THE GOVERNOR

TO THE

Supervisors and Inspectors of Elections,

TOGETHER WITH AN IMPORTANT

DECISION OF THE ATTORNEY GENERAL

SUSTAINING THE CONSTITUTIONALITY OF THE "OATH LAW," AND DEFINING THE OBLIGATION OF THE CITIZEN---THE ACT OF FEBRUARY 25, 1865, TO BE OBEYED BY SUPERVISORS AND INSPECTORS OF ELECTIONS.

STATE OF WEST VIRGINIA,
EXECUTIVE DEPARTMENT,
WHEELING, Sept. 18, 1865.

To the Superintendents and Inspectors of Elections:

I have published for your instruction the opinion of Hon. E. B. Hall, Attorney General of this State, respecting the constitutionality of the oath prescribed to voters by the act passed February 25, 1865, and defining your duty with reference thereto. The Attorney General, under the law, is the legal interpreter and adviser for the people of the State; and until the interpretation of a law by the Judiciary, that of the Attorney General is to be taken as the guide for the action of officers executing it; and it seems to me it would be presuming much for subordinate officers to disregard this opinion of the law officer for the State, in the absence of any decision by Judge or Court in conflict therewith.

My opinion of your duty in regard to the enforcement of this oath accords with that of the Attorney General; and it being my duty to "take care that the laws be faithfully executed," I have no hesitation in saying to you that whenever a person offering to vote is challenged before you, for the cause contemplated by the law of February 25, 1865, it is your duty to require of him the production of the affidavit therein prescribed, before permitting him to vote.

Very respectfully,

A. I. BOREMAN.

SEPTEMBER 8, 1865.

To his Excellency Governor A. I. Boreman:

In the communication of James H. Hinchman, Recorder of Logan county, which you submit for my official opinion and answer to the questions therein contained, the writer states that certain persons elected to office in Logan county present themselves before him, as recorder, for qualification, proposing to take the oaths to support the Constitution of the United States, the Constitution of the State of West Virginia, and the oath of office; but declining to take the oath prescribed for officers by our Act of November 16th, 1863; and desires, through you, my official opinion, as to the constitutionality of said act.

In answering this, I desire also to answer the communication of A. P. White, an officer in Hampshire county, asking if section 2, of chapter 56, Acts of 1865, prescribing an oath to be taken in certain cases by voters, is, or is not, *ex post facto*, and in violation of Sec. I of Art. II, and Secs. I and V of Art. III of our Constitution.

These are acts of the Legislature; are part of the law of the State; and are *presumed* to be constitutional, and must be observed and enforced, unless and until, they shall be adjudged and decided to be unconstitutional *by a Court* of competent jurisdiction, in a case regularly and properly brought before it. It is not competent for the Recorder of Logan county, or the Supervisor and inspectors of elections, or any officers or citizens, other than the regular judicial authorities, to overrule and disregard these, or other laws, because, forsooth, he or they may be of opinion that the laws are unconstitutional. And, as cogently argued by his Honor, Judge N. Harrison, of Lewisburg, in his recent communication to the Clerk and Recorder of Greenbrier county: "To hold that these (subordinate) officers, of themselves, may nullify solemn acts of

the Legislature, upon constitutional grounds, would be to encourage resistance to the law, and to clothe them, in fact, with the highest possible functions of judicial power; and under the practical exercise of such a privilege, not only might the same law be differently construed in different counties, but even in different parts of the same county."

Blackstone defines law to be *a rule of civil conduct* prescribed by the supreme power in a State. It must be a *rule*, but with such unrestricted right of authoritative interpretation, *no rule*,—therefore *no law* can exist; but all law would become practically a jargon of confusion and contradiction, tending only to anarchy and the subversion of law and government. It was by this very fallacy that the leaders of the late wicked rebellion were enabled to drag into treason and to death, or to disgrace and ruin, so many thousands, who might otherwise have remained good citizens. They asserted that the States had a right to secede at their pleasure. They knew this was a legal question, involving the peace of the nation, the perpetuity and very existence of the constitution, laws and government of the United States, and of which the Supreme Court of the United States alone had jurisdiction. But they told the people that as States and individuals they had a right to decide the question for themselves, and appealed to their prejudices and passions to incite them to action, and thus they gathered their legions for the attempted destruction of the Government. In this view of the subject, the questions of my correspondents, so far as they are *practically* interested, are answered. The laws are before them and must be observed and enforced unless and until the Courts, in cases properly brought before them, shall declare them void.

But they ask: "Are these laws unconstitutional?" and I have no disposition to avoid a full answer to all their questions.

Section I of Article II of our Constitution, as well as article IX of the Constitution of the United States, provides that no *ex post facto* law shall be passed, &c.

Section I of article III of our constitution provides that "The *white male* citizens of the State shall be entitled to vote at all elections held, &c., except minors, paupers, persons under conviction of treason, felony, &c."

Section IV of the same article provides that "No persons except citizens entitled to vote shall be elected or appointed to any State, County or Municipal office," and these subject to certain conditions of age, time of residence, &c.

Section V of the same article provides that "Every person elected or appointed to any office or trust, civil or military, shall, before proceeding to exercise the authority or discharge the duties of the same, make oath or affirmation that he will support the constitution of the United States and the constitution of this State, and every citizen of this State may, in time of war, insurrection or public danger, be required by law to make the *like oath* or affirmation, upon pain of suspension of his right of voting and holding office under this constitution."

The act of November 16, 1863, (Chap. 106 of Acts,) prescribes an additional oath to be taken by persons elected or appointed to any office of trust, civil or military, to the effect that they have never voluntarily borne arms against the United States, or voluntarily given aid and comfort to those engaged in armed hostility thereto, by countenancing, counseling or encouraging them in the same; that they have not sought, accepted or attempted to exercise the functions of any office whatever, under any authority in hostility to the United States; that they have not yielded a voluntary support to any pretended government, authority, power or constitution within the United States, hostile or inimical thereto, and that they take the obligation freely, without any mental reservation or purpose of evasion. (Page 138, Acts 1863.)

The Act of February 25, 1865, prescribes and requires the person offering to vote, when challenged, to make and subscribe an affidavit to the same effect as the oath aforesaid. (See Sec. II, Chap. LVI, pages 47 and 48, Acts of 1865.)

It is a principle recognized by our highest judicial authorities, that the courts should and will sustain the constitutionality of a law in every case which is not *clearly* unconstitutional. In all cases of doubt, they sustain the law. Numerous decisions recognize and

establish this rule of construction, and it is very clearly and explicitly enunciated in a recent case decided in the Supreme Court of the State of Iowa: Morrison *vs.* Springer—American Law Register; new series; vol. 3: p. 286, in which references are made to the parallel decisions of the Supreme Court of Kentucky, Ohio, Michigan, and other States.

But it is suggested that the said two legislative acts are unconstitutional, because, in violation of said Section V, Article III, of our Constitution, which prescribes an oath that may be required of officers and voters; that the section, having made provision on the subject, and provided that certain oaths might be required, does, by implication, provide that none other shall be required. This is a correct legal principle in the construction of *statutory* law, but is not the rule in construing constitutional law.

All power and authority reside in and eminate from the people, and subject to the Constitution and laws of the United States, and the rights and restrictions clearly delegated and imposed by their own Constitution, the people of a State have an inherent right, through their representatives, to pass, and to require to be observed and enforced, all such laws as they deem necessary, wise, and for their or the public good. Again, it will be observed that said Section V, refers only to those who are *actually citizens*, and does not provide that other oaths may not be required; nor, does it prescribe the oath that may be required by law; (the language is: "may be required to make the *like oath or affirmation;*) but I deem it unnecessary here to consider what latitude of construction this form of expression may warrant.

Again it is suggested that these two legislative acts impose penalties for supposed offenses, which may have been committed before their enactment, and are, therefore, *ex post facto* in their operation and effect, and for this reason unconstitutional. I take it, they impose no penalty, they simply prescribe certain disabilities and *conditionally* limit or restrict the right to vote and hold office under our Constitution and laws; and this restriction and condition applies to no particular class of persons, but each and every one is subject to their operation and effect. The condition prescribed can be no bar or obstacle in the way of any one who has not voluntarily been guilty of, or participated in the highest crimes known to the law. If he cannot take the required oaths, it is because he is guilty of a violation, not of said legislative acts or any other statutory law merely, but of a law as universal in its existence and operations as civilization and civil government, and that has existed "*time out of mind.*" If, for said restrictions, said legislative acts are unconstitutional, then, also, are said sections I, IV and V, of article III of our Constitution *ex post facto* and void, because in violation of section IX of the Constitution of the United States. Said sections I and IV contain restrictions, and prescribe, *not conditional*, but *absolute* disabilities; for example, the disability of sex, age, color, time of residence, &c., and section V prescribes that an oath shall be taken as a condition precedent, &c. The Constitution of every State in the Union contains like restrictions to a greater or less extent, yet it will not be pretended that they are, for this, unconstitutional. But neither of these legislative acts or constitutional provisions contain any of the essential elements, constituting what are denominated *ex post facto* laws; they punish no offense, made such by subsequent enactments; they increase or enlarge no penalty for previous offenses, and prescribe no diminution of evidence, as necessary to convict for previous offenses; and without these elements, are not, and cannot be *ex post facto*. Their provisions do not look to the punishment of offenses, but to the protection and security of good government, by the adoption of wise and necessary precautions. Besides, *ex post facto* laws have reference solely to criminal proceedings and prosecutions, and therefore can have no application to a mere withholding of a political privilege.

In considering how far the right to vote and hold office is inherent, and incapable of qualification or restriction, we must not overlook the distinction, between *political* privileges and *civil rights*, the former, entitling the *citizen* to participate in creating and conducting the government, the latter entitling the denizen or inhabitant to *protection only under the government;* and this brings us to the question, Who are citizens of the State?

The Virginia Bill of Rights, made part of the Constitution of the old State, under which we lived until the organization of our State, provided that, "All men having sufficient evidence of common interest with, and *attachment to*, the community, have the right of suffrage." In addition and explanation of this provision, the Legislature of that State (Chap. 3, Code of 1860,) defined and prescribed who should be deemed citizens of the State. This chapter was amended and re-enacted by Act of Feb. 3, 1863, (Acts 1862-3, Chap. 71, Page 67,) the 3d Section of which Act provides that those voluntarily guilty of certain acts therein prescribed, shall be deemed no citizens of the State. The acts on account of which persons are so declared to be no citizens, are substantially the same as those of which by said Statutes of Nov. 16, 1863, and Feb. 25, 1865, the voter and officer, respectively, are required to make oath and affidavit, they have not been guilty. Said amended statute of February, 1863, was passed cotemporaneous with the making and adoption of our Constitution, and little more than one month before the final ratification and adoption thereof by the people. It was in force at the time our Constitution went into effect (June 20th, 1863,) and has not since been amended, altered or repealed by the Legislature; is not repugnant to the Constitution; and therefore by Section VIII, of Article XI of the Consti-

tution it remains part of the law of the State, in full force; and aside from its force and effect, as a law, is the best evidence of what was meant and intended by the term "*citizens of the State*," in said article III of the Constitution. The only provision in our Constitution, defining who are citizens of the State, is contained in section VI of article I, which declares, "The citizens of the State are the citizens of the United States, residing therein."

Those who are guilty of the acts enumerated in said oaths prescribed for officers and voters, it can hardly be claimed, still retain the *political rights* and *privileges* of citizens of the United States or of the State, having voluntarily renounced their allegiance to both, and endeavored to destroy the same, thereby forfeiting, under the law, not only their privileges as citizens, but their property, liberty and life, and any clemency upon the part of the United States Government can restore them to civil rights only, and not to political rights and privileges. Anything contained in the terms of surrender, amnesty proclamations or a United States Executive clemency can do no more, nor can the United States authorities so enfranchise a citizen of a State as to restore him to his political privileges therein. Those who have encurred disabilities divesting them of the rights, privileges and character of citizens of the State, can be restored only by action of the State.

The United States authorities neither exercise or claim jurisdiction or control in the matter of voting or holding office in the States. These are regulated solely by municipal authority. The privilege of suffrage always rests with the body of the people of the State, who may, with or without assigning reasons, confer or withhold it.

By act of Congress, approved July 2d, 1862, and act amendatory thereof, approved Jan. 24, 1865, it is expressly provided that every person elected or appointed to any office of honor or profit under the Government of the United States, either in the civil, military or naval departments of the public service, or who desires to be admitted to the bar or permitted to practise as an attorney or counselor in any of the Courts of the United States, shall first take and subscribe an oath substantially the same and almost in the very language of the oaths prescribed to be taken by officers and voters by our said acts of November 16, 1863, and February 25, 1865, showing conclusively that none of these provisions or acts of clemency are intended to restore the subject thereof to political rights and privileges. The party claiming the benefit of the terms of surrender, proclamations of amnesty or executive pardon, necessarily concedes thereby the guilt, by reason of which, under the law, his rights and privileges as a citizen are forfeited, and his restoration therefore is only to the extent of the legal effect of said acts of clemency.

These congressional acts above referred to, are subject to all the objections that *can* be argued against either of our said legislative acts. If the latter are *ex post facto*, then also are the former, which, however, I submit, for the reasons before given, are not *ex post facto*. Congress in its acts, as well as our Legislature, is bound to observe and act within the scope of the Constitution; is composed of select men, and embracing largely the best legal talent and learning of the nation, and I shall presume much, lightly to assume or decide that its acts are unconstitutional; and the same is true as to the acts of our Legislature.

The effect and object of all these acts and provisions, legislative and congressional, prescribing oaths to be taken by voters, officers, &c., is to ascertain *who are citizens and who are enemies* of the State and of the United States. The same person cannot, at the same time, be an enemy of the State or the United States, and a citizen of the same, entitled to participate in making and executing the laws thereof. The right to establish government carries with it the right to maintain and preserve the same, and if, in times like the present, when the enemies of the State and nation are known to be all around us and in our midst, it is not competent to adopt some means to ascertain who are citizens and *who are enemies*, then, indeed, is government impotent—a farce and a failure. All good citizens will desire to submit to any test that may be necessary for the protection and preservation of the government.

But we are asked: "If the voter's oath, prescribed by act of February, 1865, is constitutional, why, at the same session, propose a like provision, to be incorporated as an amendment to the Constitution?" I answer, "To silence the clamor of those who, having failed to destroy the government by force of arms, now seek other means to accomplish the same end; and to enfranchise those who have abandoned their treason and performed service in the army of the United States." Preposing said amendment is no reason or argument against the constitutionality of said act of February, 1865.

I am, therefore, clearly of opinion, not only that said two legislative acts are to be presumed, observed and enforced as constitutional, until adjudged and decided otherwise by the proper Court, but that they are, in fact, both constitutional.

The importance of these questions, and the general interest felt in them, where they have been suggested, must be my apology for the length of this communication.

Very respectfully, yours,

E. B. HALL,

Attorney General for the State of West Va.