File

Leg. Voting
Rodgers

STATE OF GEORGIA
DEPARTMENT OF LAW
ATLANTA

April 8, 1965

EUGENE COOK
THE ATTORNEY GENERAL

Honorable James O. Eastland
Honorable Olin D. Johnston
Honorable John L. McClellan
Honorable Sam J. Ervin, Jr.
Honorable Thomas J. Dodd
Honorable Philip A. Hart
Honorable Edward V. Long
Honorable Edward M. Kennedy
Honorable Birch Bayh
Honorable Quentin N. Burdick
Honorable Everett M. Dirksen
Honorable Joseph D. Tydings
Honorable Roman L. Hruska
Honorable Hiram L. Fong
Honorable Hugh Scott
Honorable Jacob K. Javits
United States Senators
Members of the Committee on the Judiciary
Senate Office Building
Washington, D. C.

Re: H. R. 6400 and S. 1564 - Voting Rights Act of 1965

Gentlemen:

The purpose of this letter is to respectfully express my opposition to the above Bill and, in the alternative, to suggest various amendments to the Bill which I believe will improve its application and fairness if enacted into law. This letter is in further amplification of the views expressed by me at the hearing of your Committee concerning the above Bill which was held on March 31, 1965.

Opposition.

In the past, the federal and state courts have uniformly interpreted the provisions of the Federal Constitution[1] to mean that the states have the exclusive right to prescribe voter qualifications. Notwithstanding these precedents, the Attorney General of the United States contends that they are overridden by the Fifteenth Amendment. I submit that there is no conflict between the Fifteenth Amendment and other related provisions of the Constitution because they are easily reconcilable.

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1. See: Article I, Section II; and the Tenth and Seventeenth Amendments.

Section I of Article XV 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" and Section II of the Amendment provides that "The Congress shall have power to enforce this Article by appropriate legislation". In my opinion, the term "appropriate legislation" empowers Congress to enact laws prohibiting discrimination on the basis of race or color, but does not empower it to impair the right of the states to prescribe voter qualifications. As you know, one of the fundamental canons of constitutional construction requires that the various provisions of a constitution be construed in harmony with one another when practicable and that repeals by implication are not favored.

The provisions of the Bill which seek to abolish literacy tests in certain states and political subdivisions and to authorize the Attorney General of the United States to otherwise prescribe voter qualifications is unprecedented. Such an extreme measure was not even attempted during the vengeful days of the Reconstruction Period.

In any event, the application of the Bill is unnecessary in Georgia, which in recent years, has made great strides toward eliminating racial discrimination in the voting process. In June 1964, the Georgia Legislature enacted a comprehensive and modern Election Code[2] which provides sweeping safeguards for guaranteeing and inspiring a greater exercise of the elective franchise. Also, during the same month, the Legislature proposed to the people of Georgia a new Constitution which contained liberal provisions designed to afford sufficient latitude in voting registration procedures for increasing even further the use of the elective franchise in Georgia.[3] However, due to the legislative reapportionment decisions rendered by the Supreme Court of the United States in June 1964, a three judge federal district court prohibited the submission of the proposed Constitution to the people of Georgia for their ratification or rejection, <u>irrespective of the fact</u> that all votes cast thereon would have been precisely equal in value one with the other, and <u>irrespective of the fact</u>

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2. Ga. Laws, 1964, Extra. Sess., p. 26, et seq.
3. Ga. Laws, 1964, Extra. Sess., p. 234, at p. 241.

that the proposed Constitution contained provisions desperately needed and sought by the urban areas, and irrespective of the fact that the present Constitution was proposed in 1945 by a Legislature in which neither House was apportioned according to population.

Nevertheless, I recognize that under the present circumstances it is quite likely that the Bill or one similar to it will be promptly enacted at this Session of the Congress. Therefore, in the alternative, I wish to make several suggestions which I believe will broaden the Bill to give national coverage and sharpen its application to only include those political subdivisions which are guilty of racial discrimination and exclude those political subdivisions whose citizenry have successfully developed indiscriminate voting procedures.

Suggested Amendments.

First. I suggest that the Bill not apply to entire states, but that its application should be limited to counties or other political subdivisions in which local registrars perform their duties and which fail to satisfy the 50-50 criteria. It is very unfair to apply the Bill to a state as a whole because in so doing you stigmatize the innocent along with the guilty -- you humiliate those citizens who have worked so hard and bravely to improve race relations. Such a heavy handed, insensitive application is obnoxious to the demands of simple justice.

To illustrate this point, I would like to take Fulton and DeKalb Counties as an example because these counties contain the City of Atlanta which enjoys a national reputation. However, there are many other Georgia counties, both urban and rural, which enjoy locally the same reputation for indiscriminate voter procedures as Atlanta does nationally.

Atlanta, as you know, has been a leader in improving and fostering wholesome race relations for many years in the South. I think it is safe to say that there is more racial brotherhood in Atlanta and in various other areas of Georgia than exists in many places in the North and West. Yet, if the Bill should pass Congress in its present form, Atlanta and other progressive areas of the South would be degraded in the same fashion as the most racially hate ridden county in the South. The problems which this Bill seeks to remedy have originated on the county level and

not on the state level. Consequently, corrective measures should be aimed at the counties and not at the states so as to avoid defiling those areas of the South that have fought long, valiantly and successfully for improved race relations.

Second. I believe that it is unwise to eliminate the use of literacy tests in those political subdivisions affected by the Bill. The United States Attorney General, in his testimony before the House Judiciary Committee, did not say that literacy tests were inherently unfair or undesirable, but merely said that they were being discriminatorily applied in certain areas of the South. Therefore, I believe that the use of literacy tests should be continued unimpaired with the right, of course, to employ federal registrars in those political subdivisions which are found to be guilty of discriminatorily applying them or other tests of voter qualifications prescribed by state law. Such an amendment would greatly reduce the harsh affect of the Bill upon traditional states' rights and at the same time not diminish the potency of the relief afforded by the Bill.

Also, the elimination of the literacy test from the formula determining the application of the Bill would expand its scope to include those political subdivisions which fail to satisfy the 50-50 criteria in those thirty states which do not have literacy tests according to the testimony of the Federal Attorney General. I recognize that the most dramatic problems in discriminatory voting procedures now exist in the South, however, I believe that it is equally clear that pockets of voter discrimination exist across the Nation and that they are ever changing and tend to appear and reappear in varying geographic locations. No doubt instances of racial discrimination in voting procedures can be found being practiced against Americans of African, Mexican, Puerto Rican and oriental descent and against those of other ethnic minority groups across the Nation. I believe that the Bill should be so drawn as to afford relief against these discriminations irrespective of where they now exist or subsequently may appear in the Nation. By giving the Bill a nation-wide application and by gearing the 50-50 criteria to the preceding congressional election (as will be subsequently suggested), would not only afford protection against racial discriminations which weaken the exercise of the elective franchise, but would also inspire a greater voter registration and turnout in all national elections because affected political subdivisions would have an incentive to escape the application of the Bill and unaffected political subdivisions would have an incentive to increase their voter registration and turnout in order to

diminish the possibility that the Bill might subsequently apply to them.

Furthermore, the elimination of the literacy test from the formula determining the application of the Bill and the adoption of other suggestions made herein would avoid areas such as Alaska from suffering the injustice of having to prove their innocence in order to escape the application of the Bill.

Third. The 50-50 criteria of the Bill should not be exclusively focused upon conditions which existed in November of 1964, but should be geared to the preceding November general election for the election of congressmen so that the holding of each such election will update the application of the Bill. The advantage of this refocusing would be two fold in that it would provide an incentive for political subdivisions to avoid the application of the Bill by increasing voter registration and turnout and, also, would keep the application of the Bill in tune with current conditions and, hence, available to rectify the development of new pockets of discrimination. In short, the regearing of the application of the Bill to current conditions would nationally stimulate voter registration and voter turnout and thereby strengthen and broaden the national exercise of the elective franchise and the operation of the democratic process.

It is very unwise to limit the application of the Bill to conditions existing in November 1964 and to provide that it will be many years before a state can escape from the application of the Bill no matter how much progress it might make in increasing voter registration and turnout. Obviously, great improvement could be made in voter registration and turnout in a matter of weeks as the result of a strong effort by local citizens. The Bill as presently drawn provides no incentive for self-improvement because even if it is accomplished, the political subdivision still continues to be stigmatized by the application of the Bill for years to come. Consequently, I believe it is important to gear the application of the Bill to the preceding congressional election so as to inspire self-improvement by affected political subdivisions and so as to keep the application of the Bill in tune with current conditions.

Fourth. If it is unacceptable to gear the application of the Bill to the preceding congressional election, then I suggest that the ten-year provision contained in Section 3(c) be reduced to

five years or less. It seems to me to be very unfair to stigmatize any area for a period of ten years for voting irregularities when the conditions which were present in November 1964 could be quickly rectified within a period of weeks by local initiative.

Fifth. Section 5(a) of the Bill should be amended by eliminating the proviso contained therein. The object of this suggestion is to require that applicants must exhaust their administrative remedy before the local board of registrars prior to being permitted to seek registration by the federal registrars. The other language of Section 5(a) could be amended to guard against slow-down tactics which might be applied by the local registrars in some areas. For instance, the word "the" could be eliminated from the third line of page 5 of S. 1564 and the words "a reasonable and prompt" could be substituted in lieu thereof, so that as amended, that sentence of Section 5(a) would read as follows: "An application to an examiner shall be in such form as the Commission may require and shall contain allegations that the applicant is not otherwise registered to vote, and that, within ninety days preceding his application, he has been denied under color of law a reasonable and prompt opportunity to register or to vote or has been found not qualified to vote by a person acting under color of law.". I believe that this recommendation is important in order to keep voter registration primarily in the hands of local officials where it belongs, but at the same time would permit federal registrars to act where necessary to nullify racial discriminations.

Sixth. I suggest that the proviso contained in Section 5(b) be amended to read as follows: "Provided, That no person shall be entitled to vote in any election by virtue of this Act unless his name shall have been certified and transmitted on such a list to the offices of the appropriate election officials at least forty-five days prior to such election or prior to the voter registration deadline prescribed therefor by state law, whichever is later in time.". The reason for this suggestion is because many states have voter registration deadlines of less than forty-five days. In those states Section 5(b) would create the anomalous situation of fixing an earlier voter registration deadline for those registering with the federal registrars than for those registering with the local registrars. In my opinion, the voter registration deadlines prescribed by federal and state law should coincide to the extent practicable so as to avoid unnecessary discrimination.

Seventh. Section 6(a) should be amended so as to eliminate the requirement that challenges as to the qualifications of those registered by the federal registrars must be "made within ten days after the challenged person is listed". I believe this provision is unwise because few members of the public would be aware of the identity of those persons registered by the federal registrars during this ten-day period. Certainly, no person should be permitted to register if he does not possess the qualifications pertaining to age, residence, criminal conviction, and so forth. Therefore, I believe that an elector should be permitted to challenge the qualifications of any other elector at any time in order to purge the disqualified from the electorate. The last sentence of Section 6(a) provides that "Any person listed shall be entitled and allowed to vote pending final determination by the hearing officer and by the court.". (Emphasis supplied.) This provision is an adequate safeguard against meritless claims because no registrant could be disqualified until after final hearing and determination.

Eighth. Section 6(b) should be rewritten to clarify that the voter qualifications prescribed by state law which relate to age, residence, criminal conviction, mental incompetency, and so forth, should be followed by the federal registrars in registering applicants to vote. Section 6(b), as presently drawn, apparently permits the Civil Service Commission, after consultation with the Attorney General, to administratively determine the voter qualifications for all affected areas. I believe that such an administrative delegation of power is reckless and unnecessary. The Bill should not impair the right of the states to prescribe voter qualifications, but should be limited to the erasing of discriminatory practices in voting procedures.

Ninth. In my opinion Section 8 of the Bill should be eliminated because it in effect makes a federal district court an integral and necessary part of the state lawmaking process. Section 8 attempts to place upon a federal court in the District of Columbia a power somewhat akin to the veto power exercised by a governor in relation to the lawmaking process. Section 8 says that no law or ordinance "imposing qualifications or procedures for voting" may be enforced until it has been finally approved by the federal judiciary. I believe that this provision is unconstitutional because it seeks to confer a legislative power upon a federal court in violation of Article III of the United States Constitution which limits the federal courts to the exercise of judicial powers.

Aside from my belief as to the unconstitutionality of Section 8, I believe that it is unwise and unjust because it would create a time-lag substantially impairing the ability of a state or a municipality, no matter how small, to adopt laws to improve voting procedures. The time-lag could easily last a year or more because any party dissatisfied with the district court decision would have the right to appeal to the United States Supreme Court.

Also, Section 8 is unnecessary to the objectives of the Bill, because a three judge federal district court can very quickly strike down any statute or ordinance which fails to satisfy constitutional standards, and a single judge can restrain its enforcement until a three judge court is convened.

If the elimination of Section 8 is unacceptable, then I suggest that it is necessary to sharply define its scope. Section 8 now vaguely applies to laws "imposing qualifications or procedures for voting". The term "procedures" is very broad and could include laws relating to dates of elections, polling hours, voting machines, changes in election districts and a great many other things which apply to elections but which have no relation to racial discrimination. Consequently, I suggest that the word "registration" should be inserted immediately preceding the word "procedures" so as to limit the scope of Section 8 to coincide with what I believe is the actual legislative intent. I further suggest that the "November 1, 1964" application of Section 8, as presently drawn, be updated to the effective date of the Bill so that the Section will not apply to state legislation adopted prior to its enactment into law. The Georgia Legislature has already met in regular session this year and has made several amendments to the Georgia election laws, none of which are offensive to the purposes of the Bill. No doubt other affected states have adopted legislation relating to elections since November 1, 1964. I believe that it is only fair to exempt from the application of Section 8 that legislation adopted by a state prior to the effective date of the Bill. Of course, any such legislation which is unconstitutional could be readily so declared.

Tenth. In my opinion Subsection (e) of Section 9 of the Bill should be eliminated. This Subsection provides for the enjoining of the certification of the results of elections pending the judicial determination of a claim that a person registered by the federal registrars was denied the right to vote in the election or that his vote was not counted therein. The Subsection further provides that if the court determines that such a registrant was unlawfully denied the right to vote or to have his vote

counted, then such vote must be cast or counted "before any person shall be deemed to be elected by virtue" of such an election.

Subsection (e) is quite extreme and I believe could very easily be manipulated or misused by persons acting in bad faith who seek to forestall the results of an election in order to gain some advantage hostile to the public interest. Such manipulation could very easily impair the machinery of state and local government by delaying the installation of the elected. This consideration would be particularly pertinent in the case of special elections held to fill vacancies in public office. Furthermore, I believe that Subsection (e) is unnecessary because the severe criminal penalties imposed by Subsections (a) and (c) of Section 9 are more than adequate to deter the violations that Subsection (e) seeks to avoid.

Summary. In summary, I believe that the Bill should be rewritten into a more simplified and workable version that would only apply where needed and would contain wholesome incentives for improvement, and which would be flexible enough to deal with changing conditions. The essence of the relief afforded by the Bill is in the use of federal registrars in those political subdivisions failing to satisfy the 50-50 criteria and which are found to be practicing racial discrimination in the administration of voting procedures. This type of relief should also be made the essence of the rewritten version but on an expanded basis. The Bill should be made national in scope in order to protect the voting rights of all Americans irrespective of their race, color or residence and should be aimed solely at political subdivisions failing to satisfy the 50-50 criteria so as to avoid stigmatizing those political subdivisions fulfilling their constitutional responsibilities. The 50-50 criteria of the Bill should be geared to the preceding congressional election so as to provide a nation-wide incentive for increasing voter registration and turnout and so as to keep the application of the Bill aimed at continuing or newly developing areas of racial discrimination. The Bill should not abridge state literacy tests because in instances where they are discriminatorily applied the federal registrars would be available for correction.

Conclusion.

I am confident that we are all striving vigorously in our respective offices to build a greater Nation -- a Nation which will inspire a stronger bond of brotherhood among men and which will in

law and spirit abolish those discriminations abhored by our Constitution. However, some of us no doubt disagree as to the method of abolishing racial discrimination in voting procedures. Some prefer a solution through the enactment of additional federal legislation while I and others prefer permitting each state to solve its voting problems under the existing framework of federal and state laws.

However, if it is the will of the Congress that we march down the federal road, then I propose that we march under a national banner that affords nation-wide protection to Americans of all races and colors irrespective of where they live -- not under a banner cut into the grotesque and divisive shreds of provincial application. I propose that we march to the beat of a strong and unifying anthem that proudly proclaims "malice toward none and charity for all" and that we direct our step toward lofty goals which are untarnished by low ambitions for retribution -- not to the shrill discordant counterpoints of a war chant which seeks vengeance and is reminiscent of the harsh excesses of Reconstruction. And finally, I propose that we promptly remove this yoke of degradation from those that vanquish voting discriminations -- not leave it there to oppress the innocent and the repentant.

Your thoughtful consideration of these matters will be greatly appreciated.

Sincerely yours,

PAUL RODGERS
Assistant Attorney General
State of Georgia

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