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MEMORANDUM OF LAW

TO: Democratic State Committee

FROM: Raymond Guenter, State Committeeman, 3rd A.D. Manhattan

RE: Seating of Southern Delegations at Democratic National Convention

Introduction

Systematic exclusion of Negroes from the suffrage in violation of the United States Constitution clearly exists in all or parts of the states of Mississippi, South Carolina, Louisiana, Georgia and Alabama, and perhaps in other Southern states. 1* This exclusion from the suffrage is most stringently enforced in the Democratic Party primaries and in higher levels of Democratic Party activity such as nominating conventions. It is, of course, through such party machinery that Delegates to the Democratic National Convention are chosen. 2*

The existence of delegations to the Democratic National Convention who have been chosen either in primaries or by conventions, from which Negroes were unconstitutionally excluded, poses a problem for the Democratic Party in all states for many reasons, moral, political and legal. This memorandum is designed to demonstrate that the seating of such delegations should be opposed because (1) there is a possibility of successful legal action against the Democratic National Convention itself and/or its officers if such delegations are seated, and (2) there is a possibility of legal action in New York and perhaps in other jurisdictions to bar the Democratic candidates for President and Vice President from the ballot unless both are nominated by acclamation.

I. LEGAL ACTION AGAINST THE CONVENTION TO PREVENT THE SEATING OF SOUTHERN DELEGATIONS.

The Constitution of the United States prescribes with great particularity

* Report of the United States Commission on Civil Rights, 1959; 48 Cal. Law Review 190 "Federal Remedies for Voteless Negroes".

* In Mississippi Delegates are elected at a State Convention (Miss. Stat. 3107).

in Article II, Section 2 and in the Twelfth Amendment the method of election of the President and Vice President. The Fifteenth Amendment specifically prohibits both the United States and the States from denying a citizen the right to vote because of race. The Fourteenth Amendment prohibits the states from abridging the privileges and immunities of citizens of the United States, among which is the right to vote in elections for Federal officials.[3*] Congress has the power to regulate the manner of election of the Presidential Electors since this is an integral part of the choice of the President and Vice President of the United States.[4*]

In a long line of decisions, starting with Nixon v Herndon, 273 U.S. 536 (1927) (Texas Statute denying Negroes the right to vote in primary elections declared unconstitutional) the Supreme Court has held the activities of political parties which relate to the choice of elected officials to be subject to the ban against racial discrimination contained in the Fourteenth and Fifteenth Amendments. Thus, in Nixon v Condon, 286 U.S. 783 (1932) the Supreme Court declared unconstitutional a resolution of the State Executive Committee of the Democratic Party of Texas prohibiting Negroes from voting in Democratic primaries, which resolution had been adopted pursuant to a Texas statute allowing political parties to set the qualifications of their members. In Smith v Allwright, 321 U.S. 649 (1944) the Supreme Court declared unconstitutional the same form of resolution adopted by the executive committee of the Texas Democratic Party, even though statutory authority to establish the qualifications of its members had been repealed. The next blow at the white primary was struck in Rice v Ellmore, 72 F. Supp. 516, 165 F. 2d 387 (CCA 4th 1947); cert. den. 333 U.S. 875, in which there was court declared unconstitutional a rule adopted by the Democratic Party in South Carolina barring Negroes from participation in primaries, despite the fact that South Carolina had repealed each and every reference to primary elections in its statutes and constitution. Most recently in Terry v Adams, 345 U.S. 461 (1953) the Supreme Court struck down an attempt to prevent Negroes from exercising their franchise by means of a pre-primary primary which was open only to whites. Involved in Terry v Adams,

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3* Twinning v New Jersey, 211 U.S. 78, 97 (1908)

4* Burroughs v U.S., 290 U.S. 534 (1934)

was the exclusion of a Negro from the "Jaybird Primary". The Jaybird Democratic Association was formed in Fort Bend County Texas after 1889. Membership was open to all white voters. The Jaybird Primary was held in May, the Democratic and Republican primaries in June and July. Successful candidates in the Jaybird primary entered the Democratic Primary (they entered as individuals and not with any designation as "Jaybird" candidates) and were almost without exception, victorious in the Democratic Primary and the general election. Ibid at 46 .

In deciding the line of cases referred to above, the Supreme Court developedd a number of rationale for holding that the Fourteenth and Fifteenth Amendments were applicable to rules set up to exclude Negroes from primaries even though these rules were established by political parties without any authorization or interference on the part of a state or any other governmental unit. As in other areas of civil rights litigation, the problem was to find that the exclusion of Negroes from a primary constituted "state action".

One test used was whether the primary was an integral part of the general election that it preceded (see the opinion of Mr. Justice Black in Terry v Adams, 345 U.S. 461 at 462). Another test used was whether the primary from which Negroes were excluded was part of and auxiliary to activities of a political party which were themselves within the ban of the Fourteenth and Fifteenth Amendments (see opinion of Mr. Justice Clark in Terry v Adams, beginning at page 478). Finally, in a number of cases the determining factor was how important the primary was in terms of the outcome of the general election to which it related. U.S. v Classic, 313 U.S. 299 (1941) at .

In light of the foregoing tests, it is clear that the Democratic National Convention and the process of electing delegates thereto, is subject to the ban against racial discrimination contained in the Fourteenth and Fifteenth Amendments. The Convention is an integral part of the Constitutional process of selecting the President and Vice President of the United States. The fact that the real choice is made at the Convention and not by the Electoral College has been

recognized by judges as well as politicians. 5* In more than half the states, the names of the Electors do not even appear on the ballot. 5A* Without a doubt the national political conventions are a fundamental function of the major political parties who are thereby engaged in an activity which is clearly governmental in nature and not private inany sense. Finally, the results of the national conventions are determinative of the office of President and Vice President. No man not nominated by the national political conventions has been elected in more than one hundred years.

Congress has enacted a complex system of statutes to protect the voting rights of Negroes. 6* These provide both criminal penalties and civil remedies, including injunctive relief. Given the fact that the seating of delegations whichwere chosenin violation of United States constitutional at the national convention is in itself a violation of the Constitution and of the statutes referred to above, it would not be difficult for a Federal Court in New Jersey (the site of the Democratic National Convention) to frame an order giving appropriate relief to a petitioner.

The prospect of such an order being entered in a Federal Court naming the Convention and/or its officers as respondents at a time when Civil Rights is probably the major political issue in the nation is indeed unpleasant to contemplate. The only way to avoid it absolutely is for the Convention itself to take action against the Southern Delegations.

5* In Re Convention Nomination certified by American Labor Party, 50 N.Y.S. 2d 727, at 729 (1944).

5A* 41 Minn. Law Review 245, "Judicial Determination of Political Party Autonomy, at 260.

6* 18 USC 241, 242 (Criminal); 42 USC Chapters 20 and 21.

II. REVIEW OF THE CONVENTIONS DECISIONS BY THE NEW YORK COURTS - SUIT TO KEEP VICE PRESIDENTIAL CANDIDATE OFF THE BALLOT

The seating of Delegates and Alternate Delegates to the Democratic National Convention chosen in a manner which violates the United States Constitution and the various Civil Rights Statutes, for the reasons given in Section I above, would subject the decisions of the Convention to review by the New York Courts. Specifically, if there were a contest for the Vice-Presidency and if the votes of those Delegates who were chosen in an unconstitutional manner figured in the determination of the outcome, an action could be brought in New York Supreme Court to keep the name of the Vice Presidential Nominee off the ballot in this state. (1*) In New York the names of the Presidential Electors do not appear on the ballot, only the names of Presidential and Vice Presidential candidates to whom they are pledged. Election Law, (Section 248 (1). The names of Presidential and Vice Presidential candidates are certified to the Secretary of State by the State Committee of each political party.

The New York Courts have extensive powers to review and determine the validity of nomination of candidates for party and public office by political parties. Section 330 of the Election Law provides that:

> "The Supreme Court is vested with jurisdiction to summarily determine any question of law or fact arising as to any of the subjects set forth in this section, which shall be construed liberally. Such proceedings may be instituted as a matter of right and the Supreme Court shall make such order as justice may require.
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> "2. The nomination of any candidate, or his election to any party position, in a proceeding instituted by any candidate aggrieved or by the chairman of any committee as defined in section two, or, in the case of a nomination made otherwise than at a primary election, by a person who shall have filed objections pursuant to section one hundred forty-five....."

*1. My assumption is that President Johnson will be re-nominated by acclamation and any attempt to call this decision into question would be much more difficult.

In 1944, the Supreme Court, Special Term, Albany County, did review the designation of Presidential and Vice Presidential candidates by the American Labor Party and the Liberal Party. In Re Convention Nomination certified by American Labor Party, 182 Misc. 971, 50NYS 2nd 727, Aff'd 268 A.D. 836, 50 N.Y.S.2d 469 (1944); In Re Independent Petitions Filed By Liberal Party, 50 N.Y.S. 2d 731, Aff'd 268 A.D. 844, 50 N.Y.S. 2d 560 (1944).

In the American Labor Party Case, it was held that a party need not designate its candidates for President and Vice President by a national nominating convention, in order to have them appear on the ballot. However, the Court went on to state that: "The choice may be made as the rules of the party provide which obtain except in actual conflict with statute." 182 Misc. at 974, 50 NYS.2d at 730.

It would seem clear that where there is a conflict between the method of choosing a Presidential and/or Vice Presidential candidate and the Federal Constitution, the choice made by such method would be invalid and a candidate so chosen could not appear on the ballot. The New York courts have upset nominations made by political parties for less serious defects. In McDonald v Heffernan, 196 Misc. 465, 92 N.Y.S. 2d 382, Aff'd 275 .A.D. 92 N.Y.S. 2d 426 (1954) the selection by the county executive committee of the American Labor Party of a candidate for Congress and a candidate for District Attorney was held invalid because the term of office of the county committee of which the executive committee was a sub-committee, had expired. In Jones v Malone, 200 Misc. 88, 101 N.Y.S. 2d 895 (1950) the Court granted a recall and reconvention of a meeting of the Democratic Committee of the Town of Smithtown and invalidated the selection of an executive member and other officers because written notice had not been sent out in accordance with party rules, even though the combined vote of those

who did not attend could not have changed the result. In Crawford v Cohen, 291 N.Y. 98, 51 N.E. 2d (1943) the Court of Appeals upheld the re-convening of a meeting of the county committee of the American Labor Party for Kings County because the designated meeting place was not large enough to accommodate all of those entitled to attend.

In gauging the degree of liklihood that a legal action of the type described above might be instituted it should be noted that an objection to the certification of a candidate for Vice-President could be raised pursuant to Section 145 of the Election Law by any voter in New York, whether a Democrat, or a member of another party. 2* It is not difficult to imagine ~~that~~ such a suit being brought by a member of the Republican Party to embarrass the Democratic Party in this State. If such a suit were successful, the Republic Party could take tremendous political advantage of the fact that the Democratic National Convention had been judicially determined to have violated the Constitutional rights of Negroes. Furthermore, if the Democratic Party carried the State, there would be some question as to the propriety of the Democratic slate of Electors voting for the Democratic candidate for Vice-President, inasmuch as his name had not appeared on the ballot.

Although no extensive legal research has been done, there are at least two other states, California 3* and New Hampshire* in which the courts exercise the same kind of supervision over the affairs of political parties as is the case in New York, and in which court actions of the type described above could probably be brought.

*2 In Greenberg v Cohan, 173 Misc. 372, 17 N.Y.S.2nd 895, Aff'd 258 A.D.1039, 17 N.Y.S. 2d 878 (1940), an enrolled member of the A.L.P. was allowed to raise an objection to the nomination of the Party's candidate for Congress; in In Re Brook, 169 Misc. 369, 6 N.Y.S. 2d 954 (1938), an enrolled Republican was allowed to object to the designation of an individual as the American Labor Party's candidate for State Senate.

*3 Staut v Dem. County Central Comm., 40 Cal. 2d 91, 251 P2d 321 (1953)

*4 O'Brien v Fuller, 93 N.H. 221, 39 A. 2d 220 (1944).