A MEMORANDUM ON

THE LEGAL VALIDITY AND PROPRIETY OF THE

MFDP CHALLENGES TO MISSISSIPPI CONGRESSMEN

Two questions have been recently raised in respect to the legal validity of the present challenges filed against the seating of the purportedly elected members of the House from Mississippi.

These questions seem to be as follows:

1. It is suggested that Title 2, U.S.C., sec. 201--et seq is limited only to those cases in which there is a contest between two claimants to a seat and that the present contestants have no standing to file such contests.

There is no merit whatsoever to this contention. The statute on its face, the precedents of the House and the legislative interpretation of Title 2 are unequivocal that any person, whether claiming the seat or not is entitled to file a challenge under the provisions of Title 2.

(a) The statute on its face reads: "Whenever any person intends to contest an election to the House of Representatives...." (emphasis supplied). The statute does not limit the right established in Title 2 to one claiming a seat in the House. It clearly speaks of "any person."

(b) The House itself whenever the question has been raised has considered the provisions of Title 2 as applicable whether or not the contestant was actually claiming the challenged seat. One of the fullest discussions of standing to utilize the provisions of Title 2 is to be found in the House debates in connection with a contested election case, Brooks v. Davis, (1858). Mr. Boyce of South Carolina, submitting a report of the majority of the committee of elections, stated the following:

> "It is urged accordingly by the minority of the committee of elections that Mr. Brooks is not embraced in the act of 1851. Why is he not embraced? Because it is said that he does not claim the seat himself. But the act of 1851 is not confined merely to those who claim the seats; its language is very comprehensive; it says, 'whenever any person shall intend to contest an election.' Now, Mr. Brooks is certainly embraced in this comprehensive term 'any person,' and he does 'intend to contest an election.' To 'contest an election' it is not necessary that one should also claim the seat. To 'contest,' Johnson says, means 'to dispute, to controvert, to litigate, to call in question.' That is exactly

> what Mr. Brooks is doing; he is disputing, controverting, litigating, calling in question,' Mr. Davis's right to a seat. It is true we generally associate the idea of claiming a seat with the fact of one's being a contestant; but it is only an accidental, not a necessary connection. The moment we analyze the idea of 'contesting an election,' we see that it does not at all necessarily imply any claim for a seat. The fact therefore, that Mr. Brooks does not claim the seat does not put his case outside of the act of 1851. To insist that no one is embraced within the act of 1851 but one who claims the seat is to narrow the scope of that act very much indeed. The object of the act of 1851 is to facilitate the procedure in contested elections. To limit the benefits of the act merely to those persons claiming seats would be to narrow its sphere of usefullness.
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> "Previous to the act of 1851, there was no mode of taking testimony until after the new Congress had met, and upon memorial authorize the same to be done. The result was, that the sitting member, if illegally elected, could seldom be ousted before the end of the long session. The evil from this source was so great that, when the act of 1851 was before the House for consideration, the then existing system of contesting elections was pronounced in the debate an unmitigated 'humbug' and the necessity for a general law upon the subject was felt to be so great that the bill was passed without being referred to the Committee of the Whole. The purview of that act was to give those who might contest elections a more effectual and speedy mode of taking testimony and preparing the case for the consideration of the House. To hold that persons contesting in the position of Mr. Brooks could not avail themselves of its provisions, would be, in my opinion, an act of great injustice to such persons. It is the privilege of Mr. Brooks and, such contestants as occupy the position he does, to have the benefit of the act of 1851. To hold that they are not included in the act of 1851, is to deprive them of great advantages which I cannot consent to do." (Cong. Globe, 35 Congress, 1858, p. 725)

A case in the House directly in point, applying the analysis of Mr. Boyce, is Lowry v. White, 50th Congress, 1888, p. 5, sec. 425, vol. 1, Hind's Precedents. In this case, the House clearly held that a "contestant" within the meaning of Title 2 need not have any valid claim to the seat.

Thus the headnote of Hind's precedents reads:

"The Committee of Elections has apparently acquiesced in the view that a contestant, while bringing into issue no ground that could possibly give him the seat, is yet to be treated as a memorialist, entitled to have the question determined."

Thus it is amply clear that a "contestant" within the meaning of Title 2 need not be a claimant for the seat in question. Accordingly any suggestion that Title 2 is limited only to actual claimants to the seats is wholly without merit.

This makes it unnecessary to consider at this point whether Mrs. Hamer, Mrs. Gray and Mrs. Devine have a valid claim to the seats in question. Their right to file these contests persuant to Title 2 does not depend upon this question. The validity of their own claim to the seats will be determined in the course of the statutory challenges and will be fully briefed as required by the statute after testimony is taken. However, it might be appropriate to note at this point that votes cast at an "unofficial" or "improvised" election where citizens have been barred from voting at the so-called "regular" election have been counted by the House in an election contest. See, for example, Johnson v. Stokes, 2 Hind's precedents, sec. 1126 at page 707.

2. It has also been suggested that one of the legal grounds for the contest, namely that the systematic exclusion of Negroes from the franchise of Mississippi violates the conditions of the compact readmitting that state to representation in Congress is adversely affected in some way by the decision of the Supreme Court in the case of Coyle v. Smith, 221 U.S. 559 (1911).

There is no merit whatsoever to this contention. Coyle v. Smith holds that a condition in an admission act which was not "within the sphere of the plain power of Congress," was not binding upon the state after admission, but that a condition which was within "the sphere of the plain power of Congress" would be binding.

In Coyle the act admitting Oklahoma to the union provided that the state could never move its capital city. This, the Court said, was a question "essentially and peculiarly" within the power of the state, and

not within, "the regulating power of Congress." On the other hand, the conditions established in the act of 1870 admitting Mississippi to representation in Congress relate to the deprivation of classes of citizens of the right to vote, an area classically, "within the sphere of the plain power of Congress." See the 14th and 15th Amendments to the Constitution, an area in which Congress has acted as late as this year in the Civil Rights Act of 1964.

This memorandum is presented in its briefest form to respond speedily to certain confusions possibly engendered by the questions referred to above. A detailed memorandum of law is presently in preparation.

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