

Supreme Court of the United States

October Term, 1968

In the Matter of:

GASTON COUNTY, NORTH CAROLINA,

Appellant,

VS.

UNITED STATES,

Appellee.

Docket No. 701

Office-Supreme Court, U.S.
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 JOHN F. DAVIS, CLERK

Pt. 1

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Place Washington, D. C.

Date April 23, 1969

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C O N T E N T S

ORAL ARGUMENT OF:

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----x
 3 Gaston County, North Carolina, :
 4 Appellant, :
 5 v. : No. 701
 6 United States, :
 7 Appellee. :
 8 -----x

9 Washington, D. C.
 10 Wednesday, April 23, 1969.

11 The above-entitled matter came on for argument at
 12 1:45 p.m.

13 BEFORE:

- 14 EARL WARREN, Chief Justice
- 15 HUGO L. BLACK, Associate Justice
- 16 WILLIAM O. DOUGLAS, Associate Justice
- 17 JOHN M. HARLAN, Associate Justice
- 18 WILLIAM J. BRENNAN, JR., Associate Justice
- 19 POTTER STEWART, Associate Justice
- 20 BYRON R. WHITE, Associate Justice
- 21 ABE FORTAS, Associate Justice
- 22 THURGOOD MARSHALL, Associate Justice

23 APPEARANCES:

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1 we were certified by the Attorney General and subsequent at
2 that time was printed in the Federal Register and in August
3 of 1966 we filed this suit in the District Court and it was
4 heard here in June, June 21 and 22 of the following year.

5 These two opinions, after having been handed down,
6 we appealed to this court and probable jurisdiction has been
7 noted on January 13, 1969.

8 The three main points that we would like to argue
9 in connection with this case is first of all that Gaston County
10 and the record we contend is replete with evidence that we at
11 no time have used a test or device to discriminate because of
12 race or color or for any other reason.

13 We set out in the record, we brought witnesses here
14 to Washington, both the white and Negro race to show to the
15 court that this particular county in North Carolina was not one
16 that this act was designed for.

17 In reading the case, of course, of South Carolina
18 against Katzenbach, against which the history of this whole
19 act or the purpose of the act was set forth in stating that the
20 repressive type of thing that was going on in some other
21 States in the Union to at least try to avoid that type of
22 conduct continuing.

23 We contend that Gaston County does not fall into
24 that same category.

25 So we then presented evidence, we brought with us

1 these witnesses who testified orally. The Government offered
2 depositions without any oral testimony. Both parties to the
3 action did offer depositions. I believe that the Government
4 offered 29 depositions plus some other documentary evidence.

5 We offered depositions of about 11 people, I believe.

6 Now, we first, in the record it will indicate that
7 in 1962, a new registration was adopted in Gaston County, and
8 this was a system called a permanent loose-leaf type regis-
9 tration.

10 Until that time we had had -- well, I guess, maybe
11 1940 was the only other time that anything had been done about
12 the registration books, but in 1962 a complete new registration
13 was ordered, called the MacMillan System and it was by statute
14 that we adopted this system in North Carolina.

15 The Chairman of the Board of Elections at that time,
16 starting in April, and in April until May of 1962, conducted
17 a registration so that the voters would be eligible to vote
18 in the May Primary of 1962.

19 The evidence will probably indicate that during that
20 short period of time we registered in our county approximately
21 30-some thousand people. It was around that figure -- I am
22 not exact about that -- but approximately 30,000 people, which
23 you might say was in a period of approximately 15 days and
24 three Saturdays within that period from April until May 21st.

25 Subsequent to that time -- prior to that time,

1 however, I want to call the court's attention to what Gaston
2 County did in order to give every citizen the right to
3 register, to vote and to participate in the election process.

4 First of all, the county increased the number of
5 voting precincts from 35 to 44 precincts. That, of course,
6 was to make it more convenient for our people to register and
7 at the same time more convenient for them to be able to vote
8 after they had registered.

9 Now under this new system of registration, the elec-
10 tion books are kept open every day of the year from Monday,
11 8:30 a.m. until Friday, 5 o'clock each day. And that has been
12 done since 1962.

13 The record and it was stipulated and agreed that all
14 of our registration process would relate back to that period of
15 time, 1962. It was a little less than the five-year period
16 referred to in the Voting Rights Act of 1965.

17 So, we in an effort to make sure that the people knew
18 about this, the county spent thousands of dollars and that is
19 also in the record.

20 We conducted school. The Chairman of the County
21 Board of Elections conducted schools for the registrars, many
22 of the registrars who had served in the past were reappointed,
23 and, of course, we had new registrars because of the increase
24 in the number of voting precincts.

25 Well all of these registrars attended these schools

1 for the purpose of instructing them under this new system of
2 registration and also to give them what we understood the law
3 to be, the law of the State of North Carolina and the test
4 that we thought at that time to be used and was used, and, of
5 course, until 1964, the oral type test was used.

6 After the '64 Civil Rights Act we changed that test
7 to a written test and we contend that all of this has been in
8 conformity, of course, with Lassiter versus Northampton County.
9 That case has been kicked around by the Attorney General and
10 by us, of course, in our brief as to what effect now the
11 Voting Rights Act of '65 has on the decision in Lassiter versus
12 Northampton County.

13 We contend that we followed the test that was stated
14 by this court, was one that was not on its face discriminatory,
15 and we say that even with the Voting Rights Act now of 1965,
16 that there has been no change because the test that we used
17 in this county which was a simple, that is, since 1964, a
18 simple test.

19 We took what we considered to be the simplest three-
20 sentences from the North Carolina Constitution, and we then
21 would give this to a register or a person who had applied for
22 registration and as was testified by the Chairman of the Board
23 of Elections, after this test was adopted in 1964, that a
24 person was not required to copy every word of that test, or
25 every word of either of the one of the three sentences from

1 the Constitution that he may select, but a reasonable facsimile
2 thereof.

3 So, now even in 1964, I would like to remind the
4 Court, that again before this 1964 election -- now the general
5 election of '64, we had again the registrars, a school in ways
6 of conducting this test, because we were using a different
7 test after 1964 in order to conform with the Civil Rights Act
8 of 1964.

9 So then we also ran many newspaper advertisements
10 at a cost to the county of many thousands of dollars. We had
11 radio spot announcements. We did everything that we thought
12 reasonable and that reasonable people could do, to notify the
13 citizens of Gaston County that we were having a new regis-
14 tration and that we wanted as many as possible to come and
15 register without regard for race, creed or color.

16 Q Just as a matter of interest, this very simple
17 literacy test you have, what is the purpose of this?

18 A We-l the purpose is to comply with ---

19 Q What does it do? What does it prove?

20 A The purpose, your Honor, is to comply with the
21 Constitution of the State of North Carolina, and to comply
22 with section 163-3 -- I don't recall the exact section but
23 pertaining to the voting in Gaston County.

24 Q I see.

25 A That is exactly why we ---

1 Q To comply with your own Constitution?

2 A We do and we contend that that is what we were
3 doing.

4 Q I see.

5 A And in order to comply with our Constitution
6 and in order for our county officials to do so, we selected
7 what we contended to be the most simple type thing that we
8 could possibly select in order to comply with that law.

9 Now I wanted to ---

10 Q Do you admit that this is a quote "test or
11 device"?

12 A We admit that that is a test or device as
13 defined in the section of the '65 Act. We do that.

14 Q Where does that leave you?

15 A Well, it leaves us -- we contend that we have
16 not used it for the purpose or with the effect of discriminating
17 against any person because of race or color and we contend as
18 Judge Gasch said in his opinion, that nowhere in this record
19 could he find any evidence that would justify the finding of
20 the majority that simply because we had had a segregated
21 system of education in North Carolina and this is the whole
22 basis as I read the opinion of Judges Wright and Robinson,
23 that simply because North Carolina had in the past a dual
24 system of education that that in itself had the effect or
25 would fall within the provisions of the Voting Rights Act of

1 1965, with the words with the effect of denying or abridging
2 the right of a person to vote.

3 Now we contend that as set forth in our brief that
4 Congress never meant any such thing as that because at the
5 time this Act was adopted, they were aware of these dual
6 system States. They were aware that this had been going on
7 in many States other than the ones that this Act was designed
8 or projected toward.

9 Q Assume for the moment that North Carolina down
10 through the years has forbidden Negroes to go to school at all.

11 A I didn't hear you, your Honor.

12 Q Assume North Carolina had forbidden Negroes to go
13 to school at all and then wanted to apply a literacy test and
14 applied it.

15 Would you suppose it would be with the effect --
16 would that then be a test or device within the Act?

17 A It would be a test or device within the Act,
18 but had that been true at the time that Congress enacted this
19 legislation, then I say that Congress would have said because
20 you have practiced segregation in the schools or have had a
21 dual system of education or that you have denied your people ---

22 Q They said with the effect of though.

23 A It would have the effect.

24 Q The purpose or effect, and it would have the
25 effect of denying them the right to vote?

1 A If we use this simple test.

2 Q If you used this test and also you didn't let
3 Negroes go to school.

4 A Well, I say again, and the only answer that I
5 can give to his Honor is that that was not true in the first
6 place in North Carolina, but if that had been true, the
7 Congress would have said in a State where the Negroes have been
8 denied the right to attend school at all, use this test. You
9 shall not period, give any test or use any test or device of
10 any kind.

11 Q Well, I gather the majority of the court below
12 found that because of the kind of school system that you did
13 furnish, that the Negroes weren't permitted to get enough of
14 an education to pass the literacy test.

15 A That is exactly the basis of their decision.

16 Q Do you challenge that part of their decision?

17 A I challenge that part strongly.

18 Q That in terms of the system of education that
19 was available, that Negroes couldn't pass the literacy test?
20 You challenge that part of it?

21 A I challenge it strongly and I say that the
22 evidence in the case showed ---

23 Q But even if that were so, you would still say
24 that the court came out with a ---

25 A Even if what was so, Mr. Justice, ---

1 Q Even if it were so, even if the court was right
2 that because of the kind of education available, Negroes
3 couldn't pass the literacy test, even if that were true, you
4 would still say that you deserved to win the case?

5 A I would still say that we deserve to win the
6 case because ---

7 Q Under the law.

8 A Under the law. Now I want to point out that the
9 evidence in the case shows that 52 percent of the Negroes of
10 voting age in Gaston County had registered.

11 Q And 62 percent had what?

12 A Sixty-three percent of the whites had. Now
13 there is a discrepancy of approximately 11.1 percent.

14 Now, I pointed out and have set out in the brief that
15 in this case of United States against Texas -- which was
16 affirmed by this Court -- and that was a poll tax case, but
17 in that case, the Government and in every one of these cases
18 they have adopted this same approach that because of the
19 segregated facilities, United States against Mississippi and
20 United States against Texas, because there were segregated
21 facilities, that that in itself has the effect or is dis-
22 criminatory because of a segregated or a dual school system.

23 Now in the case of United States against Texas,
24 there where the Government had the same type evidence and Judge
25 Thornberry, I believe his name was, stated that he could not

1 take that evidence where there was only a discrepancy of
2 approximately 12 percent between those -- the whites who paid
3 the poll tax and the Negro who paid the poll tax, and that
4 that was not sufficient in his opinion as a discrepancy to
5 justify saying that the segregated school system was the
6 reason for or was sufficient to justify that they should have
7 to pay a poll tax or not pay a poll tax.

8 Now, I contend that in our situation, in Gaston
9 County that we have a discrepancy of 11-some -- 11.1 percent,
10 and that that in itself is certainly not evidence of use of a
11 test or device for the purpose of denying or abridging the
12 right of a person to register and vote.

13 Now one other thing I wanted or would like to mention
14 to you in tthat regard, we brought with us a Negro school man,
15 who had been in the public schools of Gaston County since
16 1932. He testified before this court, and he was asked whether
17 he had an opinion as to whether or not the schools since 1932
18 had sufficient facilities and were equipped to teach a child
19 or a person to read and write well enough to pass this simple
20 test that is in this record.

21 Well, he said, and his answer was that all of our
22 schools, I think, all of them would be able to teach any
23 Negro child to read and write so that he could read a newspaper,
24 so that he could read any simple material that didn't have any
25 foreign words or extractions; this has always been true and I

1 don't think there was an argument anywhere except that maybe
2 the facilities were different but they have been basically able
3 to teach this and this is what they have done.

4 Now the amazing thing to me was that the majority of
5 the court below said this testimony is unpersuasive to me,
6 and just you might say completely ignored that testimony.

7 Well, it was rebutted and under the case of South
8 Carolina against Katzenbach, it says that all the unit needs
9 do is to submit an affidavits, voting officials and then
10 refute whatever evidence the Government may offer to the
11 contrary.

12 Q May I conjecture for a moment what would happen
13 to him if he testified to anything else other than that?

14 A What would have happened?

15 Q Yes, sir.

16 A There wouldn't have anything happened to him.

17 Q He is a school principal?

18 A Absolutely.

19 Q Subject to dismissal?

20 A I say absolutely not in Gaston County.

21 Q He couldn't be dismissed?

22 A He could be, but I am saying that in Gaston
23 County that we don't operate in that manner. if it please his
24 Honor. I am saying that this man ---

25 Q Is he principal of a colored school?

1 A No, he is not a principal. He was at that time.

2 Q Of a colored or white school?

3 A Of a Negro, colored school. Yes.

4 But now, of course, we have had a consolidation of
5 our schools since this time and since the trial of this case,
6 but I am saying that if he had testified truthfully and which
7 I am satisfied in my mind he did, that certainly his testimony
8 should have been given certain weight.

9 Q Have you been in his school?

10 A Have I been in his school?

11 Q Yes.

12 A Yes.

13 Q You have been in there?

14 A I have been in the school that he was a principal
15 of.

16 Q Have you seen the teaching?

17 A Yes, I have, one of the finest schools we have
18 in the county.

19 Q One of the finest?

20 A Yes, a new facility, it was probably seven,
21 eight, ten years old.

22 Q What school would be second to it?

23 A What school would be second to it now?

24 Q Yes.

25 A Well, that is not any longer a high school.

1 Q What is it?

2 A That school is not any longer a high school. It
3 is now an elementary or grammar school, one of the two. I am
4 not sure. Because the school he was principal of was merged
5 with the white school called the Ashley High School and now
6 these schools are merged.

7 But this, I contend that this testimony should have
8 been persuasive because it was unrebutted. We had other
9 witnesses who testified and certainly there was no threat from
10 anybody that had he not testified in this regard something
11 would have happened to him.

12 Because after all, I think the evidence itself
13 shows that here we have got 52 percent of the Negro eligible
14 to register that actually registered. That certainly should
15 be some evidence that we in Gaston County are not the kind of
16 people who would come and make a threat to a person to make
17 him testify to anything, because we contend that this evidence
18 in this record shows and the statistics themselves show
19 that we have not used a test or device for the purpose of
20 discrimination.

21 Q I thought the point about that testimony was
22 that the witness had become familiar with the schools only
23 in the early 1930's and a good many of the older voters of
24 course would have gone to school before that time and that this
25 witness accepting fully the truth of what he testified to,

1 simply could not testify to conditions prior to the 1930's.

2 A That is correct.

3 Q And that -- I don't know what percentage --
4 but a substantial number of voters are people who would have
5 gone to school prior to that date.

6 A I don't recall the exact percentage, but
7 approximately 25 to 30 percent, maybe. But that was the
8 testimony that he did come to the system in 1932. This was
9 testimony that we felt was unrebutted.

10 Judge Gasch in his opinion said that he felt that the
11 majority had just completely ignored this testimony and it
12 should have been given weight, which he felt was not.

13 Of course, we also felt that it should have been
14 given considerable weight. In view of South Carolina versus
15 Katzenbach as to what we were required to prove or refute on
16 the part of the Government.

17 Q What do you say about Judge Gasch's other
18 grounds?

19 A Well, we feel that in that connection that the
20 Attorney General under the Act was required to make a certifi-
21 cation to the municipality within the county. We say that the
22 Act itself -- and when you refer to the definition of a
23 political subdivision, as set out in section 14(c)(2) of the
24 1965 Voting Rights Act, that the Attorney General was required
25 under the Act to certify to that unit because the county

1 itself had no control over the municipal election in our
2 county by virtue of State law.

3 We have eleven municipalities, I believe, as the
4 record will show and we say that since we had no control over
5 these elections, none whatever, we couldn't say to the
6 registrar, by virtue of State law again, why you don't do this
7 or this is the type of test you shall or shall not give.

8 The law gave, in our State, the right to hold a
9 municipal election to the municipality itself.

10 I wanted to mention at this point that the Attorney
11 General entered into a consent judgment with Wake County which
12 is a county right here right in our own State, using the same
13 type of test or similar type test that we use in Gaston County,
14 and they say and enter into a consent judgment that has the
15 same type of school system that we have had in the whole State,
16 a segregated type system, so yet they say in Wake County, the
17 fact that you had a segregated school system doesn't affect
18 you but Gaston County it does.

19 We say that that in itself prevents Gaston County
20 or anybody else with a segregated or a dual system of educa-
21 tion, or in the past of having that type thing of ever coming
22 out from under this Act.

23 We contend, if it please the court, that certainly
24 the five years mentioned in the Act has some -- means something.
25 They said relate back to five years, but of course, the

1 Government has gone back in here to 1900 and brought in
2 newspaper headlines from the Raleigh News Observer and put in
3 evidence which we have no way to refute what the newspaper
4 said in 1900 and that type of thing, which is part of the
5 evidence, but we do argue to you that certainly the fact that
6 there was a segregated system, it should not have any bearing
7 on this decision and that the Congress did not mean that it
8 would and that that in itself would do so.

9 Mainly on the question then of the last point, or
10 the point that Mr. Justice Harlan asked me about, as to the
11 municipality and the part that Judge Gasch ruled or in the
12 form that he ruled, we say, your Honor, that if we had had
13 control of these elections, then it would have been our
14 responsibility.

15 Of course, to have refuted evidence adduced by the
16 Government in regard to municipal elections, but we had no
17 such authority.

18 Q Do you think the legislative history of the
19 Act supports Judge Gasch's view?

20 A I don't believe so.

21 Q There isn't very much on the point.

22 A There is not very much on that point but, of
23 course, there is a great deal on the first point about the
24 segregated systems or unequal educational system.

25 Q Yes. I was thinking about the other point.

1 A There is very little in the brief of the United
2 States. They argue that the word "in" and that it had a
3 territorial effect but the term political subdivision as
4 defined in the Act, it says the term political subdivision
5 shall mean any court or parish, except -- I read, I said
6 "court," the term political subdivision shall mean any county
7 or parish except where registration for voting is not conducted
8 under the supervision of the county or parish the terms shall
9 include any other subdivision of a state which conducts
10 registration for voting, but I contend that there they had in
11 mind that you didn't have control over it, then, of course,
12 you would have to be certified under section 4(b) of the Act,
13 the coverage formula, before you would be required to suspend
14 the test.

15 And we contend for that reason we did not and were
16 not required to present evidence in regard to the municipal
17 elections over which we had no control.

18 Q Where do you think the burden of proof lies in
19 one of these cases?

20 A Well, the burden of proof, under the Act, and
21 quoting again from the Katzenbach, South Carolina versus
22 Katzenbach, that all that a political unit or subdivision needs
23 do is to get affidavits and other type of information from
24 voting officials asserting that there has been no such dis-
25 crimination or use of a test for purposes of discriminating.

1 And then it goes on to say and then the plaintiff,
2 in the action or the petition, must refute whatever evidence
3 to the contrary the Government may adduce.

4 So then that throws a burden back to the plaintiff
5 of going forward, I would say, to show that there has been no
6 use of a test or device for the purpose of denying or abridging
7 the right of a person to vote because of race or color.

8 Q There are separate municipal registrars within
9 the county, aren't there?

10 A All of the municipalities have their own
11 registrars.

12 Q And there is no showing in this record as to
13 how the municipal registrars have administered the precinct
14 test?

15 A There is none in this record.

16 Q But any judgment for the county would reinstate
17 or would allow the municipal electors to resume the use of
18 the literacy test? Isn't that right?

19 A Well, it would.

20 Q Without any evidence whatever as to whether
21 they have used them in a nondiscriminatory way?

22 A That is correct. And the Attorney General has
23 never made any determination or investigated so far as we know
24 as to whether municipalities did in any way use a test or
25 device.

1 Q But the use was suspended wasn't it by the
2 Attorney General?

3 A The Attorney General only notified the Chairman
4 of the County Board of Elections and so far as the record
5 shows, whether he ever notified anybody or any person in the
6 municipality we don't know. The record is silent on that
7 point.

8 Q What actually happened? Have the municipalities
9 been using a literacy test?

10 A I can't answer that, your Honor. I know that
11 just recently the city of Gastonia, the largest municipality
12 within the county has had a new registration. This is within
13 the last two or three weeks.

14 Q Are they using a literacy test?

15 A I can't say that they are using a literacy
16 test. I can't say that they are because I understand that
17 they were not using one. But I cannot state that as a matter
18 of fact to this court.

19 Q I don't suppose it is surprising that Judge
20 Gasch was concerned about the state of the record with respect
21 to the municipality.

22 A Without any evidence of you mean of what went
23 on in the municipalities?

24 Q Yes, because he was being asked to enter an
25 order which would in effect sanction the use of the literacy

1 test by the municipalities without any evidence:

2 (a) as to what they had been doing

3 (b) whether they had quite doing whatever they had
4 been doing.

5 A But was it responsibility of a political sub-
6 division that had no control over it to adduce evidence in
7 that regard and that is the position we take that there was
8 no certification and we were not required under the Act because
9 it doesn't say so to do, to furnish evidence with regard to
10 use of test by municipalities.

11 MR. CHIEF JUSTICE WARREN: Mr. Claiborne.

12 ORAL ARGUMENT OF LOUIS F. CLAIBORNE, ESQ.

13 ON BEHALF OF APPELLEE

14 MR. CLAIBORNE: Mr. Chief Justice and may it please
15 the Court.

16 If I may I would like at the outset to put this case
17 in a somewhat different perspective.

18 It seems to me important to remember that we are
19 dealing here with a literacy test that was never meant to serve
20 any purpose of assuring illiteracy but which was immediately
21 even boastfully invented and conceived for the sole purpose
22 of keeping the franchise entirely in white hands.

23 That, of course, was a long time ago, and the literacy
24 test has worked its purpose in that respect. It involved
25 something over a half century.

1 But we are also dealing with a test which for these
2 reasons the Congress recently isolated as a presumptive cause
3 or a presumptive cause of the low Negro registration in the
4 areas covered by the Act, including Gaston County, North
5 Carolina.

6 And the question now is whether after this history
7 in light of the purpose and effect of this literacy provision
8 we may safely assume that if the prohibition were lifted, the
9 literacy test would cease to have a discriminatory effect on
10 voting.

11 It seems to me that in light of this the presumption
12 must be against it.

13 Now it is true that North Carolina and Gaston County
14 in particular, have made very important progress, dramatic
15 progress in this area, by comparison to some other areas that
16 I am more intimately familiar with, it is notable that Negro
17 registration in 1964 was at about 50 percent of those who were
18 potentially eligible within the county and the record clearly
19 reflects that commendable efforts were made at least in
20 Gastonia, the city of Gaston County which includes about a
21 third of the population toward encouraging Negro registration.

22 But the Court should not believe that all is well
23 in the best of all possible worlds in Gaston County.

24 It is a fact that until 1965, every registrar of
25 voters was white and in that year, 1 out of 44 was a Negro,

1 appointed, however, only to handle registration in the pre-
2 dominantly Negro section of Gastonia.

3 It is also revealing that as late as 1966 when the
4 school, the high school which has been referred to here, which
5 was under the Negro -- of which the Negro principal was a
6 witness at the trial that high school was sought to be inte-
7 grated by assigning to it 300 white students and 300 black
8 students.

9 Two hundred ninety-seven of the white students
10 transferred out, leaving only three of them in school.

11 Finally, I don't want to put much emphasis on this,
12 because we are dealing with an elderly man but he is still a
13 registrar of voters in Gaston County. Certainly the millennium
14 has not come to this place when in this record we read a
15 registrar of voters talking about those he has registered of
16 the Negro race as good niggers.

17 One wonders whether they would be registered at all
18 if it had been otherwise.

19 Now on the other hand, it would be unfair to condemn
20 Gaston County because of the sins of our fathers, our grand-
21 fathers, those who are now the officials of that place, but
22 it would be equally improper and unfair to ignore what
23 subsists of the influence of the past on the presence, and
24 that is, after all the scheme of the Voting Rights Act.

25 It is not so much or not entirely a question of the

1 present purpose of the present officials. It is a question of
2 the effect, and effect alone is sufficient to prevent the
3 reinstatement of these tests and devices, of the effect that
4 these tests and devices had in the recent past and also what
5 the effect would be if they were allowed to be brought back.

6 So we get down to the question whether the influence
7 of the past has really been swept away with respect to voting
8 in Gaston County.

9 Q Mr. Claiborne, excuse me, were the 52 percent
10 of the Negroes registered after the literacy test had been
11 suspended?

12 A No, Mr. Justice, that is the figure although
13 there may be some debate whether it should be 50 or 52 but in
14 any event it is in that range, that was the figure for
15 November of '64 at the time when this county was certified
16 as subject to the Act.

17 Q I see.

18 A The figure today, while it is not in the record,
19 it is the figure supplied by the State Board of Elections, and
20 it does seem to me relevant, it is now 61 percent.

21 Q Sixty-one?

22 A Sixty-one percent of the voting age, Negro
23 population, of Gaston County.

24 Q That is after the literacy test.

25 A That is the effects, a somewhat delayed effect,

1 of the suspension of these tests or at least presumptively so.

2 Q After it anyway?

3 A Now the Voting Rights Act itself assumes as a
4 general matter that it takes at least five years free of these
5 tests and devices before the effects of the past have been
6 fully erased and even that is a rather optimistic assumption,
7 because discrimination for the better part of a century, as
8 this Court well knows, is not always so quickly wiped away.

9 It is true, however, that the Voting Rights Act pro-
10 vides that one need not wait out the five years, even though
11 tests and devices were used, if it can be shown contrary to
12 the presumption of the Act that those tests and devices did not
13 have any effect in discriminating against the Negro franchise,
14 then the subdivision involved is entitled to immediate
15 exemption.

16 Q The five-year, the general five-year presumption,
17 as you call it, it would be demonstrably invalid if the reason-
18 ing of the majority of the court here is correct, because quite
19 obviously the fairest literacy test in the world two years
20 from now, whenever the five years has elapsed, is going to
21 discriminate against Negroes if the majority of this court is
22 right.

23 Is that correct?

24 A Mr. Justice, what you say is correct.

25 Q You are not saying that it undo the segregated

1 school system that existed in this community up until a few
2 years ago.

3 A The answer is that the presumption of the Act
4 I think is that it takes at least five years, perhaps longer.
5 Now it is true that the Act only looks back to the preceding
6 five years but if an effect which dates back 20, 30 or 40
7 years is still effective and is still operative five years
8 before the suit is filed, no matter when that suit is filed,
9 then exemption is not proper.

10 Q Well a five-year period I should simply suggest
11 is not going to repair the situation, the situation pointed
12 out by the court here. It at least raises questions as to
13 whether or not the Court properly understood the Congressional
14 intent.

15 A After five years have elapsed and if the tests
16 have not been used in the interim, it is true that the sub-
17 division is entitled to exemption, even though they may be
18 independent of cause for concern that the effects of an old
19 discrimination in education may still be operative. That would
20 raise a question under the Fifteenth Amendment, quite independent
21 of the Voting Rights Act, but they are all differences between
22 merely having the literacy tests suspended and coming out from
23 under the Act.

24 You can come out from under the Act and be free to
25 enact new laws, Section 5 of the Act which this court dealt
with recently is not operative in that circumstance, nor can

1 Federal examiners or Federal observers be sent down to the
2 county.

3 So there is some point in winning exemption even if
4 you cannot reinstitute literacy tests which for independent,
5 Fifteenth Amendment reasons would not be permissible.

6 Q Are you familiar with the situation in Wake
7 County?

8 A Wake County is some embarrassment to us.

9 As I understand it the investigations of the
10 Department of Justice did not reveal in Wake County as they did
11 here, a wholesale or very common waiver of literacy tests for
12 whites but not for Negroes.

13 That ground of objection was apparently not available
14 or so our investigation disclosed in Wake County. Nor, so far
15 as I know was there there any question of whether municipali-
16 ties had existed under a different regime than the county
17 authorities, voting authorities.

18 On the other hand, educational disparities were
19 probably comparable and on that ground it may be that the
20 Attorney General might have had equal cause to object to the
21 suit filed by Wake County.

22 Q When the Attorney General does enter into a
23 consent judgment with the county, does he also enter into
24 consent judgments with each municipality within the county?

25 A No, it is our view that the municipalities are

1 covered automatically because they are within the territory
2 which is involved.

3 Q They have separate elections and separate
4 election officials?

5 A They have separate elections and separate
6 election officials, but, of course, when a State is covered
7 as a whole, the counties and municipalities are separately
8 certified even though they have separate elections and separate
9 election officials.

10 They become subject to the Act because the principle
11 of the Act is that the greater includes the less and that
12 principle is operative here with respect to municipalities
13 within the physical territory of the county.

14 Now in three respects it seems to us that to Gaston
15 County has failed to meet its burden of proof, has failed to
16 convince us that the effect of the literacy test insofar as it
17 discriminated against white vote has ended.

18 MR. CHIEF JUSTICE WARREN: Finish your statement.

19 MR. CLAIBORNE. Those three respects in which it seems
20 to us that there has been a failure of proof by Gaston County
21 or to outline them briefly, the failure to make any showing
22 with respect to lack of discrimination in municipal elections
23 the evidence showing the waiver of the literacy test for whites
24 on a wholesale basis whereas the same did not occur for
25 Negroes, and finally the inevitable, unavoidable discrimination

1 that results in applying a literacy tests to two groups who
2 had vastly different educational opportunities.

3 MR. CHIEF JUSTICE WARREN: We will recess.

4 (Whereupon, at 2:30 p.m. the Court recessed, to
5 reconvene at 10 a.m. Thursday, April 24, 1969.)
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