FDP

MEMORANDUM IN SUPPORT OF THE CHALLENGE TO THE SEATING OF MISSISSIPPI CONGRESSMEN

September 9, 1965

We write to express our view as members of the bars of our respective states that the pending challenge to the seating of Representatives from the State of Mississippi is based on well-established facts and sound constitutional precedents. We hope you will find that it merits your active support in bringing it to the floor of the House and in favorable action on the floor.

I.

No responsible spokesman has challenged the factual evidence of massive disenfranchisement of Negro voters in Mississippi. Part of this evidence is set out in the more than 10,000 pages of depositions secured from Mississippians by the contestants and duly printed for the House of Representatives at the direction of the Clerk. Numerous findings based on overwhelming additional evidence presented to agencies of the Executive Branch and to the courts, and embodied in investigative reports and judicial opinions, establish beyond any doubt the fact of systematic exclusion of the Negro from the polling place in Mississippi.

The withdrawal of the ballot from Mississippi Negroes has been accomplished by a long-continued and deliberate effort to negate the mandate of the Fifteenth Amendment and reverse the result of the Civil War itself. Means employed have ranged from poll taxes and discriminatorily-applied literacy and "constitutional interpretation" tests to systematic intimidation and violence, inspired and sometimes conducted by public officials. Organs of state government, from the Mississippi Constitutional Convention of 1890, to successive state legislatures, voting registrars and local sheriffs, have joined in fashioning and executing the design to disenfranchise. So effective has been the design and its execution that Negro voter registration has been reduced from approximately 189,000 in the late 1880's to approximately 35,000 or 6.7% of the Negro population of voting age today.

II.

The legal basis for the challenge is direct and straightforward:

1. The systematic exclusion of Negroes from the election process in Mississippi violates the Fourteenth Amendment, which prohibits the denial of equal protection of the laws, and the Fifteenth Amendment, which prohibits abridgement of the right to vote "on account of race, color, or previous condition of servitude." Earlier this year, in a suit brought by the Department of Justice to test the very statutes which have been employed against Negroes as a part of the systematic exclusion which constitutes the basis for the present challenge, the Supreme Court indicated that Mississippi's voting laws would be held to violate the Fourteenth and Fifteenth Amendments on a showing of the facts which are so amply demonstrated by the record in the challenge now pending before Congress. *United States* v. *Mississippi, March* 8, 1965, 33 L.W. 4258. In the companion case of *United States* v. *Louisiana*, March 8, 1965, 33 L.W. 4262, in which the government was actually permitted to introduce in the trial court the evidence supporting its allega-

tions, statutory provisions virtually identical to those passed by Mississippi to disenfranchise Negroes were held unconstitutional.[1] However, the record in the pending challenge shows that more than discriminatory statutes is at work to keep Mississippi Negroes from voting. State-inspired and state-condoned intimidation and violence, as well as threats of economic reprisals, are commonplace and they, even more clearly than the statues, are employed in the design to disenfranchise, thus flouting the constitutional commands of the Fourteenth and Fifteenth Amendments.

2. Acting under its constitutional power and duty to "be the Judge of the Elections, Returns, and Qualifications of its own Members," the House of Representatives has time and again set aside the result of an election marked by fraud, intimidation or other illegality. Specifically, the House has refused to seat members in over 40 instances where violence, intimidation or fraud was practiced against Negro voters to influence an election contest. Many of these cases are discussed in detail at pages 41-86 of the contestants' brief, and all are summarized in the brief's Appendix B. They show that the House does not shrink from either seating a contestant in place of a certified member or from declaring a seat vacant so that new elections may be held, if that is what the evidence demands. For example, on facts less compelling than those now presented by the pending challenge, the House set aside election results in the Mississippi case of *Lynch* v. *Chalmers*, 47th Cong., Hinds, Vol. 2, Sec. 959, P. 263 (1882), and the South Carolina case of *Johnston* v. *Stokes*, 54th Cong., Hinds, Vol. 2, Sec. 1126 (1896).

The variety of these and other cases cited by the contestants indicates that the House's power to judge the qualifications of its members has been used neither capriciously nor rarely. The protection afforded by this power to the principle of free elections and the integrity of representative government has been extended to incumbents, contestants, and voters in many states for well over a century. To justify the use of the power in this instance little more need be said than that Mississippi's election process is unique in its degree of corruption. The voter registration facts in Mississippi Congressional districts are a world apart from those in any other election district known to us. For example, as of January, 1964 in Humphreys County of the Second Mississippi Congressional District, there was *not one registered Negro voter* out of a voting-age Negro population of 5,561. For the state as a whole, the United States Commission on Civil Rights reports that less than 7% of Negroes of voting age are registered to vote. By comparison, in such states as Alabama and Louisiana, recent estimates by the Justice Department place the percentage at approximately 19.4% and 32%, respectively. The difference in percentage points between Mississippi and other Southern states is more than one of degree – and it reflects the virtually total exclusion of Mississippi Negroes from the state's electoral process.

3. There is no doubt that the challenges themselves are now properly before the House, both under the provisions of 2 U.S.C. 201 which permit "any person" to contest the election of any Member, and under the long-standing traditions of the House itself, which, as recently summarized by the Clerk, permit House adjudication of a contested election "in the case of a 'protest' or 'memorial' filed by an elector of the district concerned" or by any other persons. Letter of Assistant Clerk to Speaker, 89 Cong. Rec. 795, January 14, 1965. Indeed, there are statuatory and case precedents establishing House jurisdiction of the pending challenge which go back to the early years of our history.

The only question which merits discussion is whether the challengers here qualify as "parties" or "contestants" for purposes of availing themselves of the statutory deposition and subpoena procedures found in 2 U.S.C. 203 et seq. While it is obvious that the contestants here – all Negroes – did not appear as candidates for Congressional seats on the regular Mississippi election ballot, it is equally obvious that they could not do so because of the systematic exclusion of Negroes from Mississippi's election processes. It would be unjust and self-defeating for Congress to apply 2 U.S.C. 203 et seq. in such a way as to exclude from the ambit of its procedures the persons they were designed to protect: those complainants who, like the contestants here, failed to be designated on the ballot because of the very injustices sought to be remedied.

[1]It may be noted parenthetically that the State of Mississippi, at the urging of Governor Paul B. Johnson, has repealed these statutes in order to secure a more advantageous footing for resisting the new Voting Rights Act of 1965.

Moreover, even if the challengers do not qualify as opposing candidates, objection to the use of the statutory deposition procedures has been waived by the failure of the Members from Mississippi to take timely exception.[2] Indeed, the Members who now challenge the use of the deposition procedures actively participated in the taking of the depositions by cross-examining witnesses and by entering into stipulations concerning them. Now that the depositions have been completed and printed, and seven months after the initial debate on the challenge by the House – during which the Majority Leader stated, in effect, that the statutory deposition procedures should be employed – it is too late for the sitting Members to attack the use of these procedures by the contestants.

What is at stake in the pending challenge to the seating of the Mississippi delegation in the House is nothing less than the integrity of representative government. As the then Committee on Elections recognized early in the 35th Congress in the election challenge of *Whyte* v. *Harris*, the "freedom and purity of elections constitute the very life of republican government." House Misc. Doc. #57, 35th Cong. 1st Sess. 1 Bart. 257 (1858). We believe that statutory law, the Constitution, and valid Congressional precedent, amply warrant the action requested of the House. In fact, the mandate of the Constitution may fairly be said to impose an obligation to grant the relief asked by the contestants.

III.

It is no answer to the force of the present challenge to assert that the Voting Rights Act of 1965, effective legislation though it may be, will drastically reduce future discrimination by the State of Mississippi against Negro voters. What is before the House is the validity of the elections of November, 1964, elections in which state action deprived virtually the entire Negro population of Mississippi of the ballot, and as a result of which Congressmen purporting to represent the people of Mississippi are seated in the House. It is also worth noting that neither the Voting Rights Act nor the recent repeal of Mississippi's patently unconstitutional voter registration laws will substantially affect such extra-legal, but state-fostered methods of voter intimidation as the physical violence and economic reprisals documented in the depositions supporting the present challenge. To convince white Mississippians that continued flouting of the Fourteenth and Fifteenth Amendments is no longer possible or profitable, the results of the 1964 elections must be set aside.

IV.

The proponents of the challenge will shortly seek to bring the matter before the entire House. Since no resolution is pending, it is likely that the question of the seating of Mississippi's Representatives will be raised in the form of a privileged motion seeking to discharge the Committee on Administration and its Elections Sub-Committee from further consideration of the challenge. This procedure is fully supported by the venerable House precedent of *Page* v. *Pirce*, in which Speaker Carlisle stated that such a motion "presents a question of the highest privilege." 3 Hinds §2585, 17 Cong. Rec. 7403-04 (1886). We hope you will take whatever action is necessary to bring the challenge from the Administration Committee to the floor of the House and we respectfully urge you to support it there.

The principle of free and fair elections open to an entire constituency is the bedrock of our democratic republic. Only in free and fair elections can our system of representative government work. Only in free and fair elections, untainted by the illegality proscribed by our Constitution, can Mississippi reclaim its place in the eyes of the nation and in the halls of Congress.

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[2]The sitting Mississippi Members have not availed themselves of the objection procedure recently used and approved by the House in the case of Representative Ottinger of New York, whose seat was challenged by the campaign manager for a defeated candidate. There a resolution dismissing the deposition procedures on the grounds that the challenging party did not qualify to use them was introduced in the House soon after the deposition proceedings were begun. Apparently, the Mississippi Members knew of this means of challenging the use of the statutory deposition procedures and their failure to object was the result of a conscious decision, not mere inadvertence. See story in *Jackson Daily News*, January 28, 1965, reproduced at P. 100 of the contestants' brief.

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