The Constitutionality of the Voting Rights Act of 1965

A response to the Attorney General
of the United States

by

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Attorney General of the Commonwealth of Virginia

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H. R. 6400

A RESPONSE TO THE ATTORNEY GENERAL OF THE UNITED STATES

On March 29, 1965, in my capacity as Attorney General of Virginia, I testified before Subcommittee No. 5 of the Committee on the Judiciary of the House of Representatives of the United States in opposition to H. R. 6400, entitled the "Voting Rights Act of 1965." On that occasion, I began my testimony with the statement that the proposed bill was:

> ". . . among the most dangerous pieces of legislation ever offered in the Congress of the United States. I make this statement advisedly, for I earnestly believe it goes further than any step yet attempted to erode the basic concepts of constitutional government in which the individual States are acknowledged to be sovereign. The legislation is not only patently unconstitutional, but it is shockingly discriminatory."

During the course of the hearings on that date, my attention was directed by a member of the subcommittee to the following observation made by the Attorney General of the United States while testifying on the same bill before the House Judiciary Committee on March 18, 1965:

> "I have shown why this legislation is necessary and have explained how it would work. It remains to determine whether it is constitutional. The answer is clear: the proposal is constitutional."

In light of this obvious conflict of opinion concerning the constitutionality of H. R. 6400, I was invited by the subcommittee to submit a more elaborate expression of my views on

this subject in the form of a response to those previously announced by the Attorney General of the United States. I accepted this invitation, and I wish now to express my appreciation to the members of the subcommittee for this opportunity to detail my position on this aspect of the legislation under consideration.

In essence, H. R. 6400 provides that no person shall be denied the right to vote in any election (Federal, State or local) because of his failure to comply with any voter qualification test established by State law, in any State or political subdivision thereof (1) which maintained a voter qualification test on November 1, 1964, and (2) in which less than 50 per centum of the resident persons of voting age were registered on November 1, 1964, *or* in which less than 50 per centum of the resident persons of voting age voted in the Presidential election of November, 1964. In effect, H. R. 6400 would abolish any voter qualification test (including racially nondiscriminatory tests) in certain States *only*, *i. e.*, those States falling within the ambit of one or the other of the two "50 per centum" formulae mentioned above.

The only provision of the Constitution of the United States upon which its proponents attempt to justify enactment of the legislation in question is the Fifteenth Amendment. In its entirety, that Amendment prescribes:

> "Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.
>
> "Section 2. The Congress shall have power to enforce this article by appropriate legislation."

The Attorney General of the United States asserts that H. R. 6400 constitutes "appropriate" legislation under Section 2 of the Fifteenth Amendment. I submit, however, that H. R. 6400 is constitutionally invalid because (1) in its direct operation and effect under the "50 per centum" formulae, the bill arbitrarily and unjustifiably includes within its terms States which are demonstrably free of any racial discrimination in

the establishment or administration of their electoral processes and (2) in its direct operation and effect, the bill infringes the constitutional power of the individual States of the Union to impose such racially nondiscriminatory qualifications upon the exercise of the right to vote as each State may select. I shall discuss these two fundamental constitutional objections to the bill *seriatim*.

In considering the first stated objection to the constitutionality of H. R. 6400, it is well settled, as the Attorney General points out citing *Katzenbach* v. *McClung*, 379 U. S. 294, that Congress must have a "rational basis" for the findings upon which its legislation is predicated. It must be noted, however, that the Attorney General's attempt to establish a "valid factual premise" for Congressional action with respect to voter discrimination in Virginia is completely refuted by the findings of the United States Civil Rights Commission. In its 1961 Report on Voting, the Commission declared:

> "The absence of complaints to the Commission, actions by the Department of Justice, private litigation, or other indications of discrimination, have led the Commission to conclude that, with the possible exception of a deterrent effect of the poll tax—which does not appear generally to be discriminatory upon the basis of race or color—Negroes now appear to encounter no significant racially motivated impediments to voting in 4 of the 12 Southern States; Arkansas, Oklahoma, Texas, and Virginia." (Volume 1, p. 22).
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> * * *
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> "In three States—Louisiana (where there is substantial discrimination), Florida (where there is some), and Virginia (where there appears to be none) —official statistics are compiled on the State level by county and by race." (Volume 1, p. 102).

As the Supreme Court has repeatedly pointed out, a statute, valid on its face, may be assailed by proof of facts demonstrating that the statute as applied to a particular class is without

support in reason. See, *United States* v. *Carolene Products Company*, 304 U. S. 144. In light of the findings of the United States Civil Rights Commission summarized above, it is unarguably apparent that no racial discrimination exists in Virginia with respect to the right to vote. This circumstance completely undermines the indispensable factual foundation upon which H. R. 6400 is based. The power of Congress to enforce the guarantee of the Fifteenth Amendment is specifically limited to the enactment of "appropiate" legislation for this purpose; yet it is manifest that the "50 per centum" formulae which would activate the proposed legislation operate to include within the ambit of the bill States in which no racially motivated voter discrimination exists. Clearly, Congress may not—under the guise of enforcing the Fifteenth Amendment prohibition against denial of the right to vote on account of race or color—enact legislation which would suspend the electoral laws of a State in which racial discrimination in the exercise of the right to vote is known by Congress, as a matter of public record, to be nonexistent. Legislation having such an effect is clearly without reasonable classification or rational justification, amounts to no more than a mere arbitrary fiat and cannot constitute "appropriate" legislation under the Fifteenth Amendment.

Consideration of the second stated objection to the constitutionality of H. R. 6400 begins with the premise that the right to prescribe the qualification of electors is one constitutionally vested exclusively within the province of the individual States, subject only to the limitations contained in the Federal Constitution forbidding qualifications based upon race (Fifteenth Amendment), sex (Nineteenth Amendment) and the payment of a poll tax in Federal elections (Twenty-Fourth Amendment). Thus, Article I, Section 2, of the Constitution of the United States and the Seventeenth Amendment provide that electors for the House of Representatives and Senate, respectively, shall have the qualifications requisite for electors of the most numerous branch of each State Legislature. Under these provisions, the qualifications of electors in Congressional elections must be those qualifications established by each State for electors of the most numerous branch of the State Legislature. Further in this connection, the Supreme Court of the

United States has repeatedly declared that a State is free to conduct its elections and limit its electorate as it may deem wise, except as its actions may be affected by the prohibitions of the Federal Constitution, and that the power of Congress to legislate at all the subject of racial discrimination in voting rests upon the Fifteenth Amendment and extends only to the prevention by appropriate legislation of the discrimination forbidden by that Amendment.

Decisions of the United States Supreme Court since ratification of the Fifteenth Amendment, dispel in conclusive fashion any doubt concerning the validity of this fundamental premise. In 1876 (*United States* v. *Reese*, 92 U. S. 214), the Supreme Court declared:

> "The Fifteenth Amendment does not confer the right of suffrage upon anyone. It prevents the States, or the United States, however, from giving preference, in this particular, to one citizen of the United States over another, on account of race, color or previous condition of servitude . . . If citizens of one race having certain qualifications are permitted by law to vote, those of another having the same qualifications must be . . . *The power of Congress to legislate at all upon the subject of voting at state elections rests upon this Amendment.*" (Italics supplied).

Moreover, in 1959 (*Lassiter* v. *Northampton County Board of Elections*, 360 U. S. 45), the Court stated:

> "*The States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised* . . . So while the right of suffrage is established and guaranteed by the Constitution . . . *it is subject to the imposition of state standards which are not discriminatory* and which do not contravene any restriction that Congress, acting pursuant to its constitutional powers, has imposed . . . While § 2 of the Fourteenth Amendment, which provides for apportionment of Representatives among the States according to their respective numbers counting

the whole number of persons in each State (except Indians not taxed), speaks of 'the right to vote,' *the right protected 'refers to the right to vote as established by the laws and constitution of the State.'* " (Italics supplied).

Finally, on March 8 of this very year (*Carrington* v. *Rash*, —— U. S. ——), the Court confirmed:

> "*There can be no doubt* either of the historic function of the States to establish, on a nondiscriminatory basis, and in accordance with the Constitution, other qualifications for the exercise of the franchise. Indeed, 'the States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised.'. . . . 'In other words, the privilege to vote in a State *is within the jurisdiction of the State itself*, to be exercised as the State may direct, and upon such terms as to it may seem proper, provided, of course, no discrimination is made between individuals in violations of the Federal Constitution.' " (Italics supplied).

In light of these decisions, it is manifest that for almost a century the Supreme Court of the United States has consistently and repeatedly proclaimed the power of each State under the Federal Constitution to establish racially nondiscriminatory criteria governing the exercise of the elective franchise of its citizens. The language in which this fundamental power of the individual States has been declared, reaffirmed and protected consists of such plain English words that he who runs may read and the ingenuity of man cannot evade them. The prescription of racially nondiscriminatory qualifications upon the right to vote is the exercise of a power vested in each State by the Constitution of the United States. If this power rests with the States under the Constitution—as is unarguably true —then its exercise may not be interdicted by the Congress or any department of the Federal government, under the Fifteenth Amendment or any other provision of the Constitution. If the *constitutional* powers of the States could be thus manipulated

out of existence by the *legislative* action of Congress, the guarantees of our Constitution are illusory indeed.

Let me attempt to clarify this proposition and emphasize its validity by reference to an analogy with which, perhaps, not even the Attorney General of the United States will disagree. Section 2 of the Fourteenth Amendment authorizes Congress to reduce the basis of representation of States in the House of Representatives whenever the right to vote in a State is denied or abridged except upon stated grounds. By contrast, the right of a State to equal representation in the Senate of the United States by two Senators, each of whom shall have one vote, is a right guaranteed to each State without qualification by Article V of the Constitution. If the Congress of the United States—purporting to act under the Fifteenth Amendment—should enact a law diminishing Senate representation in those States in which the right to vote has been denied or abridged upon the ground of race, would such a law be constitutional? Manifestly not, and I do not believe that even the Attorney General of the United States would have the temerity to suggest that it would be. In enacting appropriate legislation under the Fifteenth Amendment, it simply does not lie within the power of Congress to violate other provisions of the Federal Constitution which expressly guarantee certain rights to, and confer certain powers upon, the States or other independent coordinate branches of the Federal government.

Yet the right to prescribe racially nondiscriminatory voting qualifications is one no less vested in the States by the Federal Constitution than the right to equal representation in the Senate. If the latter right of the States cannot be infringed by Congress under the Fifteenth Amendment, the former right equally cannot be.

Let me emphasize at this point that I no *not* make the broad (indeed, too broad) assertion that each State has the power to prescribe *any* voting qualifications it may see fit. It is the power to prescribe *racially nondiscriminatory* qualifications which each State constitutionally possesses, and when a State establishes such nondiscriminatory qualifications, it exercises a constitutionally protected power with which no branch of the Federal government may permissibly interfere.

Just such a situation exists in my State. Under Virginia law, a prospective voter is required to fill out in his own handwriting a form indicating the applicant's age, date and place of birth, residence and occupation at the time of registration and for one year next preceding, whether or not he has previously voted, and if so, the State, county and precinct in which he last voted. These requirements are not only reasonable but are utterly devoid of any racial connotation whatever, and their imposition neither denies nor abridges anyone's right to vote because of race or color. Under the Constitution of the United States, Virginia has the power to impose these nondiscriminatory voter qualifications upon its citizens, and the Congress has no authority whatever to suspend them. If these qualifications were discriminatory, or if they were discriminatorily administered, then—and only then—would these circumstances provide an area in which Congress, under the Fifteenth Amendment, could legislate. However, if neither of such circumstances exists—as is concededly the case in Virginia—no enactment of Congress can vary these requirements in the slightest degree. Congress cannot substitute its own voting standards for the nondiscriminatory voting qualifications prescribed by the State without infringing the constitutionally established and judicially protected power of the State in this field.

During the course of his testimony before the House Judiciary Committee on March 18, 1965, the Attorney General of the United States made reference to the following observation of the late Mr. Justice Frankfurter, speaking for the Court in *Gomillion* v. *Lightfoot*, 346 U. S. 339, 347, a Fifteenth Amendment case:

> "When a State exercises power wholly within the domain of State interest, it is insulated from federal judicial review. But such insulation is not carried over when State power is used as an instrument for circumventing a federally protected right."

Precisely so. *And when a State establishes nondiscriminatory voting qualifications, it exercises a power wholly within the domain of the State and is insulated not only from Federal*

judicial review but from Federal legislative interference. It adds nothing to emphasize that such insulation is not available when State power is used as an instrument for circumventing a Federally protected right, for when a State's voting standards are, in fact, nondiscriminatory, they cannot be an instrument for such purpose nor come within the reach of Congressional power.

The Attorney General of the United States also referred to certain observations of Chief Justice John Marshall in the historic cases of *Gibbons* v. *Ogden*, 9 Wheat. 1, and *McCullough* v. *Maryland*, 4 Wheat. 316, for alleged support of the power of Congress to enact H. R. 6400. In this connection, he quoted the following classic utterances of Marshall in those cases:

> "[t] his power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, *other than are prescribed in the constitution.*" (9 Wheat. 196).
>
> * * *
>
> "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, *which are not prohibited, but consistent with the letter and spirit of the constitution*, are constitutional." (4 Wheat. 421).

In light of the phrases of the quotations which I have italicized above, it is manifest that these declarations lend no support to the Attorney General's position. On the contrary, the great Chief Justice was abundantly careful, on both occasions, to point out that Congressional power was subject to the limitations "prescribed in the constitution" and that the only means properly available for the exercise of Congressional power are those "which are not prohibited . . ." However, as we have seen, the power of Congress to deal with State prescribed voter qualifications is severely limited by the Constitution and the suspension by Congress of the racially nondiscriminatory qualifications of a State is clearly prohibited.

Equally irrelevant and misleading are the Attorney Gen-

eral's reference to *Ex Parte Siebold*, 100 U. S. 371, and his statement that in the cited case the Supreme Court "sustained a system of federal supervisors for registration and voting not dissimilar to the system proposed here." Not only was the legislation under review in *Siebold* limited to Federal elections, but it did not even purport to interfere with State laws prescribing voter qualifications. It is thus apparent that the legislation validated in *Siebold* was not even remotely similar to the legislation currently under consideration by Congress.

I lay no claim to reputation as an authority on the subject of constitutional law, and certainly I have no talent for predicting the future course of Supreme Court decisions on the basis of existing precedent. I do believe, however,—as Mr. Justice Harlan made clear in his address dedicating the Bill of Rights Room in New York City on August 9, 1964—that the Framers of the Constitution:

> ". . . staked their faith that liberty would prosper in the new Nation not primarily upon declarations of individual rights *but upon the kind of government the Union was to have*. And they determined that in *a government of divided powers* lay the best promise for realizing the free society it was their object to achieve." (Italics supplied).

One aspect of this governmental edifice which the Framers sought to erect, and which H. R. 6400 would manifestly subvert, was the distribution of power between the Nation and the States, each supreme within its sphere, thus forming an indestructible Union of indestructible States. I speak today for the preservation of this governmental ideal and for the preservation of the right of every citizen to vote, without regard to race or color, within the framework of this ideal and in a manner consistent with the letter and spirit of the Constitution.

The Virginia Commission on Constitutional Government is an official agency of the Commonwealth of Virginia, created by act of the General Assembly in 1958. Its function is to disseminate information and critical opinion upon constitutional questions, with particular emphasis upon constitutional issues in the field of State and Federal relations.

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