No. 26, Original

In the Supreme Court of the United States

OCTOBER TERM, 1965

STATE OF LOUISIANA,

Plaintiff,

v.

NICHOLAS deB. KATZENBACH, ATTORNEY GENERAL OF THE UNITED STATES,

Defendant.

BRIEF IN SUPPORT OF MOTION FOR EXTENSION OF TIME TO ARGUE AND BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE ORIGINAL COMPLAINT

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Special Counsel.

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Defendant.

BRIEF IN SUPPORT OF MOTION FOR EXTENSION OF TIME TO ARGUE

A. The Supreme Court of the United States has no jurisdiction to hear this case or the case of *South Carolina v. Nicholas deB. Katzenbach,* No. 22, Original, October Term, 1965.

(1) The only reason why the plaintiff is in this Court is because the Court expressed a desire to hear the case of South Carolina and the decision therein may adversely affect the plaintiff in these proceedings. In that case, and in this case, jurisdiction is sought by virtue of Article III, Section 2, Clauses 1 and 2 of the Constitution of the United States, which Article provides that the judicial power shall extend to controversies between a State and citizens of another State. That Article contemplates that when a State sues a citizen of another State, the citizen is sued in his individual capacity. In the South Carolina case, the de-

fendant is sued as a resident and citizen of another State, while serving as the Attorney General of the United States. There is no prayer for relief against the defendant as a citizen individually and the prayer seeks relief from him solely in his official capacity as Attorney General, to enjoin him from enforcing the Voting Rights Act of 1965.

(2) It is readily admitted by all that the United States of America can not be sued without its consent. This is not sought in the proceedings. A subterfuge is used in the South Carolina case to get around the clear language of the Constitution in order to confer original jurisdiction on this Court. The defendant asks this Court to hear that case, but jurisdiction can not be conferred by consent of the parties; particularly, a party sued as a private citizen.

(3) This is a political right, not a property right, and this Court can not originally determine political rights.

All of the cases that have permitted suit by a State, originally in the Supreme Court, are cases involving property rights, where there is a clear dispute between the two Sovereigns as to ownership of valuable property. This case does not involve property rights but, an issue solely of political rights and determinations. On Page 15 of the plaintiff's brief, in Original No. 23, 24 and 25, it is admitted by the plaintiff, in these cases, that this action is solely designed for the purpose of "protecting fundamental political rights of citizens". This Honorable Court has consistently re-

fused to hear political cases originally and has never originally heard a case involving political rights. *Cherokee Nation v. Georgia*, 5 Pet 1, 8 L.ed. 25; *Georgia v. Stanton*, 6 Wall 50, 18 L.ed. 721.

In *Massachusetts v. Mellon*, 262 U.S. 447, 67 L.ed. 1078, the State of Massachusetts sued the Secretary of the Treasury directly in the Supreme Court, praying that the Court declare the Maternity Act unconstitutional.

> The Court held that "the State of Massachusetts presents no justiciable controversy either in its own behalf or as the representative of its citizens."
>
> In so holding, the Court said:
>
> "It is plain that that question, as it is thus presented, is political, and not judicial, in character, and therefore is not a matter which admits of the exercise of the judicial power."
>
> "This Court is . . . without authority to pass abstract opinions upon the constitutionality of Acts of Congress . . ."
>
> The Court further said:
>
> "Looking through forms of words to the substance of their complaint, it is merely that officials of the executive department of the government are executing and will execute an Act of Congress asserted to be unconstitutional; and this we are asked to prevent. To do so would be not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department—An authority which plainly we do not possess."

In *Oklahoma v. Atchison, Topeka and Santa Fe Railroad Company*, 220 U.S. 277, 55 L.ed. 465, the Court held:

> "We are of the opinion that the words in the Constitution conferring original jurisdiction on this court in a suit in which a state shall be a party are not to be interpreted as conferring such jurisdiction in every cause in which the state elects to make itself strictly a party plaintiff of record, and seeks not to protect its own property, but only to vindicate the wrongs of some of its people, or to enforce its own laws or public policy against wrongdoers generally."

(4) Only the District Courts of the United States are authorized to try and determine controversies under the Voting Rights Act of 1965.

While it is a proper statement of law that the Supreme Court of the United States has original jurisdiction in a controversy between the United States and a State, when Congress gives to the United States and the State a specific remedy, it can instruct the parties where they must seek the relief for that remedy.

The Voting Rights Act of 1965 provides a remedy against voter discrimination (at least, this is the stated purpose) and it further provides that the United States must seek relief in the United States District Courts having jurisdiction and venue over the parties. (Section 12 (d) and 12 (f) of the Voting Rights Act of 1965.) A State questioning this remedy or seeking injunctive relief therefrom must do so in the District Court of the District of Columbia, according to the

Attorney General of the United States. (Section 14 (b) of the Voting Rights Act of 1965.)

In *Ames v. Kansas*, 111 U.S. 449, 28 L.ed. 482, the Court held that Congress may provide for or deny the exclusiveness features mentioned in the Constitution. Congress may certainly make exceptions to the provisions of the Judicial Code. In *Case v. Bowles*, 327 U.S. 92, 90 L.ed. 552, the Supreme Court held that the Price Control Act superseded the Judicial Code and it "specially provides that the District Courts shall have jurisdiction over all enforcement suits". In *United States vs. California*, 297 U.S. 175, 80 L.ed. 567, the Court held that the Federal Safety Appliance Act provided a remedy and dictated that such remedy must be had in the District Court and not the Supreme Court. The Court held:

> "Since the section which, as we have held, imposes the liability upon State and privately owned carriers alike, *also provides the remedy and designates the manner and the court in which the remedy is to be pursued, we think the jurisdictional provisions are as applicable to suits brought to enforce the liability of states as to those against privately-owned carriers, and that the district court had jurisdiction.*" (Emphasis added)

South Carolina must go to the District Court in the District of Columbia in accordance with the clear mandate of Congress, to pursue the remedy provided by Congress.

B. There is no need to expedite these proceedings.

Nicholas deB. Katzenbach, defendant in the mat-

ter entitled "*State of South Carolina v. Nicholas deB. Katzenbach*", Number 22, Original, in this Court, moved the Court for expedited consideration. The sole grounds for such expedited consideration is that the parties desire an immediate determination on the constitutionality of the Voting Rights Act of 1965. The State of South Carolina desires expedited consideration because of elections to be held in June of 1966 in that State. The Attorney General of the United States desires expedited consideration because of his contention that persons listed by Federal Examiners will not be entitled to vote.

(1) The Attorney General of the United States filed a motion for leave to file a supplemental complaint and to add and drop parties in the proceedings entitled "*United States v. State of Louisiana*", #2866 on the Docket of the United States District Court for the Eastern District of Louisiana. This is a three-Judge District Court. Leave was granted and there is presently pending before that Court the issues claimed by the defendant herein as reasons for expedited consideration. The complaint therein prays that the persons listed by Federal Examiners be registered and be permitted to vote.

All of the reasons given by the Attorney General of the United States have been cured by bringing the above proceedings, which were also brought in the States of Mississippi and Alabama. Trial will be had on this point on December 21, 1965.

(2) The Attorney General of the United States

instituted proceedings in Louisiana, Mississippi and Alabama, the purpose of which was to insure that the persons listed by the Federal Examiners in those States do, in fact, vote in the 1966 elections. Both the State of South Carolina and the United States Attorney General overlook and fail to mention to the Court that the Act does not contemplate any actions on the part of the State Officials to permit a person to vote, who has been listed by Federal Examiners. Section 7 (b) provides that any person whose name appears on the Examiner's list shall be entitled and allowed to vote. . . Section 7 (c) provides that the Examiner shall issue to each person, whose name appears on such list, a certificate evidencing his eligibility to vote. Section 8 of the Act provides that Federal Officials may enter and attend any place holding an election for the purpose of observing whether persons entitled to vote are being permitted to vote and also attend the place for tabulating the vote.

Section 12 (e) provides that when any person listed under the Act or registered under the Act has not been permitted to vote, the results of such election will not become final until such persons are permitted to vote and have their vote cast.

(3) The persons registered in the State of South Carolina by the local registration officials and by the Federal Examiners will be permitted to vote and their vote legitimately counted in any election until the Voting Rights Act of 1965 is declared unconstitutional. This is true in Louisiana, Mississippi and Alabama,

and, therefore, the Attorney General of the United States is not faced with immediate problems insofar as this Court is concerned.

South Carolina argues that she has an election in the latter part of May, 1966, and the illiterates will be permitted to vote in that election if this Act is not declared unconstitutional. South Carolina could have instituted proceedings in the District Court for the District of Columbia, as did New York, and would, by now, be relieved of its problems. There have been many Voting Rights Acts, all affecting South Carolina, and this Court has never seen fit to exercise its original jurisdiction in connection with such Acts. In Louisiana, there have been several elections since the passage of the Voting Rights Act and the illiterates registered thereunder have voted. South Carolina is fearful that if the illiterates vote in South Carolina, someone might contest the validity of such election.

Several years ago the United States District Court for the Western District of Louisiana registered certain persons in East Carroll Parish and provided them with certificates entitling them to vote. These people have voted in several elections by merely presenting the certificates to the Election Official in spite of the fact that they have never been placed on the registration rolls by the Parish Registrar. Not only does the Act in question provide a means for persons to vote; Louisiana can and will prove that persons do, in fact, vote by presenting a Federal Certificate.

In Louisiana, there has been no contest of these

elections and this law is the Supreme law of the land until such time as it is declared unconstitutional.

On August 9, 1965, Mr. Clarence Jones, Assistant Director of the Louisiana State Board of Registration, sent a telegram to every Registrar in the State of Louisiana, stating that on advice from the Attorney General of Louisiana, he must advise that the Voting Rights Act of 1965 is a valid law until otherwise judicially determined and the Registrars must abide by and comply with its provisions. (See Appendix A) Subsequently, on August 12, 1965, Mr. Jones wrote a letter to each Registrar, again including the Registrars in Parishes in which Federal Examiners had been appointed, describing, in detail, instructions for complying with the Act, telling them what to do and, more importantly, what not to do with respect to literacy and citizenship tests under Louisiana law, in order to comply with the new federal law. (See Appendix B)

(4) Considerable facts need to be determined in order to properly pass upon the constitutionality of the Act. These facts are listed in the complaint filed by the plaintiff herein.

Expedited determination of the constitutionality of the Voting Rights Act of 1965 in "*State of South Carolina v. Nicholas deB. Katzenbach*", No. 22, Original, in the Supreme Court of the United States, October Term, 1965, will not fully present the Louisiana situation to the Court in view of South Carolina's absence of factual issues. In the Louisiana situation, there are vital questions of fact which must be de-

termined and these are more properly determined in a trial Court, or at least before a Master appointed by this Court. Louisiana contends that it should be able to go beyond the verbal surface of the Voting Rights Act of 1965.

> "It is said that when the meaning of language is plain, we are not to resort to evidence in order to raise doubts. That is rather an axiom of experience rather than a rule of law, and does not preclude consideration of persuasive evidence if it exists." (*Boston Sand & Gravel Co. v. United States*, 278 U.S. 4148, 73 L.ed. 170)
>
> "Of course one begins with the words of a statute to ascertain its meaning, but one does not end with them." *(Citation No. 352 U.S. 128)*
>
> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, . . . , the denial of equal justice is still within the prohibition of the Constitution." *(Yick Wo v. Hopkins*, 118 U.S. 356, 30 L.ed. 220)

Louisiana contends that this Voting Rights Act of 1965 confers upon and delegates to the Attorney General and the Bureau of Census discretionary authority in the exercise of which both of these officers have been arbitrary. This arbitrary administration, both as to their determinations under the Act and their administration of the provisions of the Act, have been discriminatory to Louisiana.

And, thus, in addition to all the reasons advanced

by South Carolina, the Act transgresses the power of Congress to legislate on this subject.

Indeed, a trial Court should hear and determine these facts and a question of the constitutionality of this Act is now pending before a three-Judge Court in Louisiana in Civil Action #2866, supra.

We submit that if there was an emergency, that the trial Court above referred to could hear and determine the facts and this Court could hear the direct appeal therefrom before the next election in South Carolina. The three-Judge District Court accepted the supplemental complaint on November 15. Answer is due by December 6, and a trial has been specially fixed for December 21. Supplemental briefs could be due on December 27, with a decision by the Court on January 10. Since this is a three-Judge Court, a direct appeal to this Court is afforded and the record could be filed by February 1. An appellant brief could be due February 18, with appellee's due March 3, and argument could be had in this Court on March 15.

In such a manner, this Court will have properly heard the issues and the facts and, in all probability, will have before it not only South Carolina on its law, but Louisiana on its facts and law, Mississippi on its law or facts, Alabama on its law or facts and New York on the decision in the matter entitled "*Morgan v. Katzenbach*", Civil Action #1915-65 in the United States District Court for the District of Columbia. We could not think of a more proper way for this Court to pass upon the constitutionality of the Voting Rights

Act of 1965. That Act was passed by the Congress in an atmosphere of speed and haste. Certainly, its constitutionality should not be determined in this same atmosphere. The orderly judicial process should be followed.

(5) In the alternative, we submit that if this Court will not delay the proceedings in order to give the State of Louisiana an opportunity to present its facts before a trial Court, then certainly the Court should delay the proceedings of South Carolina in order to have Louisiana determine its facts before a Master appointed by this Court. This could be accomplished long before any election in South Carolina.

Here, again, we refer to the facts as set forth in the brief in support of the complaint filed by the State of Louisiana.

In conclusion, we submit that neither the plaintiff nor the defendant in the South Carolina case have moved the Court for expedited consideration, but that the Court granted same. We ask the Court to reconsider that in the light of the above.

Respectfully submitted,

JACK P. F. GREMILLION,
Attorney General,
State of Louisiana.

HARRY J. KRON, JR.,
Assistant Attorney General,
State of Louisiana.

THOMAS W. McFERRIN, SR.,

SIDNEY W. PROVENSAL, JR.,
Special Counsel.

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NICHOLAS deB. KATZENBACH, ATTORNEY GENERAL OF THE UNITED STATES,

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BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE ORIGINAL COMPLAINT

JURISDICTION

The jurisdiction of this Court to entertain the original complaint of the State of Louisiana against Nicholas deB. Katzenbach, Attorney General of the United States rests on Article III, Section 2, Clause 1 and 2 of the Constitution of the United States.

QUESTION PRESENTED

Whether the Voting Rights Act of 1965 is applicable to the State of Louisiana and whether said act is unconstitutional as written and as applied to the State of Louisiana.

ARGUMENT

We do not, at this time, address ourselves to the

merits of the case. The sole burden of our present argument is that the Court should exercise its jurisdiction by granting the motions for leave to file the complaint.

The purpose of this suit is to protect the rights of the State of Louisiana insofar as the Voting Rights Act of 1965 is concerned, and to have an adjudication on the constitutionality of said act.

The State of South Carolina filed an original complaint in this Court, No. 22, against Nicholas deB. Katzenbach and this Court granted the motion for leave to file said complaint and suggested that the other states file Amicus Curiae briefs on or before December 20, 1965. The State of Louisiana prefers to file its own complaint raising questions of fact to support her contention that the Voting Rights Act of 1965 is unconstitutional, and not applicable to Louisiana, and she also raises the unconstitutionality of additional sections of the act.

Certainly if South Carolina is entitled to file her complaint then Louisiana is entitled to do so. The State of Louisiana prefers not to have the constitutionality of the act determined initially in this Court but this Court has apparently already made this determination. As long as this Court is going to hear the case of South Carolina it should also hear the case of Louisiana. It should, however, permit Louisiana to prove the facts necessary to have a proper determination of the case. We submit that a trial court should make this factual determination, but this cannot be accomplished before December 20, 1965.

If this Court refuses to grant additional time and delay the South Carolina argument, then respondent should be ordered to respond to the motion herein in an expedited manner, the same as the Court ordered in *United States v. Louisiana*, Original No. 25.

CONCLUSION

For the foregoing reasons, we respectfully pray that leave to file the complaints submitted herewith be granted.

JACK P. F. GREMILLION,
Attorney General,
State of Louisiana.

HARRY J. KRON, JR.,
Assistant Attorney General,
State of Louisiana.

THOMAS W. McFERRIN, SR.,

SIDNEY W. PROVENSAL, JR.,
Special Counsel.

APPENDIX A

WESTERN UNION

AUGUST 10, 1965

ON ADVICE FROM THE LOUISIANA ATTORNEY GENERAL'S OFFICE, I AM INFORMED THAT THE NEW FEDERAL VOTING RIGHTS ACT IS A VALID LAW UNTIL ITS CONSTITUTIONALITY OR VALIDITY HAS BEEN DECREED OR ADJUDGED AS UNCONSTITUTIONAL BY A COURT. UNTIL THAT TIME, OUT OF RESPECT FOR THE LAW AND IN VIEW OF THE CRIMINAL PENALTY PROVIDED FOR, THE ATTORNEY GENERAL'S OFFICE ADVISES THAT THE 1965 FEDERAL VOTING RIGHTS ACT BE FOLLOWED.

C. K. JONES, JR.

ASSISTANT DIRECTOR OF REGISTRATION

APPENDIX B

State of Louisiana

BOARD OF REGISTRATION
Baton Rouge

August 12, 1965

Dear Registrar:

This letter is for the purpose of giving you instructions for complying with the telegram which you received from this office on Wednesday, August 11.

For the present time, and until the constitutionality of the 1965 Federal Voting Act has been tested, we will continue to use the Form LR-65. The reason for this is that this form complies with state law that has not been declared unconstitutional. Therefore, only those portions which have been superseded by the new Federal Act will not be used for the present time. Following are the instructions to use:

(1) Obtain proof of identity, residence and age.

(2) If the applicant is able to read and write, he should fill out his own application. The first thing that you should do is to ask him to read the penalty clause at the top of the back side of the card. If he cannot read or write, you will read this penalty clause to him, make sure that he understands it, and then check the "yes" block. If you read it to him, write by the side of it "Read by" and put your name. After this is done, if it is a literate person who can read and write, you will fill in the date, ward number, precinct number, parish and residence address, then ask him to take

the card and complete it through the question "Have you been convicted of a felony, etc.". Everything below this question should be scratched out. On the back side of the card you will scratch out the preamble and the citizenship portion.

(3) If a literate person is registering, you will make sure that he has read the oath and then ask him to sign the card in the appropriate place. If it is an illiterate person, you will read the oath to him (or her, as the case may be) and ask them to repeat it after you. After this is done, you will ask them to make their mark and you will print or write their name beside the mark.

(4) The information at the bottom of the back side of the card can still be obtained from the applicant, with the explanation that this information is necessary for identification at the polls.

Some of you were told earlier that we would possibly have a new form. However, until the validity of this act is cleared, we will continue to use the LR-65 as described above. Therefore, if you need additional forms you should obtain them, at least enough to last until this matter is cleared up.

You will use the LR-65 card for both literates and illiterates. On the illiterates, you can note same on the front of the card with a red pencil. All illiterates will be put in your precinct binders on pink certificates. If you have a shortage of these, M. L. Bath Company of Shreveport has them in stock and can get them to you in a day or two.

Be sure that you keep accurate records of the people whom you register during this period, until the law is cleared. On your Form 4 report, you will count these people and the illiterates will be shown on this report as illiterates.

If you have any further questions, or if we can be of any assistance to you, do not hesitate to call upon us.

Sincerely yours,

/s/ CLARENCE K. JONES, JR.
Assistant Director

CKJjr/mmc

Copy to:

U. S. Attorney General
La. Attorney General
All Parish District Attorneys
All Parish Assistant District Attorneys