Part I

Administrative History

Department of Justice

Civil Rights Division

CIVIL RIGHTS

A. Introduction

The Civil Rights Division, created on December 9, 1957, is responsible for --

(1) enforcement of federal statutes prohibiting discrimination in voting, public schools and facilities, places of public accommodation, employment and housing;

(2) prosecuting persons who interfere with the exercise of federal civil rights on account of race, religion or national origin;

(3) coordinating enforcement of the prohibition against discrimination in activities receiving federal financial assistance from federal departments and agencies;

(4) intervening in significant cases brought by private individuals involving denials of the equal protection of the laws on account of race;

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(4) intervening in significant cases brought by private individuals involving denials of the equal protection of the laws on account of race;

(5) preparing amicus curiae briefs in significant private civil rights cases, primarily in the United States Supreme Court; and

(6) preparing legislative proposals in the civil rights area.

The Civil Rights Division in November 1963

As of November 1963, the Civil Rights Division was organized along functional lines. A Voting and Elections Section handled registration and voting matters as well as election frauds and Hatch Act violations arising under criminal statutes. Criminal matters involving deprivations of other civil rights were assigned to a General Litigation Section. A Trial Staff conducted litigation and the Appeals and Research Section handled appellate cases and research matters.

At the time President Johnson took office, the Division's primary concern was in the area of voting rights. Federal authority to proceed by civil actions to prevent racially discriminatory denials of the right to vote is

granted by (and was then limited to) the Civil Rights Acts of 1957 and 1960. The scope of the problem of voting discrimination at that time is indicated by the following statistics for 1964. In Alabama, 19 percent of age-eligible Negroes were registered to vote, compared with 69 percent of the age-eligible whites. In Mississippi, approximately six percent of the Negroes were on the voter rolls, while 80 percent of the whites were registered. And in Louisiana, some 30 percent of the age-eligible Negroes were registered, compared with 80 percent of the whites. By June of 1964, the Division had filed a total of 61 civil actions under the 1957 Act since its adoption involving racially discriminatory practices in voting. While judicial relief was ultimately granted in most of these cases, it was becoming increasingly clear that this case-by-case, conventional litigation approach was inadequate to solve this problem.

Prior to the adoption of the Civil Rights Act of 1964, the Civil Rights Divisim's primary

task in the area of school desegregation was to protect the integrity of federal court orders where desegregation decrees had been entered in private litigation. The Division lacked the authority to initiate civil actions to end public school segregation or to intervene in private desegregation suits. The scope of the school segregation problem early in the Johnson administration is indicated by the fact that in June 1964, in the 17 Southern and border states, only about nine percent of Negro children attended public schools with white children.

In November 1963, proceedings involving racial discrimination in voting and public schools occupied virtually all of the Civil Rights Division's limited resources. Although racial discrimination was widespread in such areas as public accommodations, employment, and housing, such discrimination had not yet been made unlawful.

Enactment of the Civil Rights Act of 1964

The Civil Rights Division's responsibilities were greatly expanded by the enactment of the

Civil Rights Act of 1964. That statute, in its most important provisions, outlawed discrimination in places of public accommodation, employment and federally assisted programs, and authorized Government intervention in a broad range of private suits involving racially discriminatory denials of the equal protection of the laws.

With the addition of new enforcement responsibilities, assignment of responsibility along functional, subject-matter lines was no longer feasible. For example, attorneys working on voting matters in Southern communities were gaining experience which could prove useful in handling other civil rights problems in the area. Accordingly, the Division was reorganized in the summer of 1964 into geographical units. Four new sections were created -- the Eastern Section, the Western Section, the Southeastern Section and the Southwestern Section. Responsibility for election frauds and Hatch Act matters was transferred to the Criminal Division. The Voting and Election and General Litigation Sections, as well as the Trial Staff were abolished,

but the Appeals and Research Section was retained. The Division was expanded to a complement of 86 attorneys and 99 clerical staff. However, in the year following enactment of the1964 Civil Rights Act, the major part of the Division's resources remained committed to voting discrimination cases because the elimination of such discrimination was viewed as basic to the long-run solution of a broad spectrum of civil rights problems.

The Voting Rights Act of 1965

The Voting Rights Act of 1965 was designed to obviate the difficulties of delay and circumvention encountered by the Division in litigation under the 1957 and 1960 Civil Rights Acts. Enacted in August 1965, the Act prohibits the use of literacy tests and similar devices and authorizes the appointment of federal examiners to register Negroes in areas where such tests and devices have been maladministered to disfranchise Negroes. Enforcement and implementation of the new statute was given high priority in the Civil Rights Division. By June 1966, examiners had been sent to 44 counties in

Alabama, Mississippi, Louisiana and South Carolina where they had registered some 117,000 Negroes. Voluntary compliance by local officials resulted in registration of more than 250,000 new Negro voters in deep South states during the same period. The 1965 Act also authorized the Attorney General to file civil suits against the enforcement of poll tax laws as a precondition to voting. Immediately after the 1965 Act was passed, such suits were filed by the Division in Alabama, Mississippi, Texas and Virginia and the Department also filed an amicus curiae brief in a private suit in the Supreme Court challenging the validity of the Virginia poll tax. The poll tax was subsequently declared unconstitutional in these cases.

Increased Emphasis on School Desegregation

In addition to implementation of the Voting Rights Act, the Civil Rights Division devoted increasingly greater resources to school desegregation during 1965 and thereafter through 1968. Pursuant to authority granted by the 1964 Civil Rights Act, the Division intervened in 29 school desegregation suits in 1965 and 78 such suits in 1966. In a

landmark case, United States v. Jefferson County Board of Education, the Division successfully urged the Court of Appeals for the Fifth Circuit to adopt a uniform desegregation plan based on standards developed by the Department of Health, Education, and Welfare. The Division's activities in the school area, which were coordinated with the Department of Health, Education, and Welfare civil rights enforcement programs (based on its authority to terminate federal financial assistance to segregated schools), contributed materially to an accelerated pace of public school desegregation in Southern states. In July 1968, the Division was involved in 190 separate lawsuits against school officials in Southern and border states seeking enforcement of the constitutional duty of such officials to provide a unitary, non-racial public education. In addition, during 1968, a number of school desegregation suits were brought by the Civil Rights Division against school districts located in the North, districts charged with racially discriminatory practices of student and faculty assignment.

Non-Discrimination in Employment

Title VII of the Civil Rights Act of 1964 contains broad prohibitions against discrimination by employers and unions and authorizes the Attorney General to enforce these prohibitions by civil actions.

In the fall of 1967, the Civil Rights Division was reorganized in order to permit increased emphasis upon enforcement of Title VII. Previously, approximately one-half of the Division's manpower had been assigned to sections covering the Southern states and primary effort was devoted to litigation concerning school desegregation. Since the problems of employment discrimination existed throughout the United States, the 1967 reorganization involved the shifting of a substantial number of personnel from the Southeastern and Southwestern Sections to sections covering the northeast, midwest and western portions of the United States.

During 1968, some 34 Title VII suits against employers or labor unions were initiated by the Division.

Criminal Prosecutions

Between 1963 and 1968, the Division's authority to initiate criminal prosecutions for deprivations of civil rights was confined to narrowly drafted reconstruction statutes. Thus, in many cases of racially-motivated acts of violence involving denials of federal rights, no federal criminal sanction was available. Manpower shortages and the high priorities placed on voting discrimination and school desegregation also served to limit the Division's activities in the criminal area. Nevertheless, the Division successfully prosecuted under these Reconstruction statutes the perpetrators of three of the most notorious crimes of racial violence committed during the Johnson Administration -- the slayings of three civil rights workers in Neshoba County, Mississippi and of Negro educator, Lemuel Penn in Georgia in 1964, and the 1965 killing of Mrs. Viola Liuzzo

during her participation in the demonstrations against voting discrimination in Selma, Alabama. Title I of the Civil Rights Act of 1968 now provides criminal sanctions for racially-motivated forcible interference with an appropriately broad range of federal rights.

Coordination of Enforcement of Title VI--Non-Discrimination in Federally Assisted Programs

Pursuant to Executive Order No. 11247 promulgated in 1965, a unit of the Division, headed by a Special Assistant to the Attorney General, has been responsible for coordinating enforcement of Title VI of the Civil Rights Act of 1964. Title VI prohibits discrimination in programs and activities from 25 different departments and agencies of the federal government.

Other Significant Activities

Other significant activities of the Civil Rights Division between 1963 and 1968 included litigation to a desegregate places of public accommodation and public facilities, intervention in private civil suits challenging discrimination in State Court

juries, amicus curiae participation in a variety of private civil rights cases in the United States Supreme Court, the drafting of a uniform discriminatory system for the selection of jurors in federal courts (a system ultimately embodied in the Jury Selection and Service Act of 1968,)and drafting of fair housing legislation (ultimately embodied in Title VIII of the Civil Rights Act of 1968).

Illustrations of these activities are more fully described below.

Set forth below, under separate subject matter headings, are narrative descriptions of memoranda and other documents which have been selected to reflect the internal operations and policy formation processes in the Department of Justice between 1963 and 1968 with respect to selected major developments in the areas of voting, school desegregation, employment, housing, criminal matters, public accommodations and facilities, jury discrimination, and federally-assisted programs.

B. DISCRIMINATION IN VOTING

1. Litigation Preceeding the Voting Rights Act of 1965-- Louisiana v. United States

Prior to enactment of the Voting Rights Act of 1965, the Department of Justice filed over 70 suits under the Civil Rights Act of 1957 in efforts to eliminate racial discrimination in voting. Perhaps the most significant and successful suit of this kind was Louisiana v. United States. Although the suit was begun during the Kennedy Administration, it was decided by the district court shortly after President Johnson took office and the district court's decision was affirmed by the Supreme Court in [illegible] 1965.

The suit was begun on December 28, 1961 in the federal district court for the Eastern District of Louisiana. Acting pursuant to 42 U.S.C. 1971(c), the Attorney General filed a complaint in the name of the United States against the State of Louisiana, the members of the Louisiana Board of Registration, and the Director of the Board. The gravamen of the complaint was that the Louisiana constitutional and statutory provisions which condition registration for voting upon the ability of the applicant to understand and give a reasonable interpretation of any section of the Constitution of the United States or the Constitution of Louisiana

violated 42 U.S.C. 1971(a) and the Fourteenth and Fifteenth Amendments of the Federal Constitution. The complaint prayed for judgement declaring the challeged provisions unconstitutional and enjoining the defendants from enforcing them or engaging by other means in racial discrimination in voter registration.

The case was tried by a statutory court of three judges pursuant to 28 U.S.C. 2281. The Government introduced voluminous proof of discrimination in the voter registration process, including depositions, affidavits, transcripts of testimony from other proceedings, and official voting records. While the case was pending, the State adopted a new "citizenship" test as a precondition to voter registration, as a substitute for the Constitutional interpretation test. Proof was adduced, however, that the constitutional interpretation test was still being used in some areas of the State.

A majority of the three-judge district court filed its opinion on November 27, 1963 and, on January 23, 1964, formal finding of fact, conclusions of law, and a decree granting the relief requested were entered. The history of voter registration in Louisiana and the massive proof of current discriminatory practices adduced by the Government led the District Court to conclude that the purpose and effect of the Louisiana "Constitutional

interpretation" test was solely to disfranchise Negroes and that the test was therefore unconstitutional. The Court enjoined further use of the test in the parishes in which it had been used in the past. Beyond that, although the Court did not decide the constitutionality of the new "citizenship" test, it enjoined use of that test to prevent a "freezing in" of past discriminatory practices that would otherwise have resulted because voter registration in Louisiana is permanent.

On March 5, 1964, the defendants appealed to the United States Supreme Court. The Supreme Court noted probable jurisdiction on June 22, 1964. On [illegible],1965, the Supreme Court affirmed the judgement of the District Court, holding that the "Constitutional interpretation" test violated the Fifteenth Amendment and that the Court had appropriately enjoined use of the new "citizenship" test in order to render its decree against discrimination effective. 380 U.S. 145.

2. THE VOTING RIGHTS ACT OF 1965

a. Legislative Development.

On December 28, 1964, Attorney General Katzenbach sent a memorandum to the President setting forth alternative proposals for a constitutional amendment or legislation designed to increase popular participation in elections. The Attorney General began by noting that only 62 percent of age-eligible American citizens voted in the 1964 elections. This statistic was ascribed principally to (1) lack of interest, (2) racial discrimination, and (3) restrictive state voting qualifications. With regard to racial discrimination in voting, the Attorney General observed that present federal legislation dealing with this problem, while improved by the 1960 and 1964 Civil Rights Acts, remained a relatively slow method of overcoming discriminatory practices. The Attorney General recommended three alternative proposals listed in the order in which, in his opinion, they were to be preferred:

1. A constitutional amendment to prohibit the States from imposing any qualification for voting in Federal or State elections

other than (1) age, (2) a short period of residence, (3) conviction of a felony, and (4) commitment to a mental institution.

2. Legislation vesting in a Federal commission the power to conduct registration for Federal elections.

3. Legislation granting to an agency of the Federal Government the power to assure direct control of registration for voting in both Federal and State elections in any area where the percentage of potential Negro registrants actually registered is low.

The memorandum discussed briefly the advantages and disadvantages of these alternative proposals. The third proposal listed above was subsequently embodied in the Voting Rights Act of 1965.//

//Memorandum from Attorney General Katzenbach (12/28/64) to President Johnson.

On January 8, 1965, a draft constitutional amendment embodying the first proposal suggested by Attorney General Katzenbach to President Johnson in his memorandum of December 28, 1964 was drafted in the Department.2/

2/ Draft Constitutional amendment (1/8/65), authorship not indicated.

On February 12, 1965, Mr. Joseph Rauh, Counsel for the Leadership Conference on Civil Rights, submitted a legislative proposal to Attorney General Katzenbach designed to deal with discrimination in voting. Under this proposal, the President would have been authorized to order the "nullification" of voter registration lists in areas where Negroes were substantially underrepresented on such lists if the state had maintained segregated facilities in recent years and if, since 1957, the State had enacted any law which added to or changed the qualifications for voting. In areas where nullification was ordered, the President was to establish a "Federal enrollment office" which would assume the function of

registering voters in the area. Provision was made for the abolition of "Federal enrollment offices" where the President subsequently determined that effects of past discrimination had been removed and there was no danger of a resumption of discriminatory practices.3/

3/ Proposal submitted by Mr. Joseph Rauh, Counsel for the Leadership Conference on Civil Rights (2/12/65), to Attorney General Katzenbach.

On February 15, 1965, James Morrison, an attorney in the Office of Legal Counsel, advised Norbert A. Schlei, Assistant Attorney General for the Office of Legal Counsel, concerning discussions he had had with Richard Scammon about alternative proposals to increase voting participation. Mr. Scammon had recently resigned as Director of the Bureau of Census and had acted as Chairman of the President's Commission on Registration and Voting Participation. Among other things, Mr. Scammon expressed the view that proposals to eliminate literacy tests and authorize the use of Federal registrars in areas where

discrimination was practiced would probably present substantial political difficulties and that the dual registration system that would be involved in the federal registrar proposal would create serious practical problems as well.4/

4/ Memorandum from James L. Morrison, attorney, Office of Legal Counsel (2/15/65), to Norbert A. Schlei, Assistant Attorney General, Office of Legal Counsel.

On February 23, 1965, Solicitor General Cox transmitted to the Attorney General a draft of proposed Congressional findings to accompany a new voting discrimination statute as well as part of a draft bill invalidating state literacy test requirements.5/

5/ Memorandum from Solicitor General Cox (2/23/65), to Attorney General Katzenbach.

On March 5, 1965, a draft statute embodying what were to be the basic features of the Voting Rights Act of 1965 was completed in the Department. Although this draft was written, primarily, by Harold Greene, Chief of the Appeals and Research Section of the Civil Rights Division and Sol Lindenbaum, an attorney with the Office of Legal Counsel.

differed in many significant respects from the Act as it was ultimately passed, it contained the following features: (1) a "trigger" provision whereby the use of literacy tests and similar devices were to be suspended in areas where the Attorney General and the Director of the Census made appropriate determinations concerning the use of "tests and devices" in voting and the fact that less than 50 percent of age-eligible persons voted or were registered to vote in the area in 1964; (2) authority in the Attorney General to send federal "registrars" to areas with respect to which such determinations had been made, where he deemed it necessary to enforce the 15th Amendment; (3) coverage of both State and Federal elections, general, special and primary.6/

6/ Draft Act "To enforce the Fifteenth Amendment to the Constitution of the United States" (3/5/65), authorship not indicated.

On March 11, 1965, a memorandum was prepared discussing issues to be resolved on the draft voting legislation. Attention was directed to such questions as whether there

should be any congressional findings, under what circumstances literacy tests should be suspended, and under what conditions Federal registrars should be appointed. A number of alternative possibilities were outlined.7/

7/ Memorandum entitled, "Issues to be Resolved on the Voting Legislation" (3/11/65), authorship not indicated.

On March 15, 1965, Barefoot Sanders, Assistant Deputy Attorney General, sent a memorandum to Congressman McCulloch, the ranking Republican of the House Judiciary Committee. The memorandum was accompanied by copies of the most recent draft of a proposed bill entitled "Voting Rights Act of 1965". The memorandum indicates that a somewhat different draft of the voting bill had previously been sent to Senator Dirksen and specified the respects in which the two drafts differed.8/

8/ Memorandum from Barefoot Sanders, Assistant Deputy Attorney General (3/15/65), to Honorable William M. McCulloch.

The proposed "Voting Rights Act of 1965" was transmitted to the Congress on March 18, 1965 and was referred to the Judiciary Committees of the House and Senate. On March 22, 1965, Barefoot Sanders, Assistant Deputy Attorney General told the Attorney General that the House Judiciary Committee would invite him or his delegate to sit with the Committee in executive session and submit amendments.9/

9/ Memorandum from Barefoot Sanders, Assistant Deputy Attorney General (3/22/65), to Attorney General Katzenbach.

On March 23, 1965, Solicitor General Cox recommended to Attorney General Katzenbach a number of substantial changes in the Administration's voting bill. Among other things, the Solicitor General questioned the constitutionality of the "trigger" provision in the bill as introduced because it was not limited to areas in which a substantial proportion of the population was Negro. The Solicitor General suggested language to cure what in his view were serious technical defects in this and various provisions of the proposed bill.10/

[10] Memorandum from Solicitor General Cox (3/23/65), to Attorney General Katzenbach.

On March 29, 1965, Louis Claiborne, an assistant to the Solicitor General, proposed certain substantive changes in the pending bill which the Attorney General had previously indicated might be considered for submission as Administration proposals at a later time. The proposals were designed to buttress the constitutionality of the bill and also included a "pockets of discrimination" provision similar to what became section 3 of the Voting Rights Act.[11]

[11] Memorandum entitled "Possible Substantive Changes in the Voting Bill" by Louis F. Claiborne, Assistant to the Solicitor General 3/29/65).

On March 30, 1965, L. M. Pellerzi, Associate General Counsel of the United States Civil Service Commission, suggested certain technical amendments to the pending bill having reference to the duties that would be imposed on the Commission under the proposed Voting Rights Act.[12]

[12] Letter from L. M. Pellerzi, Associate General Counsel, United States Civil Service Commission (3/30/65), to Barefoot Sanders, Assistant Deputy Attorney General.

On April 6, 1965, Solicitor General Cox suggested to the Attorney General certain additional technical changes that might be made in the then most recent version of the bill.[13]

[13] Memorandum from Solicitor General Cox (4/6/65) to Attorney General Katzenbach.

On April 6, 1965, Attorney General Katzenbach and Assistant Deputy Attorney General Barefoot Sanders attended a meeting of the House Judiciary Committee. The Committee members raised a number of questions about various provisions of the bill and the Department was requested to prepare memoranda for the Committee concerning several of these questions, including the constitutionality of abolishing the poll tax in the bill.[14]

14/ Memorandum from Barefoot Sanders, Assistant Deputy Attorney General (4/6/65), to Stephen Pollak, First Assistant, Civil Rights Division.

On April 9, 1965, Stephen Pollak, First Assistant for the Civil Rights Division, reported to Attorney General Katzenbach concerning possible implementation of procedures whereby post offices would accept poll tax payments and transmit them to appropriate State officials.15/

15/ Memorandum from Stephen Pollak, First Assistant, Civil Rights Division (4/9/65), to Attorney General Katzenbach.

On April 21, 1965, Barefoot Sanders, Assistant Deputy Attorney General, wrote letters to Counsel for the House Judiciary Committee, suggesting changes in the provisions of the Committee bill pertaining to "poll watchers" and intimidation of voters and concerning, among other things, the effective date to be included in the "freezing" provision (section 5 of the statute as enacted), in light of proposed changes in State voting laws in Southern states.16/

/6/ Letters (2) from Barefoot Sanders, Assistant Deputy Attorney General (4/21/65), to William R. Foley and Benjamin Zelenko, General Counsel and Assistant General Counsel for the House Judiciary Committee.

On April 23, 1965, Harold H. Greene, Chief, Appeals and Research Section, Civil Rights Division, proposed to Stephen Pollak, First Assistant for the Civil Rights Division, a new poll tax provision designed to take into account the various objectives and objections previously considered in connection with the poll tax. This provision, in its essential features, would have outlawed the poll tax and authorized the Attorney General to institute suits to enforce the poll tax ban./7/

/7/ Memorandum from Harold H. Greene, Chief, Appeals and Research Section, Civil Rights Division (4/23/65), to Stephen Pollak, First Assistant, Civil Rights Division.

On April 9, 1965, the Senate Judiciary Committee reported on an amended version of the Administration bill. On April 27, 1965, a memorandum was prepared discussing two major issues raised by the Senate Judiciary Committee bill: (1) the poll tax ban and, (2) the "escape" provision sponsored by Senator Dirksen, which provided an alternative basis for states or localities covered by the "trigger" provisions of the Act to escape coverage, based on the percentage of persons registered to vote or voting in the most recent Presidential election. Objections were raised about these provisions.[18]

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[18] Memorandum entitled "Questions Concerning the Voting Rights Act of 1965 as Reported by the Judiciary Committee" (4/27/65), authorship not indicated.

The Voting Rights Act of 1965 was passed by the House of Representatives on August 3, 1965, by the Senate on August 4, 1965, and signed into law by the President on August 6, 1965.

b. Administrative Implementation of the Voting Rights Act.

On June 2, 1965, in anticipation of enactment of the Voting Rights Act, representatives of the Civil Rights Division met with representatives of the Civil Service Commission to discuss preparations for implementation of the "examiner" provisions of the Act. At that meeting, a number of factual and legal questions were posed to the representatives of the Civil Rights Division to enable the Civil Service Commission to go forward with plans for administrative implementation. A major policy question arose concerning the speed with which the Act would be implemented following enactment by sending examiners into particular counties in the South. Commission representatives indicated that they would need from 60 to 90 days notice to implement the Act in any particular county. The Commission was confronted by practical problems of adequate personnel and training of such personnel for fulfilling their responsibilities under the Act. In a memorandum prepared following the meeting, Stephen Pollak, First Assistant of the Civil Rights Division, questioned whether the Act should be implemented

upon enactment in as few areas as some of the representatives of the Civil Service Commission seemed to have in mind.[19]

19/ Memorandum from Stephen Pollak, First Assistant, Civil Rights Division (6/3/65), to John Doar, Assistant Attorney General, Civil Rights Division, and other attorneys in the Civil Rights Division.

On June 11, 1965, representatives of the Civil Rights Division met again with representatives of the Civil Service Commission to discuss problems of implementing the examiner provisions of the Act. Among other matters, the question of the need for physical protection for examiners was discussed.[20] At that meeting, the Civil Service Commission delivered to the Civil Rights Division representatives draft regulations and a draft manual for the use of examiners for review by the Department.[21] Also on June 11, 1965, other representatives of the Civil Rights Division met with representatives of the Bureau of the Census to discuss the role

of the Bureau in implementing the voting rights bill. The statute makes the Bureau responsible for determining areas in which less than 50 percent of persons of voting age voted in the 1964 election, pursuant to the "trigger" provision in section 4 of the Act. Plans were made for performance of the Bureau's function with respect to the Deep South States to be covered by section 4 of the Act on the day it was to be signed by the President.[22]

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[20] Memorandum from Alan Marer, attorney, Appeals and Research Section, Civil Rights Division (6/11/65), to Stephen Pollak, First Assistant, Civil Rights Division.

[21] Memorandum from Stephen Pollak, First Assistant, Civil Rights Division (6/11/65), to Alan Marer and Frank Schwelb, attorneys, Civil Rights Division.

[22] Memorandum from Stephen Pollak, First Assistant, Civil Rights Division (6/11/65), to Attorney General Katzenbach.

On June 15, 1965, St. John Barrett, Second Assistant, Civil Rights Division, expressed his views to the Division's First Assistant, Stephen Pollak, regarding questions raised by the Civil Service Commission about

security, recruitment of Negro examiners and related matters. Among other things, Mr. Barrett felt that no conscious effort should be made to assign Negroes as examiners in Souther areas. He also thought it vital that examiners be appointed promptly in difficult as well as "easy" areas, noting that timidity on the part of the Government in this connection would simply encourage resistance to the statute.[23]

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[23] Memorandum from St. John Barrett, Second Assistant, Civil Rights Division (6/15/65), to Stephen Pollak, First Assistant, Civil Rights Division.

On June 29, 1965, representatives of the Department of Justice met with representatives of the Department of Commerce, Bureau of the Census, Civil Rights Commission and Bureau of the Budget to discuss administrative problems in connection with the Voting Rights Act.[24]

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[24] Memorandum from John Doar, Assistant Attorney General, Civil Rights Division (7/9/65), to S. A. Andretta, Assistant Attorney General, Administrative Division, and attached memoranda.

On July 6, 1965, John Doar, Assistant Attorney General for the Civil Rights Division, gave to Mr. Wilson Matthews of the Civil Service Commission a list of counties in Alabama, Mississippi, Louisiana, and Georgia for which it was then contemplated that examiners might be appointed shortly following enactment of the Voting Rights Act.[25]

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[25] Memorandum from John Doar, Assistant Attorney General, Civil Rights Division (7/14/65), to Stephen Pollak, First Assistant, Civil Rights Division.

On July 16 and 17, 1965, names of additional counties to which it was tentatively planned to send examiners following enactment of the bill were submitted by the Civil Rights Division to the Civil Service Commission.[26]

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[26] Memorandum from Stephen Pollak, First Assistant, Civil Rights Division (7/20/65), to John Doar, Assistant Attorney General, Civil Rights Division.

On July 14, 1965, attorneys in the Civil Rights Division prepared a summary of recommendations made by the United States Commission on Civil Rights regarding implementation of the Voting Rights Act. Such matters as selection of areas, selection and training of examiners, notice to prospective registrants and civil rights organizations were considered.[27]

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[27] Memorandum from Stephen Eilperin and Alan Marer, attorneys (7/14/65), Civil Rights Division, to Stephen Pollak, First Assistant, Civil Rights Division.

On July 23, 1965, Ramsey Clark, Deputy Attorney General, and other representatives of the Department of Justice, met with Governor Buford Ellington of the White House staff to discuss sending examiners to counties of Deep South states. Governor Ellington planned to have informal discussions with individual governors of the five Deep South states concerning implementation of the examiner provision of the Voting Rights Act.[28]

28/ Memorandum from Stephen Pollak, First Assistant, Civil Rights Division (7/26/65), to John Doar, Assistant Attorney General, Civil Rights Division.

As of July 30, 1965, the Civil Service Commission had recruited some 68 persons to serve as examiners under the Voting Rights Act. Among the recruits were two Negroes. The Commission had sought other Negroes as examiners, but had been unable to persuade any others to accept. A training session for examiners was scheduled to be held in Washington on August 4-6, 1965. The Commission was having difficulty locating space for examiner offices in several counties.29/

29/ Memorandum from Alan Marer, attorney, Civil Rights Division (8/2/65), to John Doar, Assistant Attorney General, Civil Rights Division.

On August 6, 1965, President Johnson signed the Voting Rights Act of 1965 into law. On the same day, the Attorney General and the Director of the Census made the

appropriate "trigger" certifications under section 4 of the Act and the Attorney General further certified that the appointment of federal examiners was necessary to enforce the Fifteenth Amendment, pursuant to section 6 of the Act, in nine counties in Alabama, Louisiana, and Mississippi. Detailed justification memoranda were prepared by the Civil Rights Division with respect to each county certified by the Attorney General for examiners.

On August 7, 1965, Attorney General Katzenbach sent a letter to State and local election officials in every county covered by the "trigger" provisions, enclosing a copy of the statute and explaining its principal provisions.[30/]

30/ Letter from Attorney General Katzenbach to election officials (8/7/65), (addressee not indicated on sample).

On August 8, 1965, John Doar, Assistant Attorney General, Civil Rights Division, sent a memorandum to United States Attorneys, explaining the provisions of the

Voting Rights Act in some detail. The United States Attorneys were requested to transmit any reports they might receive about the degree of compliance with the Act by state and local election officials in their respective areas.[31]

[31] Memorandum from John Doar, Assistant Attorney General, Civil Rights Division (8/8/65), to United States Attorneys.

On August 9, 1965, John Doar, Assistant Attorney General, Civil Rights Division, sent a memorandum to the Director of the Federal Bureau of Investigation, outlining the procedures to be followed by the Bureau in conducting investigations under the Voting Rights Act of 1965.[32]

[32] Memorandum from John Doar, Assistant Attorney General, Civil Rights Division (8/9/65), to Director, Federal Bureau of Investigation.

On September 20, 1965, Stephen Pollak, First Assistant, Civil Rights Division, met with officials of Halifax County, North Carolina, to discuss the suspension of literacy tests in that county pursuant to the Act. The

county officials stated that the literacy test in use there was a simple one and that it had not been used to discriminate. The officials presented statistics to substantiate their statements that no discrimination was practiced in the county. Mr. Pollak advised the county officials that, under the Act, it would be necessary for the county to file a lawsuit to accomplish a lifting of the suspension of the literacy test. He indicated that the Attorney General might consent to the entry of a judgment lifting the suspension if the county officials made a persuasive showing that there was in fact no discrimination in the county.[33/]

33/ Memorandum from Stephen Pollak, First Assistant, Civil Rights Division (9/20/65), to the File.

By letter of December 2, 1965, the United States Commission on Civil Rights transmitted copies of its Report on the Voting Rights Act of 1965 to the Attorney General. In a number of respects, the Commission's Report alleged that the Department of Justice had not been sufficiently vigorous in its enforcement of the Act.

On December 4, 1965, Attorney General Katzenbach wrote a letter to Mr. William L. Taylor, Staff Director of the Civil Rights Commission, in response to critical features of the Commission's report. In his letter, the Attorney General noted that the Commission's report was apparently based on limited and somewhat stale information. He noted further that the Commission had failed to discuss its report with the Department prior to publication. The Attorney General then proceeded to answer the Commission's criticisms of the Department's actions in some detail.[34/]

[34/] Letter from Attorney General Katzenbach (12/4/65), to William L. Taylor, Staff Director, United States Commission on Civil Rights.

On December 16, 1965, the Civil Rights Division instituted new procedures for the filing of all memoranda and other documents pertaining to enforcement of the Voting Rights Act of 1965. The memorandum setting forth these changes describes a number of important procedures with respect to enforcement of the Act, including procedures to be followed with respect to designating particular counties for Federal examiners by the Attorney General.[35/]

35/ Memorandum from John Doar, Assistant Attorney General, Civil Rights Division (12/16/65), to all employees of the Civil Rights Division.

On January 8, 1966, the Attorney General wrote a second letter to state and local officials charged by State law with the responsibility of registering voters in each county covered by the "trigger" provisions of the Act. The letter set forth the principal criteria followed by the Attorney General in determining whether it was necessary to designate examiners for a particular county. The letter emphasized the responsibility of local officials in areas where discrimination in voting had been practiced to take affirmative action to afford all qualified persons an opportunity to register to vote in order to overcome the effects of past discrimination. The Attorney General further stated that local registration offices may have to remain open in excess of the times specified by state law where that was necessary to accomplish the objectives of the federal act.36/

36/ Letter from Attorney General Katzenbach (1/8/66), to state and local registration officials (addressee not indicated on sample).

On April 23, 1966, Attorney General Katzenbach wrote a letter to state and local election officials in every county in Alabama in anticipation of the Alabama primary election in May 1966. Among other things, this letter explained the procedure under the Voting Rights Act for the making of complaints by private citizens to federal examiners in counties in Alabama which had been designated for examiners by the Attorney General. This letter also set forth the criteria to be followed by the Department in determining whether it would be necessary to send Federal poll watchers to observe the election process in counties in which federal examiners had been designated.37/

37/ Letter from Attorney General Katzenbach (4/23/66), to state and local election officials in Alabama (addressee not indicated on sample.)

3. Major Judicial Decisions Under the Voting Rights Act of 1965

a. South Carolina v. Katzenbach.

On August 6, 1965, the day President Johnson signed the Voting Rights Act into law, Attorney General Katzenbach determined that South Carolina maintained a "test or device", as defined in the Act, on November 1, 1964. At the same time, the Director of the Census determined that less than 50 percent of the persons of voting age residing in South Carolina voted in the presidential election of November 1964. These determinations "triggered" the most important provisions of the Voting Rights Act with respect to South Carolina as of the date they were made.

On September 29, 1965, South Carolina sought leave to commence an original action in the United States Supreme Court against Attorney General Katzenbach to challenge the constitutionality of the Act and, if successful, to secure injunctive relief against its enforcement. On November 5, 1965, the Court granted South Carolina's motion for leave to file a complaint and directed that the answer be filed and the merits of the case briefed on an expedited schedule. Attorney General Katzenbach argued the case before the Court on January 18, 1966. The case was heard and determined on the basis of the pleadings and briefs. No evidence was adduced before the Court.

Other Southern states covered by the "triggering" provision of the Act were invited to and did participate in the case as amici curiae.

n The constitutionality of the four key provisions of the statute was in issue in this case -- (1) the "triggering" mechanism which determined the applicability of the substantive provisions; (2) a temporary suspension (five years) of so-called "tests or devices," such as literacy tests; (3) authority to use federal examiners to qualify applicants for registration; and (4) review by the Attorney General of substantive qualifications and practices and procedures relating to voting adopted after November 1964.

The Government urged that the provisions of the statute suspending the use voting "tests or devices" were constitutionally grounded on four basic premises:

(1) Congress had wide power under the Fifteenth Amendment to enact laws reasonably adapted to the objective of preventing denials of the right to vote on account of race.

(2) Congress may prohibit the use of any test or device where such use carries with it a substantial danger of racial discrimination, even though such a test, if used under other circumstances and in a nondiscriminatory fashion, might constitutionally be required by the State.

(3) Congress had sufficient basis for concluding that, where less than half the adult population participated in a presidential election in an area which maintained a "test or device" often used to deny the right to vote on account of race, there was so substantial a probability of abuse of the test as to warrant suspending it until freedom from abuse could be proved.

(4) The Act provides a fair and reasonable opportunity for states and political subdivisions covered by the triggering device to show that their "test or device" does not discriminate on account of race.

On March 7, 1966, the Supreme Court upheld every provision of the Voting Rights Act at issue in the case, including the four basic provisions of the statute. 383 U.S. 301.

b. KATZENBACH v. MORGAN

The principal provisions of the Voting Rights Act of 1965 were predicated on the Fifteenth Amendment and were designed to eradicate racial discrimination in voting. However, during the Senate debate on the Voting Rights Act, Senators Kennedy and Javits of New York introduced an amendment, later incorporated in section 4(e) of the Act, which prohibits the States from denying the right to vote to otherwise qualified Puerto Rican residents who are literate in Spanish, on account of their inability to read and write English. The sponsors of the amendment made it clear that the purpose of their amendment was to invalidate New York's English literacy requirement for voting, which had the effect of disfranchising thousands of Puerto Ricans living in New York City.

On August 6, 1965, a husband and wife who were registered voters in Kings County, New York brought suit against Attorney General Katzenbach in the federal district court in the District of Columbia seeking to have section 4(e) of the Act declared unconstitutional and to enjoin its enforcement. The complaint alleged that approximately half of the 700,000 migrants from Puerto Rico now living in New York City were literate only in Spanish and that many of these Spanish-speaking

residents lived in plaintiff's home county; that, under section 4(e) of the Act, many of these persons would be entitled to vote in New York City in Kings County; that such persons would be unfamiliar with information available on political issues in New York City because most such information was published only in English; and that, accordingly, the exercise of the franchise by such persons would dilute the effect of plaintiff's vote. The complaint further alleged that the New York City Board of Elections had announced its intention to comply with section 4(e) and was actually registering persons who were unable to read and write English.

On October 18, 1965, the case was argued and submitted for decision to a three-judge district court. On November 15, 1965, the district court decided that section 4(e) was unconstitutional, one judge dissenting. The majority opinion stated that "the qualifications of voters has been undeniably a matter regulated by the States. This subject is one over which the Congress has no power to legislate." The dissenting judge expressed the view that section 4(e) was constitutional under the territorial clause. The United States appealed.

In the Supreme Court, the United States urged two arguments in support of the validity of section 4(e): (1) that the statute was valid under the Congressional

power to implement the territorial clause and the treaty obligations of the United States; (2) that section 4(e) is "appropriate legislation" under the enforcement clause of the Fourteenth Amendment.

Prior to the Supreme Court's decision in Katzenbach v. Morgan, the scope of the power of Congress to enforce the Fourteenth Amendment created by section five of the Amendment was unclear. Moreover, the Supreme Court had earlier held, in the absence of any federal legislation on the subject, that a North Carolina English literacy test was valid on its face, there being no evidence in the record of discriminatory administration. Thus, the basic issue in Katzenbach v. Morgan was whether Congress had power to define the substantive reach of the Equal Protection Clause beyond subjects that would be recognized as protected by the courts, or whether Congress' role was limited to providing procedural rules and sanctions for the enforcement of judicially-recognized Fourteenth Amendment rights.

On June 13, 1966, the Supreme Court sustained section 4(e) of the Voting Rights Act, holding it a valid exercise of the broad power granted Congress to enforce the Fourteenth Amendment. 384 U.S. 641.

c. Litigation Against the Poll Tax--

United States v. Texas

In section 10 of the Voting Rights Act of 1965, the Congress found that the requirement of payment of a poll tax as a precondition to voting was unconstitutional and authorized and directed the Attorney General to institute litigation seeking to have the poll tax declared invalid by the federal courts. In accordance with this directive, the United States filed civil actions attacking the poll tax in Mississippi on August 7, 1965, the day after the Voting Rights Act was signed into law by President Johnson, and in Texas, Alabama, and Virginia, on August 10, 1965. Set forth below is a description of the Texas poll tax litigation.

Suit was brought by the United States pursuant to section 10(b) of the Voting Rights Act in 42 U.S.C. 1971 (c) against the State of Texas and election officials in Travis County, Texas, having responsibility for enforcement of the Texas poll tax laws. Among other matters, the complaint alleged that --

(1) When the Texas poll tax was adopted in 1902 one of its principal purposes was to disfranchise poor persons, many of whom found political expression through the Populist Party.

(2) Since 1902 the effect of the Texas poll tax has been to impose a greater burden on Negroes as a precondition to voting then upon white persons because the median income of Negroes in Texas is lower than the median income of white persons. These disparities in median income resulted from the fact that the State had for many years denied Negroes educational opportunities equal to those afforded white persons.

(3) The poll tax requirement classified potential voters between those who have paid and those who have not paid a tax which bears no rational relationship to voting. This classification is arbitrary and unreasonable and denies the equal protection of the laws to that class of persons who have not paid poll taxes.

The complaint concluded that, for these reasons, enforcement of the Texas poll tax denies qualified persons the right to vote in Texas in violation of the Federal Constitution, including the due process and equal protection clauses of the Fourteenth Amendment, and the Fifteenth Amendment, and in violation of 42 U.S.C. 1971(a). The complaint prayed that a statutory three-judge court be convened pursuant to 28 U.S.C. 2281 and that the Court

declare the Texas poll tax requirement unconstitutional and enjoin its enforcement. On the day the complaint was filed, the United States moved for an expedited hearing of the case on the merits, pursuant to section 10(c) of the Voting Rights Act.

On October 21, 1965, the Court entered a pre-trial order concerning the taking of depositions, certain stipulations entered into by the parties and a time schedule governing the completion of other pre-trial matters. At the same time, the trial date was set for November 14, 1965.

At the trial, the United States submitted voluminous evidence in the form of depositions, documents, and summaries of data concerning administration of the poll tax requirement in support of its arguments that the Texas poll tax was unconstitutional. An extensive trial brief supported by detailed explanatory appendices was submitted to the Court.

On February 9, 1966, the three-judge district court rendered its opinion, holding that the Texas poll tax was invalid under the due process clause of the Fourteenth Amendment because it bore no rational relationship to any legitimate State interest in the

conduct of elections. Although the Court found that an original purpose of the Texas poll tax had been to disfranchise Negroes and poor persons, it further held that this original invalid purpose was not enough to invalidate the tax and that the government had failed to prove that the poll tax, as it was currently administered, violated the Fifteenth Amendment. The Court found it unnecessary to consider the government's argument that the poll tax violated the equal protection clause by discriminating against poor persons generally. 252 F.Supp. 234 (W.D. Tex. 1966).

The district court entered an injunction against enforcement of the poll tax by the defendants but stayed the effect thereof to allow the parties time to apply for a stay of its order. On February 15, 1966, the State of Texas applied to Justice Black, Circuit Justice for the Fifth Circuit, for a stay of the district court's order. The United States opposed the State's application for a stay, and the application was subsequently denied.

On March 3, 1966, in United States v. Alabama, a three-judge federal district court in Alabama held that the Alabama poll tax violated the Fifteenth Amendment and enjoined its enforcement. 252 F.Supp. 95 (M.D. Ala.). On

March 24, 1966, the Supreme Court decided Harper v. Virginia State Board of Elections, holding that the requirement of a payment of a poll tax as a precondition to voting, violates the Equal Protection Clause. 383 U.S. 663. On May 2, 1966, the Supreme Court affirmed the decision striking down the Texas poll tax. 384 U.S. 155. Judgments invalidating the poll tax as a precondition to voting were subsequently entered in the government's cases in Mississippi and Virginia.