to be true since 1952 under the Puerto Rican Constitution.[4]

[fol. 115] Thus it has been that since 1934—more than 30 years—no Puerto Rican schooled in his native land has been required to become literate in English in the course of an elementary school education extending through the sixth grade—the level adopted by New York as the measure of its educational qualification. Although literate in Spanish—the language in which his schooling in Puerto Rico has been conducted—voting in New York is denied him solely because of his lack of literacy in English. Section 4(e) represents a Congressional judgment that this is not in keeping with long-standing Congressional policies towards Puerto Rico, and that the New York policy should yield to the federal.[5] That is a judgment which, in my view, Congress is entitled to make by reason of the authority and responsibility assigned to it by the Constitution to provide for Puerto Rico and its people. It is not claimed, as it cannot be, that the present status of

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[4] Although Puerto Rico has often been the recipient of funds for educational assistance voted by Congress, these grants have never been conditioned upon instruction in English and have been made knowingly in the light of the use in Puerto Rico of Spanish as the official teaching language.

[5] In the Senate, both of the New York Senators, Javits and Kennedy, who sponsored Section 4(e), stressed the inequity of denying the vote to Puerto Ricans who had been educated in Spanish as a consequence of Congressional policies. Senator Kennedy pointed out that (111 Cong. Rec. 10675):

> In school [the typical educated Puerto Rican] reads, in Spanish, the same textbooks which his fellow citizen on the mainland reads in English. That his schooling takes place in Spanish is not up to him, but is due to the fact that the U. S. Government has chosen to encourage the cultural autonomy of the Commonwealth of Puerto Rico, to make Puerto Rico a showcase for all of Latin America.

Representatives Ryan and Gilbert from New York were the House proponents of Section 4(e). They concurred in emphasizing the "anomaly" of Congressional action "to encourage the perpetuation of Puerto Rico's Spanish language culture and at the same time do nothing to protect the rights of citizenship of Puerto Ricans who move to other sections of the country." 111 Cong. Rec. 15666.

Puerto Rico has nullified completely such authority and responsibility.

[fol. 116] It may be urged that, since Section 4(e) purports on its face to be a declaration of rights under the Fourteenth Amendment, only that Amendment may be looked to as a measure of the underlying Congressional power. That may well be true if we were dealing with the statute's applicability to persons not within the reach of any other constitutional power. It does not seem to be a necessary conclusion in respect of the Puerto Ricans about whom this lawsuit has been brought and with respect to whom relief is sought. As my colleagues recognize, acts of Congress are to be approached in the first instance as if they were constitutional. Whether this be couched in the language of presumptions, or simply in terms of the comity appropriate between coordinate branches of the same government, it remains true that courts do not invalidate acts of Congress until the search for a foundation for them has been exhausted.

We are concerned here with what Congress has done, and not only with what it has said. If it chooses to characterize the voting status it has elected to confer on Puerto Rican citizens as one within the scope of the Fourteenth Amendment, the validity of that status still turns upon whether Congress can create it, not upon what Congress calls it. That power to create does not have to be discovered solely in the Fourteenth Amendment. It may or may not be there. But that is a question that need not be resolved in the context of this case, involving, as it does, Puerto Ricans who are the objects of Congressional concern under other provisions of the Constitution.

Absent an assertion of overriding federal power, it is presumably the privilege of the people of New York to [fol. 117] insist that Puerto Ricans shall, in order to vote, be literate in English. *Camacho* v. *Doe*, 7 N. Y. 2d 763 (1959); and see *Lassiter* v. *Northampton Election Board*, 360 U.S. 45 (1959). But with the enactment of Section 4(e), a new element is added; and thereafter it is the function of the Supremacy Clause to elevate Congressional policy over New York policy, valid and enforceable

though the latter may formerly have been.[6] If it be said that Art. IV, § 3, is to be read narrowly as limiting Congress to making the rules whereby life is to be carried on in Puerto Rico, the answer is that it has not been so regarded. At least one of the Insular Cases, *Downes* v. *Bidwell*, 182 U. S. 244 (1901), dealt with the regulation of Puerto Rico's external trade by means of the imposition of duties at American ports of entry. Justice Brown, in an opinion supporting the decision that such duties could be imposed by Congress in the exercise of its powers under the territorial clause, characterized that clause as "absolute in its terms, and suggestive of no limitations [fol. 118] upon the powers of Congress in dealing with (the territories)." Admittedly, Article IV, Section 3, is terse,[7] and its reach must be defined primarily by refer-

[6] The challenge here made to Section 4(e) goes mainly to the existence of Congressional power, and not to the propriety, in terms of reasonableness, of this particular exercise of it. This emphasis is tactically well-advised, since there would appear to be little doubt on the latter score. Other states having large non-English-speaking elements have not emulated New York in barring them from voting. In Hawaii, persons literate either in English or Hawaiian may vote, Rev. Laws of Hawaii (1955), Sec. 11-8. The Louisiana Constitution has long required as a voting qualification only literacy either in English or a mother tongue. New Mexico, in deference to its large Spanish-speaking population, has no English literacy requirement and prints its ballots and instructions in both Spanish and English. N. Mex. Statutes (1953), §§ 3-3-7, 3-3-12, 3-2-41. Thus the impact of Section 4(e) in New York is one which Congress might well have viewed with equanimity, especially in the light of the national interests which it was thought to advance.

[7] The reason why the "question of territories was dismissed with a single clause" was not, in Justice Brown's view, far to seek. It lay in the fact that "the vast possibilities of that future (of the geographical sway of the Constitution) could never have entered the minds of its framers. The States had but recently emerged from a war with one of the most powerful nations of Europe; were disheartened by the failure of the confederacy, and were doubtful as to the feasibility of a stronger union. Their territory was confined to a narrow strip of land on the Atlantic coast from Canada to Florida, with a somewhat indefinite claim to territory beyond the Alleghenies, where their sovereignty was disputed by tribes of hostile Indians supported, as was popularly believed, by the British, who had never formally delivered possession under the

ence to the wisdom and necessity of its manifold applications in the light of what the Framers would have intended could they, in Justice Brown's phrase, have "foreseen that, within little more than one hundred years, we were destined to acquire not only the whole vast region between the Atlantic and Pacific Oceans, but the Russian possessions in American and distant islands in the Pacific . . ."

An expansive view of the sweep of Congressional authority under the territorial clause has been the rule in Supreme Court interpretation of it in lawsuits presenting [fol. 119] a wide range of issues.[8] The conspicuous exception was Chief Justice Taney's opinion in *Dred Scott* v. *Sandford*, 60 U.S. 393 (1956), and that is not widely regarded as one of the Court's happier forays into constitutional exegesis. The power seems to me to be, and

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treaty of peace. The vast territory beyond the Mississippi, which formerly had been claimed by France, since 1762 had belonged to Spain, still a powerful nation, and the owner of a great part of the Western Hemisphere. Under these circumstances it is little wonder that the question of annexing these territories was not made a subject of debate. The difficulties of bringing about a union of the States were so great, the objections to it seemed so formidable, that the whole thought of the Convention centered upon surmounting these obstacles. . . ." 182 U.S. 284, 285.

[8] Statements are legion that Congress has broad powers over the territories and their inhabitants. *Hooven & Allison Co.* v. *Evatt*, 324 U.S. 652, 674 (1945); *Public Utility Comm'rs* v. *Ynchausti & Co.*, 251 U.S. 401, 406 (1920); *Binns* v. *United States*, 194 U.S. 486, 491 (1904); *Dooley* v. *United States*, 183 U.S. 151, 157 (1901). Such power has been explained as being required by the special problems created by the territories and the need for flexibility in dealing with them. *Balzac* v. *Porto Rico*, 258 U.S. 298 (1921); *Dorr* v. *United States*, 159 U.S. 149 (1904); *Hawaii* v. *Mankichi*, 190 U.S. 197, 218 (1903). Legislation by Congress pursuant to the territorial clause, and by territorial legislatures deriving their authority from the Congressional power, has frequently been sustained in circumstances where constitutional limitations might otherwise have been insuperable. *Balzac* v. *Porto Rico, supra; Public Utility Comm'rs.* v. *Ynchausti & Co., supra; Dowdell* v. *United States*, 221 U.S. 325 (1911); *Dorr* v. *United States, supra; Hawaii* v. *Mankichi, supra; Dooley* v. *United States, supra; Downes* v. *Bidwell*, 182 U.S. 244 (1901); see *Raband* v. *Boyd*, 353 U.S. 427, 432 (1957).

to have been intended to be, commensurate with all legitimate and relevant objects of national concern in our relationships with our territories and their peoples, and with the world at large. Assuring our Puerto Rican citizens a right to vote under the circumstances disclosed in this record could rationally have been deemed by Congress to be such an object. As such, its accomplishment by the vehicle of Section 4(e) is not beyond the range of Congressional power.

[fol. 120]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[File Endorsement Omitted]

Civil Action No. 1915-1965

JOHN P. MORGAN & CHRISTINE MORGAN, PLAINTIFFS

v.

NICHOLAS deB. KATZENBACH, as Attorney-General of the United States, the UNITED STATES, and the NEW YORK CITY BOARD OF ELECTIONS, consisting of James M. Power, Thomas Mallee, Maurice J. O'Rourke, and John R. Crews, DEFENDANTS

ORDER AND JUDGMENT—December 7, 1965

Upon consideration of the Plaintiffs' motion for summary judgment, and the Defendants' cross-motion for summary judgment, and upon the written opinion delivered by this Court dated November 15, 1965, and for the reasons therein stated, it is

ORDERED, that the Defendants' cross-motion for summary judgment be, and the same hereby is, denied, and it is further

ORDERED, that the Plaintiffs' motion for summary judgment be, and the same hereby is, granted, and it is

ORDERED, that defendant Katzenbach be, and he hereby is, enjoined from taking any steps to enforce Section 4(e) of the Voting Rights Act of 1965, or to execute the same, and it is ORDERED, that the Defendants constituting the New York City Board of Elections be, and they hereby are, enjoined from giving any effect to the said Section 4(e) of the Voting Rights Act of 1965, and it is

~~ORDERED, that the Defendants constituting the New~~ York City Board of Elections shall, not later than February 1, 1966, inform the attorney for the plaintiffs herein whether the number of persons registered to vote on account of Section 4(e) of the Voting Rights Act of 1965 who were ineligible to vote according to New York State law, and who actually voted in the elections held in New York City in November, 1965, for any office voted on therein, insofar as this can be ascertained, exceeded in any such case the plurality of any person elected in that election, and which such persons, and it is ORDERED, that based on this information plaintiffs shall have leave to apply for usch ancilliary relief as they may be advised, ~~and it is~~

ORDERED, that a declaratory judgment be, and hereby is, granted, that Section 4(e) of the Voting Rights Act of 1965 is unconstitutional, ~~and it is~~

~~ORDERED, that the Clerk be, and he hereby is, directed to enter this Order as a Judgment without further notice.~~

Dated December 7, 1965

U.S.C.J.

/s/ Alexander Holtzoff
U.S.D.J.

/s/ Joseph C. McGarraghy
U.S.D.J.

[fol. 121] [CERTIFICATE OF SERVICE]

* * * *

[fol. 122]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1915-65

[File Endorsement Omitted]

[Title Omitted]

NOTICE OF APPEAL—Filed December 13, 1965

I. Notice is hereby given that Nicholas deB. Katzenbach, as Attorney General of the United States, and the United States, defendants above named, hereby appeal to the Supreme Court of the United States from the order entered in this action on December 7, 1965.

This appeal is taken pursuant to 28 U.S.C. Sections 1252 and 1253.

[fol. 123] II. The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the entire record below, including all pleadings, motions, transcripts of arguments, opinions, and orders of the District Court, and this notice of appeal.

III. The following question is presented by this appeal:

Whether Section 4(e) of the Voting Rights Act of 1965 is constitutional.

/s/ John Doar
JOHN DOAR
Assistant Attorney General

/s/ David G. Bress
DAVID G. BRESS
United States Attorney

/s/ St. John Barrett
ST. JOHN BARRETT
Attorney
Department of Justice

/s/ Peter S. Smith
PETER S. SMITH
Attorney
Department of Justice

[fol. 124]

[CERTIFICATE OF SERVICE Omitted in printing]

[fol. 125]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1915-65

[File Endorsement Omitted]

[Title Omitted]

MOTION FOR A STAY OF THE ORDER AND JUDGMENT IN THE ABOVE-ENTITLED CASE DURING THE PENDENCY OF AN APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed December 13, 1965

Come now Nicholas deB. Katzenbach, as Attorney General of the United States, and the United States, defendants in the above-entitled case, and file this motion for a stay of the order and judgment of this Court of December 7, 1965, during the pendency of an appeal to the Supreme Court of the United States, for the following reasons:

[fol. 126] 1. In holding that "Section 4(e) of the Voting Rights Act of 1965 is unconstitutional," this Court has exercised "the gravest and most delicate duty that . . . [a] Court is called on to perform." *Blodgett* v. *Holden*, 275 U.S. 142, 147-148 (opinion of Mr. Justice Holmes). The order of this Court forbids the Attorney General, the Nation's chief law enforcement officer, from enforcing a congressional enactment. The gravity of such an order makes it appropriate to stay its implementation until the Supreme Court, the final arbiter of such questions, is given the opportunity of review.

2. Staying an order which forbids the Attorney General to enforce a congressional enactment is particularly appropriate in the circumstances of this case since there clearly can be no irreparable injury to plaintiffs if such an order were granted. Should the Supreme Court affirm this Court's decision, it will be a simple process for the Board of Elections to

strike from the rolls those individuals who, in the interim, became registered by taking advantage of the provisions of Section 4(e) of the Voting Rights Act. On the other hand, should the order of this Court not be stayed, there is a substantial likelihood of irreparable injury to persons who might otherwise have registered under Section 4(e). The registration offices in New York City are open on a year-round basis. Hence many persons desiring to register in the coming months will be refused that
[fol. 127] opportunity. Once denied the opportunity, they might find it inconvenient, or be discouraged from making another attempt months later, should the Supreme Court sustain the validity of this congressional enactment.

For the foregoing reasons, the defendants, Nicholas deB. Katzenbach and the United States, respectfully request this Court to stay its order and judgment of December 7, 1965, during the pendency of an appeal to the Supreme Court.

/s/ John Doar
JOHN DOAR
Assistant Attorney General

/s/ David G. Bress
DAVID G. BRESS
United States Attorney

/s/ St. John Barrett
ST. JOHN BARRETT
Attorney
Department of Justice

/s/ Peter S. Smith
PETER S. SMITH
Attorney
Department of Justice

[fol. 128]

[CERTIFICATE OF SERVICE Omitted in printing]

[fol. 129]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1915-65

[File Endorsement Omitted]

[Title Omitted]

NOTICE OF APPEAL—Filed December 20, 1965

I. Notice is hereby given that the New York City Board of Elections, consisting of James M. Power, Thomas Mallee, Maurice J. O'Rourke, and John R. Crews, defendants above named, hereby appeal to the Supreme Court of the United States from the order entered in this action on December 7, 1965.

This appeal is taken pursuant to 28 U.S.C. Sections 1252 and 1253.

II. The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the entire record below, including all pleadings, motions, transcripts of arguments, opinions, and orders of the District Court, and this notice of appeal.

[fol. 130] III. The following question is presented by this appeal:

Whether Section 4(e) of the Voting Rights Act of 1965 is constitutional.

/s/ Leo A. Larkin
LEO A. LARKIN
Corporation Counsel of the
City of New York

/s/ Morris Einhorn
MORRIS EINHORN
Assistant Corporation Counsel of
the City of New York

[fol. 131]

[CERTIFICATE OF SERVICE Omitted in printing]

[fol. 132] * * *

[fol. 133]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1915-65

[File Endorsement Omitted]

[Title Omitted]

MEMORANDUM ORDER GRANTING STAY OF ORDER AND JUDGMENT—December 21, 1965

Motion of the defendant Attorney General and the defendant United States for a stay of the enforcement of the order and judgment of this Court, is granted on condition that the defendant Members of the New York City Board of Elections maintain a separate roster of all voters who qualify pursuant to the provisions of Section 4 (e) of the Voting Rights Act of 1965 and are registered thereunder, during the pendency of the appeal.

/s/ Alexander Holtzoff
U.S.D.J.

/s/ Joseph C. McGarraghy
U.S.D.J.

/s/ Carl McGowan
U.S.C.J.

December 21, 1965.

[fol. 134]

[Clerk's Certificate to foregoing transcript omitted in printing.]

[fol. 135]

SUPREME COURT OF THE UNITED STATES

Nos. 847 and 877, October Term, 1965

NICHOLAS DEB. KATZENBACH, Attorney General of the United States, et al., APPELLANTS

v.

JOHN P. MORGAN AND CHRISTINE MORGAN

NEW YORK CITY BOARD OF ELECTIONS, ETC., APPELLANT

v.

JOHN P. MORGAN AND CHRISTINE MORGAN

APPEALS from the United States District Court for the District of Columbia.

ORDER NOTING PROBABLE JURISDICTION—
January 24, 1966

The statements of jurisdiction in these cases having been submitted and considered by the Court, probable jurisdiction is noted. The cases are consolidated and a total of two hours is allotted for oral argument.

☆ U. S. GOVERNMENT PRINTING OFFICE; 1966 205760 542