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PROPOSED FEDERAL LEGISLATION ON VOTING RIGHTS

By The Committee on Federal Legislation
The Committee on the Bill of Rights

INTRODUCTION

On March 17, 1965 President Johnson sent to Congress a special message on voting rights and submitted with it a proposed bill to enforce the Fifteenth Amendment to the Constitution of the United States, to be known as the "Voting Rights Act of 1965." The next day the bill was introduced in the Senate as S.1465, sponsored by 66 Senators, and in the House of Representatives as H.R.6400, 89th Cong., 1st Sess. (1965). This bill and the special message immediately followed an address by the President to an evening joint session of Congress and the nation on voting rights. The circumstances in which S.1564 was introduced focused immediate and principal attention upon it, and this Report is chiefly concerned with that bill. However, although the Report was substantially completed before the Administration's bill was reported out of Committee, the Report comments on changes proposed in both the Senate and House Committees on the Judiciary, including significant changes ultimately included in the bill reported out of the Senate Committee on the Judiciary with S. Rep. No. 162, 89th Cong., 1st Sess. (1965). The Report also comments on two other bills which we believe have helpful provisions.

The crisis in voting rights which reached its decisive stage with the recent demonstrations in Selma, Alabama, has been developing for years. After extensive study the United States Commission on Civil Rights in its 1961 report concluded that "the franchise is denied entirely to some because of race and diluted for many others. The promise of the Constitution is not yet fulfilled."* Attempts to deal with the problem through litigation under Civil Rights Acts passed in 1957, 1960 and 1964 have proved ineffective. There has been increasing recognition of a need to enforce the proscription of the Fifteenth Amendment against racial discrimination in voting by administrative rather than judicial

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* 1 Report of U.S. Comm'n on Civil Rights, Voting 133, 135 (1961).

formulas.* The Selma demonstrations, and the violence which accompanied them, focused national attention on the urgent necessity for a prompt new remedy for such discrimination.

DESCRIPTION OF BILL

S.1564 as originally introduced provides that "no voting qualification or procedure shall be imposed or applied to deny or abridge the right to vote on account of race or color" (§2). In particular, it prohibits denial of the right to vote in any federal, state or local election because of a person's failure to comply with a "test or device," in any state or political subdivision as to which both of the following determinations are made: (1) the Attorney General determines that a "test or device" as a qualification for voting was maintained on November 1, 1964, and (2) the Director of the Census determines that less than 50% of the persons of voting age residing therein were registered on November 1, 1964 or voted in the presidential election of November, 1964 (§3(a)). The phrase "test or device" is broadly defined to include any requirement that a person demonstrate "the ability to read, write, understand, or interpret any matter," or "educational achievement or his knowledge of any particular subject," that he "possess good moral character," or that he "prove his qualifications by the voucher of registered voters or members of any other class." (§3(b)). The inapplicability of such tests as qualifications to vote continues until the state or political subdivision, by an action brought in a three-judge District Court of the District of Columbia, obtains a declaratory judgment that neither it nor any person acting under color of law has engaged in racial voting discrimination for a period of ten years. A direct appeal lies to the Supreme Court. The District Court may not issue such a declaratory judgment if there has been a final judgment of any court of the United States that racial discrimination in voting has occurred within a ten-year period "anywhere in the territory" of petitioner (§3(c)).

The bill further provides (§4) that if the Attorney General certifies, with respect to any political subdivision as to which such determinations have been made by the Attorney General and the Director of the Census, that he has received meritorious written complaints from twenty persons who allege that they have been denied the right to vote on account of race or color, or that

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* The Committee on Federal Legislation reported on bills respecting literacy tests in the 87th Congress in 1 Reports of Committees of N.Y.C.B.A. Concerned with Federal Legislation 143 (1962) (hereinafter cited as "Reports"). The Committee on the Bill of Rights reported on the voting provisions of the Civil Rights Act of 1964 (Title I) in 2 Reports 63 (1963).

he otherwise deems the appointment of examiners necessary to enforce the Fifteenth Amendment, the Civil Service Commission shall appoint examiners to register applicants to vote in any such subdivision pursuant to the detailed provisions of the Act (§§5-8; 10). There are, in addition, criminal sanctions imposed upon those who deny the right to vote because of race or color or conspire to do so or to interfere with rights guaranteed under the bill, or who commit criminal or civil contempts or who make false statements to examiners (§§9, 11(a), (d)).

S.1517, introduced by Senator Douglas for himself and others, and H.R.4552, introduced by Representative Lindsay, have also received considerable attention, and some of their provisions will be discussed below.

SUMMARY

We conclude that a new statute to enforce the Fifteenth Amendment to the Constitution is urgently required and that S.1564 is a constitutional exercise of congressional power under that Amendment. However, we believe that its reach, effectiveness and clarity can be improved by certain amendments suggested in this Report.

CONSTITUTIONALITY

"Appropriate Legislation". S.1564 is obviously a bill to enforce the Fifteenth Amendment and does not purport to rest on any other constitutional basis. The Fifteenth Amendment reads as follows:

> "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 ultimate constitutional question, therefore, is whether S.1564 constitutes "appropriate legislation" within the meaning of Section 2 of the Fifteenth Amendment. We believe it does.

In cases interpreting the language "appropriate legislation" as it occurs in the Fourteenth and Fifteenth Amendments, Congress has been held to possess wide latitude to enact legislation which is directed to the enforcement of their provisions. In Ex Parte Virginia, 100 U.S. (10 Otto) 339 (1879), the Supreme Court considered the validity of a federal law which prohibited the states

from disqualifying Negroes, otherwise qualified, from sitting on juries in their courts. The Court held that the statute was "appropriate legislation" under the Fourteenth Amendment and, speaking of the Thirteenth, Fourteenth and Fifteenth Amendments together, said:

> "Congress is authorized to enforce the prohibition by appropriate legislation. Some legislation is contemplated to make the amendments fully effective. Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power." Id. at 345-46 (emphasis in original).

The wide scope of the Fifteenth Amendment is indicated by Lane v. Wilson, 307 U.S. 268 (1939), which struck down an Oklahoma "grandfather clause":

> "The reach of the Fifteenth Amendment against contrivances by a state to thwart equality in the enjoyment of the right to vote by citizens of the United States regardless of race or color, has been amply expounded by prior decisions. Guinn v. United States, 238 U.S. 347; Myers v. Anderson, 238 U.S. 368. The Amendment nullifies sophisticated as well as simple-minded modes of discrimination. It hits onerous procedural requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race." Id at 275*

Some further enlightenment can be had on the standards of "appropriate legislation" from cases interpreting that clause as it appeared in the Eighteenth Amendment which permitted the states and the Federal Government in the exercise of concurrent jurisdiction to enforce Prohibition by "appropriate legislation." The Supreme Court considered the appropriateness of such legislation in James Everard's Breweries v. Day, 265 U.S. 545 (1924), where the Court said:

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* See also United States v. Raines, 362 U.S. 17 (1960); Hannah v. Larche, 363 U.S. 420, 452 (1960), rev'g 177 F. Supp. 816, 819-21 (W.D. La. 1959); United States v. McElveen, 180 F. Supp. 10 (E.D. La. 1960); United States v. McElveen, 177 F. Supp. 355, 358 (E.D. La. 1959).

> "It is clear that Congress, under its express power to enforce by appropriate legislation the prohibition of traffic in intoxicating liquors for beverage purposes, may adopt any eligible and appropriate means to make that prohibition effective. The possible abuse of a power is not an argument against its existence." Id at 560.

In Rose v. United States, 274 Fed. 245 (6th Cir.), cert. denied, 257 U.S. 655 (1921), the Court defined "appropriate legislation" under the Eighteenth Amendment very broadly:

> "'Appropriate legislation,' as used in this section, necessarily means such legislation as will tend to make this constitutional provision completely operative and effective." Id. at 248.

We believe that legislation under the Fifteenth Amendment may broadly deal with those activities which have been found to be prohibited by the Amendment itself. It is thus clear that Congress may reasonably conclude, based on investigations by the Civil Rights Commission and other evidence, that discrimination in voting is practiced in several states and that a further remedial statute is necessary.

Basis for S. 1564. In surveying discriminatory voting practices, the Johnson Administration apparently concluded that the "tests or devices" reached by the bill present obstacles to voting particularly susceptible of discriminatory application. The 50% "triggering mechanism" in Section 3(a) has been said to apply to Alabama, Georgia, Louisiana, Mississippi, South Carolina, Virginia and Alaska, 34 counties in North Carolina, and one county each in Arizona, Idaho and Maine (although the Department of Justice has stated that Alaska and the counties in Arizona, Idaho and Maine could probably obtain exemption under the relief provisions of the bill). 23 Cong. Q. 586 (1965). Criticism of the constitutionality of the "triggering mechanism" has included the contention that the drawing of jurisdictions which do not discriminate within the sweep of the bill and the exclusion of "pockets of discrimination" in other states because they do not use a "test or device" as a qualification for voting is an arbitrary exercise of power.

We believe that this criticism does not take account of the wide latitude of Congress to determine the extent to which it shall attack an evil and to select the means to do so. Congress, no less than the states, may have its choice from among all "the various weapons in the armory of the law." Tigner v. Texas, 310 U.S. 141, 148 (1940).

In a recent attack upon the validity of the public accom-

modations provisions of the Civil Rights Act of 1964, it was asserted that Congress could have pursued other methods to eliminate the obstructions to interstate commerce caused by racial discrimination. However, in upholding the statute the Supreme Court stated that "this is a matter of policy that rests entirely with the Congress not with the courts . . . subject only to one caveat -- that the means chosen by it must be reasonably adapted to the end permitted by the Constitution." Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 261-62 (1964). Similarly, as stated by the Supreme Court in upholding the Federal Corrupt Practices Act of 1925 in Burroughs v. United States, 290 U.S. 534, 547-48 (1934):

> "The power of Congress to protect the election of President and Vice President from corruption being clear, the choice of means to that end presents a question primarily addressed to the judgment of Congress. If it can be seen that the means adopted are really calculated to attain the end, the degree of their necessity, the extent to which they conduce to the end, the closeness of the relationship between the means adopted and the end to be attained, are matters for congressional determination alone."

Thus, Congress may determine how far to exert its authority under the Fifteenth Amendment against the evil of discrimination in voting. As observed by the Supreme Court in upholding the National Labor Relations Act in NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 46 (1937):

> "We have frequently said that the legislative authority, exerted within its proper field, need not embrace all the evils within its reach. The Constitution does not forbid 'cautious advance, step by step,' in dealing with the evils which are exhibited in activities within the range of legislative power."*

All regulation involves classification, and the selection of categories is for the legislative body with leeway which "allows a penumbra to be embraced that goes beyond the outline of its object in order that the object may be secured."** Cf. United States v.

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* "The Constitution does not make it a condition of preventive legislation that it should work a perfect cure. It is enough if the questioned act has a manifest tendency to cure or at least to make the evil less." Louis K. Liggett Co. v. Baldridge, 278 U.S. 105, 115 (1928) (Holmes, J., dissenting).

** Schlesinger v. Wisconsin, 270 U.S. 230, 241 (1926) (Holmes, J., dissenting).

Darby, 312 U.S. 100, 121-22 (1941); Currin v. Wallace, 306 U.S. 1, 11, 13-14 (1939); James Everard's Breweries v. Day, 265 U.S. 545, 560 (1924); Jacob Ruppert v. Caffey, 251 U.S. 264, 289-92 (1920); Purity Extract & Tonic Co. v. Lynch, 226 U.S. 192, 201 (1912). Moreover, the constitutional application of the "triggering mechanism" in the generality of situations is not foreclosed by any arguable doubtful validity of application in certain cases:

> "What the law looks for in establishing its standards is a probability or tendency of general validity. If this is attained, the formula will serve, though there are imperfections here and there. The exceptional, if it arises, may have its special rule." Burnet v. Wells, 289 U.S. 670, 681 (1933).*

We conclude that, on reasonably determining that "tests or devices", as defined in S.1564, have been employed to discriminate on racial grounds in the denial of the right to vote, Congress may suspend or eliminate such requirements (even if fair on their face) in all elections in the manner provided by that bill.**

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* A proposed amendment to preclude applicability of the "triggering mechanism" in S.1564, as introduced, to states or political subdivisions where Negroes make up less than 20% of the voting-age population would remove from coverage Alaska and rural counties in southern states with very small Negro populations. See N.Y. Times, April 3, 1965, p. 14, col. 7.

** In making the triggering mechanism operative upon a figure of less than 50% voting rather than registering, the bill would reach political subdivisions in which complete registration rolls kept by local registrars have been found to be unavailable or materially inaccurate (such as those in 115 counties in seven southern states where the number of white registrants exceeded the white voting age population, according to statistics in 1 Report of U.S. Comm'n on Civil Rights, Voting 252-53, 260-62, 264, 266-68, 278-83 (1961)), and would guard against the effect of alterations of such records. One member of the Committee on the Bill of Rights expresses the view that literacy or educational requirements bear on registration and not on the casting of a vote. Accordingly, while agreeing that a new statute to enforce the Fifteenth Amendment is urgently required, he feels that the conjunctive application of (1) the 50% vote test (as distinguished from the 50% registration test), and (2) the Attorney General's findings of the existence of literacy or educational requirements in order to trigger the bill, is somewhat illogical and that it therefore may be "inappropriate" legislation.

Desirability of Congressional Findings. The Supreme Court in Katzenbach v. McClung, 379 U.S. 294, 299-300 (1964), pointed out that formal congressional findings are not necessary to establish constitutionality and concluded that the hearings prior to the enactment of the Civil Rights Act of 1964 supplied adequate basis for the statutory provisions against discrimination by public accommodations. Nevertheless, we believe that specific findings in the voting rights bill would be highly desirable in supporting the constitutional justification for the legislation, particularly the "triggering mechanism" -- the relationship between the evil and the means chosen to combat it. For example, the findings in Section 101(a) of S.1517 that tests as a prerequisite to voting have been used as instruments of discrimination on grounds of race or color would provide helpful buttressing for the choice of remedies in the legislation in that such findings would be given great weight by the courts in determining the constitutionality of the legislation. See Block v. Hirsh, 256 U.S. 135, 154 (1921); Borden's Farm Prods. Co. v. Baldwin, 293 U.S. 194, 209 (1934); Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 94 (1961).

Other Objections to Constitutionality. In addition to challenges to the reasonableness of the basic scheme of S.1564, various other objections have been asserted on constitutional grounds. It has been charged that the bill encroaches upon the rights of the states to determine voting qualifications, that it constitutes a prohibited ex post facto law and a bill of attainder, that it creates a presumption which is invalid under the Due Process Clause and otherwise operates with unconstitutional inequality both within a single state and between different states, and that it places excessive burdens upon the states to end federal "interference." We do not believe that any of these objections can be sustained.

Right of States to Determine Voting Qualifications. The right of the states to determine voting qualifications is implied in Article I, Section 2 of, and in the Seventeenth Amendment to, the Constitution, which provide that the electors in each state for members of the Senate and the House of Representatives "shall have the qualifications requisite for electors of the most numerous branch of the State legislature." It has been repeatedly held that the states may constitutionally require tests, non-discriminatorily applied, as a condition of the right to vote. E.g., Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959); Guinn v. United States, 238 U.S. 347, 366-67 (1915); Trudeau v. Barnes, 65 F.2d 563 (6th Cir.), cert. denied, 290 U.S. 659 (1933); cf. Breedlove v. Suttles, 302 U.S. 277, 283 (1937); Pope v. Williams, 193 U.S. 621, 633 (1904); Mason v. Missouri, 179 U.S. 328, 335 (1900); McPherson v. Blacker, 146 U.S. 1, 39 (1892); Davis v. Beason, 133 U.S. 333, 345-47 (1890); Ex parte Yarbrough, 110 U.S. 651, 664-65 (1884); Minor v. Happersett, 88 U.S. (21 Wall.) 162, 170-73 (1874).

It is also beyond constitutional doubt that the Fifteenth Amendment forbids the states from discriminating in the exercise of their otherwise valid power on racial grounds. United States v. Mississippi, 85 Sup. Ct. 808 (1965); Louisiana v. United States, 85 Sup. Ct. 817 (1965); Schnell v. Davis, 336 U.S. 933 (1949), aff'g per curiam, 81 F. Supp. 872 (S.D. Ala. 1949); Lane v. Wilson, 307 U.S. 268 (1939); Guinn v. United States, supra. Moreover, when Congress exercises its constitutional powers under the Fifteenth Amendment the powers which the state might have enjoyed give way to those enactments. In Ex parte Virginia, supra, the Supreme Court stated with respect to the Fourteenth Amendment:

> "Nor does it make any difference that such legislation is restrictive of what the State might have done before the constitutional amendment was adopted. The prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of State power. It is these which Congress is empowered to enforce, and to enforce against State action, however put forth, whether that action be executive, legislative, or judicial. Such enforcement is no invasion of State sovereignty. No law can be, which the people of the States have, by the Constitution of the United States, empowered Congress to enact. This extent of the powers of the general government is overlooked, when it is said, as it has been in this case, that the act of March 1, 1875, interferes with State rights. It is said the selection of jurors for her courts and the administration of her laws belong to each State; that they are her rights. This is true in the general. But in exercising her rights, a State cannot disregard the limitations which the Federal Constitution has applied to her power. Her rights do not reach to that extent. Nor can she deny to the general government the right to exercise all its granted powers, though they may interfere with the full enjoyment of rights she would have if those powers had not been thus granted. Indeed, every addition of power to the general government involves a corresponding diminution of the governmental powers of the States. It is carved out of them." 100 U.S. (10 Otto) at 346.

In considering voting, the Court in In re Wallace, 170 F. Supp. 63, 67 (M.D. Ala. 1959), specifically addressed itself to this question:

> "The authority delegated to the Federal Government by the Fifteenth Amendment to the Constitution of the United States is undoubtedly the authority under which the Congress of the United States was acting when the Civil Rights Act of 1957 was passed. The provision in the Act providing for

> investigation of alleged discriminatory practices, including inspection of voting and other pertinent records, must be considered to be an essential step in the process of enforcing and protecting the right to vote regardless of color, race, religion, or national origin. That part of the Act is, therefore, by this Court considered 'appropriate legislation' within the meaning of Section 2 of the Fifteenth Amendment.
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> "The sovereignty of the State of Alabama, or of any other of the states, must yield, therefore, to this expression of the Congress of the United States, since this expression of Congress -- by this Act -- was passed in a proper exercise of a power specifically delegated to the Federal Government. . . ."

Since Congress may determine the means to attack the evil of discrimination in voting, we conclude that no constitutional objection can be sustained against the bill on the ground that it interferes with the rights of the states to prescribe voting qualifications.

Ex-Post-Facto and Bill-of-Attainder Objections. Nor does the bill constitute an ex-post-facto law or a bill of attainder, prohibited by Article I, Section 9, Clause 3. It has been held since 1798 that the constitutional prohibition against ex-post-facto laws applies only to retroactive penal statutes. Calder v. Bull, 3 U.S. (Dall.) 386, 390 (1798); Ex parte Garland, 71 U.S. (4 Wall.) 333, 377 (1866); Johannessen v. United States, 225 U.S. 227, 242 (1912). Since S.1564 does not operate retroactively in its criminal sections, but proscribes and punishes only future acts, it is not a prohibited ex-post-facto law. The bill-of-attainder provision is also inapplicable; that clause has been given limited scope and applied only to legislative acts deemed to inflict punishment without trial. Ex parte Garland, supra; United States v. Lovett, 328 U.S. 303 (1946).

It is also significant that the proposed legislation does not suddenly proscribe discrimination in voting rights on the basis of race or color. Such discrimination has been barred by the Constitution for almost a century, and the new legislation simply seeks effective enforcement of the constitutional guaranties.

Due-Process-Clause and Inequality Objections. Although expressed in various ways these objections essentially challenge the reasonableness of the basis for the legislation and the choice of "triggering mechanism", which have already been discussed above. In other words, what is challenged in terms of an alleged unwarranted "presumption" by Congress is really the factual basis for the inference by Congress of the nexus between "tests or devices" in certain jurisdictions where the 50% formula applies and discrimination in voting rights on the basis of race or color. As we have already

noted, Congress has the power within broad limits to determine the nature of the evil and "the closeness of the relationship between the means adopted and the end to be attained." Burroughs v. United States, 290 U.S. 534, 548 (1934).

Although the cases involving statutory presumptions operative in federal court proceedings are not strictly apposite, the statement of the Supreme Court in a recent statutory presumption case is of interest:

> "As the Court of Appeals correctly stated in this case, the constitutionality of the legislation depends upon the rationality of the connection 'between the fact proved and the ultimate fact assumed.' Tot v. United States, 319 U.S. 463, 466. The process of making the determination of rationality is, by its nature, highly empirical, and in matters not within specialized judicial competence or completely commonplace, significant weight should be accorded the capacity of Congress to amass the stuff of actual experience and cull conclusions from it." United States v. Gainey, 85 Sup. Ct. 754, 757 (1965).

Congress, in basing the proposed legislation on "the stuff of actual experience" before it, could validly "cull conclusions" about the relationship among voting "tests or devices," extent of registration and voting, and unconstitutional discrimination.

With respect to the allegedly unequal operation of the bill within a state and between states, the considerations already discussed of the basis for the legislation and the classifications selected by Congress are applicable. It is not an objection of constitutional standing that the formula chosen by Congress may not reach all areas or all means of discrimination already prohibited by the Fifteenth Amendment.

The doctrine of equality of the states defined in Coyle v. Oklahoma, 221 U.S. 559 (1911), is not abridged because the bill is operative in some states and not in others. There the Court held that Congress could not constitutionally condition its admission of Oklahoma to the Union upon a prohibition against moving the state capital after admission, and stated that the United States is a Union of states, "equal in power, dignity and authority, each competent to exert the residuum of sovereignty not delegated to the United States by the Constitution itself." Id. at 567. Such state sovereignty, however, does not embrace the authority to discriminate racially in voting, and the power to eliminate such discrimination has been specifically delegated to Congress. As we have already noted, legislation drawn to exercise that power is not objectionable because its impact is not felt equally by all the states.

Burden Imposed on the States. When a state or political subdivision is brought within the statutory formula of Section 3(a), the bill in effect makes it take the initiative in asserting under Section 3(c) that it has not discriminated for ten years. It is no less within the power of Congress to determine the period during which the new statute should be operative to undo the effects of the discrimination than to select the means to do so. It appears from proposed amendments that a five-year period may be selected. N.Y. Times, April 6, 1965, p. 18, col. 6. Attorney General Katzenbach testified that, after a state or political subdivision had filed affidavits of nondiscrimination, the burden of proof of establishing the contrary rested with the federal government. It is suggested that the statute as enacted or the legislative history furnish clear confirmation of that interpretation. See 23 Cong. Q. 586 (1965).

As to the requirement of Section 8 that prior approval be obtained from the United States District Court for the District of Columbia by a jurisdiction for which determinations under Section 3(a) are in effect before new voting qualifications or procedures are instituted, the history of evasive action by some southern states as to voting rights and in seeking to avoid compliance with Brown v. Board of Educ., 347 U.S. 483 (1954), provides ample justification for such "pre-clearance." Furthermore, where apportionment laws have been declared unconstitutional, the federal courts have frequently required submission of the new apportionment for approval before it was put into effect. See e.g., Honsey v. Donovan, 236 F. Supp. 8 (D. Minn. 1964); Petuskey v. Clyde, 234 F. Supp. 960 (D. Utah 1964); Ellis v. Mayor, 234 F. Supp. 945 (D. Md. 1964); League of Nebraska Municipalities v. Marsh, 232 F. Supp. 411 (D. Neb. 1964); 23 Cong. Q. 585 (1965). To avoid needless "red tape" proposed amendments contemplate a procedure for quick approval of routine changes in voting procedure. N.Y. Times, April 6, 1965, p. 18, col. 6.

The requirement that certain judicial proceedings under the new law be brought in the District of Columbia is supported by the precedent of legislation during World War II confining the right to challenge the validity of provisions of the Emergency Price Control Act and action thereunder to a single Emergency Court of Appeals with review by the Supreme Court. Yakus v. United States, 321 U.S. 414 (1944); Bowles v. Willingham, 321 U.S. 503 (1944).

We therefore conclude that, since the scheme of S.1564 tends to make the provisions of the Fifteenth Amendment operative and is not prohibited by other provisions of the Constitution, it is "appropriate legislation" under the Fifteenth Amendment and is a valid exercise of congressional power.

SCOPE AND CLARITY OF PROPOSED BILL

While we are satisfied that the bill is not subject to basic constitutional objection, we believe that there are areas in which it fails to accomplish fully its underlying purpose or is unclear as to its application.

Coverage of Bill. Because the "triggering mechanism" of S.1564 depends on the existence of a "test or device," it does not apply to states not having such voting qualification requirements but where "pockets of discrimination" have been asserted to exist. Thus, Arkansas, Florida, Tennessee and Texas, which allegedly include such areas, are not covered. Counties in North Carolina which have low Negro registration are also excluded because registration and voting in such counties exceed the 50% levels specified in Section 3(a) of S.1564. Where no "test or device" is utilized, discrimination has been accomplished by other procedures, such as failure to process applications, refusal to accept poll-tax payments, failure to open registration offices, and a myriad of other methods.*

As we have already noted, it has been the experience of three Administrations under the Civil Rights Acts of 1957, 1960 and 1964 that these discriminatory procedures can only be circumvented to a meaningful degree by the establishment of administrative registration procedures not requiring separate, lengthy judicial proceedings in each locality. On the basis of that experience, we believe that the provisions for appointment of federal examiners in S.1564, as introduced, should be extended to other jurisdictions than those covered by the original "triggering mechanism" in that bill. S.1517, for example, provides in Section 201 (a) and (b) that federal registrars shall be appointed for counties where less than 25% of the total number of persons of voting age of a race or color are registered to vote. Section 3 of H.R. 4552 provides for the appointment of federal registrars in areas where the court finds that a pattern or practice of discrimination exists on the basis of a finding that 50 or more persons of a race or color who are qualified to vote have been denied the opportunity to register. We approve and recommend strengthening the Administration's bill by amendments of similar effect which, we understand, are being proposed. N.Y. Times, April 10, 1965 p. 14, col. 1. Although Attorney General Katzenbach expressed concern that racial voting statistics might not be suf-

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* See 1 Report of U.S. Comm'n on Civil Rights, Voting 252-311 (1961). For example, the Civil Rights Commission in its 1961 report found that no Negro voters were registered in Lafayette County, Florida (11.9% Negro population) or Liberty County, Florida (15.2% Negro population). 1 id. at 260-61; see N.Y. Times, April 3, 1965, p. 14, col. 6.

ficiently reliable to apply a provision like that of Section 201 (a) and (b) of S.1517, that objection would seem to relate more to whether such a provision should be invoked as to a particular area, based on the reliability of its racial voting statistics, than to the inclusion of the provision in the legislation itself. See 23 Cong. Q. 586 (1965).

Application of the Bill to Primaries and Referendums. At no point does S.1564 contain a definition of "election" (the reference to "vote" in Section 10(c) is not sufficiently inclusive), and we recommend the inclusion of such a definition making it clear that the bill applies equally to the registration and voting process in general elections, primaries and referendums. A comprehensive definition of "election" is given in Section 3(a) of S.1517, and it has been reported that a clarifying amendment to the Administration bill is being proposed in the House Committee on the Judiciary. It would indeed be unfortunate if there were any doubt about the applicability of the bill to primary elections, which often have the practical effect of a general election in certain parts of the South, or its applicability to referendums. There can be no doubt that Congress acting under the Fifteenth Amendment can reach primary elections, and the Fifteenth Amendment does not distinguish between elections of officials and elections at which issues are determined. Cf. Smith v. Allwright, 321 U.S. 649 (1944); Terry v. Adams, 345 U.S. 461 (1953); United States v. Classic, 313 U.S. 299 (1941).

Qualifications Examiners Are To Apply. Under Section 5(b) of S.1564 a federal examiner is to register persons whom he finds "to have the qualifications prescribed by State law" pursuant to instructions issued by the Civil Service Commission after consultation with the Attorney General, as provided in Section 6(b). Such qualifications would doubtless include age, citizenship and residency, but the bill is not clear as to what state qualifications would be respected by the federal examiners, although they would not include a voting "test or device," as defined in Section 3(b). See 23 Cong. Q. 434 (1965). It is not specified whether, for example, state disqualifications based on felony convictions or mental incompetency would be respected.

On the other hand, Section 203(a) of S.1517 specifically limits qualifications to be applied by the registrars who would be appointed under that bill to those with respect to "citizenship, age, residence, mental competency, or absence of conviction for a felony under the laws of the State in which such voting district is located," but the registrars would not be permitted to apply qualifications "more restrictive than those in effect on May 17, 1954" (§203 (b)) (apparently to bar more restrictive disqualifications following the stepped-up program of civil rights activity after the decisions in the school segregation cases on that date). Furthermore, "mental

competency" is defined in Section 3(d) of that bill to mean "absence of an adjudication of mental incompetency," in order to avoid circumvention of the law on the basis of that criterion. We believe that it would be desirable to provide clarification as to the objective, non-discriminatory state qualifications to be applied by the federal examiners, which may include qualifications as to party membership for eligibility to vote in primaries (again excluding a "test or device").

It has been suggested that the bill should redress the discriminatory application of literacy tests by providing that henceforth federal examiners will administer them in a nondiscriminatory fashion. However, as Attorney General Katzenbach has contended, the objective application in the future of literacy standards would serve both to penalize Negroes for the deficient education provided them by the southern states in the past and to impose a requirement which was disregarded in the past in favor of illiterate whites now on the registration rolls. It has similarly been argued that wiping the registration books clean and starting afresh with literacy tests applied fairly to both whites and Negroes would still result in unfair disqualification of Negroes because of past denial to them of educational opportunity in violation of the Fourteenth Amendment. Furthermore, disenfranchisement of large numbers of illiterate whites who have voted all during their adult lives would be an anomalous by-product of legislation designed to extend the franchise. We believe that the Administration's approach is sound in excluding literacy tests altogether wherever the bill applies, and it should be noted that in so doing the practice of 30 states which impose no literacy test at all would be followed. See N.Y. Times, Mar. 29, 1965, p. 28, col. 4.

Poll Taxes. Section 5(e) of S.1564 deals with the problem of poll taxes required to be paid under state law. Such a requirement obviously applies only to elections for state and local officials, since the Twenty-Fourth Amendment to the Constitution now bars the imposition of poll taxes with respect to elections for President and Vice President (and electors for such offices) and members of Congress.* Under Section 5(e), no person shall be denied the right to vote for failure to pay a poll tax if he tenders payment of such tax for the current year to an examiner, whether or not such tender would be timely or adequate under state law. In contrast, Title III of S.1517 provides that the collection of poll taxes shall in all circumstances be barred as a condition to voting in any election, and Section 3 of H.R. 4552 provides that the federal registrars shall disregard any poll taxes as a prerequisite to vote.

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* Only Alabama, Mississippi, Texas and Virginia now have a poll tax for state and local elections; Arkansas has recently taken action to eliminate its poll tax. N.Y. Times, April 6, 1965, p. 18, col. 3.

The poll tax provisions of Section 5(e) of S.1564, as introduced, appear to be a compromise approach to a difficult problem. It has been argued that the poll tax is an objective voting requirement whose propriety in non-federal elections was endorsed by implication when Congress proposed a constitutional amendment to abolish such taxes for federal elections. Opponents of the poll tax contend that it is historically a method used to circumvent the Fifteenth Amendment by reason of the basic economic disadvantage of the Negro and the greater impact upon him of any per capita tax. The justification given for the requirement in S.1564 that a poll tax for the current year be paid is that the right to pay such tax to the examiner precludes the misuse of the poll tax by local officials who have heretofore refused to accept payments from Negroes even when tendered, whereas the elimination of any requirement to pay cumulative poll taxes removes the economic problem presented by large arrearages which bear particularly heavily on Negroes, and recognizes that such cumulative taxes have often been built up in the case of Negroes because of their inability to vote and their unwillingness to engage in an exercise in futility by making payment.*

Attorney General Katzenbach testified that the Administration bill did not outlaw poll taxes completely because of concern that, in view of other more effective means of discrimination, it would be difficult to prove that poll taxes had been used as an instrument of discrimination in violation of the Fifteenth Amendment. He suggested a separate statute to eliminate the poll tax as a violation of the Fourteenth Amendment. 23 Cong. Q. 586, 588 (1965). It appears that Committee amendments to the bill will outlaw the poll tax completely. N.Y. Times, April 10, 1965, p. 14, cols. 1-2. We strongly oppose the economic impediment to voting represented by the poll tax, and upon Congress finding adequate basis for concluding that it has been used as an instrument of discrimination, the poll tax can stand on no different footing than a "test or device" initially proscribed by the bill.

Requirement of Attempt to Register Within 90 Days. Under the provisions of Section 5(a) of S.1564, as introduced, an application to an examiner must contain the allegation that, within 90 days preceding the application, the applicant was denied under color of law the opportunity to register or was found not qualified to vote, with the proviso that the requirement of such allegation may be waived by the Attorney General. It appears to be an unnecessary and often onerous requirement that such an attempt be made to register before local officials in areas where a sufficiently clear

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* S.1564 does not make explicit that payment of past poll taxes cannot be a condition for voting after the examiner procedure ceases to be applicable to a jurisdiction.

pattern of discrimination is established to call for the appointment of examiners. Unless the Attorney General were to waive this requirement in such a large percentage of cases as to make it meaningless, it might well impose upon the Negro registrant an unwarranted risk of harassment. We understand that, in response to such objections, an amendment is contemplated to eliminate the requirement that registration first be sought before local officials, and we support such an amendment. See N.Y. Times, April 9, 1965, p. 6, col. 4.

Meaning of "Political Subdivision" and Other Ambiguities. S. 1564 does not contain any definition of "political subdivision", and we believe that it would be desirable to include such a definition, which in most cases would probably be the county but might be a city or other unit. It would likewise be desirable for Section 3(c) of S.1564 to make explicit that a political subdivision which has not discriminated for the requisite period may be removed from coverage by the statute even though other political subdivisions in the same state may not be eligible for such relief.

Section 4(a)(2) should also be clarified to make explicit that like Section 4(a)(1), as the Attorney General testified, Section 4(a)(2) relates only to jurisdictions with respect to which determinations have been made under Section 3(a).

Suggestion as to Civil Rights Act of 1964. Although S.1564 does not directly relate to the Civil Rights Act of 1964, there is a relevant amendment of the latter which we think would be advisable. The Civil Rights Acts of 1957 and 1960, in dealing with voting rights, apply to all elections. In contrast, Title I of the Civil Rights Act of 1964 applies only to "Federal elections."* There does not appear to have been adequate basis for the belief that, in practical effect, the same provisions would automatically apply to state elections which are conducted under the same electoral process. The flaw in such argument has been well-established in the reaction of some states to the similar provisions in the Twenty-Fourth Amendment by distinguishing between state and federal elections in imposing poll tax requirements. We believe that new legislation in this field should promptly eliminate the distinction made in the 1964 Act between elections of federal and state officials since the Fifteenth Amendment extends to both. The exemption under the Civil Rights Act of 1964 of elections for those officials most closely affecting the

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* The Committee on the Bill of Rights recommended that no such distinction be made in the legislation. 2 Reports 63, 78-79 (1963). The Committee on Federal Legislation took a similar position on bills before the 87th Congress. 1 Reports 143, 160-61 (1962).

day-by-day life of local citizens is particularly inadvisable since the disabilities under color of law from which Negroes suffer most deeply are imposed by such officials.

We therefore recommend the addition to S.1564 of sections similar to those now contained in S.1517 and H.R. 4552 amending Sections 2004 of the Revised Statutes (42 U.S.C. §1971) to eliminate the provisions limiting it to federal elections.

CONCLUSION

The history of the development of Negro voting rights since the ratification of the Fifteenth Amendment in 1870 has been replete with constant efforts, both simple and sophisticated, to circumvent its basic purpose -- elimination of distinctions on the grounds of race or color in the right to vote. Sincere efforts by Congress and the Executive to meet these problems through the courts have proven unsuccessful despite the provisions of the 1957, 1960 and 1964 Civil Rights Acts. The record makes clear that administrative procedures are essential to permit rapid and extensive registration of persons heretofore discriminatorily denied the right to vote. We believe that the proposed bill is a clearly constitutional exercise of congressional power under the Fifteenth Amendment, and we strongly urge its prompt enactment with the strengthening and clarifying amendments we have suggested.

April 10, 1965

Respectfully submitted,

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