UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED

AUG 16 1966

ROBERT M. STEARNS, Clerk

GASTON COUNTY, a political subdivision of the State of North Carolina, Gastonia, North Carolina, Plaintiff,	)	
v.	)	Civil Action
UNITED STATES OF AMERICA, Defendant.	)	No. 2196-66

GASCH, J., concurring in the result. Gaston County is a political subdivision of North Carolina, located in the Southern part of the State. The county seat of Gaston County is the City of Gastonia. As of January 24, 1966, approximately one-third of the County's population - 45,429 out of 135,775 persons - lived in Gastonia. The remaining two-thirds lived in small towns and rural areas within the county.

A 1966 Special Census showed that 69,252 white persons and 8,407 Negroes of voting age lived within the County. Of these, 63.3 percent of the white persons (43,874) and 52.2 percent of the Negroes (4,388) were registered to vote in November, 1964. In the general election of November, 1964, only 37,326 people of those registered actually voted, a figure comprising more than 50 percent of the registered voters, but less than 50 percent of the voting age population. Of the registered Negroes, 68.95 percent (3,114) actually voted; of the registered white persons, 80.97 percent actually voted. Therefore,

despite the fact that more than 50 percent of Gaston County's voting age population was registered to vote, Gaston County was certified under the Voting Rights Act of 1965. As a result of this certification, all literacy tests in the County were suspended. On August 18, 1966, Gaston County filed this suit in the United States District Court for the District of Columbia.

The majority opinion suggests that the evidence is inconclusive to prove that Gaston County deliberately and purposefully used its literacy test to deny to Negroes their rights to register and vote. I agree. Gaston County's registration practices do not present the kind of clear repressive discrimination against Negroes in the exercise of their franchise that the Act was designed to correct. There is no evidence in Gaston County of large pockets of qualified Negroes who have been discriminated against in their attempts to register and vote. Indeed, there is no evidence of <u>any</u> Negro who has been denied registration because of his race. Nor is there evidence of a large discrepancy between percentages of Negroes and whites who were registered to vote. Approximately fifty-two percent of voting age Negroes and sixty-three percent of voting age whites were registered to vote in 1964. There is evidence that some illiterate whites were allowed to register in the County. There is also evidence that some illiterate Negroes were registered. No general pattern or practice was shown.[1/] On this record, it would be impossible

1/ The evidence offered was that 29 illiterate white persons and 11 illiterate Negroes were registered. Eighty-nine percent of those living in the county of voting age were white.

to find that Gaston County used its literacy test for the purpose of discriminating against Negroes.

I do not concur that there is evidence to sustain the finding of the majority that the test was used with a discriminatory effect.[2/] However, I concur in the result the majority reaches because, in my judgment, Gaston County has failed to meet a necessary element of its proof.

As the majority has pointed out, the Voting Rights Act added a new dimension to voting rights enforcement by presuming discrimination where a literacy test was used and where 50 percent of the voting age population was not registered or did not vote in 1964. In these circumstances, the state or political subdivision was required to rebut this presumption in order to reinstate literacy tests within its borders. The Government was thereby relieved of proving endless individual cases of discrimination in the slow and expensive avenues of court review.

Both the language and the legislative history of the Voting Rights Act of 1965 make it clear that the burden of proof placed on the plaintiff state or political subdivision by the Act involves a showing of nondiscrimination not only in county, state, and national elections, but also in township and municipal elections, and in every other election within the state or political subdivision. Section 4(a) of the Voting Rights Act provides in pertinent part that "no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure

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2/ See Part II, infra.

to comply with any test or device . . . [which has been suspended because of a certification under the Act]." (Emphasis added). The section further states that a county is not eligible for declaratory relief if any court has found within the past five years voter discrimination "anywhere in the territory of such plaintiff." A fair interpretation of the statutory requirement is that all elections, including local elections, must be free of voter discrimination for five years before a literacy test can be reinstated.

In his testimony before the House Judiciary Committee on the Voting Rights bill, former Attorney General Katzenbach emphasized that the bill would apply to every election in the state:

> The Chairman. This bill covers Federal, State, and municipal elections. Would it cover an election for a school bond?
>
> Mr. Katzenbach. Yes; it would, Mr. Chairman. Every election in which registered electors are permitted to vote would be covered by this bill.[3]

The Attorney General further stated that each certified subsection or state is to be treated as a unit. No subdivision or part of an area that has been certified can come out alone; each certified unit must petition this Court for relief as a whole.[4] Thus, for Gaston County successfully to resist the continued suspension of its

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3/ Hearings on H.R. 6400, Before Subcommittee No. 5 of the House Committee on the Judiciary, 89th Cong., 1st Sess., ser. No. 2 (1965), 21.

4/ Id., at 99.

literacy test it must show that all elections within the County have been untainted by discrimination. A state would be responsible for all elections at every level within the state if it were petitioner; a county, when certified, faces the burden of showing an absence of discrimination in all of the elections within its territorial limits, including municipal elections.

The record contains no proof concerning municipal election practices within Gaston County. Yet the record does indicate that eleven municipalities in Gaston County hold separate municipal elections. These municipalities conduct their own voter registrations with their own municipal registrars, and apply their own literacy tests and other voting qualifications.

Moreover, such proof was not forthcoming from the present plaintiffs. Two successive Chairmen of the Gaston County Board of Elections testified that the County Board of Elections exercised no control over municipal elections within the County. Mr. William Mack Davis (Chairman from 1960 to 1964) testified that while the Gaston County Board of Elections exercised control over all Federal, State, County, and Township elections, it had no control over any municipal elections in the County.[5/] Mr. Linwood Hollowell, Jr., (Chairman since 1964) confirmed Mr. Davis' testimony:

> Q: Now, Mr. Hollowell, when this suit was brought on behalf of Gaston County, I think it has been testified that you have no direct connection with the city registration in the different municipalities in this county.

5/ Transcript, p. 61.

A: We have no jurisdiction concerning registration or voting in any municipality in our county.

* * *

Q: You don't know whether they comply with the Voting Rights Act, do you?

A: To the best -- I don't know. I just don't know. I just have to be honest with you. I have not checked.[6]

Certification of Gaston County under the Voting Rights Act suspended the literacy test for all elections within the County. A judgment for the County in this action would reinstate the literacy test for municipal registrars as well as all others in the County. The County has made no showing that a literacy test has not been used by municipal registrars in Gaston County in a discriminatory fashion. This failure of proof marks a fatal defect in its case. For this reason, I would deny declaratory relief under the Act and accordingly, I concur in the decision of the majority.

II.

The majority denies declaratory relief to Gaston County on the ground that inferior educational opportunities offered to Negroes in Gaston County's segregated schools places them at a material disadvantage to white persons in passing the Gaston County literacy test; therefore, the test has had a discriminatory effect against Negroes in registering and voting. While I accept the majority's

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6/ Transcript, pp. 142-44.

assumption that the quality of education received by Negroes in Gaston County in segregated Negro schools was inferior to that received by white persons in white schools, I am not convinced that, in the context of Gaston County's literacy test, this evidence justifies an affirmative finding of a discriminatory effect.

The Gaston County literacy test, as amended in accordance with the Civil Rights Act of 1964, consisted of copying one of three sentences in a space provided under the sentence itself. (The test was orally administered before 1964.) The applicant had his choice as to which of the three sentences he wished to copy. To pass the test, he was not required to spell each word correctly or even to write every word in the sentence, as long as he could print or write a reasonable facsimile of the sentence. He was not asked to interpret or explain the sentence to the registrar. And applicants were given as much time as they needed to complete the test. In some instances, this amounted to an hour or more. There is nothing to indicate that the pre-1964 oral test was administered with any more rigidity.

Given the very low level of competency required by the test, it is not at all clear that even the Negro schools in Gaston County did not provide adequate and sufficient training for Negroes to pass the test. It may well be that even though the Negro student received an inferior education, he was at least equipped to pass this simple test.

The point may be made by analogy. Assume two medical students of equal ability attended two different medical schools, one of which is significantly inferior to the other. As a result, one of the students received a much lower quality education than the other. Because of his inferior educational background, the one who graduated from the second-rate school would probably be at a disadvantage if the two were tested on their respective abilities to diagnose rare diseases, or perform a difficult operation. If the test consisted merely of taking a pulse, or reading a thermometer, however, both might do equally well, despite the disparity in educational background. The latter tests are of such an elementary character that both schools would have provided sufficient training to enable their students to pass them.

Similarly, where schools are segregated, it may reasonably be assumed that at any given grade level, Negro students will be less prepared academically than their white counterparts. If Negro and white students are then asked to demonstrate an ability in creative writing, interpretation of language, or higher mathematics, the Negro, who attended inferior schools, would be at a material disadvantage. Where the test consists merely of reading or copying a printed sentence, however, the quality of education each received is less significant in terms of the ability of each to pass it. Both might be prepared to score equally well on the simple test, even though, at the higher levels of achievement, the white student, by reason of his superior education, would be expected to do better.

The point to be made is that no evidence has been adduced in this case to show that Negro schools in Gaston County were or were not giving their students the very elementary training necessary to pass the Gaston County literacy test. Given the low level of achievement called for by the Gaston County test, I think such proof is essential to support the affirmative conclusion which the majority has reached, that the segregated education did in fact have a material impact on the respective abilities of Negroes and whites to pass the test.

To support its finding that there was such an impact, the majority has pointed out that the Gaston County public schools were legally segregated until 1965; and that the annual per-pupil expenditure at the Negro schools was consistently much smaller than that appropriated for the white schools. The majority also cites census data that proportionally fewer Gaston County Negroes than whites over age 25 attained at least a fourth grade education during the period the schools were racially segregated, and that more than twice as many Negroes as whites in Gaston County received no formal education at all. In my opinion, this evidence is insufficient to support the majority's case. There is no proof that had Gaston County schools been integrated, more Negro children would have completed the fourth grade. Nor has it been shown how segregated schools were responsible for the fact that more Negroes than whites in Gaston County attended no school at all. A more logical inference from this data might be that economic necessity, not segregated schools, compelled the

Negro child to participate in an income producing activity for his family at an earlier age, at the expense of formal education.

Footnote 20 emphasizes that the burden of proof is upon the petitioner. It quotes from South Carolina v. Katzenbach and in pertinent part emphasizes that petitioner "refute whatever evidence to the contrary may be adduced by the Federal Government."

The critical question then arises: What evidence has the Government adduced that demonstrates that an educational test or device, i.e., copying a single sentence, has the effect of denying or abridging the right to vote? Whatever weight may be accorded the respondent's cold statistics is, in my opinion, dispelled by the testimony of the petitioner's expert witness who expressed the unqualified and unchallenged opinion that the Negro schools prior to integration were sufficient to enable the students to pass the type of test required. There it is important to note that the present test is ability to copy a single sentence. We are not concerned with the prior test which is discussed in Bazemore v. Bertie County Board of Elections, 254 N.C. 398, 119 S.E.2d 637, 641 (1961). Likewise, we are not concerned with conditions in 1900 and attitudes represented therein. 7/

To summarize this point, I agree that a showing of a discrepancy in formal education between the races may in some circumstances indicate a potential discriminatory

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7/ See footnote 11 of the majority opinion.

effect in the use of a literacy test.[8] But it is actual effects, not potential effects, that are proscribed by the Act. I do not feel that the evidence justifies a finding that educational disparities in Gaston County, when viewed in the light of the literacy test actually administered there, had an actual discriminatory effect on voter registration.[9]

8/ For example, where the test requires the registrant to explain the meaning of a section of the Constitution, an inferior education could render the Negro at a real disadvantage, because of the high level of competency necessary to pass it.

9/ The majority opinion, in footnote 22, cites as support for the proposition that denial of equal educational opportunities to Negroes limits the discretion of a state or political subdivision with respect to its voting standards United States v. State of Texas, 252 F.Supp. 234 (W.D. Tex. 1966), affirmed per curiam, 384 U.S. 155 (1966). In that case, the court was asked to find a discriminatory effect in the use of a poll tax on the ground that Negroes, deprived of an equal educational opportunity, were less able to succeed financially and therefore less able to pay the tax required to vote. As the majority opinion is essentially a holding that Negroes, deprived of an equal educational opportunity in Gaston County, were less able to pass the test required to vote, I consider the two cases similar in theory. The court in the Texas case declined to find discrimination on the evidence submitted. The holding of that court precisely expresses my concern over the sufficiency of the evidence in the case at bar:

"The evidence clearly shows, and the United States does not dispute, that as [sic] least during the last twenty years there has not been any attempt to use the poll tax overtly to deprive the Negro of his right to vote. Despite unlimited pretrial discovery, no instances of outright discrimination have been shown or alleged. In fact, the United States has relied primarily on evidence of discrimination in public education and the resulting economic disadvantages to establish that the poll tax is more of a burden upon the Negro than upon the white voter. Although we consider the United States' method of proof a legitimate means for reaching such a conclusion, the facts will not support

(Continued on Page 12.)

Several consent judgments have been entered under the Voting Rights Act. One such judgment involved Wake County, North Carolina.[10/] In the Wake County case, the Attorney General consented to a judgment that no test or device had been used in the past five years with the purpose or effect of denying or abridging the right to vote on account of race or color. Wake and Gaston are neighboring counties. The same State literacy test requirement applies to both. The census table on which the majority relies shows that proportionally fewer Negroes than whites in Wake County had fourth grade educations and that many more Negroes than whites had no schooling at all. These considerations lead this Court to strike down a literacy test in Gaston County, but they were not applied to deny

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a finding of racial discrimination. The figures most favorable to the United States' position indicate that of the eligible persons between the ages of 21 and 60, 57.3% of the whites and 45.3% of the Negroes pay their poll tax. It is to be noted that both of these figures, although not commendable in terms of the total electorate, are subtantial [sic] and that the difference between them is only 12%. If the disparity had been larger, we might have been more inclined to accept the evidence of a historical background of discrimination and the result of the poll tax sales as sufficient to justify a finding that the poll tax discriminates against Negroes. The disparity, however, is not glaring. Indeed, it is relatively small. The evidence points to other possible reasons for this difference." 252 F.Supp. at 245.

The factual parallel between the Texas case and the case at bar is highly significant, particularly regarding the absence of proof of outright discrimination and the similar percentages of Negroes and whites who were registered to vote.

10/ Civil Action No. 1199-66 (January 23, 1967).

Wake County use of its literacy test. Nor was any mention of segregated schools or discrepancies in Negro and white grade level attainment made in Apache County, et al. v. United States,[11] State of Alaska v. United States,[12] or Elmore County, Idaho v. United States,[13] the other consent judgments entered under the Voting Rights Act. The majority opinion seems, then, to impose a different and more difficult burden of proof in the case of Gaston County than the Department of Justice or this Court has applied to any other case under the Voting Rights Act.[14]

I am also concerned that the majority's opinion seems to preclude any showing by any Southern state or political subdivision to reinstate its literacy test before the five-year suspension period has expired. Because the decision of the majority in this case is so broad and so far-reaching, it will have the effect of disqualifying any

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11/ 256 F.Supp. 903 (1966).

12/ Civil Action No. 101-66 (August 17, 1966).

13/ Civil Action No. 320-66 (September 22, 1966).

14/ One other case cited by the majority as support for the proposition that denial of equal educational opportunities may affect permissible voting standards is United States v. State of Mississippi, 229 F.Supp. 925 (S.D. Miss. 1964), reversed, 380 U.S. 128 (1965). In that action for injunctive relief, the United States sought to have registered "any Negro applicant who is over age 21, able to read, a resident for the period of time prescribed by state law, and not disqualified by state laws disfranchising the insane and certain convicted criminals." (See 380 U.S. at 135, emphasis supplied). While that case did not involve the statute under consideration here, the relief sought even in those aggravated circumstances should be considered as part of the context of the case.

political unit presently certified under the Act from obtaining a declaratory judgment before five years of suspension of its literacy test have elapsed. These units are not denied declaratory relief on the merits of any case they might present; they are now bound by an all encompassing rule, the soundness of which they had no opportunity to contest, which presents a burden of proof that will be impossible for them to meet.

From the President's Message to the Congress proposing the Voting Rights Act, [15] and the hearings [16] and floor debate [17] in the Congress, it is clear that the Voting Rights Act was primarily directed at the Southern states. In the Act, the Congress allowed a fair opportunity for a certified unit to rebut the presumption that its literacy test was used in a discriminatory manner. Thus, sections 4 and 5 of the Act provide a procedure whereby a State or political subdivision which has been the subject of a certification under the Act, may petition this Court for declaratory relief to reinstate its test before the five-year suspension period has elapsed. Sections 4 and 5 will provide no remedy to a Southern state, however, if, as the majority finds, a segregated school system coupled with

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15/ 111 Cong. Rec. 4924 (daily ed. March 15, 1965).

16/ See generally, Hearings on H.R. 6400 Before Subcommittee No. 5 of the House Committee on the Judiciary, 89th Cong., 1st Sess., ser. 2, (1965); Hearings on S. 1564 Before the Senate Committee on the Judiciary, 89th Cong., 1st Sess., (1965).

17/ See generally, Cong. Rec., 89th Cong., 1st Sess., (April 13 - May 26, 1965) (Senate); Cong. Rec., 89th Cong., 1st Sess., (July 6 - July 9, 1965) (House).

census data showing higher literacy and education for whites than for Negroes, is sufficient to preclude recovery under the Act. We can take judicial notice that the segregated school system was the prevailing system throughout the South. If this were what Congress had in mind, it would have stated that no test could be used where literacy was higher among whites than among Negroes. I do not believe that Congress intended that the Act be interpreted in such a way as to render §§ 4 and 5 inapplicable to Southern states or those which had segregated educational systems. To the extent the majority opinion reaches this result, it is not, in my judgment, in accord with the intent of Congress.

For the reasons hereinabove stated, I concur in the result, but not the grounds of decision of the majority.

Judge

Date: August 14, 1968