assumption that the institutions of state government are structured so as to represent fairly all the people. However, when the challenge to the statute is in effect a challenge of this basic assumption, the assumption can no longer serve as the basis for presuming constitutionality. * * * [Footnotes omitted.]

See also, *e.g., Cipriano* v. *City of Houma, supra,* 395 U.S. at 706; *Evans* v. *Cornman, supra,* 38 Law Week at 4597; *City of Phoenix* v. *Kolodziejski, supra,* 38 Law Week at 4512.

Exhibit—Memorandum in Support of Motion of Defendant John N. Mitchell

While *Kramer* and the related cases did not involve the question of congressional implementation of the Equal Protection Clause, Congress in enacting the Voting Rights Act Amendments was warranted in adopting the principle that state restrictions on the right to vote must be grounded on more than a merely "rational basis." *Katzenbach* v. *Morgan, supra,* 395 U.S. at 656. Congress examined the state voter qualifications affected by the 1970 Amendments and found, in each instance, that no "compelling state interest" justified the disfranchisement resulting from the state laws. As will be shown, these congressional findings and the other findings underlying the 1970 statute were fully supported by the legislative record; and the corrective measures adopted by Congress were proper means of effectuating the guarantees of the Fourteenth and Fifteenth Amendments.

B. *The suspension of tests effected by section 201 is a valid exercise of the power of Congress to implement the Fourteenth and Fifteenth Amendments.*

1. Section 201 of the Voting Rights Act as amended, 84 Stat. 315, suspends, until August 6, 1975, the use of literacy tests and any similar "test or device" [18] in any state or political subdivision not subject to suspension by reason of subsection 4(a) of the 1965 Act.[19] The literacy-test areas

[18] The term "test or device" is defined in subsection 201(b) and includes any prerequisite for voting which involves literacy, educational achievement, moral character or proving qualification by voucher of other persons. The definition is identical to that contained in subsection 4(c) of the 1965 Act, 42 U.S.C. 1973b(c) (Supp. V).

[19] The jurisdictions presently subject to suspension under subsection 4(a) of the Voting Rights Act are the States of Alabama, Georgia, Louisiana, Mississippi, South Carolina and Virginia; 39

which are covered by section 201 are the States of Alaska, Arizona (except Yuma County), California, Connecticut, Delaware, Maine, Massachusetts, New Hampshire, New York, Oregon, Washington and Wyoming; and 61 counties in North Carolina.[20] Two states, Connecticut and Idaho, have moral-character provisions which are also suspended by section 201.

2. The constitutional bases for section 201 are the Fourteenth and Fifteenth Amendments.

In *South Carolina* v. *Katzenbach, supra,* 383 U.S. at 329, the Court noted that, in most of the states covered by the Voting Rights Act of 1965, literacy tests had been purposely administered so as to disfranchise Negroes. With respect to the states subject to suspension under section 201 of the Act as amended, Congress did not have similar evidence of intentional abuse in administration of tests. However, in addition to *South Carolina* v. *Katzenbach,* the decisions in *Katzenbach* v. *Morgan, supra,* and *Gaston*

---

counties in North Carolina, one county in Arizona; and one county in Hawaii.

The date when the period of suspension under section 201 is to end, August 6, 1975, corresponds to the time of operation of subsection 4(a) as amended. That is, with respect to most of the jurisdictions covered by subsection 4(a), the coverage will have been in effect for 10 years as of August 6, 1975.

[20] A table setting forth the state laws providing for a "test or device" is contained in the Hearings on Voting Rights Act Extension before Subcommittee 5 of the House Judiciary Committee, 91st Cong., 1st Sess. (1969) p. 90. (Hereafter these hearings will be referred to as the "House Hearings.")

It should be noted that the literacy requirement of the Hawaii Constitution (included in the above-cited table) was repealed as a result of a referendum on November 5, 1968. The statutory provision implementing the literacy requirement was deleted in 1969. See Hawaii Rev. Stat., § 11-4, as amended.

County v. *United States,* 395 U.S. 285 (1969), make clear that section 201 is a proper exercise of congressional authority.

As the Supreme Court held in *Morgan* and in *South Carolina* v. *Katzenbach,* the test to be applied in determining the validity of the federal statute is that enunciated in *McCulloch* v. *Maryland.* It is apparent that section 201 was intended to implement the Fourteenth and Fifteenth Amendments—specifically, to correct what Congress found to be unwarranted, discriminatory restriction upon the franchise. The purpose of the legislation is demonstrated, for example, by the joint statement of the ten members of the Senate Judiciary Committee who supported the substitute bill which included section 201 and which, with modification, was ultimately adopted.[21] The joint statement included the following [116 Cong. Rec. 2758 (daily ed., March 2, 1970[22]]:

> . . . this extension [of the suspension of tests to areas not covered by the 1965 Act] is justified for two reasons: (1) because of the discriminatory impact which the requirement of literacy as a precondition to voting may have on minority groups and the poor; and (2) because there is insufficient relationship between literacy and responsible, interested voting to justify such a broad restriction of the franchise.

---

[21] There was no Senate committee report on the Voting Rights Act Amendments. However, the above-mentioned statement of a majority of the members of the Senate Judiciary Committee serves the same function.

A chronology of the legislative history of the 1970 law appears in the Appendix, Ap. p. 44.

[22] The statement of the Judiciary Committee members is set forth in the Appendix, Ap. p. 12.

Exhibit—Memorandum in Support of Motion of Defendant John N. Mitchell

The reasons described above are fully supported by the relevant factual material.

a. *Discriminatory effects of literacy tests.*

One ground utilized by Congress was application of the principles underlying *Gaston County* v. *United States, supra.* In *Gaston County,* a suit under section 4(a) of the Voting Rights Act of 1965,[23] the Court refused to permit reinstitution of a literacy test, in view of the fact that the (segregated) schools which the county had provided Negroes of voting age were inferior to those provided whites. The Court's opinion concluded as follows (395 U.S. at 296):

> Appellant [the county] urges that it administered the 1962 reregisration in a fair and impartial manner, and that in recent years it has made significant strides toward equalizing and integrating its school system. Although we accept these claims as true, they fall wide of the mark. Affording today's Negro youth equal educational opportunities will doubtless prepare them to meet, on equal terms, whatever standards of literacy are required when they reach voting age. It does nothing for their parents, however. From this record, we cannot escape the sad truth that throughout the years Gaston County systematically deprived its black citizens of the educational opportunities it granted to its white citizens. "Impartial" administration of the literacy test today would serve only to perpetuate these inequities in a different form.

---

[23] Section 4(a), 79 Stat. 438, 42 U.S.C. 1973b(a) (Supp. V).

Exhibit—Memorandum in Support of Motion of Defendant John N. Mitchell

The *Gaston County* decision rested, not upon the Constitution, but upon a statutory provision.[24] However, the Court's reasoning related directly to Fourteenth and Fifteenth Amendment rights; and, in any event, it was proper for Congress to rely upon the *Gaston County* principle in framing legislation to effectuate those Amendments.[25] *Katzenbach* v. *Morgan, supra,* 384 U.S. at 648.

Congress found, in light of such facts as (1) the failure of Negroes and other minorities, in various parts of the country, to receive equal educational opportunity and (2) the migration of Negroes from the South to literacy-test states, that the *Gaston County* rationale as to the discriminatory effects of literacy requirements applies throughout the United States.

First, as Attorney General Mitchell pointed out before the House and Senate subcommittees,[26] the principle of the *Gaston County* case is directly applicable to states or politi-

---

[24] As noted previously, the Gaston County suit involved construction of subsection 4(a) of the 1965 Act.

The precise holding of the Supreme Court in *Gaston County* was that the District Court for the District of Columbia had properly determined that the county had failed to prove that, prior to 1965, its use of a literacy test had no racially discriminatory "effect". See 395 U.S. at 296.

[25] In making use of the rationale of *Gaston County* v. *United States,* Congress placed emphasis upon the underlying concern of protecting the rights of individuals (as opposed to placing sanctions on governments which failed to provide equal educational opportunity). See, *e.g.,* 116 Cong. Rec. 2770 (daily ed., March 2, 1970) (Senator Hruska).

[26] House Hearings, p. 222; Hearings on Amendments to the Voting Rights Act before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, 91st Cong., 1st and 2nd Sess. (1969, 1970), p. 185 (hereafter referred to as "Senate Const. Rights Hearings"). (The Attorney General's statement before the Senate subcommittee is set forth in the Appendix, Ap. p. 21.)

cal subdivisions which had limited Negroes to inferior, de jure segregated schools. Prior to 1954, such school systems existed in the southern and border states and in the District of Columbia. See House Hearings, p. 222 and Senate Const. Rights Hearings, p. 185 [Ap., p. 21] (statement of Attorney General Mitchell). Among the states which had de jure segregation are two of the states affected (at least in part) by section 201, *i.e.*, Delaware and North Carolina.[27] Clearly, the latter jurisdictions are covered by the *Gaston County* rationale.

Moreover, *Gaston County* applies even if the literacy test is imposed by a government other than that which failed to provide equal educational opportunity. In *Gaston* v. *United States*, the Supreme Court assumed that most of the adult residents of the county had been educated there. 395 U.S. at 293, footnote 9. However, the Court added that: "It would seem a matter of no legal significance that they may have been educated in other counties or States also maintaining segregated and unequal school systems."[28] *Ibid.*

As Attorney General Mitchell suggested in urging support of a nationwide ban on literacy tests, Congress could properly rely upon the fact that large numbers of Negroes have migrated from the South to other parts of the United States.[29] According to the Bureau of the Census, net mi-

---

[27] See, *e.g.*, Evans v. Ennis, 281 F.2d 385, 392, footnote 2 (C.A. 3), *cert. denied*, 364 U.S. 933 (1960) (inferiority of Negro schools in Delaware).

[28] In a prior footnote, the Court stated that: "We have no occasion to decide whether the Act would permit reinstatement of a literacy test in the face of racially disparate educational or literacy achievements for which a government bore no responsibility." 395 U.S. at 293, footnote 8.

[29] See House Hearings, p. 223; Senate Const. Rights Hearings, p. 186 [Ap., p. 22].

gration of Negroes from the South between 1940 and 1969 totaled some 3.8 million persons.[30] That such persons received inferior education in segregated systems, both before and after 1954, is indicated by numerous court decisions.[31] And Congress had a valid basis for assuming that part of the movement by southern Negroes was to the northern and western states which employ literacy tests.[32]

Finally, it was pointed out by the Attorney General[33] and other witnesses that denial of equal educational opportunity occurs not only in school systems which had de jure segregation, but also in systems characterized by de facto segregation or racial isolation. The latter conditions exist throughout the United States,[34] including the states whose

---

[30] Bureau of the Census, "The Social and Economic Status of Negroes in the United States, 1969", Current Population Reports, Series P-23, No. 29, p. 5.

[31] See, *e.g.*, *Lee* v. *Macon County Bd. of Ed.*, 267 F. Supp. 458, 471-472 (M.D. Ala.), *aff'd*, 389 U.S. 215 (1967); *United States* v. *Jefferson County Bd. of Ed.*, 372 F.2d 836, 891-892 (C.A. 5, 1966), *aff'd on rehearing en banc*, 380 F.2d 385, *cert. denied*, 389 U.S. 840 (1967); *United States* v. *Mississippi*, 229 F. Supp. 925, 990 (S.D. Miss., 1964) (dissenting opinion), *rev'd*, 380 U.S. 128 (1965).

[32] For example, the 1960 Census indicates that even during the limited period, 1955-1960, there was substantial migration of Negroes from the South to such states as Arizona (4,388 persons, both adults and children), California (74,804), Massachusetts (7,418) and New York (74,821). See Bureau of the Census, 1960 Census of the Population, vol. I, pts. 4, 6, 23 and 34, table 100.

[33] See House Hearings, p. 224; Senate Const. Rights Hearings, p. 186 [Ap., p. 22].

[34] For example, Howard A. Glickstein, then Acting Staff Director of the United States Commission on Civil Rights, testified as follows (House Hearings, p. 56):

> Nationally, a wide gap has existed—and continues to exist—between the quality of the public education afforded to white students and the quality of the public education available to

tests are suspended by section 201,[35] and are reflected in statistics on educational attainment.[36]

Negroes, Mexican-Americans, and members of other minority groups.

Studies such as the Coleman report ["Equality of Educational Opportunity" (1966)] and the Commission's "Racial Isolation in the Public Schools" show the educationally harmful effects upon Negro students of attending—as they do across the Nation—schools isolated by race and social class. Evidence at our recent hearing in San Antonio, Tex., indicated that similar damage is being done to Mexican-American students.

In addition, evidence at Commission hearings in Cleveland, Boston, Rochester, and San Antonio indicates that schools attended predominantly by minority students often have inferior facilities. * * *

[35] It should be noted that, apart from the matter of de facto segregation, official discrimination against Negroes or Mexican-Americans has been found in a number of public school systems in literacy-test states other than southern or border states. See *Gonzales* v. *Sheely*, 96 F. Supp. 1004, 1007 (D. Ariz., 1951) (inferior schools afforded Mexican-Americans); *Spangler* v. *Pasadena Bd. of Ed.*, 311 F. Supp. 501 (C.D. Cal., 1970) (discrimination against Negroes); *Crawford* v. *Bd. of Ed. of the City of Los Angeles*, No. 822, 854, Super. Ct. for L.A. County (May 12, 1970) (discrimination against Negroes); *Taylor* v. *Bd. of Ed. of New Rochelle*, 294 F.2d 36 (C.A. 2), *cert. denied*, 368 U.S. 940 (1961) (racial segregation); and *Blocker* v. *Bd. of Ed. of Manhasset*, 226 F. Supp. 208 (E.D. N.Y., 1964) (racial segregation).

[36] Available data indicates, as to all regions of the United States, substantial disparities between the races in regard to years of school completed. See, *e.g.*, House Hearings, p. 224; Senate Const. Rights Hearings, p. 186 [Ap., p. 22] (Attorney General Mitchell); Bureau of the Census, "Educational Attainment (March 1968);" Current Population Reports, Series P-20, No. 182 (1969), table 3.

The 1960 Census indicates that similar disparities exist in particular literacy-test states. For example, in New York, 10.9 percent of Negro adults had completed 0 to 4 years of school, as opposed to 7 percent of the whites. For California, the corresponding figures were 10.9 percent for Negroes and 5.1 percent for whites. In Arizone, 34.7 percent of the nonwhites had completed 4 or fewer years of school, while only 7.4 percent of the white adults were in that

Exhibit—Memorandum in Support of Motion of Defendant John N. Mitchell

In short, several applications of the *Gaston County* rationale constitute strong support for the suspension of literacy tests in the states and counties subject to section 201 of the Voting Rights Act as amended.[37] Other persuasive evidence that literacy requirements have discriminatory effects upon Negroes and other minority groups was brought to the attention of Congress.[38] Congress also had a sound basis for finding that literacy tests tend to discriminate against the poor.[39]

---

category. In Massachusetts, the figures were 8.8 percent for Negroes and 2.5 percent for whites. 1960 Census of the Population, vol. I, pts. 4, 6, 23 and 24, tables 94, 102 and 103.

[37] The decision in *Lassiter* v. *Northampton County Bd. of Elections,* 360 U.S. 45 (1959), where the North Carolina literacy-test requirement was held not to be unconstitutional on its face, has at best scant bearing upon the validity of section 201. First, that case did not involve the power of Congress to implement constitutional guarantees. See *Katzenbach* v. *Morgan, supra,* 384 U.S. at 649. Secondly, the matter of inequality of education was not put in issue in *Lassiter* and the Court was not called upon to decide that issue.

[38] A study conducted by the United States Commission on Civil Rights regarding northern and western states, based upon Bureau of the Census tabulations, indicated that "literacy tests do have a negative effect upon voter registration and that this impact of literacy tests falls most heavily on blacks and persons of Spanish surname". See Senate Const. Rights Hearings, pp. 399-407 [Ap., pp. 32-40].

A statement of Raymond Nakai, the Chairman of the Navajo Tribal Council, said that Navajos in New Mexico (which has no literacy test) are much more likely to be registered voters than are members of the tribe residing in Arizona. According to Mr. Nakai, a major cause of the difference is the Arizona literacy requirement which prevents Navajos who cannot read English or are unsure of their command of English from attempting to register. Senate Const. Rights Hearings, p. 678. The Attorney General of Arizona pointed out that: "Many of the older Indians were never privileged to attend a formal school . . ." Senate Const. Rights Hearings, p. 675.

Exhibit—Memorandum in Support of Motion of Defendant John N. Mitchell

b. *Lack of compelling state interest.*

As indicated previously, an alternative ground for the suspension of tests effected by section 201 was the congressional determination that the possible interests of a state in maintaing a literacy requirement are not sufficient to justify the resulting disfranchisement. See 116 Cong. Rec. 2758 (daily ed., March 2, 1970) [Ap., p. 50] (statement of 10 Judiciary Committee members).

First, many witnesses stated that, in view of the widespread availability of radio and television and the coverage given to local and national issues, a person need not be able to read to be informed.[40] It was pointed out that the Report of the President's Commission on Registration and Voting Participation (November 1963) had

---

[39] *E.g.*, the 1960 Census showed that only a small percentage of persons (25 and over) with substantial income ($7,000 to $9,999 per year) had completed no more than 4 years of school, but that a sizeable percentage of persons with income of $1,999 or less had had no more than 4 years of school.

In Arizona, only 1.3 percent of the persons with income of $7,000 to $9,000 had completed at most 4 years of school, while 20 percent of the persons with income below $1,999 were in that category of education. For California, the corresponding percentages as to 0 to 4 years of school completed were 1.2 percent ($7,000-$9,999) and 9.6 percent ($0 to $1,999); the percentages for New York were 1.6 percent ($7,000-$9,000) and 11.5 percent ($0 to $1,999).

(It should be noted that the income data is per capita. Thus, the low-income category does not necessarily indicate poverty since it includes, *e.g.*, women with little or no income whose husbands earned adequate salaries. It can be assumed that the educational level of such women is much higher than that of persons in poverty-level families.)

Source: Bureau of the Census, 1960 Census of the Population, vol. I, pts. 4, 6 and 34, table 138.

[40] See, *e.g.*, House Hearings, p. 59 (Mr. Glickstein) and p. 222 (Attorney General Mitchell); and Senate Const. Rights Hearings, p. 185 [Ap., p. 21] (Attorney General Mitchell), and 468 (Bar Assn. of City of N.Y.).

reached the same conclusion and had recommended the abolition of literacy tests.[41]

Secondly, it is significant that most states do not have and have never had a literacy requirement as a precondition for voting.[42] This shows that no "compelling state interest," in terms of either the quality of the electorate[43]

---

[41] The Report of the President's Commission stated the following view of the majority of the members (p. 40):

> Many media are available other than the printed word to supply information to potential voters. The Commission is not impressed by the argument that only those who can read and write or have a sixth grade education should have a voice in determining their future. This is the right of every citizen no matter what his formal education or possession of material wealth. The Commission recommends that no literacy test interfere with the basic right to suffrage.

See also pp. 55-59 of the Commission's Report.

[42] At most, 19 states have statutory or constitutional provisions prescribing the use of literacy tests. As noted previously, section 201 suspends literacy tests in 12 states and part of another state; the six other literacy-test states are those subject to suspension by virtue of subsection 4(a) of the 1965 Act.

In addition to the fact that the number of states which have literacy-test laws is limited, certain of the states which retain such laws either have ceased applying the requirement (as in the case of Delaware and Oregon) or leave the matter to the discretion of local registrars (reportedly, the case in California). See House Hearings, pp. 96, 102 and 104; Senate Const. Rights Hearings, pp. 407-409, 672, 676 and 677.

[43] In view of the history of the adoption of literacy requirements, the notion that the purpose of the requirements was to assure an intelligent electorate is subject to serious doubt.

As a memorandum of the Commission on Civil Rights pointed out, even outside the South, "a primary motivation behind literacy requirements was to render politically impotent 'various racial, ethnic . . . [and] religious . . . groups' ". See Senate Const. Rights Hearings, pp. 413-414. Also, see p. 186 [Ap., p. 22] (statement of Attorney General Mitchell).

Cases citing evidence of the discriminatory purpose of literacy tests include: *Katzenbach* v. *Morgan, supra,* 384 U.S. at 654, foot-

or administrative convenience, necessitates disfranchisement of persons unable to read and write.

c. *Propriety of the means adopted by Congress.*

The suspension of tests imposed by section 201 of the Voting Rights Act as amended affects every literacy-test state and county in the nation, excepting only those jurisdictions which are subject to suspension under section 4(a) of the Act. The suspension is to continue until August 6, 1975, and section 201 provides no means by which a state or county may "escape" from its prohibition.

In light of the factual basis of the legislation, its comprehensive scope is entirely proper. As indicated above, the *Gaston County* principle, or the variation of it based upon migration of Negroes from the South, has wide application. Furthermore, the finding of lack of compelling state interest is directly pertinent to each of the jurisdictions[44] and means that the "tests and devices" do not

---

note 14; and *Castro* v. *State,* 85 Cal. Rptr. 20, 466 P.2d 244, 248-249 (Cal. S.C., 1970) (California's English language requirement held unconstitutional as applied to persons literate in Spanish).

See generally, Liebowitz, English Literacy: Legal Sanction for Discrimination, 45 Notre Dame Law. 7 (1969).

[44] In addition to its effect upon literacy tests, section 201 suspends the moral-character tests of Connecticut and Idaho (the text of these provisions is set forth at House Hearings, pp. 90-91, footnotes 7 and 13.) The legislative record concerning these tests is limited. But see, *e.g.,* House Hearings, p. 59 (Mr. Glickstein); 116 Cong. Rec. 2759 (daily ed., March 2, 1970) (statement of Judiciary Committee members).

The fact that few states impose any such character test as a condition for voting demonstrates that no overriding state interest requires such a limit on the franchise. This conclusion as to lack of any sufficient state interest should warrant suspension of the moral-character tests. *Cf. Katzenbach* v. *Morgan, supra,* 384 U.S. at 653.

meet the standards of the Equal Protection Clause. (See part A of this Argument.) At least, Congress had a fully adequate foundation for making that determination.

Accordingly, as in *South Carolina* v. *Katzenbach* and *Katzenbach* v. *Morgan, supra,* the remedies Congress employed in section 201 are well within the discretion which it has regarding implementation of the Fourteenth and Fifteenth Amendments.

C. *Section 202 Concerning Durational Residency Requirements in Regard to Presidential Elections Is a Proper Exercise of the Power of Congress to Implement the Fourteenth Amendment.*

1. Subsection 202(c) of the Voting Rights Act as amended, 84 Stat. 316, provides in pertinent part as follows:

> No citizen of the United States who is otherwise qualified to vote in any election for President and Vice President shall be denied the right to vote for electors for President and Vice President, or for President and Vice President, in such election because of the failure of such citizen to comply with any durational residency requirement of such State or political subdivision. . . .

The general prohibition quoted above is implemented by subsections (d) and (e).[45]

[45] In addition to dealing with the matter of residency, section 202 prescribes uniform standards for absentee balloting in presidential elections and requires that each state provide for absentee registration with regard to such elections. However, the present suit relates only to the residency provisions of section 202.

Exhibit—Memorandum in Support of Motion of Defendant John N. Mitchell

Subsection 202(d) requires each state to provide for the registration of (or other means of qualifying) all otherwise qualified residents who apply at least 30 days before a presidential election for registration to vote in such election. In effect, this subsection means that any otherwise qualified person who has resided in a state (or political subdivision) for at least 30 days prior to a presidential election must be treated as eligible to vote in such election.

Subsection 202(e) provides that any otherwise qualified person who moves to a state or political subdivision within 30 days of a presidential election and who is not eligible to vote in his new location must be allowed to vote for President and Vice President, in person or by absentee ballot, in the state or political subdivision of his prior residence.

The net result of these provisions is to make it possible for any otherwise qualified person to vote in a presidential election, regardless of the date when he changes his residence.

2. Prior to enactment of section 202, many of the states imposed lengthy state and local residency requirements with regard to voting for President and Vice President. Thirty-eight states (and the District of Columbia) required that, before a person who had moved into the state could vote in a presidential election, he must have resided in the state for more than 30 days.[46] The federal statute

[46] Tables showing the existing state and local residency requirements were placed in the Congressional Record by Senator Goldwater. See 116 Cong. Rec. 3542-43 (daily ed., March 11, 1970) [Ap., p. 59], tables 1-2.

Table 1, cited above, lists 37 states and the District of Columbia as requiring more than 30 days' residence for voting in presidential

prohibits enforcement of such durational requirements with respect to voting for President and Vice President.

In the other 12 states, existing laws prescribe a residency period of 30 days or less in regard to voting by new residents in a presidential election.[47] The operation of such requirements is not affected by section 202. Subsection 202(g) expressly provides that: "Nothing in . . . [section 202] shall prevent any State or political subdivision from adopting less restrictive voting practices than those that are prescribed herein."

A second type of durational requirement applies to residents of a state who move, within the state, to a new county, city or precinct. Under the pre-existing laws of 27 states, a person must have resided in the county or city for a period exceeding 30 days in order to be eligible

---

elections. Subsequently, the Florida statute was amended to provide for a minimum of 45 days (as opposed to the prior minimum of 30). See Fla. Stat. Ann., § 97.031(2) as amended. Therefore, Florida must be added to the group of states whose residence requirement exceeded 30 days.

[47] Also, it should be noted that in one of the states included in the over-30-day category (Massachusetts), the prescribed period is 31 days. See 116 Cong. Rec. 3542 (daily ed., March 11, 1970) [Ap., p. 59], table 1.

In two states (Oregon and Wisconsin), the existing requirement as to presidential elections is one day. (It should be noted that the table cited above shows Oregon as not requiring any particular duration of residency. Subsequent to preparation of the table, the Oregon law was amended to provide in effect for a one-day requirement. See Ore. Rev. Stat., § 247.420(1) as amended.) Five other states (Alaska, Hawaii, Nebraska, North Dakota and Oklahoma) have requirements of less than 30 days. Five states (Georgia, Maine, Michigan, Minnesota and New Hampshire) have laws prescribing a 30-day period regarding presidential elections.

to vote for President and Vice President;[48] and four of these states had precinct requirements of more than 30 days. Section 202 renders all such provisions unenforceable.[49]

The effect of the state and local residence requirements was described as follows by Senator Goldwater [116 Cong. Rec. 3538 (daily ed., March 11, 1970); Ap., p. 55]:

State Residence Requirements

> The worst offender [among existing election laws] is the burden on voting imposed by lengthy residency requirements. Sixteen of our States require a full year's residence within their boundaries before they will allow a citizen to vote for President and Vice President. One of these States actually requires residence for as long as 2 years before a citizen can vote. Standing alone, the laws of these few States disqualify more than 620,000 Americans of voting age who move from State to State in an election year.

---

[48] See 116 Cong. Rec. 3542 (daily ed., March 11, 1970) (Senator Goldwater) [Ap., p. 59], table 2. That table shows Florida as requiring 6 months' residence in the county. The Florida statute was subsequently amended so as to permit a registered voter who moves from one Florida county to another to vote for President (and statewide offices) in the county of former residence, during the 6 months after the move. See Fla. Stat. Ann., § 97.100(1) as amended.

[49] The other 23 states either (1) have no county, city or precinct residence requirement whatsoever in regard to presidential elections, (2) prescribe a period of 30 days or less or (3) waive the usual residence law by allowing a person who moves within the state to vote in the place from which he moved. See 116 Cong. Rec. 3542 (daily ed., March 11, 1970) (Senator Goldwater) [Ap., p. 59], table 2.

Exhibit—Memorandum in Support of Motion of Defendant John N. Mitchell

In addition, three States, to which over 150,000 adult citizens move each year, impose a 6-month waiting period as a precondition to voting for President.

Thirty-two other States require waiting periods for new residents ranging from 3 months down to zero. Even these shortened periods result in the disqualification of nearly half a million otherwise eligible voters.

Mr. President, the combined effect of the various State residence laws is the denial of the right to vote for President in the case of over 1,120,000 Americans. * * *

Local Requirements

But this is only part of the story. Added to this obstruction to the free exercise of a citizen's franchise were numerous local rules that imposed a separate waiting period on persons who moved about inside a State. These laws affect both longtime residents of a State and newly arrived residents who may move after entering the State.

For example, if a citizen living in any one of 10 States changed his address to a different county or city in that same State as much as 6 months before the 1968 election, he would have lost his right to vote in that election. One might think that the cumulative effect of these strictly local rules would be small, but to the contrary they actually cause the disfranchisement of at least an additional 855,000 citizens.

Citizens Disqualified by Waiting Periods

* * *

Mr. President, it is clear from reading the table

[116 Cong. Rec. 3543, table 3] that no less than 2 million Americans are being denied a voice in the selection of their President solely because they have changed their residence. But let me emphasize that this figure is the bare bones minimum which can be proven.

Actually, the Gallup Poll's in-depth analysis of the 1968 election claims that the true number of citizens who were disfranchised by restrictive residence laws exceeded 5 million persons. What is more, one estimate made by the Census Bureau indicates that 5.5 million Americans were caught by these restrictions.

Since there were more than 21 million citizens of voting age who in fact made a change of households during the year preceding the 1968 election, it is my feeling that 5 million is much closer to the truth.

Thus, the pre-existing residency laws unquestionably had the effect of preventing a vast number of citizens from voting for President and Vice President.[50]

3. The Fourteenth Amendment provides the basis for the residency provisions of section 202.

Though the Constitution itself is silent with respect to the power of the states to prescribe qualifications of voters in presidential elections,[51] it has long been assumed that

---

[50] See Bureau of the Census, "Estimates of the Population of Voting Age," Current Population Reports, Series P-25, No. 406 (1968), table 1 (but see footnote 1 of the table); and "Voting and Registration in the Election of November 1968," Series P-20, No. 192 (1969), table 16. See also Gallup Opinion Index, Report No. 42 (1968), p. 6.

[51] In contrast to the provisions regarding voter qualifications for elections for members of Congress (see Article I, section 2 and the

the states have authority to prescribe qualifications for voters in presidential elections. See *McPherson* v. *Blacker*, 146 U.S. 1, 35 (1892). However, as the Supreme Court made clear in *Williams* v. *Rhodes, supra,* 393 U.S. at 29, the authority of the states to legislate with respect to the selection of presidential electors is subject to the provisions of the Fourteenth Amendment.

As shown in part A of this Argument, Congress in exercising its power under section 5 of the Fourteenth Amendment, may remedy restrictions on the franchise irrespective of whether the restrictions are prohibited by the terms of the Amendment itself. *Katzenbach* v. *Morgan, supra.* See also *Harper* v. *Virginia Board of Elections, supra,* 383 U.S. at 678-680 (dissent of Justice Black). Accordingly, just as *Lassiter* v. *Northampton County Election Bd., supra,* was not determinative in *Morgan* (see 384 U.S. at 649), the decision in *Drueding* v. *Devlin*[52] is not controlling with regard to the validity of the residency provisions of section 202.

Drueding v. *Devlin* involved an attack upon the constitutionality of a durational residency requirement for voting in a presidential election; the case did not relate to any federal legislation. Moreover, it is by no means certain that, if the Supreme Court were to pass today upon

---

Seventeenth Amendment), the provision regarding selection of the President (Article II, section 1) merely states that: "Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors [that is, members of the electoral college] . . ." for the purpose of choosing the President and Vice President.

[52] In 1965, in *Dreuding* v. *Devlin,* the Supreme Court summarily affirmed a district court decision upholding a one-year residency requirement with respect to presidential elections. 234 F. Supp. 721 (D. Md. 1964), *aff'd per curiam,* 380 U.S. 125.

the merits of such a residency requirement,[53] the state law would be upheld.[54]

In any event, the residency provisions of section 202 are "appropriate legislation" within the meaning of the pertinent test.

As was shown by Senator Goldwater and others, the state laws which are affected by the residency provisions of section 202 operated so as to prevent a large class of

---

[53] In 1969, the Supreme Court decided *Hall* v. *Beals,* a case involving an attack on a state's six-month residency requirement with regard to voting for President and Vice President, 396 U.S. 45 (per curiam). The majority opinion did not discuss the merits of the constitutional challenge, but ruled that, because the 1968 election had been concluded and because, as of the time of the decision, the plaintiffs satisfied the residency requirement, the case had become moot and should be dismissed. Two justices dissented asserting that the case was not moot and that the state law was in violation of the Equal Protection Clause of the Fourteenth Amendment. 396 U.S. at 50, 51.

[54] See the dissent of Justice Marshall (joined by Justice Brennan) in *Hall* v. *Beals, supra,* 396 U.S. at 52, which stated that: ". . . if it was not clear in 1965 [when *Dreuding* v. *Devlin* was decided] it is clear now that . . . [a state] may exclude persons from the franchise only upon a showing of a compelling interest, and even then only when the exclusion is the least restrictive method of achieving the desired purpose." According to the dissenting justices, the 6-months residency requirement at issue in *Hall* v. *Beals* did not satisfy the pertinent test of constitutionality.

The compelling-interest standard was also applied in *Shapiro* v. *Thompson,* 394 U.S. 618 (1969), where a majority of the Supreme Court held to be unconstitutional statutes imposing upon new residents a one-year waiting period for eligibility for welfare benefits. (The Court expressed no view in *Shapiro* as to other types of waiting periods or residency requirements. 394 U.S. at 638, footnote 21.)

In *Burg* v. *Caniffe,* Civ. Action No. 69-855-C, D. Mass. (July 8, 1970), a three-judge district court held that the compelling-interest test was applicable to determination of the validity of a Massachusetts residency law governing the general matter of eligibility to vote.

citizens from voting for President and Vice President. Such persons were thus deprived of a significant aspect of the franchise, for the general principle as to the importance of the right to vote (see, *e.g.*, *Kramer* v. *Union Free School District, supra*) certainly applies with respect to selection of the President and Vice President.[55] *Burroughs* v. *United States*, 290 U.S. 534, 545 (1934); *Williams* v. *Rhodes, supra*, 393 U.S. at 31.

Regarding the interest of the states, Congress found that:

> . . . the imposition and application of the durational residency requirement as a precondition to voting for the offices of President and Vice President . . . does not bear a reasonable relationship to any compelling State interest in the conduct of presidential elections.

See section 202(a)(6) of the Voting Rights Act as amended, 84 Stat. 316. The validity of this finding can be demonstrated by appraising the various justifications offered for the durational requirements.[56]

---

[55] Application of the Equal Protection Clause to voting in presidential elections is not affected by the fact that a state might provide for appointment, rather than election, of presidential electors. Once it is decided to rely upon popular election, the state must, as with regard to any election, comply with the Fourteenth Amendment in determining eligibility to vote. *Williams* v. *Rhodes, supra*. *Cf. Kramer* v. *Union Free School District, supra*, 395 U.S. at 628.

[56] It is important to distinguish between the basic requirement that the person be a bona fide resident of the jurisdiction and the separate qualification as to length of residency. Section 202 deals with the latter and does not affect the former, except for the limited case of authorizing voting in a state or subdivision by persons who moved from the jurisdiction within 30 days of the presidential election. Regarding voting by former residents, see footnote 59, *infra*.

Exhibit—Memorandum in Support of Motion of Defendant John N. Mitchell

The general basis for such limits on the franchise is to insure familiarity with local conditions, candidates and issues, but this is inapplicable to presidential elections because the issues and personalities involved are national. The new resident is as familiar with them as is the resident of long standing. See, *e.g.*, House Hearings, p. 225 (Attorney General Mitchell); 116 Cong. Rec. 2758 (daily ed., March 2, 1970) (Senate Judiciary Committee members) [Ap. p. 50].

There is no merit in the related notion that a state may require a long period of residence on the ground that a presidential election may involve certain parochial interests of the state or city and, therefore, time is required to impress local viewpoints upon voters. *Cf. Carrington* v. *Rash, supra,* 380 U.S. at 94, where the Court stated that: " 'Fencing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible." See *Evans* v. *Cornman, supra,* 38 Law Week at 4512; *Hall* v. *Beals, supra,* 396 U.S. at 53 (dissent of Justice Marshall).

Nor can the administrative convenience of the states justify the lengthy residence requirements. Each state has a law providing for the closing of registration at some point before election day. With regard to such requirements of registration prior to the election, Senator Goldwater stated the following (Senate Const. Rights Hearings, p. 282):

> When these requirements are applied in a reasonable way, they can serve a valid purpose by protecting against fraudulent voting and allowing the election officials to carry out the paperwork and mechanics of holding an election.

Exhibit—Memorandum in Support of Motion of Defendant John N. Mitchell

> But whatever the reasons for permitting a State to set a closeout date for registering to vote for President, there is no compelling reason for imposing a separate and additional requirement that voters also must have been residents of the State for a particular length of time. If a State can satisfy its logistical needs by keeping its voting lists open up to 30 days before an election—as 40 States now do—what is the justification for barring citizens from balloting for President unless they have been residents of the State for 6 months or 1 year?
>
> So long as a citizen is a good-faith resident of a State and the State has adequate time to check on his qualifications, the duration of his residency should have no bearing on his right to participate in the election of the President.

In view of the fact that a substantial majority of the states permit registration by at least some classes of citizens up to the thirtieth day prior to a presidential election,[57] Congress could properly conclude that a 30-day residency period is adequate to accommodate the legitimate logistical needs of the states and that the possibility of "some remote administrative benefit"[58] cannot warrant the separate,

---

[57] See 116 Cong. Rec. 3543 (daily ed., March 11, 1970) (memorandum on registration closing days submitted by Senator Goldwater) [Ap., p. 60].

According to Senator Goldwater's memorandum, 31 states have special registration or application closing dates with respect to new residents and, in 18 of those states, a new resident may apply for a presidential ballot within 15 or fewer days of the election.

[58] *Carrington* v. *Rash, supra,* 380 U.S. at 96.

lengthy durational residency requirements.[59]

In regard to the interest of the states in preventing double voting and other fraudulent practices, adequate safeguards—other than wholesale disfranchisement of persons who change residences—are available.[60] In view of the standards of the Equal Protection Clause,[61] it is proper for Congress in effect to limit the states to use of the less restrictive safeguards.

As a general matter, Congress intended to—and did—give adequate weight to the needs and interests of state election officials. In discussing the amendment which was enacted as section 202, Senator Goldwater stated the following (116 Cong. Rec. 3539 (daily ed., March 11, 1970)) [Ap. p. 56]:

> . . . the basic practice that a State will have to establish once my amendment takes effect is one which most States already have put into operation. To date, 31 of our States have created a special method for voting in presidential elections in the case of new residents

[59] Subsection 202(e) specifies that, in certain circumstances, a state (or locality) is to permit former residents to vote for President and Vice President. Voting by former residents in presidential elections is authorized under the laws of 10 states. See 116 Cong. Rec. 3543 (daily ed., March 11, 1970) (memorandum of Senator Goldwater) [Ap., p. 60]. Also, many states waive local residency requirements for persons who move within the state. 116 Cong. Rec. 3542, Table 2 [Ap., p. 59].

[60] The federal statute itself prescribes criminal penalties for false registration and other fraudulent acts relating to the residency provisions. See section 202(i), 84 Stat. 317. Many states have similar prohibitions against improper voting practices, and any state has the option of adopting such a law or providing other means of protecting the integrity of the registration and electoral process.

[61] See *Hall* v. *Beals, supra,* 395 U.S. at 52 (dissent of Justice Marshall).

who cannot meet the usual residence requirements. These citizens are allowed to vote for presidential electors but not for other offices.

This proves beyond any doubt that the States can set up the separate system for voting that is required under my amendment.

In short, every standard set forth in the amendment has been modeled after practices that are used by the States themselves and are proven to be workable. Therefore, I can safely say to those of my colleagues who share with me a special respect and concern for the strength and diversity of our State and local governments that their interests were fully taken into account in the preparation of this measure. * * *

In conclusion, in light of the above factors regarding (1) the interests of citizens disfranchised by durational requirements and (2) the absence of any substantial countervailing state interest, Congress determined that the state laws affected by section 202 are inconsistent with the guarantees of the Fourteenth Amendment.[62] That determination, we submit, was fully warranted and the remedies adopted by Congress are appropriate ones. At the very least, the Court can "perceive a basis" for the federal legislation. *Cf. Katzenbach* v. *Morgan, supra.* It follows that section 202 is a valid exercise of congressional authority.

---

[62] Subsection 202(a), 84 Stat. 316, sets forth a number of other constitutional rights which are involved, including the inherent constitutional right to vote for President and Vice President, the right of interstate travel, and the privileges and immunities guaranteed by Article IV, section 2 of the Constitution. These alternative constitutional bases are discussed at 116 Cong. Rec. 3540-3541 (daily ed., March 11, 1970) (Senator Goldwater) [Ap., pp. 57-58].

Exhibit—Memorandum in Support of Motion of Defendant John N. Mitchell

D. *Reduction of voting age is a proper exercise of congressional authority effectuating the Fourteenth Amendment.*

1. Section 302 of the Voting Rights Act as amended, 84 Stat. 318, provides that:

> . . . no citizen . . . who is otherwise qualified to vote in any State or political subdivision in any primary or in any election shall be denied the right to vote in any such primary or election on account of age if such citizen is eighteen years of age or older.

As noted previously, the provisions of Title III lowering the voting age to 18 are to "take effect with respect to any election or primary held on or after January 1, 1971." Section 305, 84 Stat. 319.

At present, the minimum age for voting is 18 in two states, Georgia and Kentucky. The minimum voting age is 19 in Alaska and 20 in Hawaii, but, in all other states (and the District of Columbia), 21 is the prescribed age.[63] It was estimated that almost 10 million persons will be enfranchised by reduction of voting age to 18.[64]

2. Title III of the Voting Rights Act as amended is intended to implement the Equal Protection Clause of the Fourteenth Amendment. See section 301(a)(2), 84 Stat. 318. As pointed out, *supra,* in part A, the authority

---

[63] A table showing past and forthcoming state referenda on reduction of the voting age was submitted by Senator Goldwater. See 116 Cong. Rec. 3218 (daily ed., March 9, 1970) [Ap., p. 70].

[64] See Senate Const. Rights Hearings, p. 328; 116 Cong. Rec. 3060 (daily ed., March 5, 1970) (memorandum of Senator Kennedy) [Ap., p. 66].

of the states to establish qualifications for voting is subject to the provisions of the Fourteenth Amendment. Age limits, like other qualifications for voting, are to be evaluated on the basis of the compelling-interest standard.[65]

That test—which was expressly relied upon by Congress[66]—demonstrates the validity of Title III. For, as the Court held in *Katzenbach* v. *Morgan, supra,* section 5 of the Fourteenth Amendment is a positive grant of legislative power and, in implementing the Amendment, Congress is not confined to prohibiting operation of state laws determined by a court to be invalid. In regard to sections 201 (suspension of tests) and 202 (elimination of durational residency requirements), the issue was whether Congress had employed its authority properly, not whether the judiciary would hold the affected state laws to be unconstitutional. The same inquiry is applicable to the federal statute lowering voting age; and, for reasons to be shown, the same conclusions—*i.e.,* that the federal law is valid—results.

3. The ordinary justification for restricting the franchise to those who are 21 and over is the lack of maturity of younger persons.[67] Congress concluded that such no-

[65] In our view, the contrary holding of the district court in *WMCA Vote at 18 Club* v. *New York City Bd. of Elections,* No. 70 Civ. 1814, S.D. N.Y. (June 23, 1970), a suit involving the constitutionality of limiting the vote to persons 21 and over, is erroneous. Because the effect of age limits is to exclude a class of citizens from the franchise, there is no reason to apply a lesser test than that of compelling-interest.

[66] See section 301(a)(3), 84 Stat. 318.

[67] According to Professor Paul Freund, the historical basis for treating 21 as the age of majority is that "a young man was deemed to have become capable at that age of bearing the heavy armor of a knight." 116 Cong. Rec. 3503 (daily ed., March 11, 1970).

tion of maturity was no longer correct and that no state interest was sufficient to warrant denial of suffrage to persons between 18 and 21 years of age.

a. *Maturity and achievements of persons aged 18 to 21.*

As indicated repeatedly during congressional consideration of Title III, the level of education achieved by present-day youth is significantly higher than that of prior generations. For example, Senator Goldwater stated the following [116 Cong. Rec. 3216 (daily ed., March 9, 1970); Ap. p. 68]:

> In 1900 only 6% of Americans who had reached 18 were high school graduates. In fact, as late as 1940, only one-half of all 18-year-olds had completed high school.
>
> But this is 1970. This is the age of instant communications, all-news radio stations, T.V. news, and the most avid political concern on the part of young Americans that I have ever witnessed.
>
> Today fully 81% of Americans have graduated from high school before they reach 18. Almost 50% of 18-, 19-, and 20-year olds are enrolled in college. And the education which they are receiving is more advanced and intense than at any time in our history.
>
> In short, youth today is better informed and better equipped than any previous generation. They are without a doubt equally mature, both mentally and physically, as the average citizen who had reached 25 when I was growing up. In fact, they may be better able to comprehend the dramatic technological advances

and changing perspectives of modern life than many of their parents.

Similar information regarding progress in educational attainment was provided by others, including Speaker McCormack [see 116 Cong. Rec. 5675 (daily ed., June 17, 1970)].[68] Congress received other evidence that, at the present time, physical and mental maturity comes several years ealier than it did, say, 100 years ago.[69]

Employment is another area in which persons aged 18, 19 and 20 have demonstrated their responsibility and have made significant contributions to the nation. According to Department of Labor statistics on employment in the

---

[68] A report of the Bureau of the Census entitled "Educational Attainment: March 1968" showed that, in the United States, the median number of school years completed was 12.2 for persons aged 18 and 19, but was only 8.8 for persons aged 65 to 75. Current Population Reports, Series P-20, No. 182 (1969), table 1.

[69] See 116 Cong. Rec. 3510 (daily ed., March 11, 1970) (Senator Bayh, referring to testimony of Dr. Margaret Mead); Senate Const. Rights Hearings, p. 323 and 116 Cong. Rec. 3057 (daily ed., March 5, 1970) (memorandum of Senator Kennedy) [Ap., p. 63].

During the February 1970 hearings of the Senate Judiciary Committee's Subcommittee on Constitutional Rights regarding amendment of the Voting Rights Act, several witnesses dealt with the matter of statutory reduction of voting age.

Also, hearings on proposed constitutional amendments to lower voting age were conducted by the Subcommittee on Constitutional Amendments of the Senate Judiciary Committee during the second session of the 91st Congress (February-March 1970). A number of the statements made before the Constitutional Amendments Subcommittee discussed the matter of statutory reduction and were inserted into the Congressional Record during the debate on what became Title III. See, *e.g.*, 116 Cong. Rec. 3216 (daily ed., March 9, 1970) (Senator Goldwater favoring statute); 116 Cong. Rec. 3417 (daily ed., March 10, 1970) (Assistant Attorney General Rehnquist, opposing statute).

United States, 66.8 percent of the males and 49.3 percent of the females, aged 18 and 19, were in the labor force as of May 1970.[70] Though separate figures are not available for the 20-year age group,[71] it is reasonable to assume that a correspondingly large percentage of that group participated in the labor force.

Proponents of the legislation stressed not only the fact that millions of men and women in the affected age group hold jobs, but also the related fact of their paying substantial amounts of taxes to the federal and state governments.[72] Yet, in most states, as Senator Mansfield pointed out, "they [persons between 18 and 21] have no voice in the imposition of those taxes." 116 Cong. Rec. 2939 (daily ed., March 4, 1970).

---

[70] See Department of Labor, Bureau of Labor Statistics, Employment and Earnings, vol. 16, No. 12 (June 1970), table A-3. The term "labor force" includes both civilian and military employment. Also, the term includes full-time and part-time employees and persons who are in the labor force, but are currently unemployed. For both males and females, aged 18 and 19, the unemployment rate was approximately 10.6 percent. Of the males, aged 18 and 19, *not* in the labor force, the vast majority were enrolled in school. Of the females, aged 18-19, not in the labor force, almost all were either in school or were "keeping house."

It should be noted that the percentages of persons aged 16 and 17 in the labor force (i.e., 44.1 percent for males; 30.4 percent for female) were significantly lower than those for the 18 to 19 year-old group.

[71] The pertinent tables include 20-year-olds in a 20-to-24 category.

[72] Unpublished data of the Office of Research and Statistics of the Social Security Administration indicates that persons aged 18, 19 and 20 had income (subject to the Social Security tax) of 15 billion dollars in 1967. (1967 is the latest year for which such calculations have been made.)

Exhibit—Memorandum in Support of Motion of Defendant John N. Mitchell

One of the clearest indications that 18-year-olds are sufficiently mature to take part in and contribute to the electoral process is the experience in Georgia and Kentucky, where such persons have been eligible to vote for many years. Senator Cook described the experience in Kentucky, where the voting age has been 18 since 1955, as a "complete success." 116 Cong. Rec. 3215 (daily ed., March 9, 1970). Regarding the four states which permit persons below age 21 to vote, Senator Kennedy stated the following (Senate Const. Rights Hearings, p. 324; 116 Cong. Rec. 3058 (daily ed., March 5, 1970) [App. p. 64].

> Today, four states—Georgia since 1943, Kentucky since 1955, and Alaska and Hawaii since they entered the Union in 1959—grant the franchise to persons under 21. There is no evidence that the reduced voting age has caused any difficulty whatever in the states where it is applicable. In fact, former governors Carl Sanders and Ellis Arnall of Georgia have testified in the past that giving the franchise to 18-year-olds in their states has been a highly successful experiment.

Thus, substantial material showing the maturity of men and women, aged 18 to 21, and accomplishments relevant to their ability to exercise the franchise was brought to the attention of Congress.

Exhibit—Memorandum in Support of Motion of Defendant John N. Mitchell

b. *Military service and other obligations placed upon the age group.*

A disproportionately large percentage of persons who take part in military service, as a result of the draft[73] or voluntarily,[74] are aged 18, 19 or 20.

In this regard, Senator Kennedy stated:

> The well-known proposition—"old enough to fight, old enough to vote"—deserves special mention. To me, this part of the argument for granting the vote to 18-year-olds has great appeal. At the very least, the opportunity to vote should be granted as a benefit in return for the risks an 18-year-old is obliged to assume when he is sent off to fight for his country. About 30% of our forces in Vietnam are under 21. Over 19,000 or almost half of those who have died in action there, were under 21. Can we really maintain that these young men did not deserve the right to vote?
>
> To be sure, as many critics have pointed out, the

---

[73] All males in the United States must, with limited exceptions, register for the draft upon attaining age 18. 50 U.S.C. App. 453. Men between 18½ and 26 years of age are liable for training and service in the Armed Forces. 50 U.S.C. App. 454 (Supp. V).

The matter of the draft is dealt with in 50 U.S.C. App. 455 (Supp. V), which authorizes the President to prescribe rules and regulations concerning the manner of selecting persons for military service. On November 26, 1969, following an amendment to that provision, the President established a system of random selection. See Proclamation No. 3945, 34 Fed. Reg. 19017.

[74] Enlistment, *without* parental consent, is permitted in the Army, Air Force, Navy and Marine Corps at age 18 for males and 21, for females. 10 U.S.C. 3256(a); 8256(a); and 5533(a) and (b). Persons who have parental consent may enlist at lower ages.

No one under 21 is permitted to enlist in the Coast Guard unless he has parental consent. 14 U.S.C. 368.

> abilities required for good soldiers are not the same abilities required for good voters. Nevertheless, I believe that we can accept the logic of the argument without making it dispositive. A society that imposes the extraordinary burden of war and death on its youth should also grant the benefit of full citizenship and representation, especially in sensitive and basic areas like the right to vote.
>
> In the course of the recent hearings I conducted on the draft, I was deeply impressed by the conviction and insight that our young citizens demonstrated in their constructive criticism of our present draft laws. There are many issues in the 91st Congress and in our society at large with comparable relevance and impact on the nation's youth. They have the capacity to counsel us wisely, and they should be heard at the polls.

Senate Const. Rights Hearings, p. 323; 116 Cong. Rec. 3058 (daily ed., March 5, 1970) [Ap. p. 64].

According to recent statistics of the Department of Defense, 904,000, or 26.4 percent, of the men on active duty in the Armed Forces as of June 30, 1969 were 18, 19 or 20 years of age.[75] A majority of the persons who have been inducted into military service since 1965 are in that age category.[76]

---

[75] See exhibit 1, Ap., p. 77.

[76] *E.g.*, during the first half of 1970, 55.4 percent of the inductees were 20 years of age and 2.6 percent were 19. For certain of the prior years, the combined percentages of the below-21 age groups were even higher. *E.g.*, of the 381,955 persons inducted in 1966, 30.8 percent were 20, 30.4 percent were 19 and one percent were 18.

Exhibit—Memorandum in Support of Motion of Defendant John N. Mitchell

It is apparent that Congress had a strong basis for its finding that denial of the right to vote to citizens between 18 and 21 is "particularly unfair . . . in view of the national defense responsibilities imposed upon such citizens." See section 301(a) (1), 84 Stat. 318. The burden of military service and of the draft has a direct impact upon a substantial percentage of the men in that age group and also affects indirectly the young women. The need to grant such persons the opportunity to participate in the election of those who determine defense and foreign policy is surely one proper concern of Congress in effectuating the Fourteenth Amendment.

Another type of legal classification relied upon by Congress was laws regarding the age when a person is subject to criminal prosecution.[77] Senator Randolph pointed out that:

> In all states except one an 18 year old by law is treated as an adult in criminal court, fully responsible for his or her actions. In all states juvenile rights can be waived at the discretion of the court for even younger defendants. * * *

The number of inductees who were volunteers is small compared to the number of draftees. However, during each year since 1965, some 70-75 percent of the volunteers were under 21.

A table based on Selective Service Commission reports regarding inductions, 1965 to June 1970, is included in the Appendix. See exhibit 2, Ap., p. 78.

[77] The distinction between those who are within the jurisdiction of juvenile courts and those who may be prosecuted for the commission of a crime. The history and theory of juvenile courts in the United States is discussed in *In re Gault,* 387 U.S. 1, 14-29 (1967).

116 Cong. Rec. 3518 (daily ed., March 11, 1970) [Ap., p. 74].[78]

Proponents of Title III discussed other types of state laws, such as those regarding capacity to marry, which attach significance to the attaining of age 18.[79]

The relevance of laws extending rights and responsibilities to 18-year-olds was explained by Senator Kennedy in the following manner (Senate Const. Rights Hearings, p. 323; 116 Cong. Rec. 3058 (daily ed., March 5, 1970) [Ap. p. 64]:

> It does not automatically follow of course—simply because an 18 year-old goes to war, or works, or marries, or makes a contract, or pays taxes, or drives a car, or owns a gun, or is held criminally responsible like an adult—that he should thereby be entitled to vote. Each right or responsibility in our society pre-

[78] Senator Randolph inserted a memorandum describing the laws of each state regarding age of criminal responsibility. In a number of states, the basic age as to liability for criminal prosecution is 16 or 17.

The pertinent federal statute, 18 U.S.C. 5031, defines "juvenile" as a person who has not reached 18 years of age.

[79] In many states, females who are 18 may marry without the consent of their parents and men who are between 18 and 21 may marry with parental consent. See, *e.g.*, N. Y. Domestic Relations Law, § 15; Cal. Civil Code § 4101. Senator Goldwater noted (apparently using 1960 data) that, at ages 18 and 19 and particularly at age 20, a substantial percentage of women were married. 116 Cong. Rec. 3216 (daily ed., March 9, 1970) [Ap., p. 68]. The percentages for males were smaller, but a substantial number of men, aged 18 to 21, were married. See Bureau of the Census, 1960 Census of the Population, vol. I, pt. 1, table 176. See also Bureau of the Census "Marital and Family Status: March 1969," Current Population Reports, Series P-20, No. 198 (March 25, 1970), which shows that since 1960 the median age at marriage had increased somewhat.

> sents unique questions dependent on the particular issue at stake. Nonetheless, the examples I have cited demonstrate that in many important respects and for many years, we have conferred far-reaching rights on our youth, comparable in substance and responsibility to the right to vote. * * *

Cf. Evans v. *Cornman, supra,* 38 Law Week at 4513.

In *Kramer* v. *Union Free School District, supra,* 395 U.S. at 626, the Supreme Court stated:

> . . . statutes distributing the franchise constitute the foundation of our representative society. Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government.

Congress determined that denial of the vote to citizens aged 18, 19 and 20 was not justified by any compelling state interest and that such denial[80] contravened the Equal Protection Clause.[81] In view of the factors outlined above

---

[80] Congress had a valid basis for fixing the minimum age at 18, rather than at some lower figure. *Cf. Katzenbach* v. *Morgan, supra,* 384 U.S. at 657.

As Professor Archibald Cox noted: "... the educational system draws a major line roughly at eighteen years of age, upon graduation from high school." See 116 Cong. Rec. 3063 (daily ed., March 5, 1970). Other significant differences between 17-and 18-year-olds are reflected in statistics concerning employment, Selective Service obligations and military service. The experience of Kentucky and Georgia pertains to voting by 18-year-olds, but not younger persons.

[81] The validity of statutory reduction of voting age is not affected by section 2 of the Fourteenth Amendment. That section provides, in part, as follows:

regarding the achievements of and the responsibilities imposed upon that age group, the congressional findings are correct. In any case, the Court can undoubtedly perceive a basis for the congressional action. *Cf. Katzenbach* v. *Morgan, supra,* 384 U.S. at 656. It follows that, like sections 201 and 202, Title III is a valid enactment.

E. *Plaintiffs' attack on sections 4 and 5 as amended is premature and, in any event, is without merit.*

1. The 1970 amendment to subsection 4(a) of the Voting Rights Act suspends the use of "tests and devices" in any state or political subdivision (not already subject to suspension by virtue of the 1965 Act) which (1) the Attorney General determines maintained a test or device on November 1, 1968, and with respect to which (2) the Director of the Census determines that less than 50 percent of the

---

> But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 2 was intended to remedy a different type of discriminatory denial of the right to vote [though this provision has not been enforced, see, *e.g., Dennis* v. *United States,* 171 F.2d 986, 993 (D.C. Cir. 1948)]. This provision reflected the fact that at the time of Reconstruction the states extended the franchise to men, aged 21 and over. There is, however, no sound reason for concluding that section 2, by implication, fixes a constitutional standard as to voting age and bars action determined by Congress to be necessary to implement the Equal Protection Clause.

residents of voting age were registered on November 1, 1968, or voted in the 1968 presidential election.[82] A covered state or county may terminate such suspension if it establishes, in an action in the District Court for the District of Columbia, that there has been no racially discriminatory use of a test or device during the preceding 10 years.[83]

2. The complaint alleges (in counts 7 and 8) that the abovementioned provisions of sections 4 and 5 of the Voting Rights Act as amended apply to New York County and have the effect of diluting the votes of plaintiffs Christopher, Cole and Lo Dico. These allegations are not correct.

The terms of subsection 4(a) make its coverage dependent upon determinations of the Attorney General and the Director of the Bureau of the Census. The Attorney Gen-

---

[82] It should be noted that the jurisdictions which may be brought under subsection 4(a) as a result of the 1968 coverage formula are virtually the same as those subject to suspension of tests under section 201. Unlike subsection 4(a) whose operation depends upon determinations of the Attorney General and the Director of the Bureau of the Census, section 201 took effect immediately upon enactment. As indicated in part B of the Argument, section 201 presently suspends literacy and other tests in a number of states, including New York.

Jurisdictions brought within the coverage of subsection 4(a) must comply with section 5 of the 1965 Act which deals with review of new voting laws. Section 5, 79 Stat. 438, 42 U.S.C. 1973c (Supp. V.), as amended by the 1970 law, 84 Stat. 315. However, section 201 pertains only to suspension of tests. Jurisdictions covered by section 201 are not subject to section 5.

[83] See subsection 4(a) of the 1965 Act, 79 Stat. 438, 42 U.S.C. 1973(a) (Supp. V), as amended by section 3 of the 1970 law, 84 Stat. 315.

When a jurisdiction secures termination of subsection 4(a) coverage, it is no longer subject to section 5.

eral has found that the State of New York maintained a "test or device" on November 1, 1968.[84] However, the determinations of the percentage of the voting-age population registered for or voting in the 1968 presidential election have not been made. The Director of the Bureau of the Census has stated that such determinations will be made later this year when data from the 1970 census is available.[85] The method of implementation adopted by the Census Bureau is entirely proper.[86] Until the required determinations of voting-age population and voter participation have been made, it is not certain whether New York County (or any other jurisdiction) is covered by the amendment to section 4.[87] Accordingly, plaintiffs' attack upon that section is premature [*cf. United Public Workers* v. *Mitchell,* 330 U.S. 75, 89 (1947)], and should be dismissed.[88]

---

[84] See 55 Fed. Reg. 12354 (August 1, 1970) [exhibit 3, Ap., p. 79].

[85] See exhibit 4, Ap., p. 80. The Bureau of the Census will, by interpolation, use the 1970 data to determine November 1968 voting-age population of the relevant jurisdictions.

[86] It should be noted that, under subsection 4(b) of the Voting Rights Act, 79 Stat. 438, 42 U.S.C. 1973b(b) (Supp. V), the determinations of the Director of the Census "shall not be reviewable in any court. . . ." See *South Carolina* v. *Katzenbach, supra,* 383 U.S. at 332-333.

[87] During the Senate debate regarding amendment of section 4, references were made to registration and voting statistics for New York County and coverage of that county. However, such information was based on data from the 1960 census. [See 116 Cong. Rec. 3708 (daily ed., March 13, 1970) (Senator Cooper)] and cannot be determinative.

[88] Since applicability of section 5 depends upon the jurisdiction's being covered by subsection 4(a), plaintiffs' challenge to section 5 is also premature. In addition, while a covered state or county might have standing to contest the validity of the amendment to

Exhibit—Memorandum in Support of Motion of Defendant John N. Mitchell

3. Moreover, there is no merit in plaintiffs' contentions regarding the validity of the 1970 amendments to sections 4 and 5.

The effect of the amendments is to renew, through the use of 1968 data, the type of coverage formula contained in subsection 4(b) of the 1965 Act. In *South Carolina* v. *Katzenbach, supra*, the Supreme Court upheld the provisions of sections 4(b) and 5. That decision supports the validity of the 1970 amendments. Regarding the matter of overly extensive coverage, the Court stated the following in *South Carolina* v. *Katzenbach*, (383 U.S. at 331):

> Acknowledging the possibility of overbreadth, the Act provides for termination of special statutory coverage at the behest of States and political subdivisions in which the danger of substantial voting discrimination has not materialized during . . . [a specified previous period].

The same is true here, for, as noted above, subsection 4(a)'s provisions for termination of coverage are available to jurisdictions brought under the statute by the 1968 formula.

Thus, even apart from the matters of lack of ripeness and lack of standing, plaintiffs' objections to sections 4 and 5 are not well taken.

---

section 5 (*cf. South Carolina* v. *Katzenbach, supra*), we submit that individual citizens would not have the type of legal interest which is a prerequisite to standing.

Exhibit—Memorandum in Support of Motion of Defendant John N. Mitchell

V. Conclusion

This action presents no material questions of fact and, for the reasons shown above, defendant John N. Mitchell is entitled to judgment as a matter of law. With respect to counts 1 through 6 of the complaint (the counts pertaining to sections 201, 202 and 302 of the Voting Rights Act as amended), summary judgment should be entered in favor of defendant Mitchell. With respect to counts 7 and 8 (regarding sections 4 and 5 of the Act), the Court should order dismissal or in the alternative should enter summary judgment in favor of defendant Mitchell.

Respectfully submitted,

Jerris Leonard
Assistant Attorney General

David L. Norman
Deputy Assistant Attorney General

David B. Marblestone
Jeremy I. Schwartz
Attorneys,
Department of Justice
Washington, D. C. 20530

Attorneys for Defendant John N. Mitchell

Thomas A. Flannery
United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that on August , 1970, I served the foregoing Memorandum and the Appendix upon the parties in this action by mailing a copy to respective counsel as follows:

J. LEE RANKIN
Corporation Counsel
Municipal Building
New York, New York 10007
Attorney for Defendant
New York City Board
of Elections

ALFRED AVINS
Suite 73
605 West 113th Street
New York, New York 10025
Attorney for Plaintiffs

DAVID B. MARBLESTONE
Attorney
Department of Justice
Washington, D. C. 20530

MEILEN PRESS INC. — N. Y. C. 219