Opinion No. 71-04

January 22, 1971

BY: OPINION OF DAVID L. NORVELL, Attorney General

TO: The Honorable Betty Fiorina Secretary of State State Capitol Santa Fe, New Mexico

Re: Voting Rights Act Amendments of 1970

OPINION

*{*4}* I feel it is imperative to further advise your office concerning the Voting Rights Act Amendments of 1970. This office is now prepared to respond to the public inquiries surrounding the Voting Rights Act Amendments, particularly as those amendments pertain to the extension of 18-year-old suffrage to primary elections at which "federal" office-candidates are chosen. This opinion shall supersede a letter to former Secretary of State Evans on this subject, dated December 28, 1970, by my predecessor, Mr. James A. Maloney, insofar as the same are in conflict. Otherwise, it shall serve to reinforce Mr. Maloney's earlier opinion.

*{*5}* A meaningful resolution to this extremely important question requires a review of certain aspects of the Supreme Court's decision in **Oregon v. Mitchell** (decided December 21, 1970), hereinafter referred to as **"Oregon,"** which dealt with constitutional challenges to the Voting Rights Act Amendments of 1970, Pub. Law 91-284, 84 Stat. 314 (approved June 22, 1970).

The Voting Rights Act Amendments of 1970 were designed, in general, to establish three requirements.

1. They reduced the minimum age of voters in all federal, state and local elections, and primary elections, from 21 to 18.

2. They established a prohibition against disqualification of any citizen in a national election for Presidential and Vice-Presidential electors on the grounds that he has not met residency requirements, provided he applies for registration to vote not later than 30 days immediately prior to the Presidential election.

3. They extended the literacy-test provisions of the Voting Rights Act of 1965 to bar the use of literacy tests in all elections, whether federal, state or local.

Oregon involved challenges to each of these three requirements on the grounds that, under the Constitution, Congress lacked the legislative power to impose them and the imposition of such requirements by Congress intruded into powers reserved to the states to control their own elections.

In response to these challenges, the Supreme Court reached the following conclusions:

1. Unanimously the court upheld the literacy-test ban on the Voting Rights Act Amendments of 1970.

2. By a majority of eight of the nine Justices of the Court, the Court upheld the provisions of such Amendments barring states from disqualifying voters in national elections for Presidential and Vice-Presidential electors on the grounds that they have not met state residency requirements, provided he applies for registration to vote not later than 30 days immediately prior to the Presidential election.

3. By a vote of five of the nine Justices, The Court upheld the provisions of the Voting Rights Act Amendments of 1970 that lowered the minimum voting age of 21 to 18 only to the extent that such minimum-age requirements apply to voter qualifications for "national" or "federal" elections. By a vote of five of the nine Justices, the lowering of the minimum-age requirements from 21 to 18 for state and local elections was invalidated on constitutional grounds.

In view of the fact that four members of the Supreme Court -- Justices Douglas, Brennan, White and Marshall -- agreed that the Congress had acted constitutionally, while four other members of the Court -- the Chief Justice and Justices Harlan, Stewart and Blackmun -- were of the view that the minimum-age requirements were invalid both as to federal elections and as to state and local elections, the decisive opinion was that of Justice Black, who concluded that minimum -- age requirements were a valid exercise of the legislative power of Congress, but only insofar as the minimum-age requirements apply to "federal" or "national" elections.

Justice Black's opinion that Congress was empowered to enfranchise 18-year-old citizens for federal elections drew on two sources of Congressional Legislative power. The first source, as stated by Justice Black, rested on Congress' "ultimate supervisory power over Congressional elections." (39 U.S. Law Week at 4029). The second source of legislative power in Congress rested on what Justice Black perceived as a broad power to supervise Presidential elections, inherent in our federal system of government. Justice Black's opinion states:

"Finally, and most important, inherent in the very concept of the supreme national government with national officers is a residual power in Congress **to insure that these *{*6}* officers** (i.e., President and the Vice-President) **represent their national constituency as responsively as possible.** 39 U.S. Law Week at 4029, n. 7. (Emphasis added).

There seems no question that Congress meant to use all its legislative powers with respect to elections to the fullest to enfranchise 18-year-old citizens. Thus, Section 302 of the Voting Rights Act Amendments of 1970 provides:

"Except as required by the Constitution, no citizen of the United States who is otherwise qualified to vote in any state or political subdivision **in any primary or in any election** shall be denied the right to vote in any such primary or election on account of age if such citizen is eighteen years of age or older." (Emphasis added).

There are other cases which support the authority of Congress to regulate election practices, **Smith v. Allright,** 321 U.S. 634 (1943), **Katzenbach v. Morgan,** 384 U.S. 641 (1969), and **United States v. Classic,** 313 U.S. 299 (1941), being three of the more prominent examples. In **Classic, supra,** the existing federal vote-fraud act was held to apply to fraudulent practices existing in Congressional primaries in Louisiana. The decision overruled, at least in effect, **United States v. Gradwell,** 233 U.S. 476 (1917) and **Newberry v. United States,** 256, U.S. 252 (1921). The earlier cases, and several other lower-court decisions, had flatly held that primaries were not within the reach of Congress' power. **Classic, supra,** held they were, under certain particular facts.

Classic did not determine whether the Congress could **set** qualifications for primaries. It held only that **if a voter was qualified according to state standards,** then the voter's right to participate in a primary was federally-protected. There was no challenge to the proposition that the voters in **Classic** were qualified Louisiana electors.

The Court in **Classic** did observe that the nominating process is vital to the electoral system generally, and held that the primary participation sought to be protected is secured by Article I, Sections 2 and 4. **Classic** states that:

"Where the state law has made the primary an integral part of the procedure of choice, or where in fact the primary effectively controls the choice, the right of the elector to have his ballot counted at the primary is likewise included in the right protected by Article I, Section 4."

It cannot be realistically argued that for purposes of Congressional elections, New Mexico is a one-party state within the latter of **Classic's** two conditional terms; the composition of our present Congressional delegation, the closeness of the recent elections for those offices, and the pre-1971 makeup of the delegation militate against that kind of "effective control." But we do by law make the primary an "integral part of the procedure of choice." Cf. Sections 3-8-9 through 3-8-22 and Sections 3-8-33 through 3-8-43, New Mexico Statutes Annotated 1953 compilation. These provisions appear to be at least as comprehensive as the Louisiana statutes in effect at the time of **Classic.** The **Classic** decision phrases the two criteria as disjunctive, but seems to treat them as conjunctive, thus requiring both to be present. The analysis of the matter by contemporary writers, however, indicates that when either establishment by statute or effective control is present the doctrine obtains. Cf. 10 Geo. Wash. L.R. 625, 36 Ill. L.R. 475, 4 La. L.R. 133, 40 Mich. L.R. 460, 14 R.M.L.R. 93, and 15 S. Cal. L.R. 99.

It must also be remembered that there exist authorities too numerous to mention that constitutionality of legislative action must be presumed in the absence of a specific

declaration by a Court of competent jurisdiction concluding the act in question to be unconstitutional. No more than four members of the Court specifically determined that 18-year-olds could not vote in primary elections. **Moruzzi v. Federal Life and Casualty Co.,** 42 N.M. 35, 75 P. 2d 320, 115 A.L.R. 407 (1938). Likewise, doubt as to constitutionality of a legislative act should always be resolved in favor of its validity. State ex rel. **Hannah v. Jaramillo,** 38 N.M. 73, 28 P. 2d 511 (1933).

*{*7}* In addition, to reach a contrary conclusion would create a dichotomy (i.e., allowing one class of voters to nominate and a completely different class of persons to elect), which would be untenable and certainly not within the legislative intent of Congress and not the appropriate construction to place upon the opinion of the Supreme Court in **Oregon.**

For these reasons, it is my opinion that the 18-year-old vote requirements apply to all primary or other elections for President; Vice-President, U.S. Congressmen and U.S. Senators.

Since our own laws declare that one may register to vote if he will be legally qualified at the time of the next election, Section 3-2-4, N.M.S.A., 1953 compilation, registration of new voters may not be limited to those persons already 18 years old. Since the next election will take place on June 6, 1972, any person whose date of birth is on or before June 6, 1954 will be entitled to vote for the federal candidates in that election, and should be registered upon request at any legally-permitted time between January 1, 1971, the effective date of the Voting Rights Act Amendments, and the date on which voter registration for that election normally closes. It should be made very clear that the practical effect of the law is to require that registration officers accept registrations from persons who may now be only sixteen years old.

Secondly, much of the attention given to Oregon, has centered on the extension of the franchise to 18-year-olds, the decision will have another, and potentially extremely-disruptive, effect on New Mexico's election laws. The Supreme Court upheld a portion of the Voting Rights Act Amendments of 1970 which established a nationwide uniform residency period of thirty days in elections for President and Vice-President **only.**

While other portions of the Amendment dealt with all "federal" elections, the residency provisions were specifically limited to elections for President and Vice-President. Those provisions substantially changed the law by declaring: (1) that an individual qualifies as a resident if he will have resided in this state for thirty days at the time of the election; (2) that this state must allow application for absentee ballots for President and Vice-President from such qualified residents until seven days prior to the election, and must receive and count absentee ballots until the close of polls on election day; and (3) that this state must permit former qualified residents who have left this state within thirty days of the next election to vote in this state at the place of their former residence, either in person or by absentee ballot.

The effect of this portion of the Court's ruling is to create another "special" class of voters, and to seriously impair the ability of local election officials to function efficiently. In addition to the problem of 18-year-olds being allowed to vote in some elections but not in others, the startling fact is that another class of voters 18 and over has been created, in which residency in this state for thirty days entitles its members to vote for President and Vice-President, but not for United States Senator and not for United States Representative, and not for any state or local officials.

Last, it should be noted that certain other aspects of New Mexico's voting laws are also involved. The decision upheld the Act's ban on literacy tests. New Mexico does not impose such a test, and thus there need be no concern over the decision's effect in that regard.

This opinion should serve as notice to the recently convened 30th Session of the New Mexico Legislature that serious problems emanate from the Supreme Court's opinion in **Oregon,** and that swift remedial action is indicated. I would hope that their attention be quickly drawn to legislation which would apply the **Oregon** standards regarding 18-year-old suffrage to state and local elections in order to provide some uniformity to our election laws.

I trust their attention will likewise be focused on the 30-day residency requirements established in **Oregon,** with the hope in mind that such residency requirements will be applied with some consistency to senatorial; congressional, state and local elections.

*{*8}* Governor King shares my concern that havoc will persist in the thirty-two County Clerks' offices in New Mexico, and certainly in your office, if some degree of rationality is not forthcoming.

There still remains the somewhat unsettling question as to whether the conclusions reached in **Oregon,** would justify our legislature, by statute, to extend the doctrines of **Oregon** to state and local elections.

Although certain language in **Oregon** could possibly lead one to that conclusion, I suggest that such interpretation cannot exceed the limits which the following language of the opinion places on its holding. Mr. Justice Black said:

"In summary it is the judgment of the court that the 18-year-old vote provisions of the Voting Rights Act Amendments of 1970 are constitutional and enforceable insofar as they pertain to federal elections and unconstitutional and unenforceable insofar as they pertain to state and local elections."

Consequently, Article VII, Section 1 contains the controlling provisions on voting age requirements for state and local elections, as well as durational residency requirements of twelve months for all offices except President and Vice-President. Since any statute which contravenes a constitutional provision is void, the voting age for state and local elections can only be changed by constitutional amendment.

I trust you will advise the appropriate election officials in your office and throughout the state of my decision heretofore rendered.