Department of Justice

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TESTIMONY OF

ATTORNEY GENERAL WILLIAM P. ROGERS

BEFORE THE

SENATE RULES AND ADMINISTRATION COMMITTEE

ON

PROPOSED CIVIL RIGHTS LEGISLATION

10:30 A. M., FRIDAY, FEBRUARY 5, 1960

Throughout the world, today, the word "democracy" is a rallying cry. It expresses men's basic desires for dignity and the fullest utilization of human potential. The word connotes the very opposite of tyranny which debases the spirit of man by using government and its machinery to impose the will of rulers upon the governed without regard to their consent. The concept of democracy, indeed the word itself, is a source of such powerful inspiration that even its greatest enemies cynically attempt to use it by designating themselves democracies.

Basic to our concept of democracy are the propositions that government rests upon the consent of the people and is representative of the people. History has shown, I think, that the only way yet discovered to make these principles effective is through the use of the ballot without arbitrary limitations. This is the sole means by which the will and the consent of the governed may be manifested.

While democracy in its true sense may take different forms and use different political mechanisms, free and full elections are basic to its existence. The right to vote in an election may properly be qualified by considerations of age, residence, literacy, citizenship, or the like. One proposition is, however, plain. Race or color is not a proper ground for disqualification. It is arbitrary. It is unreasonable, and it is completely inconsistent with democracy. The basic charter of our nation embodies this concept. Thus the Fifteenth Amendment to our Constitution expressly provides that:

> "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."

The fact remains, nevertheless, that in a few areas of our country democratic government is not fully realized. In these areas the right to vote is being denied many otherwise qualified citizens because of their race or color.

The Constitution does not leave the Government established by it powerless to act effectively to eliminate racial discrimination in voting. Section 2 of the Amendment expressly confers upon Congress power to enforce the prohibition against state-supported racial discrimination in elections of any kind, both state and federal.[1/]

It is imperative that practice of some states or some parts of some states to abridge rights of citizens on grounds forbidden by the Fifteenth Amendment be terminated. In the face of this practice there is no alternative to a more effective exercise of constitutionally conferred federal powers to end racial discrimination in voting. The Administration therefore is in full agreement with the basic objectives of the voting

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1/ Other relevant constitutional provisions are Article I, § 2, provides that members of the House shall be chosen every second year "by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." Article I, § 4, provides that Congress may at any time "make or alter" regulations regarding the times, places and manner of holding elections for federal senators and representatives. The Seventeenth Amendment provides for popular election of senators, the electors in each state to have the qualifications requisite for electors of the most numerous branch of the State legislatures.

rights bills which are before this Committee. It is essential however that any proposed legislation in this area be evaluated in the light of its probable effectiveness in actual operation and by the extent to which it is apt to reach the evil. As you probably know, the Department of Justice has drafted a bill to deal with the problem of racial discrimination in voting and herewith submit it for your consideration. I believe that it comes much closer to meeting these standards of effectiveness and reach than the other proposals before the Committee. This bill has the full support of the Administration.

The bill, the details of which I shall outline later on in my statement, has the following significant advantages:

1. It covers deprivations of voting rights in both state and federal elections in contrast to the other proposals which in the main are confined to federal elections.

2. The bill would supplement the remedies already provided by the Civil Rights Act of 1957 and operate within the established framework of judicial powers.

3. It covers the whole election process, including registration, voting, and the counting of votes.

4. It will be enforceable through the recognized contempt powers of the courts, a more realistic and effective sanction in this situation than a resort to criminal prosecutions.

5. It will interfere with established state voting procedures to the minimum extent consistent with the vindication of constitutionally guaranteed rights.

For these reasons, I believe that the Administration bill is likely to provide effective guarantees against racial discrimination in voting in all elections more rapidly than any of the other proposals.

The Administration Bill would provide that in any voting rights case instituted by the Attorney General under the Civil Rights Act of 1957 which seeks relief from racial discrimination under color of law the court would be authorized to direct, in the exercise of its equity powers, the appointment of officers to be known as voting referees. These referees would be authorized, as officers of the court, to certify as qualified to vote at any election for either state or federal office all persons applying for certification who are found to possess the necessary voting qualifications provided by state law. The referees' findings will be subject to review by the court itself.

After the court has found that a pattern of racial discrimination exists and has enjoined its continuance, it would then consider the desirability of appointing a referee as authorized by the Administration proposal. If it decides to do so, it is expected that it will then set forth in its order, the procedures which the referee will follow, depending on the facts and circumstances of the case.

The Administration proposal, without attempting to spell out any rigid procedures, gives the court full discretion to have the referee proceed in the manner best calculated to make its mandate effective. It is expected, however, that the voting referee will decide in the most

expeditious fashion whether an applicant has been denied registration and whether he has qualifications which entitle him to register. The report of the referee will be subject to review by the court under procedures which will give all parties notice and an opportunity to file exceptions for court determination. The courts have ample power to provide for summary disposition where there is no substantial issue of fact. In those few cases where such issues exist, the court may, by general or special provisions, provide for their expeditious disposition by the court or referee.

The next step is for the court to enter a supplementary decree in the original proceeding listing all the persons found entitled to vote. Once this decree is signed by the judge, the voting referees will have the power to issue a voting certificate to each person named in the decree. The certificate will identify the holder as a person entitled to vote at any election covered by the decree.

The Attorney General would then have certified copies of the court's original and supplementary decrees transmitted to all appropriate state election officials. Any election official who has notice of the decrees and refuses to permit an individual covered by the decrees to vote or to have his vote counted will be subject to contempt proceedings.

To ensure effective compliance, the bill further authorizes the court to direct the voting referees to attend any election covered by

the decrees and report to the court whether any person entitled to vote pursuant to them has been denied the right to vote or to have his vote counted, and empowers it to take such other action as may be necessary or appropriate to enforce its decrees.

In addition the voting referees may be vested with all the powers conferred upon a master appointed by the court pursuant to Rule 53(c) of the Federal Rules of Civil Procedure. Finally, the bill would provide that the court shall fix the compensation of the voting referees which will be payable by the United States.

The bill has a second provision applicable to voting rights cases. It would provide that in any such case where state officials charged with the discrimination involved have resigned or have been relieved of their offices and no successors have taken their places, the case may be instituted or continued against the State itself. The purpose of this provision is merely precautionary because in a case now before the courts, the Department of Justice has taken the position that existing law permits such litigation.

A brief review of the recent background would help in any appraisal of the Administration proposal and the other bills before the Committee:

The Civil Rights Act of 1957, the first congressional enactment in this field since 1875, established a Commission on Civil Rights (1) to investigate allegations that "citizens of the United States are being deprived of their right to vote and have their vote counted by reason of their color, race, religion, or national origin"; (2) to "study and

collect information concerning legal developments constituting a denial of equal protection of the laws under the Constitution;" and (3) to "appraise the laws and policies of the Federal Government with respect to equal protection of the laws."

The Commission's first report, issued September 9, 1959, made it plain--if ever there was any doubt of the question--that in some areas Negro citizens are being systematically denied the right to vote solely because of their race or color. It also made it plain that the additional powers which the 1957 act had established to protect voting rights should be implemented. Principally, those additional powers had conferred upon the Attorney General of the United States authority to institute in its name suits to prevent violations of voting rights which had already been made the subject of statutory protection. However, prior to 1957 the vindication of those rights was left to litigation instituted by the persons aggrieved. The 1957 act, therefore, recognized the need for swift and effective action by making an instrumentality of the United States available to assist those persons.

In order to implement the 1957 legislation the Commission on Civil Rights has recommended, in substance, that legislation should be enacted authorizing the designation by the President of local incumbent federal officers or employees to serve as "temporary voting registrars" with respect to elections for federal office only. This designation by the President would occur after investigation and a

determination of some kind by the Commission that individuals, otherwise qualified under state law to vote, have been denied the right to register because of race, color, religion or national origin. S. 2684, S. 2719, S. 2783, and S. 2814 in effect embody the Commission's proposal and are substantially similar. Each covers only federal elections. S. 2535, which approaches the problem in a different manner, is also limited to elections for federal office. It would establish a three-man Congressional Elections Commission with power to conduct all such elections.

The registrar proposals are based on Articles 1, Sections 2 and 4 of the Constitution and the Seventeenth Amendment and are, therefore necessarily limited to federal elections. Those provisions of the Constitution authorize Congress to regulate such elections. By contrast, the Administration proposal, which extends to state elections, finds its principal support in the Fifteenth Amendment. In my opinion, it is a clearly appropriate exercise of the authority conferred upon Congress by that Amendment.

First: The Fifteenth Amendment empowers Congress to enact appropriate legislation to enforce the prohibition that no State shall deny or abridge the right of a citizen of the United States to vote on account of his race or color. This is the power underlying 42 U.S.C. § 1971(a), which applies to both federal and state elections. It provides that all citizens of the United States otherwise qualified to vote at any election in any state or political subdivision thereof shall be entitled and allowed to vote at all such elections without regard to race or color, any law,

custom, or regulation of the State or under its authority to the contrary notwithstanding. Under Part IV of the Civil Rights Act of 1957, the Attorney General is authorized to institute in the name of the United States civil proceedings in the federal district courts to enforce 42 U.S.C. § 1971(a). This authority is provided by subsection (c) of Section 1971. Our proposal is an implementation of this authority and is intended to enlarge the equity jurisdiction of the court and to make it clear that the courts shall utilize such powers to preserve and effectuate the rights declared by the statute.

Subsection (a) has a long history. It was first enacted in 1870 as section 1 of the Enforcement Act of May 31, 1870, 16 Stat. 140, and was reenacted by the Civil Rights Act of 1957. It has been invoked and relied on in many cases in the federal courts (see Smith v. Allwright, 321 U.S. 649 (1944); Nixon v. Condon, 286 U.S. 73 (1932); Reddix v. Lucky, 252 F. 2d 930 (C.A. 5, 1958); Baskin v. Brown, 174 F. 2d 391 (C.A. 4, 1949); Rice v. Elmore, 165 F. 2d 387 (C.A. 4, 1947); Chapman v. King, 154 F. 2d 460 (C.A. 5, 1946), certiorari denied, 327 U.S. 800 (1946)).

It was recently given full force and effect by the Supreme Court in Terry v. Adams, 345 U.S. 461, decided in 1953. That case held that qualified citizens could not be excluded from privately held preprimary elections on the ground of their race or color, which in the circumstances constituted state action. The various opinions of the Justices in that case clearly show that the Fifteenth Amendment empowers Congress to enact legislation to deal with state action interfering with the right to vote in any election on grounds of race or color.

In the Terrell County case the District Court for the Middle District of Georgia held in a suit brought by the Attorney General under subsection (c) seeking to enforce subsection (a) that the subsections were unconstitutional on the theory that they authorized suits with respect to private action, even though the only action involved was state, not private. This case was recently argued in the Supreme Court (United States v. Raines, October Term 1959, No. 64) and the Department took the position that the constitutional challenge was totally without merit.

Second: the proposal for court-appointed voting referees in aid of the judicial power is a plainly appropriate method of enforcing the Fifteenth Amendment. Under that amendment Congress may enact legislation corrective in character which is adapted to counteract and redress the operation of prohibited state action. This is the principle of the Civil Rights Cases, 109 U.S. 3, decided by the Supreme Court in 1883.

While, under the Tenth Amendment, the States are vested with authority over elections for candidates for state office, they are not thereby immunized from corrective federal action enforcing the Fifteenth Amendment. As stated in Oklahoma v. Civil Service Commission, 330 U.S. 127, 143 (1947), quoting from United States v. Darby, 312 U.S. 100, 124 (1941), the Tenth Amendment has been consistently construed "as not depriving the national government of authority to resort to all means for the exercise of a granted power

which are appropriate and plainly adapted to the permitted end." The end sought by our proposal is to ensure through the medium of court-appointed voting referees that any person entitled to vote in a state election is not excluded therefrom by persons clothed with the authority of the State because of the individual's race or color, grounds of exclusion forbidden by the Fifteenth Amendment, subject to the traditional authority of the courts to vindicate constitutional rights. It will continue to function as before, but merely freed from any taint of administration in a manner forbidden by the Constitution. The proposal does not, therefore, infringe upon any legitimate, constitutional exercise of state sovereignty.

Third: The powers which the voting referee proposal would confer upon the courts are plainly consistent with the traditional authority exercised by courts of equity in our constitutional system. Under the Civil Rights Act of 1957, a proceeding instituted by the Attorney General in the name of the United States has the object of preventing racial discrimination in voting in violation of 42 U.S.C. § 1971. Such a proceeding possesses, of course, all the requisites of the case or controversy requirement of Article III of the Constitution.

The court will not be exercising administrative functions in violation of Article III of the Constitution. The duties and powers of the voting referees appointed by the court are designed only to give full effect and force to the court's adjudication that there has been a denial of voting rights in violation of the Constitution and laws of the United States.

In a voting rights case under the Civil Rights Act of 1957 the court proceeds in the exercise of its equitable jurisdiction in an area of great public interest. This is reflected by the fact that Congress authorized action by the United States as plaintiff in the voting cases. The additional powers conferred upon the court by this bill are clearly within the power of Congress to authorize.

At this point I wish to amplify the reasons why the Administration proposal represents a practical and realistic method for the elimination as rapidly as possible of existing barriers to the effective exercise of the franchise by Negroes.

First, the federal registrar proposal and S. 2535, the Congressional Elections Commission bill, would be limited to federal elections. The Fifteenth Amendment is not so limited; nor is the Administration proposal. Discrimination is constitutionally objectionable whether it applies to a state election or a federal election. Actually, the right to vote in a state or local election is often of greater practical significance to the voter. The need for the elimination of racial discrimination in the conduct of both types of elections is apparent. Legislation dealing with the matter should therefore extend to both.

Second, even as to federal elections, the registrar proposal does not provide effective guarantees that those discriminated against will be able to vote. The registrars would merely be authorized to determine that, under the state qualification laws, an individual is entitled to vote

in a federal election and to issue to that individual a certificate to that effect. It seems doubtful whether this will in fact enable him to vote, and have his vote counted, in even a federal election.

An examination of how the federal registrar proposal would actually operate shows this. S. 2684, S. 2719 and S. 2783 would limit the registration authority of federal registrars to persons who allege that they have been denied the right to register by the state authorities. Therefore, the voters who would be qualified by the federal registrars would not have been registered under state law. After registration with the federal registrar they still would not be qualified to vote in state and local elections. However, ordinarily voting for federal officers occurs as a part of a general election in which state and local officers are also elected. It is my understanding that in most states voting is conducted by the use of a consolidated ballot on which appears the names of the candidates for federal, state, and local office. The voting officials will be faced with a dilemma--and for state officials bent upon discrimination, a happy dilemma. There would appear before them a citizen who is legally qualified to vote for the candidates for federal office, but who has not been qualified by anyone to vote for state officers. Even if we assumed that the officials wished to comply with the federal law it is difficult to see how they could resolve the dilemma. To hand the voter the complete ballot and thus permit him to vote in the state election would involve a probable violation of state law. To mark out or tear off those portions

of the ballots dealing only with state and local elections would probably constitute defacing the ballot and make it void. To refuse to hand the voter a ballot at all would probably be a violation of federal law. The problem would, of course, be aggravated in areas where voting machines are employed. However appealing the federal registrar proposals are in theory unless they provide some method of forcing the states to change their election laws the situation which would finally prevail under such proposals would be chaotic.

Even assuming that some states were willing to change their voting law, they might retain consolidated ballots for persons qualified under state laws and provide separate ballots for those qualified by the federal registrars. The consequence of this would be a system under which ballots cast by Negroes would be as clearly identified as if their race were stamped on their ballots. These separate ballots would be particularly susceptible to challenge for minor irregularities and would destroy the basic concept of a secret ballot.

For these reasons, I have characterized the federal registrar proposal as, despite its good intentions, possibly operating to establish a system of "separate and unequal" voting. The superiority of the Administration proposal, which provides guarantees that the individual may vote in all elections, both state and federal, on an equal footing with white persons and that his vote will be counted, is manifest.

Third, the federal registrars proposal failed to meet the critical problem of the action required to be taken to obtain compliance with administrative determinations that particular Negroes were entitled to

vote and have their votes counted by state officials.

The long history of administrative action makes clear that administrative orders are subject to lengthy review proceedings in the courts. Assuming that particular federal registration orders were challenged in the courts on the ground that they were not supported by sufficient evidence, these court proceedings might continue long beyond the elections. Assuming that the federal registration orders were sustained in the courts it is doubtful that any sanction, except criminal prosecutions, would be available in the event of a refusal by state election officials to permit the federally registered Negroes to vote or have their votes counted.

Criminal prosecutions are of quite limited value here, when the possibility of any substantial number of convictions by jurors who are unsympathetic to the program is realistically considered. The Administration proposal meets the problem by making the contempt sanction available. This sanction will, of course, be subject to the provisions of the 1957 Act.

Fourth, an important consideration in appraising legislative proposals in this field is whether they are apt to be subjected to legal attack which will handicap or delay their operation. Here, too, I believe the Administration proposal offers advantages. The constitutionality of the Civil Rights Act of 1957 is before the Supreme Court. The main basis for attack upon the Act will have been disposed of if the Court upholds its constitutionality. In that event, the Administration proposal would merely relate to the equitable remedies available for the enforcement of an act the constitutionality of which has been established.

The constitutional problem is apt to be much more complicated and difficult under the federal registrar proposal. Each of the bills before you implementing that proposal would confer the task of investigating allegations of discrimination in the Commission on Civil Rights and require them to make a determination of discrimination and certify the same to the President. If any of these bills were enacted, it seems quite likely that extensive litigation will ensue as to the procedure to be followed in these proceedings. It may be anticipated that state officials will claim that they are being exposed in those proceedings to accusations of having committed federal or state crimes and that due process requires that they be accorded an opportunity to confront witnesses, cross examine and the like.

Fifth, the Administration proposal throughout is confined to a minimum of federal participation in the voting process required to eliminate discrimination by states because of race or color. State officials will not be replaced and will continue to be able to perform their functions in a lawful manner. Only after a judicial determination that state officials have violated the Fifteenth Amendment will there be federal intervention, and this will be closely supervised by a federal judge.

I should like to close by reemphasizing the point with which I began. The United States cannot square its democratic ideals with the existence of significant areas in which Negro citizens are disqualified from voting because of their race or color. This ugly blot on the body

politic must be erased as rapidly as possible. There is no disagreement on the objective. The only questions relate to the efficacy of the means chosen. I believe the Administration proposal holds out the most substantial and realistic hope for solution of the problem.