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Congressional Power over Elections

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CONGRESSIONAL POWER OVER ELECTIONS

Of recent national interest has been the problem of equal suffrage of the Negro in the South.[1] Many attempts have been made to exclude this race from the voting place by various methods running the gamut from state grandfather statutes to actual and open violence. One method now in vogue is literacy tests, inequitably administered. To counter state and local discrimination, many people have turned to the federal Congress. A recent result has been two bills, Senate Bill S480[2] introduced on January 17, 1961, and Senate Bill S2750[3] introduced on January 25, 1962. Although neither bill had been acted upon at the time this article was written, it is clear that the issues these bills raise are among the most heated of the day. The purpose of this paper is: (1) to define the powers of Congress in this area, and (2) to investigate these two bills within the context of these powers.

Although the terms have not been judicially defined or in general usage, in this paper the term "national elections" will be used to indicate elections in which the office and the manner of selection derives from the Constitution of the United States, while the term "local or state elections" will refer to those elections in which these powers have derived from the state or subdivision thereof.

Thus, the elections of senators and representatives are clearly national, as the definition of the offices are found in Amendment XVII[4] for senators and Article 1, Section 2[5] for representatives, and the Congressional power to regulate the election of these officers comes from Article I, Section 4.[6]

A territorial election would also be a national election as Congress has power under Article IV, Section 3[7] to make all needful rules respecting territories.

The election of the electors for the President and the Vice-President of the United States does not fit into the dichotomy of national and state election terminology. It has been held that the electors are officers of the state and their election is not a federal election.[8] However, they do exercise a federal function in balloting for the President and the Vice-president. They act by the authority of the state but the state in turn receives its authority from the Federal Constitution.[9] The office of the elector is defined by Article II, Section 1, clause 2[10] which gives to the states the power to designate the manner in which he shall acquire the office.

1. 1961 U.S. Comm'n on Civil Rights Report; Voting 1..
2. S480, 87th Cong., 1st Sess. (1961).
3. S2750, 87th Cong., 2d Sess. (1962).
4. U.S. Const. Amend. XVII.
5. U.S. Const. art. I, § 2.
6. U.S. Const. art. I, § 4.
7. U.S. Const. art. IV, § 3.
8. Walker v. United States, 93 F.2d 383 (8th Cir. 1937).
9. Ray v. Blair, 343 U.S. 214 (1951).
10. U.S. Const. art. II, § 1, clause 2.

All other elections are local elections.

It becomes necessary to separately define the Congressional powers over the election of electors of the President and the Vice-President of the United States as this election is in a limbo of its own. In the case of *Burroughs v. United States*[11] the court held as proper the Congressional control over groups which attempt to influence the election of Presidential electors in two or more states or through a national organization; in other words, this aspect of the presidential electoral process is to be classified as national. If the activities are wholly contained within a state, then the election will be treated as if it were a local election.

The powers of Congress over a state election can only come from the Fourteenth and Fifteenth Amendments,[12] whereas, in national elections, Congress has much broader powers.

> Article I, Section 4 reads:
> The times, places and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations. . . .[13]

This section has been interpreted to mean that in these elections, Congress is supreme in its power to control the election.[14]

> If Congress does not interfere, of course they may be made wholly by the state; but if it chooses to interfere, there is nothing in the words of [Article I, Section 4] to prevent its doing so, either wholly or partially.[15]

Therefore, it is quite clear that Congress, if it wished, could limit the use of the literacy test in a national election or even eliminate it. It possesses the power if it wishes to exercise it.

When practices under local elections are in question the Congress is limited in its powers to the Fourteenth and Fifteenth Amendments and the enabling clauses thereunder.[16] Contrary to popular belief, the Fifteenth Amendment does not grant the Negro "the right to vote."[17] Indeed, the right to vote is not an attribute of federal citizenship.[18] The Amendment simply states that if United States citizens are not to be allowed to vote, the reason cannot be race, color, or previous condition of servitude. Thus, in state elections, including those in which presidential electors are chosen, the state is prefectly free, within limitations presently to be discussed,

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11. Burroughs v. United States, 290 U.S. 534 (1933).
12. United States v. Cruikshank, 92 U.S. 542 (1875); Davis v. Schnell, 81 F. Supp. 872 (S.D. Ala. 1949); aff'd, 336 U.S. 933 (1949).
13. Supra note 6.
14. United States v. Mosely, 238 U.S. 383 (1915); Ex parte Yarbrough, 110 U.S. 651 (1884); United States v. Gale, 109 U.S. 65 (1883); Ex parte Clarke, 100 U.S. 399 (1880); Ex parte Siebold, 100 U.S. 399 (1880).
15. Ex parte Siebold, supra note 14 at 383.
16. Guinn v. United States, 238 U.S. 347 (1915); James v. Bowman, 190 U.S. 127 (1903); United States v. Cruikshank, supra note 12; Lackey v. United States, 107 Fed. 114 (6th Cir. 1901); Davis v. Schnell, supra note 12.
17. United States v. Reese, 92 U.S. 214 (1876).
18. United States v. Cruikshank, supra note 12.

to impose its own standards for voting. For example, insistence by the state upon the absence of criminal conduct,[19] a specified period of residency within the state,[20] and the payment of a poll tax[21] have all been held proper. Before the enactment of the Nineteenth Amendment it was held that a state could exclude the right of suffrage from women or grant it to them as it wished, and Congress would be impotent to stop the discrimination.[22]

On what questions in the area of state elections may Congress legislate? The major limitation on the Congressional power under the Fourteenth and Fifteenth Amendments is that a state, and a state alone, is prohibited from discriminating. Therefore, private individuals cannot be made to answer in federal court for acts which prevent a Negro from voting in a local election.[23]

It might be argued that under the doctrine of *Shelley v. Kraemer*[24] (in which restrictive covenants were declared to be valid, but unenforceable by a state court, because to do so would constitute state action) the failure of a local prosecutor to prosecute individuals for violating local election laws makes such *refusal* to act "state action" within the Fourteenth Amendment. However, in *Shelley v. Kraemer* the action of the state court was a positive action, while here inaction would be involved. At best, the argument of *Shelley v. Kraemer* would here have only questionable validity.

It might be further argued that the doctrine of *Brewer v. Hoxie School Dist. No. 46*[25] would apply to voting. In this case a federal court assumed jurisdiction, recognizing a federal question, when groups of private citizens moved to prevent the voluntary integration of a public school. The court based its jurisdiction upon the fact that the school board was under a duty, by oath of office, to uphold the Constitution of the United States and that the conspiracy by the defendants to interfere with their duty under the Fourteenth Amendment as defined in *Brown v. Board of Education*[26] violated the school board's federal rights. The full ramifications of this decision have yet to be discovered. The size and power of the conspiracy may be a controlling consideration. In the case of *Collins v. Hardyman*,[27] the federal courts refused jurisdiction on the grounds that the breaking up by members of the American Legion of a meeting held by United States citizens in order to petition Congress on foreign policy was not a sufficient conspiracy. It would only be conjecture to attempt to predict whether a federal court would entertain a

19. Davis v. Beason, 133 U.S. 333 (1890).
20. Pope v. Williams, 193 U.S. 621 (1904).
21. Breedlove v. Suttles, 302 U.S. 277 (1937).
22. Minor v. Happersett, 21 Wall. 162 (1875).
23. James v. Bowman, supra note 16; Lackey v. United States, supra note 16.
24. Shelley v. Kraemer, 334 U.S. 1 (1948).
25. Brewer v. Hoxie School Dist. No. 46, 238 F.2d 91 (8th Cir. 1956).
26. Brown v. Board of Education, 347 U.S. 483 (1954).
27. Collins v. Hardyman, 341 U.S. 651 (1951).

suit by an election official, intimated by a White Citizens Council, to seek his federal remedies.

Therefore, so far as local elections are concerned, Congress is restricted to power over acts which are state acts, or are done under color of state law, and which are discriminatory. Such past state acts which have been held to be discriminatory are best exemplied by the Oklahoma "grandfather clause." The state constitution provided that any person was deemed registered to vote if his ancestor had been registered to vote in 1862. Historically, the Negro was still a slave at the time, hence few Negroes could qualify under this provision. Thus, although never specifically excluding or even mentioning the Negro or any race, the state constitution set up such restrictions as discriminated specifically against the Negro. The court recognized that this was discriminatory as to the Negro within the prohibition of the Fourteenth and Fifteenth Amendments.[28]

An impartially applied literacy test, however, has been held not to be discriminatory[29] as "literacy and illiteracy are neutral on race, creed, color, and sex."[30] A test of literacy is a reasonable test because it goes to the very heart of intelligent voting. It is irrelevant that it happens to fall more harshly upon one racial group than upon others.[31]

Literacy, however, is a relative term. The dictionary[32] defines it in two ways (1) a learned person and (2) one who can read and write. Between these two definitions there runs a wide spectrum of learning. The states have great latitude in determining for themselves where along this spectrum the minimum educational requirement shall be for voting.[33] The only federal questions would be that the standards for the tests be definite, that they be applied consistently and without racial discrimination in fact, and that they be reasonable.

One of the usual types of literacy tests now in use is the requirement that a prospective voter must be able to read and write any section of the state constitution.[34] This has been held in *Lassiter v. Northhampton County Board of Electors*[35] to be proper. In *Davis v. Schnell*[36] the court held a test which required that an individual be able to understand and explain the state constitution too indefinite to be interpreted fairly and uniformly.

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28. Guinn v. United States, supra note 16.
29. Lassiter v. Northhampton County Board of Electors, 360 U.S. 45 (1959); Guinn v. United States, supra note 16; Comacho v. Rogers, 199 F. Supp. 155 (S.D. N.Y. 1961); Darby v. Daniel, 168 F. Supp. 170 (S.D. Miss. 1958).
30. Lassiter v. Northhampton, supra note 29.
31. Camacho v. Rogers, supra note 29.
32. Webster's New Collegiate Dictionary, G. & C. Merrian Co., Springfield, Mass. (1953).
33. Lassiter v. Northhampton, supra note 29.
34. For example, see N.C. Const. art. VI, § 4.
35. Lassiter v. Northhampton, supra note 29.
36. Davis v. Schnell, supra note 12.

One of the early attempts to solve the problems of civil rights was Section 5507 of the Criminal Code.[37] It reads:

> Every person who prevents, hinders, controls, or intimidates another from exercising, or in exercising the right of suffrage, to whom the right is guaranteed by the Fifteenth Amendment to the Constitution of the United States, by means of bribery or threats of depriving such person of employment or occupation, or of ejecting such person from a rented house, lands, or other property, by threat of refusing to renew leases or contracts for labor, or by threats of violence to himself or family, shall be punished as provided in the preceding section.

In the case of *Lackey v. United States*,[38] several white men were indicted under Section 5507 for having bribed certain Negros in order to keep them from voting in a state election. The section was held to be unconstitutional on two grounds: (1) the statute did not differentiate between state and national elections, and (2) it did not state that the obstruction to the voting of these Negroes must be because of race. Congress cannot constitutionally prohibit every attempt to keep an individual from voting in a state election.

A federal statute which has been upheld is 18 U.S.C. § 252[39], which reads:

> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects, or causes to be subjected, any inhabitant of any state, territory, or district to the deprivation of any rights, privileges or immunities secured or protected by the Constitution and laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, then are prescribed for the punishment of citizens. . . .

In *United States v. Classic*,[40] election officials of the State of Louisiana were indicted under Section 242 and convicted for falsifying the vote count in a primary United States Congressional election. This was held to have deprived citizens of the right to have their vote counted, which is the same as being deprived of the vote, and the right of candidates to be properly considered by the voters.

In *Screws v. United States*,[41] the defendant, a state police officer, arrested a Negro and then beat him to death. Screws was also indicted and convicted under Section 242. The court held that he was acting under the color a state law although no specific law allowed him to do the acts which he did.

As in the *Screws* case, if a registrar of voters, acting under a constitutional state statute should vary from the statute in order to deprive

37. U.S. Rev. Stat. § 5507.
38. Lackey v. United States, supra note 16.
39. 18 U.S.C. § 242 (1950).
40. United States v. Classic, 313 U.S. 299 (1941).
41. Screws v. United States, 325 U.S. 91 (1945).

a Negro of his federal rights, that is his rights under the Fifteenth Amendment, he would also be open to prosecution under Section 242. However, further legislation on this subject proved to be necessary because of procedural difficulties which state officials raised,[42] and this led to the Civil Rights Acts of 1957[43] and 1960.[44]

Legislation by Congress which prohibits and punishes acts of state officials which knowingly deprive any individual of a right or a privilege under the Federal Constitution because of his race will clearly be held constitutional.

Coming now to a consideration of the two bills recently introduced in Congress: Senate bill S480[45] is an example of what would seem to be unconstitutional Congressional action in the area of local elections. It provides in part:

> All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any local election shall be allowed to vote without subjection to any arbitrary or unreasonable test, standard , or practice with respect to literacy. . . . Arbitrary or unreasonable test, standard, or practice with respect to literacy shall mean *any* requirement designed to determine literacy, comprehension, intelligence, or other test of education, knowledge, or understanding, in the case of any citizen who has not been adjudged an incompetent who has completed the sixth primary grade in a school accredited by any state or by the District of Columbia. (Emphasis supplied.)

The right to vote, as stated above, is not an attribute of national citizenship. "The Fifteenth Amendment does not confer the right of suffrage upon anyone."[46] It is not a right but a privilege granted by the states.

> The privileges and immunities protected are only those that arise from the Constitution and laws of the United States and not those that spring from other sources.[47]

Therefore, the states and not the federal Congress have the freedom to choose where along the spectrum of literacy shall be the limitation on the voter. The above bill destroys this choice and imposes upon the states the will of Congress. If a state would wish to set a limitation on voting such as the achievement of five grades or seven grades of education, it would be prohibited from doing so if this bill is constitutional, even though the action of the state would meet all constitutional requirements. Therefore, the bill must be considered an arbitrary act of Congress and should be deemed unconstitutional.

Senate bill S2750[48] contains substantive provisions similar to those

42. See Civil Rights Report, supra note 1 at 73.
43. 42 U.S.C. § 1971 (b) (1958).
44. 42 U.S.C. § 1971 (c); § 1971 (e); § 1974 (1958).
45. Supra note 2.
46. United States v. Reese, supra note 17 at 217.
47. Breedlove v. Suttles, supra note 21 at 283.
48. Supra note 3.

of S480, except that it applies only to federal elections. It defines federal elections as:

> any general, special, or primary election held solely or in part for the purpose of electing or selecting any candidate for the office of President, Vice President, presedential elector, member of the senate or member of the house of representatives, delegate, or commissioner from the territories or possessions.

This bill is clearly constitutional as within Congress' powers under Article I, Section 4[49] and Article IV, Section 3[50] except that the substantive provisions applying to the election of the presidential electors are too vague.[51]

Thus, men zealous in their desire to raise the Negro to a position of political equality with white persons have fallen into pitfalls in regard to Congressional power over local elections. Barring a constitutional amendment, which would have undesirable ramifications in our federal system,[52] the federal legislators must limit themselves to regulating those in official state positions who are bent on unjustifiably depriving the Negro of the vote in local elections. It is hoped that severe penalties for these violators coupled with the type of supervision and energy shown by the federal courts in the school integration cases will one day lead to the results for which many people pray.

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49. Supra note 6.
50. Supra note 7.
51. Lackey v. United States, supra note 16.
52. "Beyond doubt the Amendment [15th] does not take away from the state governments in a general sense the power over suffrage which has belonged to those governments from the beginning and without the possession of which power the whole fabric upon which the division of state and national authority under the Constitution and the organization of both governments rest would be without support and both the authority of the nation and the state would fall to the ground." Guinn v. United States, supra note 16 at 362.