RG 453 Correspondence + Memoranda Relating to Voting Rights, March - April 1915

STAFF MEMORANDUM

Examples of Methods Used to Deny Minorities their Voting Rights

U.S. Commission on Civil Rights
March 1975

Dr. Arthur S. Flemming, Chairman of the U.S. Commission on Civil Rights, in his testimony of February 25, 1975 before the Subcommittee on Civil Rights and Constitutional Rights of the Committee on the Judiciary of the House of Representatives noted that minority voters continue to encounter barriers to the full exercise of their voting rights in jurisdictions covered by the Voting Rights Act. On pages 15 and 16 of that statement he summarized how these rights are denied at every stage of the political process. This memorandum lists, under each of the 19 summary areas he cited, cases taken from the Commission report, The Voting Rights Act: Ten Years After, published in January 1975. Page references are to the text of that report.

Included among examples that follow are materials which may tend to defame, degrade, or incriminate individuals. The Commission, in accordance with its statute, rules, and regulations, afforded these individuals an opportunity to reply in writing to such material. The responses are included in Appendix 7 of the published report.

(1) "burdensome, inadequate and inconvenient registration procedures"

Minority persons reported various kinds of registration hindrances including problems of time and location. For example:

a) In Charleston County, South Carolina, which is over 100 miles long and 20 miles wide, most registration is conducted in Charleston, the county seat. Although mobile units have been sent into rural areas, it is alleged that despite requests they have not been sent to areas where blacks are concentrated. (p. 75)

b) Registration personnel in one Alabama County have not posted notice of their schedules for precinct visits. The only way blacks are informed of the time and place of such registration is through notices sent out by the NAACP and other black organizations. (p. 76)

c) Although hours of registration are prescribed by law, a Commission interviewer in one Alabama county was told that the registrar's office literally followed no set hours. The office reportedly opens late and closes early, especially when a number of blacks come in to register. (pp. 72-73)

d) Blacks in Bertie County, North Carolina, reported that they were not informed of the need to register separately for municipal and county elections. (p. 77-78)

(2) "hostile and uncooperative registration officials"

In a number of jurisdictions visited by the Commission staff the registrar was a white unsympathetic with minority persons' desire to register. The registrars in Madison Parish, Louisiana, and Humphreys County, Mississippi, have been characterized by county residents as particularly hostile. The Madison Parish registrar is said to be incompetent and uncooperative. In addition to charges that the registrar closes the office when it is supposed to be open, she allegedly harasses black registrants, particularly about identification. In Humphreys County, Mississippi, the registrar reportedly has steadfastly opposed the black franchise. Among charges made against him is that he behaves in such an arrogant manner that registrants "are thoroughly denigrated, embarrassed and intimidated." (pp. 79-82)

(3) "election officials fail to find their /minority voters/ names on polling lists"

Failure to find voters' names on polling lists was a frequent problem in the areas visited. Although verification of voter registration can often be obtained by a trip to the courthouse, the impact of this tactic is to frustrate minority voters and turn them against participation in the political process.

In Wilcox County, Alabama, the names of numerous blacks were left off voting lists provided to election officials during the 1972 general election. These individuals were not permitted to cast challenge ballots.

(p. 100) In Oktibbeha County, Mississippi, many blacks have been required to make time-consuming trips to the courthouse to verify their registration because election officials claimed they could not find black voters' names on the lists. (p. 99) A Mexican American voter in Monterey County, California, whose name was not posted on the polling list was told that he could not vote in the 1974 general election because he had registered too late. In actuality, he had registered two days before the books closed. (p. 103)

(4) "failure to inform voters of the right to cast challenge ballots"

Minority voters are also seldom told of their right to cast a challenge ballot or are not given the opportunity to exercise that right until their eligibility to vote can be verified. During the 1973 municipal election in Starkville, Mississippi, "Election officials refused to allow a woman to cast a challenge ballot when she came to vote about 20 minutes before the polls closed. They claimed that her name was not on the list, and it was impossible for her to verify her registration before the polls closed." (p. 99) Two blacks in Moss Point, Mississippi, were not allowed to vote in the municipal election because election officials could not locate their names on the voting list. The precinct manager refused to allow them to cast challenge ballots. (p. 100)

(5) "failure to provide adequate polling facilities"

Minority voters are often required to use inadequate, overcrowded voting facilities which may deter them from returning to the polls for future elections. In Apache and Coconino Counties, Arizona, a serious shortage of polling places on the Navajo Reservation caused hardships and curtailed the vote in the 1972 general election. (pp. 109-111) One Tucson, Arizona polling place in the 1974 general election was so crowded that the line of Mexican Americans waiting to vote was so close to the voting booths that they could observe the choices of persons voting. (p. 111)

(6) "failure to inform voters of changes in polling places"

Minority voters in several jurisdictions including Southampton County, Virginia, and Monterey County, California, reported that they are not informed by election officials of changes in their polling places. In the Southampton County general election in 1972 black voters were not informed that their polling place had been changed. When they went to the old polling place they were turned away. Many were also turned away from the new polling place. In this election a black candidate lost by 16 votes. (pp. 102-103)

In the 1974 general election in Soledad, California, the polling place was moved from its previous site; however, no signs were posted indicating its new location. (p. 109)

(7) "failure to inform minority candidates of the legal requirements for candidacy"

Politically active blacks in covered jurisdictions reported instances of difficulty in finding out how to qualify as candidates. One prospective candidate in Humphreys County, Mississippi, was unable to obtain information on candidacy from either the county circuit clerk or the chairman of the election commission. "Another prospective candidate in the same county got the necessary information only with the help of an attorney with the Lawyers' Committee on Civil Rights Under Law in Jackson." (p. 138)

A probate judge in an Alabama county gave inaccurate information to a black candidate who wished to run against him by telling him that the filing fee was higher than it actually was. (p. 139)

(8) "location of polling places in white-owned stores, homes, or clubs where minorities are usually not welcomed"

A district court in Mississippi found that the location of a polling place in the all-white VFW Club inhibited black voters in the free exercise of the ballot. (p. 105) "In the 1971 election in Humphreys County, Mississippi, one polling place was in the same building as the white candidate's office. (p. 105)

(9) "residency and purging requirements applied unequally to minority and white registrants"

Such tactics as discriminatory purges and unfair uses of residency requirements remove from voting rolls the names of large numbers of minority voters. Discriminatory purging, among other irregularities, led a Federal court to set aside the April 1970 Democratic primary in Tallulah, Madison Parish, Louisiana. According to the court, the registrar failed to provide adequate notification of the purge and reinstatement procedures to 141 persons purged for nonvoting. All but 11 of them were black. The purge was conducted during the 30-day period in which the books were closed and deprived the voters of a full 10-day period for reinstatement. Although the registrar extended the reinstatement period for 4 days, she failed to inform the public or the purged voters of that fact. (pp. 87-89)

Another discriminatory purge occurred in a small Georgia town after blacks won three of five city council seats in 1971. In litigation concerning this purge, it was alleged that a committee that had no criteria other than personal opinion purged the rolls of non-residents of the town. It was further alleged that the purge "was instituted for the purpose of removing black voters from the list of electors in order to insure that black candidates for office would be defeated in the December 5, 1973 general election." They were. (pp. 89-90)

(10) "failure to provide bilingual election materials"

Language minority voters often have their voting rights limited because election materials are almost uniformly printed in English. Navajo voters in Apache County, Arizona, have expressed concern about the lack of voting materials in their native languages and have suggested that cassette recordings of instructions and propositions be placed at the polls. To date, Apache County has not made any provision for making such translation available. (p. 121)

There is a lack of sufficient or adequate materials in Spanish in all covered jurisdictions where there are numbers of Spanish-speaking voters. Although there is a court order requiring translation of the ballot into Spanish in New York City, the translation for the September 10, 1974 primary was so inadequate it created "confusion and disillusionment" among Puerto Ricans. (pp. 119-120)

In Pima County, Arizona, the only official effort to provide election materials in Spanish was the translation of a small section of the sample ballot mailed to each voter listing three recent changes in election law. Neither the section on the use of the voting machine nor the propositions were translated. (pp. 120-121)

(11) "failure to provide adequate assistance at the polls for illiterates and non-English-speaking voters"

Although most State statutes provide that assistance be given to voters requiring it, such assistance is sometimes neither available nor adequate. Two illiterate voters requested assistance in Macon County, Georgia, in the September 1974 primary. The poll worker told the first illiterate to help the second after he had finished voting. (p. 124)

In Madison Parish, Louisiana, and Surry County, Virginia, poll workers reportedly do not assist black illiterate voters in hopes that they will make disqualifying mistakes on their ballots. (p. 123)

Since many Navajos neither speak or read English, they require assistance in the use of voting machines and in the translation of propositions on the ballot. In the November 1974 general election at the Tuba City precinct on the Navajo Reservation, there were 13 voting booths and only one interpreter. Unavailability of assistance and the 3-hour wait caused many people to leave without voting. (p. 117)

(12) "questionable increase in the number of absentee ballots cast for white candidates"

Absentee ballot problems were reported in many jurisdictions. They included both the casting of an inordinately large number of absentee votes for white candidates and its corollary, the denial of absentee

ballots to black voters. The 1972 municipal election in Fort Valley, Georgia saw the defeat of three black candidates by whites in a runoff on the strength of absentee votes. The election was subsequently overturned because absentee ballots had been issued to non-residents. (p. 127)

The general election in Wilcox County, Alabama, in 1972 was decided by absentee ballots. The white candidate received 178 of 180 absentee votes. The black candidate would have won by more than 100 votes but for the absentee ballots. Subsequent investigation showed that blacks had great difficulty obtaining absentee ballots. (p. 128)

(13) "failure of voting machines in minority precincts to record votes"

Inaccurate counting of votes from black precincts is often a problem when paper ballots are used but, as found in Brown v. Post, a Madison Parish, Louisiana, case, it can also occur with voting machines. (p. 88) The report cites an example of discriminatory vote counting from Noxubee County, Mississippi as reported by a poll watcher:

> When a ballot cast for a black was examined, white vote counters would often remark, "Here's another one of these." Many ballots cast for black candidates were disqualified because the checkmark was on the boundaries of the parenthesis or box next to the candidate's name. Ballots cast for white candidates were much less frequently disqualified for similar technicalities. (p. 154)

(14) "threats or acts of economic or even physical reprisal for political activity"

Although incidents of actual violence occur much less frequently than ten years ago, a black "key campaign worker" was murdered in August 1970 in West Point, Mississippi. The victim, a supporter of the black mayoral candidate, was shot five times as he sat in a campaign van. A white man disarmed at the scene was acquitted by an all-white jury. (p. 175)

In February 1974 an assault and subsequent altercation between the registrar and a prospective registrant and her husband occurred in Madison Parish, Louisiana. (pp. 183-184)

A candidate for a State house seat in South Carolina charged that economic pressure from her opponent contributed to her defeat. The opponent, whose family owned the gas company patronized by 75 percent of the district's voters, reportedly threatened to cut off service to black voters who opposed him in the 1974 primary runoff. (p. 199)

(15) "election officials refuse to permit campaign workers for minority candidates access to voters near the polls"

Minority candidates and campaign workers frequently reported that electioneering distance limits from the polls were enforced more stringently against them than against their white opponents. In Stewart County, Georgia, for instance, a "check-off worker" for a black school board candidate in the August 1974 primary was not allowed to sit outside

a polling place checking off the names of persons who entered to vote. In addition, the white opponent was allowed to enter the polling place frequently during the day to check the new voting machines while the black candidate was not. (p. 148)

A second such incident occurred in a Louisiana town where a polling place official, who happened to be the relative of one of the white candidates, vigorously enforced the 300-foot rule. The one black candidate sat most of the day behind a post on a porch across the street from the poll. She was prevented from communicating with her poll watchers unless they came out to see her. The official, however, was observed to have frequent conferences with his relative throughout the day. (p. 147)

(16) "refusal to permit effective pollwatching for minority candidates"

Minority candidates in several jurisdictions reported that their poll watchers were sometimes refused admission to polls or impeded in the performance of their duties once inside the polling place. One example of an attempt to exclude a poll watcher for a black candidate from a polling place altogether comes from a special election in 1974 in Adams County, Mississippi. The white poll manager of one polling place would not let in the poll watcher for the black candidate for county supervisor until after 10:00 a.m., 3 hours after the polls opened. (pp. 149-150)

"A black who was defeated in a race for county board of supervisors in Virginia in 1972 reported that his watcher at the election was not permitted behind the tables where the voter's names were checked off. He was thus unable to verify that the persons who voted were actually on the voters' list. He could only observe who went in and out of the voting booth. He was also not allowed to observe the counting of the ballots." (pp. 151-152)

(17) "refusal to seat successful minority candidates"

Minority persons in several jurisdictions reported that defeated whites and their supporters sometimes went to great lengths to make assuming office difficult for minority candidates who managed to win elections. In one case a Navajo who was elected to the three-member county board of supervisors in Apache County, Arizona, with a clear majority was denied his seat. He was unable to assume office until the State Supreme Court ruled for him in a lawsuit. The defeated candidate argued that because the Navajo winner was immune from civil process while on the Navajo Reservation and because he did not own any taxable property he could not be seated. (p. 166)

On two occasions defeated whites in Bolton, Mississippi challenged the results of municipal elections either in court or before the Bolton Democratic Executive Committee. (pp. 166-167)

(18) "racial gerrymandering"

There are numerous examples of racial gerrymandering in the nine States covered by the 1975 Report. The following two should give an idea of the nature of the problem:

The 1971 districting plan for the Arizona State legislature created 30 single-member senate districts, each of which served as a two-member house district. As originally introduced in the legislature the plan placed the Navajo reservation entirely within a single legislative district. "Thereafter, and at the insistance of an incumbent House member who resides in the district as proposed, the bill was so amended that the reservation was divided among three legislative districts.

The court found that the division of the reservation 'was made in order to destroy the possibility that the Navajos, if kept within a single legislative district might be successful in electing one or more of their own choice to the legislature.' The court adopted a revision of the plan which restored the reservation to a single district." (pp. 246-247)

Louisiana adopted a new legislative districting plan in 1971 which was objected to by the Attorney General. "The plan placed as many blacks as possible into--and, indeed, overpopulated--the district of the State's only black legislator to prevent the formation of another majority black district. It split up three majority black rural parishes that together could have formed a house district that was majority black. It used

multi-member districts to dilute the political effectiveness of concentrations of black population, and it also submerged black voters by creating noncontinguous districts." (pp. 234-235)

(19) "imposition of voting rules such as at-large elections and anti-single-shot laws that minimize if not eliminate the chance for minority political success"

Discriminatory rules of some type have been applied in all the jurisdictions discussed in the report. The following examples give some indication of the impact of such rules:

In 1962 the Mississippi legislature adopted a law requiring at-large voting. Because of the renewed black interest in voting and because of the continuing shift of the black population in Mississippi from farm to city, there was concern that wards in many cities would become predominantly black and that these blacks would be able to elect their own aldermen. Therefore the bill's sponsor argued that the change was needed in order 'to maintain our southern way of life.'

"The effect of the law is as clear as its purpose. In the 1973 municipal elections, considering those of the affected cities whose populations are less than 2/3 black, only 2/3 of 1 percent of the aldermen elected were black in a State that is 37 percent black." There is now pending a statewide class suit challenging the at-large voting system of

nine Mississippi cities. Its outcome will affect at least 29 cities and possibly as many as 200.

A suit has been filed challenging the at-large method of election in Birmingham, Alabama. "While Birmingham is 42 percent black, only two of the nine council members, or 22 percent, are black. The use of numbered posts was eliminated by the Justice Department in 1971, but an anti-single-shot requirement continues to reduce the effectiveness of the black vote. In the 1971 election 16,000 ballots were voided because fewer candidates were voted for than there were positions available on the city council. Some 97 percent of the voided ballots were from black areas, a Commission staff member was told." (pp. 317-318)

ASSISTANT ATTORNEY GENERAL

Department of Justice
Washington, D.C. 20530

MAR 20 1975

Honorable Don Edwards
Chairman, Subcommittee on Civil Rights
and Constitutional Rights
Committee on the Judiciary
U. S. House of Representatives
Washington, D. C. 20515

Dear Mr. Chairman:

This is in reply to your letter of March 7, 1975, in which you requested that I provide you with a draft amendment to the Voting Rights Act of 1965 which would address the voting problems of language minorities. Because of the great interest which the Subcommittee and others have shown in this subject, and because we would have the responsibility of enforcing any new voting rights legislation which may be enacted, I am pleased to assist in drafting such an amendment. As indicated in my testimony, we have not completed our review of the extent of the need for such an amendment and I can make no representations of support on behalf of the Administration at this time. I am enclosing draft amendments to the Voting Rights Act with this letter. I am also enclosing a Section-by-Section analysis of the draft amendments and a list of those jurisdictions which we believe might be covered by Section 4 of the Act by operation of the amendments.

In drafting these amendments we attempted to define the class of protected persons in such a way as to avoid any conflict with the limitations of the Fifteenth Amendment. At the same time we chose to conform these amendments, where possible, to the format of the Voting Rights Act. In order to ensure that provisions dealing with the expansion of the coverage of the Voting Rights Act are severable from any provisions to extend the Voting Rights Act, we have included the two sets of amendments in one Bill under separate titles. The inclusion of a

severability clause also demonstrates the intent of Congress that the provisions be separable. However, I think that the likelihood of a successful challenge to the constitutionality of these amendments has been minimized by the choice of definition of the protected class.

The list of jurisdictions which might be covered by these suggested amendments (which is attached to the Section-by-Section analysis) is tentative for two reasons. First, precise data on voting age population by county is not presently readily available to us for such groups as American Indians, Eskimos, and Asian Americans. Second, it is not possible to determine definitely at this point, which of the jurisdictions which have a greater than 5 percent protected class population and less than 50 percent voter participation also held English-only elections in 1972 as defined by the amendments. It is likely, however, that the attached list represents the outer limits of the jurisdictions which might be covered by Section 4.

I hope that the suggested amendments I have provided to you will be of assistance to the Subcommittee.

Sincerely,

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SECTION BY SECTION ANALYSIS OF AMENDMENTS
TO THE VOTING RIGHTS ACT

I. TITLE I.

Sec. 101 & 102. Extends the temporary provisions of the Act for an additional five years.

II. TITLE II.

A. Explanation

Sec. 201. Amends Section 4(a) of the Act. Subsection (a) is amended to provide for the suspension of tests and devices in those jurisdictions which are brought within coverage of Section 4 by operation of the amendments to subsections (b) and (c).

The "bail-out" provision of subsection (a) is amended to allow jurisdictions brought under the Act for the first time as a result of the amendments to subsections (b) and (c) to be exempted from coverage of Section 4 if they can establish before a three judge district court that the test or device was not used for the purpose or with the effect of denying the right to vote on account of race or color during the five years preceding the filing of the "bail-out" action. This provision tracks the original bail-out provision of the 1965 Act, in which jurisdictions

were required to show evidence of non-discrimination in the use of tests for the preceding five years.

The proposed amendment to the third paragraph of Section 4(a) would permit the Attorney General to consent to a declaratory judgment in an action brought under the first paragraph of Section 4(a) by a jurisdiction covered by Section 4 by operation of these amendments.

Sec. 202. Subsection (b) is amended to bring within the coverage of subsection (a) any jurisdiction which maintained a test or device, as defined in subsection (c), on November 1, 1972, and with respect to which the Director of the Census determined that less than 50 percent of the persons of voting age in the jurisdiction were registered on November 1, 1972, or less than 50 percent of the persons of voting age in the jurisdiction voted in the Presidential election of 1972. This amendment is modeled upon the first two sentences of subsection (b).

The proposed amendment to the second paragraph of subsection (b) extends the non-reviewability of the determinations made by the Attorney General and the

Director of the Census under this subsection, but excludes from this provision the specific provision for reviewability contained in subsection 4(c).

Sec. 203. Subsection (c) is amended to add a new definition of the phrase "test or device." A jurisdiction may be determined to employ a test or device if:

(1) More than 5 percent of the persons of voting age residing in the jurisdiction are determined by the Director of the Census to be members of a single minority race or color the native language of which is other than English; and

(2) The jurisdiction in the Presidential election of 1972 provided any ballots, voting or registration notices, registration forms, or voting or registration instructions to voters printed only in the English language without providing printed translations of such voting and registration materials in the native language of the protected race or color group as defined in this subsection (i.e. which represents more than 5 percent of the voting age population of the jurisdiction).

The amendment provides however, that if a jurisdiction provided all of the enumerated election and registration materials bilingually, except ballots, the jurisdiction would not be deemed to have employed a test or device if it provided sample ballots bilingually and allowed voters to use them while they voted.

The third paragraph of subsection (c) provides that the Director of the Census shall determine which jurisdictions contain the requisite minority populations, as required by this subsection, and also had less than 50 percent voter participation in 1972, as required by subsection (b), within 60 days of enactment of this Act, and that this determination is effective upon publication in the Federal Register and is not subject to review in any court.

The proposed fourth paragraph of subsection (c) provides that the Attorney General shall notify the chief legal officer of any State or political subdivision which might be covered by Section 4 because of the determinations of the Director of the Census. This provision places the burden upon these States and political subdivisions to demonstrate that they did not conduct English-only elections

in 1972. If the Attorney General does not receive sufficient evidence that the State or subdivision has not held English-only elections within a specified time, then he shall certify that the jurisdiction used a test or device as defined by the second paragraph of the subsection. The subsection further provides that the determination of the Attorney General shall be effective upon publication in the Federal Register, and that it shall be reviewable by a three judge court of the District Court for the District of Columbia.

Sec. 204. Subsection (d) is amended to provide that a jurisdiction which is covered by Section 4 by operation of these amendments may demonstrate that it does not use a test or device if it demonstrates that the illiteracy rate in English among voting age members of the class of persons protected by these amendments is equal to or less than the nationwide illiteracy rate for all persons of voting age. Illiteracy is defined for purposes of this subsection as failure to complete 5 grades of schooling.

Sec. 205. Section 5 is amended to make jurisdictions covered by Section 4 because of the amendments to that Section subject to the preclearance requirements of Section 5.

Sec. 206. Section 19, the severability clause, is amended to demonstrate Congress' intent that the provisions of the amended statute are severable.

B. Discussion

The amendments to Section 4 are in most respects modeled upon present provisions of the Section.

The proposed amendments to Section 4 provide a triggering mechanism which would bring jurisdictions within the coverage of Section 4 if: (1) there are large concentrations of persons who are members of a single minority race or color the native language of which is other than English. This classification would include persons of Spanish heritage, Asian-Americans, American Indians, and Eskimos; (2) certain election and registration materials were printed only in English in 1972; and (3) less than 50 percent of persons of voting age voted in 1972. A list of those jurisdictions which would appear to meet the first and third requirements, based on the information presently available, is attached. It is not possible at this time to determine with any degree of certainty which of these jurisdictions would also meet the second requirement.

The Director of the Census would be required to determine which jurisdictions had large concentrations of such racial and language minorities, based on the 1970 decennial census. In determining which jurisdictions had the requisite concentration of persons of Spanish heritage, the Director of the Census should use the "Spanish heritage" identifier. This identifier is a compilation of three identifiers used in three different areas of the United States. It includes persons of Puerto Rican birth or parentage in New York, New Jersey, and Pennsylvania; persons of Spanish language or Spanish surname in Texas, Arizona, California, Colorado, and New Mexico; and persons of Spanish language in the other 42 states and the District of Columbia. Although use of this identifier will result in some undercounting and some overcounting, depending on the specific identifier and the location, it is preferable to the "Spanish origin" or "Spanish mother tongue" identifiers.

Virtually all of the jurisdictions that would be covered under Section 4 by operation of this trigger would be ones with large concentrations of persons of Spanish heritage. It appears that a few jurisdictions with large

American Indian or Eskimo populations would be covered, but that no jurisdictions with large Asian-American populations would be brought under Section 4 (because of the 50 percent voter participation requirement).

The proposed amendments allow for review only of the Attorney General's determination that a jurisdiction had held an English-only election as defined in subsection (c). Review is deemed appropriate in this case because of the rather complicated factual finding which is required.

Section 4(d) has been amended to allow covered jurisdictions the option of proving that in fact the vast proportion of persons protected by the new amendments are not illiterate in English. This provision would provide covered jurisdictions with an incentive to educate persons in the protected class. The provision is also advisable because, as the rationale for coverage is that persons illiterate in English are subject to serious forms of voting discrimination, if these persons are in fact literate in English the justification for coverage is substantially diminished.

The phrase "members of any single race or color the native language of which is other than English" is used in order to limit the classes of persons protected by the Section to those who are both members of a racial minority group and who have language barriers to effective voting. Limiting the class in this way avoids the following problems:

1) Sections 4 and 5 are geared to discrimination on account of "race or color." The proposed definition of the protected class would not include language minorities which are not also racial minorities (e.g., French-Americans).

2) There is little, if any, evidence presently available that language minorities such as French-Americans have suffered from the kind or quantity of discrimination that racial minorities have experienced. Thus, they are not appropriately includible within the protected class.

3) The proposed definition of the protected class would not run afoul of the limitations of the Fifteenth Amendment which forbids voting discrimination only on account of "race or color." However, enactment

of these amendments under the authority of the Fourteenth Amendment as well as the Fifteenth Amendment would further strengthen the constitutional basis for the Act.)

The proposed amendments to Section 4 use the 1972 Presidential election as the triggering year. This is consistent with the trigger in the original Act and with the 1970 amendments. It is also most likely to result in coverage of those jurisdictions which in fact should presently be covered by Section 4.

The new provisions of Section 4 are limited to a five year time period, rather than the proposed fifteen year ban. This is consistent with the operation of the Act as originally passed, which initially covered jurisdictions for a five year period.

The proposed amendments would not exempt jurisdictions which provided <u>oral</u> translations of voting materials from coverage under Section 4. The provisions of translators is subject to abuse, harassment, and fraud. The alternative-provision of written translations-therefore appears to be a better alternative.

The severability clause is of particular importance in this bill because it should be the demonstrable intent of Congress that the extension of the Voting Rights Act of 1965 not be impaired by a challenge to the constitutionality of the provisions of this bill which would expand the coverage of the Act. Similarly it should be demonstrable that it is the intent of Congress that valid portions of the Amendment expanding coverage of the Voting Rights Act are separable from any portions which might be held unconstitutional.

The fundamental determination in weighing the separability of valid and invalid sections of an act rests on the intent of Congress. The inclusion of a severability clause in an act creates a presumption of severability to which the courts will give great weight. Therefore the bill should specifically state Congress' intent that the provisions of this Act as amended are separable.

III. TITLE III

A. Explanation

Sec. 301. Amends the Voting Rights Act by adding a new section. Subsection (a) would ban the use of English -

only election and registration materials, as defined in subsection (a) prior to 1980 in all jurisdictions where the Director of the Census determined that more than 5 percent of the voting age population were members of any single group whose mother tongue is other than English. Subsection (b) makes the determination of the Director of the Census effective upon publication in the Federal Register and not reviewable in any court. Subsection (c) requires jurisdictions covered by subsection (a) to provide the enumerated written election and registration materials in the language of the class of persons protected by subsection (a).

SEC. 302. Amends Section 203 to allow the Attorney General to enforce Section 206.

B. Discussion

Section 206 would encompass jurisdictions with substantial proportions of persons whose mother tongue is Spanish, French, German, etc. There is evidence that although groups, such as French-Americans, do not suffer from pervasive voting discrimination, they do register and

vote in fewer numbers than their English-speaking neighbors. Therefore this Section would provide some amount of assistance to these groups, with a minimum of federal intrusion into state affairs, without setting into operation all of the stringent requirements of other Sections of the Voting Rights Act. Such a provision is a constitutional exercise of Congress' Fourteenth and Fifteenth Amendment powers. Data on the jurisdictions which would be covered by this Section 206 are not presently readily available.

JURISDICTIONS IN WHICH MORE THAN 5 PERCENT OF THE POPULATION ARE MEMBERS OF ANY SINGLE MINORITY RACE OR COLOR, THE NATIVE LANGUAGE OF WHICH IS OTHER THAN ENGLISH, AND WHICH HAD LESS THAN 50 PERCENT VOTER PARTICIPATION IN 1972

I. Spanish Heritage

	Voter Turnout 1972 (%)	Span-Her/VAP 1970
ARIZONA		
*Apache	36.7	6.9
*Cochise	41.6	27.9
*Coconino	49.3	12.4
Maricopa	49.5	11.6
*Mohave	47.2	5.4
*Navajo	41.5	10.4
*Pima	48.5	19.5
*Pinal	37.8	31.4
*Santa Cruz	43.7	70.4
*Yuma	37.0	22.2
CALIFORNIA		
Kings	43.7	21.5
Merced	47.4	20.5

*Districts already covered by VRA.

	Voter Turnout 1972 (%)	Span-Her/VAP 1970
*Monterey	48.2	18.0
Solano	49.1	9.5
Tulare	48.4	20.9
Yuba	43.3	6.7
COLORADO		
El Paso	44.9	7.2
FLORIDA		
Collier	47.5	6.5
Dade	45.0	22.6
Hardee	39.7	9.2
Hendry	43.3	6.9
Hillsborough	42.6	10.9
Monroe	46.0	14.3
NEW MEXICO		
Curry	41.9	14.3
McKinley	42.8	19.9
Otero	42.7	20.9

* Districts already covered by VRA.

	Voter Turnout 1972 (%)	Span-Her/VAP 1970
NEW YORK		
*Bronx	43.7	17.5
*Kings	43.3	7.8
*New York	46.2	9.1
TEXAS - STATEWIDE		
248 Counties **/	46.9	16.4 **/

II. American Indian

STATE & COUNTY	% OF POPULATION ***/	% TURNOUT
NEW MEXICO		
1. McKinley County	62.0	42.8
OKLAHOMA		
1. Choctaw County	6.0	47.6
2. McCurtain County	8.7	42.7

* Districts already covered by VRA.

**/ % total population.

**/ Of the 248 counties in Texas, 132 have a Spanish heritage voting age population (VAP) in excess of 5% of the total VAP. Of these counties, 104 had a voter turnout in 1972 which was less than 50% of the total VAP.

***/ Total population figures used rather than voting age population figures.

STATE & COUNTY	% OF POPULATION */	% TURNOUT
SOUTH DAKOTA		
1. Shannon County	86.2	35.3
2. Todd County	69.0	47.9
UTAH		
1. San Juan County	24.0	48.0
STATE OF ALASKA **/	5.4 (Indian) 11.9 (Other)	48.2

*/ Total population figures used rather than voting age population figures.

**/ Voting age population figures are not presently available for American Indians and members of other races in Alaska. The American Indian voting age population may be less than the requisite 5 percent. However, the Eskimo voting age population of Alaska (classified by the Bureau of the Census as an "other" race) is likely to be over 5 percent.

Sources: U.S. Department of Commerce, Bureau of the Census Census of Population: 1970 - General Population Characteristics; Final Report PC(1)-B, Tables 34 and 35.

U.S. Department of Commerce, Bureau of the Census, Preliminary Study - States with Less than 50% Voting in Presidential Election of November 1972.

DRAFT

DOJ 3-20

A BILL

To extend the Voting Rights Act of 1965 to protect the right to vote under the provisions of the fourteenth and fifteenth amendments, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Voting Rights Act Amendment of 1975."

TITLE I

SEC. 101. Section 4(a) of the Voting Rights Act of 1965 (79 Stat. 438; 42 U.S.C. 1973b(a)), as amended by the Voting Rights Act Amendments of 1970 (84 Stat. 315), is further amended by striking the words "ten years" wherever they appear in the first and third paragraphs and by substituting the words "fifteen years".

SEC. 102. Section 201(a) of the Voting Rights Act of 1965 (42 U.S.C. 1973aa(a)), as added by the Voting Rights Act Amendments of 1970 (84 Stat. 315), is amended by striking "August 6, 1975" and substituting "August 6, 1980".

TITLE II

SEC. 201. Section 4(a) of the Voting Rights Act of 1965 (79 Stat. 438; 42 U.S.C. 1973b(a)), as amended by the Voting Rights Act Amendments of 1970 (84 Stat. 315), is further amended by:

(1) adding after "determinations have been made under": "the first two sentences of";

(2) by adding at the end of the first paragraph thereof the following: "No citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under the third sentence of subsection (b) of this section or in any political subdivision with respect to which such

determinations have been made as a separate unit, unless the United States District Court for the District of Columbia in an action for a declaratory judgment brought by such State or subdivision against the United States has determined that no such test or device has been used during the five years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color: Provided, That no such declaratory judgment shall issue with respect to any plaintiff for a period of five years after the entry of a final judgment of any court of the United States, other than the denial of a declaratory judgment under this section, whether entered prior to or after the enactment

this subchapter, determining that denials or abridgments of the right to vote on account of race or color through the use of tests or devices have occurred anywhere in the territory of such plaintiff.";

(3) by striking out "the action" in the third paragraph thereof, and by inserting in lieu thereof "an action under the first sentence of subsection 4(a)"; and

(4) by adding following the third paragraph thereof the following paragraph: "If the Attorney General determines that he has no reason to believe that any such test or device has been used during the five years preceding the filing of an action under the second sentence of subsection 4(a) for the purpose or with the effect of denying or abridging the right to vote on account of race or color, he shall consent to the entry of such judgment."

SEC. 202. Section 4(b) of the Voting Rights Act of 1965 (79 Stat. 438; 42 U.S.C. 1973(b)(b)), as amended by the Voting Rights Act Amendments of 1970 (84 Stat. 315), is further amended by:

(1) adding at the end of the first paragraph thereof the following:

"On or after August 6, 1975, in addition to any State or political subdivision of a State determined to be subject to subsection (a) pursuant to the previous two sentences, the provisions of subsection (a) shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1972, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1972, or that less than 50 per centum of such persons voted in the Presidential election of November 1972."

(2) by adding in the second paragraph thereof, after "any court": "except as provided in Section 4(c)."

SEC. 203. Section 4(c) of the Voting Rights Act of 1965 (79 Stat. 438; 42 U.S.C. 1973(b)(c)), is amended by adding at the end thereof the following:

"With respect to the Presidential election occurring in November 1972 "test or device" (in any State or political subdivision where more than 5 per centum of the persons of voting age residing therein are determined by the Director of the Census to be members of a single minority race or color the native language of which is other than English) shall also mean any practice or requirement, as determined by the Attorney General, by which such State or political subdivision provided any ballots, voting or registration notices, registration forms, or voting or registration instructions to voters printed only in the English language without providing printed translations of such ballots, voting or registration notices, registration forms, or voting or registration instructions in the native language of the applicable group of persons, as defined in this paragraph, which represents more than 5 per centum of the voting age

population. Provided, That a State or political subdivision shall be deemed to have provided printed translations of ballots if such State or political subdivision provided translated printed sample ballots to voters and allowed voters to retain such sample ballots as they cast their votes.

The determination of the Director of the Census that more than 5 per centum of the persons of voting age residing in a State or political subdivision are of a minority race or color the native language of which is other than English, and that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1972, or that less than 50 per centum of such persons voted in the Presidential election of November 1972, as provided in subsection (b), shall be made as soon as is practicable, but within 60 days from the date of enactment of this Act, shall not be reviewable in any court, and shall be effective upon publication in the Federal Register.

Upon publication in the Federal Register of such list of all States and political subdivisions in which reside more than 5 per centum of persons of voting age who are members of a minority race or color the native language of

which is other than English, and in which less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1972, or in which less than 50 per centum of such persons voted in the Presidential election of November 1972, the Attorney General shall notify such State or political subdivision that it may be subject to the provisions of Section 4 of this subchapter. The Attorney General shall inform the chief legal officer of such State or political subdivision that in order to establish that it is not subject to Section 4 of this subtitle, such State or political subdivision must provide the Attorney General within 60 days of receipt of the Attorney General's notice sufficient evidence to establish that in the Presidential election of November 1972 such State or political subdivision did not provide any ballots, voting or registration notices, registration forms, or voting or registration instructions printed only in the English language without providing printed translations of such materials in the native language of the applicable group of persons, as defined in the second paragraph of this

subsection. As soon as is practicable after the expiration of 60 days from the date of notification, the Attorney General shall determine whether the State or political subdivision has submitted sufficient evidence to establish that such State or political subdivision conducted bilingual elections as defined in this subsection. If the Attorney General determines that such State or political subdivision has not established that it conducted bilingual elections as defined by the second paragraph of this subsection, he shall certify that such jurisdiction used a test or device as defined by the second paragraph of this subsection.

The certification of the Attorney General that a State or political subdivision has used a test or device shall be effective upon publication in the Federal Register, and shall be reviewable in the United States District Court for the District of Columbia. An action pursuant to this provision shall be heard and determined by a court of three judges in accordance with the provisions of § 2284 of Title 28 and any appeal shall be to the Supreme Court."

SEC. 204. Section 4(d) of the Voting Rights Act of 1965 (79 Stat. 438; 42 U.S.C. 1973(b)(d)), is amended by striking out the period at the end thereof and by inserting in lieu thereof a comma and the following: "or if (5) the illiteracy rate in the English language of the members of the class of persons protected by this Section by operation of the second paragraph of subsection 4(c) residing in such State or political subdivision is equal to or less than the nationwide illiteracy rate in the English language for all persons of voting age. For purposes of this subsection, illiteracy is defined as failure to complete 5 grades of schooling."

SEC. 205. Section 5 of the Voting Rights Act of 1965 (79 Stat. 439; 42 U.S.C. 1973(c)), as amended by the Voting Rights Act Amendments of 1970 (84 Stat. 315), is further amended by adding after "force or effect on November 1, 1968," the following: "or whenever a State or political subdivision with respect to which the prohibitions set forth in Section 4(a) based upon determinations made under the third sentence of Section 4(b) are in effect shall enact or seek to

administer any voting qualification or prerequisite to voting different from that in force or effect on November 1, 1972,".

SEC. 206. Section 19 of the Voting Rights Act of 1965 (79 Stat. 446; 42 U.S.C. 1973p) is amended by adding after "this subchapter" the following: "as amended".

TITLE III

SEC. 301. The Voting Rights Act of 1965 (42 U.S.C. 1973) is amended by adding at the end of Section 205, the following:

"Sec. 206. (a) Prior to August 6, 1980, no state or political subdivision shall provide ballots, voting or registration notices, registration forms, or voting or registration instructions to voters in English only, if more than 5 per centum of the persons of voting age of such State or political subdivision are of any single mother tongue other than English, as determined by the Director of the Census, based on the 1970 decennial census.

(b) The determination of the Director of the Census under this subsection shall not be subject to review in any court, and shall be effective upon publication in the Federal Register.

(c) Any State or political subdivision subject to the provisions of Subsection (a) of this Section, shall provide to voters written ballots (or sample ballots), registration forms, voting or registration notices, and voting or registration instructions, in the mother tongue of the class of persons who represent more than 5 per centum of the voting age population of such State or political subdivision, and whose mother tongue is other than English."

SEC. 302. Section 203 of the Voting Rights Act of 1965 (84 Stat. 317; 42 U.S.C. 1973aa-2) is amended by adding after the words "in violation of section 202," the following: "or (c) undertakes to deny the rights protected by section 206."

SEC. 303. Section 205 of the Voting Rights Act of 1965 (84 Stat. 318; 42 U.S.C. 1973aa-4) is amended by adding after "chapter" each time it occurs "as amended".

UNITED STATES COMMISSION ON CIVIL RIGHTS
WASHINGTON, D. C. 20425

STAFF DIRECTOR

March 12, 1975

Honorable Don Edwards
Chairman
Subcommittee on Civil Rights and
Constitutional Rights
Committee on the Judiciary
Washington, D.C. 20515

Dear Mr. Chairman:

The Commission on Civil Rights is happy to provide you with a part of the information and materials promised as a result of Chairman Flemming's testimony of February 25, 1975. Several items are not yet completed, although we expect to have some of them to you by Friday of this week.

As you are probably aware the Commission's organic statute contains a prohibition against publication of any material which tends to defame, degrade or incriminate any person. In the event it does then the report " . . . shall be delivered to such person thirty days before the report shall be made public in order that such person may make a timely answer to the report." Since our analysis of the interviews and material gathered in uncovered jurisdictions requested by the Subcommittee does involve defamatory material, the Commission feels it must follow the requirements of our statute, prior to providing our analysis to you. We will move as expeditiously as possible to complete the defame and degrade procedures.

I am enclosing the following items: (1) Staff Memorandum analysing HR 3247 (Ms. Jordan) and HR 3501 (Mr. Roybal and Mr. Badillo); (2) Opinion of Counsel with respect to whether the terms "test or device" as defined in the Voting Rights Act includes use of English-only voting materials for persons whose only language is not English; and (3) a memorandum referencing in The Voting Rights Act: Ten Years After documentation for the statement in our testimony that "Minority voters have been denied their rights in all of these ways in recent years in some jurisdictions covered by the Voting Rights Act." (page 16 of the prepared testimony)

In addition to the above we will have prepared on Friday a revised legal opinion regarding the constitutionality of a permanent ban on literacy tests and the opinion of counsel on whether the use of the terms "race or color" in the 15th Amendment includes national origin minorities and whether coverage of national origin minorities under the Voting Rights Act should be based on the Fourteenth or Fifteenth Amendment.

We will also forward at that time a copy of our letters to Chairman Al Ullman implementing Recommendation 16, regarding repeal of those sections of the Tax Reform Act of 1969 which limit the ability of foundations to fund non-partisan voter registration campaigns.

The staff is presently preparing for review by the Commissioners, a proposal which may assist you in resolving the current debate over a separate title vs integrated amendment approach to extending the protections of Act to language minorities, particularly persons of Spanish-origin. I am sharing copies of our response to the Subcommittee and with Representatives Jordan and Roybal.

The corrected transcript of Chairman Flemming's testimony is enclosed. If you have any questions, please have Mr. Parker and Ms. McNair call Bud Blakey (254-6626).

Sincerely,

JOHN A. BUGGS
Staff Director

Enclosure

UNITED STATES COMMISSION ON CIVIL RIGHTS

Washington, D. C. 20425

April 4, 1975

Staff Memorandum

Analysis of Bills to Expand the Coverage
of the Voting Rights Act

Introduction

This memorandum analyzes and compares H.R. 5552, introduced by Reps. Badillo, Jordan, and Roybal, and the draft bill prepared by the Civil Rights Division for the House Civil Rights Subcommittee. The former will be referred to by the initials "BJR" and the latter by "DOJ." The Voting Rights Act of 1965, as amended in 1970, will be referred to by the initials "VRA." To understand this memorandum the reader should have a copy of the Voting Rights Act, of H.R. 5552 with Mr. Badillo's introductory statement and the section-by-section analysis (all printed at Cong. Rec. H2434-37, March 26, 1975), and of the March 20, 1975 letter from Assistant Attorney General J. Stanley Pottinger to the Hon. Don Edwards, with the attached draft bill and section-by-section analysis.

The two bills are organized the same way and attempt to accomplish similar purposes. Title I of each bill extends the coverage of the present VRA and extends the national ban on literacy tests. BJR is identical in this respect to H.R. 939 (10 year extension of the special provisions and permanent ban on literacy tests); DOJ is identical to H.R. 2148 (5 years and 5 years).

Title II of both bills extends the coverage of the VRA to additional areas but with two essential differences. DOJ assumes that Mexican Americans and other persons of Spanish heritage are members of a race or color group protected under the 15th amendment. BJR assumes that this is not the case and therefore provides for protection against discrimination under the 14th amendment. Secondly, DOJ expands the coverage of the

VRA to any jurisdiction having a substantial population of "members of a single minority race or color the native language of which is other than English" and meeting other criteria. BJR expands coverage to areas having a substantial Spanish origin population and meeting other criteria.

BJR would cover Texas and scattered counties in Arizona, California, Colorado, Florida, and New Mexico having substantial Spanish origin populations. DOJ would cover these areas and also--because of the presence of substantial Native American populations--the State of Alaska and scattered counties in New Mexico, Oklahoma, South Dakota, and Utah.

Title III of both bills provides for registration and election materials in the language of any group whose mother tongue is other than English if the group is numerous enough in a State or political subdivision. The two bills differ on how this is done.

Analysis

Sections 201 of both bills are very similar; both amend VRA section 4(a), which provides special coverage. DOJ provides 5 years of coverage, BJR 10 years. The other difference, discussed below, is the result of BJR's not relying on the prohibition of discrimination on the basis of race or color.

Section 202 of both bills amends VRA section 4(b), the trigger. Both bills would cover jurisdictions that used a test or device in 1972 (as defined in section 203 of each bill) and in which turnout was less than 50 percent in the 1972 presidential election. The only difference is that DOJ allows judicial review, which is provided for in section 203.

Section 203 is the heart of each bill. Each amends the definition of test or device. DOJ does this by amending VRA section 4(c); BJR adds a new section 4(f) to the VRA. The approaches taken by the two bills here are completely different. For a number of reasons one must conclude that DOJ succeeds and BJR fails.

New section 4(f)(1) created by BJR is the key provision of that bill. It is comparable to section 2 of the VRA, which states:

> No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.

Because the theory behind BJR is that persons of Spanish origin do not constitute a group defined by race or color the bill assumes that VRA section 2 does not prohibit discrimination in voting against persons of Spanish origin. The new section 4(f)(1) is designed to fill this gap. Its drafting, however, is not successful. It states that "no citizen of Spanish origin shall be denied the right...to vote in any Federal, State, or local election <u>because</u> of his inability to read, write, understand, or interpret any matter in the English language." (emphasis added) This does not prohibit all discrimination in voting against persons of Spanish origin but only that based on language problems. The importance of this omission is shown if one jumps ahead to BJR section 206. This section amends VRA sections 2, 3, 4, 5, 6, and 13. All of these VRA sections refer to discrimination based on race or color. To each the language is added "or in contravention of the guarantees set forth in section 4(f)(1)." Since 4(f)(1) is not general enough these sections, as amended, would not prohibit discrimination against persons of Spanish origin unless that discrimination was based specifically on language disability (still assuming with BJR that persons of Spanish origin do not constitute a race or color group). For example, if section 5 preclearance were requested for a statute that prohibited the use of Spanish at the polls the Attorney General would enter an objection. If, however, preclearance were requested for a change from ward to at-large election in a city that was 40 percent Chicano there would be no basis for objection, since the discrimination would not be based on language. Likewise, a discriminatory change in a polling place location could not be stopped under section 5.

What section 4(f)(1) must contain then, to do the work that it is intended to do, is a general prohibition against discrimination in voting against persons of Spanish origin. One possibility is a provision identical to VRA section 2 (quoted above) except for using the words "national origin" rather than "race or color". This would succeed in prohibiting discrimination against persons of Spanish origin but it would also prohibit discrimination against every other national origin group. Thus in enforcing section 5 the Attorney General would have to make a determination that a particular change does not discriminate against blacks, Native Americans, Asian Americans, persons of Spanish origin, French Americans, German Americans, Irish Americans, Finnish Americans.... This would make section 5 unworkable. The other alternative would be the following:

> No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of Spanish origin.

This approach has what is considered by many the drawback of referring to a group by name. This is a problem shared by BJR section 203.

While not going far enough in one respect, section 4(f)(1) would go too far in another. If there were in a jurisdiction only one person of Spanish origin and that person did not know English, the jurisdiction would be required to give that person assistance in Spanish. This is similar to the requirement contained in Title III of both bills, but in Title III no duty is imposed on a jurisdiction unless the language minority voting age population is 5 percent or more of the total voting age population. Thus Spanish-speaking persons who constituted less than 5 percent of a jurisdiction's population would have a right to assistance but French-speaking persons would not. No justification for this distinction is apparent.

BJR's new section 4(f)(2) is redundant. It is designed to accomplish the same thing that BJR section 201 did in amending VRA section 4(a).

BJR's new section 4(f)(3) contains the new definition of test or device. A State or political subdivision has imposed a test or device if the 1972 presidential election or subsequent elections were conducted in English only and if more than 5 percent of the population was of Spanish origin.

DOJ does not need provisions like 4(f)(1) and 4(f)(2). DOJ section 203 amends VRA section 4(c) to expand the definition of test or device. The DOJ definition applies "in any State or political subdivision where more than 5 per centum of the persons of voting age residing therein are...of a single minority race or color the native language of which is other than English." In such a jurisdiction, if certain conditions are met, an English-only election constitutes a test or device. The problem with the DOJ formula is that not all persons of single minority race or color have the same native language. Thus a county could be covered because 5 percent of its voting age population is Asian American, when the native language of 1 percent of its voting age residents is Japanese, of another 1 percent Chinese (which dialect?), of another 1 percent Korean, of another Tagalog, and of another Vietnamese. Would the county be required to print election materials in all 5 languages, or in none of them? A two-part formula would eliminate this problem: Require (1) that 5 percent of the voting age population be of a single minority race or color and (2) that members of that group constituting at least 5 percent of the voting age population have the same native language that is other than English.

The DOJ definition makes English-only elections a test or device only in the 1972 presidential election. It thus fails to prohibit English-only elections in the future. Adding the phrase "or any election occurring after such presidential election" from BJR cures this defect.

DOJ has a proviso that a non-English language sample ballot will satisfy the requirement for a printed translation of the ballot. BJR does not have this proviso, which appears to be an acceptable solution to the practical problem of printing ballots in more than one language.

Neither bill attempts to come to terms with the problem of languages that are oral only. (This problem only arises for BJR in Title III.) For DOJ this could be a problem with respect to the jurisdictions covered because of Native American populations. Also, neither bill, here or in Title III, makes any special provision for persons who in addition to not understanding English are illiterate in their native language. It would seem preferable to fill this gap legislatively rather than waiting for the courts to fill it.

DOJ has a complicated procedure for determining what jurisdictions satisfy the new definition of test or device. The procedure puts the burden on the jurisdiction meeting the 5 percent and 50 percent criteria to prove that it did not conduct English-only elections in 1972. This approach is preferable to the BJR approach of leaving the determination solely to the Attorney General. Because of the nature of the determination, allowing judicial review, as does DOJ but not BJR, is appropriate.

Section 204 of DOJ allows a jurisdiction to escape if the English language illiteracy rate of the race or color group in that jurisdiction is equal to or less than the national rate of English language illiteracy. BJR does not contain this useful escape clause. The section defines illiteracy as failure to complete 5 grades of schooling. Since this definition does not specify that the schooling be in the English language it is not ideal. Its advantage is that it relies on information that is gathered by the Bureau of the Census.

Section 205 of DOJ and section 204 of BJR amend VRA section 5 to require preclearance of changes for the jurisdictions covered by the new trigger. This amendment is analogous to that made in 1970. However, DOJ inadvertantly omits the words ", or standard, practice, or procedure with respect to voting".

Section 205 of BJR amends sections 3 and 6 of VRA to allow remedial action for 14th as well as 15th amendment violations. Section 3 would thus allow the Attorney General in a suit brought under a statute to enforce the 14th amendment to ask the court for Federal examiners or for preclearance of changes with respect to voting. Because Title III is based on the 14th amendment and is made enforceable by the Attorney General, the amended section 3 would enable the Attorney General to ask for examiners or preclearance because of language discrimination against French or German speaking citizens. This appears to be unnecessarily broad.

BJR section 206 is discussed above in connection with the proposed VRA section 4(f)(1).

DOJ section 206 and BJR section 207 are both separability clauses, though their wording is different. (DOJ refers to the words "this subchapter" in section 19 of VRA. Section 19, however, uses the words "this Act" rather than "this subchapter".)

Title III of both bills prohibits, in certain circumstances, the use of English-only elections that would discriminate against groups in addition to those protected under Title II. The difference between Title II and Title III is that Title II in addition to banning English-only elections carries with it all the special provisions of the VRA. Title III does not. It would protect any minority language group, whether or not it is also a minority race or color group. DOJ provides this protection for 5 years, BJR for 10 years.

Both are based on the 1970 census, although the 10 year coverage of BJR would make reference, in addition, to the 1980 census appropriate.

BJR, but not DOJ, allows escape if the language minority population has a English language literacy rate higher than the national average. This is modeled after DOJ section 204. The problem of assuming that 5 years of schooling is equivalent to English literacy might be greater here. Many jurisdictions in which the foreign mother tongue population is actually literate in English would probably be required to provide bilingual election materials.

Under both bills and in both Title II and Title III the question arises whether bilingual election materials must be provided in all parts of a jurisdiction if the persons of a language minority are concentrated in one part of the jurisdiction. This could be remedied, to some extent, in Title III by providing for coverage only at the level of political subdivisions and not for entire States. The converse problem arises if a language minority group constitutes less than 5 percent of the jurisdiction's voting age population but constitutes a substantial part of the voting age population of part of the jurisdiction. For example, the New Jersey statute (N.J. Laws, 1974, ch. 51) uses the election district as the unit of measure.

BJR provides an elaborate procedure under which a jurisdiction can prove that it does not have English-only elections. There is, however, no point to this procedure. Nothing changes for the jurisdiction after it has made its showing. It is still under the same obligation to provide non-English election materials.

Title I of BJR, unlike Title I of DOJ, makes the national ban on literacy tests permanent. It, however, does not make the ban on discriminatory English-only elections likewise permanent. DOJ is more consistent, having a 5 year ban for both.

UNITED STATES COMMISSION ON CIVIL RIGHTS

Washington, D. C. 20425

March 12, 1975

STAFF MEMORANDUM
ANALYSIS OF H.R. 3247 AND H.R. 3501,
BILLS TO EXPAND THE COVERAGE OF
THE VOTING RIGHTS ACT OF 1965

This memorandum analyzes H.R. 3247 and H.R. 3501 (94th Cong. 1st Sess.). These bills are designed to expand the coverage of the special provisions of the Voting Rights Act of 1965 (42 U.S.C. §§ 1973-1973p, as amended, 42 U.S.C. §§ 1973aa to bb-4 (1970)) to areas of the Southwest having significant Mexican American populations. Both bills also extend the special provisions of the Voting Rights Act for 10 years and make permanent the national ban on the use of literacy tests enacted in 1970 for a five year period.

H.R. 3247

H.R. 3247, introduced by Rep. Barbara Jordan of Texas, is a substitute for H.R. 939. Thus it combines in one bill the extension of the present temporary provisions of the Voting Rights Act with new coverage for other jurisdictions. Specifically, the bill extends the temporary provisions of the act for 10 years (Section 1) and makes the literacy test ban permanent (Section 6). In these respects it is identical to H.R. 939.

In addition, the bill provides Voting Rights Act coverage for jurisdictions in which 5 percent or more of the voting age residents have a mother tongue other than English, in which election materials are in English only, and in which the voting rate in 1972 was less than 50 percent (Sections 2-5). The bill would bring Texas under the Voting Rights Act as well as some other areas scattered around the country. This is accomplished by the amendment of several sections of the Voting Rights Act.

Section 2 of the bill modifies Section 4(b) of the Voting Rights Act by adding a 1972 trigger to the 1964 and 1968 triggers already in the act and applies the expanded definition of "test or device" contained in Section 3 of the bill.

Section 3 of the bill amends Section 4(c) of the Voting Rights Act to add as a test or device:

> any practice or requirement by which any State or political subdivision provided election or registration materials printed only in the English language.

This definition applies: (a) when more than 5 percent of the voting age residents of the jurisdiction are of any single mother tongue other than English and (b) with respect to the November 1972 presidential election or subsequent elections.

Section 4 of the bill amends Section 4(d) of the Voting Rights Act to make a bail-out suit more difficult for a jurisdiction covered under the proposed trigger than it is for a jurisdiction previously covered.

Section 5 of the bill freezes the electoral laws and procedures of the newly covered jurisdictions as they were on November 1, 1972 and applies the preclearance procedures of Section 5 of the Voting Rights Act to any change since then.

Purpose

The apparent purpose of H.R. 3247 as drafted is to provide the protection of the temporary provisions of the Voting Rights Act to language groups. This is done by providing coverage of States or counties 5 percent or more of whose voting age population is of a single mother tongue group other than English if the jurisdiction satisfies certain other criteria. The bill, incidentally, would protect blacks and other racial minorities in jurisdictions which satisfy the bill's criteria.

The sponsor of the bill, Rep. Jordan of Texas, has indicated that the purpose of the bill is to provide Voting Rights Act protection for Mexican Americans in the Southwest, especially in Texas. (See

Extension of Remarks of Rep. Barbara Jordan, Cong. Rec. E569, Feb. 19, 1975, Daily Ed., and Testimony of Rep. Barbara Jordan before the Subcom. on Civil and Constitutional Rights of the House Judiciary Comm., Feb. 26, 1975.)

As is discussed more fully below, although the bill appears to protect any non-English mother tongue group, it is intentionally written to give protection only to a mother tongue group that is also a group defined by race or color and protected under the 15th amendment.

Covered Jurisdictions

The exact geographical coverage of the bill is unclear. Appended to the prepared testimony of Rep. Jordan is a list of jurisdictions which would be covered by the bill. It includes one State, Texas, covered because of Spanish mother tongue, and 35 counties in 10 other States. Of the 35 counties, 14 are covered because of Spanish mother tongue, 14 because of French mother tongue, and 7 because of German mother tongue.[1] Because the Census Bureau only publishes mother tongue data by county for French, German, and Spanish, information is readily available only for these three groups. The Census, however, asks a 15 percent sample of the population its mother tongue. (For States information is also published on the number of people with Polish, Russian, Yiddish, and Italian mother tongues.) The Census Bureau data would make it possible to determine what other counties would be covered because of other mother tongue groups. There are probably some counties with more than 5 percent of another mother tongue that also meet the other criteria. These may include some

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1. However, the list of jurisdictions attached to the Jordan statement may contain some having bilingual electoral processes, which would not be covered under the criteria of the bill. (See Statement of J. Stanley Pottinger, Assistant Attorney General, Civil Rights Division, before the Subcom. on Civil and Constitution Rights of the House Judiciary Comm., March 5, 1975.)

counties with more than 5 percent of a particular Native American or Asian American language group that meet the other criteria.

The bill refers to 5 percent of the voting age population of a jurisdiction. The list appended to the Jordan statement, however, uses total population. Because the average age of persons of Spanish origin is less than the average age for the population as a whole, using total rather than voting age population will overstate the number of affected jurisdictions. For example, 5.01 percent of the total population of Solano County, California, according to the Jordan list, is of Spanish mother tongue. It is probable that less than 5 percent of the voting age population is of Spanish mother tongue.

Implications of Coverage

While the bill speaks only of mother tongue groups it is necessary for the purposes of analysis to distinguish three kinds of groups. These are (1) mother tongue groups that are also racial groups, (2) mother tongue groups that are not racial groups, and (3) racial groups that are not mother tongue groups. These distinctions are important because the 15th amendment and the Voting Rights Act of 1965 only protect groups defined by race or color. H.R. 3247 does not change the Voting Rights Act in this respect; thus it would not protect a mother tongue group that is not also considered a racial group.

Mother tongue groups that are also racial groups include various Asian American and Native American groups and persons of Spanish origin.[2] If one of these groups constituted 5 percent or more of a county's (or State's) voting age population and the other criteria of the bill were met, then that county would under H.R. 3247 be fully covered by the Voting Rights Act. The county would be required to print election materials in the language of the mother tongue group. It would be required to submit changes in election laws and practices to the Attorney General for Section 5 preclearance for a determination that the new laws or practices do not discriminate against the mother tongue group

2. H.R. 3247 assumes that Mexican Americans are a racial group for the purposes of the 15th amendment and the Voting Rights Act.

(or any other racial group). The Attorney General would be authorized to send examiners and observers to the county to protect the voting rights of the mother tongue group (or of any other racial group).

To remove itself from coverage the county would have to show that during the preceding 20 years English-only elections had not been used with the purpose and had not had the effect of discriminating against the mother tongue group. There would be three ways of showing this. First, the county could show that in fact all citizens of voting age of the mother tongue group knew English during the 20 year period and therefore the use of English did not discriminate against them.

Secondly, the county might argue that, although either its registration or its election materials (or both) were printed only in English, its oral assistance was so adequate that there was no discrimination. For example, in some States a person registering to vote does not have to read or write anything but only provides the necessary information by answering questions from the registrar. If in a covered county in such a State all registrars were fluent in the language of the mother tongue group then the lack of printed registration materials in the language of that group would not be discriminatory.

Third, the county could use bilingual election materials for 20 years and remove itself from coverage in 1995.

Mother tongue groups that are not also racial groups include such groups as Franco-Americans, German-Americans, and Italian-Americans. Because Sections 4, 5, and 6 of the Voting Rights Act only provide protection against discrimination based on race or color these groups would receive no protection from the bill. Even if the English-only election system discriminated against the mother tongue group the county could successfully bring a Section 4(a) bail-out suit because the discrimination would not be based on race or color.

A complication arises if, in addition to the mother tongue group that is not a racial group, there is present in the county a racial group that is not a mother tongue group. Blacks in the county, for example, would receive the protection of the Voting Rights Act. Section

5 preclearance would be required, but the issue would be discrimination on account of race or color, i.e., discrimination against blacks, rather than discrimination against the mother tongue group. The Attorney General could also send examiners and observers to the county if needed to protect the voting rights of blacks. Thus blacks (or other racial groups) would be protected because of the presence of, for example, German-Americans who would not themselves be protected.

This anomalous protection would usually be shortlived. The jurisdiction could immediately bring a bail-out suit under Section 4(a) alleging that the use of English-only elections did not discriminate on the basis of race or color. Since the mother tongue group would not have been discriminated against on the basis of race or color, the Department of Justice would have no ground on which to oppose the suit.

There are two circumstances that could lead to the retention of coverage in this situation. First, if there were in the jurisdiction a second mother tongue group that was, unlike the first, also a racial minority but constituted less than 5 percent of the population, a court might hold, if the group were numerous and concentrated enough, that the English-only election discriminated against it. Secondly, if at any time during the past 20 years the jurisdiction enforced a literacy requirement, it would not be allowed to remove itself if that test had the effect of discriminating against blacks (or other racial groups) under the theory of Gaston County v. United States, 395 U.S. 285 (1969).[3]

Language Discrimination

If a Native American is discriminated against because he or she is a Native American, that is an example of discrimination on account of race or color. If, however, a Native American is discriminated against because an election worker cannot speak, for example, the Navajo language, this might be discrimination on account of language rather than discrimination on account of race or color. Which it is would depend on the facts of the

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3. Either of these situations could prevent bail-out in the situation discussed above where the mother tongue group was also a racial group but was not discriminated against because members of the group knew English.

particular instance. If, for example, there were in the jurisdiction numerous Polish- and Italian-Americans who did not know English and no provisions was made for their assistance at the polls either, and if generally Native Americans participated freely in the electoral process and were frequently elected to office, then one might conclude that the only discrimination was on account of language and not on account of race or color.

H.R. 3247 assumes that any discrimination against a mother tongue group that is also a racial group is discrimination on account of race or color. While this may be the case it is not true by definition and needs to be shown for each group. This has implications for the effectiveness of H.R. 3247. If discrimination on account of mother tongue is not, for racial groups, discrimination on account of race or color, then persons of Spanish origin, Asian Americans, and Native Americans get no more protection from the bill than do Franco-Americans and German-Americans.

Evidence of Discrimination

The Census uses "mother tongue" to refer to the language that a person used at home as a child. The fact that one's mother tongue is other than English does not mean that one does not now normally speak English or that one cannot speak and understand English adequately. Thus there is no guarantee that the bill would identify groups that are actually harmed by English-only elections.

Moreover, the intent of H.R. 3247 is to do far more than remedy any language barriers that exist in the electoral process. The bill would authorize the Attorney General to send examiners and observers to the jurisdictions covered by it and would require these jurisdictions to follow Section 5 preclearance procedures whenever a change affecting the electoral process is made. Congress can be expected to pass this legislation, therefore, only if it concludes that there is a need, either actual or potential, for the Voting Rights Act remedies.

Twenty Years

H.R. 3247 would provide coverage for the States and counties affected for 20 years. Under the original Voting Rights Act Congress provided coverage for 5 years. When Congress saw that 5 years were not enough, coverage for an additional 5 years was provided. This year bills are before Congress to extend the Voting Rights Act for either 5 or 10 more years. Instead of applying the requirements and procedures of the Voting Rights Act to the newly covered areas initially for a 5 year period and reviewing progress after 5 years to see if an extension is necessary, Congress would under H.R. 3247 make the determination at the outset that 20 years of the Voting Rights Act are necessary.

Definition of Test or Device

Section 3 of H.R. 3247 adds to the definition of test or device contained in Section 4(c) of the Voting Rights Act a State or political subdivision's providing "election or registration materials printed only in English language...." A test or device is present under this definition if either registration or election materials were provided only in English. However, if some registration materials and some election materials were provided in another language the jurisdiction would apparently not be covered by this definition, even if the materials were inadequate and the system remained discriminatory against the non-English-speaking. Furthermore, the bill does not specify that the language other than English in which the materials are to be printed must be the language of the mother tongue group that constitutes 5 percent or more of the voting age population. Thus if a county were 10 percent Japanese-American and printed its materials in Tagalog it would not be covered. It follows that if the county were 10 percent Mexican American and 10 percent Japanese-American it would not be covered if it printed materials in either Spanish or Japanese but not in both.

When Congress banned the use of tests or devices anywhere in the Nation in 1970 for 5 years it used the same definition of tests or devices that was already contained in Section 4(c) of the Voting Rights

Act. This definition is contained in Section 201(b) of the act. H.R. 3247 changes the definition of tests or devices contained in Section 4(c) (but only for elections occurring in November 1972 or thereafter) but does not change the definition contained in Section 201(b). Given the difference in definitions it would be reasonable, if H.R. 3247 were enacted, to interpret Section 201 not to prohibit inadequate bilingual election materials or assistance. This could reduce the protection that courts might provide for non-English speaking voters.

Section 4(d) Escape

Section 4 of H.R. 3247 amends Section 4(d) of the Voting Rights Act to deny to jurisdictions covered because of the bill's trigger the opportunity to bail out if there have been few incidents of the discriminatory use of tests, these incidents have been promptly corrected and have no continuing effects, and there is no reasonable probability of their recurrence in the future. Jurisdictions covered by H.R. 3247 are excluded from this escape provision "to make clear that the mere printing of Spanish election materials is not sufficient grounds for the jurisdiction to escape coverage." (Testimony of Rep. Jordan) Rep. Jordan further states: "Without this amendment a large loophole would be created." Her view appears to be based on a misinterpretation of what Section 4(d) allows. She states:

> "Section 4(d) of the Act provides that if a jurisdiction ceases to employ a test or device, and if the jurisdiction can prove the continuing effect of a test or device has been mitigated, the jurisdiction may be relieved from coverage by the District Court." Id.

But under Section 4(d) it is not sufficient that a jurisdiction cease to employ a test or device; rather, incidents of the discriminatory use of tests or devices must have been "few in number and have been promptly and effectively corrected by State and local action. ..." Any jurisdiction which regularly provided its election materials only in English in the 20 year period could not satisfy Section 4(d).

H.R. 3501

H.R. 3501, introduced by Reps. Edward Roybal of California and Herman Badillo of New York, is a substitute for H.R. 939. Thus, like H.R. 3247, it combines in one bill the extension of the present temporary provisions of the Voting Rights Act (with some modification) with new coverage for other jurisdictions. Specifically, the bill extends the temporary provisions of the act for 10 years (Section 5) and makes the literacy test ban permanent (Section 7). Unlike H.R. 939 or H.R. 3247, the bill also provides judicial review of a decision by the Attorney General not to send examiners to a county under Section 6 of the Voting Rights Act if he has received 20 complaints (Section 6).

In addition, the bill provides Voting Rights Act coverage for jurisdictions in which 5 percent or more of the citizens of voting age are of Spanish origin, in which the voting rate in the 1964 or the 1968 presidential election was less than the national average, and in which, in one of those years, elections were held in English only. These jurisdictions are to be covered by the Voting Rights Act for 10 years, from 1975 to 1985.

The principal provisions of H.R. 3501 are contained in Section 1. That section contains a congressional finding that the conduct of elections only in English is a practice which discriminates against persons of Spanish origin under the 14th and 15th amendments.

The bill therefore applies the temporary provisions of the Voting Rights Act (Section 5 preclearance, examiners, and observers) for a 10 year period (August 6, 1975 to August 6, 1985) to States or political subdivisions of States that meet all three of the following criteria:

1. Five percent or more of the citizens of voting age of the State or political subdivision are of Spanish origin.
2. Printed election or registration materials of the State or political subdivision for the 1964 or the 1968 presidential election were only prepared in English or registration and election procedures were otherwise conducted only in English.

3. In either 1964 or 1968 less than the "national percentage" of citizens of voting age in the jurisdiction voted in the presidential election.

The jurisdiction can escape coverage before 1985 only if it can prove in court that during the preceding 10 years it has not had any voting rights violations under the 14th or 15th amendments.

The remaining sections of the bill (Sections 2, 3, and 4) make necessary adjustments in Sections 5, 6, and 13 of the Voting Rights Act.

While a jurisdiction would become covered under H.R. 3501 because of the presence of persons of Spanish origin, any racial group in a covered jurisdiction would then be protected under the Voting Rights Act.

Covered Jurisdictions

The exact geographical coverage of H.R. 3501 is unclear. According to a member of the staff of Rep. Roybal, a sponsor of the bill, the States of Arizona, California, and Texas would be covered. There are probably also scattered counties elsewhere in the Southwest and possibly in Florida and in the Northeast that would be covered. The determination of what jurisdictions would be covered is difficult for three principal reasons.

First, one criterion is that 5 percent or more of the jurisdiction's citizens of voting age are of Spanish origin. While the Census gathers data on citizenship, Spanish origin, and age, these data are not published in a way that allows a convenient determination of a jurisdiction's Spanish origin, citizen, voting age population.

Secondly, the bill does not tell the Director of the Bureau of the Census whether a determination with respect to the 5 percent criterion should be as of 1975, as of the 1970 Census, as of the date used for the other parts of the trigger, i.e., 1964 or 1968, or as of the 1960 Census. The use of any of these dates could be justified, but some are obviously more convenient than others. Moreover, there have been significant changes in the Spanish origin population during the last 15 years as well as changes in Bureau of the Census methodology in counting persons of Spanish origin.[4]

4. According to a member of Mr. Roybal's staff, 1960 data are being used.

Third, another criterion contained in the bill is whether registration and voting materials were available in Spanish in 1964 or 1968. This is difficult to determine because the bill does not specify exactly what would satisfy the criteria, because the elections in question are so far in the past and therefore difficult to obtain definite information for, and because so many different jurisdictions will have to be considered.

Rationality of the Trigger

Coverage under H.R. 3501 is based, in addition to the population criterion, on voter turnout and the language of elections in 1964 or 1968. Thus, to the extent that the criteria of the bill are tied to the existence of discrimination, it is discrimination that occurred in 1964 or 1968. It would appear to be more acceptable to base coverage on present conditions or on conditions at the time of the most recent presidential election. Neither the Voting Rights Act of 1965 nor the Voting Rights Act Amendments of 1970 went back beyond the most recent presidential election.

A jurisdiction is covered under H.R. 3501 if voter turnout in the 1964 or 1968 presidential election was less than the national rate of turnout. This was 61.8 percent in 1964 and 60.7 percent in 1968. This is a much more stringent test than the 50 percent test used by the 1965 or 1970 acts.[5] While Congress might reasonably determine that voter turnout below the 50 percent level is unacceptably low, it is more difficult to fault a turnout rate because it is below the national rate. For unless turnout in each State or county in the Nation is equal, there will always be some jurisdictions above the national rate and some below.

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5. With this test the entire State of North Carolina would also have been covered in 1965 and the entire States of California and New York would also have been covered in 1970. In addition, a number of other counties in States not covered as a whole would have been covered.

Termination of Coverage

The bill provides two ways for coverage to be terminated. First, a covered jurisdiction can file suit in the United Stated District Court for the District of Columbia and show that--

> during the ten years preceding the filing of the action such State or subdivision has not enacted or sought to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting which had the purpose or effect of denying or abridging the right to vote as guaranteed under the fourteenth and fifteenth amendments.

While coverage is based on the presumed discriminatory effect of registration and election procedures conducted only in English, this bail-out provision does not give the jurisdiction an opportunity to prove that its procedures are not in fact discriminatory. It could not escape, for example, by proving that all of its citizens of Spanish origin and of voting age speak English or by showing that it has adequate oral assistance in Spanish. A jurisdiction cannot even escape if it proves that there has been no discrimination in voting of any kind against persons of Spanish origin during the preceding 10 years. Any abridgment of the right to vote under the 14th or 15th amendments would be sufficient to keep the jurisdiction covered. Thus if a court found that the State's redistricting plan in 1971 violated one person, one vote criteria the State would not be able to remove itself, though the case did not involve discrimination against persons of Spanish origin at all. Finally, the bill does not contain a provision like Section 4(d) of the Voting Rights Act of 1965, allowing escape if incidents of discrimination have been few in number and quickly corrected.

Although the first method of bail-out is almost impossible to use successfully, the second method is automatic. Coverage ends on August 6, 1985 even if discrimination against persons of Spanish origin has not ended, and coverage cannot be reapplied under the bill if discrimination is resumed after August 6, 1985. Under the Voting Rights

Act of 1965, on the other hand, a jurisdiction cannot remove itself except by proving to the District of Columbia District Court that it has not, for the required number of years, used tests or devices with the purpose or the effect of discriminating. Even if the jurisdiction obtains a judgment from the court, the Department of Justice can reopen the case at any time up to 5 years after the judgment.

Evidence of Discrimination

That persons are of Spanish origin does not mean that they do not in fact speak English. H.R. 3501, moreover, is not primarily concerned with remedying language problems. It applies the principal tools of the Voting Rights Act--Section 5 preclearance, examiners, and observers--to the jurisdictions that it would cover. Congress can be expected to pass this legislation, therefore, only if it concludes that there is a need, actual or at least potential, for the Voting Rights Act remedies.

Examiners

Section 6 of H.R. 3501 allows judicial review of a decision of the Attorney General not to send examiners to a county after he has received 20 complaints from that county of denials of the right to vote on account of race or color. While the U.S. Commission on Civil Rights has disagreed with the Attorney General concerning his policy for the use of examiners, no evidence has been cited that the Attorney General has ever failed to send examiners to a county after 20 complaints had been received.

It would be difficult, moreover, to justify judicial review of this one aspect of enforcement of the Voting Rights Act while continuing to deny it with respect to other aspects. If judicial review were allowed at every stage of the act's enforcement, the effectiveness of the act could be seriously compromised.

Drafting

H.R. 3501 has a number of problems that probably relate to drafting.

The criteria for coverage contained in the bill are open to more than one interpretation. One criterion is that the jurisdiction "printed its election or registration materials or otherwise conducted its registration or electoral procedures only in the English language. ..." This appears to mean that if the jurisdiction printed some of registration materials and some of its election materials in Spanish and otherwise conducted some of its registration and election procedures in Spanish it would not be covered by the bill, even if the use of Spanish was so slight and inadequate that Spanish speaking persons were discriminated against.

Moreover, if the jurisdiction conducted registration and elections both in English and French (or any other language), it would not be covered by this bill, even though the Spanish speaking minority would still be discriminated against.

The way the bill is drafted, if elections were in English only in 1964 but not in 1968 and if turnout was below the national rate in 1968 but not in 1964 (or vice versa) the jurisdiction would be covered. While this might have been intended, it makes the link between English-only elections and low turnout extremely tenuous.

The bill does not contain a definition of "Spanish origin." It should either provide an explicit definition or refer to a definition of the Bureau of the Census.

Section 4(a) of the Voting Rights Act specifies that "no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device. ..." H.R. 3501 contains no comparable provision. Thus it does not explicitly state that a citizen shall not be denied the right to vote because of the use of English-only elections.

In a number of places the bill uses the terminology "denying or abridging the right to vote as guaranteed under the fourteenth and fifteenth amendments." The Voting Rights Act, in analogous provisions, uses the terminology "denying or abridging the right to vote on account of race or color." (Section 4(a)) This indicates that the sponsors of the bill doubt that a 15th amendment basis for the bill (discrimination on account of race or color) is sufficient to protect persons of Spanish origin and therefore seek to protect rights under the 14th amendment as well. However, Sections 5 and 6 of the Voting Rights Act, which use the "race or color" terminology, are not modified by H.R. 3501. Thus either the bill fails in its attempt to apply Sections 5 and 6 (preclearance and examiners) to protect persons of Spanish origin in areas covered by the bill, or the use of "14th or 15th amendment" terminology in the bill is unnecessary.

If "14th or 15th amendment" terminology is necessary but is not used, then Sections 5 and 6 would protect blacks, Asian Americans, and Native Americans in jurisdictions covered by H.R. 3501 but would not protect persons of Spanish origin. If "14th or 15th amendment" terminology were used in Sections 5 and 6, preclearance could only be received if a change violated no 14th or 15th amendment right. Thus the Attorney General would be enforcing one person, one vote rules, for example.

Section 4 of H.R. 3501 amends Section 13 of the Voting Rights Act to allow termination of Federal listing when 50 percent of the Spanish origin voting age population is registered. Unlike Section 1 of the bill, Section 4 does not refer only to citizens of Spanish origin. Thus in jurisdictions with a high percentage of Spanish origin residents who are not citizens the 50 percent level might be impossible or nearly impossible to reach.

CONCLUSION

Both H.R. 3247 and H.R. 3501 have serious problems, both in substance and in drafting. H.R. 3247 gives the appearance of protecting mother tongue groups when in fact it is designed to protect persons of Spanish origin. H.R. 3501 bases coverage on the situation existing 7 or 11 years ago rather than on the existence of discrimination now.

Even if these basic problems and the many other problems described in this memorandum were taken care of, the fundamental question would remain whether a factual basis exists for Congress to impose the extraordinary measures of the Voting Rights Act on the jurisdictions that would be covered by either of the bills.

UNITED STATES COMMISSION ON CIVIL RIGHTS
WASHINGTON, D. C. 20425

STAFF DIRECTOR

MAR 21 1975

Honorable Don Edwards
Chairman
Subcommittee on Civil Rights and
Constitutional Rights
Committee on the Judiciary
Washington, D.C. 20515

Dear Mr. Chairman:

The Commission on Civil Rights is transmitting at this time two staff memoranda of legal opinion which Chairman Flemming promised to provide during his testimony on extension of the Voting Rights Act on February 25, 1975. The first memorandum concerns the constitutionality of a permanent legislative ban on the use of literacy tests as a prerequisite to voter registration. The second memorandum pertains to the question of whether the terms "race or color" in the 15th Amendment include national origin minorities and whether coverage of national origin minorities under the Voting Rights Act should be based on the Fourteenth or Fifteenth Amendment.

As indicated in our letter of March 13th, we hoped to also transmit to you today a copy of our letter to Chairman Al Ullman regarding the Commission's recommendations for the repeal of those sections of the Tax Reform Act of 1969 which limit the ability of foundations to fund non-partisan voter registration campaigns. Staff are still preparing our recommendations on this matter, and they will be transmitted to you at the same time they are sent to Chairman Ullman.

If you have any questions, please have Mr. Parker and Ms. McNair call Bud Blakey (254-6626).

Sincerely,

John A. Buggs

JOHN A. BUGGS
Staff Director

Enclosure

U.S. COMMISSION ON CIVIL RIGHTS

OFFICE OF GENERAL COUNSEL

STAFF MEMORANDUM

The Phrase "Race or Color" as Used in the Voting Rights Act of 1965, as Amended, Includes Persons of Spanish Origin.

The phrase "race or color", as used in the Voting Rights Act of 1965, as amended, is taken directly from the 15th amendment. Its interpretation, therefore, should be based upon a consideration of that phrase as it was used originally in the 15th amendment, and as it is used in relation to the broad purposes of the Voting Rights Act.[1/]

This memorandum will discuss what population groups may be included within the "race or color" classification based on 15th and 14th amendment constructions, and on the sociological/anthropological definition of such classification.

A. The phrase "Race or Color", as used in the 15th amendment, is not limited to blacks.

Section 1 of the 15th amendment provides that:

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

Both from its language and from a reading of the Congressional debates preceding the amendment's adoption it is clear that Congress

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1/ By its terms, the Voting Rights Act was enacted to "enforce the 15th amendment and for other purposes" (42 U.S.C. § 1971 - emphasis added) including the 14th amendment guarantee of equal protection in the exercise of voting.

specifically intended to guarantee all black citizens the right to vote. The "previous condition of servitude" language refers primarily to blacks; the addition of the words race or color suggests the intention to cover groups other than blacks. It can therefore be concluded that on its face the 15th amendment race or color language is not limited to blacks alone.

In the absence of cases which deal expressly with the protection of groups other than blacks under the 15th amendment, the legislative history is a useful guide to the scope of that amendment's race or color language. Opinions expressed during Congressional debates on the amendment give strong indication that its protection was never intended to be limited to black citizens but, arguably, was intended to extend to all male citizens of any race or color.

Opponents of the amendment attempted to broaden the amendment's protection by prohibiting any denial of the right to vote based on such criteria as sex, creed, property or education, in addition to race or color. Although these efforts failed, the focus on such other categories of coverage suggests that the legislators saw no need to further define race or color because of their conviction that all men would be protected under that description.

This position is supported by Senator Abbott of North Carolina, who spoke in support of the 15th amendment,". . . we are bound to conduct this Government on the basis of permitting the ballot to every male citizen."[2/] Speaking in favor of extending the vote to women,

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2/ Cong. Globe, 40th Cong., 3d Sess. (1869) at 981.

Senator Pomeroy of Kansas expressed a similar view, "Manhood suffrage is now held to be the native and the inherent right of every male citizen of a prescribed age . . ."[3/]

In opposition to a proposal which would specifically prohibit the use of any educational requirement as a voting qualification, Senator Patterson of New Hampshire supported a limited form of Intelligence test which could" . . . be easily reached by our foreign population or by any of our native population who may lack the means of education."[4/]

Senator Corbett of Oregon, clearly believing that the 15th amendment, as adopted, would include races other than blacks, introduced additional language to specifically deny citizenship, and thus the right to vote, to "Chinamen" and Indians.[5/] The California delegation shared Oregon's concern, fearing that the amendment's adoption would allow the Chinese to be enfranchised.

It seems clear that the members of Congress understood the words "race or color" to include at least those groups referred to during the debates: Negroes, Chinese and Indians.

Although the right to vote was guaranteed to citizens of any race or color from 1870 forward, case law under the 15th amendment saw little development for the next hundred years. By the time the Voting Rights Act was passed in 1965, minority groups other than blacks were seeking

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3/ Id. at 709.

4/ Id. at 1037.

5/ Id. at 828.

protection of their voting rights; most prominent among these have been the Spanish origin groups. In 1970, the Supreme Court referred specifically to persons of Spanish origin in an opinion holding the 1970 ban on literacy tests constitutional on 15th amendment grounds. Four Justices found that persons of Spanish surname, as well as blacks, were adversely affected by such tests, and were appropriate subjects for protection under the 15th amendment.6/

B. The Phrase "Race or Color", For Purposes of Equal Protection Under the 14th Amendment, Includes Spanish Origin Minority Groups.

The Voting Rights Act of 1965, as amended, protects the right of all citizens to vote, by prohibiting the denial of that right on the basis of race or color. The 14th amendment has also been held to protect the right to vote7/ under Section 1, which states in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; . . . nor deny to any person within its jurisdiction the equal protection of the laws.

6/ Oregon v. Mitchell, 400 U.S. 112, 235 (1970); opinion of Mr. Justice Black, and joint opinion of Justices Brennan, White and Marshall.

7/ Ex parte Yarborough, 110 U.S. 651 (1881); United States v. Classic, 313 U.S. 299 (1941); Katzenbach v. Morgan, 384 U.S. 641 (1966); White v. Regester, 412 U.S. 755 (1973); Oregon v. Mitchell, 400 U.S. 112 (1970).

Population groups which can be characterized by race or color are clearly cognizable under the Equal Protection Clause of the 14th amendment and have been held by the Supreme Court to be protected from discrimination in several voting rights cases.[8/] In one of these cases the Court invalidated multi-member districts in two Texas counties, as having unconstitutionally diluted the votes of Negroes and Mexican Americans, respectively.[9/] The Court recognized no difference between blacks and Mexican-Americans for purposes of granting relief from discriminatory voting procedures in this case. Such a finding suggests that for purposes of protecting voting rights the courts will consider Spanish origin minorities to be racially identifiable.

Although voting discrimination cases brought on 15th amendment grounds have begun to define the Spanish origin population as an identifiable class, equal protection cases in analagous subject areas have gone far toward expanding the race or color classification to include Spanish origin population groups.[10/]

8/ Katzenbach v. Morgan, 384 U.S. 641 (1966); Gaston County v. United States, 395 U.S. 285 (1969); Nixon v. Herndon, 273 U.S. 536 (1927); White v. Regester, 412 U.S. 755 (1973).

9/ White v. Regester.

10/ Jury selection: Hernandez v. Texas, 347 U.S. 475 (1954). Education: Keyes v. School District No. 1, Denver, Colorado, 413 U.S. 189 (1973); Cisneros v. Corpus Christi Independent School District, 324 F. Supp. 599 (S.D. Texas 1970), modified (as to remedy), 467 F.2d 142 (5th Cir. 1972), cert. denied, 413 U.S. 922; United States v. State of Texas, 342 F. Supp. 24 (E.D. Texas 1971), aff'd 466 F.2d 518 (5th Cir. 1972); United States v. Texas Education Agency, 467 F.2d 848 (5th Cir. 1972). Voting: White v. Regester, 412 U.S. 755 (1973); Garza v. Smith, 320 F. Supp. 131 (W.D. Texas 1970), vacated (on jurisdictional grounds), 401 U.S. 1006 (1971), appeal dismissed (on jurisdictional grounds), 450 F.2d 790 (5th Cir. 1971). Housing: Ranjel v. City of Lansing, 293 F. Supp. 301 (W.D. Mich. 1969), rev'd on other grounds, 417 F.2d 321 (6th Cir. 1969), cert. denied, 397 U.S. 980 (1970).

In a 1954 case, the Supreme Court held unconstitutional the systematic exclusion of Mexican Americans from jury duty, rejecting the contention of the State of Texas that constitutional protection against discrimination is limited to blacks. The Court stated:

> Throughout our history differences in race and color have defined easily identifiable groups which have at times required the aid of the courts in securing equal treatment under the laws. But community prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection. Whether such a group exists within a community is a question of fact. When the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or as applied, single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated. The Fourteenth Amendment is not directed solely against discrimination due to a "two-class theory"--that is, based upon differences between "white" and Negro. 11/

Significantly, the court maintained that whether or not a group of peoples is entitled as a class to 14th amendment protection is a question of fact and that skin or color alone is not dispositive.[12/] In a Colorado school desegregation case[13/] the Supreme Court maintained that the "District Court erred in separating Negroes and Hispanos for purposes of defining a 'segregated' school."[14/] The Court maintained that Negroes and

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11/ Hernandez v. Texas, 347 U.S. 475, 478 (1954).

12/ See also, White v. Regester, 412 U.S. 755 (1973).

13/ Keyes v. School District No. 1, Denver, Colorado, 413 U.S. 189 (1973).

14/ Id. at 197.

Hispanos in Denver suffer identical discrimination in treatment as compared to the treatment afforded Anglo students, and concluded that "Hispanos constitute an identifiable class for the purposes of the 14th amendment."[15/] Hernandez, Keyes and Regester all support the conclusion that the Supreme Court has rejected a narrow two class theory of equal protection in favor of a more expansive view. Thus the Court, in defining racial-minority groups for equal protection purposes, will consider skin color as a factor but will give greater weight to the historical and factual predicate on which discrimination against a particular group is based.

The Supreme Court in Keyes cited a lower court case, Cisneros v. Corpus Christi Independent School District[16/], in concluding

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15/ Id. at 197.

16/ Cisneros v. Corpus Christi Independent School District, 324 F. Supp. 599 (S.D. Texas 1970), modified (as to remedy), 467 F.2d 142 (5th Cir. 1972), cert. denied, 413 U.S. 922. The District Court record in Cisneros, a Texas school desegregation case, cited in a footnote the testimony of an expert witness on the definition of Spanish-speaking Americans as a racial minority group.

> Looking at it culturally, they are an identifiably different group with adherence to the Spanish language, certain physical characteristics that are more or less Indian or mistisaje or the blending of the Spanish and the Mexican. So, no matter how you cut it, you are going to come out as a minority, both from social-science and from the legal point of view, and from the cultural point of view and the racial point of view. Id at 607.

that Hispanos were a protected class under the 14th amendment. In Cisneros, the State of Texas asserted that the use of the terms race or color had been limited by the Brown case and could apply only to blacks. In rejecting that assertion the Cisneros court pointed out that since Brown dealt only with discrimination against blacks its definition of "race or color" was necessarily limited and therefore was not binding. 17/ Finding that Mexican Americans were a protected minority the court noted:

> "[W]e can notice and identify their physical characteristics, their language, their predominant religion, their distinct culture, and, of course, their Spanish surnames. 18/

In a similar case 19/ another District Court in Texas noted that it could justify its holding that Mexican Americans are a protected minority on the basis of the fact that Mexican American students:

> react to or are affected by a given stimulus--the Anglo-oriented educational program such as that maintained in the former Del Rio Independent School District--in a similar and predictable manner and, in the opinion of a recognized expert, this reaction is based almost entirely on common characteristics which, incidentally may be traced to their common and distinct ancestry. 20/

In all of these cases the Court has determined that Spanish origin population groups are an identifiable group for purposes of equal protection under the 14th amendment. Although any determination of the need

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17/ Id. at 605.

18/ Id. at 608.

19/ United States v. State of Texas, 342 F. Supp. 24 (E.D. Texas 1971), aff'd. 466 F.2d 518 (5th Cir. 1972).

20/ Id. at 26.

for equal protection must be based on discriminatory treatment of the identifiable class, the Spanish origin minorities are also and obviously definable by factors in addition to the discrimination they have suffered. They are a population group identifiable by their physical characteristics, their culture and their language. Such common factors are determinative in defining a population group as a race for anthropological purposes.[21/] It is therefore arguable that in defining the Spanish origin population by such factors, the courts have recognized that Spanish origin and other similarly identifiable minority groups constitute a "race" for purposes of the 15th amendment.

C. 1. The Anthropological/Sociological Definition of Race or Color

The fields of anthropology and sociology treat the term race, which includes color, as an abstract concept, susceptible of various definitions. Webster's dictionary defines "race" as:

> (1) The descendants of a common ancestor; a family, tribe, people or nation belonging to common stock.
>
> (2) A class or kind of individuals with common characteristics, interests, appearance or habits as if derived from a common ancestor. 22/

21/ See, Section C, below.

22/ Webster's Third New International Dictionary, 1870 (1965).

Black's Law Dictionary defines race as:

> An ethnical stock; a great division of mankind having in common certain distinguishing physical peculiarities constituting a comprehensive class appearing to be derived from a distinct primitive source. A tribal or national stock, a division or subdivision of one of the great racial stocks of mankind distinguished by minor peculiarities. 23/

Under either of these broadly phrased definitions Spanish-speaking peoples could be easily categorized as a "race".

Race has been used in the literature of sociology and anthropology to describe groups of people sharing common language.[24/] Based on such assertion, all Spanish origin peoples, including Mexican Americans, Puerto Ricans and Latin Americans can be defined as a race.

The various meanings attributed to the term race stem from the fact that the word attempts to define a flexible concept,[25/] connoting a social value rather than an empirical fact. Thus, scientists do agree among themselves on what physical characteristics should be used to determine race (e.g., skin color, hair texture, blood-type or cranial size).[26/] Since none of these factors is considered to be dispositive of

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23/ Black's Law Dictionary 1423 (4th ed. 1951).

24/ 15 Encyclopedia Britannica 348 (15th ed. 1975).

25/ Erlich and Holm, "A Biological View of Race" in The Concept of Race 171-173 (A. Montague ed. 1964). The authors state: "The evolution of man is an interaction between classical 'biological' evolution and psychosocial or cultural evolution."

26/ Id. at 167-71.

what constitutes a race, it is clear that any attempt to classify peoples into racial groupings is discretionary and can be considered in no way exact nor immutable.

Conclusion

Population groups distinguished by, and discriminated against on the basis of, their language, their common cultural heritage, and their physical characteristics meet the anthropological/sociological definition of race. In using such racial characteristics to identify a class for 14th amendment purposes, the courts have gone far in supporting the definition of such groups as "races" for purposes of 15th amendment protection. Based on such reasoning, Spanish origin minority groups should be defined as a race for purposes of protection under the Voting Rights Act.

March 10, 1975

UNITED STATES COMMISSION ON CIVIL RIGHTS
WASHINGTON, D. C. 20425

Staff Memorandum

The Constitutionality of Legislation by Congress Permanently Prohibiting the Use of Literacy Tests as a Prerequisite to Voter Registration

I. THE PROPOSED LEGISLATION

The Commission on Civil Rights in its report The Voting Rights Act: Ten Years After (1975) recommends that the Voting Rights Act (42 U.S.C. §1973 et seq.) be extended for 10 years and that the national ban on literacy tests be extended for the same number of years. While its report and its testimony to Congress [1/] did not call for a permanent national ban on literacy tests, the Commission is of the opinion and supports the view that a permanent national ban on literacy tests is constitutional. [2/] This memorandum considers the constitutionality of proposed legislation which would ban permanently the use, anywhere in the nation, of literacy tests as a prerequisite to voter registration.

Congress is currently considering a number of proposals designed to extend and expand the current Voting Rights Act (42 U.S.C. §1973 et seq.). Section 2 of H.R. 939 introduced on January 14, 1975,

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1/ Testimony of Arthur S. Flemming, Hearing of the Civil Rights and Constitutional Rights Subcommittee of the Committee on the Judiciary, U.S. House of Representatives, February 25, 1975.

2/ Commissioner Frankie M. Freeman's view favoring a permanent national ban on literacy tests is included in the report (p. 357), and this view is shared by Chairman Flemming, Commissioner Murray Saltzman (news conference, Jan. 23, 1975) and Commissioner Manuel Ruiz, Jr. Support for a temporary ban on literacy tests is stated by Commissioners Stephen Horn (at p. 360, 5 year extension) and Robert Rankin (at p. 363, 10 year extension) in the report.

Section 6 of H.R. 3247 introduced on February 19, 1975, and Section 7 of H.R. 3501 introduced on February 20, 1975, (94th Cong., 1st Sess.), provide for a national permanent ban on literacy tests. An alternate proposal would extend the present national ban contained in the law (42 U.S.C. §1973aa) for 5 years (H.R. 2148). It is clear from prior legislation and the sections of existing law which these proposals amend that literacy tests are the major discriminatory voting "test or device," 3/ and that a ban on literacy tests would require States to assure that illiterates are able to vote effectively. 4/

The Voting Rights Act defines the phrase "test or device" to mean

> any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class. 5/

3/ This memorandum only discusses the issue of congressional authority to ban literacy tests, the questions involved with other tests or devices may be similar. See also U.S.C.C.R. Staff Memorandum "Is an English-only electoral process, in a jurisdiction with significant numbers of citizens who are not literate in English, a 'test or device' as defined by Section 4(c) of the Voting Rights Act?" March, 1975.

4/ Assistance to illiterate voters has been held to be required under the Voting Rights Act: United States v. Louisiana, 265 F. Supp. 703, 708 (E.D. La. 1966), aff'd per curiam, 386 U.S. 270 (1967); United States v. Mississippi. 256 F. Supp. 344, 348 (S.D. Miss. 1966); Morris v. Fortson, 261 F. Supp. 538 (N.D. Ga. 1966).

5/ Section 4(c), 42 U.S.C. §1973b(c).

It defines the terms "vote" or "voting" broadly to include

> all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, listing pursuant to this Act, or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election. 6/

The extension of the literacy test ban would primarily affect the 15 States 7/ that currently retain provisions for such tests or devices within the meaning of the Act in their constitutions or statutes. It is uncertain to what degree these States would enforce literacy requirements, and which States might reenact them if the suspension were not continued or made permanent. Research by the Commission prior to the nationsl suspension in 1970 showed 21 States 8/ had tests then, although several States appeared not to enforce them or to enforce them irregularly. 9/

6/ Section 14(c)(1), 42 U.S.C. §1973l(c)(1).

7/ Alabama, Ala. Const., amend 223, §1, Ala. Code, Tit. 17, §31 (Cumm. Supp. 1973); Connecticut, Conn. Const., Art. 6, §1; (1967); Delaware, Del. Const., Art. 5 §2 (Supp.); Georgia, Ga. Code Ann. §2-704 (1973); Louisiana, LSA Const. Art. 8, §1(c)(d) (Supp. 1974), LSA-R.S. §18:31 (1969); Maine, Me. Const., Art. 2, §1 (1964); Mississippi, Miss. Const., Art. 12, §244 (1972), Miss. Code Ann. §§ 23-5-19 (1972); New Hampshire, N.H. Const. Pt. 1, Art. 11 (1970), N.H. Rev. Stats. §55.10, 55.12 (1970); New York, McKinney's Const., Art. 2, §1 (1969); North Carolina, N.C. Const. VI, §4 (1970), N.C. Gen. Stats. §163-58 (1972); South Carolina, S.C. Const., Art. 2, §6 (1971), S.C. Code Ann. §23-62(4) (Supp. 1973); Washington, Wash. Const., Art. 6, §1, Amend. 5 (1964); Wyoming, Wyo. Const., Art. 6, §9 (1957); Oregon, Oreg. (1964), Const. Art. 8 §6 (1974); Oregon (School board elections). Idaho Const., Art 6, §3 disqualifies on the basis of teaching, advising, counseling, or encouraging persons into bigamy or polygamy (a good character test).

8/ These States were: Alabama, Alaska, Arizona, California, Connecticut, Delaware, Georgia, Hawaii, Idaho, Louisiana, Maine, Massachusetts, Mississippi, New Hampshire, New York, North Carolina, Oregon, South Carolina, Virginia, Washington and Wyoming.

9/ U.S. Commission on Civil Rights, Memorandum, Current Status of Literacy Tests or Devices for the Qualification of Prospective Voters, Printed in Hearings on Amendments to the Voting Rights Act Before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, 91st Cong., 1st and 2nd Sess., at 407 (1969-1970).

II. PRIOR LEGISLATION RELATING TO LITERACY TESTS

Earlier civil rights legislation regulated and restricted the use of literacy tests to eliminate the particular evils that Congress found associated with such tests.

The Civil Rights Act of 1957, [10] provides the Attorney General of the United States with specific statutory authority to institute suit on behalf of persons deprived of voting rights by reason of race or color. The civil rights legislation passed in 1960 [11] and in 1964 [12] had the effect of strengthening the 1957 Act. The Civil Rights Act of 1964 required that any literacy test must be entirely in writing [13] and created a presumption that a person with a sixth grade education is literate. [14] The Voting Rights Act of 1965 extended this presumption to persons educated in American flag schools in which the language of instruction is other than English [15] and it temporarily banned the use of literacy tests for 5 years in areas in which presumptively they had been used for improper purposes. [16] In 1970 the Voting Rights Act was extended to suspend all literacy tests nationally until August 6, 1975. [17]

10/ Pub. Law 85-315, 71 Stat. 647, 42 U.S.C. §1971(a) (1970).

11/ Pub. Law 88-352, 74 Stat. 90, 42 U.S.C. §1971 et seq. (1970).

12/ Pub. Law 89-110, 78 Stat. 241, 42 U.S.C. §1971 et seq. (1970). These statutes are codified in 42 U.S.C. §1971.

13/ 42 U.S.C. §1971(a)(2)(C)(i) (1970).

14/ 42 U.S.C. §1971(c) (1970).

15/ Section 4(e), 42 U.S.C. §1973b(e) (1970).

16/ Section 4(a), 42 U.S.C. §1973b(a) (1970).

17/ 42 U.S.C. §1973aa (1970).

III. POWER TO ESTABLISH VOTING QUALIFICATIONS

The Constitution of the United States does not spell out precisely what level of government, Federal or State, is authorized to establish general qualifications for voting. There is express language within the Constitution that deals with voting, and that indicates that the States and the Federal government have responsibilities in this area.

Article I, Section 2 provides that members of the House of Representatives are to be chosen by the people of the several States and "the Electors in each State shall have the qualifications requisite for Electors of the most numerous Branch of the State Legislature." Article II, Section 1 provides inter alia that States may appoint, in such a manner as their legislature may direct, a certain number of Electors to serve in selecting the President and Vice-President as set out within the Constitution. A subsequent amendment to the Constitution (Amendment XVII, April 8, 1913) provides that senators are to be chosen by the people and that voters for senators have the same qualifications as voters for representatives. This language plus the Tenth Amendment's general States' rights provision,[18/] has been traditionally interpreted by the Supreme Court to be the source of the States' power to regulate elections.[19/]

18/ "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

19/ See, Lassiter v. Northampton Election Board, 360 U.S. 45 (1959); Carrington v. Rash, 380 U.S. 89 (1965); See also discussion of this issue in the various opinions in Oregon v. Mitchell, 400 U.S. 112 (1970). This memorandum will discuss this issue in greater detail in Section V infra.

Section 4 of Article I provides that the times, places and manner of holding elections for Senators and Representatives shall be prescribed in each State by its legislature, but that Congress may alter such regulations, except as to places of choosing Senators. This language plus the general power of Congress "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers" (enumeration of Federal government functions) (U.S. Const. art. I, §8 cl. 18) has also been interpreted to give Congress ultimate power to supervise national elections.20/

The Civil War Amendments to the Constitution clearly provide the following: (1) abolition of slavery and its vestiges (U.S. Const. amend. XIII); (2) statement of citizenship and establishment of basic rights which States are forbidden to infringe, including due process of law, equal protection of the law, and privileges and immunities (U.S. Const. amend XIV): and (3) that voting rights shall not be denied or abridged on account of race, color or previous condition of servitude (U.S. Const. amend. XV). The plain reading of these amendments places limitations on the power of the States and Congress to establish voter qualifications which discriminate against persons on account of their race.

There is also support for the position that the powers granted Congress by §5 of the Fourteenth Amendment to "enforce" the Equal Protection Clause are the "same broad powers expressed in the Necessary and Proper Clause, Art. 1, §8, cl. 18. Thus the positive grant of

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20/ Mr. Justice Black was of this opinion in Oregon v. Mitchell, supra, (at 124), citing the following Court decisions: Ex parte Siebold, 100 U.S. 371 (1880); Ex parte Yarbrough, 110 U.S. 651 (1884); United States v. Mosley, 238 U.S. 383 (1915); and United States v. Classic, 313 U.S. 299 (1941).

legislative power in §5 authorizes Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." 21/

The Voting Rights Act of 1965 and the 1970 Amendments to the Act have been sustained as constitutional exercises of congressional power to enforce the Fourteenth and Fifteenth Amendments. 22/ The breadth of the Civil War Amendments (especially, Amendments XIV and XV) in the voting rights context is an issue which will be discussed throughout this memorandum.

Although other amendments to the Constitution (Amendments XIX, XXIV and XXVI) effect voting rights, their impact on resolution of the issue of congressional power to permanently ban literacy tests is limited. It is generally recognized from legislative practice and case law that voter qualifications is an area where States and Congress have legitimate regulatory interest. Both have legislated as to National, State and local elections. The constitutionality of congressional legislation barring States' use of literacy tests depends on two factors: (1) whether such tests are unconstitutionally discriminatory and (2) the breadth of congressional power to establish or prohibit certain voter qualifications. The Constitution itself is the ultimate arbiter where Congress and the States purport to legislate

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21/ Katzenbach,v. Morgan, 384 U.S. 641, 650-51 (1966).

22/ See discussion in Sections V-VI infra.

pursuant to the authority of the Constitution. The Supremacy clause of the Constitution provides that "Laws of the United States" shall be supreme. 23/ Thus, a constitutionally valid congressional enactment can nullify or supersede State laws.

23/ U.S. Const. art. VI, cl. 2.

IV. CONGRESS HAS THE AUTHORITY UNDER THE FOURTEENTH AND FIFTEENTH AMENDMENTS TO ENACT LEGISLATION PERMANENTLY BANNING LITERACY TESTS.

Case law in the voting rights area amply supports the conclusion that Congress has the power under the Fourteenth and Fifteenth Amendments to ban literacy tests permanently. In a long line of cases beginning with Schnell v. Davis, 336 U.S. 933 (1949) and continuing to the present, the Supreme Court has only once upheld the constitutionality of literacy tests. See Lassiter v. Northampton County Board of Elections, 360 U.S. 45 (1959). Furthermore, the Court's decision in Lassiter rested on narrow grounds. The Court held that literacy tests per se were constitutional. The Court did not consider whether literacy tests would be valid in the face of countervailing considerations. It reserved judgment with respect to the issue raised by the racially discriminatory administration of facially neutral voter qualification tests. The Court pointedly mentioned that:

> . . . a literacy test fair on its face may be employed to perpetuate that discrimination which the Fifteenth Amendment was designed to uproot. No such influence is charged here. 24/

Several years after Lassiter was decided Congress passed the Voting Rights Act of 1965. The Act, among other things, banned the

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24/ Lassiter v. Northampton County Board of Elections, 360 U.S. 45, 53 (1959).

use of literacy tests for a five year period in covered jurisdictions. 25/ Another section of the Act provided that persons receiving a sixth grade education in American Flag schools were presumed to be literate and could not be denied the right to vote because of an inability to read or write English. 26/

Shortly after the passage of the Act, two cases came before the Supreme Court challenging the Act's provisions regarding literacy tests. The issue before the Court in South Carolina v. Katzenbach, 383 U.S. 301 (1966) was whether or not Congress had the power under the Fifteenth Amendment to ban literacy tests in the absence of a judicial determination that the test had a discriminatory effect. The Court maintained that Section 2 of the Fifteenth Amendment was a broad grant of legislative power equivalent to the power granted Congress under the Necessary and Proper Clause, U.S. Const. Art. I, §8, cl. 18. 27/ The Court proceeded to define the appropriate standard for judicial review in Fifteenth Amendment cases:

> The basic test to be applied in a case involving §2 of the Fifteenth Amendment is the same as in all cases concerning the express powers of Congress with relation to the reserved powers of the States. Chief Justice Marshall laid down the classic formulation, 50 years before the Fifteenth Amendment was ratified:
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> > "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional." McCulloch v. Maryland, 4 Wheat. 316, 421. 28/

25/ 42 U.S.C. 1973b(a) (1970)

26/ 42 U.S.C. §1973b(e) (1970)

27/ South Carolina v. Katzenbach, 383 U.S. 301, 327 (1966).

28/ Id. at 236.

Applying this standard, the Court held that the congressional determination that literacy tests are discriminatory barriers to voting was appropriate. 29/ The Court also held that the legislative remedy of a five year ban on literacy tests in covered jurisdictions was a legitimate response to the problem. 30/

In Katzenbach v. Morgan, 31/ the Court addressed the issue of whether Section 4(e) of the Voting Rights Act of 1965 was a valid exercise of congressional power under the Fourteenth Amendment. Section 4(e) provides that persons who have obtained a sixth grade education at any American flag school cannot be prevented from voting by a State imposed English literacy requirement. The Court held that under Section 5 of the Fourteenth Amendment Congress has the authority to determine what constitutes a denial of equal protection and can design legislation to remedy the problem. 32/

29/ Id. at 328.

30/ Id. at 328.

31/ 384 U.S. 641.

32/ Katzenbach v. Morgan, 384 U.S. 641, 651 (1966).

Congressional legislation, the Court explained, need only meet the test of McCulloch v. Maryland, 4 Wheat. 316, 421 (1819)[33] -- the same test laid down by the Court in South Carolina v. Katzenbach for Congressional action under the Fifteenth Amendment. Applying this test the Court found that the basis for Congressional action was clear:

> Here again, it is enough that we perceive a basis upon which Congress might predicate a judgment that the application of New York's English literacy requirement to deny the right to vote to a person with a sixth grade education in Puerto Rican schools in which the language of instruction was other than English constituted an invidious discrimination in violation of the Equal Protection Clause. 34/

Thus, under the holding in Kazenbach v. Morgan, Congress has the power both to identify a constitutional injury violating the equal protection of the laws and to choose the means to remedy that injury. Furthermore, judicial review stops once the Court determines that Congress is not acting arbitrarily leaving to Congress the discretionary exercise of its legislative function.

Three years after the Katzenbach cases the Court had yet another occasion 35/ to review the validity of literacy tests. Pursuant to Section 4(a) of the Voting Rights Act of 1965, Gaston County brought

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33/ Id. at 650

34/ Id. at 654-56

35/ Gaston County v. United States 395 U.S. 285 (1969).

suit to reinstate its literacy test. 36/ The North Carolina County maintained that it had administered the test in a fair and impartial manner. The United States, in opposing the granting of relief, maintained that the literacy test had the effect of denying the vote on account of race because the County had, at one time, operated a segregated school system thereby depriving black persons of an equal chance to pass the test.

In rejecting the County's argument the Supreme Court noted that:

> (t)he legislative history of the Voting Rights Act of 1965 discloses that Congress was fully cognizant of the potential effect of unequal educational opportunities upon the exercise of the franchise. This casual relationship was, indeed, one of the principal arguments made in support of the Act's test-suspension provisions 37/

The court held that it is proper to consider whether literacy tests have "the effect of denying. . .the right to vote on account of color" where the State has maintained a de jure discriminatory school system. 38/ The Court stated that the test is not limited to the maintenance of a de jure segregated school system but must look to the

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36/ Section 4a of the Voting Rights Act of 1965 provides that a State or subdivision in a covered jurisdiction may bring an action against the United States for declaratory relief that it has not employed a test during the five years preceding the filing of the action "for the purpose or with the effect of denying or abridging the right to vote on account of race or color."

37/ Gaston County v. United States, 395 U.S. 285, 289 (1969).

38/ Id. at 293.

effect of such segregated system to determine whether "the county deprives its black residents of equal educational opportunities, which in turn deprives them of an equal chance to pass the literacy tests. 39/ Gaston County holds, therefore, that whenever a State has deprived its citizens of equal educational opportunities on account of race or color, the State cannot add insult to injury by conditioning the right to vote on any prerequisite which presumes a level of educational proficiency e.g., a literacy test.

In the 1970 Amendments to the Voting Rights Act, Congress extended its ban on the use of literacy tests anywhere in the United States for another 5 year period. 40/ The constitutionality of the 1970 national literacy test ban was unanimously sustained in Oregon v. Mitchell, 400 U.S. 112 (1970). While the Justices based the source of congressional power to impose the ban on Fourteenth and Fifteenth Amendment grounds, they unanimously agreed that Congress had the authority to enact such legislation to remedy invidious discrimination in the denial of the right to vote.

Mr. Justice Black, announcing the judgment of the Court in an opinion expressing his own view, spoke approvingly of the Court's prior decisions in South Carolina v. Katzenbach, Katzenbach v. Morgan and Gaston County v. United States. He noted that "Congress had before

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39/ Id. at 291

40/ 42 U.S.C. §1973aa (1970).

it a long history of the discriminatory use of literacy tests to disenfranchise voters on account of their races" 41/ as well as "this country's history of discriminatory educational opportunities in both the North and South" 42/ He concluded:

> Faced with this and other evidence that literacy tests reduce voter participation in a discriminatory manner not only in the South but throughout the Nation, Congress was supported by substantial evidence in concluding that a nationwide ban on literacy tests was appropriate to enforce the Civil War amendments. 43/

In a separate opinion, Mr. Justice Douglas found that the national ban on literacy tests could be sustained as a valid exercise of Congressional power under the Fourteenth Amendment. Relying on the Court's decisions in Katzenbach v. Morgan and Gaston County v. United States, Douglas stated:

> . . .Congress in the present legislation need not make findings as to the incidence of literacy. It can rely on the fact that most States do not have literacy tests; that the tests have been used at times as a discriminatory weapon against some minorities, not only Negroes but Americans of Mexican ancestry, and American Indians; that radio and television have made it possible for a person to be well informed even though he may not be able to read and write. We know from the legislative history that these and other desiderata influenced Congress in the choice it made in the present legislation; and we certainly cannot say that the means used were inappropriate. 44/

41/ Oregon v. Mitchell 400 U.S. 112, 132 (1970).

42/ Id. at 133.

43/ Id. at 133.

44/ Id. at 147.

Also in a separate opinion, Mr. Justice Harlan, while regretting Congress' sweeping approach to the problem, i.e., the national scope of the ban, concluded that Congress' choice of remedies "was within the range of the reasonable." 45/ He concluded that:

> (d)espite the lack of evidence of specific instances of discriminatory application or effect, Congress could have determined that racial prejudice is prevalent throughout the Nation, and that literacy tests unduly lend themselves to discriminatory application, either conscious or unconscious. This danger of violation of Section 1 of the Fifteenth Amendment was sufficient to authorize the exercise of Congressional power under Section 2. 46/

The remaining six Justices spoke approvingly of the Court's decision in South Carolina v. Katzenbach and Gaston County v. United States. As a basis for sustaining the national ban on literacy tests, the Justices relied on the nexus between unequal educational opportunity and the resulting discriminatory effect of literacy tests. The opinion of Mr. Justice Stewart (concurred in by Chief Justice Berger in Mr. Justice Blackmun) noted with particular satisfaction that Congress adopted a national remedy:

> . . .Finally, nationwide application may be reasonably thought appropriate when Congress acts against an evil such as racial discrimination which in varying degrees manifests itself in every part of the country. A remedy for racial discrimination which applies in all the States underlines an awareness that the problem is a national one and reflects a national committment to its solution. 47/

45/ Id. at 217.

46/ Id. at 216

47/ Id. at 283, 284.

It is clear therefore that Congress has the authority to impose a permanent ban on literacy tests and that the constitutionality of such an enactment can rest on one of several grounds: (1) the lack of a compelling State interest sufficient to overcome the denial of the right to vote; (2) the nexus between unequal educational opportunities and the resulting discriminatory effect of literacy tests; and (3) the pervasive discrimination which still exists in this country and which gives rise to the presumption that literacy tests which were discriminatorily applied in the past will continue to be so applied in the future.

The Court has repeatedly affirmed Congress' broad power under the Civil War Amendments to remedy the discriminatory denial of the right to vote. A permanent national ban on literacy tests is well within the range of reasonable solutions to enforce the prohibitions contained in these amendments. A permanent ban meets the standards of the test enunciated by Chief Justice Marshall long ago and reaffirmed by the Court in Katzenbach v. Morgan and South Carolina v. Katzenbach:

> Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional. McCulloch v. Maryland. 48/

48/ McCulloch v. Maryland, 4 Wheat. 316, 421 (1819).

V. FACTUAL SUPPORT FOR A PERMANENT NATIONAL BAN ON LITERACY TESTS

Having established the power of Congress to enforce the Civil War Amendments and its authority to act independently in determining proper remedies pursuant to these amendments, it is appropriate now to consider the factual grounds on which Congress might base a decision to permanently ban the use of literacy tests.

It has generally been stated that literacy tests per se are used to exclude illiterates, and such discrimination has been justified as a reasonable way to provide a more informed or intelligent electorate. 49/ The weight of factual evidence indicates that the use of literacy tests in this country has an invidiously discriminatory history, that they have little or no value in insuring an informed electorate, that they have been used for racially discriminatory purposes and that their use could have a discriminatory effect (now and in the future), and that reinstating them as a voter qualification would achieve no meaningful purpose.

While literacy tests have been primarily thought of as having disfranchising effects on black people in the South, their actual effects have not been limited to the South or to blacks. The history of literacy requirements for voting (as well as in other areas) shows that a primary motivation behind these requirements has been to render various racial, ethnic, religious, and national origin groups politically impotent. 50/

49/ Lassiter v. Northampton County Board of Educ., supra.

50/ See generally Leibowitz, English Literacy: Legal Sanctions for Discrimination, 45 Notre Dame Law. 7 (1969). Garcia, Language Barriers to Voting: Literacy Tests and the Bilingual Ballot, 6 Col. Hum. Rights L. Rev. 83 (1974).

Diverse groups have been the victims of literacy tests in this nation's history--blacks, Jews, Irish, Finns, Chinese, Japanese, American Indians, Eskimos, and the Spanish-speaking or Spanish surnamed. 51/

In 1970, prior to enactment of the Voting Rights Act amendments, there were 31 States and the District of Columbia which did not have literacy tests. 52/ In addition, the use of literacy tests was suspended by the Voting Rights Act in six States, and in at least four other Snates the test was not applied. 53/ Thus in 1970 a literacy requirement was seriously enforced in only about nine States. We urged then that,given the total absence of any evidence that the quality of government or of elected officials was any higher in these literacy States than in any others, Congress could reasonably conclude that literacy tests were not accomplishing the purpose for which they were designed.

A study by the U.S. Commission on Civil Rights, prior to enactment of the national ban on literacy tests, concluded that, "in general, States with literacy tests have lower registration and turnout rates than those without literacy requirements." 54/ In the 12 non-literacy test States covered by the study, 83 percent of the voting age population was registered; for all States maintaining literacy tests, registration

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51/ Id.

52/ See note 9 infra.

53/ Id.

54/ U.S. Commission on Civil Rights, The Impact of Voter Literacy Tests Upon Voter Participation in States of the North and West: November, 1968, at 2 (Jan. 19, 1970). Printed in Senate Hearings on Amendments to the Voting Rights Act at 185.

was 78 percent. Furthermore, two of the three highest voter registration States with literacy tests appeared not to enforce the test. 55/ At that time, the lowest percentage reported for a non-literacy test State was higher than that for four of the literacy test States. As noted in Oregon v. Mitchell, this report and other information presented by the Commission during the 1970 congressional hearings concluded that in the States surveyed literacy tests have a negative impact upon voter registration which "falls most heavily on blacks and persons of Spanish surname." 56/

There is a basic inconsistency between the principles of a democratic government and the use of literacy tests as a precondition of the right to vote.

The theory of a democratic government is that political power should be distributed equally throughout society. Government is for the people, by the people and of the people. The laws and actions of local, State and Federal governments have equal effect on literates and

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55/ Id. Those States were Delaware and Washington.

56/ 400 U.S. 112, 235 (Brennan, J.).

illiterates. 57/ Certainly illiterates should not be excluded from a voice in their government if they are otherwise qualified to vote.

The simple expedient of using literacy tests to determine qualified voters should not serve as a substitute for regulations using less drastic means where fundamental rights going to the heart of a democratic form of government are at stake.

Moreover, Congress could reasonably find that literacy tests do not sufficiently disqualify "unintelligent" voters or assure the qualification of "intelligent voters." Today the written word is less significant as a means of acquiring information than it was historically--even in recent history. Radio and television are for

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57/ In a letter to President Nixon (March 28, 1969) Father Theodore M. Hesburgh, then Chairman of the U.S. Commission on Civil Rights, advocated a ban on the use of literacy tests. He stated:

> There is much to be said for the view that it is unfair to deny a voice in their own government to those who cannot read or write. The lives and fortunes of illiterates are no less affected by the actions of local, State and Federal governments than those of their more fortunate brethren. Most States, perhaps for this reason, do not impose a literacy test as a prerequisite to voting.

Father Hesburgh in testimony before the Subcommittee on civil and constitutional rights of the House Committee on the Judiciary on March 6, 1975, reiterated his support for a national permanent ban and pointed out additional supportive facts.

many people primary sources of information. 58/ In a special ten year study of public attitudes toward television and other media, Roper Research Associates reported that in the studied years from 1959-1968 television became the chief source of information for adults in this country. 59/ "In 1963 television took over the lead from newspapers as a source of most news" for persons over 21 years of age. Thus, as Justice Douglas stated in Oregon v. Mitchell, it is "possible for a person to be well informed even though he may not be able to read and write." 60/

A 1970 study by the U.S. Commission on Civil Rights 61/ documents the discriminatory impact of literacy requirements. In literacy test States less than 55 percent of the black population having an educational

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58/ The President's Commission on Registration and Voting Participation in its November 1963 Report recommended that literacy tests should not be a requisite for voting. The Commission explained:

> Many media are available other than the printed word to supply information to potential voters. The Commission is not impressed by the argument that only those who can read and write or have a sixth grade education should have a voice in determining their future. This is the right of every citizen no matter what his formal education or possession of material wealth. The Commission recommends that no literacy test interfere with the basic right to suffrage. Id. at 40.

59/ Roper Research Associates, "A Ten-Year View of Public Attitudes Toward Television and Other Media 1959-1968," at 2 (1969). The study also showed that for the same age group, television was a primary source of news for 59% by 1968, for 29% television was the exclusive source of news; 44% considered television to be the most believable medium compared with 21 % who felt newspapers were most believable.

60/ Oregon v. Mitchell, 400 U.S. 112, 147 (1970).

61/ See note 54, infra.

attainment of eight years or less was registered, whereas, in States without literacy tests over 75 percent of the black population having less than eight years of education was registered.

Because of their generally lower educational level, blacks are affected more by literacy tests than are whites. For the same reason, literacy tests have an equally discriminatory effect on persons of Spanish surname and on American Indians.

Statistics show that blacks, Native Americans and Spanish origin minorities are handicapped by both lower educational attainment levels and lower performance levels than other population groups.

The most recent census statistics, for example, reveal that 56.3 percent of persons of Mexican origin, twenty-five years of age or older, have only 8 years or less schooling; the same is true of 47.8 percent of persons of Spanish origin in general, and 36.6 percent of blacks. Only 21.4 percent of whites over 25 have had as little education. 62/ This 1974 survey did not include Native Americans, but the 1970 census showed that 43.2 percent of American Indians of at least 25 years of age had completed eight years or less in school. 63/

In terms of median levels of attainment, whites lead with 12.1 years, while American Indians trail at 9.9, Spanish origin (native

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62/ P-20, No. 274 (Dec. 1974), Table 2 at 33-45.

63/ Census, Educational Attainment, (1970) PC(2)-5B, Table 1 at 1. See also, U.S. Commission on Civil Rights, The Southwest Indian Report 24-25 (May 1973) (hereinafter cited as Southwest Indian Report).

born) at 9.9, blacks at 9.7, and Spanish origin (foreign born) at 8.3. 64/

Performance levels are also pertinent. The widely quoted Coleman Report comparison of the academic achievement of various racial and ethnic groups within grades 3, 6, 9 and 12 revealed that black ninth graders in the metropolitan Northeast were 2.6 grade levels behind their white counterparts in reading comprehension. 65/ Mexican American ninth graders were 1.9 grade levels behind Anglos in the metropolitan Southwest. Puerto Rican ninth graders were 3.3 grade levels behind whites in the metropolitan Northeast. And American Indians were 2.0 grade levels behind whites in the non-metropolitan North. 66/

Discriminatory State action has been shown to be a significant factor in creating and perpetuating this educational gap between the quality of public education afforded to white students and that available to blacks, Americans of Spanish origin, and Native Americans.

Studies such as the Coleman Report and the U.S. Commission on Civil Rights' study of Racial Isolation in Public Schools (1967) show the educationally harmful effects upon black students of attending--as

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64/ PC(2)-5B, Table 1 at 1. This disparity has changed some since 1970: in 1974 the median for whites is 12.4, blacks 11.1, Spanish origin 9.4 and Mexican origin 8.3. P-20, No. 274 (Dec. 1974) Table 1 at 16-21. These same data discloses great disparity for persons 55 to 65 years old (median for whites 12.1 years, blacks 8.4 years and 6.2 for Mexican origin persons). This disparity increases as the age groups increase. Id.

65/ J. Coleman, et al., Equality of Educational Opportunity (U.S. Office of Education 1966).

66/ Id. at 274, Table 3.121.2. See also, Southwest Indian Report at 24.

they do across the nation [67]--schools isolated by race and social class. In its report on school financing, this Commission noted that:

> Discrimination against minority students in the Nation's public schools is rapidly giving cause for real alarm among all those concerned with equal opportunity and with the entire future of this country. Inequality in school financing is increasingly recognized as a major factor in perpetuating this educational and social dilemma. [68]

In great measure, the functional illiteracy prevalent among Mexican Americans in the Southwest [69] is the result of a failure on the part of local governments to provide adequate education opportunities. Numerous studies by the U.S. Commission on Civil Rights and other groups have documented the proposition that Mexican Americans receive education inferior to that afforded Anglos. [70] Federal courts have also found widespread isolation and segregation of Mexican Americans in the public schools of the Southwest, resulting in inferior education for Chicano children. In Cisneros v. Corpus Christi Independent School District, 324 F. Supp. 599 (S.D. Tex. 1970), modified 467 F.2d (5th Cir. 1972); cert. denied, 413 U.S. 922 (1973); it was said:

67/ See also, U.S.C.C.R., Equal Opportunity in Suburbia (1974); U.S.C.C.R., Twenty Years After Brown (1974).

68/ U.S. Commission on Civil Rights, Inequality in School Financing; The Role of the Law at 1 (August 1972).

69/ More than a quarter of Mexican Americans (26.5 percent) over the age of 25 completed less than 5 years of school. Persons of Spanish Origin in the United States; March 1974. Series P-20, No. 267, Bureau of the Census.

70/ The United States Commission on Civil Rights has issued a series of reports on the quality of education in the Southwest entitled, "Mexican American Educational Series". Rept. I: Ethnic Isolation of Mexican Americans in the Public Schools of the Southwest", (1971); Rept. II: The Unfinished Education (1971); Rept. III: The Excluded Student (1972); Rept. IV: Mexican American Education in Texas: A Function of Wealth (1972); Rept. V: Teachers and Students (1973); Rept. VI: Toward Quality Education for Mexican Americans (1974).

> The Court is of the firm opinion that administrative decisions by the school board in drawing boundaries, locating new schools, building new schools and renovating old schools in the predominantly Negro and Mexican parts of town, in providing an elastic and flexible subject, transfer system that resulted in some Anglo children being allowed to avoid the ghetto, or 'corridor' schools, . . . (by) not allowing Mexican-Americans or Negroes the option of going to Anglo schools, by spending extraordinarily large sums of money which resulted in intensifying and perpetuating a segregated, dual school system, . . . were, regardless of all explanations and regardless of all expressions of good intentions, calculated to, and did, maintain and promote a dual school system. [Id. at 617-620.]

Similarly, in the United States v. Texas, 342 F. Supp. 24 (E.D. Tex. 1971), the court found that Mexican American students in the Del Rio area of Texas

> have been subjected, over the years, to unequal treatment with respect to the educational opportunities afforded them and are, thus, part of a so-called de jure dual school system based upon separation of students of different ethnic origins. [Id. at 24.]

The Court ordered wide-ranging relief designed to meet the linguistic needs of Spanish-speaking students.

Moreover, in Texas, the Civil Rights Commission has found a direct correlation between the wealth of a school district and the quality of education:

> The Texas school finance system results in discrimination against Mexican American school children. Predominantly Mexican American districts are less wealthy in terms of property values than Anglo districts and the average income of Chicanos is below that of Anglos. These circumstances existing, the State of Texas has devised an educational finance system by which

> the amount spent on the schooling of students is a function of district and personal wealth. The end result is that the poor stay poor and those receiving inferior education continue to receive inferior education. 71/

The result, throughout the Southwest, is a pattern of under-achievement by Mexican American students. The Commission concluded:

> The basic finding of this report is that minority students in the Southwest--Mexican Americans, blacks, American Indians--do not obtain the benefits of public education at a rate equal to that of their Anglo classmates...Without exception, minority students achieve at a lower rate than Anglos: their school holding power is lower; their reading achievement is poorer; their repetition of grades is more frequent; their overageness is more prevalent; and they participate in extracurricular activities to a lesser degree than their Anglo counterparts. 72/

For the State to provide inferior education in the use of basic English skills and then to force upon voters the obstacle of a literacy test as a prerequisite for voting would result in no less than the disfranchisement of a major portion of the country's minorities. While a State may manifest some interest in a literate electorate, this interest cannot justify a State's use of a disability created in part by its own dereliction, or that of another State, in violation of the Fourteenth Amendment, as the basis for disfranchisement.

71/ U.S. Commission on Civil Rights, Mexican American Education in Texas: A Function of Wealth 28 (1972).

72/ U.S. Commission on Civil Rights, The Unfinished Education 41 (1971).

The Supreme Court, in Gaston County v. United States, [73] recognized the casual relationship between unequal educational opportunities and the discriminatory effect of literacy requirements:

> The legislative history of the Voting Rights Act of 1965 discloses that Congress was fully cognizant of the potential effect of unequal educational opportunities upon exercise of the franchise. This causal relationship was, indeed, one of the principal arguments made in support of the Act's test suspension provisions. [74]

It should be clear, that, the only satisfactory solution to the problem of unequal education and its continuing effects is the extension of a total ban on literacy tests.

It should also be clear that limiting a total ban on literacy tests only to those jurisdictions shown to have violated the Fourteenth Amendment requirements in their public education systems would be insufficient for it to protect a nationally mobile population [75] and to remedy a problem which is national in scope. [76]

73/ 395 U.S. 285 (1968).

74/ Id. at 289.

75/ See generally, Census, Population Characteristics, Mobility of the Population of the United States March 1970 to March 1974, Series P-20, No. 273 (Dec. 1974); see also, Supplementary Report: Characteristics of Negro Immigrants to Selected Metropolitan Areas: 1970, Series PC(S1)-47 (June 1973).

76/ Oregon v. Mitchell, supra.

CONGRESS COULD CONCLUDE THAT THE BAN ON LITERACY TESTS SHOULD BE PERMANENT

In the aftermath of Oregon v. Mitchell (discussed at Section V supra), proponents of States rights have asserted that the unanimity of the Supreme Court's decision to uphold the national suspension of literacy tests turned on the fact that it was a temporary rather than a permanent ban. They rely on Mr. Justice Harlan's opinion to support their argument since he found comfort in the fact that the suspension was temporary.[77/] However, even Justice Harlan recognized that

> "While a less sweeping approach in this delicate area might well have been appropriate, the choice which Congress made was within the range of the reasonable." (emphasis added, citations omitted) [78/]

It is equally reasonable to infer from this statement by Mr. Justice Harlan, and statements of other members of the Court in unanimously upholding the national ban on literacy tests [79/] that Congress could proscribe such tests for 5 years, 10 years or indefinitely. Once the Court has determined that Congress has the power to legislatively proscribe the use of such tests, it will not substitute its judgment as to how broad the proscription should be and for what length of time. [80/]

77/ 400 U.S. 112, 216.

78/ Id. at 217.

79/ Id. at 118, 129, 133 (Black, J.); id. at 147 (Douglas, J.); id. at 235-236 (Brennan with White and Marshall, J.J. concurring); and id. at 283-284 (Stewart, J. with whom Blackmun, J. and Burger, C.J. concurred).

80/ Much of the Civil Rights legislation enacted by Congress over the last 10-15 years has been permanent rather than temporary, particularly where Congress has recognized the need to forcefully legislate to deal with a national problem and where invidious discrimination is found. See for example, Title VII of Civil Rights Act as amended, 42 U.S.C. §2000e et seq. Nor is Congress reluctant to nullify State laws and regulate areas previously believed to be exclusively within the province of sovereign States (i.e. the 1972 Amendments to Title VII cover State and local governments and employees of educational institutions).

In the instant matter, Congress could conclude from evidence presented to it in 1970 and in 1975 of the discriminatory history, use and effect of literacy tests and the widespread nature of the problem, such tests have no place in a modern democratic society. Further, the overwhelming evidence of unequal educational opportunity and the present slow pace of changes in the disparities between white and minority citizens could lead Congress to conclude that there is no reasonable expectation of parity or successfully overcoming the effects of this discrimination in the near future. Thus, Congress could enact a national permanent ban on literacy tests. When, and if parity is reached, then Congress can in its wisdom legislate appropriately.

CONCLUSION

Giving consideration to the present suspect status of literacy tests under the Fourteenth and Fifteenth Amendments, the power and appropriateness of congressional action to implement these Amendments, and the factual basis to support a determination by Congress that the use of literacy tests should be terminated, one must conclude that there is no obstacle under the Constitution to a permanent national ban on the use of literacy tests.

U.S. COMMISSION ON CIVIL RIGHTS
Office of General Counsel

March 1975

STAFF MEMORANDUM

ISSUE: Is an English-only electoral process, in a jurisdiction with significant numbers* of citizens who are not literate in English, a "test or device" as defined by 4(c) of the Voting Rights Act?

The phrase "test or device" is used thirteen times in the Voting Rights Act and defined twice:

> 4(c) The phrase "test or device" shall mean any requirement that a person as a prerequisit for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.

The courts have not specifically addressed the issue of definition in relation to English-only elections. It is clear, however, that all matters affecting voting or political participation are not cognizable as "tests or devices."[1/] Some of the specific practices held not to be included are: property qualifications,[2/] documentation of residency,[3/] and a requirement that a candidate designate a financial committee.[4/]

1/ South Carolina v. Katzenbach, 383 U.S. 301 (1966).

2/ 30 Fed. Reg. 14045, 14046.

3/ Davis v. Gallinghouse, 246 F. Supp. 208 (E.D. La. 1965).

4/ Hadnott v. Amos, 295 F. Supp. 1003 (M.D. Ala. 1968).

*This memorandum assumes that the presence of a significant population of non-English speaking persons is required, as 4(d) of the Civil Rights Act excludes occasional incidents. In addition, those cases providing a remedy for monolingual elections have utilized a 5 percent non-English speaking population requirement.

"English-only" elections

The issue of "English-only" elections has been subject to substantial litigiation in the context of whether such elections are violations of the right to vote. 5/

The leading cases, which have held such elections to be impermissible, concern Puerto Ricans. Under Section 4(e) of the Voting Rights Act, States are prohibited "from conditioning the right to vote on the ability ...to read, write, understand or interpret any matter in the English language" of persons educated in an "American flag school" where the predominant classroom language was other than English.

In Torres v. Sachs, 6/ the Federal District Court held that the electoral process in New York City, conducted exclusively in English, constituted a "condition" on Puerto Rican plaintiffs' right to vote. The court based its decision both on Section 4(e) and on Section 201 of the 1970 amendments. As the Section 201 definition of "test or

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5/ The issue of whether an English language literacy requirement can be a valid exercise of State power in non-Voting Rights Act situations has been addressed in a number of cases: in Castro v. California, 2 Cal. 3d 223 (1970), the California Supreme Court found that although the English language requirement is unconstitutional, it did not order a bilingual election, and stated that the State did have a valid interest in a single language system; in Mexican American Federation-Washington State v. Naff, 299 F. Supp. 587 (E.D. Wash. 1969) jur. vac. rem'd. sub. nom. Jimmez v. Naff, 400 U.S. 986 (1971), the Washington State Supreme Court held an English language literacy test to be a valid exercise of the State power to regulate suffrage; in Cardona v. Power, 16 N.Y. 2d 639 (1965), the New York Court of Appeals, prior to passage of the 1965 Act with its Section 4(e) special "Puerto Rican" provision, would not invalidate English literacy requirements.

6/ 381 F. Supp. 309 (1974).

device" [7] is identical to that contained in Section 4(c), the Court inferentially held English-only elections to be "tests or devices."

In reaching its conclusion the court pointed out that Congress had by §4(e) recognized a situation created by governmental action. Many Puerto Ricans residing in New York City were born and educated in the Commonwealth of Puerto Rico, where--by governmental action--they were educated exclusively in Spanish. Since all persons born in the Commonwealth of Puerto Rico are U.S. citizens by virtue of congressional action [8] there was no "citizenship based" reason for becoming English language literate as there is for non-citizen immigrants who must be literate in English in order to attain citizenship status. [9] Although not mentioned, another factor that has systematically kept Puerto Rican migrants in the U.S. mainland from acquiring English language literacy has been the overwhelming failure of local school systems to provide equal educational opportunity to Puerto Rican migrants. [10]

The court in Torres felt that the right to vote was meaningless unless the voter was cognizant of what he or she was doing. It relied on early decisions relating to black and Chicano illiterates, which required

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7/ Id. at 312.

8/ 8 U.S.C. §1402.

9/ 8 U.S.C. §1423.

10/ See Hearing, U.S. Commission on Civil Rights, New York, February 1972; and Bilingual/Bicultural Education/Un Privilegio o Un Derecho? a report of the Illinois Advisory Commission to the U.S. Commission on Civil Rights, 1974.

jurisdictions to provide illiterates with assistance.[11] The Torres court also focused on the definition of voting contained in Section 14(c)(1) of the Voting Rights Act which states that:

> The terms "vote" or "voting" shall include all action necessary to make a vote effective...

Another New York case makes clear that voting means more than the specific act of casting a ballot. In Coalition for Education in District One v. Board of Elections[12] concerning a court ordered multilingual school board election[13] the district court considered the entire electoral process including information, ballots, voter assistance, etc., to be essential parts of voting.

It is significant to note that neither the court in Torres, nor the courts in any of the similar cases decided in Illinois,[14] Pennsylvania,[15] or New Jersey,[16] have required a substantial showing of other voting discrimination or education discrimination against Commonwealth born Puerto Ricans.

11/ United States v. Louisiana, 265 F. Supp. 703 (E.D. La. 1966) aff'd per curian 386 U.S. 270 (1967); United States v. Mississippi, 256 F. Supp. 344 (S.D. Miss. 1966); and Garza v. Smith, 320 F. Supp. 131 (W.D. Tex. 1970), vacated and remanded, 401 U.S. 1006 (1971), appeal dismissed for lack of juris., 450 F.2d 790 (5th Cir. 1971).

12/ 370 F. Supp. 42 (S.D. N.Y. 1972).

13/ Lopez v. Dunkins, 73 Civ. 695 (S.D. N.Y. 1973).

14/ PROPA v. Kusper, 350 F. Supp. 606 (N.D. Ill. 1972) aff'd. 490 F.2d 575 (7th Cir. 1973).

15/ Arroyo v. Tucker, 372 F. Supp. 764 (E.D. Pa. 1974).

16/ Marquez v. Falcey, 73 Civ. No. 1447 (D. N.J. 1973).

Application of Torres Principles to Other Language Minorities

The theory behind Section 4(e) of the Voting Rights Act is equally although somewhat differently applicable to at least three "racial" groups which contain significant numbers of persons not literate in English. These groups are: Mexican Americans, Native Americans and Asian Americans.[17/]

Section 4(e), as noted earlier, contains congressional recognition of two significant factors relating to voting rights: (1) governmentally supported education exclusively in Spanish which had permitted citizens to be illiterate in English; and (2) citizenship by birth rather than based on a requirement of being literate in English. All three groups have been located in this country for generations; the presence of Native Americans and Mexican Americans preceded the establishment of the constitution. Their citizenship therefore is by birth. The inability to be literate in English for significant portions of these populations is due in large part to Federal, State, and local government inaction and all too frequently to deliberate unconstitutional denials of equal educational opportunity. This Commission has documented much discrimination in education against Chicanos in the Southwest[18/] and the courts have

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17/ The phrase "race or color" as used in this memorandum includes language minority groups, such as Asian Americans, Native Americans, Mexican Americans, and Puerto Ricans. See separate USCCR staff memorandum: The Phrase "race or color" as Used in the Voting Rights Act of 1965, as Amended, Includes Minority Groups Other than Blacks, 1975.

18/ U.S. Commission on Civil Rights, the "Mexican American Educational Series". Rept. I: Ethnic Isolation of Mexican Americans in the Public Schools of the Southwest (1971); Rept. II: The Unfinished Education (1971); Rept. III: The Excluded Student (1972); Rept. IV: Mexican American Education in Texas: A function of Wealth (1972); Rept. V: Teachers and Students (1973); Rept. VI: Toward Quality Education for Mexican Americans (1974).

recognized the existence of this educational deprivation.[19] The tragic story of the educational neglect and abuse the Native American population has suffered has all too frequently been documented.[20] In addition, the U.S. Department of Health, Education, and Welfare has determined that monolingual education practices of the San Francisco schools discriminate against Asian Americans; this determination was upheld by the U.S. Supreme Court in Lau v. Nichols.[21]

Moreover, the Supreme Court has made clear that where the government bears responsibility for illiteracy, literacy cannot be used as a condition upon the right to vote.[22]

Although many of the factual bases which underly Section 4(e) are present for other language minority groups, the court cases concerning these groups do not establish clearly that monolingual elections violate their rights. The California Supreme Court[23] found an English language

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19/ See, e.g., Keyes v. School District No. 1, 413 U.S. 189 (1973) and Cisneros v. Corpus Christi Independent School District, 324 F. Supp. 599 (S.D. Tex. 1970) modified (as to remedy), 467 F.2d 142 (5th Cir. 1972) cert. denied, 413 U.S. 922 reh. denied, 414 U.S. 881 (1973).

20/ See, e.g., U.S. Commission on Civil Rights, The Southwest Indian Report, 1973; NAACP, Legal Defense and Education Fund, Inc., An Even Chance (1971); Special Subcommittee of Indian Education of the Senate Committee on Labor and Public Welfare, Indian Education: A National Tragedy--A National Challenge, Nov. 1969, 91st Cong. 1st Sess.

21/ 414 U.S. 563 (1974).

22/ Gaston County v. United States, 395 U.S. 285 (1966). The court refused to allow Gaston County to be removed from the coverage of Section 4(b) which would have allowed it to reinstitute literacy testing, because the County had a long history of denying equal educational opportunity to its black citizens.

23/ Castro v. California, 2 Cal. 3d 223 (1970).

literacy requirement unconstitutional but did not order the same broad bilingual relief that the Torres court did. California does, however, now have a limited bilingual election process. In the State of Washington, [24/] Chicano litigants were unable to convince the court that English-only elections were unconstitutional. The decision, however, was given prior to nationwide ban on literacy contained in the 1970 amendments to the Voting Rights Act.

Two cases arising out of Texas do support, indirectly, a thesis that English-only elections are part of a pattern of discrimination against non-English speaking citizens. In Garza v. Smith [25/] Mexican Americans successfully challenged a Texas statute which allowed aid in voting to physically handicapped citizens but did not provide such aid to "Chicano" illiterates. The case, brought on an "equal protection" theory, did not specifically reach the issue of monolingual elections as a per se denial of voting rights. In Graves v. Barnes [26/] the U.S. District Court held a redistricting in Bexar County, Texas (San Antonio) which provided for multi-member districts to violate the "one person, one vote" mandate of Reynolds v. Sims [27/] in relation to the Chicano population.

24/ Mexican American Federation-Washington State v. Naff, 299 F. Supp. 587 (E.D. Wash. 1969) jud. vac. and rem'd. sub. nom., Jimmez v. Naff, 400 U.S. 986 (1971).

25/ 320 F. Supp. 137 (W.D. Tex. 1970) vacated and remanded, 401 U.S. 1006 (1971) appeal dismissed for lack of juris., 450 F.2d 790 (5th Cir. 1971). Subsequent history exclusively concerns remedy sought by plaintiffs.

26/ 343 F. Supp. 704 (W.D. Tex. 1972).

27/ 377 U.S. 533 (1964).

The U.S. Supreme Court in sustaining the holding in relation to Baxar County, in White v. Regester [28/] noted that the District Court had based its decision on its survey that the "Chicano" population had differed from and continues to suffer from the effects of invidious discrimination in education, employment, economics, health and politics.

Utilizing Torres as the Basis of Holding that English-only Elections are "tests or devices"

The Department of Justice has taken the position that the decision of U.S. District Court in Torres means that the utilization of English-only elections by New York is a test or device within the meaning of 4(b) of the Voting Rights Act. This position has been litigated and to the degree it was in fact before the court, sustained.[29/]

The history of the New York litigation is important in determining the import of the current decision. In the 1968 Presidential elections, three counties in New York State, which has a literacy test, had less than 50 percent of voting age population voting. The counties, King, Bronx, and New York--all in New York City--by operation of the "trigger" in Section 4(b) are automatically subject to the special provisions of the Voting Rights Act, primarily Section 5. New York sought to remove itself from Voting Rights Act coverage, under the "excape clause" provision of Section 4(a) of the Voting Rights Act. The U.S. Attorney General consented to New York's removal.[30/] After the decision in Torres,

28/ 412 U.S. 755 (1973).

29/ New York v. United States, 95 S. Ct. 166 (1974).

30/ These decisions are readily appealable by third parties even though third parties may be subject to the operation of the "test or device." See NAACP v. New York, 413 U.S. 345 (1972) for a history of this litigation. See also, Apache County v. United States, 256 F. Supp. 903 (D.C. D.C. 1966) as to reviewability.

the Department of Justice went back to the U.S. District Court and withdrew its previous consent and filed a motion to reopen. The District Court granted the motion to reopen. Several months later the District Court granted a motion [31/] to deny New York's request for a declaratory judgment. The net effect is that the New York counties remained covered under Section 5 and New York's request to be removed was denied. New York appealed both District Court orders. The Supreme Court summarily affirmed. As the District Court did not enter a written opinion on either issue, it is unclear what import to give the Supreme Court's affirmation. The Department of Justice does not explain in detail its view that Torres found a "test or device" rather it simply alleges in its brief that it did:

> The practical consequence of the Board's practices is that the Torres plaintiffs and others similarly situated are unable to vote because they cannot adequately comprehend the English language. Thus, the Board has, in effect, imposed a "requirement that a person as a prerequisite for voting . . . demonstrate the ability to read, . . . understand, or interpret" the election materials (42 U.S.C. 1973b(c)). The printing, distribution, and use of election materials solely in the English language and the failure adequately to provide bilingual materials constitute a "test or device" within the meaning of Section 4(c). 32/

Although the Torres decision implies, by inference, that an English-only election is a "test or device" it does not clearly state that conclusion. Torres refers to the language of 4(e) "conditioning the right to vote...on

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31/ Civ. No. 73-1740, April 30, 1974. The motion for summary judgment was made by the intervenor NAACP on additional grounds to the holding in Torres.

32/ Motion to Affirm at 10.

the ability to read, write, understand, or interpret any matter in the English language." The definition of "test or device" in Section 4(c) however refers to "any requirement that a person as a prerequisite for voting . . . demonstrate the ability to read . . . ." A key issue therefore is whether there is any substantive or legal distinction to be drawn between the meaning of the two sections.

The Supreme Court has adopted a policy of broadly interpreting the provisions of the Voting Rights Act.[33/] In South Carolina v. Katzenbach[34/] the court consistently referred to "literacy tests and similar devices" as mechanisms instituted for the purpose of disenfranchisement, framed in a way to facilitate such disenfranchisement and administered in a discriminatory fashion.[35/]

English-only elections would seem to meet this standard. There is substantial evidence that English literacy requirements were designed to exclude non-English speaking immigrants.[36/] The discriminatory effect of the English-only election is evidenced by the significant under-representation of Mexican Americans and other language minority persons in the political process. The administration of the device of

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33/ See, e.g., Allen v. State Board of Elections, 393 U.S. 544 (1969) and Perkins v. Matthews, 400 U.S. 379 (1971).

34/ 383 U.S. 301 (1966).

35/ Id. at 333-334.

36/ See, USCCR Staff Memorandum, The Constitutionality of Legislation by Congress Permanently Prohibiting the Use of Literacy Tests as a Prerequisite to Voter Registration, 1970, found in Hearings on Amendments to the Voting Rights Act of 1965 before the Subcommittee on Constitutional Rights of the Senate Judiciary Comm., 91st Cong., 1st and 2d Sess., 413-14 (1970).

such monolingual elections impacts only on persons not literate in English. The Department of Justice's position in New York v. United States is therefore a reasonable interpretation of the statutory language.[37/]

As other language minority persons are similarly situated to the Puerto Rican plaintiffs in Torres v. Sachs, a similar case can be constructed so that English language elections are definable under Section 4(c) as "tests or devices."

Consequence

A determination that English language elections are "tests or devices" does not necessarily subject the jurisdiction conducting the elections to the provisions of the Voting Rights Act.[38/]

Section 4(b) of the Act is the "triggering mechanism" which determines Section 5 coverage. The use of a "test or device" is only one part of the formula. In order for coverage to exist, it is also necessary that during the 1964 or 1968 Presidential election, less than 50 percent of the persons eligible to vote were registered or less than 50 percent of

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37/ The courts have been prone to give Justice significant leeway in making 4(b) determinations. See, e.g., Apache County v. United States, 256 F. Supp. 903 (D.C. D.C. 1966).

38/ Section 5, often labeled "the heart of the Act" provides that wherever a covered jurisdiction undertakes to change any matter affecting voting, the change must be submitted to the U.S. Attorney General or the District Court for the District of Columbia. The change is evaluated against the standard that it not have the purpose or effect of "denying or abridging the right to vote on account of race or color . . . ." Congress created Section 5 because it determined that traditional means had to date failed to eliminate voting discrimination. The long and expensive piecemeal process of litigating in relation to specific State legislation or practices had not been effective. Jurisdictions which historically had been flagrant violators of voting and other rights would under Section 5 bear the burden of justifying any action they take.

of the registered voters voted. Under this formula, of those jurisdictions containing significant numbers of language minority persons, probably Texas would be subject to Section 5 coverage.

Even if a jurisdiction could not be covered by Section 5 because it did not meet either the "test or device" or low voting requirement of the trigger, English-only elections would not be free from attack under The Voting Rights Act.

Jurisdictions not subject to Section 5 do not have free license to discriminate in voting. They are covered by the permanent sections of the Voting Rights Act of 1965, as well as prior Voting Rights legislation.[39/] Any action or practice in a jurisdiction which is believed to discriminate in voting on the basis of "race or color" may therefore be challenged by court action.

The Administrative Approach in Implementing a Determination that English-only Elections are "tests or devices"

The Department of Justice, to date, has been willing to take the legal position that English-only elections are "tests or devices" only where a court has invalidated the "English-only election."[40/] There does not appear to be any legal obstacle to the Department of Justice taking the same position without a judicial determination. In other Section 4(b) decisions Justice has not waited upon judicial determinations.

39/ 42 U.S.C. §1971(a); and 28 U.S.C. §1983.

40/ Statement of J. Stanley Pottinger, Assistant Attorney General for Civil Rights, before Civil Rights Oversight Subcommittee of House Judiciary Committee, March 6, 1975.

Justice's position seems to be based on several factors: the fact that the Act has been in existence ten years and such a position had not previously been taken; the lack of clear legislative history to support the position it took in New York v. United States and the possibility that the position could lose in a fully litigated setting. 41/

Conclusion

The argument that "English-only" elections are prohibited as "tests or devices" under the Voting Rights Act is applicable to Puerto Ricans and other language minorities other than Puerto Ricans. The reasonableness of the argument, however, does not preclude it from being rejected by the courts. Therefore, if it wishes to be certain that other language minorities are covered by the Voting Righs Act, it would be appropriate for Congress to legislatively achieve this result. The existence of substantial educational deprivation and its logical relationship to the electoral process should provide ample basis for such congressional action.

41/ In Garza the District Court in dicta did express the view that English-only elections were not "tests or devices."