NO. 22, ORIGINAL

IN THE

Supreme Court of the United States

October Term 1965

STATE OF SOUTH CAROLINA, *Plaintiff*

v.

NICHOLAS deB. KATZENBACH,
Attorney General of the
United States, *Defendant*

REPLY MEMORANDUM FOR THE PLAINTIFF

DANIEL R. MCLEOD
Attorney General
State of South Carolina
Wade Hampton Building
Columbia, S. C.

DAVID W. ROBINSON
DAVID W. ROBINSON, II
Special Counsel
P. O. Box 1942
Columbia, S. C.

ROBINSON, MCFADDEN & MOORE
OF COUNSEL

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On October 21, 1965 the Solicitor General filed a Memorandum return to the Motion of South Carolina for permission to file her Complaint in which he declined to oppose the Motion. In so doing he made several observations which we feel merit a reply.

1. EXPEDITION

Upon receipt of the directive of the Attorney General of August 7, 1965 (Exh. F-2, Complaint p. 33-34), the Registration Boards of South Carolina's forty-six counties suspended her literacy test. Since that date applicants in large numbers have been registered without any literacy requirement in violation of her Constitution and laws.[1]

[1] As this Reply went to press, the Attorney General announced that during the week of November 1-7, 1965, he was sending federal examiners into two South Carolina counties, Dorchester and Clarendon. This action was taken not because of the administration of any literacy requirement in connection with registration, but because the officials in those counties refused to open the registration books a sufficient number of days per month to satisfy the defendant, although the State law requires the books to be opened only one day per month in nonelection years. See Appendix A, p. 5.

In June of 1966, South Carolina will hold a major statewide primary (Democratic) in which many important federal, state and county offices will be at stake.[2] Unless the eligibility of the illiterates registered since August 7, 1965 to vote in that primary has been finally determined, the results of these races will undoubtedly be challenged and become hopelessly entangled. A determination by this Court that the provisions of the Act challenged are unconstitutional would permit the names of these illiterates to be purged in advance of the primary.

For these reasons South Carolina joins in the request of the Solicitor General that this proceeding be treated expeditiously.[3]

2. "ALTERNATE REMEDY"

In his Memorandum, p. 2, and Brief, note 5, pp. 16-17 in *United States v. Alabama*, No. 23, Original, *United States v. Mississippi*, No. 24, Original, *United States v. Louisiana*, No. 25, Original, the Solicitor General suggests that South Carolina has an "adequate alternate remedy" to a challenge of the constitutionality of the Act by instituting a proceeding in the United States District Court for the District of Columbia under §4(a) of the Act, (Complaint, p. 82) for a determination that she has been free of discrimination for the previous five years. We concur with the further suggestion of the Solicitor General that such a

[2] Among others, the offices up for election include two United States Senators, Governor, Lieutenant Governor, Attorney General, twenty-three county Senators and all members of the South Carolina House of Representatives.

[3] In view of his request, we are somewhat at a loss to understand the Solicitor General's suggestion that the Court need not reach the merits of this action, and his effort to bring Alabama, Mississippi and Louisiana into the original jurisdiction of the Court over the apparent opposition of each of these States (Complaint, Original No. 23, p. 5-6; Complaint, Original No. 24, p. 5-6; Complaint, Original No. 25, p. 5-6). The conflicts between the allegations contained in these three Complaints and the allegations in the state court actions, attached thereto, indicate factual issues in these causes, issues which may delay final adjudication therein. Yet the Solicitor General's suggestion that this cause might be dismissed because of an alleged remedy available in the District Court of the District of Columbia and his efforts to expedite hearings in this Court in Original Nos. 23, 24 and 25 may well result in delaying the constitutional test beyond the term.

The Complaint in *South Carolina v. Katzenbach*, No. 22, Original presents the basic constitutional questions free of factual issues.

disposition should not be determined in advance of a full hearing in view of the importance of the questions raised and the possible disastrous effects of a further delay. However we believe that his suggestion warrants brief comment at this stage.

a. Sect. 4(a) affords no alternate remedy to South Carolina. On its face, the necessary certificates having been issued, the Act automatically suspended South Carolina's literacy test and pursuant to the Defendant's direction she has been registering illiterates since August 7, 1965. If she is now directed to the United States District Court for the District of Columbia, the most that that Court can declare is that her literacy test and freedom to legislate are no longer thereafter suspended. Sect. 4(a), Complaint, p. 82. Meanwhile her voter registration rolls will contain the names of thousands of illiterates registered in violation of her laws and Constitution.

There is no provision in the Act authorizing South Carolina to go back and purge the names of these illiterates from her rolls as a result of such a decision by the United States District Court for the District of Columbia. The constitutionality of the Act will not have been determined, so possibly their registration would have been legal. Yet they would not be qualified *electors* entitled *to vote* under South Carolina law. Thus, the possible chaotic conditions would still arise in the June 1966 primaries.

In short, a constitutional determination of whether the challenged portions of the Act are inoperative, null and void, or are valid, is essential to the future conduct of South Carolina's elections.[4]

b. The "remedy" set forth in §4(a) is itself an inherent and essential part of the sections of the Act challenged as unconstitutional. The very sentence of §4(a) which per-

[4] Of course if South Carolina had refused to register illiterates pending a determination by the United States District Court in the District of Columbia, she would not face this dilemma and §4(a) would afford an alternate remedy. But this was not the course of action which the Defendant directed, nor that which South Carolina followed.

mits recourse to the District of Columbia courts, creates the arbitrary and irrebuttable presumption as to the Plaintiff's conduct and "triggers" the other sections of the Act which deprive her of her sovereign powers and her citizens of their constitutionally protected rights. It is among the essence of South Carolina's positions in this cause that Congress cannot, in the manner sought, require her to resort to this "remedy" in order to be free to conduct her elections in accordance with her lawful Constitution and statutes.

A determination of the constitutionality of the "remedy" necessarily involves a determination of the validity of many of the objectionable portions of the Act. This is the very question which South Carolina seeks to have resolved here.

c. For the reasons set forth in her Brief at page 57, South Carolina also contends that this "remedy" deprives her citizens of due process, to which they may not be required to resort without a prior constitutional determination.

Respectfully submitted,

DANIEL R. MCLEOD
Attorney General
State of South Carolina
DAVID W. ROBINSON
DAVID W. ROBINSON, II
Special Counsel

ROBINSON, MCFADDEN & MOORE
OF COUNSEL

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APPENDIX A

Pertinent Provisions, 1962 Code of Laws of South Carolina

§ 23-63. Opening registration books at courthouse.—The books of registration shall be opened on the first Monday of each month, at the courthouse, for the registration of electors entitled to registration under the Constitution and under § 23-62, and, during election years, shall be kept open for three successive days in each month. In every general election year, when the registration books are opened in the months of May and August, they shall be kept open continuously every day except Sunday, at the courthouse, up to and including the fifteenth days of such months. (1952 Code § 23-63; 1950 (46) 2059.)

§ 23-65.1. Additional days and hours for registration.—Notwithstanding the provisions of § 23-53, boards of registraiton shall remain open as now provided by law, and in addition thereto, shall remain open and available for registration on any additional days and during such hours as the boards may determine. Due notice of the time and place shall be given by publication in a newspaper of general circulation in the county at least one week in advance. (1957 (50) 671.)