Supreme Court of the United States

OCTOBER TERM, 1970

In the Matter of:

UNITED STATES, Plaintiff,	:	Docket No.
vs.	:	No. 46 ORIG
THE STATE OF ARIZONA, Defendant.	:	
UNITED STATES, Plaintiff,	:	
vs.	:	No. 47 ORIG.
THE STATE OF IDAHO Defendant.	:	

Place Washington, D. C.

Date October 19, 1970

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

TABLE OF CONTENTS

* * * * *

JHAM

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1970

UNITED STATES Plaintiff, vs THE STATE OF ARIZONA Defendant.	)	No. 46
UNITED STATES Plaintiff, vs THE STATE OF IDAHO Defendant.	)	No. 47

Washington, D. C.
Monday, October 19, 1970

The above-entitled matter came on for argument at 1:00 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON O. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: Numbers 46 and 47.

Mr. Solicitor General, whenever you are ready.

ORAL ARGUMENT BY ERWIN N. GRISWOLD, SOLICITOR GENERAL OF THE UNITED STATES, ON BEHALF OF THE UNITED STATES

MR. GRISWOLD: Mr. Chief Justice and may it please the Court: These cases are original suits brought by the United States against the State of Arizona and the State of Idaho. Both arise as did the previous two cases, under the Voting Rights Amendment Act of 1970, the full text of which is set out in the Appendix to our brief in this case. It is also set out in the Appendix to our brief in the Arizona and Texas case, the voting rights of persons are.

And turning to page 78 I would point out the way the statute is put together, after what has now become Title I, which extends the 1965 Voting Rights Act and also steps up the controlling date to the 1968 election in the alternative and not in place of the previous one.

Then we come to Title II, which extends the abolition of literacy requirements to all of the states. That is involved in the Arizona case, number 46, which involves the voting age requirements, too.

And then in Section 202 of Title II we have the fairly extensive provisions, dealing with the residency

requirements and that, along with voting rights, is involved in the Idaho case, number 47.

As Mr. Wright pointed out, there is in Section 205 a separability clause which is in an odd place, but its language is certainly broad enough to be applicable to any of the provisions of the Act and finally, in Title III we have the voting rights provision which were the subject of the argument this morning.

As I have indicated, both of these cases involve voting rights. I will not repeat the arguments which I gave in the Texas and Oregon cases, but I do have a few supplementary points which I would like to advance.

The Chief Justice asked whether, in Carrington against Rash the two classes were not identical and this made the restriction against one of them invalid.

I think I can respond to that now precisely with respect to Evans and Cornman, which also dealt with exclusion based on residence. There, as I mentioned in my argument, there were differences between the two classes concerned. Residents in the enclave did not pay real estate taxes, either directly, or through their rent. They were subject to somewhat different criminal provisions insofar as they were subject to the Maryland law that was pursuant to the adopting provisions of the Federal statute.

The issue of residence involved there, like that of

age, is one as to which, in general, there is a substantial state interest, of course. If the question of drawing fine lines were one of state prevalence, then we would have expected the Maryland statute to be upheld.

Whether people are Maryland residents as a matter of Maryland law, would seem to be in the first instance a matter for the Maryland Legislature. But we think that the Court was right in that case in concluding that the law violated the Equal Protection Clause. In the Cornman case the Court readily could conclude that the basis offered by Maryland for the distinction was insufficient.

Q Is it really accurate to say that they are in Maryland or are they on an island surrounded by Maryland?

A WEll, I think, Mr. Chief Justice, that the Court decided that they were in Maryland. The Court certainly said in its opinion that it was within the external boundaries of Maryland.

Q I suppose if it hadn't been for the enclave factor it wouldn't have been necessary to be so circumspect in these terms, would it?

A No; I suppose not, but I think the Court must have decided that they were residents and citizens of Maryland, otherwise they couldn't vote.

In this case the Court alone -- in that case it was black and white; either they were in or they were out. There

was no numerical problem; no line drawing problem and the Court, we think, properly held that they were in Maryland, and for Maryland to say otherwise, was not supported by a sufficiently compelling reason to take it out of the Equal Protection Clause.

In this case the Court alone might not be able to reach such a conclusion, choosing between 18 and 21 requires line drawing which the Court is not particularly well-qualified to do. Congress can do it and Section 5 of the 14th Amendment, we submit, permits it.

Now, let me go back to the South Carolina against Katzenbach case and we call attention to the specific provisions of the Voting Rights Act of 1965 which was upheld there. The literacy test provision sustained there had a trigger provision fixed by Congress under which the provisions of the statute went into effect in states where less than 50 percent of the possible voters had registered or had voted.

Now, this might have been 40 percent; it might have been 60 percent, but Congress made it 50 percent. This figure was never questioned. If Congress had power to act at all, the establishment of such a figure was exactly what it was qualified to do, better qualified on the whole than the courts.

And in Katzenbach against Morgan the statute upheld was applicable to those who, studying in American Flag schools were -- who studied in American Flag schools where

Spanish was the language, had proceeded through the sixth grade -- not the fourth grade, or the eighth grade, but the sixth grade. I think this Court might have found it very difficult to decide, simply under the Equal Protection Clause whether the fourth or the fifth or the eighth or the sixth. It is hard for me to even think of a recordwhich would really support such a determination.

In both of these cases, Congress, proceeding under the enforcement clause of Section 5 of the 14th Amendment, drew lines and fixed exact points. Now, this is the kind of line that Congress is well-qualified to draw and this was upheld by this Court.

And I may go back to the definition by Congress under the 18th Amendment of what constituted intoxicating liquor. Some of us may recall 3.2 beer and I guess that was exactly the same kind of a line well-drawn by Congress and perhaps difficult for this Court to draw, pursuant to the powers expressly granted to Congress, or in that case, to enforce the 18th Amendment.

Q Well, Mr. Solicitor General, does Section 5 give Congress equal power to exclude as well as include. And 3.2 beer was "exclude;" wasn't it?

A Three point two beer was excluded. It was held not to be intoxicating if it was not more than 3.2.

Q That was Congress's statement.

A That was Congress's statement.

Q And we are bound to accept that?

A The Court decided that it would accept it and I suspect, on the basis -- well, undoubtedly on the basis that it was a valid law.

Q But the same standards for exclusion as inclusion?

A No; I'm not sure if Congress had passed a statute saying that 50 percent spirits is not intoxicating, I suppose that would have been found to be unconstitutional.

Q Well, I would suppose there may be some limites, but how about the standards by which we judge the validity of a Congressional action under Section 5? The same for exclusion as inclusion? Just say that cough syrup is within the reach of the 18th Amendment if it's got something intoxicating in it of a certain amount.

A Yes, Mr. Justice, I suppose the Court would havesustained an act of Congress which forbade the sale of anything with any alcoholic content.

Q You'd use the same standard, in your view, to judge the validity of a Congressional act which excludes from coverage as well as includes?

A I want to be careful not to jump from the 18th Amendment analogy I have given and the interstate commerce analogy to which we have referred and the 15th Amendment one,

to the Equal Protection situation because I do not contend that Congress has power to say that anything which this Court has held to be a violation of Equal Protection shall henceforth not be a violation of Equal Protection. I have already made reference to Footnote 10 which, in the Katzenbach and Morgan opinion which represented a difference of opinion in the Court and I stand with the majority view that the power of Congress is to bar actions which it regards as denials of equal protection above and beyond what would be denials of equal protection without the Act of Congress, but I am hesitant about answering about inclusion and exclusion.

I also said this morning that if Congress does extend the enforcement of the 14th Amendment I think it can thereafter repeal its extension but I do not think that it can repeal a decision of this Court which has been reached without the effect of any act of Congress.

Q Well, what is -- why should Congress --

A Because the constitution itself says that nor shall any state deny, deprive any person of the equal protection of the laws and if this Court has held that the state had deprived a person of the laws, nothing that Congress does under Section 5 can be an action by Congress to enforce the 14th Amendment. It can be an action by Congress to limit the enforcement of the 14th Amendment but not to enforce the 14th Amendment.

Q Well, if Congress thinks that an action of this Court frustrates the 14th Amendment, why isn't that enforcing it by --

A Well, I think that that might well be and we've already referred to that and specifically the Virginia literacy statute which this Court held to be consistent with the 14th Amendment, was thereafter made ineffective by the Act of Congress under Section 5 involved in SouthCarolina against Katzenbach. I don't know that Congress necessarily decided that this Court's decision frustrated the 14th Amendment but I think it did decide that under all the circumstances it could not effectively enforce the 14th Amendment.

Now, let me turn to first, the case of the United States against Arizona and the literacy problem which is involved there, arising under Section 201 of the statute. Under thatprovision Congress has provided that any test or device which is a phrase taken out of the 1965 Act, as a prerequisite for voting and which -- for which we have used the shorthand of literacy as a requirement, shall be invalid in all states of the country to which the trigger provisions of the 1965 Act, as extended, do not apply.

And the effect of that is that literacy requirements are made invalid throughout the United States. I cannot say that they are exactly the same in every part of the United States, because any state which is within the trigger class

is also subject to further provisions under which it cannot make changes in these laws without either the approval of the Attorney General or of the District Court of the United States for the District of Columbia. And those provisions with respect to approval are not applicable in Idaho or Minnesota. They may be applicable in one county of Arizona and they are applicable in Alabama and Mississippi and the other states which were subject to the 1965 Act.

And so the question is, as to the power of Congress seeking to act under Section 5 of the 14th Amendment or other provisions which might, in this case, include Section 2 of the 15th Amendment and even Section 2 of the 13th Amendment, has power to extend the abolition of literacy requirements to the entire country.

I am inclined to think that the way the argument has developed we have argued the most difficult case first; that is that the voting age requirement raises the most serious intellectual and constitutional problems. In my own view the argument with respect to residency is a fortiori from the previous discussion and the argument with respect to literacy is a moto fortiorari from the previous discussion.

We have here an express determination by Congress that literacy devices do work out discriminatorily. We have the foundation of South Carolina against Katzenback which upheld the validity of the 1965 statute and more recently we

have the decision of the Court in Gaston County against the UnitedStates, which held that merely because a county's current practice was nondiscriminatory was not enough to take it out from the 1965 Act.

If the continuing effect of past discrimination in education continued to produce persons who were now held illiterate and who would be barred from voting, not because of any current discrimination but because of past discrimination, that that was enough to sustain the continued application of the statute.

Now, we have a very similar situation here. It is not suggested that there has been past discrimination, at least within recent times, in education in Arizona, but it is very clear that large numbers of persons have moved into Arizona from other parts of the country where they had been subjected to educational discrimination. What Congress has done is in no sense designed to punish Arizona for any past derelictions; it isn't suggested that there have been such derelictions.

Q Would you say that's true of Oregon and Idaho, also?

A Yes, Mr. Justice, I think it is true, to some extent, of Oregon and Idaho.

Q To a substantial degree?

A To an appreciable degree and, I suppose, any person who is illiterate because of this and can't vote, is

subjected to it, besides which it seems to me that this is the kind of thing upon which Congress can rightly and properly adopt a national policy which shall be effective throughout the United States --

Q That's a little different, because they don't need any evidence in the latter situation, do they? If they are acting on the premise you just suggested, then I would take it there would be some evidence in the legislative history to support the findings.

A WEll, Mr. Justice, there is complaint by Arizona in this case that Congress held no hearings in Arizona and did not develop the facts with respect to Arizona. And I think that is immaterial because Congress did have before it in the legislative history extensive material as to the movement about throughout the country. It is perfectly true that there was more in some areas and more to, let us say, big cities than elsewhere, of millions of people who had been subjected to discrimination of this kind in the past and Congress concluded that Congress and its members were well aware of the situation and could properly find as it did that the statute could be based on the enforcement powers under both the 14th and the 15th Amendments.

I don't think that this is a matter which has to be separately adjudicated on a state-by-state or county-by-county or city-by-city basis. It is a national problem.

Congress is our national legislature and undertook to dispose of it on a national basis. This is particularly referred to in the testimony of the Attorney General in the Senate hearings on pages 42 and -- pages 42 to 46 where he dealt at some length with the -- in the House hearings in the summer of 1969 when the provision for the extension of the abolition of literacy requirement was presented, the Attorney General's testimony appears on pages 42 to 46 and deals with the matter on a national basis.

Now, in the Lassiter case there was no statutory provision under Section 5, the Lassiter case holding that the Virginia literacy requirement could constitutionally be enforced. Here we have an explicit legislative provision under Section 5 of the 14th Amendment. There are, I think, as of today, no compelling state interests justifying the imposition ofliteracy tests. We have much wider dissemination of information and knowledge about political matters through radio and television.

I suspect that of people who are illiterate that numerically speaking, far more get their information on political matters today through their ears and through television than they do by reading. Most states do not have literacy requirements and never have had them and some few that do have them don't enforce them as to which I understand that Oregon is an instance. And we believe that the question of

the validity of the extensionof literacy requirements in Section 201 is really covered by South Carolina against Katzenbach on the one hand and Katzenbach against Morgan on the other. And so I will return to the Idaho case, number 47.

Q Mr. Solicitor General, do I understand you to s that Arizona itself has been guilty in the past of denials of equal protection to certain groups, other than denying the right to vote?

A Mr. Justice, not with respect to Negroes; I think that there is somesuggestion in the record that there may be a difference with respect to Indians in Arizona.

Q But not with respect to Negroes?

A Not with respect to Negroes. I am not now talking about the somewhat remote past in the 1870s and '80s --

Q Then what is it that sustains this act with respect to --

A That people come there to Arizona in substantial numbers who are illiterate because they were subjected to discrimination in the places where they were at earlier times.

Q What is the legal justification for Congress for making Arizona do something that they otherwise wouldn't have to do because of something some other state did.

A Well, the legal justification -- I repeat -- it's not punishment; it's not retribution; it's simply that

there is a denial of equal protection. Here are people in the State of Arizona who are otherwise qualified to vote and whom Arizona will not allow to vote because they are illiterate.

Q Well, illiterates have been denied equal protection by State A and Congress is saying to give them the remedy by State B.

A No; they are denied equal protection today by Arizona, because Arizona won't let them vote today and that is a denial of equal protection.

Q Because some state in the past has denied equal protection.

A The reason is that they are illiterate and the reason they are denied the right to vote is that they are illiterate and the question simply is whether that is such a compelling interest of the state that Congress cannot properly, under Section 5 of the 14th Amendment, hold it invalid.

Now, we concede that it is an appropriate interest of the state. We concede that in the absence by Congress a state could make literacy a test, as many states have --

Q If the states who deprived these illiterates of equal protection of the law, hadn't denied them that equal protection of the law and they had moved to Arizona, Arizona couldn't make any --

A No, Mr. Justice, under this statute it doesn't make any difference who is to blame for the fact that

they are illiterate. Under this statute the mere fact that they are illiterate, no matter who is to blame and no matter what reason, just because they could have gone to school but were lazy and didn't go to school, under this statute they can vote in Arizona.

Q I understand the impact of the statute on this, but I am asking about the justification for it. The justi- justification is that, although Arizona could have maintained this literacy test in normal circumstances people have moved there from other places who have been denied equal protection of the law.

A No; the justification, Mr. Justice, I believe, is within a sense, somewhat more simple than that; it is that though Arizona has an interest with respect to literacy, this is a matter which Congress can, pursuant to its powers under Section 5 of the 14th Amendment, regardless of the origin determined is not sufficient to justify the discrimination against voting and thus the denial of equal protection which is a result or consequence of it.

Q Then, before these people moved into Arizona, for example, I take it there was no problem because there were no classes of people or groups of voters on whom the present standards could operate.

A You mean in Arizona?

Q In Arizona.

A Well, the Indians had been there a long time.

Q But they are not the source of this legislation; were they?

A Well, Mr. Chief Justice, the Indians are sufficiently referred to in the hearings and there is evidence that a much higher proportion of Indians voted in New Mexico where there is no literacy requirement, than greater than in Arizona where there was a literacy requirement. And there is a considerable case history of discussion in the record that one of the reasons for the literacy requirement in Arizona is only to keep the Indians from voting.

Now, the brief for Arizona does show that under Mr. Justice Douglas's interim order, requiring that people be registered, although illiterate, on a separate list to await the result of this Court's decision. I think only 21 persons in the state actually were registered, or the record showed that there were some 80,000 persons in Arizona who were barred from voting on the literacy requirements.

I think that's a disappointing showing, but I don't think it's terribly significant. All the experience in the Deep South showed that you got people to register only by fairly intensive voting drives and indeed it was not very effective until lots of people went down and gave people information and instructions and led them to the appropriate places and after a while

when the fear subsided, and so on, and more people got out and did it, then the number of those registered greatly increased and I suspect that if this Court approves the provision of this statute and if there is some effort to register people in Arizona who heretofore have not been allowed to vote, that a very substantial number, surely not 87,000, but a very substantial number will, in fact, register and the voting rolls in Arizona will be substantially increased.

Now do we turn to the residency provision which is applicable with respect to the State of Idaho. As a matter of fact, we had some difficulty in finding defendants with respect to the residency requirements and even some with respect to the literacy requirements. Most of the states did not indicate any desire to contest these provisions.

The residency provision is really three positions; there are three distinct things which it does and let me point out one preliminary matter. It relates only to voting for President and Vice President.

Q Mr. Solicitor General, why do you think Congress was so careful in that restriction in this particular section, whereas it didn't impose it in any other section?

A Because, Mr. Justice, I think this is the explanation: with respect to other elections like Governor, and even Congressman and Senator, certainly the sheriff and district attorney and all of those things; knowledge of local issues,

knowledge of the community, being a part of the local community as well, is relevant; not necessarily controlling. I think I would be quite prepared to defend this statute if Congress had made it applicable in all elections.

But, with respect to voting for President or Vice President, it doesn't make the slightest difference, barring only only such mechanics as arise out of the electoral college provisions that anachronism by which we are still bound, it doesn't make the slightest difference whether we vote in Arizona or in New York.

Now, it is true that, as far as I know we have never had an election in this country that was determined by one vote. You can -- that is a Federal election -- you can, of course, assume a case where one man moved from Idaho to New York and voted there and that was enough to make a majority in New York which got the number of New York electoral votes and the fewer number of Idaho votes either were not changed or went the other way.

But, simply in terms of the franchise Congress felt, and I think quite understandably and rightly so, that a citizen of the United States who is resident in the United States ought to be able to vote for President and Vice President every four years. And that is the -- or to put it another way, there was no substantial controlling, compelling reason on the part of the states to say that he shouldn't be entitled to vote.

Because, the first provision here is that if you have have resided within the state for 30 days you can vote in the state in which you reside. The second provision is that the state --

Q Mr. Solicitor General, may I bring you back, though, just for one follow-through question: despite all of the discussions as to the elimination of the Electoral College we still have it.

A We still have it.

Q Hence, the voter does not vote to record for the President and the Vice President; he votes for a strange animal called an elector.

A Yes.

Q Do you think this makes the case a more difficult one for your point of view than if we have direct elections?

A Oh, yes. No doubt about it; it is diverted here by the electoral college. The statutes throughout refers to "vote in any elections 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." Apparently the draftsmen of that provision thought that that was some hope that perhaps we might eliminate the electors, but we still have them.

I think that if we didn't have the electors, I

think I could almost say that there is no wrong whatever on which a state could oppose this provision. It would be a little like transferring a criminal indictment from the Southern District of Texas to the Northern District of Arkansas. It's a matter of convenience and if we didn't have electors and we simply counted the votes, then the only interest would be to see that a person didn't vote twice and where he voted wouldn't make any difference at all.

Now, in addition to the 30-day residence limitation, which I may say is vitally in effect throughout the country under state statute, the Act of Congress of last June also provides for absentee voting and absentee registration under fairly short-term provisions in many respects different from provisions of some of the states.

For example: some states say that the absentee ballot must be received not later than noon on the day of the election. The Federal statute says that it shall be counted as if it was received up to the closing of the polls on the day of the election.

And then finally, there is a third provision which purely is doctrinaire terms, perhaps, goes the farthest of all, and which says that if you have left a state in which you were qualified to vote and have gone to another state and have not resided in that second state for 30 days as to be eligible to vote there, then you can still vote in the state from which

you came and of which you are no longer a citizen and you can raise a complete and formal argument that this compels a state to allow a person to vote for President and Vice President who, by hypothesis, is not a citizen of that state.

And yet I think that, too, is valid, although it pushes it further, simply on the general proposition that Congress was concerned and was rightly concerned that every citizen in the United States, resident in the United States, should be entitled to vote for President or Vice President some-place and that the fact that the exigencies of his job or simply that he retired and decided to move to a new location or problems with respect to his family's health or other matters, had required him to move just at the crucial time.

Q Mr. Solicitor General, is the voter given the option under that last section that you have mentioned, the option to vote in the state from whence he came or the one to which he is -- or has come.

A No, Mr. Justice, the state into which he moved, I suppose, can allow him to vote, in which case I believe he cannot vote in the other state, but --

Q That gives the voter quite a choice, doesn't it? Obviously he, depending upon the states involved, his vote could have far greater impact --

A No; I don't think it gives him any option, Mr. Chief Justice. Either he can vote in the new state or he

can't. The new state may allow him to vote by having a one-day residence requirement or having a special provision for people who move in from another state.

The statute is on page 81 of our brief in the Arizona case: "If any citizen of the United States who is otherwise qualified to vote in any state or political subdivision, he shall be allowed to vote for the choice of electors. If he has started the residence 20 days before the election, but the state into which he moved says you can vote if you have been here for 15 days, then he isn't protected by this statute. He would have to vote in the new state, not in the old state. Under this statute he has no election. He can go one place and only one place. He can vote in the new state if the new state will let him; if the new state won't let him vote the in the new place he can vote in the old state.

Q Is this statute retain a kind of penal sanction for voting in two states?

A Yes, Mr. Justice, I believe that that is Section 202 (i),"the provisions of Section 11 (c) shall apply to false registrations and other fraudulent acts and conspiracies committed under this section. 11(c) is in the original Voting Rights Act of which this is an amendment and that is a general criminal provision for criminal acts. There is no doubt that the person who -- certainly a person who votes twice and a person who votes where he is not entitled to vote will be subject

to Federal criminal sanctions.

Now, our position is that though the states have an interest and we don't question that -- the states have an interest in -- and we don't question that -- the states have an interest with respect to literacy; they have an interest in respect to residency; they have what you might call an administrative interest in terms of making their voting procedures not too expensive and in such a way that they can effectively guard against fraudulent registration and voting; that this is not a compelling enough interest to stand up against the exercise of power by Congress in its wisdom, pursuant to the powers granted by Section 5 of the 14th Amendment.

This is not a petty matter. It is estimated that 5 million people are barred from voting in this country and Presidential elections because of the residency requirements. We have a highly mobile population; we have a great many people whose jobs are with big companies or others and they are transferred. We have people coming to Washington and going from Washington, not Presidential appointees so that they may have a domicile here in Washington while they are here, to go back to their states, and the aggregate here is a very large number, something like three or four percent of the total possible voting rolls. I don't say that this will increase it by 5 million votes because not of the 5 million people will actually register and vote, but there are 5 million persons who will be

made eligible to vote under this provision who, until the very recent past have not been so eligible. The state restrictions have been loosening up in recent years so that this has been a less serious matter than it used to be.

There is no real argument here, in our view, with respect to administrative convenience. This, I think, is evidenced by the fact that a great many states now have 30-day provisions and other special provisions with respect to the elections for President and Vice President.

The states will have to change their statutes; they would have to modify their practices in one way or another. The fact that many states have done it successfully indicates that it is not a serious matter now; indeed,four-fifth of the states, which is 40 states, permit registration or qualification of at least some voters up to 30 days before the election.

A number of states have maintained separate vouchers for Presidential elections. It is -- the situation is similar to some of those who have left the state with respect to absentee voting and registration. It seems to me the decisions of this court in Carrington and Rash and Katzenbach against Morgan are applicable.

Now, I've discussed Section 202 and mostly with respect to the Equal Protection Clause of the 14th Amendment, but there are also other bases which can be dekisddon here. This is applied only to the first, the foremost, the Federal

elections, that of President and Vice President. It is a Federal event with respect to which the Federal Congress might have some appropriate voice, but the privileges of national citizenship are -- at least they can be contended to be a privilege of national citizenship to vote for President or Vice President, derived from the Constitution.

One of the privileges and immunities of a citizen of the United States analogous to the right to travel freely among the several states, indeed, this has been a curb, a break, a restraint, on freedom of movement among the several states and I think all of us have known people who did delay their move until after the election or who were very concerned because they couldn't vote because they had to move before an election.

Such cases as Edwards against California can also be relied on.

For these reasons we think that the prays of the complaints in these two cases should be granted; that a declaration should issue that the statute enacted by Congress is Constitutional and that the states should be enjoined from enforcing their statutes which are in conflict with the Federal statute.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Solicitor General.

Mr. McGowan, you may proceed whenever you are ready.

ORAL ARGUMENT BY JOHN M. MC GOWAN, II,

ON BEHALF OF THE CITY OF PHOENIX, ARIZONA

MR. MC GOWAN: Mr. Chief Justice and may it please the Court: First I would like to correct or restate some of the facts stated by the Solicitor General.

In the Government's brief the figure used is certainly 3,400 rather than 87,000 as the number in Arizona not registered. And since the order of Justice Douglas on the 21st of August only 18 people have registered to vote in all of the 14 counties of Arizona, rather than 21 as stated.

In the appendix of Arizona's brief we have attached copies of all of the county recorders of Arizona, setting forth the number that did register and the total population of the said county as revealed by the latest census figures.

In --

Q As I recall the problem the schedule worked out for the approval of the Attorney General of Arizona?

A Yes, sir. And it was given the notoriety in all of the papers and the television and radio broadcast that they had the opportunity for three weeks, Mr. Justice, to register.

It is Arizona's position that there was not adequate basis given for the enactment of the Voting Rights Act of 1970. Arizona was not given an opportunity to be heard and that in this Court's decision in the Morgan case the Court satisfied itself

that pertinent factors were used in that Congressional decision. Here there is nothing before this Court for which it can pursue the basis of which Congress acted as it did in passing the 1970 Act.

Q Mr. Mc Gowan, you say Arizona wasn't heard. Were they prohibited from coming?

A They were not invited, Mr. Justice.

Q Well, you had consented to. So, I mean -- you are not making the point you were denied the right?

A No, no, Your Honor.

Q But you weren't invited.

A That's correct. No hearings were held in Arizona.

Q But you knew the bill was pending?

A Yes, sir.

For what is put forward it appears that Congress merely took cognizance that literacy tests have been used in the past as a tool to deliver invidious discrimination. That has never been the case in Arizona and Arizona has people from all different parts of the country residing there, that have moved there, and as this Court held in the Gaston opinion, that in Footnote 8 when it very carefully said, "We have no occasion to decide whether this act will permit reinstatement with literacy tests in the face of a rush to a disparate literacy achievement for which the government bore no

responsibility.

The Government's brief quotes the Honorable Raymond Knockeye, Chairman of the Navajo Nation, to the effect that the only reason advanced for the numberof -- the high number of illiterates not registered in Arizona, then New Mexico was the effect of Arizona's literacy test, but no other factor substantiates that statement.

Arizona has the great bulk of the Navajo people. They live in rather isolated areas. New Mexico's Indian population is largely situated in Pueblos. That fact does not bear up under --

Q Are they illiterate in the Indian language?

A No, sir; by and large, no, sir.

Q Is that a personal opinion or are there historical records or official documents with reference

A It's a personal opinion, Your Honor.

Q Is it a spoken language only?

A It is a spoken language and it's a written language as of about 50 years ago. The gentleman who comprised the written language passed away about two years ago.

Q Do they have newspapers or --

A In the English language.

Q What about their schools?

A The schools are taught in the English language.

Q In the English language, for how long has that been true? As far back as the schools go?

A Yes, sir; since the Treaty of '67 or '68 when the Federal Government promised them a school teacher for every so many Indian children.

Q Well, there's a gap there, it seems to me needs some explanation. I'm not sure how relevant it is, but if they have had schools for a hundred years what's the explanation for the illiteracy in English? Don't they attend the schools?

A Mr. Chief Justice, by the very nature of the geography of the area the children are taken into towns like Winslow and Phoenix and other places and educated, and some of them have never liked that approach and therefore they have not gone.

Q Widespread truancy?

A Yes, sir.

Q I'm not sure how relevant this is, but it's rather a surprising gap here.

A And it's in the Gaston case, where the footnote is quoted and this Court last June, in the Evers case, in striking down the Ingla [illegible] that the state within the state concept must go. Now, where is that effect?

Yet, we have a case in Arizona that's Warren Trading Post versus Arizona Tax Commission, in 1965 in which this

Court said, "In compliance with its true obligations, the Federal Government has provided for roads, education and other services needed by the Indians." The Court concluded that quote: "Since Federal legislation has left the state with no duties all responsibilities respecting the reservation Indians we cannot believe that Congress intended to leave to the State the privilege of levying the State Privilege Tax."

By the very language of the Warren Trading Post, Arizona was brought with an exception providing Footnote 8 of the Gaston decision. As it was determined in the Warren Trading Post case, Arizona has no responsibility for the literacy or lack of it for a large part of its citizens by virtue of Federal responsibility.

Arizona has always spent a great amount of its funds on education: approximately 70 percent. And, Arizona's constitution is, was enacted in the heydey of direct democracy, if former Chief Justices of this Court and former Presidents had laid Arizona's admission by virtue of the recall of judges we have a very evenly-amended constitution. Five percent of the voters of Arizona may refer to the voters of Arizona any bill passed the legislature. For that reason no bill becomes law for 90 days following the adjournment of the legislature to give any five percent of the people the right to petition for referral to themselves.

By virtue of that fact it's an awkward situation

let so many who cannot read what he has to decide upon, that he has a right to pass upon the constitution or any ordinary statute of the state, because it's easy to refer a measure; no bill becomes a law until 90 days have passed unless two-thirds of the legislature is declared to be an emergency.

It's for this reason that Arizona has always spent a great portion of its taxable wealth on education. Our constitution is amended every two years. We have three or four this year, which is a smaller number than usual. It decided that they may listen to radios and television all right, but as far as candidates, but when it comes to the voting on detailed legislation andthe constitutional amendments it makes it a rather difficult proposition to defend.

Now, we have, in Arizona, a case that says that the right to drive an automobile is a right, not a privilege, but no one has ever said that a person is -- has impaired eyesight should have the right to have that driver's license.

The same way, is illiterates are given the right of the ballot, they won't not only not be able to sufficiently use that, but it will impede the right of someone else who has taken the time to learn to read and write.

Now, if Arizona had ever used this as a testing device to prevent someone from voting that would be one thing; but we have never done that. It was all used to insure that the ballot would be understood and that the great number of

people that we elect and the ease by which we hang our constitution reform as it would not be given the full protection of that process if literates are given the ballot.

Q Mr. McGowan, to what do you attribute is the significance of so few registering pursuant to Mr. Justice Douglas's interim relief order?

A The only conclusion that I could reach is that there was not the demand for it.

Q Do you think this will be carried out in the future if the application of the stoppel d'terre de Arizona is upheld?

A I don't think the percentage would increase, Mr. Justice.

Q Then, why are you concerned about the thing?

A As a matter of if one person is allowed to vote as an illiterate, that puts the whole process in jeopardy.

Q Why do you say that?

A Because, Your Honor, our whole system in Arizona is built upon the people, reserving to themselves legislative processes and if a person has the right equivalent with someone who has learned to read and write, to go in there and make it his vote by blinded voting, then it makes a mockery of our system.

Q What is the Spanish speaking community in Arizona; is it literate in English, largely?

A Largely, Your Honor; yes, sir.

Roughly 21 percent of Arizona has names with Spanish derivatives.

Q If they are literate only in Spanish you don't don't let them vote?

A The Constitution says they just read the Constitution of the United States, or be able to and to write their names.

Q Read the Constitution of the United States --

A In English.

Q In Spanish or in English?

A In English.

Q This is an ordinary thing, this negative response. I suppose it could be related to the communication that was mentioned about the order. Does this mean that this is open for an inference that now the Navajos generally don't have television or don't have radios or what -- would you care to speculate on that at all?

A Well, Your Honor, I think it has to do with the geographical distribution. Some people must come 50 and 60 miles to vote.

Q What is the time limit I advised? I signed that late in August, didn't I?

A The 21st of August, Your Honor, and it was

to expire, though on the 14th of September, so there were three full weeks in which -- our primary was on the 8th.

Q That may explain part of it, the shortness of time.

A But there was much interest by virtue of the fact that the primary was two weeks after you signed it so the consciousness of election was before everyone.

Q Do the Indians still want to retain a state of Indian autonomy in connection with passage of laws and importance of laws?

A Yes, sir, Your Honor. They have 25 percent of Arizona that is under their sole jurisdiction.

Q That's for the election of the people, officers and so on?

A Yes, sir, so they will have their own private government.

Q Might that have anything to do with the conditions which have been asked about?

A Quite possibly, sir.

Q In other words, it's the rejection, perhaps, speculatively, of participation in the affairs outside their own Navajo Nation tribal affairs.

A A lack of interest, Mr. Chief Justice.

I thank you gentlemen.

MR. CHIEF JUSTICE BURGER: Thank you.

Mr. Nelson.

ORAL ARGUMENT BY GARY K. NELSON, ATTORNEY GENERAL OF THE STATE OF ARIZONA

MR. NELSON: Mr. Chief Justice, and may it please the Court: if I might just briefly comment on some of the questions that were just asked concerning the literacy in the Indian Nation and the reasons for not registering in the interim period. I think there are a combination of factors that are exceedingly frightening to me, as chief legal officer of the state, which has a large Indian population.

I think one of the problems is that the Indians, since 1800 have by and large rejected the Federal Government's efforts to bring them into the mainstream of this country's processes, whether it is by language, by government, or any other criteria -- education, if you want to wave and I think this is the reason, in addition to the actual factual matter, but the communications on the reservation are totally inadequate to take information to the Indian Nation. And I don't know what the solution is to it, but they have exactly three jurisdictions that they are concerned with, not any one of which has thorough responsibility over them: the Federal Government, the state in which they are in and their own nation, and it is a pressing problem but I don't think that it is right for them to be able, in a sense, without having any basis in fact or knowledge to legislate in the State of Arizona, and I think they could

particularly in two counties, if they chose to do so.

So, it's a problem with which we are really concerned and we don't purport to offer here, nor would this be the proper forum, all of the answers to this question.

Q Are those two counties a majority of Indians in the population?

A I believe that is correct; yes.

Q Well, what's wrong with them governing themselves, or do you think they are illiterate?

A Nothing, but they don't choose to do so, Mr. Justice Marshall. They have never chosen to do so.

Q Who has given them the opportunity?

A Well, there is no evidence -- there was no evidence before Congress and there is no evidence here as a basis to these admittedly short-term opportunities and affidavits that they cared to do so, that they cared to come in and register and run the two counties, even though they wouldn't admittedly be subject to paying any of county's taxes --

Q Are they free to vote in those counties?

A As far as I know they are, Your Honor.

Q Oh, you take it that the natives don't want to vote?

A I think it's not quite that simply explained, but they haven't shown motivation; certainly that's true.

Q Well, why do you oppose this move to give

the illiterate ones the right to vote?

A We oppose it on the constitutional grounds that we don't think it can be done this way, plus we oppose it on the main grounds, as Mr. McGowan mentioned, concerning the factor that so much of Arizona's legislation, both constitutional and statutory legislation is submitted to the people and if they can't read and understand the language how can they possibly intelligently vote. And then the odds are increased because they vote in a block, like someone suggests they should vote as opposed to making an independent decision, and I just think that's a terrible risk that Arizona has to take.

Q You have provisions in Arizona, I assume, for blind people voting?

A Yes, Your Honor.

Q Well, couldn't somebody read to the Indians who can see but can't read?

A Certainly.

Q Where is the problem?

A I just don't think it would be done; it isn't done.

Q Do they have members of the legislature in the State Senate?

A They finally elected one Member of the House of Representatives, which is the lower body and he served one term; his name was Lloyd House; he was a Navajo and he tried

to run for the Congress and was beaten in a three-way primary.

To the best of my knowledge and I would ask Mr. McGowan to check his records, that's the only Navajo that's been elected. There have been, I believe, some other Indians, Apaches, perhaps, Yavapis, who are either totally Indian or part Indians who have been elected, but I just can't recall. Lloyd House, I know.

Q Do they have districts there the Indians can elect members?

A Oh, yes, I think there are at least two districts in Arizona there, if all the Indians voted, even the one that perhaps are registered, they could elect a representative if they chose to do so.

Now, if I may briefly touch upon which I think is the most critical issue before this Court. I sort of feel a little bit like proving Lincoln's words; I think it's appropriate, although it's a different form than he found himself at Gettysburg.

I think we are really met here today in this particular question of the 18-year-old vote to find out if our country so conceived as ours has, can long endure. And I think that's really the ultimate test that we're faced with when we brush our other cases aside, our decisions, and look simply at the Fourteenth Amendment, even though we may call it abortive, or an anachronism, or whatever we call it. I don't see how we

conceivably sweep it away.

And I think I was very encouraged to hear the Solicitor General mention that we still consider the Electoral College, which I think is a classic example of what most people in most of the states for different reasons and with different degrees of how they would like to change it, totally inapposite to our system today. But, it's still there.

I find myself in the position where personally, I have for years circulated petitions to get the 18-year-old vote question on the Arizona ballot. There is no question in my mind it will happen and that's not the issue. But, it's a very dangerous situation that we find ourselves in because I think historically this is where the governments tend to make the first shortcut that leads to its eventual downfall and that's in an area where everybody sees a need. It's a good thing; it's not an evil thing that we're doing, so why not do it the easy way; why wait as we did for the female suffrage amendment. Why wait for that long, drawn-out, difficult political process of constitutional amendment. Everybody really wants it or the majority of Congress wouldn't have voted it in the first place and the 14th Amendment, we see from the briefs in this case and from the concurring opinion of Judge MacKinnon, the legislative history is not really conclusive and it's never been enforced in its original provision so why not forget it. And I think that would be a tragedy.

I think you can explain all of the parts of the 14th Amendment and I think we must. I think we just construe them all and the fact that it hasn't been enforced I can't see any logical or legal argument that that makes any difference whatsoever.

Now, I concede a very sound argument to be made that Section 5 may give a concurrent remedy other than the remedy of simply reducing a state's representation in Congress. I can see that as an argument, as a logical argument that this Court might adopt in 1970 as opposed to, perhaps, what was in vogue in the 1800s of potentially reducing the representation in the Federal legislation.

But, to say that --

Q You mean to give Congress the power to act a concurrent remedy or an alternative or additional remedy:

A Yes, Your Honor.

But, to say that the words are not there; that the numbers are not there or to say that all it did was really put into the constitution what was the accepted standard in 1865 or '66 the generally accepted minimums is to avoid the question: so what. If, indeed that's what it did and if, indeed, they shouldn't be there today that may be true but we can't change it by Congress.

Yes; excuse me.

Q What you are arguing is that the second

section of the 14th Amendment does -- what do you think it does?

A I think it sets a minimum age for voting at 21 years under which the Federal Government has no authority to enforce any sanctions against the state whatsoever, for disallowing people under the age of 21 to vote. I think it says that very clearly.

Now, granted, perhaps if we had been drafting the 14th Amendment we could have set it better or more straightforwardly but I don't think we can strew away the fact that it says to the states: "States, if you don't allow your people who are 21 old or older to vote, the Federal Government can come in under this amendment and sanction it." Now, I think it has to say, "If you do allow all people under 21 years of age or older to vote, then the Federal Government has no authority to come in and sanction you on that purpose and I just -- well, it's inconceivable to me, quite frankly, that we could come to any other conclusion in spite of the sound constitutional lawyers and judges opinions that are to the contrary.

And, it seems that we wouldn't even be bending the constitution; we'd simply be breaking it, and while it would be for a good purpose and a result that I personally want to see accomplished, I think it would just be the first step and every other step then would be a little easier, even if it were more controversial. And I think this is just the history of how governments finally concede have gone wrong because they

took a step a little outside the law because everybody wanted to do it. And the way to do it within the law was a little cumbersome. We had some problems; we had some oral unrest, perhaps, that's attributable to this, although I think that's an erroneous conclusion and I just would urge this Court to think very, very carefully about ignoring, as Congress said, "That's one check that's gone."

As unfortunately, the President has, even though he stated that he thought it was unconstitutional. That's two strikes and there's only one check left and unquestionably the Congress had the power to do what they did. This Court has the power to sanction it and I don't think either body has the authority.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Attorney General.

Mr. Robson.

ORAL ARGUMENT BY ROBERT M. ROBSON, ATTORNEY GENERAL OF THE STATE OF IDAHO

MR. ROBSON: Mr. Chief Justice, and Gentlemen of the Court: I hate to keep flogging this poor Katzenbach to death but it looks like that's the name of the game all afternoon.

I think that we have heard enough arguments that I can assume that this Court will recognize Congress, at least directly by the Constitution of the United States, has no right

to enfranchise any citizen to vote per se. That Congress can legislate to prevent discrimination under the Equal Protection Clause is not denied and a combination of Article 14, Section 1 and Section 5 certainly has been allowed to be exercised by this Court in a good many areas.

But I think when you look at Section 14 as to the whole you find that really the intent of the enactors of that piece of legislation were attempting to stop discrimination against citizens of the United States in an area where discrimination had been practiced for a hundred years because of race, color and national origin.

They were so unsure about Section 14 in what it did that they enacted Section 15 to make sure that they weren't understood, or they weren't misunderstood.

I think Katzanbach, and I want to point this out because I don't think it's been pointed out in any argument today that Note 14 shows that expressly in the Constitutional Convention of the State of New York there was a great deal of discussion about our national origin. I can't help but believe that this Court was taking a real good look at that when they decided Katzenbach.

Contrary to the argument of the Solicitor General, I do think that there was, in this Court's mind, some invidious discrimination on the basis of race, color and creed or national origin.

Q But, I don't think the Puerto Ricans were around the country when this amendment was passed; am I correct?

A I'm talking about Katzenbach versus Morgan in the case of --

Q Well, when you said the 14th Amendment was restricted, that it only freed slaves.

A I was talking about Katzenbach -- now you've got me confused. I'm not on your wave length.

Q You said that the 14th Amendment was restricted to the newly freed slaves and I submit Puerto Ricans weren't even here at that time. And Katzenbach involved Puerto Ricans.

A I understand that but the New York Constitutional provision that was struck down in Katzenbach, as I understand it, in one of the footnotes in that case there was clearly pointed out -- I think it's on page 645 or 654 -- 654 to be exact, 384 U.S. 654. I think that that footnote indicates that this has been looked at because there's a quote in there directly but of the Constitutional Convention of the State of New York, which showed that they were considering national origin as the source or their limitations.

I just wanted to point that out that this was before this Court and it does have some overtones.

Another thing that I would like to point out to the Court and there has been some discussion of this today but not specifically. There was a specific finding by Congress in the

determination of how they were going to word the section in regard to the 18-year-old vote in which they found in exactly the language of this Court in Katzenbach that it was an invidious discrimination for the states not to allow 18-year-olds of age to vote because of their military service and it was required by them and I would like to point out that this is, I think, a syllogism because certainly more than half of the 18-year-olds in this country are women and are not subject to any Federal service.

The service is required by the Federal Act, not by a state act, so this can't be a state discrimination here. And the fact that of 50 percent of the males who are old enough to be subject to the military service, only about ten percent of them ever served, unless we were in the World War II situation.

I don't believe that just because you are old enough to fight means that you are old enough, necessarily, to vote. All that means is that you are old enough to take orders and you've been old enough to do that since you could understand.

The other side of the coin is that if you are too old fight, as I am now considered to be by my country, then you are too old to vote, and I don't think I'm too old to vote.

I would like to point out another argument that I'd like to make. The rationale and the arguments that

have been proposed here by the Solicitor General are that by a combination of Sections 1 and 5 of the 14th Amendment, Congress can do something indirectly that it can't find in the enumerations of powers that it may do directly.

In other words, by removing a step by coming on with an argument that, because we want to enforce equal protection of the laws and we don't want any discrimination we can come in the back door and do what you could not do directly, I think is a parody on the law and I don't think it's an argument that holds too much water, particularly in a situation where there is no particular discrimination by a state that is really pervasive across-the-board. Where you can show that any particular age group or section of the population is really being discriminated against any more than another.

Here is a group between 18 and 21 that are not allowed to vote. Well, after all, it's common law and this is our heritage; nobody was allowed to vote and everybody was an infant until they were 21 years of age. We have modified this up and down, hither and yon andwe've allowed the state legislatures to do this. But certainly up to this point Congress has never attempted to do so.

If they can do it in this area, in the area of the political arena, then there is no reason why the same kind of argument cannot be carried over into marriage. We have a terrible social problem with the break-up of marriage in this

country. There is no reason why they couldn't move into that area. There is no reason why they couldn't move into driving. We have a terrible highway fatality record in this country. There is no reason why they couldn't move into that area. And there's no reason -- we've got a terrible alcoholic problem in this country; there is no reason why they couldn't move into the alcoholic and the drinking area.

There is no end to it and once you open this door if you, by the premise that's presented here by the Solicitor General in the Government, then the door is open.

It also seems to me in regard to this -- this is the last comment I would like to make in regard to the Katzenbach case -- it seems to me that when Congress made the finding they did that there was an invidious discrimination because the states did not allow 18-year-old persons to vote, that the legislature was, in effect, invading the judicial power of the United States which is invested in this Court.

Now, somebody said that -- I think it was the Solicitor General -- it was easier for Congress to make up its mind about what was an invidious discrimination in this area than it was the nine men on this Court. I don't believe that for one minute because they are not any farther away from the people in Idaho or Arizona or California or Maine or New Jersey than you are and they are not any closer.

As a matter of fact, it's a judicial determination

to shape the size of what is discriminatory then lay down the guidelines; not a legislative one. It has to be determined on facts and it has to be determined on a specific law and the specific instance as applied to some kind of standards and what we're here to find out is this: are we going to let the legislature, the Congress of the United States, set the standard or is this Court going to set the standard?

Now we get down to the arguments of the Solicitor General in regard to the terrible discrimination which my state perpetrates on residents of the State of Idaho.

The Solicitor says that under the Act that was enacted by Congress that we must allow all citizens to vote whether he is domiciled in the state or not on the same basis as those who are domiciled within the state. Obviously this is an impossibility. You have to have different procedures for those residents of the State of Idaho who are not domiciled in the state and who register and vote by absentee ballot than you do those who are going to be able to register with their registrar of elections and go to the polls and vote.

Because, in the first place, gentlemen, you have to use a little Federal help here. You have to use the United States Post Office and in Idaho we get one mail delivery a day. I don't know how you do in the rest of the country, but out there we get one. Now, he was yelling about how do we get the absentee ballot in at noon of election day.

Now, I want to tell you what the problem is. I was Prosecuting Attorney in Idaho County, Idaho, which has 8,700 square miles. That's about one-and-a-half times the State of Massachusetts and in that county there are 12,000 people. And there are 27 voting precincts and when the mail comes in at 10:00 o'clock in the morning and it goes to the County Clerk the Deputy Sheriffs have to get on their horse or their car or whatver it may be and get to those precincts and get those absentee ballots where so that by 8:00 o'clock at night when the polls close they will be there so the election judges can count them.

And if you think you can do that before 4:00 o'clock in the morning on election day you're out of your minds. In that county it can't be done. It's totally impossible and gentlemen, there is a compelling reason for having those votes in at noon. Don't let anybody kid you.

There are 13 towns in my state that have more than 5,000 people in them. We have got 700,000 people scattered over an area that would make most of you ashamed. Twelve-and-a-half people per square mile. And if you don't think that creates some problems: administratively which he shrugs off. That's great. But I think it creates some real problems; some real expenses and some pragmatic issues that the State of Idaho is interested in and quite frankly, with all due respect, I don't think that the Congress of the United States

has got any business monkeying with it because they don't know what they are talking about, as far as we are concerned.

Q Does the record in this case, Mr. Attorney General, show the position Idaho's two representatives in the two houses, took on this problem?

Did they call all of these practical things to the Congress?

A I'm not so sure they did, and I don't have any control of them, Your Honor. I have very little influence with any of them.

Q Why -- do I assume that they voted for this bill?

A I haven't the slightest idea. I think one Senator did and think the other three did not. But I'm not -- don't quote me.

He says that it's a real easy thing to have the Congress come along and say, "Well, you are a citizen of the United States. You just go whever you happen to light on election day." We have a reasonable provision in the Federal law. We have a 60-day residence requirement for President and Vice President. I don't see anything unreasonable about it. We were talking about fixing a line here this morning between 18 and 21: three years, 30 days.

Well, it seems to me that the whole premise that a presidential election is a Federal event is a false premise.

If you have ever watched TV on election night, what you see is how the states are voting and you see these totals come up on the board and everybody is waiting for precinct so and so down-state in lower Illinois to get in. There are seven precincts from Upper Michigan to get in so we'll know what the final vote is. And it's important to the people of the state to know within a reasonable time what their vote is and who their presidential electors are and really it doesn't become a Federal job until they needed the electoral college; then it becomes a Federal event.

Because up to that time who is supervising the election:not Federal officers. Who is paying for it? There isn't any Federal money in there and when they passed this bill, this amend to amend the Voting Rights Act I didn't see them appropriating any money either to cover any increased costs or expenses it might cause the states. And to me that's important because my state has a very low income.

Now, let's talk about fraud for a minute. We have -- we're close to a lot of states and we are locked inthe moun-tains. Now, he says that if these people can come into Idaho and vote in an election absentee if they left Idaho 30 days ago and they couldn't get in the next state, or 15 days ago and they couldn't get in the vote in the next state, so we've got to take them and they write back home and they say, "We're going to vote by absentee ballot." How are we going to check and find

out whether they really did not vote in say, Oklahoma or North Dakota -- most of our kooks go to California to vote -- California. How are we going to check and how are our people going to find out whether there is from them. Where is the Federal Register that we're going to find out whether these people really did it or not?

Don't you think there is some kind of compelling interest here on the part of the state that has to counter-balance to find out whether that man has voted twice or three times or four times? He shrugs it off; it's an easy thing.

I've been a prosecuting attorney, both at the Federal and County level. I know it's not easy. It's tough and it's hard to get the evidence.

This opens it wide open and it's awfully hard for me to accept the illegal theory which says that once a man has decided he isn't going to live in my state any more and he sells his property and he takes his kids out of school and he takes his wife and he leaves to go live someplace else. How can it be once he has served his residency, which is a matter of objective intent, and that's a fundamental principle of law -- once he's objectively said, "I no longer am a resident of the State of Idaho," how can we discriminate against a man that isn't even in our jurisdiction? I want to know.

I cant see how in the world we can be held responsible for them. I can see if Congress passed a law saying

that in the Federal Building at Boise, Idaho, if you happen to be passing through Idaho you can go over there and vote and register and we'll count it and we'll see that it gets in the proper place and it gets on the election board. But I can't see for the life of me how that kind of argument can be used successfully.

There is one final argument I'd like to make in this. It seems to me this argument hasn't been made at all today and no consideration has been given to it. There seems to be a philosophy or a tendency on the part of, not only courts, but Congress and legislators and lawmakers of all kinds to protect the individual to the point where he is totally dependent upon us to protect him from everything.

Now, it doesn't seem to me so great of a burden that a man ought to be able to get, if he is going to leave a state, get down to the county courthouse and get his absentee ballot and vote it before he goes to Timbuctu or he goes to the playground U.S.A. or he flies to Europe or he comes back here walking. It doesn't take very long.

I have a son who is going to school in the State of Oregon. He came home to visit this summer and in half an hour I had him registered and voting before he went back to school and his wife, too. Half an hour.

It didn't take any great effort to protect that boy's right to vote and his wife's right to vote. With a

little planning it seems to me that the individual could pretty well protect himself. And if he wants to take the responsibility for lolligagging all over the United States of America or all over the world, for that matter, and he doesn't want to make any effort to get where he's supposed to be when it comes voting time I can't feel very sorry for him.

It seems to me that there should be, at least an area in here where a state has not invidiously discriminated against an absentee voter because of 30 lousy days.

We amended our constitution some time ago, to fall in line with the trend that was going on and at that time 60 days seemed to be a reasonable period of time. Most of the states since, that he was speaking about this morning, have amended their laws or constitution, since we did. And we keep finding ourselves in the position of trying to come along with the times and then finding out all of a sudden we didn't go far enough because somebody set up the standard another notch.

We find this particularly true all along the line of administrative law. This morning we argued Cipriano and Kramer and I have a great deal of respect for this Court in those decisions but they left an impact on my state and the City of Phoenix, that is hard to imagine because for two years we had no capital investment in our state because we can't sell our bonds and there is not a thing I can do about it until

our own Supreme Court falls in line with this court and if it doesn't do it pretty quick we're two years away again because our legislature won't be able to take care of the problem.

So, when these ripples come out from here they go in all directions and they're very important and it seems to me, gentlemen, Congress should not be allowed to substitute its judgment unless there is a serious, capricious and arbitrary judgment being made by the State Legislatures and I don't think this Court ought to allow Congress under the provisions of Sections 1 and 5 of the 14th Amendment, to rewrite the Constitutions and statutes of 50 states.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Attorney General.

Mr. Solicitor General, you have, I think, 13 minutes left.

REBUTTAL ARGUMENT BY ERWIN N. GRISWOLD,

SOLICITOR GENERAL OF THE UNITED STATES

MR. GRISWOLD: Mr. Chief Justice and may it pleas the Court: first I would like to thank Mr. McGowan for correcting the figures I gave as to the number of persons barred from voting in Arizona and the tiny number who did register under Mr. Justice Douglas's order. I was speaking from memory and I am sorry that I had them somewhat inaccurate.

Q What do you have -- do you care to comment

on the diversity of problems which the states must meet which the Attorney General of Idaho has just commented on?

A They --

Q Even New York may be highly efficient, problems of registration are different from the problems of a mountainous rural state.

A I couldn't follow the discussion, I'm sorry, Mr. Chief Justice, because the statute provides that the ballot must be received by the closing of the polls and there is no obligation on the state to get the ballot there. The obligation is on the voter and on the United States Post Office and the voter ought to be aware that he had better allow plenty of time if his post office is going to have it received by the time the polls are closed.

If the ballot is received by the time the polls are closed I don't see any burden on the state above and beyond that which is presented by the voter who comes in five minutes before the polls are closed and casts his vote.

So, I couldn't follow that particular argument.

Q I was thinking of this particularly, Mr. Solicitor General in the realm of the new voter problems that attend the exchange of mail, for example, to check, if Idaho wants to check on new residents to vote I suppose it's rather a complicated business to find out from the old voting situs whether the man has the right to case an absentee ballot.

A Mr. Chief Justice, there is some problem about following up here. What will happen in some cases, I suppose, will be that there will be a charge of some kind made that this man voted twice. It can then be investigated without great difficulty. It may be somewhat hard in advance to prevent dual voting, although I think this is really a threat, but not a very serious matter. Time may come when we'll have electronic checkups by Social SEcurity numbers and things of that kind, but even in the meantime there are telephones and I have no doubt there are telephones in Idaho which extend to a great many places where it won't be very difficult to get the information.

In this connection I think it is relevant that Arizona is a large, sparsely populated state with very similar problems: mountains and the desert and they chief proponent of much of this legislation was Senator Goldwater from Arizona.

Also I think it was relevant with respect to the argument of Arizona about the literacy requirement although Senator Goldwater was primarily interested in the residency aspects, he took an active part in all of the discussion and he at no time opposed the regulative legislation with respect to literacy on the ground that it would present special problems in Arizona.

Moreover, the suggestion on behalf of Arizona which the problem with respect to literacy in Arizona was due to the

default of the United States in not providing an adequate education for these Indians and if that is true and I have no doubt that it is a substantial measure of responsibility there, that surely the United States ought to be able to take the steps to remedy its own default.

With respect to the problem of people who moved into the State of Arizona who had been discriminated against in their education in other states, this was specifically pointed out by the Attorney General in his testimony, both in the House and in the Senate, and the Gaston County case was expressly relied upon by him and by others and it was never effectively countered. The -- in the Senate there was never any committee report; there was a problem getting it out of the Judiciary Committee and it was taken out by another legislative department but ten members, constituting a majority of the Senate Judiciary Committee, and this is printed on page 40 of our brief, issued a joint statement which it seems to me under all circumstances, can be treated as the equivalent of a committee report, in which they said that this extension of the suspension of tests to areas not covered by the 1955 Act and incidentally, I think it is not irrelevant that this statute does not invalidate, does not nullify state literacy tests; it suspends them for five years.

They said that this extension of the suspension 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 there is nothing there about who is responsible for it; where it happened. We are going to make them be good because they were bad in the past. It simply is a current fact that a large proportion of the persons who are now illiterate for one reason or another are of minority groups and of the poor and thus the literacy requirement as a specific impact them and too, the joint statement continued "because of an insufficient relationship between literacy and the responsible interested voting to justify such a broad restriction of the franchise."

Now, that committee and the Congress proceeded to view the problem as a national problem and to legislate on a national basis, what the specific fact is in a particular case, whether in one state is another serious problem than in another is not important.

The objective that Congress had in mind and could appropriately have in mind, we believe under Section 5 of the 14th Amendment is to eliminate denials of the Equal Protection Laws anywhere in the United States, large or small.

In the last analysis, it seems to me that these three problems: voting age, literacy and residence aren't that very similar. I would not necessarily say that they must stand or fall together. There are different arguments which can be made with respect to one of them. The voting age, I

believe, stands only on Section 5 of the 14th Amendment, whereas Section 2 of the 15th Amendment and other provisions can be brought in in addition, with respect to the others.

But these are, in our view, matters which lie within the judgment of Congress pursuant to its powers to enforce these several provisions of the Constitution. Suggestions have been made that Congress might go to extremes. If Congress goes to extremes, that will be another case and it can be dealt with whenthis Court is still sitting.

But in this case, in our view, Congress has not gone to an extreme. What Congress has done is an appropriate action within the concept of the necessary and proper clause that was established by Chief Justice Marshall 150 years ago and should be sustained by this Court.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Solicitor General.

Thank you gentlemen. The case is submitted.

(Whereupon, the above-entitled matter was concluded)

=