

C O N T E N T S

ORAL ARGUMENT OF:

P A G E

Louis F. Claiborne, Esq.,
on behalf of Appellee

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IN THE SUPREME COURT OF THE UNITED STATES

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

Washington, D. C.
Thursday, April 24, 1969.

The above-entitled matter came on for argument at
10:12 a.m.

BEFORE:

EARL WARREN, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, Jr., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
ABE FORTAS, Associate Justice
THURGOOD MARSHALL, Associate Justice

APPEARANCES:

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P R O C E E D I N G S

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2 MR. CHIEF JUSTICE WARREN: No. 701, Gaston County,
3 North Carolina, appellant, versus the United States.

4 Mr. Claiborne, you may continue with your argument.

5 ORAL ARGUMENT OF LOUIS F. CLAIBORNE, ESQ.

6 ON BEHALF OF APPELLEE

7 MR. CLAIBORNE: Mr. Chief Justice and may it please
8 the Court.

9 When the court rose yesterday I had just summarized
10 the three respects in which now view Gaston County has failed
11 in its proof of showing that the application of the literacy
12 test in that jurisdiction had not had either purpose or effect
13 of discriminating against the Negro franchise.

14 Those were first failure to show that with respect
15 to municipal elections carried on within the territory of the
16 county discrimination had not occurred within the preceding
17 five years.

18 Second, a failure to rebut, if a rebuttal was
19 possible, the inference of discrimination that arises from the
20 fact that white illiterates were registered and the literacy
21 test waived as to them whereas the same was not true with
22 respect to Negro illiterates.

23 Q Wasn't there some evidence that Negro illiterates
24 had been registered?

25 A Mr. Justice, there was but I think there were

1 nine arguably illiterate Negroes who were brought as witnesses.
2 of those, three may have failed the test for some eye defect
3 rather than because of illiteracy. Two had apparently memor-
4 ized the oath, this being under the regime of the oral test
5 that involved reading the oath, and to that extent perhaps
6 deceived the registrar that they were illiterate the remaining
7 two or three seemed to have been true illiterates whose
8 illiteracy may have been known to the registrar.

9 It is significant in that each of these nine witnesses
10 came from the Precinct 7 in Gastonia, the one area predominantly
11 Negro where the policy of the county authorities seemed to have
12 been more lenient toward Negro registration than elsewhere.

13 There was no evidence that anywhere else within the
14 jurisdiction of the county comparable waiver had taken place.

15 Q It was in that particular precinct in the city
16 of Gastonia where a large majority of the Negroes in the county
17 lived, wasn't it?

18 A One-third of the population of the county of
19 all races lives within that city. I think less than half of
20 the Negro population lives within the city of Gastonia. I am
21 not clear whether those figures are of record or not. I think
22 it is clear, however, that fully half if not considerably more
23 live in the rural areas or in other municipalities other than
24 Gastonia.

25 Q I think I remember a figure from the briefs

1 here somewhere that only about 13 percent of the population of
2 the out-of-city, out of the county population is Negro.

3 Is that correct?

4 A That is true overall within the county. I
5 think it is actually 12 percent of the population of Gastonia
6 County today is Negro. At one time it seems to have been
7 considerably larger proportionately as today.

8 On the other hand, the waiver for whites was clearly
9 a matter of general practice throughout the county. There
10 were 29 eye witnesses whose testimony was taken by deposition
11 but who were clearly illiterate. Many of them had been visited
12 at their homes, they had made no effort to register on their
13 own and some, at least one notable example the applicant
14 had indicated to the registrar that he didn't want to register
15 and was registered nevertheless.

16 Most of them testified that they had informed the
17 registrar that they were illiterate and nevertheless had been
18 registered.

19 In addition to that evidence, the Government intro-
20 duced registration forms from some 70 white applicants which
21 showed the illiterate in the full sense of being unable to
22 even sign their names and the notations there which make it
23 clear the registrar signed for them are sometimes quite
24 candid, can't write is the explanation, sometimes there is an
25 "X" which is unexplained, in many instances the notation

1 excusing the applicant from signing is too nervous, in some
2 other instances the notation is left glasses at home, eye
3 glasses.

4 The Government, of course, the total here is some-
5 thing like 100. The Government, I think reasonably infers
6 from this number, who were willing to testify or whose illit-
7 eracy was evident from their inability to even sign their
8 names, that the practice was quite prevalent and, of course,
9 in no sense limited to this number that would be found as
10 willing witnesses.

11 Finally we think Gaston County has failed in its
12 proof by failing to rebut the natural inference resulting from
13 the educational disparity, the lack of equal educational
14 opportunity afforded Negro voters of today when they were
15 school children that the literacy test has borne more heavily
16 on them and has continued to do so.

17 I want to make clear that in our view either of
18 the first two grounds is sufficient to support the judgment
19 denying exemption to Gaston County.

20 On the other hand, I propose to focus on the third
21 ground. The reason for that is in part that the failure
22 with respect to proof or concerning municipal elections was
23 sufficient ground does seem to us to be a somewhat tentative
24 one, a little like the tail wagging the dog.

25 It does not come to the heart of the policy of the

1 Voting Rights Act.

2 The second ground while again quite sufficient does
3 have a somewhat punitive character in that if in the past three
4 years Negro illiterates have been afforded full opportunity
5 to come on the rolls it may be that the registration of white
6 illiterates has in that sense been cured and that the dis-
7 crimination has in a real sense been largely eliminated.

8 That is not the test under the Act. Under the Act
9 so long as there has been discrimination within the prior five
10 years Gaston County would have to wait another two years. But
11 still it seems to us to get more to the central issue to focus
12 on the ground which is the ground that the District court,
13 the majority of the District Court thought the soundest on
14 which to base its judgment.

15 It is, of course, also a ground which presents a
16 question of recurring importance which sooner or later will
17 have to come before the court in this case or another. It
18 also has a different consequence.

19 This bears on my somewhat inadequate answer to
20 Mr. Justice Stewart yesterday. Under the Act after the five
21 years are up and jurisdiction means exemption, there is an
22 additional five-year period during which the jurisdiction of
23 the District Court is retained and the court is instructed
24 to entertain an application by the Attorney General during
25 that period under the same standards as would have applied

1 during the previous five years.

2 And if the effect of the disparity with respect to
3 education were continuing in the second five-year period there
4 would then be a justification for a suit of that kind and that
5 probability seems likely only with respect to this third
6 ground.

7 So that the basis of the judgment may have a very
8 important practical impact.

9 Finally, this third ground looks in one sense to
10 past that is the educational disparity but on the other hand
11 it quite realistically looks to the future, unlike either of
12 the prior two grounds.

13 In this sense what is being tested here is whether
14 the discrimination of the past still has a lingering effect
15 and will in years to come. For that reason, not because the
16 educational disparity has had a discriminatory effect but
17 because it will continue to have for some time to come, it
18 seems to us that this basis for the judgment is the one that
19 ought to be focused upon.

20 It seems to us also that this ground of decision is
21 faithful to the legislative intent. We must remember that
22 at the time the suspension of tests was proposed in the
23 Congress the argument ran that that was an unnecessary radical
24 procedure, that it was quite sufficient if the complaint were
25 that illiterates, white illiterates, had been registered and

1 that same privilege had been denied Negroes.

2 The way to cure that is to require or at least offer
3 the States the alternative of a complete re-registration. The
4 answer made to that suggestion by the Attorney General repro-
5 duced in both committee reports is that that would not have
6 solved the problem because the reinstatement of the literacy
7 test would bear more heavily on the Negro voters precisely
8 because they had been denied the same educational opportunities.

9 So we are dealing here with a ground of decision
10 which the Congress itself focused on. Now I must concede as
11 Justice Stewart pointed out yesterday that the result of this
12 argument is one that the Congress apparently did not fully
13 appreciate at the time.

14 But there are several things that ought to be said
15 about that. First, the Act as I think I pointed out yesterday
16 does not deal merely with literacy tests, it also suspends
17 other tests which have nothing to do with educational dis-
18 parities and it also has other provisions with respect to
19 enactment of new laws, sending of Federal Examiners, Federal
20 observers which have nothing to do with these educational
21 disparities.

22 Also, the five-year period was in the end simply a
23 legislative compromise. Congress seemed not to have quite
24 focused on what would happen at the end of that five-year
25 period. It is rather unthinkable for instance that having

1 allowed thousands of illiterate Negro voters in the South to
2 become registered thanks to this Federal Act, the Congress
3 intended to permit that suddenly they should be purged from
4 the rolls after five years had gone by.

5 Q I was going to ask you that. There is just no
6 provision covering that possibility is there in the law?

7 A Short of an objection, no, on this ground.

8 Q After the termination of five years?

9 A After the termination of five years the Act
10 itself would not ---

11 Q Would not prevent under the re-established
12 literacy tests, it would not prevent people from being purged
13 from the rolls, is that correct?

14 A That is correct. I think what we must say is
15 that Congress didn't look that far ahead.

16 Q No.

17 A It assumed that the Act would be extended or
18 that the courts would intervene and they did provide in this
19 additional five-year period I was speaking of for the courts
20 to intervene when the Act otherwise expired. And it seems to
21 me that that is the legislative scheme.

22 Now it is perfectly obvious that this literacy test
23 if reinstated will bear more heavily on the Negro. That is
24 true because fewer Negroes went to school at all, twice as
25 many Negroes never went to school in Gaston County as whites,

1 it is true because fewer of them than whites stayed long enough
2 to obtain the necessary literacy. Again, almost twice as many
3 Negroes were in that position as whites, and that 30 percent
4 of the Negroes of Gaston County never got beyond the fourth
5 grade and finally they learned less when they were there.

6 Q And finally, finally, a lower percentage of them
7 are registered.

8 A Yes, of course.

9 Now some of these results are directly attributable
10 to State action, some are not. Of course, economic necessity
11 made many Negroes quit school sooner than whites. Also, the
12 incentive for learning or for staying in school or for learning
13 while there was a great deal less in the case of a Negro 30 or
14 40 years in Gaston County with no purpose to obtain an
15 education with only a future in the cotton mills there was
16 not much point in obtaining an education.

17 Q I beg your pardon, Mr. Claiborne, but suppose
18 that there had been no history of segregation in the public
19 schools. Suppose that there was just a great many more Negro
20 illiterates for the economic or social reasons that you have
21 been talking about, would it nonetheless follow that you could
22 not apply a literacy test?

23 A Mr. Justice, I would so argue if it were
24 necessary. Here it is so clear that the State and local
25 Governments do bear some responsibility for the lower literacy

1 of the Negro that I needn't make that argument. I think the
2 Act says when the effect is to bear more heavily on the Negro
3 franchise it is a forbidden test especially so when it is
4 designedly chosen with that reality in mind as this literacy
5 test was originally, and presumably that is the reason it was
6 continued.

7 Q Am I right in concluding that the burden of your
8 argument is that at least where there has been a State decision
9 or a State encouraged segregation, segregated school system
10 the State cannot have a -- neither State nor county can have
11 a -- literacy test and still be free from the provisions of the
12 Act here in issue?

13 A Well, we do say that, Mr. Justice. But again
14 we don't quite go that far. Here there is a violation of
15 not only Brown versus the Board but also Plessey versus
16 Ferguson. Not only was the education segregated but it was
17 grossly unequal. Thirty-five percent of the present-day
18 voting age Negro population went to school before 1918, 50
19 percent of that present-day voting age population went to
20 school before 1930, before Mr. Jeffers the plaintiff's expert
21 knew anything about it, 50 percent.

22 Now in the period preceding 1918 with less than one-
23 fifth of the money spent on white teacher salaries was spent
24 on Negro teacher salaries. The result was that 95 percent of
25 the Negro teachers had second-class certificates whereas most

1 of the white teachers had first-class certificates.

2 This Negro education in that day was in large part
3 in one classroom with all grades taught together. Money, of
4 course, is not the full answer to education but as we well
5 know it can have a very serious practical impact on the
6 quality of education that results.

7 Finally, let me say that what we should be comparing
8 here, it is true that this last test was a relatively easy
9 test, we must remember that there was an oral test for a few
10 years before that which was not so easy -- it involved reading
11 an oath.

12 But what we should compare is not high school
13 graduates of both races or even elementary school graduates
14 of both races, but those who only went to school for one, or
15 two or three or four years, as to them even the slightest
16 disparity would result in one group being able to pass the
17 test and the other not.

18 We know, as I have just indicated that there are many
19 in that category in Gaston County who were only able for one
20 reason or another to attend school for this short time.

21 Finally, let me say that the suspension of the test
22 has had, though belatedly, a very substantial practical impact.
23 There has now been a 25 percent increase in Negro registration
24 in the county out of originally some 4,100 Negroes registered
25 there are now 5,100 Negroes registered, a thousand increase on
this small number.

1 Q I notice you have 52 to 61 percent. Didn't you
2 tell us yesterday?

3 A That is correct but that works out ---

4 Q Does that work out to 25 percent?

5 A I assume it does, Mr. Justice. My mathematics
6 are delinquent.

7 (Whereupon, at 10:30 a.m. the oral argument in the
8 above-entitled matter was concluded.)
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