

OFFICIAL OPINION NO. 77-73, Voting Rights Act of 1965, as amended by Public Law 94-73: bilingual elections

August 23, 1977

The Honorable Lorna B. Herseth
Secretary of State
State Capitol
Pierre, South Dakota 57501

Official Opinion No. 77-73

Voting Rights Act of 1965, as amended by Public Law 94-73: bilingual elections

Dear Mrs. Herseth:

You have requested an official opinion based on the following facts:

FACTS:

In 1965, Congress passed the Voting Rights Act of 1965, 42 U.S.C. 1973, *et seq.* In 1975, Congress passed the 1975 Amendments to the Voting Rights Act, Public Law 94-73, 89 Stat. 400. Under these amendments Congress extended the Voting Rights Act protection to cover language minorities. These language minorities include American Indians.

The questions presented are:

QUESTIONS:

1. Is South Dakota covered by Public Law 94-73?
2. If so, is all of South Dakota covered or only part of South Dakota?
3. If only part of South Dakota is covered, which parts or counties in South Dakota are covered?
4. Part of the federal act states that certain changes in the election law have to be

precleared by the Attorney General of the United States. Do any of these provisions apply to South Dakota?

5. If so, which areas of South Dakota election law would have to be precleared?
6. Would the law have to be precleared for all of the counties in South Dakota or only part of the counties?
7. What procedure should be followed by the Legislature in enacting laws that need preclearance?
8. Are there any other areas of the election law that would have to be precleared or approved by any federal agency?
9. Are any rules adopted by the State Board of Elections subject to preclearance approval or regulation by any federal agency?
10. If so, what areas or rules are so regulated?
11. What procedure should the State Board of Elections follow to meet the federal approval requirements?
12. If preclearance of the Attorney General of the United States is necessary, should all acts passed by the Legislature and rules adopted by the State Board of Elections since the effective date of the federal act be submitted to the Attorney General now for preclearance?
13. If not all acts and rules should be submitted, should any of them be submitted?

IN RE QUESTIONS 1 THROUGH 3:

A. *Coverage in General.*

The Voting Rights Act of 1965 banned the use of literacy tests and similar "discriminatory tests or devices" in southern states and in isolated areas in the north where such tests or devices had had the discriminatory purpose or effect of disenfranchising qualified blacks

without deterring the registration or voting of illiterate whites. Hunter, *The 1975 Voting Rights Act and Language Minorities*, 25 CATHOLIC UNIV. L. REV. 250 (1976); *South Carolina v. Katzenbach*, 383 U.S. 301, 312-13 (1966).

The 1975 Amendments to the Voting Rights Act, Public Law (P. L.) 94-73, were prompted primarily by voting difficulties reportedly encountered by the country's Spanish-speaking population:

The hearings were concerned almost entirely with persons of Spanish origin and somewhat less with all those of a mother tongue other than English. Very little evidence was received concerning American Indians, and virtually no testimony was given to justify inclusion of either Asian Americans or Alaskan Natives. H. R. Doc. No. 94-196, 94th Cong., 1st Sess. 87 (1975), *Voting Rights Act Extension* (Comm. on the Judiciary, May 8, 1975), Supplemental Views of Messrs. Butler, Hutchinson, McClory, Wiggins, Moorhead, Hyde, Kindness, and Mann Concerning the Bailout Amendment.

Coverage was nevertheless extended to several other minority groups by redefining "discriminatory test or device" to include English-only elections in areas where more than five percent of the voting age population belonged to a "language minority group." Section 207(3) of P. L. 94-73 provides:

The term "language minorities" or "language minority group" means persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage.

Ironically, the definition of "language minority group" is so broad that it includes all American Indians of voting age with a "mother tongue" other than English, even those who are bilingual, or who speak only English. Mr. Cato W. Valandra of the Institute of Indian Studies at the University of South Dakota, Vermillion, South Dakota, estimates that less than one percent of the Indian people of voting age could *read* the native language. Furthermore, the act ignores the fact that the Dakota, Nakota and Lakota dialects do not have words for "President," "Governor," "Senator," "Gerald R. Ford," "Jimmy Carter," etc. Therefore, virtually all the words printed on a "minority language" ballot would of necessity be English.

Despite the facial absurdity of the law, eight South Dakota counties with American Indian populations comprising more than five percent of the voting age residents, have been

declared subject to coverage under either Title II or Title III of P. L. 94-73. The federal law thus requires that bilingual voting assistance be provided in the following South Dakota counties: Bennett, Charles Mix, Corson, Lyman, Mellette, Shannon, Todd, and Washabaugh. 41 Fed. Reg. 30002 (July 20, 1976).

B. Title II Coverage.

Coverage under Title II of the Voting Rights Act Extension of 1975 is triggered by:

- (1) English-only elections,
- (2) in an area where the Director of the Census has determined that more than five percent of the voting age residents are members of a "language minority group," and
- (3) where "less than 50 percentum of the citizens of voting age were registered on November 1, 1972, or . . . less than 50 percentum of such persons voted in the Presidential Election of November, 1972."

Two South Dakota counties, Shannon and Todd, meet the above Title II criteria. 41 Fed. Reg. 783-4 (1976); 41 Fed. Reg. 30002 (1976).

Title II jurisdictions are required to conduct bilingual elections, to submit all new voting changes for preclearance in accordance with the provisions of § 5 of the Voting Rights Act, and to allow federal examiners and observers to monitor elections upon request.

C. Title III Coverage.

Coverage under Title III of the Voting Rights Act Extension of 1975 is triggered by:

- (1) English-only elections,
- (2) in an area where the Director of the Census has determined that more than five percent of the voting age residents are members of a "language minority group," and
- (3) where the illiteracy rate of the "language minority group" in that area is greater than the national average illiteracy rate. (Illiteracy is defined to be less than a fifth grade

education.)

Seven South Dakota counties are covered by Title III: Bennett, Charles Mix, Corson, Lyman, Mellette, Shannon, and Washabaugh. 41 Fed. Reg. 30002 (1976).

Title III jurisdictions are required to conduct bilingual elections until August 6, 1985. *Preclearance provisions do not apply to Title III jurisdictions*, and federal election examiners cannot be sent out to monitor elections in Title III jurisdictions.

D. *Elections Covered.*

The bilingual election requirements of Title II and Title III apply to all primary, general and special elections within the eight covered counties. The act purports to extend coverage not only to elections of officers, but also to elections regarding such matters as bond issues, constitutional amendments and referendums. 41 Fed. Reg. 29998, 29999 (July 20, 1976).

Ironically, Indian tribal elections are not covered by the Voting Rights Act. Therefore, tribal elections need not be bilingual. *Wounded Head v. Tribal Council of Oglala Sioux Tribe of Pine Ridge Reservation*, 507 F.2d 1079 (8th Cir. 1975). In fact, tribal ballots, registration forms, and election ordinances are all printed in English.

E. *Bail Out.*

Drafters of the 1975 Voting Rights Act Extension were aware of the possibility "that there may be areas covered by this title where there has been no voting discrimination." H. R. Doc. No. 94-196, 94th Cong., 1st Sess. 27 (1975), Voting Rights Act Extension (Comm. on the Judiciary, May 8, 1975). Therefore, the bill included provisions allowing jurisdictions to "bail out" from coverage if certain criteria were met. The "bail out" provisions were intended to provide a constitutional safety valve, narrowing coverage so that the statute would not be unconstitutionally overbroad. *South Carolina v. Katzenbach*, 383 U.S. 30, 331 (1966).

A "bail out" suit is "the only procedure available . . . to seek termination of Voting Rights Act coverage." *Briscoe v. Bell*, 45 U.S.L.W. 4765 (June 20, 1977).

A jurisdiction can bail out from Title II coverage if it can prove, in a declaratory judgment

action before the Federal District Court for the District of Columbia, that English-only elections and registration procedures or any other “tests or devices” were not used for the purpose or with the effect of denying the right to vote on account of race or color or in contravention of the guarantees of § 4(f)(2) of the Voting Rights Act, during the ten years preceding the filing of the bail out action. 41 Fed. Reg. 29998, 29999 (July 20, 1976).

South Dakota is preparing to file a “bail out” suit in an attempt to exempt Shannon County and Todd County from Title II coverage. If successful, those counties will be relieved of the preclearance requirements, but Shannon County would still be required to hold bilingual elections under the requirements of Title III. 41 Fed. Reg. 29998, 29999 (July 20, 1976).

A jurisdiction can bail out from Title III coverage only by proving to a local federal district court that the illiteracy rate of the “language minority group” no longer exceeds the national average illiteracy rate. 41 Fed. Reg. 29998, 29999 (July 20, 1976). This proof requirement makes it virtually impossible for a jurisdiction to “bail out” from Title III coverage.

F. *Compliance.*

A jurisdiction is in compliance with the bilingual election requirements if it takes all reasonable steps to insure that election materials and assistance are provided in a way designed to allow members of applicable language minority groups to be informed of and participate in voting connected activities “as effectively as English speaking persons are informed of and participate in such activities.” The basic standard is one of effectiveness. 41 Fed. Reg. 29998, 30000 (July 20, 1976).

Whenever any of the eight South Dakota counties covered by the Voting Rights Act provide “any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots,” they must provide them in the most widely used dialect (Lakota, Nakota or Dakota) spoken by the voting age American Indians in that county, as well as in English. 41 Fed. Reg. 29998, 29999 (July 20, 1976).

A representative of the Voting Rights Office, Civil Rights Division, U.S. Department of Justice, has indicated that *oral assistance alone would constitute compliance* in areas where the language has historically been unwritten, where the vast majority of American Indians who cannot read English are also unable to read Lakota, or where the election materials

cannot be translated into the native dialects.

Oral assistance would be required at all stages of the electoral process, including registration and voting. Although a voter would be allowed to receive oral assistance from a friend or relative of his own choosing, interpreters would need to be made available to those who were unable or unwilling to have their own helper. 41 Fed. Reg. 30001 (July 20, 1976).

G. *Conclusion.*

In response to your first three questions, only the following South Dakota counties are required to conduct bilingual elections:

Title II: Shannon
Todd

Title III: Bennett
Charles Mix
Corson
Lyman
Mellette
Shannon
Washabaugh

IN RE QUESTIONS 4 THROUGH 11:

All jurisdictions which are covered by Title II of P.L. 94-73 (Shannon and Todd counties in South Dakota) must obtain federal preclearance review of a change in their voting laws. Two alternative methods of preclearance are available:

(1) The state may file a declaratory judgment action in the United States District Court for the District of Columbia and subsequently may implement the change if the court declares that the change has no racially discriminatory purpose or effect, or

(2) The state may submit the change to the United States Attorney General and subsequently may enforce the change if the Attorney General has not interposed an

objection within *60 days*. Any objection raised after the 60 day period has expired is invalid. *Morris v. Gressette*, 45 U.S.L.W. 4773 (June 21, 1977). Any action (or inaction) of the United States Attorney General is not subject to judicial review. *Morris v. Gressette, supra*.

Any change in "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" enacted after November 1, 1972, which potentially affects any election in Shannon County or Todd County must be precleared in accordance with § 5 of the Voting Rights Act of 1965. 42 U.S.C.A. § 1973c.

The preclearance requirements would apply to all state statutes, and rules promulgated by the State Board of Elections, which create changes in voter registration, voting procedures, redistricting, reapportionment, requirements for candidacy, etc., in the covered areas of Shannon and Todd counties.

The preclearance provisions of the Voting Rights Act have been *broadly* interpreted to apply to even the most trivial changes in voting procedure, at the local, county, or state level:

As a result of recent Supreme Court interpretations of the responsibility of the Attorney General, it is now clear that every voting procedure is subject to these [preclearance] limitations. An extreme example is one which occurred in the State of Virginia. In the City of Fredericksburg a situation arose where in the city hall, they were going to enlarge the hallway to make an alcove for a sitting room for the mayor. The enlarging of this hallway would require partitioning off part of the registrar's office--approximately three feet. The city was advised by the Department of Justice this was a change subject to the Voting Rights Act, and the hallway was not widened for a period of sixty days. H.R. Doc. No. 94-196, 94th Cong., 1st Sess. 75 (1975), *Voting Rights Act Extension* (Comm. on the Judiciary, May 8, 1975), Supplemental Views of Messrs. Butler, Hutchinson, McClory, Wiggins, Moorhead, Hyde, Kindness, and Mann Concerning the Bailout Amendments.

Despite strong opposition to the preclearance requirements of the Voting Rights Act, the United States Supreme Court has recognized the validity of the preclearance procedures, at least as applied in the earlier versions of the Voting Rights Act, e.g., *Allen v. State Board of Elections*, 393 U.S. 544 (1969); *Georgia v. United States*, 411 U.S. 526 (1973); *Morris v. Gressette*, 45 U.S.L.W. 4773 (June 21, 1977). Absurdity apparently does not render a law unconstitutional.

The procedures to be followed when seeking preclearance of a statute or regulation are outlined in detail at 28 Code of Federal Regulations, Part 51 (1974). The regulations should be consulted before submitting any voting changes for preclearance. Essentially, the preclearance procedure involves submission of all voting changes, in writing, to the United States Attorney General. If an objection is interposed by the Attorney General, the submitting authority has an opportunity to request a conference where facts and testimony in support of the voting changes could be presented.

The only way a covered jurisdiction can be relieved of the administrative burden imposed by the preclearance requirements is to bring a Title II "bail out" suit in the United States District Court for the District of Columbia and obtain a judgment of that court declaring that for the past ten years English-only elections in Shannon County and Todd County have not had a discriminatory purpose or effect. South Dakota is currently preparing for such "bail out" litigation.

The "omnipotent" Federal Government has apparently seen fit to impose upon the states an unworkable solution to a nonexistent problem. I agree with the following criticism of the preclearance provisions of the Voting Rights Law:

Section 5, by providing that some of the States cannot pass state laws or adopt state constitutional amendments without first being compelled to beg federal authorities to approve their policies so distorts our constitutional structure of government as to render any distinction drawn in the Constitution between state and federal power almost meaningless. One of the most basic premises upon which our structure of government was founded was that the Federal Government was to have certain specific and limited powers and no others, and all other power was to be reserved either "to the States respectively, or to the people." Certainly if all the provisions of our Constitution which limit the power of the Federal Government and reserve other power to the States are to mean anything, they mean at least that the States have power to pass laws and amend their constitutions without first sending their officials hundreds of miles away to beg federal authorities to approve them. Moreover, it seems to me that § 5 which gives federal officials power to veto State laws they do not like is in direct conflict with the clear command of our Constitution that "The United States shall guarantee to every State in this Union a Republican Form of Government." I cannot help but believe that the inevitable effect of any such law which forces any one of the States to entreat federal authorities in faraway places for approval of

local laws before they can become effective is to create the impression that the State or States treated in this way are little more than conquered provinces. H.R. Doc. No. 94-196, 94th Cong. 1st Sess., 73 (1975), *Voting Rights Act Extension*, (Comm. on the Judiciary, May 8, 1975), Supplemental Views of Messrs. Butler, Hutchinson, McClory, Wiggins, Moorhead, Hyde, Kindness, and Mann Concerning the Bailout Amendment.

Based on the foregoing, the answers to Questions 4 through 11 may be summarized as follows:

Any voting change which has been enacted since November 1, 1973, and which affects "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" in Shannon County or Todd County is technically required to be precleared with the United States Attorney General in accordance with § 5 of the Voting Rights Act, 42 U.S.C.A. § 1973c; 28 C.F.R. § § 51.23-51.25 (1974).

The federal law (perhaps unconstitutionally) purports to suspend the effectiveness of such state laws and regulations in Shannon and Todd counties until they have been precleared. The preclearance requirements of Title II *do not* prevent voting law changes from becoming effective in all *other* South Dakota counties.

IN RE QUESTIONS 12 AND 13:

You have asked whether all acts passed by the Legislature and rules adopted by the State Board of Elections since the effective date of the federal act must be submitted *now* to the United States Attorney General for preclearance.

I cannot in good faith recommend that your office and the State Board of Elections be unnecessarily subjected to the bureaucratic agony of obtaining immediate preclearance of all voting legislation and regulations passed or promulgated since November 1, 1972.

If South Dakota's "bail out" suit or a constitutional challenge is successful, all your efforts would have been a total waste of your time and the taxpayers' money. Furthermore, if the Bellmon Amendment currently before Congress is passed, the bilingual election and preclearance requirements of the Voting Rights Act currently plaguing South Dakota would be repealed.

Therefore, in answer to your final two questions, I would suggest that you await the outcome of the "bail out" suit and the Bellmon Amendment before submitting the materials subject to preclearance. I see no need to proceed with undue speed to subject our State's laws to a "one-man veto" by the United States Attorney General.

Respectfully submitted,

William J. Janklow
Attorney General

WJJ:LLF:pk