Opinion No. 70-69

July 28, 1970

BY: OPINION OF JAMES A. MALONEY, Attorney General

TO: Honorable David F. Cargo Governor State of New Mexico Santa Fe, New Mexico 87501

QUESTIONS

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What steps should be taken by New Mexico at this time to comply with the directions of Attorney General John Mitchell regarding the carrying out of the provisions of the Voting Rights Act (Public Law 91-285), signed into law on June 22, 1970?

CONCLUSION

See Analysis.

OPINION

*{*116}* **ANALYSIS**

The answer to your question depends upon the outcome of the new federal law as it relates to our own state constitutional provisions. Title III of the Voting Rights Act, Section 301, provides:

"(a.) The congress finds and declares that the imposition and application of the requirement that a citizen be twenty-one years of age as a precondition of voting in any primary or in any election --

(1.) denies and abridges the inherent constitutional rights of citizens eighteen years of age but not twenty-one years of age to vote -- a particularly unfair treatment of such citizens in view of the national defense responsibilities imposed upon such citizens;

(2.) has the effect of denying to citizens eighteen years of age but not yet twenty-one years of age the due process and the equal protection of the laws that are guaranteed to them under the Fourteenth Amendment of the Constitution; and,

(3.) does not bear a reasonable relationship to any compelling state interest.

(b.) In order to secure the constitutional rights set forth in subsection (a.), the Congress declares that it is necessary to prohibit the denial of the right to vote to citizens of the United States eighteen years of age or over."

This section of the law is in direct conflict with the Constitution of the State of New Mexico which provides in Article VII, Section 1:

"Every citizen of the United States, who is **over the age of twenty-one years,** and has resided in New Mexico twelve months, in the county ninety days, and in the precinct in which he offers to vote thirty days. . . . shall be qualified to vote at all elections for public officers." (Emphasis added.)

The question of which law will govern depends upon the constitutionality of Public Law 91-285. According to the Supremacy clause, Article 6 of the U.S. Constitution:

"This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all the Treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every state shall be bound thereby, anything in the Constitution or laws of any state notwithstanding."

The Fourteenth Amendment of the U.S. Constitution, which is the basis for the Title III provision, provides that:

". . . No State shall make or enforce any law which shall abridge *{*117}* the privileges or immunities of citizens of the United States; or shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (Section 1)

"The Congress of the United States shall have the power to enforce, by appropriate legislation, the provisions of this article." (Section 5)

The Tenth Amendment to the U.S. Constitution, the reserve clause, notes that:

"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."

The Constitution does delegate to Congress, by the Fourteenth Amendment, Section 5, the power to pass laws to enforce its provisions. Since the U.S. Constitution is the supreme law of the land and Congress can make laws to enforce it, if Public Law 91-285 is found to be constitutional on the basis of the equal protection argument, Article VII, Section 1 of the New Mexico Constitution will amount to a denial of equal protection, and will be superseded by the new federal law.

It is the duty of the various county clerks in the state to determine voter eligibility. Section 3-4-19, N.M.S.A., 1953 Comp. (1970 Repl.). Thus far only the Clerk of Bernalillo County has asked for advice on the constitutionality of the federal law. The Bernalillo County District Attorney has issued an opinion questioning the constitutionality. In reviewing that opinion we find that they have not discussed what we consider the basic rationale for the law-the "compelling interest doctrine."

This doctrine requires that before a state excludes certain classes of voters, the exclusion must be supported by a compelling interest of the state or be held to amount to a violation of the equal protection clause of the Fourteenth Amendment. **N.A.A.C.P. v. Alabama,** 357 U.S. 449, 2 L. Ed. 2d 1488, 78 S. Ct. 1163 (1958); **Shapiro v. Thompson,** 394 U.S. 618, 22 L. Ed. 2d 600, 89 S. Ct. 1322 (1969). "Fencing out" from the franchise a sector of the population because of the way they might vote is constitutionally impermissible. **Carrington v. Rash,** 380 U.S. 81, 13 L. Ed. 2d 675, 85 S. Ct. 775 (1965).

In two recent cases, the United States Supreme Court found no "compelling interest" of the state in denying non-property owners the right to vote in special elections. **Cipriano v. Houma,** 395 U.S. 621, 23 L. Ed. 2d 583, 80 S. Ct. 1886 (1969); **Kraemer v. Union Free School Dist.,** 395 U.S. 701, 23 L. Ed. 2d 647, 89 S. Ct. 1867 (1969). The Supreme Court further noted in **Phoenix v. Kolodziejski,** No. 1066, June 23, 1970, that the Federal Constitution does not permit a state to exclude non-property owners from voting in elections for approval of general obligation bonds, but the Supreme Court of Utah in **Cypert v. Washington County School Dist.,** No. 12070, July 16, 1970, expressed strong disagreement with that decision as a denial of the sovereignty of the states as guaranteed by the Tenth Amendment.

The U.S. Supreme Court has recognized that the states have broad powers to determine conditions for exercising the right to vote, but once the franchise is granted, equal protection must be guaranteed to all. In **Evans v. Corman,** No. 263, June 15, 1970, the Supreme Court concluded that citizens living on a federal reservation were entitled, under the Fourteenth Amendment, to exercise the right to vote. They noted that:

"Before that right (to vote) can be restricted, the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny. The sole interest or purpose asserted by appellants to justify the limitation on the vote in the present case is essentially to insure that only those citizens who are primarily or substantially interested in or affected by electoral decisions have a voice in making them. . . all too often lack of a substantial interest might mean no more than a different interest."

*{*118}* Considering all of these authorities and the persuasiveness of arguments on both sides, a subsequent opinion will be issued by this office after the Voting Rights law becomes effective. In view of the fact that the Attorney General of the United States is planning to test this new law in the federal courts and probably in the U.S. Supreme Court before January 1, 1971, any final opinion of ours must await the outcome of that litigation.

Until the effective date of Section 301, Public Law 91-285, January 1, 1971, the county clerks in this state are bound by the New Mexico Constitution and cannot register those who are under 21 years of age.