CIVIL RIGHTS ACT OF 1960

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

EIGHTY-SIXTH CONGRESS

SECOND SESSION

ON

H.R. 8601

AN ACT TO ENFORCE CONSTITUTIONAL RIGHTS, AND FOR OTHER PURPOSES

MARCH 28 AND 29, 1960

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MONDAY, MARCH 28, 1960

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 9:45 a.m., in room 2228, New Senate Office Building, Senator James O. Eastland (chairman) presiding.

Present: Senators Eastland, Kefauver, Johnston of South Carolina, Hennings, McClellan, O'Mahoney, Ervin, Carroll, Hart, Wiley, Dirksen, Hruska, Keating, and Cotton.

Also present: Senator Talmadge.

The CHAIRMAN. Senator Talmadge, proceed.

Senator TALMADGE. Mr. Chairman and distinguished members of the Judiciary Committee, if I may out of order present one of my warm personal friends and distinguished constituents who will follow the Attorney General as a witness this morning. Charles J. Bloch is no stranger to your committee. He has testified before you on many occasions. He is recognized throughout the length and breadth of America as one of the foremost scholars of our times. He is an author of note. He has contributed many legal treatises to the American Bar Journal. He has written at least one book on constitutional law.

He has had a wide field of civic and political service in my State. He has been a member of the board of regents which operates the highest educational institutions of Georgia. He has been a member of the general assembly of my State. He has been a Democratic Party official of my State. He has held many honors both within and without the State.

I have the honor of presenting to you my warm personal friend, my constituent, one of the most able legal scholars in America today, Charles J. Bloch.

If I may at this time, Mr. Chairman, withdraw. I appreciate the courtesy of this committee.

Mr. BLOCH. Thank you, Senator, and I am honored to be here.

The CHAIRMAN. Gentlemen, we have the Attorney General with us. You may proceed, sir.

STATEMENT OF THE HONORABLE WILLIAM P. ROGERS, ATTORNEY GENERAL OF THE UNITED STATES; ACCOMPANIED BY LAWRENCE E. WALSH, DEPUTY ATTORNEY GENERAL

Mr. ROGERS. Mr. Chairman and gentlemen, I have a prepared statement here which, with the permission of the committee, we would like to read, and if you do not mind, I would like to have Judge Walsh read it. I have had a little laryngitis problem and I

want to save my voice to answer questions. So if that is agreeable with the committee, I would appreciate it if you would permit Judge Walsh to read the statement.

Senator CARROLL. You have copies of the statement?

Mr. ROGERS. Yes.

Mr. WALSH. Mr. Chairman, shall I proceed?

It is a basic premise of our society that every individual shall enjoy, in full measure, the rights and immunities guaranteed to him by the Constitution of the United States. That principle is central to our democratic system. Yet notwithstanding the clarity with which the principle has been announced, the ideal remains in some areas of our country and for many citizens of our Nation largely unfilled.

This committee now has under consideration legislative proposals recently approved by the House of Representatives in H.R. 8601. Those proposals are meant to assist in the elimination of types of discrimination based on race or color. Each of the proposals has already received careful and exhaustive study. Each treats an area where there is a proven need for additional legislation. Each is practical and effective. Each deserves prompt and favorable consideration.

First, I would like to discuss the provisions in the bill dealing with voting rights and then the remaining sections of the bill.

1. VOTING REFEREES

The voting referee provision (title VI) of H.R. 8601——

Senator JOHNSTON. May I ask one question. Why do you not take up the bill in its logical order?

Mr. WALSH. Well, Senator, the reason for grouping it this way is because it would be more helpful to the committee. There are two sections dealing with voting because there are some general principles with respect to discrimination in voting that would be equally applicable to both.

Senator JOHNSTON. The reason I make that statement is because there has been so much talk in the general public and a great many of the people have been led to believe there is nothing but voting in the bill, and I believe that leads us along the same trail.

Mr. WALSH. As long as the committee is not misled, why, if it is satisfactory to the committee, I will proceed this way.

Senator JOHNSTON. You go ahead like you want to.

Mr. WALSH. Thank you, sir.

The CHAIRMAN. Before you proceed, the bill, H.R. 8601 will be inserted in the record at this point.

(H.R. 8601 is as follows.)

[H.R. 8601, 86th Cong., 2d sess.]

AN ACT To enforce constitutional rights, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Civil Rights Act of 1959."

TITLE I

OBSTRUCTION OF COURT ORDERS

SEC. 101. Chapter 73 of title 18, United States Code, is amended by adding at the end thereof a new section as follows:

"§ 1509. Obstruction of certain court orders

"Whoever corruptly, or by threats or force, or by any threatening letter or communication, willfully prevents, obstructs, impedes, or interferes with or willfully endeavors to prevent, obstruct, impede, or interfere with the due exercise of rights or the performance of duties under any order, judgment, or decree of a court of the United States which (1) directs that any person or class of persons shall be admitted to any public school, or (2) directs that any person or class of persons shall not be denied admission to any public school because of race or color, or (3) approves any plan of any State or local agency the effect of which is or will be to permit any person or class of persons to be admitted to any public school, shall be fined not more than $1,000 or imprisoned not more than sixty days, or both.

"No injunctive or other civil relief against the conduct made criminal by this section shall be denied on the ground that such conduct is a crime; provided that any such fine or imprisonment imposed for violation of such injunction shall be concurrent with and not consecutive or supplemental to any criminal penalty imposed hereunder.

"This section shall not apply to an act of a student, officer, or employee of a school if such act is done pursuant to the direction of, or is subject to disciplinary action by, an officer of such school."

SEC. 102. The analysis of chapter 73 of such title is amended by adding at the end thereof the following:

"1509. Obstruction of certain court orders."

TITLE II

FLIGHT TO AVOID PROSECUTION FOR DAMAGING OR DESTROYING ANY BUILDING OR OTHER REAL OR PERSONAL PROPERTY OR TO AVOID PROSECUTION FOR COMMUNICATING ANY THREAT OR FALSE INFORMATION WITH RESPECT TO ANY ATTEMPT TO COMMIT SUCH AN ACT

SEC. 201. Chapter 49 of title 18, United States Code, is amended by adding at the end thereof a new section as follows:

"§ 1074. Flight to avoid prosecution for damaging or destroying any building or other real or personal property or to avoid prosecution for communicating any threat or false information with respect to any attempt to commit such an act

"(a) Whoever moves or travel in interstate or foreign commerce with intent either (1) to avoid prosecution, or custody, or confinement after conviction, under the laws of the place from which he flees, for willfully attempting to or damaging or destroying by fire or explosive any building, structure, facility, vehicle, dwelling house, synagogue, church, religious center or educational institution, public or private, or (2) to avoid giving testimony in any criminal proceeding relating to any such offense shall be fined not more than $5,000 or imprisoned not more than five years, or both.

"(b) Whoever moves or travels in interstate or foreign commerce with intent either, (1) to avoid prosecution, or custody, or confinement after conviction, under he laws of the place from which he flees, for willfully imparting or conveying, or causing to be imparted or conveyed, through the use of the mail, telephone, telegraph, or other instrument of commerce, or any other mode of communication, any threat or false information, knowing the same to be false, concerning an attempt or alleged attempt being made or to be made, to perform any act to damage or destroy by fire or explosive any building, structure, facility, vehicle, dwelling house, synagogue, church, religious center or educational institution, public or private, or, (2) to avoid giving testimony in any criminal proceeding relating to such an offense, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

"(c) Violations of this section may be prosecuted in the Federal judicial district in which the original crime was alleged to have been committed or in which the person was held in custody or confinement: *Provided, however*, That this section shall not be construed as indicating an intent on the part of Congress to prevent any State, Territory, Commonwealth, or possession of the United States of any jurisdiction over any offense over which they would have jurisdiction in the absence of such section."

SEC. 202. The analysis of chapter 49 of such title is amended by adding thereto the following:

"1074. Flight to avoid prosecution for damaging or destroying any building or other real or personal property or to avoid prosecution for communicating any threat or false information with respect to any attempt to commit such an act."

TITLE III

FEDERAL ELECTION RECORDS

SEC. 301. Every officer of election shall retain and preserve, for a period of two years from the date of any general, special, or primary election of which candidates for the office of President, Vice President, presidential elector, Member of the Senate, Member of the House of Representatives, or Resident Commissioner from the Commonwealth of Puerto Rico are voted for, all records and papers which come into his possession relating to any application, registration, payment of poll tax, or other act requisite to voting in such election, except that, when required by law, such records and papers may be delivered to another officer of election and except that, if a State or the Commonwealth of Puerto Rico designates a custodian to retain and preserve these records and papers at a specified place, then such records and papers may be deposited with such custodian, and the duty to retain and preserve any record or paper so deposited shall devolve upon such custodian. Any officer of election or custodian who willfully fails to comply with this section shall be fined not more than $1,000 or imprisoned not more than one year, or both.

SEC. 302. Any person, whether or not an officer of election or custodian, who willfully steals, destroys, conceals, mutilates, or alters any record or paper required by section 301 to be retained and preserved shall be fined not more than $1,000 or imprisoned not more than one year, or both.

SEC. 303. Any record or paper required by section 301 to be retained and preserved shall, upon demand in writing by the Attorney General or his representative directed to the person having custody, possession, or control of such record or paper, be made available for inspection, reproduction, and copying by the Attorney General or his representative. This demand will contain a statement of the basis and the purpose therefor.

SEC. 304. Any record or paper demanded pursuant to section 303 shall be produced for inspection, reproduction, and copying at the principal office of the person upon whom such demand is made or at an office of the United States attorney in the district in which such records or papers are located.

SEC. 305. Unless otherwise ordered by a court of the United States, neither the Attorney General nor any employee of the Department of Justice, nor any other representative of the Attorney General, shall disclose any record or paper produced pursuant to this title, or any reproduction or copy, except to Congress and any committee thereof, governmental agencies, and in the presentation of any case or proceeding before any court or grand jury.

SEC. 306. The United States district court for the district in which a demand is made pursuant to section 303, or in which a record or paper so demanded is located, shall have jurisdiction by appropriate process to compel the production of such record or paper.

SEC. 307. As used in this title, the term "officer of election" means any person who, under color of any Federal, State, Commonwealth, or local law, statute, ordinance, regulation, authority, custom, or usage, performs or is authorized to perform any function, duty, or task in connection with any application, registration, payment of poll tax, or other act requisite to voting in any general, special, or primary election at which votes are cast for candidates for the office of President, Vice President, presidential elector, Member of the Senate, Member of the House of Representatives, or Resident Commissioner from the Commonwealth of Puerto Rico.

TITLE IV

CIVIL RIGHTS COMMISSION EXTENDED FOR TWO YEARS

SEC. 401. Section 105 of the Civil Rights Act of 1957 (42 U.S.C. Supp. V 1975d) (71 Stat. 635) is amended by adding the following new subsection at the end thereof:

"(h) Without limiting the generality of the foregoing, each member of the Commission shall have the power and authority to administer oaths or take statements of witnesses under affirmation."

SEC. 402. Section 105(a) of the Civil Rights Act of 1957 (42 U.S.C. Supp. V 1975d(a)) (71 Stat. 635) is amended by striking out the words "in accordance with the civil service and classification laws," and inserting in lieu thereof the words "without regard to the provisions of the civil service laws and the Classification Act of 1949, as amended."

TITLE V

EDUCATION OF CHILDREN OF MEMBERS OF ARMED FORCES

SEC. 501. (a) Subsection (a) of section 6 of the Act of September 30, 1950 (Public Law 874, Eighty-first Congress), as amended, relating to arrangements for the provision of free public education for children residing on Federal property where local educational agencies are unable to provide such education, is amended by inserting after the first sentence the following new sentence: "Such arrangements to provide free public education may also be made for children of members of the Armed Forces on active duty, if the schools in which free public education is usually provided for such children are made unavailable to them as a result of official action by State or local governmental authority and it is the judgment of the Commissioner, after he has consulted with the appropriate State educational agency, that no local educational agency is able to provide suitable free public education for such children."

(b)(1) The first sentence of subsection (d) of such section 6 is amended by adding before the period at the end thereof: "or, in the case of children to whom the second sentence of subsection (a) applies, with the head of any Federal department or agency having jurisdiction over the parents of some or all of such children".

(2) The second sentence of such subsection (d) is amended by striking out "Arrangements" and inserting in lieu thereof "Except where the Commissioner makes arrangements pursuant to the second sentence of subsection (a), arrangements".

SEC. 502. (a) Section 10 of the Act of September 23, 1950 (Public Law 815, Eighty-first Congress), as amended, relating to arrangements for facilities for the provision of free public education for children residing on Federal property where local educational agencies are unable to provide such education, is amended by inserting after the first sentence the following new sentence: "Such arrangements may also be made to provide, on a temporary basis, minimum school facilities for children of members of the Armed Forces on active duty, if the schools in which free public education is usually provided for such children are made unavailable to them as a result of official action by State or local governmental authority and it is the judgment of the Commissioner, after he has consulted with the appropriate State educational agency, that no local educational agency is able to provide suitable free public education for such children."

(b) Section 10 of such Act is further amended by inserting "(a)" after "SEC. 10.", and by adding at the end thereof the following new subsection:

"(b) Whenever the Commissioner determines that—

"(1) any school facilities with respect to which payments were made under section 7 of this Act, pursuant to an application approved under section 6 after the enactment of this subsection, are not being used by a local educational agency for the provision of free public education, and if it is the judgment of the Commissioner, after he has consulted with the appropriate State educational agency, that no local educational agency is able to provide such free public education, and

"(2) such facilities are needed in the provision of minimum facilities under subsection (a),

he shall notify such agencies of such determination and shall thereupon have authority to secure possession and use such facilities for the purposes of subsection (a) pursuant to an agreement between such agencies and the Commissioner which includes such terms and conditions as the Commissioner may determine to be necessary to carry out the provisions of this section."

TITLE VI

SEC. 601. That section 2004 of the Revised Statutes (42 U.S.C. 1971), as amended by section 131 of the Civil Rights Act of 1957 (71 Stat. 637), is amended as follows:

(a) Add the following as subsection (e) and designate the present subsection (e) as subsection "(f)":

"In any proceeding instituted pursuant to subsection (c) in the event the court finds that any person has been deprived on account of race or color of any right or privilege secured by subsection (a), the court shall upon request of the Attorney General and after each party has been given notice and the opportunity to be heard make a finding whether such deprivation was or is pursuant to a pattern or practice. If the court finds such pattern or practice, any person of such race or color resident within the affected area shall, for one year and thereafter until the court subsequently finds that such pattern or practice has ceased, be entitled, upon his application therefor, to an order declaring him qualified to vote, upon proof that at any election or elections (1) he is qualified under State law to vote, and (2) he has since such finding by the court been (a) deprived of or denied under color of law the opportunity to register to vote or otherwise to qualify to vote, or (b) found not qualified to vote by any person acting under color of law. Such order shall be effective as to any election held within the longest period for which such applicant could have been registered or otherwise qualified under State law at which the applicant's qualifications would under State law entitle him to vote.

"Notwithstanding any inconsistent provision of State law or the action of any State officer or court, an applicant so declared qualified to vote shall be permitted to vote in any such election. The Attorney General shall cause to be transmitted certified copies of such order to the appropriate election officers. The refusal by any such officer with notice of such order to permit any person so declared qualified to vote to vote at an appropriate election shall constitute contempt of court.

"An application for an order pursuant to this subsection shall be heard within ten days, and the execution of any order disposing of such application shall not be stayed if the effect of such stay would be to delay the effectiveness of the order beyond the date of any election at which the applicant would otherwise be enabled to vote.

"The court may appoint one or more persons who are qualified voters in the judicial district, to be known as voting referees, to serve for such period as the court shall determine, to receive such applications and to take evidence and report to the court findings as to whether or not at any election or elections (1) any such applicant is qualified under State law to vote, and (2) he has since the finding by the court heretofore specified been (a) deprived of or denied under color of law the opportunity to register to vote or otherwise to qualify to vote, or (b) found not qualified to vote by any person acting under color of law. In a proceeding before a voting referee, the applicant shall be heard ex parte. His statement under oath shall be prima facie evidence as to his age, residence, and his prior efforts to register or otherwise qualify to vote. Where proof of literacy or an understanding of other subjects is required by valid provisions of State law, the answer of the applicant, if written, shall be included in such report to the court; if oral, it shall be taken down stenographically and a transcription included in such report to the court.

"Upon receipt of such report, the court shall cause the Attorney General to transmit a copy thereof to the State attorney general and to each party to such proceeding together with an order to show cause within ten days, or such shorter time as the court may fix, why an order of the court should not be entered in accordance with such report. Upon the expiration of such period, such order shall be entered unless prior to that time there has been filed with the court and served upon all parties a statement of exceptions to such report. Exceptions as to matters of fact shall be considered only if supported by a duly verified copy of a public record or by affidavit of persons having personal knowledge of such facts or by statements or matters contained in such report; those relating to matters of law shall be supported by an apropriate memorandum of law. The issues of fact and law raised by such exceptions shall be determined by the court or, if the due and speedy administration of justice requires, they may be referred to the voting referee to determine in accordance with procedures prescribed by the court. A hearing as to an issue of fact shall be held only in the event that the proof in support of the exception disclose the existence of a genuine issue of material fact. The applicant's literacy and understanding of other subjects shall be determined solely on the basis of answers included in the report of the voting referee.

"The court, or at its direction the voting referee, shall issue to each applicant so declared qualified a certificate identifying the holder thereof as a person so qualified.

"Any voting referee appointed by the court pursuant to this subsection shall to the extent not inconsistent herewith have all the powers conferred upon a master by rule 53(c) of the Federal Rules of Civil Procedure. The compensation to be allowed to any persons appointed by the court pursuant to this subsection shall be fixed by the court and shall be payable by the United States.

"Applications pursuant to this subsection shall be determined expeditiously. In the case of any application filed twenty or more days prior to an election which is undetermined by the time of such election, the court shall issue an order authorizing the applicant to vote provisionally. In the case of an application filed within twenty days prior to an election, the court, in its discretion, may make such an order. In either case the order shall make appropriate provision for the impounding of the applicant's ballot pending determination of the application. The court may take any other action, and may authorize such referee or such other person as it may designate to take any other action, appropriate or necessary to carry out the provisions of this subsection and to enforce its decrees. This subsection shall in no way be construed as a limitation upon the existing powers of the court.

"When used in the subsection, the word 'vote' includes all action necessary to make a vote effective including, but not limited to, registration or other action required by State law prerequisite to voting, casting a ballot, and having such ballot counted and included in the appropriate totals of votes cast with respect to candidates for public office and propositions for which votes are received in an election; the words 'affected area' shall mean any subdivision of the State in which the laws of the State relating to voting are or have been to any extent administered by a person found in the proceeding to have violated subsection (a); and the words 'qualified under State law' shall mean qualified according to the laws, customs, or usages of the State, and shall not, in any event, imply qualifications more stringent than those used by the persons found in the proceeding to have violated subsection (a) in qualifying persons other than those of the race or color against which the pattern or practice of discrimination was found to exist."

(b) Add the following sentence at the end of subsection (c):

"Whenever, in a proceeding instituted under this subsection any official of a State or subdivision thereof is alleged to have committed any act or practice constituting a deprivation of any right or privilege secured by subsection (a), the act or practice shall also be deemed that of the State and the State may be joined as a party defendant and, if, prior to the institution of such proceeding, such official has resigned or has been relieved of his office and no successor has assumed such office, the proceeding may be instituted against the State."

TITLE VII

SEPARABILITY

SEC. 701. If any provision of this Act is held invalid, the remainder of this Act shall not be affected thereby.

Passed the House of Representatives March 24, 1960.

Attest: RALPH R. ROBERTS,
Clerk.

Mr. WALSH. The voting referee provision (title VI) of H.R. 8601 is one of its key provisions. Its ultimate objective is to secure to all qualified persons the right to vote and to have that vote counted.

The bill provides that in any voting rights case instituted under the Civil Rights Act of 1957, which seeks relief from racial discrimination under color of law, the court, upon request by the Attorney General, must make a finding as to whether the discrimination was pursuant to a pattern or practice. If such pattern or practice is found, the court would be authorized to issue supplemental orders including therein the names of persons whom it found qualified to vote and who had been unable to qualify to vote before any appropriate State official. To assist it in passing on the qualifications

of such persons, the court could appoint officers to be known as voting referees.

The bill sets forth in detail the procedures to be followed. Any application for an order finding a person qualified to vote must be heard within 10 days and the order may not be stayed if such stay would delay its effectiveness beyond the date of any election in which the applicant would otherwise be enabled to vote.

The proceedings before the voting referee would be ex parte, but exceptions to the referee's report may be made to the court. Such exceptions must be filed with the court within 10 days after notice of the referee's report has been served on the State officials.

In the case of any application to qualify to vote filed 20 or more days prior to an election which is undetermined by the time of such election, the court shall issue an order authorizing the applicant to vote provisionally, and shall make appropriate provision for the impounding of the applicant's ballot pending determination of the application.

After an order of court upon the report has been entered, the Attorney General transmits certified copies thereof to all appropriate State election officials. Any election official who has notice of the order and refuses to permit an individual covered by the order to vote or to have his vote counted will be subject to contempt proceedings, as provided in the Civil Rights Act of 1957.

To insure effective compliance, the bill further permits the court to authorize the voting referees, or other persons appointed by the court, to take any other action appropriate or necessary to enforce its decrees.

Subsection (b) of the bill provides that where the complaint in a proceeding brought under 1971 (c) alleges that any State official or agency of the State has committed illegal acts and practices which deprive persons of their right to vote on account of race or color, the act or practice is to be deemed the act or practice of the State itself. Under this provision if the suit has been instituted the State may be joined as a party, or if the local official has resigned and no successor has been appointed the suit may be instituted against the State itself. Inclusion of the provision in the bill is merely to clarify the authority which exists under the 1957 act, since a question has been raised concerning this authority in the case of *United States* v. *Alabama*. This provision merely reaffirms in explicit terms the authority granted by the 1957 act.

To summarize the merits of this proposal:

1. The bill would operate within the established judicial framework and would supplement existing legislation. It thus avoids the constitutional and legal questions which would arise under plans based upon a determination by a nonjudicial body.

2. The bill would apply to both State and Federal elections.

3. It would be effective because the proceeding extends through the entire voting process. It is not terminated by the mere act of registration.

4. It would be enforcible because there would be an outstanding court order requiring State officials to permit Negroes named in the order to vote. Any failure to comply with an order would permit the

court to proceed immediately to hold State officials in contempt and impose a sentence of 45 days in jail or $1,000 fine.

5. The bill would not fragmentize the election process. It would leave the election procedures in the States where they have always been, subject only to their being administered in a manner consistent with the Constitution.

Turning to the second broad proposal of the bill:

2. FEDERAL ELECTION RECORDS

Two recent decisions of the Supreme Court have established a firm legal and constitutional basis for the Civil Rights Act of 1957. *United States* v. *Raines*, 28 U.S. Law Week 4147; *United States* v. *Thomas*, 28 U.S. Law Week 4163.

However, a practical problem of great significance to truly effective enforcement of the statute remains unresolved. In many cases, discrimination in registration can be proved only by comparing the records of Negro applicants with those of white applicants. At the present time, the Government lacks any procedure by which to compel the production of these records before suit is filed.

To be sure, after an action has been initiated, records can be subpenaed and depositions can be taken from registrars and registered voters. But if this approach were adopted, the United States would often be forced to file suits merely on information and belief in order to determine whether or not a case of discriminatory treatment can be made out.

Experience has shown that the enforcement agencies of the Federal Government cannot always depend upon the voluntary cooperation of the State voting officials even to permit the inspection of the necessary documents, much less to allow their removal for copying. Last year the State of Alabama passed a statute providing for the destruction of records 30 days after an application to register is denied unless an appeal has been taken to the State board. A similar measure has been passed by the Georgia legislature. Legal officers of some of the States have openly advised voting officials not to cooperate with Federal law enforcement officers or with the FBI.

Title III would vest in the Attorney General authority to require the production of records and papers relating to any general, special or primary election involving candidates for Federal office. It also requires the retention and preservation of such records for 2 years. Willful failure to retain and preserve such records or their willful theft, destruction, concealment, mutilation, or alteration is made an offense punishable by fine of not more than $1,000 or imprisonment for not more than 1 year or both.

In the event of nonproduction, jurisdiction is conferred upon the Federal District Courts to resolve any dispute which might arise in connection with the exercise of the authority conferred. Congress clearly has the power to enact such legislation pursuant to the provisions of article I, section 4, of the Constitution. *Burroughs and Cannon* v. *United States*, 290 U.S. 534 (1934).

This proposal differs from that recommended by the President in that it requires a retention of records for 2 years rather than 3, does not provide for an increased penalty for willful theft, concealment, mutilation, destruction, or alteration of records, requires the Attorney

General to state the basis of any demand for records and the purpose for which he is making the demand, and specifically authorizes disclosure by him to the Congress, congressional committees, and government agencies.

The Department does not object to these modifications and enactment of this proposal is essential to the effective enforcement of the provisions of the Civil Rights Act of 1957.

Turning to the next main title of the bill:

3. BOMBINGS

In recent years there have been many incidents involving bombings and attempted bombings of schools and religious institutions. Some of these incidents you may remember, but I shall cite a few examples for the record.

Bombings have occurred at Clinton High School, Clinton, Tenn. (October 5, 1958); at the Hebrew Benevolent Congregation, Atlanta, Ga. (October 12, 1958); at Jewish Temple Aushai Emeth, Peoria, Ill. (October 14, 1958); at Osage Junior High School, Osage, W. Va. (November 10, 1958); at Orleans Parish School Board Building, New Orleans, La. (November 23, 1958); at Heizer Junior High School, Hobbs, N. Mex. (November 23, 1958); and at Palma High School, Salinas, Calif. (January 1, 1959). And only a few days ago, a synagogue was bombed in Gadsden, Ala.

There has been no lack of effort by State law enforcement agencies in their endeavor to prosecute these crimes. Further, under existing law the Federal Bureau of Investigation makes available to these agencies the facilities of its laboratory and technical experts.

Accordingly, it is not recommended that State law enforcement officers be in any sense superseded in their primary responsibility in this regard.

To facilitate, however, the investigation and prosecution of these cases in which there is widespread interstate activity it is recommended that it be made a Federal crime to travel in interstate commerce to avoid prosecution, custody or confinement for damaging or destroying or attempting to damage or destroy by fire or explosive any religious or educational property.

If title II becomes law, there will be no interference with responsibility of State law enforcement agencies for prosecuting the State crimes involved but there will be an undisputable basis for Federal participation in the investigation of crimes of an interstate nature.

Although this provision was amended in the House to broaden the original recommendation of the administration, it is believed that it would be more desirable for the Senate to pass the bill as presently drawn than to amend it. The Department does not believe that it was intended to impose primary responsibility upon the Federal Government for threats to damage or destroy buildings by fire or explosives. Most threats are hoaxes. They average 200 a month. In the absence of preliminary indication that they were the acts of a fugitive, the Department would not construe the provisions of the bill relating to threats to require an expansion of its present responsibilities.

It should be noted, moreover, that Representative Cramer, the sponsor of the "threat" amendment in the House, has recognized this prob-

lem, for he has stated that this bill gives the Federal authorities discretion as to whether the particular case required investigation. (106 Daily Cong. Rec. 5928)

The fourth major title of the bill relates to:

4. OBSTRUCTION OF COURT ORDERS IN SCHOOL DESEGREGATION CASES

H.R. 8601, title I, deals with obstruction of Federal court orders in school desegregation cases. It would impose a fine of not more than $1,000 or imprisonment for not more than 60 days, or both, upon any person who corruptly, or by threats or force, wilfully prevents, or endeavors to prevent, the due exercise of rights or the performance of duties under any school desegregation order entered by a Federal court. Exempted from the application of the title are acts of any student, officer or employee of a school done pursuant to the direction of, or subject to disciplinary action by, an officer of such school.

Title I of H.R. 8601 is quite similar to a recommendation made last year by the President to the Congress. The House version differs in only three particulars from that recommendation.

First, under the House version, the crime here defined is made a misdemeanor, not a felony. In my view, this change in no way impairs the effectiveness of the title. True the conduct proscribed is closely analogous to that punishable as a felony by the present Obstruction of Justice Statute (18 U.S.C. 1503).

However, reduction of the penalty from felony to misdemeanor status will in no way prevent prompt arrests for violation of the title, and, indeed, will produce the advantage of permitting the United States to proceed by way of information as well as indictment.

A second change made by the House is the insertion of the word "public" before the word "school" each time "school" appears. This was done to make clear what was always intended—that the title would apply only to cases involving desegregation of schools operating under color of law.

The third change made by the House is the addition of a proviso that the punishment imposed under the title not be consecutive or supplemental to any criminal contempt penalties imposed for violation of a school desegregation injunction.

I want to make clear to this committee that I have no objection to any of the House modifications.

The need is clear for a Federal criminal statute dealing with obstruction of school desegregation orders. In the 5 years since the implementation decision of the Supreme Court in the original school desegregation cases, the Federal courts have entered approximately 40 orders requiring desegregation or approving State or community plans of desegregation in public schools. At least 10 of those orders have been met by violence or threats of violence from persons who were neither parties to the litigation nor acting in concert with parties to the litigation.

As I reminded a subcommittee of this committee a year ago, the most extreme example of this type of interference with a Federal court order occurred at Little Rock in 1957. Notwithstanding the presence of the local police force, a large mob made it necessary to remove the nine Negro children who had attempted to exercise their

rights to attend a public school ordered desegregated by a Federal court.

Existing law is inadequate to deal effectively with such a situation. Our Obstruction of Justice Statute (18 U.S.C. 1503) comes into play only when persons act to disturb the ordinary and proper functions of a court in a pending case. Under title I we are trying to reach deliberate attempts by force, or threats of force, to frustrate Federal court orders which have finally settled constitutional rights.

The contempt power is equally inadequate to deal effectively with violent opposition to school desegregation decrees. As I testified last year, that power is of dubious value against persons who are neither parties to litigation nor provably acting in concert with such parties (Rule 65(d), Fed. R. Civ. P.).

To be sure, once a mob has formed, it is possible to return to court and seek an injunction against named members of a mob. But where experience has shown a strong likelihood of violent resistance to Federal court orders, the United States clearly should have the power to act promptly to arrest instigators of resort to force and abuse.

Turning to the next title remaining in the House bill:

5. EDUCATION OF CHILDREN OF MEMBERS OF ARMED FORCES

I should like to consider now the children of our citizens who are serving in the Armed Forces in areas which still maintain total or extensive segregation to the public schools. Approximately 40 percent of the total military personnel within the United States, it is estimated, live in such areas. Five States maintain complete segregation in their elementary and secondary schools. In two States, some desegregation has occurred as a result of litigation instituted by Negro parents, and in four States the extent of desegregation is minimal.

Resistance to desegregation of the schools in these areas has resulted in the closing of some public schools. Even where the public schools have not been closed, the children of our Negro soldiers, sailors, and airmen have been deprived of their constitutional rights by the refusal of local school officials to admit them to schools which would logically serve the area of their residence. This has occurred despite the fact that Federal funds are used to assist in the construction and maintenance of schools in so-called Federally-impacted areas.

It is indeed incongruous that those who, through no choice of their own, are assigned to off-base quarters in areas which maintain segregated schools can be and are being deprived of the enjoyment of their constitutional rights, in spite of the fact that racial segregation in the Armed Forces is forbidden by Executive Order.

Title V of H.R. 8601 was originally designed to remedy this entire situation. The proposal of the President and title V both authorize the Commissioner of Education to provide for the education of all children of military personnel, whether living on Federal property or not, if local facilities are unavailable.

However, while the President's proposal would permit the Commissioner to use for a fair rental school facilities constructed with Federal aid if they are not being used for free public education, title V provides for such use only if an agreement can be reached between the Commission and the local agencies as to use of the buildings.

While I believe the President's original proposal to be preferable, nonetheless title V will assist in assuring education facilities to the

children of members of our Armed Forces, and I, therefore, urge its enactment.

The last remaining title in the House bill is the:

6. COMMISSION ON CIVIL RIGHTS

The Commission was, of course, extended at the last session, and this deals with two remaining parts of the original title.

Title IV of the bill amends the portion of the Civil Rights Act of 1957 which established the Commission on Civil Rights. It deals with two comparatively minor administrative matters.

First, the Commissioners are authorized to administer oaths and take statements of witnesses under affirmation. The amendment merely clarifies and makes this power explicit.

The second section eliminates the requirement that Commission staff personnel be hired pursuant to the civil service classification laws so as to afford more personnel flexibility to the Commission in keeping with its temporary status and statutory purposes. Enactment is recommended.

I turn now to two proposals which the President has urged the Congress to enact and which the House of Representatives failed to include in H.R. 8601.

The need exists for Federal assistance to those states and localities which prior to the 1954 decision in *Brown* v. *Board of Education* practiced segregation in their schools and are now undertaking desegregation. Approximately 30 cases are pending in Federal court in which Negroes are seeking admission to presently segregated schools. Others are to be expected.

The report of the Civil Rights Commission, its hearings at Nashville, and studies of experts in the field, stress the fact that no one pattern of desegregation is adaptable to all communities. Whatever method is adopted, however, careful planning and community education are basic to success. State departments of education will have additional services to render in assisting communities to formulate and effect workable plans.

Much help can be gained by the technique of using professional conferences and workshops on both a local and statewide level and employing special nonteaching personnel who can take an active role in the practical preparation for a step, admittedly not easy, for the States and localities involved. Additional expense must necessarily be involved in successfully carrying out a desegregation program.

If this committee decides to amend the House bill, I would urge that it reinstate the President's recommendation for technical and financial aid to states and localities incurring special expenses in connection with the development of policies and programs looking to desegregation in their public schools. The proposal is contained in section 4 of H.R. 8315.

The other recommendation of the President not contained in the House bill is that which would give statutory authorization for the President's Committee on Government Contracts. This Committee has as its object the implementation of the standard clause in Government contracts which provides that employment for work thereunder shall be without discrimination because of race, religion, color, or national origin. This clause or one substantially similar has been

incorporated in all Government contracts since 1941. The Committee has been in existence since August 1953. The present authority for both the clause and the Committee lies in Executive orders issued by President Eisenhower.

Under existing law each Government contract contains a clause in substance as follows:

> In connection with the performance of work under this contract, the contractor agrees not to discriminate against any employee or applicant for employment because of race, religion, color, or national origin.

By Presidential order each Government contracting agency is required to provide for compliance with this clause in the same manner it provides for compliance with other provisions of Government contracts. To coordinate their efforts the President created the Committee on Government Contracts, which is composed of representatives of the Atomic Energy Commission, Department of Commerce, Department of Defense, Department of Justice, Department of Labor, General Services Administration, and eight public members.

The Committee's functions are alined in three general programs:

1. COMPLAINT REVIEW

It reviews action on complaints from persons who claim discrimination in employment by Government contractors. Since its creation, the Committee has received approximately 600 complaints over which it had jurisdiction. Sixty percent of these have been satisfactorily concluded. Forty percent are still under active investigation or negotiation.

2. COMPLIANCE SURVEYS

At the request of the Committee, contracting agencies have surveyed approximately 500 plants each year since 1957. Most of these plants are located in communities which have a Negro population of over 50,000.

In this connection, it has sought to determine those plants which do not employ Negroes and the extent of discrimination in those which do employ Negroes, but exclude them from employment in certain job categories such as the professions, skilled mechanics, office employment, and apprenticeship programs.

3. EDUCATION PROGRAM

The committee also conducts meetings to coordinate activities by other groups interested in the elimination of racial and religious discrimination in employment. Among other things, it held in Washington a conference of 500 religious leaders, the largest group of this sort ever assembled by a Government agency.

After 7 years of work it is desirable that the Committee effort be ratified by the Congress. This important Committee should become a permanent one with regular appropriations. Although the Committee could continue in its present form, this action by Congress would be of great signnificance in showing congressional recognition and affirmation of the principle that employment for Government work must be free from racial bias.

Congress should affirm this principle because—

1. It is just that those who are taxed for Government programs have equal opportunity to compete for the opportunity to serve those programs;

2. This country cannot afford to waste the skills of its labor force by arbitrary restrictions which prevent the most skillful from filling the most demanding jobs;

3. Racial discrimination in all of its ugly forms can have no more telling impact that in arbitrary job limitations. To be, by birth, denied work is intolerable and inexplicable on other than a shameful basis, to one's children or to the world, white or non-white;

4. The contractors who profit from Government work should be the leaders in eliminating this practice.

If this committee, or the Senate itself, decides to amend the House bill, this section should be of primary concern. Certainly there is nothing of more importance in the field of equality for minority groups than equal job opportunity.

In conclusion, then, I strongly urge this committee to act favorably on the House bill, and if it decides to amend the House bill, to include these two important provisions which the President has recommended.

The CHAIRMAN. The Attorney General has stated that he would be present and answer questions.

Senator Kefauver.

Senator KEFAUVER. Thank you, Mr. Chairman.

Mr. Attorney General, in the first section of voting referees, does the original finding of a pattern or lack of a pattern or discrimination, is it contemplated that that be by the judge or does the use of the word "court"; is that broad enough to include a commissioner or a referee?

Mr. ROGERS. No; that would just include the judge himself, Senator.

Senator KEFAUVER. I had one district judge who thought that that might, the use of the word "court" might make it possible for that decision to be made by a commissioner, and he hoped that that might be the case, because he would rather have some objection as sitting as a magistrate, so to speak, in making the determination and the case might come back to him later on.

Mr. ROGERS. No, Senator: you see this is merely implementation of the Civil Rights Act of 1957, and under the Civil Rights of 1957 that determination of discrimination is made by the judge. And if Congress enacts this bill, the judge would make the determination as to whether a pattern or practice of discrimination existed in that judicial district or not.

Senator KEFAUVER. Well, in the Georgia case that was recently decided by the Supreme Court, I have forgotten the style of it, that part of it, did the judge in that case appoint a referee or a commissioner to register the applicants?

Mr. ROGERS. No, Senator.

Senator KEFAUVER. How did they register them; how did they get voting?

Mr. ROGERS. You are speaking now about the Louisiana case?

Senator KEFAUVER. Yes; I suppose that is the one.

Mr. ROGERS. Yes. The Georgia case was not that at all. The Georgia case merely involved the constitutionality of the Civil Rights Act of 1957.

Senator KEFAUVER. That is what I am talking about, the latter case, the Louisiana case.

Mr. ROGERS. The Louisiana case. It was a restoration of voters already on the rolls, and the court found they were purged so that there was not any requirement there for the court to make the initial determination about qualification of voters.

Senator KEFAUVER. But it did recognize in that case that even though one or two may be named, that it could be given application to the broader number who came under similar circumstances?

Mr. ROGERS. Yes. The Civil Rights Act of 1957 does not contemplate that the injunctive power of the court be used merely to insure that the particular complainant or the witness in the case be permitted to vote. The Civil Rights Act of 1957 authorizes the court, when the court finds that there is discrimination by registrars on account of race or color, to enjoin those practices in the future.

So the injunction applies to discriminatory practices. The injunction is not merely for the purpose of insuring that the particular voter vote in that election.

Senator KEFAUVER. I have heard it said, Mr. Rogers, that the district court under its equity powers, which are, of course, broad and wide, would have substantially the same power to do substantially the same things in connection with finding of a pattern of discrimination, ordering the registration of those discriminated against if they had previously applied to the State election officials, and so forth, as is contained in this voting referee section.

What do you have to say about that?

Mr. ROGERS. Senator, we do not believe that is the case. Of course, if that is the case, there would be no objection to the passage of this bill to make it explicitly clear that the court has such power. In other words, if that is the present law, a restatement of it certainly should not be objected to by anyone.

Senator KEFAUVER. What do you feel the present law is? How far can a district court go under its equity power——

Mr. ROGERS. Well, I don't think the court could go anywhere nearly as far as it could under the proposal contained in this bill. I think that it would be limited by rule 53 of the Federal Rules of Civil Procedure, and I do not think it would authorize the court to use the referees to the extent that this bill provides.

Senator KEFAUVER. Why should the proceedings before the voting referee be ex parte, as set forth in page 2?

Mr. ROGERS. Because, if—you see they already have before a voter comes before the referee—there has been a determination by the court there has been a pattern of discrimination in that district, and if the statute required litigation in the usual sense in each case of each voter, then this bill would not be effective.

The purpose of this bill is to expedite the application of qualified Negroes in areas where there has been a pattern or practice of discrimination found to exist by a Federal court.

Now, I think you should keep in mind, Senator, that the ex parte is not in any sense arbitrary, because the objections that the State might have to permitting Negroes to vote could be made to the court. So that State officials have full opportunity to present their case, but they present it to the court and they do not do it one at a time. They

present the case to the judge when the matter is certified back to the judge.

Senator KEFAUVER. Suppose, Mr. Rogers, a Negro contended ex parte that he had applied to the State officials to register and had been denied that right—the State officials felt otherwise—or that he had not applied at all. Where would that issue be drawn; where would it be presented?

Mr. ROGERS. That would be presented to the court when the referee made his report to the court, and then the Attorney General is required by law to put the State officials on notice and they would have full opportunity to make that claim before a judge.

Senator KEFAUVER. Before the judge upon consideration of the referee's ex parte report?

Mr. ROGERS. That is correct.

Senator KEFAUVER. They would have the right to give sworn testimony that would be made a part of the record?

Mr. ROGERS. That is correct.

Senator KEFAUVER. Mr. Chairman, I may have some questions, I do have some questions on other sections, but I imagine it would be better to discuss this section fully so I will pass for the time being.

The CHAIRMAN. Senator Johnston. I notice one section here you have in regard to taking them out from under the civil service. Why do you do that? Over at page 8, title IV, this is something else, this is the Civil Rights Commission extended for 2 years.

Mr. ROGERS. Senator, I cannot answer that question. We did not ask for that, and we have tried to maintain an independent status from the Commission so it could not be charged that they were a judge of the Department of Justice, so frankly I cannot answer the question.

Senator JOHNSTON. You say striking out the word in accordance with classification in the civil service law. My committee made the point that you can turn them absolutely loose, and you can have them pay any salaries they want to. I would like to know if you think that is so as the Attorney General?

Mr. ROGERS. I do not know that is so; that is the only complication. I think the language is pretty clear that they are not, this Commission, if the bill is enacted, would not be bound by the civil service rules.

As I say, I would actually prefer, Senator, to have you inquire from the Civil Rights Commission, because I do not want to make any statement here that might impair their request.

Senator JOHNSTON. I think if you will take it up with the Civil Service Commission you will find they are opposed to this request.

Mr. ROGERS. I was referring to the Civil Rights Commission.

Senator JOHNSTON. This is entirely loose here in regard to salaries, hiring and firing, and everything else.

Mr. ROGERS. Of course, it is a temporary commission, and I think that makes a difference.

Senator JOHNSTON. Is there any limitation put on the employees, too? None. I think you will find there is not any limitation put on them.

Mr. ROGERS. Well, of course, the Congress has the power of appropriation, so you control their employment to some extent.

Senator JOHNSTON. Yes. But is that not something new in our way of doing business? Do we not generally have an enabling act and then appropriations are made in accordance with the enabling act?

Mr. ROGERS. I do not think it is any different than the staff of congressional committees. Is that not the way the staffs of your committees operate?

Senator JOHNSTON. No. Our committees, we go into that and ask for that, and, of course, that goes into an enabling act.

Mr. ROGERS. Well, staffs of congressional committees are not bound by civil service rules, though.

Senator JOHNSTON. No. But they are in a different status over here on the Hill.

Mr. ROGERS. Well, this Civil Rights Commission is not fully an executive branch; it has to report to the Congress. It is an independent agency that reports directly to the Congress.

Senator JOHNSTON. I cannot understand why there are not any limitations as to the amount of employees or anything.

We do limit over on the Hill, every Congressman and Senator is limited on how much they can spend all the way through, on top salaries and all. This is not. There is something new here from the civil service standpoint, and as chairman of the Civil Service Committee, it has been called to my attention and I have taken it up with the Civil Service Commission, and I understand they, too, cannot understand it.

Mr. ROGERS. Of course, I am sure that the Appropriations Committee could put limitations on the amounts that they spend, and probably other limitations, so if you had any fears along that line you probably could control the employment by the appropriation method.

The CHAIRMAN. Any other questions?

Senator JOHNSTON. I will pass.

The CHAIRMAN. Senator Hennings.

Senator HENNINGS. Mr. Attorney General, I would like at this time, if I may, to refer to the Congressional Record. Can I make myself heard, General?

Mr. ROGERS. Yes, Senator.

Senator HENNINGS. Tuesday, March 22, 1960, in which you addressed a letter to our esteemed colleague, the distinguished minority leader, Mr. Dirksen, and which he read into the Record at page 5820.

Mr. ROGERS. Yes.

Senator HENNINGS. With your indulgence, I would like to read that letter into this record at this time [reading:]

OFFICE OF THE ATTORNEY GENERAL,
Washington, D.C., March 22, 1960.

HON. EVERETT M. DIRKSEN,
U.S. Senate, Washington, D.C.

DEAR SENATOR: You have asked for my comments upon the Clark-Javits amendment (3-11-60-B) to section 3 of your amendment (2-24-60-I) to H.R. 8315. Essentially, the Clark-Javits amendment would combine a voting referee proposal with the so-called enrollment officer procedures proposed by Senator Hennings (3-10-60-F).

Supporters of the Federal enrollment proposal contend that it is a stronger measure than the administration's referee proposal. This is not so. As a practical matter, it would be worthless. It is for that reason that the administration is strongly opposed to it.

The defects of the Federal enrollment proposal cannot be avoided simply by adding the proposal to the voting referee plan.

Stated very simply, the Federal enrollment proposal would be totally ineffective, except in cases of voluntary compliance by State officials, because it does not provide any practical method of enforcement. It would provide the Negro with an opportunity to have his name enrolled by a Federal enrollment officer, but it does not provide any effective way to insure that State officials will allow the Negro to vote.

It provides that when a State election official refuses to honor a Federal enrollment certificate and denies the Negro the right to vote, a suit for an injunction may thereafter be started by the Attorney General on behalf of those who have been deprived of the right to vote. Such equitable relief would be of no value, because by the time the lawsuit was concluded the election would be over.

The act by the State officials of refusing to honor a certificate of the enrollment officer would not subject them to actions for contempt of court, for they would not have disobeyed an outstanding injunction.

Nor does the fact that the officials would be subject to criminal penalties breathe life into the Federal enrollment proposal, because, as I have stated on many occasions, criminal remedies in this field are of little or no value.

By way of contrast, under the voting referee proposal, there would be an outstanding court order requiring State officials to permit Negroes named in the order to vote. Any failure to comply with this order would permit the court to proceed immediately to hold them in contempt and impose a sentence of 45 days in jail or $1,000 fine.

I should like to use this opportunity again to emphasize that it is not enough, as the authors of the Clark-Javits amendment apparently believe, to pass a bill that simply assures Negroes of the right to register.

In an apparent failure to appreciate this simple truth, the authors of the Clark-Javits amendment would also emasculate the voting referee proposal.

I would particularly call attention to subsection (b) (2), page 3, of the Clark-Javits amendment, which provides that an order declaring an applicant qualified to vote "shall become effective 20 days after the issuance of such order and notice thereof to the Governor of the State, unless any person named therein shall have been registered by appropriate State officials in the intervening period, in which case the order may be vacated on application duly made as to the registration of such person."

Such a provision emasculates the voting referee proposal and would make a farce of any bill which included it. In practice, it would mean that after a Negro has applied to the Federal court and has proven his qualifications before the judge or a referee and the court has issued an order certifying him as qualified to vote, a State official could completely wipe out the binding effect of that court order simply by placing the Negro's name in a registration book. Once this was done, and the court order was vacated, State election officials would be under absolutely no compulsion from Federal process to permit the Negro to vote. It is the right to vote, and not merely the right to register, that the 15th amendment of the Constitution guarantees to the Negro citizen.

To summarize, then, the Clark-Javits proposal suffers from a fatal illness—it cannot be enforced. It is simply an enrollment scheme providing no guarantees that the Negro will be permitted to vote not now contained in the Constitution and present laws. If added to the voting referee proposal of the administration, it would not only clutter it up wih worthless provisions but would seriously weaken it.

With kind regards,

Sincerely,

WILLIAM P. ROGERS, *Attorney General.*

Now, Mr. Attorney General, I think that you and I can agree that the majority of us want, in good faith, to enact an effective bill irrespective of where the credit may be given.

Mr. ROGERS. Yes, sir: that is correct.

Senator HENNINGS. There is plenty of credit to go around to everybody who wants it.

Are you still of the opinion that you expressed in that letter?

Mr. ROGERS. Yes, I am, Senator.

Senator HENNINGS. In view of the action of the House of Representatives.

Mr. ROGERS. What did you say last?

Senator HENNINGS. In view of the action of the House of Representatives, too.

Mr. ROGERS. Which action do you have reference to?

Senator HENNINGS. Well, the bill passed by the House.

Mr. ROGERS. Yes, I am of that opinion. I believe that the weakness that I point out there is a very real weakness, and I think that the referee proposal, which we are discussing here this morning, would be effective, and I think it would be unfortunate if we attempted to add anything to a proposal which I think is generally accepted by knowledgeable people that it would be effective.

So far as I know, there has not been any responsible group who contend that the referee proposal would not be effective. Now, maybe there are some people who think it would not be effective, but I think almost everyone that I have discussed it with feels that it would be effective.

They recognize it would have the drawbacks that all judicial proceedings have. You would have to have court proceedings, you would have appeals, and the like, but it is within the established framework, it is consistent with our whole process of administration of justice in this country, and I think it would be most unfortunate if we added anything like the Federal enrollment proposal to it because it would not be effective and I think it would cause a great deal of difficulty in the enforcement of the referee proposal.

Senator HENNINGS. Then, in your opinion, Mr. Attorney General, and I am not going to get into a quibble about what you mean by responsible people——

Mr. ROGERS. No. I suppose there are some people who feel it may not but, generally speaking, I think the referee proposal has been very well accepted by persons who have studied it, and I think most people feel that in the long run it will result in considerable progress in this field.

Senator HENNINGS. Now, after you appeared before the Senate Committee on Rules and Administration and testified relating to the referee proposal on the last day of those hearings, did you make any other and different suggestions from those that you presented to the Senate Committee on Rules and Administration with respect to your voting referee proposal? Was there not a so-called second Attorney General proposal?

Mr. ROGERS. Well, I think—I think I know what you mean.

Senator HENNINGS. Your amplified proposal.

Mr. ROGERS. Yes. I think what we did actually was to spell out in the bill itself with a little more particularity the things we thought were implicit in the bill in the form that we discussed it when I appeared before your subcommittee.

Senator HENNINGS. It was not a subcommittee; it was the full Committee on Rules and Administration.

Mr. ROGERS. Excuse me; your committee.

So that I think it is fair to say that the present bill has spelled out the procedures with more particularity than they were spelled out when I testified before your committee, but I think it carries out the

general thoughts we believed were included in the proposal at that time.

Senator HENNINGS. Then there were no substantial changes?

Mr. ROGERS. Well, I wouldn't say that.

Senator HENNINGS. From your testimony——

Mr. ROGERS. Excuse me.

Senator HENNINGS. By "substantial," you and I are not going to cavil about that, either. By that I mean matters of substance, not merely the form.

Mr. ROGERS. Well, I think, I do not believe that we changed the substance of it, but I think it could be argued that by spelling it out with more particularity that we improved the bill, made it more specific.

Senator HENNINGS. As you indicated to our able colleague, Senator Keating, when Senator Keating inquired of you at the time of the hearings, I believe you said that any combination of a voting registrar or enrollment officer would be, in your phraseology, a "shotgun wedding."

Mr. ROGERS. That is right.

Senator HENNINGS. You used a very colorful phrase.

Mr. ROGERS. Well, I think I was led into it. I do not think I coined the phrase initially. I think someone asked me if I thought it was a good wedding.

Senator HENNINGS. Worth about as much as a ticket to the Dempsey-Firpo fight, one of our heavyweight fights; is that not what you said at that time?

Mr. ROGERS. In substance.

Senator HENNINGS. Yes. You feel, Mr. Attorney General, and I say this, I have respect for you and I consider that you and I are friends—I do not wish to be adverse in any sense—we are all trying to work out, some of us at least, trying to work out a solution to a very vexing and complex problem—do you not think the Administration's approach in the amendment that I had offered is compatible with the present referee proposal in H.R. 8601 and it could work separately or in conjunction with the referee plans so that we can see which works better?

Mr. ROGERS. Well, I do not happen to, Senator. I share your concern as far as objectives are concerned, and I also agree with you that we will remain friendly, and I appreciate the support you have given the Department since I have been Attorney General. It is my opinion that it would not be helpful.

Now, I believe that it would involve a great deal of difficulty in the application of the referee proposal. For example, Federal judges might very well use the enrollment proposal as a way to escape their responsibility. They might say, "Well, why do you not use the other method, why do you come to this court when you could have appointed an enrollment officer, had the President appoint an enrollment officer, and so forth." I think it would be a way for the Federal judges if they wanted to, in a few instances, to escape their responsibility under the law, and I think if you proceeded by the other route, as I tried to point out in this letter, you would have no enforcement provision because the lawsuits start too late.

The advantage of the referee proposal is that the lawsuit has been concluded before the election. So that the judge has made all his

decisions prior to the election, and if officials thwart the judge, obstructed the judge's order or refused to carry out the order of the court, then they are answerable to the judge.

But other proposals where the lawsuit starts after the denial of the Negroes right to vote, in my opinion, would not be effective.

Senator HENNINGS. You have indicated then that—and I hope I do not enlarge upon your meaning—you have indicated that Federal judges might try to escape their responsibilities?

Mr. ROGERS. I think it incurs a possibility in some very few instances that because in particular communities this is a very unpopular kind of position, if there were some alternative method outside the court system that could be used, that there might be a temptation on the part of some few judges to say, "Why do you use this method? Why do you not try the other method? Why do you bother the court with this method?"

Secondly, because the other method would be, in my opinion, ineffective, it seems to me unwise to include it. I would be for anything in addition to the referee proposal that I though would be effective. But I honestly do not believe that the enrollment provision or the registrar provision would be effective, and it is for that reason that I would not like to have it joined with the referee proposal.

Senator HENNINGS. Well now, Mr. Attorney General, you would have the right to, of course, choose as to the alternative methods of procedure, would you not? Because under the enrollment plan the action would be brought by the Attorney General under the registrar plan, as well as under the referee proposal. The Attorney General would be the primary mover in the matter of the assignment of enrollment officer by the President or employment of referees by the court; is that not true?

Mr. ROGERS. Well, the Attorney General would have the responsibility in the—as I recall the enrollment proposal—would have the responsibility of initiating the action once the Negro had been deprived of the right to vote, but, as I say, the difficulty with that proposal is that the action comes too late.

Senator HENNINGS. Now, the enrollment officer will, for example, Mr. Attorney General, provide the court order of injunction can be obtained in any case where the Attorney General believes there is reason for him to believe that the certificates issued by the enrollment officer might not be recognized by the local election officer.

Mr. ROGERS. How would you know that until after the election?

Senator HENNINGS. Would that not be to argue, as the Attorney General, as you have, that it is simpler under your scheme to have a court order blanketing in all voting officials who might obstruct the voting of a certified potential voter? Would that not in effect be arguing that one court order is easier to obtain from the court than any other and would it not seem only logical that the courts are going to require evidence in all instances that there is reason to believe that the voting officials will obstruct the act of voting by certified voters and in each instance, whether in your referee scheme that you have just delineated to us, or the possible enrollment officer plan or registrar plan, evidence of possible obstruction would have to be given to the court.

Mr. ROGERS. Senator, let me——

Senator HENNINGS. How say you thus?

Mr. ROGERS. What page is the language you read just a moment ago?

Senator HENNINGS. That is from my own memorandum.

Mr. ROGERS. Let me get the bill. I think I can explain the point I am making if you could read that language back to me, what is the language you just read, Senator?

Senator HENNINGS. That is from a memorandum that I prepared myself.

Mr. ROGERS. If you will wait just a minute—it was the language from the bill you read I was interested in, the language said the Attorney General may initiate the action.

Senator HENNINGS. The Enrollment Officer bill provides that a court order of injunction can be obtained in any case where the Attorney General believes there is reason for him to believe the certificate issued by the enrolling officer might not be recognized by the local election officer.

Mr. ROGERS. No, it is that language right there I think I can use to demonstrate to you why in my opinion this would not be effective.

The only time the Attorney General could go into court and—well, put it this way, it would be a most unusual case where the Attorney General could go into court and say "I know now that the State officials will not honor the enrollment officer's certificate on election day."

In other words, the only time you would really have any evidence that the State officials were going to refuse to honor the certificate issued by the enrollment officer was after the State officials had refused to honor it, and that would be election day.

In other words, I cannot imagine the Attorney General going in and saying, "The enrollment officer has issued so many certificates to Negroes to vote, and I think that on election day the State officials will not honor those certificates."

How could you prove it?

Now, the only way you could prove it would be to wait until the election was over and have the Negroes come in and say, "Well, we had the certificate, but we were not permitted to vote," then the Attorney General would have to start his lawsuit, and it would be too late to vote; the election would be over. So it is exactly the point that I mean, that language illustrates exactly the point I want to make.

In my opinion, there would be no way prior to the election of proving that the election officials were not going to honor the certificates so that you would be forced to rely on a lawsuit started after election and I think that would be ineffective. The State would merely have to have annual registration under those circumstances and a civil injunctive suit after election would not be effective.

Senator HENNINGS. Well, now, Mr. Attorney General, you know that there is provision both under the State and under the U.S. Code for voters to make application on election day in court?

Mr. ROGERS. That is correct.

Senator HENNINGS. In order that they be permitted to vote.

Mr. ROGERS. That is correct.

Senator HENNINGS. And of course you are familiar with the fact that—do you recall what Mr. Justice Vanderbilt had to say about the

general matter of referees and references, do you know that case, do you remember what Mr. Justice Holmes had to say about the delays of the reference system, sending matters to reference, as he put it?

Mr. ROGERS. Well, I know both Justice Vanderbilt and Justice Holmes, Judge Vanderbilt and Justice Holmes were concerned about delays in the administration of justice.

Senator HENNINGS. Did they not condemn the system of referees and references, as they put it, by saying they knew of no surer way to delay and indeed to deny justice than the system of reference availed of by the courts?

Mr. ROGERS. Well, I think that it is important that any time you discuss a particular statement or particular statements by judges to take it in context, and there are areas where it is probably better to have judges do it than Commissioners and so forth, but I think in this area there is no alternative.

The thing that is noticeable to me, Senator, about some of the public discussion about enrollment officers and registrars is the assumption that somehow the registrar or the enrollment officer will have enforcement power of his own.

Under our system, the enforcement power rests with the courts.

Senator HENNINGS. Yes.

Mr. ROGERS. And that is the way it should be. We should not have Federal officers with power to go in and force people to do things, and whether it is an enrollment officer or registrar, or whoever else you want to select or whatever name you want to give him, in the final analysis under our system he would have to go to court and he would have to have a judge's order to support his decision in order to get enforcement.

Now, I do not see any particular advantage to starting outside the judicial system and then be required subsequently to go before the court and to get the court's order when you can do it within the confines of a pending judicial proceeding, as we have under the Civil Rights Act of 1957. So, just to conclude this thought, I do not see any advantage of having Federal officials outside the judicial system, with some fancy title, and that obviously would cause a great deal——

Senator HENNINGS. What do you mean by "fancy title"?

Mr. ROGERS. Well, Federal enforcement officer——

Senator HENNINGS. Is that fancy?

Mr. ROGERS. I did not suggest it in an unkind sense at all that he has power of himself—that he can himself guarantee the right of the Negro to vote. The fact is whether it is registrar or Federal enforcement officer he still has got to go back to court to get an order and I do not see any reason for taking another step.

Senator HENNINGS. Of course, your bill, your referee bill, assumes in its operations by implication that there will be obstruction placed in the way of actual casting of ballots by certified voters.

Mr. ROGERS. I think that when we—excuse me.

Senator HENNINGS. The enrollment officer proposal, as I would suggest, Mr. Attorney General, meets your objections to the so-called Clark-Javits amendment, and it would seem to me it is far fairer and less punitive to Southern voting officials in the affected area where there has been difficulty registering officials. For example, the referee bill assumes in its operations there are going to be obstructions placed

in the actual casting of ballots by certified voters, and by that same measure every voting official will be automatically under a court order, as I understand it, restraining him and any action by him, and it would be possibly contended that the enrollment officer approach makes no assumption of legal blocking by the voting officials, and so in an area where an enrollment officer, as you say, a fancy title, has been appointed, it will be assumed that his certified voters will have no difficulty in casting ballots. But if there is reason to believe some obstruction will occur at the voting place, the enrollment officer proposal allows the Attorney General to use any equity powers of the court to protect the individual in casting his ballot.

The referee system, I think, is punitive, and I think it assumes guilt by voting officers because of previous difficulty with registration officials.

It is my own view, Mr. Attorney General, and I most respectfully state it to you, that the enrollment system only uses the equity protection of the courts when there is a showing that such protection may be needed and that the addition of the enrollment proposal which I have given a good deal of study to, in my opinion, as you suggest, all of us may not have respectable opinions, some of us have been working at this a good many years, maybe we do not all seek counsel in the same groups with some of our advisers who are not respectable, it may be a misunderstanding of the law, and if that is so, I certainly want to be set right, and it would seem that the alternative approach to be used in triggering here the voting rights, the referee and registrar or enrollment action would give us two ways to get at it.

The referee proposal requires the matter to be before the courts at the outset before it can be used, that is true, is it not—the referee proposal, Mr. Attorney General?

Mr. ROGERS. That is right.

Senator HENNINGS. —requires that the matter be before the courts at the outset, before it can be used.

The enrollment officer plan provides that in addition to matters already pending in the courts, the Civil Rights Commission may initiate its protection by reporting its findings to the President, as the Congress has authorized it to do.

Thus the enrollment officer plan, it would seem, might provide a wider area of protection than does the referee plan standing alone, and to my untutored mind, it would seem that these plans are compatible, and it is not, as you characterized Senator Keating's on the last day of our hearings, as a shotgun marriage, as worthless, and that either could be used at the discretion of the President or the Attorney General of the United States, and when I read, as I did, this, knowing you as I do, does not sound exactly like you, when you out of hand say that "such and such thing would be worthless," and that, as you say, stated very simply the federal enrollment proposal would be totally ineffective except in cases of voluntary compliance by state officials because it does not provide any practical method of enforcement. Well, we have a practical method of enforcement already imbedded in our law, have we not, Mr. Attorney General?

Mr. ROGERS. Well, I just do not happen to think so, Senator, and that is why we are trying to find another—some legislation that will give us a practical method of enforcement.

Senator HENNINGS. You do not think the injunction——

Mr. ROGERS. I don't think that the history of the 15th amendment for the last 10 years suggests that it has been very effective in this area and that is why the House passed this bill, in my opinion. I think the House recognized the need for additional legislation and that is why they passed the bill.

I would like to say, Senator, so that there is no offense taken, I did not refer to your enrollment bill as one with a fancy title, I said no matter what fancy title happened to be given to it, I was not talking about yours and I cannot characterize Senator Keating's proposal. He asked me would I agree to it, to a merger, a wedding, and I said, well, if I agreed to it it will be a shotgun wedding, I wouldn't do it——

Senator HENNINGS. Mr. Attorney General, you and I have been at the law long enough for either of us not to take offense at any characterization——

Mr. ROGERS. I didn't mean to——

Senator HENNINGS (continuing). In an adverse argument and I certainly do not. But I do question the statement that certain things are worthless.

Mr. ROGERS. Well, that is my opinion, I might as well be frank about it. I think it would be worthless.

Senator HENNINGS. How long could it take, Mr. Attorney General, for—let us say we have a finding by the referee which thereafter is certified to the court, and appeal lies, does it not?

Mr. ROGERS Well, I think once the act has been sustained by the courts once that there won't be any delay. The State cannot—you cannot have a stay beyond the election, so that I think once the court sustains the validity of the act, there would not be any delay. You would have to try the lawsuit initially, and I think the point is, Senator, as I see it, this is not a bill to deal with each individual situation. This is a bill which will try to—which has as its purpose the doing away with the situations where a pattern or practice of discrimination has existed over the years, and when we have situations, we have four instances now, of districts where we have the lawsuits, and undoubtedly there will be others, and in those communities if the pattern or practice of discrimination will be done away with, I think the communities themselves concerned will recognize they would rather do it voluntarily themselves and the court won't have to continue the injunction for long.

I think there is a growing awareness that our country just cannot support the idea that some of our citizens can be discriminated against on a count of race or color in the voting process, and I think this bill, which is—which operates within the judicial framework will do a great deal to break down the pattern or practice of discrimination which has existed in some areas.

I think it is an intelligent way to do it. It is not inconsistent with our constitutional principles or our judicial system, and I think it will work.

Senator HENNINGS. Well, now, that certainly is to be devoutly hoped, Mr. Attorney General.

How many actions have you brought since the 1957 act was enacted?

Mr. ROGERS. As I saw, we have four cases pending in court altogether.

Senator HENNINGS. How many cases altogether?

Mr. ROGERS. I think four.

Senator HENNINGS. And they were of what nature?

Mr. ROGERS. Well, there were allegations that the State officials discriminated against Negroes on a count of race or color, and there were cases where we asked the court to enjoin State officials from continuing that practice.

Now, each one of them represents——

Senator HENNINGS. When did you bring the first of those actions, when you asked the State officials that they be enjoined.

Mr. ROGERS. I think the first one in Georgia—Georgia was the first one.

Senator HENNINGS. Where?

Mr. ROGERS. Terrell County, Ga.

Senator HENNINGS. Yes.

Mr. ROGERS. And of course, there is——

Senator HENNINGS. When was that action instituted?

Mr. ROGERS. I think that was in—I think we started in the fall of 1958 and I believe the judge made his decision in April of 1959. Mr. Block argued the case on the other side against me in the Supreme Court so he is familiar with the facts, too.

Senator HENNINGS. What was the nature of that action specifically?

Mr. ROGERS. Well, that was a case where the complaint alleges that Negro citizens in Terrell County, Ga., were denied the right to vote because of race or color. The complaint alleged that included in those persons who were denied the right to vote were four teachers in the public schools in Georgia. Georgia has a requirement of literacy. You must be able to read or write to vote. These four Negroes, together with several others, attempted to vote. One of them had a master's degree from a university, all of them were college graduates, all of them graduated from colleges in Georgia, one of them taught in the public high schools in Georgia. The other three taught in the elementary schools in Georgia. They applied to register, they took the test as to whether they could read or write and the registrar denied them the right to register on the ground that they could not read or write.

We alleged that that was proof they were discriminated against on account of race or color because it is inconceivable that Negro citizens who teach in public schools, who are college graduates of the State itself, State colleges, could be denied the right to vote because they could not read or write.

The State officials through their lawyers claimed that the statute was unconstitutional.

As far as I know, there were no efforts to correct the situation which, on its face, certainly, was a very serious one. The district court held that the statute was unconstitutional, the Government took a direct appeal to the Supreme Court, Mr. Block argued for the State of Georgia, I argued for the United States. The Supreme Court of the United States affirmed—I mean reversed the judge's decision, held that the statute was unconstitutional by unanimous court—I mean the statute was constitutional by unanimous court.

Senator HENNINGS. Yes.

Mr. ROGERS. That is right.

Senator HENNINGS. How long did that process require from the institution of the Government's complaint until the ultimate handdown from the Supreme Court?

Mr. ROGERS. A year, a year and a half, something like that. Of course, the first time a statute is challenged on constitutional grounds it takes some time to go to the Court. But once the constitutionality is established, then there isn't that delay in the application of the statute.

Senator HENNINGS. Is it your opinion that an appeal could be taken to the U.S. Circuit Court of Appeals?

Mr. ROGERS. Excuse me, Senator, I did not hear what you said last.

Senator HENNINGS. Could an appeal be taken to the U.S. Circuit Court of Appeals?

Mr. ROGERS. In this case? No, there was a direct appeal to the Supreme Court.

Senator HENNINGS. It could be taken, could it not?

Mr. ROGERS. Well, under the——

Senator HENNINGS. Appeals lie to the U.S. Circuit Court of Appeals.

Mr. ROGERS. Yes, but in a case where the court has held a statute unconstitutional, the Government has the power to take the appeal directly to the Supreme Court, and certainly it would be, we would have been very remiss in our duty if we had not taken a direct appeal, which we did.

Senator HENNINGS. Well, to put it on the other foot, suppose the finding of the court is adverse to the Government and an appeal is taken by——

Mr. ROGERS. It would go to the circuit court.

Senator HENNINGS. Circuit court of appeals?

Mr. ROGERS. That is right.

Senator HENNINGS. It is entirely possible, is it not, that that might happen, that it has indeed happened in other cases?

Mr. ROGERS. That is correct.

Senator HENNINGS. So you have some cases that are still awaiting disposition in the U.S. Circuit Court of Appeals, have you not?

Mr. ROGERS. That is correct.

Senator HENNINGS. How long have they been there?

Mr. ROGERS. Well, as I say, a year, a year and a half. Altogether, I mean from the time——

Senator HENNINGS. Anybody voting during that period, any of the people?

Mr. ROGERS. Well, in the State of Louisiana we have had 1,300 and some Negroes restored to the rolls.

Senator HENNINGS. Yes, but they had already been on the rolls.

Mr. ROGERS. That is correct.

Of course, Senator——

Senator HENNINGS. How does the referee proposal insure a speedier determination of the matters in controversy?

Mr. ROGERS. Let me see if I can answer your question by asking one: Don't you realize that your enrollment procedure would also have to run the gamut of the courts? Don't you realize there would

be a challenge as to the constitutionality of that and that would have to go through the same court procedures that this goes through?

Senator HENNINGS. It would be after the President had been advised by the Attorney General he would appoint a citizen of the congressional district who is registered and qualified.

Mr. ROGERS. Well, Senator, let me say this to you——

Senator HENNINGS. Thereafter——

Mr. ROGERS. Excuse me.

Senator HENNINGS. Thereafter, a citizen who is registered and qualified to be designated by the President to be a Federal enrollment officer or registrar, I care not what the terminology, and thereafter he would be empowered to see to it that the certificate was issued and thereafter that the voter be allowed to vote at the voting place, to cast his ballot, if the ballot is subject to challenge, it would be challenged and impounded.

Of course, I see Judge Walsh is handing you something.

Mr. WALSH. Excuse me, Senator.

Senator HENNINGS. That is perfectly all right, I did not want to interrupt your train of communicatons.

Mr. ROGERS. No, that is all right, I am listening, Senator.

Senator HENNINGS. And thereafter the voter would be allowed to vote, his ballot would, as in all elections, where a vote is challenged on the grounds of qualification of the voter or his eligibility to vote, would be impounded, and thereafter determined after the election by the courts?

Mr. ROGERS. Well, Senator, have you finished? I want to suggest where I think the first legal challenge would come.

Senator HENNINGS. I would be very glad to hear you.

Mr. ROGERS. Under the enrollment proposal, there has to be a finding that there has been a pattern or practice of discrimination.

Senator HENNINGS. Not under mine.

Mr. ROGERS. How do you trigger the——

Senator HENNINGS. There has to be a finding that two or more people have been denied the right to vote because of race or color.

Mr. ROGERS. And the Civil Rights Commission would make that determination.

Senator HENNINGS. No, sir.

Mr. ROGERS. Who would?

Senator HENNINGS. The court would make that determination.

Mr. ROGERS. Then that would be challenged. I mean right at that point you would have the same challenge to your proposal that you would have to the referee proposal. In other words, I do not know of any legislative enactment that can be conceived that would avoid a challenge in court. It will come very early.

In the case of the Civil Rights Commission, there is a case now pending in court that the procedures they used in holding hearings violated the Constitution, and Judge Walsh argued that case before the Supreme Court.

So any legislative enactment that can be conceived, in my opinion, will be challenged in court, and that challenge will have to be decided by the court and that will take some time and there is no way to avoid it unless we change our system.

Senator HENNINGS. Under the enrollment or registrar plan, if that is not quite as fancy a word, perhaps, there will be appointed an enrollment officer who would issue a certificate.

Mr. ROGERS. That is right.

Senator HENNINGS. Of registration.

Mr. ROGERS. But there would be a legal challenge before his appointment. He would not be——

Senator HENNINGS. There might be.

Mr. ROGERS. That would go to the Supreme Court.

Senator HENNINGS. How could there be a legal challenge before his appointment?

Mr. ROGERS. Well, for the same reason that the Civil Rights Commission's case is before the Supreme Court now on the procedure involved. There would be a question of due process. There would be a challenge on whether the procedure leading up to the appointment of the enrollment officer complied with the due process provision of the Constitution.

Senator HENNINGS. Would not a better time be to avail of an appeal be after his appointment, have a fait accompli, and you would have a man appointed?

Mr. ROGERS. Well, it depends on your point of view. If you are trying to prevent the act from becoming effective, you would make your challenge as soon as you can.

Senator HENNINGS. Then you would make the challenge under your scheme before the court appoints the referee?

Mr. ROGERS. Well, it could be. I think the——

Senator HENNINGS. They could move there.

Mr. ROGERS. I think the challenge will come somewhere after the decision of the district court in the first instance.

Senator HENNINGS. It could be before the court appoints a referee?

Mr. ROGERS. Well, I doubt it. I think under the court's system, I think there will have to be a determination by the court. I do not think it would be an interlocutory appeal under the court system.

In other words, if you have the procedure outside the court system, you run into due process. I do not think you will have that challenge in the court system.

Senator ERVIN. Pardon the interruption, but a man moved to dismiss on the ground that the act under which it is brought was unconstitutional and the judge has sustained the motion, as it was done in the other case.

Mr. ROGERS. That is the Raines case, Senator; that is right.

Senator HENNINGS. Yes. Mr. Chairman, at this time, I will pass, reserving the right to come back.

The CHAIRMAN. Senator O'Mahoney.

Senator O'MAHONEY. Mr. Chairman, I perhaps do not need to say that I have not had an opportunity to follow this debate, and my questions may therefore be more elementary than I would like to have them.

But, Mr. Rogers, I think you appreciate the fact that I am concerned with ex parte proceedings of whatever nature. Do you not think that under this provision here that you have presented, the fact that the report of the referee must be made to the court and that thereafter the court will issue an order to show cause lends considerable

validity to the report which the referee made against the parties on the other side?

Mr. ROGERS. First, let me say, Senator, how pleased I am to see you back. I have not seen you for some time. I am pleased to see you looking so well.

Senator O'MAHONEY. Thank you very much.

Mr. ROGERS. Yes. I think the answer to that question is, Yes; it would lend some validity to it.

Senator O'MAHONEY. Do you think there ought to be inserted somewhere with reference to the appointment that the person to be appointed as referee shall not only be a qualified voter but shall be sworn upon appointment to act impartially in his examination and report to the court?

Mr. ROGERS. Senator, I conferred with the Deputy Attorney General, who was a Federal district court judge for several years, a very distinguished Federal judge, and he says that the referee would have to take an oath of office which would require him to state that, so I do not believe it would be a problem.

Senator O'MAHONEY. Would it be necessary to write that into this law?

Mr. ROGERS. I do not believe so, Senator.

Senator O'MAHONEY. Into this bill?

Mr. ROGERS. No, I do not. I think that would be covered by his oath. I might say, too, Senator, that——

Senator O'MAHONEY. What does rule 53(c) of the Federal Rules of Criminal Procedure say?

Mr. ROGERS. We will get it in just a minute for you, Senator.

Senator O'MAHONEY. In the bill passed by the House, on page 15 applies to the voting referee this rule of civil procedure and it is therefore the only rule of civil procedure that applies to it.

Mr. ROGERS. Senator, if you do not mind——

Senator O'MAHONEY. However, your answer is not required to that question. It is an elementary question.

I gather that from your testimony here this morning that you recognize that the court decisions under this law now on the books are not uniform at all. They vary according to the district in which they are rendered, do they not, the decisions of the courts?

Mr. ROGERS. Yes.

Senator O'MAHONEY. In other words, the Supreme Court has referred to procedure by all deliberate speed, thereby recognizing that the conditions in different areas make necessary different judgments. Does the Department of Justice agree with that?

Mr. ROGERS. Well, I do not agree with the all deliberate speed in connection with voting cases; no. I agree with it in the case of schools.

Senator O'MAHONEY. Yes, I am speaking in the cases of schools.

Mr. ROGERS. Yes, I agree with that, Senator.

Senator O'MAHONEY. Now then, you seem surprised that the amendment appearing in title IV striking out from the existing Civil Rights Act the words "in accordance with the Civil Service and classification laws" and substituting in lieu thereof the words "without regard to the provisions of the Civil Service laws and the Classification Act of 1949, as amended."

It seemed to be a matter of surprise to you that that change was made. Are you for or against that?

Mr. ROGERS. Well, I do not ——

Senator O'MAHONEY. I ask you that question because, simply because, you are appearing, as I understood you, of simply giving the administration's views about the bill.

Mr. ROGERS. Senator, I am appearing here today because Senator Eastland called me up and asked me to be here. I will be glad to appear in that role and I guess that is correct.

I did not intend to look surprised about it. What I did intend to suggest was that this was—this language was the result—I think, of the recommendation of the Civil Rights Commission. I certainly think that it is acceptable, and I would oppose any change. I do not think that that is of any consequence to speak of.

As I say, it is a temporary ——

Senator O'MAHONEY. Did you object to following the Civil Service rules and Classification Act when the 1957 act was under examination?

Mr. ROGERS. I do not think it came to my attention at that time, Senator.

Senator O'MAHONEY. Do you know of any reason why this change is asked?

Mr. ROGERS. No. I suppose it is because it is a temporary commission, and I suppose there are some problems of employment. It is difficult to get good people to take a temporary job, and they may have some problems of salary. But as I say, Congress has control over the amount of money the Commission spends, so I would not think there would be much objection to it.

Senator O'MAHONEY. Did you read the story published a few days ago in the Washington Post to the effect that one of the employees there alleged that there was discrimination because of race or color against him by the Commission or by one member of the Commission?

Mr. ROGERS. I read ——

Senator O'MAHONEY. Whether it was or not, I do not know.

Mr. ROGERS. I read a story, but I also read the denials and answers to it, which I thought were quite convincing.

Senator O'MAHONEY. But there was that allegation.

Mr. ROGERS. I have been around Washington long enough not to be too concerned about allegations, Senator. If we stigmatize people on allegations, I think all of us would be in trouble.

Senator O'MAHONEY. Oh, yes. Do you not think that allegations do have a bearing on insisting as a matter of administration policy no matter who is in power upon the civil service laws and the Classification Act?

Mr. ROGERS. Well, I would not want to relate this language with this incident and I would not want to be a party to that.

Senator O'MAHONEY. I do not want to relate it to that incident, but I give you an example of a charge that was made, and I wonder whether you would want to repeal the civil service law and Classification Act with respect to other commissions.

Mr. ROGERS. No. My only position on this is that I think this language is satisfactory, and I think it should not be changed. I would like to have——

Senator O'MAHONEY. Have you received any information from any source indicating why it was put into the bill?

Mr. ROGERS. I suppose it is because it was analogous to the staffs of congressional committees, and because this committee does report to Congress, I suppose they felt that for the same reason that congressional committees——

Senator O'MAHONEY. It is not analogous because the employees of a Member of Congress, in his office or on their staffs, are not under the civil service law because they represent special district, and special citizens of the United States.

Mr. ROGERS. Yes.

Senator JOHNSTON. May I also state there, in your office you only are appropriated so much money, and then it is stated so many you can hire at a certain salary and so much at another salary, and so on down. We are limited to the salaries we can pay.

Mr. ROGERS. Senator, I was not talking about the Senator's staff; I was talking about committee staffs.

Senator JOHNSTON. Committee staffs are the same way; they are limited as to what they can pay, also. But this is no limitation whatsoever and you show me another one that is turned loose, I do not know of it, and I am chairman of the committee.

Senator O'MAHONEY. I think this is an appropriate time to remark for the record that the budget every year will show that the expenditures by Congress are less than $500 million a year, and that the executive departments spend very much greater sums than that, as well as the various commissions. So that that is why Congress has passed the civil service law and the Classification Act.

I am still unable to hear from you any suggestion that you heard from any source any reason why this exemption should be granted.

Mr. ROGERS. Well, as I say, I think the reason is that they, on a temporary job of this kind, they need some flexibility in salaries in order to attract qualified people, and I think that there probably is a ceiling on the amount they can pay. I think there is a general ceiling on the amount that can be paid, and I am sure that would apply in this situation. I think that is the reason.

Senator O'MAHONEY. Will you look that up and see whether there is a ceiling and let us know?

Mr. ROGERS. Yes; I will be glad to. I am quite sure there is.

Senator O'MAHONEY. Thank you very much.

(In response to the above questions, the following letter was received by the committee pursuant to request of the Attorney General:)

COMMISSION ON CIVIL RIGHTS,
Washington, D.C., March 29, 1960.

HON. JAMES O. EASTLAND,
Chairman, Senate Committee on Judiciary,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Part IV of H.R. 8601 would exempt the Commission on Civil Rights from compliance with the civil service rules and regulations.

As a temporary Government agency, the Commission has experienced difficulty in obtaining the services of an adequate number of fully qualified personnel for part-time, short-tenure employment. This is quite understandable in view of everyone's natural desire to seek and obtain permanent employment. We feel that this difficulty could be alleviated, to some extent at least, by permitting the Commission to employ persons without reference to civil service and classification laws as was the Wright commission. The Commission on Civil Rights is

similarly charged with investigation in a senstive area and likewise is required to report its findings to the Congress.

The foregoing does not imply any criticism of the principles under the civil service system with which the Commission is in complete accord and with which it has made every reasonable effort as a temporary agency to comply. While the Commission would not wish the consideration of this provision to prejudice the adoption of an effective voting rights measure, we hope the bill as passed by the House will be approved by this committee. Such approval will be helpful to the Commission in the effective performance of an important and difficult task in a limited time.

Very truly yours,

GORDON M. TIFFANY.

Senator O'MAHONEY. With respect to the first section of the bill—and I am referring to page 2—does this provision of the bill raise any question in your mind: "No injunctive or other civil relief against the conduct made criminal by this section shall be denied on the ground that such conduct is a crime."

I am reading lines 16, 17, and 18 on page 2.

Mr. ROGERS. Yes.

No, Senator; I do not think so. That just means that if we decided to proceed by injunctive relief that we would not be barred because the conduct was criminal.

Senator O'MAHONEY. Well, if this is passed, we create a crime. Why is this negative provision written in?

Mr. ROGERS. Well, because if we preferred to proceed by injunction rather than by prosecution, we would not want to be barred.

Senator O'MAHONEY. Are there any personal rights neglected by this provision?

Mr. ROGERS. No; I do not think so.

Senator O'MAHONEY. Due process of law for a defendant?

Mr. ROGERS. Oh, not due process, because the defendant would have to be tried before a district judge, before a local petit jury.

Senator O'MAHONEY. How can a person be punished for a crime and yet the authors of the bill find it necessary to eliminate a provision that injunctive relief might be sought? What is the necessity for that?

Mr. ROGERS. Well, as I say, I think there might be a situation where it would be preferable to proceed by injunction rather than by prosecution.

Senator O'MAHONEY. It is clear that you can proceed both by injunction and by criminal law.

Mr. ROGERS. That is correct.

Senator CARROLL. Would the Senator yield?

Senator O'MAHONEY. I have in mind the declaration of the preamble of the Constitution, which states the objectives for which the Constitution was written, and among those objectives is domestic tranquillity.

Personally, I have no doubt whatever of the right of Negroes to vote. But they must be qualified Negroes, and I am seriously aware that agitation of this question can be carried to the point where domestic tranquillity will be seriously interrupted. We have had many stories about the riots on both sides, both by Negroes and by whites, with respect to this sit-down emotion or demonstration that is proceeding now. Those are the reasons I asked my question.

I have no more, Mr. Chairman.

Mr. ROGERS. Senator, I want to say to that I am deeply concerned about the problem that you just mentioned, and all of us in the Department have tried to be restrained in our comments. We have tried to say nothing of a bellicose nature of any kind. We recognize the gravity of these problems in terms of our national prestige. And in the Little Rock situation, the second time around, we did all we could to avoid a repetition of violence, and I think it is very much in the national interest to avoid it in every conceivable way, in every possible way, and we have done all we can to see that from the standpoint of law enforcement we try to enforce the law as we are required to under our oaths of office without inflaming anyone or causing any more difficulty than is inherent in the general problem.

Senator O'MAHONEY. Thank you very much.

Senator Kefauver (presiding). Mr. Ervin.

Mr. ERVIN. Mr. Attorney General, I construe these provisions relating to voting referees' rights, the verbiage in which they are couched would make them apply to every election of every character conducted for any purpose anywhere in the United States or its possessions; is that correct?

Mr. ROGERS. That is correct.

Senator ERVIN. In other words, it would not only apply to elections at which a candidate for the Senate or Congress is voted for, they would likewise apply to elections and primaries in which only State officers were candidates? They would likewise apply to all municipal elections where nobody was running for anything except candidates for mayor and the city council, and it would also apply to bond issues where the sole question was whether the credit of a district, credit of a State or credit of a county or credit of a municipality or the credit of a school district or the credit of a sanitary district, was being pledged for the payment of bonds; is that not true?

Mr. ROGERS. That is right. It would apply; it would be just as broad as the 15th amendment.

Senator ERVIN. It would apply to a candidate running in a township for the office of justice of the peace, would it not?

Mr. ROGERS. That is correct.

Senator ERVIN. Do you agree with me on the proposition that Congress has no right whatever to legislate in respect to a State or county or municipal or other local election apart from the 15th amendment?

Mr. ROGERS. Well, not exactly. I think there are other provisions of the Constitution, but I think the principal support for the legislation is the 15th amendment. I think there is some support for it in the 14th amendment.

Senator ERVIN. Well, the 14th amendment does not confer the right to vote; does it?

Mr. ROGERS. Not specifically.

Senator ERVIN. No. And the only possible application of the 14th amendment would come as to whether there is not equal protection of the laws which was denied?

Mr. ROGERS. That is correct.

Senator ERVIN. As a matter of fact, have the courts not held time and again that the only right of Congress to legislate with respect to a State election is based upon the 15th amendment?

Mr. ROGERS. No. I think the courts have held that is the principal basis for it. I do not think the courts have held that is the only basis for it.

Senator ERVIN. Well, I will read you this from 18 American Jurisprudence, subject of elections, paragraph 8, page 186:

The power of Congress to legislate at all upon the subject of voting at State elections,

unless it may be with respect to elections for Senators and Representatives—

rests upon the 15th amendment. The legislation authorized by this amendment is restricted. It extends only to the prevention by appropriate legislation of the discrimination which is forbidden by the provision. Congress has no power to punish the intimidation of voters at purely State elections where the conduct complained of is not grounded upon race, color, or previous condition of servitude

Do you agree or disagree as to whether that is correct?

Mr. ROGERS. I agree with that. I do not think that necessarily says that the 14th amendment has no possible application though. I think it rests its case principally on the 15th amentdent.

Senator ERVIN. Is not the voting referees provision of this bill based upon the 15th amendment?

Mr. ROGERS. Yes.

Senator ERVIN. Now, I want to read you this statement from an opinion of the Circuit of Appeals, in *Karem* v. *United States*, which is reported in 124 Federal at page 250—and the reason I select it is because it is written by one of the men, I think one of the greatest Federal judges we ever had in this country, Judge Lurton. He says this:

The right to vote in States—

this portion is a quotation from the Cruikshank case—

The right to vote in the States comes from the States, but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the Constitution of the United States but the last has been * * *.

After quoting that from the Cruikshank case, Judge Lurton said this:

The 15th amendment is therefore a limitation upon the powers of the States in the execution of their otherwise unlimited right to prescribe the qualifications of the voters in their own elections and the power of Congress to enforce this limitation is necessarily limited to legislation appropriate to the correction of any discrimination on account of race, color, or condition. The affirmative right to vote in such elections is still dependent upon and secured by the Constitution and the laws of the States, the power of the State to prescribe qualifications being limited in only one particular: the right of the voter not to be discriminated against at such elections on account of race or color is the only right protected by this amendment and that right is a very different right from the affirmative right to vote. There are certain very obvious limitations upon the power of Congress to legislate for enforcement of this article. First, legislation authorized by the amendment must be addressed to State action in some form or through some agency. Second, it must be limited to dealing with discrimination on account of race, color, or condition.

Do you agree or disagree with that statement of Judge Lurton?

Mr. ROGERS. I agree with that, Senator.

Senator ERVIN. Now, a little further he says:

Appropriate legislation grounded on this amendment is legislation which is limited to the subject of discrimination on account of race, color, or condition.

Do you agree with that?

Mr. ROGERS. Yes, I think so. I think it is the same point, I think——

Senator ERVIN. Now, I ask you if as a matter of constitutional law, if this is not true, the Federal Government has no power in this field in respect to State or local elections, that is, to regulate State or local elections, except insofar as it is necessary for the Federal Government to enforce the prohibition that a State shall not deny or abridge the right of a citizen of the United States to vote on account of race, color, or previous condition of servitude?

Mr. ROGERS. Yes, I agree with that.

Senator ERVIN. Now, the provision of the 15th amendment insofar as it confers upon Congress the power to enforce the amendment by appropriate legislation is similar to the fifth section of the 14th amendment which gives Congress the power to enforce the prohibition against a State denying due process of law or the equal protection of the laws of a person within its jurisdiction; is it not?

In other words, the two provisions empower Congress only to enact such legislation as is appropriate to enforcement of these particular provisions?

Mr. ROGERS. That is correct.

Senator ERVIN. And these particular provisions are prohibitions rather than affirmative grants of power?

Mr. ROGERS. That is correct.

Senator ERVIN. In the case of *United States* v. *Cruikshank* which is reported in 92 United States at page 542, the Court was dealing with what was appropriate legislation under the 14th amendment to enforce the prohibition against denying equal protection of the laws and due process of laws and said this:

> The 14th amendment prohibits a State from denying to any person within its jurisdiction the equal protection of the laws. But this provision does not any more than the one which precedes it, and which we have just considered—

that is the due process clause—I interject the words—

> add anything to the rights which one citizen has under the Constitution against another.
>
> The equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle if within its power. That duty was originally assumed by the States, and it still remains there. The only obligation resting upon the United States is to see that the States do not deny that right. This the amendment guarantees but no more. The power of the National Government is limited to the enforcement of this guaranty.

Do you agree that that is a correct statement of law?

Mr. ROGERS. There was a little noise so I did not hear the first part. I think so, Senator. It sounds to me like it is consistent with the previous language you read, and it sounds to me as if it is correct.

Senator ERVIN. Now, I will read from *United States* v. *Harris*, which is reported in 106 United States at page 629, and I will read certain other quotations which it makes from the Cruikshank case:

> The purpose and effect of the two sections of the 14th amendment above quoted were clearly defined by Mr. Justice Bradley in the case of *United States* v. *Cruikshank*, 1 Woods 316—

that was a circuit court case rather than the Supreme Court decision. And the guaranties it spoke of were due process and equal protection of the laws.

It is a guaranty of protection.

This is a quotation from Mr. Justice Bradley—

It is a guaranty of protection against the acts of the State governments itself. It is a guarantee against the execution of arbitrary and tyrannical power on the part of the government and legislature of the State, not a guaranty against the commission of individual offenses and the power of Congress, whether express or implied, to legislate for the enforcement of such a guaranty does not extend to the passage of laws for the suppression of crime within the States. The enforcement of the guaranty does not require nor authorize Congress to perform the duties that the guaranty itself supposes it to be the duty of the State to perform and which it requires the State to perform.

And then it proceeds to say further: When in the case of *United States* v. *Cruikshank* came to this Court, the same view was taken here. The Chief Justice, delivering the opinion of that case, said:

The 14th amendment prohibits a State from depriving any person of life, liberty or property without due process of law, or from denying to any person equal protection of the laws, but this provision does not add anything to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society. The duty of protecting all its citizens in the enjoyment of the equality of rights was originally assumed by the States and it remains there. The only obligation resting upon the United States is to see that the States do not deny the right. This the amendment guarantees and no more. The power of the National Government is limited to this guarantee.

And again in the civil rights cases of 1883, the court said that all that Congress was authorized to do in respect to this section of the 14th amendment, fifth section, was to adopt legislation which was appropriate to prevent the State from denying these rights, and it did not authorize Congress to enact a set of affirmative laws to take over the field covered by the clause due process of law.

Do you agree with that?

Mr. ROGERS. Well, Senator, you have asked me quite a long question. The first part of—put it this way: I thought that the quotations you read from the other cases expressed it better than this last quotation you read, so I would be inclined to say that I agree with the previous quotations more than I do these last ones. I think some of the language in the last quotation I would have some question about.

Senator ERVIN. Well, of course, it is rather a lengthy passage.

Mr. ROGERS. Yes, generally speaking, I agree with it.

Senator ERVIN. I have a challenge to the constitutionality of this bill. If I construe title 6 of the House bill, aright, whenever the court found that any person has been deprived of his right to vote on account of race or color and has further found that it is pursuant to a pattern or practice, any person of that race can apply to a voting referee appointed by the judge and get an order that he is entitled to vote, and if I understand the provisions of the section beginning on page 11, at line 22, with the word "if," and extending down to line 8 on page 12 and ending with the word "law," then these voting referees do not pass upon the question whether the people who apply to them

for this order have been discriminated against on the ground of race or color.

Mr. ROGERS. Well, I think that undoubtedly any legislative enactment will be challenged in court, as I said to Senator Hennings.

Undoubtedly if this is enacted, it will be challenged, and I am sure that we could probably spend a considerable amount of time arguing this point. I do not have any question about the constitutionality of this statute. I think it is appropriate legislation within the meaning of the 15th amendment, and I think it would be sustained by the Supreme Court without any question.

If this is not appropriate legislation to implement the 15th amendment, then I do not see how you could draft legislation that would be appropriate.

There has been no real effort to enforce, to implement the 15th amendment really in 19 years until 1957. And the Civil Rights Commission, made up of distinguished representatives from both sections of the country, both North and South, both political parties, made a finding that there has been discrimination of a substantial nature in several areas of our country, and I think that without any question that this section of the act would be held to be constitutional.

I realize there is an argument you can make against it. But I think just as there was an argument made by Mr. Bloch against the Civil Rights Act of 1957, but I was satisfied that would be upheld by the Supreme Court and I am satisfied this will be upheld by the Supreme Court.

Senator ERVIN. I just wish to make this statement: I agree with the statement made by Judge Hughes, not Charles Evans Hughes, but by District Judge Hughes, reported in 46 Federal, page 381, that no constitutional statute could be passed by Congress relating to State and municipal elections except for the purpose of protecting voters from being hindered or prevented from voting on account of their race, color, or former slavery.

The lines I called your attention to, and these lines on top of page 13 beginning with line 3 and going through the word "law" on line 13, provide that these referees do not even go into the question of whether the person who applies to them for this order has been deprived of his right to vote on account of his race or color, and these persons are not either parties to the original action or beneficiaries of the original action. They are brought in later, and all the referees have to find, according to this, is that the applicant is qualified to vote under State law, first, and second, either one of these alternative conditions, namely, that the applicant has since the finding by the court concerning the pattern or practice, been deprived of or denied under color of law of the opportunity to vote or otherwise to qualify or vote, or the alternative, he has since that finding been deprived of his right to vote by a State election officers.

The only requirement is that he shall be a member of the same race as the persons involved in or for whom the first suit was brought. There is no requirement at all that he be discriminated against on account of race or color, and yet here is an affirmative law by which the Federal Government undertakes to pass on the qualifications of the man who is not required to have been discriminated against

on account of race or color. To my mind that is not enforcing a prohibition.

It is letting the Federal Government undertake an obligation which rests upon the State. If we got any Constitution left, this bill is clearly unconstitutional because it allows the Federal Government to pass upon the qualifications of a man to vote in State elections, without any finding that the particular man has been denied the right to vote on account of his race or color. And I say this, if the words of the 15th amendment still mean what they have always been construed to mean, the provisions cannot possibly be sustained.

You have stated your position on that, so I am not going to ask you again. I just want to say a couple of other things. I have a multitude of questions I would like to ask, but I realize that time is fleeting. I am like Senator O'Mahoney and also like you in one respect: I have found out that allegations sometimes are not the truth. I like to know the truth and that is one reason I object to ex parte proceedings.

After these referees are appointed, these people who are not parties to the original case can go to the referee who is appointed by the judge. The referee hears them and takes the evidence ex parte.

How can that provision be reconciled with article III, section 2, of the Constitution which confines the judicial power of the United States to the determination of cases and controversies which require litigants, adverse litigants?

Mr. ROGERS. Well, Senator, keep in mind you have already had litigation, you have had litigation, you have a court order, and you have defendants, and this is just an ancillary proceeding to assist the judge to make his order effective.

Now, if the emphasis which you put on ex parte suggestions that the State officials have no opportunity to be heard, I would agree with you. But they do have full opportunity to be heard. They are heard before the judge, when the judge makes the decision, and the only ex parte proceeding is before the referee, and the reason for that is that otherwise you would, each voter would have to separately litigate each case. What you do is you wrap it up in one proceeding before the judge, and makes a decision. If State officials come in and say that 55 Negroes, that the referee decided were qualified to vote, were not denied the right to vote because of the pattern or practice which the court has already found to exist, but for some other reason, the judge will hear those reasons.

Senator ERVIN. But the decision——

Mr. ROGERS. Let me just say this: I realize that you have a strong belief that there is a constitutional question in this statute. I do not think there is a constitutional problem. I do not think we will have any difficulty sustaining this statute in court.

There was, I remember in the Civil Rights Act of 1957 there were serious questions raised in the hearings about the constitutionality of that and we suggested then we did not think there were constitutional problems and the Court upheld that statute unanimously, and I would, although I grant that it is not easy to predict always exactly how a case is coming out, I would predict that the Court would sustain the constitutionality of this statute by unanimous decision.

Senator ERVIN. Well, if it is, I would say that the American people no longer have the protection of a written Constitution. But my

understanding of the decisions on due process of law is that parties to a case are entitled to be present every time anything substantial is done that may affect their rights.

Under the bill, the State election officials must discriminate as to parties in the original case. Does it not clearly require that?

Mr. ROGERS. That is correct. I will tell you, Senator——

Senator ERVIN. And after the finding, the bill provides that there is going to be an ex parte hearing. You agree with me that an ex parte hearing is a hearing on the application of one party, without the presence, without notice, and an opportunity to be heard on the part of the others; do you not?

Mr. ROGERS. That is correct.

Senator ERVIN. So the referees take the evidence, which is going to be used as a basis to deny the regular State officials of their power to discharge the duties of their office, in their absence, without notice, without an opportunity to be heard.

Then after he has taken the evidence, the referee makes his report to the judge, and up to the time he makes his report to the judge, there is no notice whatever and no opportunity to be heard?

Mr. ROGERS. That is correct.

Senator ERVIN. No opportunity to cross-examine the applicants, and no opportunity to present evidence until after the referee has made his tentative report to the judge, and then for the first time, a notice to show cause is issued to the attorney general of the State, and to the election officials; is that not the correct procedure under this?

Mr. ROGERS. That is correct, Senator. If you do not mind, I would like to have Judge Walsh answer some of these questions on this proceeding just because, first, he is familiar with it, if you do not mind, I would appreciate it temporarily.

Senator ERVIN. That is the procedure, is it not?

Mr. WALSH. That is the procedure as outlined; yes, sir.

Senator ERVIN. After the evidence has been taken, and the report, the decision of the referee made, then for the first time notice is given?

Mr. WALSH. Notice is given as to this application; yes, sir.

Senator ERVIN. And I invite your attention to this provision concerning this ex parte hearing—and I am reading lines 17 to 23 of page 13:

> Where proof of literacy or understanding of other subjects is required by valid provisions of State law, the answer of the applicant, if written, shall be included in such report to the court; if oral, it shall be taken down stenographically and a transcription included.

Mr. WALSH. Yes, sir.

Senator ERVIN. Then it provides in lines 20 to 22 on page 14:

> The applicant's literacy and understanding of other subjects shall be determined solely on the basis of answers included in the report of the voting referee.

Mr. WALSH. Yes, sir.

Senator ERVIN. In other words, the referee takes evidence of the applicant ex parte. As far as his adversary is concerned, he takes it in secret, that is what it amounts to, is it not?

Mr. WALSH. Right. In other words, his answer is taken before the referee the same as the answer would be taken before a State registrar, and if it is wrong that may be demonstrated to the court. If it is right, that may be demonstrated to the court, but he is not to be cross-

examined as to his answer any more than any applicant is cross-examined as to his answer before a State registrar.

Senator ERVIN. Well, if it got into court, the applicant could be subjected to cross-examination?

Mr. WALSH. No. I think the purpose of this provision on page 14 is that his answer stands, the same as an answer to an examination, and then you can——

Senator ERVIN. If that question arose in anything except a proceeding under the provisions of this bill, he could be cross-examined; could he not?

Mr. WALSH. No, I do not think so, Senator.

If the question was the adequacy of your answer before any type of administrative agency or before a referee, in other words, there is no question as to what his answer was, there is no question of fact. The question is one of law, as to whether his answer was right or wrong, and that can be argued before the court, but you cannot change his answer before the court.

Senator ERWIN. But the election official cannot even show, if he has the evidence in his power, that it was not taken down correctly by the stenographer?

Mr. WALSH. No. This is an issue of fact; you could show that.

Senator ERVIN. Oh, no. You cannot introduce any evidence about it. It says:

The applicant's literacy and understanding of other subjects shall be determined solely on the basis of answers included in the report of the voting referee.

It closes the door.

In other words, the general rule prevails in courts of law and equity that you can have evidence and seek the truth by any competent evidence, and this is eliminated here.

Mr. WALSH. I think, Senator, there is no doubt as to the intent if there is a question of fact as to what he actually said before the referee, that could be raised before the court.

Senator ERVIN. But you do not have any witnesses at all.

Mr. WALSH. You have the referee and the applicant.

Senator ERVIN. You cannot contradict this because you cannot offer any evidence to the contrary.

Mr. WALSH. I think that the purpose of this section is to make sure that there is no elaboration of the answer or cross-examination of the answer, before the court. That is the sole purpose of that section.

Senator ERVIN. That is not what it says, though. It says:

The applicant's literacy shall be determined solely on the basis of answers included in the report of the voting referee.

Mr. WALSH. That presupposes that the referee has performed his function as set forth on page 13: that he has, if the answer is written, included the answer in his report, and if it is oral, he has had it taken down stenographically.

Senator ERVIN. That is going to be the sole basis, no other evidence can be received at all, that is the sole basis.

Mr. WALSH. The sole basis ——

Senator ERVIN. Of making the determination.

Mr. WALSH. The sole basis of fact, that is right.

Senator ERVIN. In other words, all other truth is barred from the proceeding? The courthouse doors are nailed shut against truth com-

ing from any other source. And so even though it may be not true, even though it may have been doctored, you cannot contradict it?

Mr. WALSH. Senator, I can assure you there is no intent to nail the courthouse door shut against truth. The sole purpose of this section is to make sure that the answer of the applicant is not changed before the judge.

In other words, the answer given before the referee is to be the basis for deciding whether he is literate or illiterate and he is not to be cross-examined on it either for his own help or detriment.

Senator ERVIN. There is no provision for cross-examination anywhere, is there?

Mr. WALSH. Before the judge there is full adversary proceedings on exceptions raised by any party to the report of the referee.

Senator ERVIN. Except it requires them to submit affidavits in writing. Is there any provision here that they can call witnesses? It says you have to have affidavits in writing.

Mr. WALSH. That simply is to show a genuine issue of fact, Senator. In other words, the——

Senator ERVIN. But this provision is a matter to be solely determined—would apply to a hearing before the judge?

Mr. WALSH. No, I do not think there is any intent, Senator, that the hearing before the judge be—that the judge be restricted in holding a full adversary proceeding.

Senator ERVIN. Why, certainly it is, Judge. Start on line 13 and page 14: "Issues of law and fact raised by such exceptions shall be determined by the court," and so on.

This applies to the hearing before the court, that is the only hearing these people ever get. Even the judge cannot decide to pass on anything about the literacy or other qualification in that respect except on the basis of this evidence taken before the——

Mr. WALSH. I am not sure I follow you, Senator. The issues of fact and law raised by exceptions are going to be determined before the court in the usual adversary proceeding.

Senator ERVIN. On line 13——

Mr. WALSH. Yes, sir.

Senator ERVIN. It talks about the issues of law and fact raised by such exceptions, which are to be determined by the court.

Mr. WALSH. The exceptions simply frame the issues.

Senator ERVIN. When it provides for a hearing on issues of fact the bill is talking about a hearing before the judge in court. It provides that a hearing shall be held only in event the affidavits in support of the exception disclose a material issue of fact.

The applicant's literacy and understanding of other subjects is to be determined solely on the basis of answers included in the report of the voting referee.

Mr. WALSH. Well, the net effect of that is that the exceptions will frame the issues to be heard before the court, and the next sentence about genuine issue of material fact, that is simply the standard that is now in the law as to when you grant summary judgment and when you do not.

In other words, if it does not show a genuine issue of fact, why, there is nothing to be heard.

Senator ERVIN. On that issue of fact, the next sentence says in the hearing on exceptions filed with the judge, that the judge has to make his determination on one aspect of the case, and a most material one, solely upon the basis of the answers of the applicant taken by the referee.

Mr. WALSH. Yes, sir.

Senator ERVIN. I have never yet seen a statute which says that a court can only consider ex parte evidence on determination of an issue. I have never heard of a statute that attempted to close the ears of the court to the truth before.

Mr. WALSH. I do not think there is any intent to close the ears to the truth.

Senator ERVIN. I have always known that justice was supposed to be blind but this is the first time I have heard people proposing that it also should be deaf.

Mr. WALSH. This means that the issue of literacy shall be an issue of law and fact.

Senator ERVIN. It cannot be a question of law, because the issue of whether a man can read is a question of fact.

Mr. WALSH. Yes, but the referee shall have taken the evidence as to whether a man can read or write and will not be heard before the judge any more than the State registrar permits an applicant to be cross-examined on his ability to read or write.

Senator ERVIN. I have two more questions.

Mr. WALSH. Yes, sir.

Senator ERVIN. I have read, and am trying to repeat from memory one of the statements you made in justificaiton of not allowing the voting reefrees to pass on the question of whether the particular person who applies to them for an order was denied the right to register or vote on account of his race or color—you said it would be difficult to prove that.

Mr. WALSH. Also, unnecessary, because when we presuppose as this bill does that he is a qualified voter, and the U.S. attorney has just proved to a judge the existence of a pattern of racial discrimination, and he is then, after that order has been obtained by the U.S. attorney, goes back again and tried to register—we say that it is, and the only logical explanation as to his failure to register or qualify—you see the voter is qualified——

Senator ERVIN. Let us suppose I go to a State registrar. I got arrested one time for speeding, which is a misdemeanor. In my State you have a law that denies the man of his right to vote if he is convicted of a felony. Suppose a State registrar says to me: "You have been convicted of speeding and that is a felony," and he denies me the right to vote; could the Federal Government do anything about that?

Mr. WALSH. In the case you mentioned, I see no basis for Federal Government action at all.

Senator ERVIN. I agree with you there.

Now, suppose this, some colored fellow had been convicted of speeding and had the same experience and was turned down by the State official, who supposed that speeding was a felony and denied him the right to register on that ground. Under this bill, the Federal Government could come in and take charge, through a voting referee, and

overrule the State registrar on that point, which is none of the Federal Government's business, without any finding being made that the man had been denied the right to register and vote on account of misinterpretation of the law by the State official?

Mr. WALSH. Well, this would only be in a case where there had been a previous proof of a pattern of racial discrimination and that this man was a member of the race discriminated against so there are mathematical possibilities such as you describe.

Senator ERVIN. I may have to go back to practicing law after the next election. I would hate to practice law under a system where they take the evidence of the other side in the absence of my client in an ex parte proceeding and then tell me I could not contradict that evidence by other evidence on the trial.

Mr. WALSH. I think that is not the meaning of the bill, Senator.

Senator ERVIN. That is what it does, that is exactly what it says.

Mr. WALSH. Well——

Senator KEFAUVER. If the Senator will yield, let him say what the meaning is.

Mr. WALSH. The meaning of the bill is, Senator, and I think it is clearly set forth, that the referee will take these relatively—the applicant's statement as to these relatively simple facts, where he lives, how old he is, and how long he has lived there, and if there is a literacy test, why, the referee will apply it the same as a State registrar would.

After the referee has collected this information, he will make a report to the court, and the court will require the U.S. attorney to serve that on the State registrar and on the attorney general, the State attorney general, and if they conclude that this report is erroneous, in fact, or wrong as to the law, they will come in and except to it before the court.

Now, once they except, from that point forward the proceeding acts exactly like the regular trial. If there is an issue of fact as to where somebody lives, the State registrar or whichever party excepts to the report, on that issue as well as others, he can come in and contradict or whatever he wishes.

Senator ERVIN. Judge, what is the meaning of these words, lines 20, 21, on page 14: "The applicant's literacy," and so forth, "shall be determined solely on the basis of answers included in the report of the voting referee"?

Mr. WALSH. The answer to that is that there will be no issue of fact as to those answers. I mean the fact is, did he say this in answer to this question or did he not. Now, that is the only issue of fact there could be, and as to that, they could except to the referee's report if they think it is inaccurate as to taking down the answers of the applicant.

But once those answers are made, then the applicant is to have no opportunity to expand them before the judge and say something new before the judge, neither is he to be cross-examined before the judge and driven from the position he took in his answer. That is the purpose of those three lines.

Senator ERVIN. That is the purpose of it?

Mr. WALSH. Yes.

Senator ERVIN. And you could not offer independent evidence to contradict anything in there?

Mr. WALSH. The literacy; the applicant is put in the same position that he would be before a registration officer of the State. His answers to the examination propounded by the State registrar would be treated the same way as the answers propounded by the referee.

Mr. ROGERS. Senator, all the evidence that the State officials wanted to produce before the judge they could produce. The only thing they would be limited to, they would be limited to deciding the question of literacy based on the test already given.

The CHAIRMAN. Assuming you are right, they can introduce all kinds of evidence that they wanted to This says that the judge could not hear any of it or consider any of it, except this.

Mr. ROGERS. Just on literacy.

The CHAIRMAN. If it does not mean that, it means nothing.

Mr. WALSH. On that one issue; I think we are in agreement, it does mean that.

The CHAIRMAN. That is right.

Senator MCCLELLAN. Would the Senator yield? I need to be on the floor, and I had only just a few questions.

Senator ERVIN. I am going to quit.

Senator MCCLELLAN. I have got to file some reports. If the witness will be back this afternoon I can go and ask my few questions this afternoon when I return.

Senator ERVIN. I want to apologize to everybody for taking so much more time.

Senator MCCLELLAN. I thought I could go on the floor and take care of matters there, and be back when the witness will return this afternoon.

Senator KEFAUVER. Will the Senator from North Carolina yield? Will the Senator ask what the Attorney General means, what "ex parte" means, that the other parties cannot be there or just cannot participate?

Mr. ROGERS. Well, there would be no notice to the other parties. The Negro would come in and present himself to the referee and say that he tried to register with State officials, and they refused to let him, and that he was qualified, and then the referee would not be required to give notice at that point.

But, as Judge Walsh just pointed out, the State officials will be given full notice and a full opportunity to be heard just at a later stage, that is all.

In other words, rather than doing it each step of the way, which would keep the Negro involved in very protracted litigation right then, each one of them, you do it before the judge at one time, and the referee proposal is an ancillary proceeding to assist the judge in having a hearing, adversary proceeding, at one time.

Senator CARROLL. This is not a star chamber session?

Mr. ROGERS. Not at all.

Senator CARROLL. This is a session that people can come and take a transcript and hear the testimony. The real question, as I understand the able Senator from North Carolina is raising, the question is how can they attack the evidence that comes, but there is nothing secret about this hearing.

Mr. ROGERS. No. The referee acts just the way a registrar would act, a State registrar, and then he presents everything to the judge,

and then the attack made on his decision is made before the judge, and there is a full hearing before the judge.

Senator ERVIN. I will ask Judge Walsh, it is not necessary but for three people to be at the hearing, in fact, one of them is the referee, one is the applicant, and the other is the stenographer?

Mr. WALSH. That is right.

Senator ERVIN. And a person would have to have a very vivid imagination so as to know when all of those three are going to have to get together. To use an expression I have used before, as far as this law is concerned, this applicant can travel to the voting referee just like old Nicodemus did to the Lord, can he not?

Mr. ROGERS. Nothing can happen, no action can be taken, and he cannot get any court order until the State registrar and every party to the original proceeding has had notice and opportunity to be here, by means of exceptions to the referee's report.

Senator ERVIN. Except the evidence is salted down, and he cannot contradict the evidence. I just want to make this observation before I quit. I cannot reconcile this procedure with these rules of law. The right under the due process clause to a full hearing includes the right on the part of the party whose rights are sought to be affected to introduce evidence and have judicial findings based on it.

A party has a right to the opportunity when in court to establish any fact which, according to the usages of the common law or provisions of the Constitution, would be a protection to his property or his liberty. A conclusive presumption, or a presumption that operates to deny a fair opportunity to repel it, which violates the due process clause.

That is all.

Senator CARROLL. Mr. Chairman, I am going to put my questions quickly, if I may, to the Attorney General, and if he is not feeling well, Judge Walsh may answer them.

Mr. ROGERS. Senator, thank you, I feel well. I just have a little laryngitis. I can finish the session; thank you.

Senator CARROLL. Directing your attention to title I of the House bill, H.R. 8601, you know that the Senate was acting on H.R. 8315, the so-called Dirksen bill?

Mr. ROGERS. Yes.

Senator CARROLL. And, first, that that court order was broadened, and then it was struck?

Mr. ROGERS. Yes.

Senator CARROLL. Now, I observed in the House bill that some of us had some qualms about the multiple punishment, the possibility of it but I observe now there has been a proviso added in the House bill that was not contained in the Dirksen bill that the Senate acted upon.

Mr. ROGERS. That is correct.

Senator CARROLL. Now, do you really feel that you need this approach rather than the general powers contained in the general statute; do you need this criminal statutory approach rather than the injunctive approach?

Mr. ROGERS. Yes, Senator.

I testified at some length before Senator Hennings' committee. I also testified, I think last year, before this committee, a subcommittee of this committee, and before the House, too, and pointed out there that I think this statute is of great importance for this reason, that

under the present law, for reasons that I spelled out in some detail in my testimony, the present statute, which this is modeled after, the present statute is 1503, title 18, does not cover the cases covered by this statute, nor does the content power cover leaders of a mob who attempt to obstruct court orders in school desegregations.

Senator CARROLL. It might cover leaders of a mob if you could prove——

Mr. ROGERS. If you could prove they were acting in concert. But unlike other situations, the obstructors, the mob, are quite often not connected in any way with the defendants.

Senator CARROLL. Is it your concept that with this statute the Federal Government would have the power to move in quickly and arrest the leaders?

Mr. ROGERS. That is exactly, Senator, what this statute does. I would hope that we would never have to use it, but we have at the present time no effective remedy to deal with a mob, where there is a court order requiring Negro children to enter a particular school.

What this statute does would be to permit the Government under those circumstances to make an arrest of the mob leaders, to break up the mob violence, and we would have to try them before a local judge, a local jury, so that they would have all the safeguards that we provide under our constitutional system.

But in the absence of this, in a situation such as we had in Little Rock, the Federal Government, although it is charged with the responsibility of enforcing the court order, has no enforcement power.

Senator CARROLL. Well, if you had this enforcement power, if you did, you could go into court in an ex parte proceeding, if you had the names of the mob leaders, and you could get an injunction. This is evidence of what you can do in an ex parte proceeding in the case of violence. You could do that, could you not?

Mr. ROGERS. Yes. But the difficulty of that, of course, is that it is too late. I mean the trouble is behind you by that time. I mean in the Little Rock situation, for example, we could have gone back to court and included the leaders of the mob in the injunction, but we would have had to amend the complaint. We would have to prove they were out there, and by that time several days might have elapsed.

Senator CARROLL. What I am thinking about is this: As a practical matter, as the situation developed, I think it was in the Tennessee case where you know who the leaders were, then you can move into court and move ex parte and you can amend quickly and, as a matter of fact, you can be in court in a few hours and you can get your action quickly because of the obstruction of a court order.

The court is not going to take kindly to the obstruction of its order and if you are going to bring people, in they can be brought in, can they not, even though they were not acting in concert before, and you would find them obstructing the court order, and I think you would——

Mr. ROGERS. Yes. But you see what would happen then in a situation like that, you would have new mob leaders. Those particular people would not be there and the next day you would have somebody else.

Senator CARROLL. It is your idea about the statute, and I am not opposed to it, that you can move quickly to arrest and arraign and you could move as rapidly as you have continuously?

Mr. ROGERS. That is correct.

Senator CARROLL. If I may say, I think you used some unhappy language, at least as a result of what happened in the Senate, where you had no objection to broadening this obstruction of court orders, and this is what they did in the Senate, they broadened it, and then they wiped it out because they felt that the application of this was so broad, and there had not been any testimony taken on the effect of a general broad obstruction law or statute involving the obstruction of court orders, because the Federal courts enter thousands of orders, I assume, every day; is that not right, Judge Walsh?

Mr. WALSH. Yes, I think you could say that 335 judges enter more than an average of three a day.

Senator CARROLL. And this is what concerned many folks, many people about this thing, that they thought this was so broad and so comprehensive, so sweeping, they did not know the extent of it.

Mr. ROGERS. Well, I made very clear——

Senator CARROLL. Do you still take the position—are you willing to modify your stand, that you want to hold it to this alone?

Mr. ROGERS. Yes, Senator. I testified that way in the House. I testified that this was a particular statute to deal with a particularly serious aggravated situation that we might be faced with in the future, that it was to correct the weakness in the present statute dealing with this particular kind of case, that we did not need it in any other field. I do not known of any other field where we have any difficulty in enforcing court orders.

We could have serious difficulty with mob violence in the future, and I pointed out that we needed this as an alternative to the use of Federal troops.

If Congress passes this statute, I am reasonably confident that the Government can enforce court orders in school cases without the use of Federal troops.

If we do not have a statute like this, which gives the Government some authority, to break up a mob which is trying to obstruct a court order in school cases, then we have no power.

We have a solemn duty to enforce court orders, to support them, to see that they are carried out, and yet under the present law in the school cases, we have no way of doing it effectively, short of the use of troops, and I deplore the use of troops as much as anyone on this committee, and I think if we have this statute we can avoid it, and it is for that reason that we strongly support this statute, and urge Congress to pass it in its present form.

Senator CARROLL. You know the old rule of law, sort of Hornbook law, that you cannot normally get an injunction to prevent the commission of a criminal act. Do you think that this statute remedies that? Do you think the statute would be binding on a court of equity where it says that no injunctive or other civil relief against the conduct made criminal by this section shall be denied, on the ground that such conduct is a crime? Do you think that is adequate? Do you think a court of equity will pay attention to that?

Mr. ROGERS. Yes, I do not think that is a problem, as I think I said to Senator O'Mahoney.

This means if, in a case that you cited, we wanted to go back in court, we thought that would be an effective way, rather than making arrests, and we could go back and name these particular defendants

in the original litigation so they would be included in the injunction. We could do it that way, and we would not be barred from using that remedy rather than the criminal remedy. That is all it means, I think.

Senator CARROLL. Let us go over to title 2 for a moment. This "flight to avoid prosecution."

I have been reading the record, and you know some of this thing, some of us thought there ought to be the same restriction or the same practice ought to obtain on this new flight statute that obtained for 25 years under the Fugitive Felon Act.

It is my understanding that in 25, 26 years, the Attorney General never prosecuted anyone under the Flight Statute except where the original crime was committed; is that correct?

Mr. ROGERS. I did not hear the last part, Senator.

Senator CARROLL. The purpose of this flight statute was really to aid the States, to bring prisoners back?

Mr. ROGERS. That is correct.

Senator CARROLL. To avoid getting into the complications of extradition. In all these years there has never been anyone prosecuted, has there——

Mr. ROGERS. Oh, yes.

Senator CARROLL (continuing). For the flight, except where the crime was committed.

Mr. ROGERS. You mean where there was no original crime committed?

Senator CARROLL. I mean the flight statute, he was brought back, the statute says where the original crime was committed, that is, not the crime of flight, but the original crime from which he flew, and it is my information that you have not had a prosecution of that in any State; I think in your own testimony it showed, that in 1957—and I will give you round figures—there were some 957 violations of the statute, but most of those were turned over, as they should have been to the States.

Mr. ROGERS. Oh, yes, most of them are turned over to the States.

Senator CARROLL. I think you have nine prosecutions under this flight statute, but in no case was the prosecution obtained—has the prosecution taken place except where the original crime was committed.

Mr. ROGERS. I think that is probably correct.

Senator ERVIN. I have an indistinct recollection about reading in the newspaper about a Federal court in Ohio trying 1 or more of some 15 or 20 felons who broke out of prison in North Carolina and fled to Ohio. I have the recollection of reading that there was some prosecution of one or more of them in the Federal courts of Ohio, under the flight statute in Ohio.

Senator CARROLL. May I say to the distinguished Senator from North Carolina, they did not try them on the flight statute, but under the Dyer Act. Do you recall that, Mr. Attorney General?

Mr. ROGERS. Yes.

Senator CARROLL. In this statute, Mr. Attorney General, you have broadened this, not only where the original crime was alleged to be committed, or in which the person was held in custody or confinement. I am reading from the wrong statute here, the wrong—in other words, what I want to know is how you construe this law.

Mr. ROGERS. Well, I construe this law to be consistent with the present fugitive felon statute and I would expect it would work pretty much the same as the present statute works, except it is extended to include these offenses, and I would think that the way it would work in practice would be that the FBI would be authorized, as a result of this statute, to investigate cases of a serious nature, where there had been an interstate flight.

Senator CARROLL. That is the real purpose of it?

Mr. ROGERS. That is the real purpose of it.

Senator CARROLL. You bring the Federal Government in not to supplant the State, but to supplement their actions, to help the States?

Mr. ROGERS. Oh, yes, not by any sense of the word do we want to take over jurisdiction, and the purpose of this is to give the FBI clear jurisdiction in these very serious matters, to assist the States, if they so desire.

Senator CARROLL. I am going to pass over for the time here, and a little bit later on this afternoon, if you will be back, I think we ought to go into this matter of education; I think it is very important and vital to this bill, but I would like to pass now, if I may, to title 6, and I hope the chairman will go a little bit beyond 12:30, not too long. I am perfectly willing to stay for anyone else who wants to interrogate the Attorney General.

Let us build this step by step, if you will, for the record. Before the 1957 act, individual citizens had certain rights in the Federal courts; did they not?

Mr. ROGERS. That is correct.

Senator CARROLL. And the Federal court at that time could protect their voting rights, their constitutional rights; could it not?

Mr. ROGERS. Well, it had some remedies, but they were not effective.

Senator CARROLL. But which meant that he had a remedy at law.

Mr. ROGERS. Yes, himself; he could bring an action himself.

Senator CARROLL. Then in 1957 the Congress, for the first time, gave the Attorney General the power to institute a suit in behalf of the people of the United States or in the name of the United States.

Now, I have heard some reference here to the *Giles* v. *Harris* case, I think it was in 1903; Oliver Wendell Holmes did make some comment about Federal courts of equity getting into political arenas. He did not use those words, but he said getting into political fields. But Congress has changed that, has it not, by its 1957 act?

Mr. ROGERS. Yes.

Senator CARROLL. Do you have the exact wording, as we have here, since that time, we have had a Supreme Court decision, I think it was in the *Raines* case?

Mr. ROGERS. That is right.

Senator CARROLL. Now the *Raines* case again broadened even what we did in the 1957 act. Have you got that pertinent excerpt there in the *Raines* case about where the Supreme Court talks about that the court must be the guardian——

Mr. ROGERS. We will look, Senator. I do not happen to have it before me.

Senator CARROLL. If you will look for it—we will pass on, because if we will take this step by step, we will find out where we are going with this thing.

You then today as Attorney General—forget about this legislation at the moment—you bring a suit in behalf of the United States of America. This is what you did in the *Louisiana* case, was it not?

Mr. ROGERS. That is correct, Senator.

Senator CARROLL. Now, in that *Louisiana* case, that involved 1,300, 1,400, 1,500 people?

Mr. ROGERS. That is right.

Senator CARROLL. They were not all in court?

Mr. ROGERS. That is correct.

Senator CARROLL. But when you set up in that case you set up by your complaint, you made certain allegations. Did you name individuals in those allegations?

Mr. ROGERS. Yes.

Senator CARROLL. And was the evidence—you had to put in evidence to support your complaint in equity, your bill in equity, about those individuals?

Mr. ROGERS. That is correct.

Senator CARROLL. How many people were before the court in that *Louisiana* case?

Mr. ROGERS. I do not know how many witnesses we used. I do not think—I think it was——

Mr. WALSH. Louisiana was where they were reinstated on the rolls. I do not know.

Mr. ROGERS. We do not know, but we can find out. I do not know offhand.

Senator CARROLL. Then under the 1957 act, and the court acting as a court of equity, answered an order, did it not, to restore those people to vote?

Mr. ROGERS. That is correct.

Senator CARROLL. And that has been unanimously approved by the Supreme Court?

Mr. ROGERS. That is correct.

Senator CARROLL. The Supreme Court of the United States.

Let us go over to the *Terrell County* case. That suit was also brought in the name of the United States, was it not?

Mr. ROGERS. That is right.

Senator CARROLL. How many witnesses were in that case?

Mr. ROGERS. You see, we are going to try the case. We have a ruling on the constitutionality of the statute, and we are going to have to try the case, and I am not sure how many witnesses will be called, but I would imagine it would be in the neighborhood of 15 to 20, something like that.

Senator CARROLL. All right.

Let us assume you had 15 or 20 people—I am talking about existing law today——

Mr. ROGERS. Yes.

Senator CARROLL. Fifteen or twenty Americans who claim they have been discriminated against. As long as that order of that court is open, other citizens can intervene, can they not?

Mr. ROGERS. That is right. And further than that, Senator, the order of the court, when that case is completed, will not be limited just to those people. It will not say to the defendants. "You have dis-

criminated against these people and, therefore, the court orders you to register these people."

It will say that, but it will say more, too, it will say: "You have engaged in discriminatory practices, and we enjoin you from continuing this discrimination in any other case of any other individual even those not named in the lawsuit." In other words, it will be a broad injunction.

Senator CARROLL. Well, the able Senator from North Carolina raises a very important question, and I think the constitutionality of the whole thing will be hit on this ground, the attack will be made on this ground: The question is, Can the Federal courts, can the courts of equity, prevent or do they have the affirmative powers to effectuate and protect the constitutional rights of people who claim their rights have been denied?

Mr. ROGERS. That will be the constitutional question to be presented before the court.

Senator CARROLL. It seems to me, although it is a different situation, it seems to me that what was the power of the court there—let me ask what was the power of the court there, it was an affirmative act, and the court said, "restore."

Mr. ROGERS. Correct.

Senator CARROLL. Now, let us assume that they refused to restore. It seems to me I recall in courts of equity of specific performance, that if the defendant in the case refuses to perform the act itself, the court can perform the act, can sign a deed itself, or direct its master to sign the deed.

Mr. ROGERS. That is correct.

Senator CARROLL. I think I want to make these points.

Senator ERVIN. But the 15th amendment does not apply to deeds.

Senator CARROLL. We understand that. We are talking about powers, the affirmative powers, of a court of equity.

I want to say quite frankly I wish we could have proceeded in a different way. I have great concern about leaving this administrative job to our courts, and I wish that we had—and some time it may come, that we had a National Labor Relations Board problem—I think it would have been more intelligent had we come forward with a commission that had powers, that the Congress delegated powers to it, that it could function clear across the board in the field of civil rights not only in voting but in other fields, and that that commission could promulgate rules and regulations, and that they would use the courts to protect those rules, and enforce those rules and regulations.

But I think under the situation that has developed here where there has been massive resistance on the part of State machinery and of States, it requires a more drastic remedy than the courts now have.

Whether the executive branch will not, whether the legislative branch cannot, certainly it seems to me that the judicial branch can constitutionally proceed to protect the rights as was said in the *Raines* case. Have you found that?

Mr. WALSH. Yes, sir.

Senator CARROLL. Will you read that into the record at this point?

Mr. WALSH. This is from *United States* v. *Raines*, 29 U.S. Law Week 4147, February 29, 1960:

> It is urged that it is beyond the power of Congress to authorize the United States to bring this action in support of private constitutional rights. But there

is the highest public interest in the due observance of all constitutional guarantees, including those that bear the most directly on private rights; and we think it perfectly competent for Congress to authorize the United States to be the guardian of that public interest in a suit for injunctive relief.

It say, see *United Steel Workers* v. *United States*, 361 U.S. 39, 43.

Senator CARROLL. That is the point I want to emphasize; that the Congress can give to the court the power as the guardian of that great public interest.

Now, the question comes how do we do this. When I bring a suit, let us assume we pass this law, when you bring a suit you now again bring it in the name of the United States?

Mr. ROGERS. That is right.

Senator CARROLL. And we assume that all Attorneys General who are able lawyers and have able staffs, that before they move they will have the evidence, but you will set up in your pleadings, will you not, you just go in and say that there is discrimination; you have to allege the discrimination and the nature of it.

Mr. ROGERS. Sure, yes.

Senator CARROLL. And the individual, you may have to use some individual, to explain that?

Mr. ROGERS. That is correct because, as we did in—just as we did in the *Terrell County* case.

Senator CARROLL. When you set up those individuals, what you really do is the court is passing judgement on those particular individuals; is he not?

Mr. ROGERS. That is right.

Senator CARROLL. But what you really are asking the Congress to do now is to broaden the scope of the 1957 act to establish a pattern and a practice?

Mr. ROGERS. That is right.

Senator CARROLL. To create a greater umbrella for people who were not a party to the suit in the sense that they are physically present in court.

Mr. ROGERS. That is correct.

Senator CARROLL. And the court, after he makes such a finding—the Congress for the first time gives the court a power to establish a voting referee, and this is why you desire to broaden the scope of rule 53; is that not so?

Mr. ROGERS. That is right.

Senator CARROLL. Rule 53, as I understand it, permits the appointment of masters only in exceptional cases.

Mr. ROGERS. That is correct.

Senator CARROLL. We say this is no longer the exception, this is the rule; is that a correct interpretation of what you have in mind?

Mr. ROGERS. Yes; that is correct.

Senator CARROLL. After you get this voting referee he now is functioning—one more step. When the court makes this finding, I ask Judge Walsh, a former Federal judge, when he makes a finding of fact and conclusion of law, he has to set up the standards in his decree, does he not? One of his findings will have to be what are the voting qualifications of the State. In other words, we are not going to leave in the hands of a referee willy-nilly to determine what the qualifications are. I should think they would be set up in the court's decree.

Mr. ROGERS. Well, certainly the court's decree will require that he comply strictly with State law, and I am sure the district judge will lean over backwards to be sure that anybody who is certified and qualified to vote will be fully qualified under State law.

Senator CARROLL. But the difficulty is when you talk about qualified under State law, it may vary from county to county because of the broadness of the statute in accordance with the registrar.

In the county there he may have many precincts, and he may have a half-dozen referees, and it would seem to me, and this is why I would want to make a record in this case, it would seem to me that the courts might set up in their decree—and there ought to be testimony given—as to what the qualifications are.

Mr. ROGERS. I think that would be the case.

Certainly there is enough flexibility so that the judge would do that, and the type of case you suggest, I am sure, he would do that, Senator.

Senator CARROLL. When you talk about flexibility, this brings me back to this question of—it is page 15, line 21:

This subsection shall in no way be construed as a limitation upon the existing powers of the court.

I have a very strong feeling about this. If the Congress gives the court this power, a court of equity, and the courts have not been heretofore willing to assume it, at least they have not met the issue head-on, and the Supreme Court has spoken, and the Congress spoke in 1957, why should we set up rules and regulations to handcuff the court from exercising its equity powers, its equity functions?

Mr. ROGERS. I think the reason for this sentence is exactly that, Senator, to be sure that this was not to handcuff the district court; that is why this sentence was included.

Senator CARROLL. That being here, I am reading over here on page —take a look at line 8, page 12—

to an order declaring him qualified to vote, upon proof that at any election or elections (1) he is qualified under State law to vote—

this is proper, this is constitutional. We think they ought to be qualified under State law—

and (2) he has since such finding by the court been (*a*) deprived of or denied under color of law—

in other words, the man just got trying his lawsuit, you are trying his lawsuit in court, you have got 30, 40 people in court now, and the man—the question is here whether there was a pattern of discrimination, whether there is really discrimination, and the court has now found there is such discrimination, but this man now under this, it is said that he has now since, he has got to go back since the court order, and he has got to go through it all over again. I would like to have your explanation.

Mr. ROGERS. This would not apply to those——

Senator HRUSKA. Mr. Chairman, will the Senator yield? I understood that the chairman announced we were to meet at 2 o'clock again. If we are going to meet at 2 o'clock again perhaps we ought to suspend or we will meet ourselves coming back.

Senator CARROLL. I will abide by Senator Hart. Do you want to put any questions?

Senator HART. No, I do not want to put any.

Senator HRUSKA. I do not mean by this to shorten this questioning at all, Senator, but I think if we are going to be back at 2 we ought to suspend.

Senator CARROLL. I want to suspend at this point and say to the Attorney General, I want to press this line of questioning, and you will have a chance to study this. Do you want to come back at 2 o'clock?

Senator HENNINGS. Mr. Chairman, some of us have offices in the other building, and it is a matter sometimes of 10 minutes to get from here to the other Senate Office Building, and that would not even allow us an interval to take telephone calls and to take care of other matters and tend to other immediate and urgent things.

Senator JOHNSTON (presiding). What would suit the Attorney General?

Mr. ROGERS. I would like to be excused this afternoon and let Judge Walsh continue for me, because I did not realize when I talked to the chairman that it was going to continue on this afternoon, and he is fully familiar with it and he testified in the House on it, and if you don't mind I would prefer to do it that way.

Senator JOHNSTON. What is the wish of the committee?

Senator CARROLL. I think it is all right with me.

Senator HENNINGS. I think, Mr. Chairman, the Attorney General has indicated that he is presently under some handicap with relation to his voice, unfortunately and cannot testify as freely and as fully as he would like, and I believe this committee should be as considerate of that fact as we can be. I, for one, would suggest that the Attorney General, in accordance with his own suggestion, be excused, and that Judge Walsh, who is exceedingly well versed and, I am sure, can speak for the Attorney General in all particulars, be good enough to come to us this afternoon.

Senator JOHNSTON. What do you say about the time of coming back?

Senator CARROLL. 2:30.

Senator JOHNSTON. Some of you have to go downtown and back.

Mr. ROGERS. Excepted to. I appreciate your comment. I want to say that I am really not under any handicap except I am not supposed to talk too long. I am not sure that that is a handicap.

Senator HENNINGS. I had the same trouble about 10 days ago.

Mr. ROGERS. If I could just answer this one question and then I will stop, Senator, to answer your question, those persons who have already testified in the action and who have been witnesses before the judge, and it is their testimony upon which the judge makes the finding that a pattern or practice of discrimination exists, they would be included in the injunction, they would not have to go back before the referee.

In the Terrell County case, the court will include these persons in the injunction, and he will say that the witnesses testified—he will say "The witnesses testified before me, that they have been discriminated against, and I order the State officials to permit them to register so they won't have to go through the proceeding again."

The only ones who will appear before the referee are the ones who have not been permitted to register, following the court's injunction.

Now, there was some objection, this portion was added after it,

because there was some objection raised, and I think it was a valid one, that people, Negroes, might come in and say that 3 or 4 or 10 years ago they were denied the right to register, and they would ask to register before the referee, and the point was that that would be unfair. That would not indicate present discrimination.

So this requires that persons not appearing in the case, and who are not named in the injunction, then have to try to apply before the local registrar, and if they are unsuccessful then they go to the referee.

Senator CARROLL. These are the people then who would go back since?

Mr. ROGERS. That is right.

Senator CARROLL. But supposing the court of equity says, "Listen, this pattern is so wide and so deep in this area that they have not been registered for 30 years." Is a court of equity going to require these people into a vain, a futile, a useless act?

Mr. ROGERS. Yes.

Senator CARROLL. Does this interfere with the court of equity's power to say to these people, "You don't need to do this here."

Mr. ROGERS. I do not think so. I think you have to assume, after the court has enjoined State officials from discrimination, you have to assume they may act differently, you certainly have to give them a chance. You cannot assume they are going to violate the court's order.

Senator CARROLL. But you say you have to assume this is so. I say that one of the manners in which you handcuff the court is this. The court will make the assumption. This is the standard which we say to the court and to the referee that this directory, not mandatory, that the court of equity will determine whether he does this or does not do it.

Mr. ROGERS. As I say, I do not believe there would be any problem there. I think that the Negroes who have not appeared in the lawsuit should be required to go back, go back to the registrar and try to vote because I think you have to assume in a lot of these areas where there is a final determination by the court, the State officials will comply, and I think it would be contrary to the ordinary procedures in the administration of justice to assume that even after the court had found that there was a discrimination and had ordered the State officials to comply under threat of contempt, that they were going to disregard his order.

Senator HENNINGS. Will the Senator yield? Wasn't that one of the objections that the Attorney General raised against the so-called enrollment officer or registrar proposal?

Mr. ROGERS. I think the point the Senator makes is one of the points you made.

Senator HENNINGS. That is one of the points I tried to make. Of course, the Attorney General disagreed with me then. The Attorney General agrees with the same question substantially put by the distinguished Senator from Colorado now. As I understand it, the Attorney General is taking two positions.

Mr. ROGERS. I do not think so now.

Senator CARROLL. I want to say that the Attorney General has not not quite answered the question, and it is a very important question, for the record. We understand about the individuals before the court.

You have done it very well, and I agree with you completely because they are part of the order.

I am not talking about these folks who go back since. The basis of your lawsuit is discrimination, a pattern. Now, the court enters an order when he finds that, and he appoints a voting referee.

Now, to have those folks go back since, why, this is enough to—except you know what will happen to your bill, you know what will happen under the circumstances you see, when you talk about the folks who are in there in the beginning, you can do that without this act. You do not need this act for that purpose. You can do that right now.

Mr. ROGERS. That is right.

Senator CARROLL. So you have got this new concept, and I do not disagree with it, of putting it in practice, but when you make these poor folks go back again, I think you have gutted your bill, except for this explanation, the sentence I read to you about your dealing with a court of equity, and the court of equity will make these determinations if, in his judgment, he thinks they ought to go back, and he can set it up that they do go back.

If, in his opinion, he says from the evidence—not in his opinion, but from the evidence, from the record, that the pattern is so wide and so deep of discrimination that a court of equity will not require them to do a vain and futile act, and this is contained in the last three or four decisions of the segregation cases—I am asking you specifically now, whether or not you think this word "since" is mandatory or directory on the par[illegible] the court. You do not have to answer it now. Think it over.

Mr. ROGERS. Well, I think that your analysis is correct, that the sentence over here that you read makes it clear that this will not in any sense of the word lessen the present power of the court. I would not want to have anything that I said here indicate that I thought the power of the court would be decreased as a result of this statute.

But I think as far as the referee is concerned, himself up here, that as provided here at page 12, line 3 through line 8, that after the order enjoining State officials from discriminating was made by the court, that Negroes who are not involved in the litigation would be required to attempt to vote, attempt to register with State officials, and if they were denied that right then they would go to a referee.

If you eliminate that step, you do have some constitutional problem; if you do eliminate that step, you do have some constitutional problem for the reason, Senator, that Senator Ervin mentioned, that those steps go a long way to assure the constitutionality of the act.

If you do eliminate that step, you would have a permanent expression of guilt that they were at one time and you are assuming they are still guilty.

Senator ERVIN. The bill assumes the States officers would violate the Constitution, and denies them a trial on that point.

Mr. ROGERS. You would assume they would violate the orders of the court, and assuming that they were going to risk contempt.

Senator HENNINGS. That was the question I asked you, Mr. Attorney General that was not the question——

Senator CARROLL. All right. You come back at 2:30.

Senator JOHNSTON. Under the circumstances you are excused, and at 2:30 you will come back, Judge Walsh.

The staff will please notify all the Senators not present at the present time as to what time they are coming back. We are adjourned to 2:30.

(Whereupon, at 12:55 p.m., the committee recessed, to reconvene at 2:30 p.m., the same day.)

AFTERNOON SESSION

(Present: Senators Eastland, Kefauver, Johnston, Hennings, McClellan, O'Mahoney, Ervin, Carroll, Hart, Wiley, Dirksen, Hruska, Keating, and Cotton.)

The CHAIRMAN. Judge, let us get busy.

Senator HENNINGS. Mr. Chairman, may I make on inquiry before this meeting proceeds into the afternoon session off the record?

(Discussion off the record.)

STATEMENT OF LAWRENCE E. WALSH, DEPUTY ATTORNEY GENERAL—Resumed

Senator CARROLL. Judge Walsh is here now, I understand, and will speak for the Attorney General?

Mr. WALSH. Yes, sir.

Senator CARROLL. Judge, you were present at the time that I put a number of questions to the Attorney General?

Mr. WALSH. Yes, sir.

Senator CARROLL. Is it fresh in your mind what the issue was at the time of recess?

Mr. WALSH. Yes, sir. You were inquiring as to the reason for the provision that requires that the applicant reapply or apply to the State registrar before going to the referee. You were discussing that general subject with the Attorney General.

Senator CARROLL. Now, in the House bill I find—and I am reading now from page 12—that after the court makes a finding of a practice or pattern of discrimination that any person, evidently, who can come within that pattern, any person of such race or color resident within the affected area shall, and I leave out a certain sentence—

shall be entitled, upon his application therefor, to an order declaring him qualified to vote, upon proof that at any election or elections (1) he is qualified under State law to vote,

and I ask now prove to whom, to the voting referee?

Mr. WALSH. Yes, sir.

Senator CARROLL (reading):

(2) He has since such finding by the court been (a) deprived of or denied under color of law the opportunity to register to vote or otherwise to qualify to vote, or (b) found not qualified to vote by any person acting under color of law.

Is that what we mean, as we read this section, that he will present himself, this applicant, to the voting referee and ask the referee to issue a certificate of registration? This will be the application. The application may go to the court, but it is before the referee or, if the court so finds by its decree, it can permit the voting referee to accept an application; is that not so?

Mr. WALSH. Yes. The certificate or the declaration of voting eligibility would be by the court itself. The referee could do the preliminary work if the court so directed.

Senator CARROLL. Let us assume that the applicant presents himself to the referee. First of all, he has to establish by proof that he is qualified under State law to vote; is that right?

Mr. WALSH. Yes, sir.

Senator CARROLL. What do we mean by those words, "qualified under State law to vote"?

Mr. WALSH. Well, "qualified under State law," is defined on page 16, line 9 of the bill which provides that:

"Qualified under State law" shall mean qualified according to the laws, customs or usages of the State, and shall not, in any event, imply qualifications stringent than those used by the persons found in the proceeding to have violated subsection (a) in qualifying persons other than those of the race or color against which the pattern or practice of discrimination was found to exist.

In other words, assuming there has been a finding that there has been a pattern of discrimination against Negroes, there will be—the State law as applied to whites will then be—applied by the referee to Negroes.

Senator CARROLL. Let me put it this way: Is it the purpose of this bill when we speak of nondiscriminatory action, that we want the same laws, customs, standards, qualifications, usages given to the black people that are given to the white people?

Mr. WALSH. Exactly.

Senator CARROLL. No special favoritism to the black people, just the same standards?

Mr. WALSH. That is right.

Senator CARROLL. And this would be what the voting referee would be bound by?

Mr. WALSH. Yes, sir.

Senator CARROLL. I asked this morning whether or not the court itself, because in some State statutes the qualification, the door is left open, and some discretion is vested in the registrar. In such an event would not the court itself, could it not, set up in its decree the qualifications under State law which would govern the action of the voting referee in accepting the application and making such a finding?

Mr. WALSH. Very often in a case, the law of the case will be determined by the court, and then subsequently applied by the referee or such other persons as may be serving the court.

Senator CARROLL. So, therefore, if a court in its decree setting up the standards did not follow the qualifications set up by the State, that would be subject to a direct attack by an appeal, would it not?

Mr. WALSH. Oh, yes; yes.

Senator CARROLL. So there is that protection, then?

Mr. WALSH. Yes, indeed.

Senator CARROLL. We are not favoring one group or race or color over another?

Mr. WALSH. No intent to do so.

Senator CARROLL. Now, the second question here, we come to the question of 2(a). He has "since such finding by the court been"——

Mr. WALSH. Yes, sir.

Senator CARROLL. What do you mean by "Since such finding by the court?" If I may ask it in this question, do you mean he has shown his qualification to vote before the referee, the referee then has to take all the finding and the evidence and submit it to the court? The court

issues an order including the applicant within that order, and then the man even has to have, after the order is issued, showing that it is a part or pattern of this discrimination, he has since got to go back to the State registrar?

Mr. WALSH. Excuse me, Senator, that is not the purpose of that provision.

The finding referred to there is the basic finding of a pattern or practice of discrimination, the underlying finding on which this entire procedure is based.

The way it will work is this: If the United States attorney or the Attorney General concludes that they can prove a pattern or practice of discrimination, they will then go ahead and prove that before the district court. This is before any applicant comes before the court.

They must prove that pattern of discrimination, and they will then undoubtedly ask for an injunction directed toward the State registrar, telling him to desist from such a practice, and then the Court can, if it sees fit, appoint a referee, and that is the first time the referee comes into it, and the only purpose of these words "since such finding" is to require any applicant for registration, before he comes to the referee, to first go to a State registrar, and give the registrar a chance to perform the duties of his office without discrimination in accordance with the——

Senator CARROLL. These are exactly the words I put before you.

Mr. WALSH. I did not understand it.

Senator CARROLL. It comes before the voting referee, the court has appointed the voting referee; the applicant comes before the voting referee, and his proof has to be, first, that he is qualified to vote.

Mr. WALSH. Yes.

Senator CARROLL. His next order of proof is he has to prove that he has been to the registrar, he either has to prove that he would not give him an opportunity to vote, either closed the place on him or he was not there, or he was there and stood in line for hours, and he has been there several hours; he has to prove that, or assuming that they had given him the opportunity to register, they have found him not qualified to vote through whatever mechanism they use. In other words, it puts him upon his proof?

Mr. WALSH. That is right.

Senator CARROLL. He has got to have that proof before he can be put in the position to come under the court's order; is that right?

Mr. WALSH. That is right. He has to make the same proof before the referee that he would ordinarily make before the State registrar. That is the purpose of that provision. In other words, he would have to show where he lives, how old he is, and whatever else the State law requires, and then he must also show that he tried to make this proof before the registrar, and either he was turned down or the registrar would not listen to him, one way or the other.

Then, you see, the court has already enjoined the registrar from racial discrimination, and then this man has gone back to the registrar and tried to qualify as a voter, and now he can prove he is qualified as a voter, so we have a man here who can prove he is qualified, who has been turned down since the court's decree, and then he comes over and says to the referee:

"Now, this decree is in effect, but I am not getting anywhere. Here are my qualifications, and I tried to register and I was turned down."

The referee says, "I will report that to the judge," and he does; and then the judge serves this report on the State registrar, the State attorney general, and says, "Now, this is what my referee tells me. Do you have any exceptions to this report?"

And the registrar can either except or not, as he sees fit. He may say, "Well, my information is he doesn't live where he says he does, and here is an affidavit of a neighbor, of a person who lives at that address and has lived there at that address for 5 years, and he says he has never seen this man at that place."

Then the issue would be tried before the judge. It is the registrar's right to prove it. Then the application will be turned down.

Senator CARROLL. As I understand it, the registrar is a county registrar?

Mr. WALSH. State or county.

Senator CARROLL. He is now in violation of the court order because the original court order is directed against him.

Now, applicant comes to him and he refuses to register him. He is in violation of the court order, is he not?

Mr. WALSH. Well, now, if——

Senator ERVIN. It would not be in violation of the court order if he does not live in the precinct, or if he committed a felony or he could not meet a literacy test. He would be in violation if he turned him down because of race or color.

Mr. WALSH. Yes.

Senator CARROLL. We assume if he is qualified to vote and he meets this other test then that State registrar is in contempt of court, is he not? He has violated the order of that court, has he not?

Mr. WALSH. The State registrar is in contempt of court if, as Senator Ervin pointed out, he turned him down because of his race.

But there are two different problems, or they are not different, they are intertwined, but they are not identical. The application for an order declaring him qualified, the applicant qualified to vote, and the prosecution of the registrar for contempt, if that should become necessary, but it is the intertwining of those two things that we think justifies the requirement that the applicant go to the State registrar after the underlying injunction and after the underlying finding of fact as to a pattern of discrimination.

Senator CARROLL. Now, Judge, is not the very purpose of this new law—and I am not opposing it——

Mr. WALSH. Yes, sir.

Senator CARROLL (continuing). But the very purpose of the new law, the only new thing you provide in this law that is different from existing law, is the pattern and practice of discrimination, coupled, of course, with the broadening of rule 53.

Mr. WALSH. No, there are two or three things here. One is, as you point out, it gets away from rule 53 which says that the use of referees shall be the exception rather than the rule.

Senator CARROLL. Yes.

Mr. WALSH. And also would eliminate an item of proof. I mean, without this bill a Negro, coming to the Federal court for relief, would have to prove that he personally had been discriminated against because of his race. Now, what we are asking the Congress

to do is to eliminate that item of proof where there has been already proof of a basic pattern of discrimination.

Senator CARROLL. That is what I was coming to.

Mr. WALSH. Where the man proves he is qualified and yet cannot get registered.

Senator CARROLL. Yes; but your pattern, you really put the pattern into practice, which is really to provide a more expeditious way of getting these folks registered so they will not have to come in and prove their case individually.

Mr. WALSH. That is correct.

Senator CARROLL. But when you get through setting up, as you have done under 1, 2(a), and 2(b)——

Mr. WALSH. Yes, sir.

Senator CARROLL. And a man has to go back and prove "since"; he has to go back since the original court finding, and then he has got to come in and offer proof——

Mr. WALSH. This applicant, Senator, need not have been a party in the underlying proceeding at all.

Senator CARROLL. I understand that; that is very clear.

Mr. WALSH. He may have been sitting home through all of that.

Senator CARROLL. That is very clear. I think we understand that perfectly. But the question nevertheless is, and I will give you an example: Let us assume a place where they have not registered a colored man for 30 years, and now the court finds this pattern and practice of discrimination, maybe not against one or two, but hundreds, several thousand people.

Now, we are going to say to these people that never in a generation have been registered, "You have got to go back now and attempt to register by this court order, you have got to go back now, make your effort, and then when you come in you have got to prove that you have been there, that you have been deprived or denied under color of law the opportunity, or having been given the opportunity, they found you not qualified," and it puts him upon proof, and he is there alone, he has not got the Attorney General in back of him. He is there all alone.

Mr. WALSH. Well, the Attorney General is still the basic litigant in this proceeding. I mean, he is alone before the referee.

Senator CARROLL. But the Attorney General is not there breathing down his neck to help this man. He is out there all by himself.

What I am trying to suggest to you—I think you folks, in accepting this word "since"—what you have done, I think, is you have almost gutted your own bill.

Mr. WALSH. Well, Senator, we have not really. We have tremendous respect for your views, but I think, frankly, that is the heart of the bill's equity. I mean, we do not want to; in the first place we do not believe the Federal Government should move any further into the administration of State affairs than it has to, and that we can justify under the 15th amendment, and we do not believe that because something may have happened 10 years ago that an applicant who can say, "I was discriminated against 10 years ago," and then we go to the trouble of getting an injunction to tell the State registrar to stop his discrimination, that the applicant should be able to bypass the State registrar after he is under an injunction.

The presumption should be that a man who is under an injunction will comply with its terms for fear of contempt, and it is our hope that the referee provision, in the end, be used very little; that the State registrar, realizing that any failure by him to deal without discrimination among qualified voters, is going to result in each individual case, coming to the attention of the court through the referee.

We think his realization of that is going to really reduce the number of cases coming up under this proceeding.

Senator CARROLL. Judge, this was not in your original bill. This was not in the original three or four bills that were presented to the Congress.

Mr. WALSH. The language "since"—

Senator CARROLL. The word "since."

Mr. WALSH. No; it was not. That was put in in the House and we acquiesced in the change because there was a sound reason for it.

Senator CARROLL. If I may finish along this line, please, and then I will be glad to yield for an observation—I want to take you back to this on page 15. Here is my point. I think you have got to make a record here.

For the first time in American history you are saddling on a court of equity, you are putting it in an administrative field, giving them voting referee powers, and you are putting a great burden upon this court, and you now, are you, seeking to handcuff a court of equity? What about this section on page 15?

I am reading line 21, "This subsection shall in no way be construed as a limitation upon the existing powers of the court."

What do you mean by that?

Mr. WALSH. Well, that means that these are to be additional powers. We are not to restrain the exercise of preexisting powers which the court has. We certainly do not want to handcuff a court of equity.

Whatever powers the court of equity had to do justice, we want left, and these new powers added to them. That is what we meant by that.

Senator CARROLL. Would you be willing to see a proviso in there so that there would be no question about this, and I am reading, after the word "law" on line 8, page 12:

Provided, however, That if the court finds that the acts necessary to fulfill the requirements under 2 (a) and (b) would be vain and futile or serve no useful purpose, it may waive the proof of such requirements"

That is an old equitable doctrine?

Mr. WALSH. It is.

Senator CARROLL. Followed through all the decisions, through hundreds of years.

Now, is there any reason why that should not go in, or can you say for the record that it is not needed, that there is implied in this bill that maxim, equitable maxim?

Mr. WALSH. I recognize the maxim, and I think it is unnecessary, and, indeed, undesirable to specify it at that particular point. I mean to the point that a court of equity would so hold that power is preserved by the general provision which you referred to earlier.

Senator CARROLL. I think that is a very important statement now, and I want to go over that again.

As I understand you now, this provision is not required because in no way does this provision or these provisions that I have mentioned

here, the proof, qualify or diminish the powers of a court of equity with reference to its findings, and its decrees in this field?

Mr. WALSH. That is right. There is no intent to limit the existing powers of a court of equity.

Senator KEATING. Would the Senator yield at that point?

Senator CARROLL. I promised to yield to the able Senator from North Carolina. Then I would be glad to yield to you.

Senator ERVIN. Isn't the trouble here that the presumption would be going backward instead of forward?

Senator CARROLL. I think the Senator from North Carolina ought to explain that. What do you mean by that?

Senator ERVIN. What the bill is trying to do is to get established what I call conclusive presumptions which run forward.

Mr. WALSH. That could be put that way, Senator.

Senator ERVIN. Is it contrary to the general principle of evidence for presumptions to run backwards?

Mr. WALSH. Well, I hate to generalize. Ordinarily you would not have them run retroactively.

Senator ERVIN. A condition shown to exist today could be presumed to continue for a reasonable time in the future, but the presumption does not run backward, that a condition that existed today necessarily existed many years ago. If you take my precinct, since I started voting in 1920, they probably have had 18 or 20 different registrars in my precinct, and what some other precinct registrar may have done ought not raise a presumption that another registrar would act the same.

Mr. WALSH. The reason for our position, Senator, it was not so much a lack of power in the Congress as it was a feeling that it is desirable not to have two streams of registration any more than you have to; that to every extent possible we should encourage the State registrar to perform his function, and for that reason we think that even though it may be an extra step for the applicant, it will be a simple one. He will soon find out whether the function is going to be performed or not.

Senator CARROLL. It is no trouble?

Mr. WALSH. To see the registrar.

Senator CARROLL. It takes them about 5 minutes.

Mr. WALSH. Some of them say it takes a couple of days, because they have to wait in line, and some, I have heard from the Civil Rights Commission's report, I think that will show some have gone there and waited all day and did not get served, and had to return another day.

Senator CARROLL. But under this rule that you are not required to do a vain thing you have to have evidence of a situation which proves that.

Mr. WALSH. Well, if it got to the point—I mean, it is hard to foresee the fact pattern in every case, but I think Senator Carroll, you have said if the evidence showed this was a vain thing, why, the judge would soon take care of that. But we certainly would start off with the hope and with this assumption that it would not be a vain thing.

Senator CARROLL. The reason I raised that, Judge, is this: We have heard for years people have got to exhaust their administrative remedies in the States, the various State courts.

This the courts time after time have knocked down in recent decisions. In the segregation cases I am mindful of one judge who said, "Am I going to put these thousands of people through the administrative machinery?"

The court used this very maxim that I have just given you in the recent case in the Charlottesville case.

Now, I want to apply it in this case. We are going to hear some very able arguments to that we are not talking here about exhausting administrative remedies, but now you have got to exhaust the judicial remedy, and what I am trying to say is if there is any constitutional merit to the concept of the appointment, using the courts, finding a pattern and a practice and using voting referees, the purpose of the suit is to show discrimination against American citizens, which violates their constitutional rights. That is the only reason you are in court. That is the only reason the court can make a finding.

Having found that, when you take these folks and make them go back again and to prove individually that they took these various steps, I am afraid that you have thrown a road block on your own machinery.

I think, on the other hand, your explanation, and I do not understand the reference of my friend from North Carolina, and I am not talking about presumptions at all, I am talking about a finding of a pattern and a practice which, if it is continuous, the voting referee proposal, if it is constitutional, will be continuous.

When the discrimination ceases, there is a mechanism in this bill, in this law, is there not, for the court to end its order?

Mr. WALSH. That is right.

Senator CARROLL. So I am not talking about presumptions. I am trying to find out what the machinery is and how these things are done.

At this point I am going to yield because the Senator from Arkansas wanted to take a——

Senator KEATING. If the Senator will just yield to me on that same point, because I want to be sure that I have the answer in my own mind which I understand that Judge Walsh gave, is it your opinion, Judge Walsh, that if a court found that to require the applicant to go back after the original finding by the court of a pattern and practice of discrimination, to go back and try to register would be a vain and futile act, and would serve no useful purpose, that the court by its inherent equity powers could dispense with that as an initial requirement for giving him the certificate of qualification?

Mr. WALSH. Yes, Senator. The court would have the same power to administer that maxim in connection with this statute as it has with any other statute or any other rule of law with which it deals, that is its general power, and it would be held to the same standard in applying it.

Senator CARROLL. I would like to put one further question: Would this apply to primary contests?

Mr. WALSH. Yes, election——

Senator CARROLL. All election contests?

Mr. WALSH. Yes.

Senator CARROLL. One further observation: I want to take up a very serious matter, but I do not want to restrict the questioning of other Senators, and this is on the educational bill. This is quite serious.

I am led to believe it may affect schools all over the country, it may affect Federal education, the Federal education program, and I'll come back to that later on. That has not been discussed, this question of seizure bothers me a great deal.

Mr. WALSH. Well, I do not think there is anything in the bill now which amounts to seizure. The House changed the original proposal quite a bit, and now it comes down to an authorization to the Secretary of Health, Education, and Welfare to provide for the education of service men where the schools are closed, but he can only use a local school by reaching an agreement with the school agency.

So the idea of seizure I do not think is present.

Senator CARROLL. Only one further question. I do not know whether I put this to the Attorney General or not. There are many learned legal scholars who are seriously concerned about imposing this new administrative burden upon the courts, actually putting them into the political arena.

As a Federal judge, do you see any problems arising as a result of that?

Mr. WALSH. No, no worse than the problems that the courts now have; and the whole purpose of permitting, or at least not the whole purpose, but one of the reasons for this authorizing of the use of referees is to permit them to assume this function, and getting others to help with it.

They have been saddled with problems of corporate elections, they have to appoint people to conduct corporate elections and, as a matter of fact, when the court gets to reorganizing a company it gets into all kinds of problems that come out of the company that are not the usual type of problem that you think of as a judge dealing with. So that aspect of it does not bother me.

Senator CARROLL. I thank you very much.

Mr. WALSH. Thank you, sir.

The CHAIRMAN. Senator McClellan?

Senator MCCLELLAN. Title 6——

Senator HENNINGS. At what page, Senator McClellan?

Senator MCCLELLAN. Page 11, the proposed amendment to existing law:

In any proceeding instituted pursuant to subsection (e)—

Mr. WALSH. Subsection (c).

Senator MCCLELLAN. (c), is it?

Mr. WALSH. Yes, sir.

Senator MCCLELLAN. What kind of proceedings can be instituted pursuant to that subsection?

Mr. WALSH. Those are the proceedings brought by the Attorney General under the Civil Rights Act of 1957. I could read the subsection to you.

Senator MCCLELLAN. That is all right. I am just getting my bearings. He can bring any proceedings which are authorized to be brought in the name of the Attorney General by that subsection?

Mr. WALSH. Yes, sir.

Senator McCLELLAN. In that proceeding, in one of those proceedings, it says:

In the event the court finds that any person has been deprived on account of race or color of any right or privilege secured by subsection (a)—

what is subsection (a)?

Mr. WALSH. That is really color of State law. That is the subsection of the statute that implements the 15th amendment.

Senator McCLELLAN. The right to vote?

Mr. WALSH. The right to vote without racial discrimination.

Senator McCLELLAN. Without racial discrimination?

Mr. WALSH. Yes, sir.

Senator McCLELLAN. If he finds he has been deprived of that on account of any such thing, the court shall, upon request of the Attorney General and after each party has been given notice and the opportunity to be heard, make a finding whether such deprivation was or is pursuant to a pattern or practice.

Could that be just one person bringing a suit?

Mr. WALSH. Well, I do not know——

Senator McCLELLAN. I am talking about any proceeding instituted pursuant to subsection (c). Now, that is the Attorney General bringing a suit?

Mr. WALSH. The proof of a pattern or practice, as we understand it, Senator, would be that it was not the exception.

Senator McCLELLAN. I know. I am trying to get to that. Some kind of a proceeding has got to be present. There has already got to be a proceeding instituted by the Attorney General of some kind.

Mr. WALSH. Yes.

Senator McCLELLAN. That kind of proceeding can be what?

Mr. WALSH. That would be a proceeding to enjoin a State registrar from discriminating against voters because of race.

Senator McCLELLAN. Now, the Attorney brings that kind of a proceeding.

Mr. WALSH. Yes, sir.

Senator McCLELLAN. And that is general, I assume; I mean it is not for the benefit of any one voter?

Mr. WALSH. Correct.

Senator McCLELLAN. So in that general proceeding, if the court finds in that general proceeding, that any person has been deprived on account of race or color of any of the rights, such as voting rights, such as the right to register, the court shall upon request of the Attorney General and after each party has been given notice and the opportunity to be heard make a finding whether such deprivation was or is pursuant to a pattern or practice.

In other words, the court is not called upon, and would not be authorized to make such a finding unless the Attorney General requested it, and notice were given and all parties involved would have an opportunity to be heard?

Mr. WALSH. That is correct.

Senator McCLELLAN. Now, what constitutes a pattern?

Mr. WALSH. A pattern of discrimination would be discrimination that was widespread beyond an individual case. It would be the burden to be carried by the Attorney General which would be to prove this was the usual rather than the unusual situation.

Senator McCLELLAN. What constitutes a practice?

Mr. WALSH. Practice would be very much the same thing. Not only was it usual but it has been indulged—I mean the words have their generic meaning; there is no word of art involved.

Senator McCLELLAN. No. But certainly the turning down, if you proved that you had turned down one Negro or even two Negroes at the same time, that would not necessarily establish a pattern or practice, would it?

Mr. WALSH. Not necessarily.

Senator McCLELLAN. To establish a practice wouldn't there have to be repeated acts?

Mr. WALSH. I think that would be the general sense of it; yes, sir.

Senator McCLELLAN. In other words, the fact that they come in and show that one fellow complains and you get a suit in there, and the evidence shows that that would be insufficient to establish a pattern or practice——

Mr. WALSH. In any case I can think of; yes, sir.

Senator McCLELLAN. In other words, to establish either there would have to be a repetition.

Mr. WALSH. Yes, sir.

Senator McCLELLAN. Would that repetition, could that repetition, occur in just one election?

Mr. WALSH. Yes.

Senator McCLELLAN. Or must it occur over a period of years?

Mr. WALSH. There is no limit provided in the bill.

Senator McCLELLAN. What is your interpretation of it as a judge?

Mr. WALSH. I think it would depend on the facts of the individual case, but it could be one election.

Senator McCLELLAN. Then can you give us any facts where it would require extension over a period of years?

Mr. WALSH. It would seem to me if you could show that was the uniform practice for a single election, that would certainly satisfy the statute.

Senator McCLELLAN. How can you establish a practice by just one single act or one or two acts, is what I am trying to find out.

Mr. WALSH. Well, the number of individual acts related to a single election would vary. I do not know how many there would be.

The CHAIRMAN. Would that be in a county now or a judicial district?

Mr. WALSH. It could be either one—really, it would relate to the area administered by the single officer.

The CHAIRMAN. You mean by the judge, the district judge?

Mr. WALSH. No, I was thinking of the State officer, Senator, Mr. Chairman.

The CHAIRMAN. Well, it would be on a county basis then?

Mr. WALSH. It would depend; I do not know whether all States have registrars on a county basis or not.

The CHAIRMAN. Well, they do.

Suppose it would show that there was discrimination in one county, with 30 counties in a judicial district. Now, are you going to saddle all 30 counties or just that one county?

Mr. WALSH. Just that one county.

Senator McCLELLAN. All right.

After you say the pattern or the practice has been established, and the courts so find, then for 1 year thereafter, that order holds, is that correct?

Mr. WALSH. That is correct.

Senator MCCLELLAN. And holds after 1 year until some affirmative action is taken by the court to declare that the practice has ceased and no longer exists.

Mr. WALSH. He vacates his underlying order.

Senator MCCLELLAN. Yes, but the order holds for 1 year and continues thereon. In other words, there has got to be an affirmative action taken by the court to remove that order?

Mr. WALSH. Yes, sir.

Senator MCCLELLAN. Is that correct?

Mr. WALSH. That is correct.

Senator MCCLELLAN. That would entitle the person who made the application or those persons who were in the mind of the court as having had a practice or a pattern established against them, to make them qualified for a year?

Mr. WALSH. No, sir, Senator. The qualification of the applicant would be for whatever period the State registrar could have qualified him, had he acted without discrimination.

Senator MCCLELLAN. What is the purpose of the 1-year statement in this law?

Mr. WALSH. The 1-year is the—and the subsequent period is the—period during which the court would have the power to pass on the qualification of the voters and to set up this referee machinery.

Senator MCCLELLAN. All right. Let us assume the court has made this finding now, that there is a pattern or a practice, and he orders accordingly, and enjoins the county registrar from violating, refusing to register on account of race or color.

Mr. WALSH. Yes, sir.

Senator MCCLELLAN. And suppose then the Negro comes along whom the registrar finds is not qualified otherwise, and he refuses or he declines to register. Then, what kind of proceeding is had?

Mr. WALSH. Well, the registrar turns down the applicant.

Senator MCCLELLAN. And the applicant contends it is on account of race or color, and the registrar says it is not, because he did not have other qualifications. What happens now?

Mr. WALSH. All right. Then the applicant has to go before the referee and he must show the referee he has the qualifications under State law, whatever the right age is, and the residence, and so forth.

Senator MCCLELLAN. When he goes before the referee, what kind of a hearing is that? Is there a hearing or just his statement?

Mr. WALSH. No. He can do that by—he does that ex parte.

Senator MCCLELLAN. He does that ex parte. Then the registrar has no right to go and be heard?

Mr. WALSH. No, he does not.

Senator MCCLELLAN. So that——

Mr. WALSH. Not before the referee. He does subsequently before the court.

Senator MCCLELLAN. All right, he has no right to be heard by the referee?

Mr. WALSH. Yes, sir.

Senator McCLELLAN. The referee then is compelled to take the word of the complainant. He has no alternative.

Mr. WALSH. He is not compelled. It is prima facie evidence, but unless—in the absence of some other proof, of something else he has, we ordinarily, I would asume, would accept the word of the applicant.

Senator McCLELLAN. What do you mean by saying something else he had? How would he have something else if the other side is not given the right to be heard?

Mr. WALSH. I mean it is impossible to foresee——

Senator McCLELLAN. I mean there is no provision to give him anything else under the law?

Mr. WALSH. Not before the referee.

Senator McCLELLAN. In other words, he has no provision.

Then he just takes the applicant's word that he has been turned down on account of race or color.

Then what happens?

Senator ERVIN. He does not pass on that.

Mr. WALSH. That is right.

Senator ERVIN. He does not pass on that. He is not allowed to pass on that.

Mr. WALSH. There is no question of why he was turned down.

Senator ERVIN. He does not pass on that under the statute. That is the only thing that gives him the right to act, and he does not pass on it.

Mr. WALSH. He passes on his qualifications as a voter, and whether he tried to register before a State officer.

Senator McCLELLAN. What constitutional provision gives the Federal Government a right to name an officer to pass on another's qualifications with respect to voting other than race, color and former servitude?

Mr. WALSH. The constitutional basis for that is the 15th amendment.

Senator McCLELLAN. What is that? On what basis was he being deprived of some other right set up by State law and not by the Federal Constitution?

Mr. WALSH. The basis would be that if a pattern of racial discrimination had been proved——

Senator McCLELLAN. But you say the race would have nothing to do with it. He cannot even contest it.

Mr. WALSH. I do not say it has nothing to do with it, but this bill, at least, does not require each individual applicant to prove that was the basis for his turn down.

Senator McCLELLAN. Oh, well we have gone down here and blanketed in all of the black race, that is what you do, in effect, in a given community, and here comes along one who goes down to register, and the registrar says, "Well, I don't find you qualified, otherwise, by reference to literacy, a literacy test or some other thing, residence or something else, and I won't register you."

Mr. WALSH. Then the applicant has to prove he is qualified.

Senator McCLELLAN. But how does he prove it?

Mr. WALSH. He goes before the referee and gives him the proof required by State law, and the referee makes the report to the court and the court has that report served on the State registrar, and the Attorney General, and they except to it if they think it is in error.

Senator McCLELLAN. When does the registrar have a right, and the public then does have a right, to be heard with respect to whether this man is really qualified to vote?

Mr. WALSH. Assuming that the referee reports that he is, when they except to the referee's report.

Senator McCLELLAN. All right. We have got the fellow who is under this blanket order, you have got a blanket order and all of them are entitled to register, and he goes down to register, and the man is turned down by the registrar, because the registrar thinks he has not been a citizen the required time or for some other reason unrelated to race and color.

Mr. WALSH. Yes.

Senator McCLELLAN. And he refuses to register him. Then he comes back to the registrar, the applicant does, and says, "Mr. Registrar, I have been turned down."

Mr. WALSH. To the referee, and says, "I have been turned down."

Senator McCLELLAN. Yes, the referee. He says, "I have been turned down."

He does not have to contend that he is turned down on account of race?

Mr. WALSH. That is right.

Senator McCLELLAN. But yet that is what the original order enjoins.

Mr. WALSH. That is right.

Senator McCLELLAN. Although there is no injunction against turning him down for other reasons?

Mr. WALSH. That is correct.

Senator McCLELLAN. Well, then, he would not be in contempt of court for turning him down for other reasons.

Mr. WALSH. No. If, in fact, he did turn him down for other reasons.

Senator McCLELLAN. I mean if he turned him down, if it is developed that he turned him down, for other reasons, then he is not in contempt of court for doing it.

Mr. WALSH. That is correct.

Senator McCLELLAN. So he goes back to the referee and the referee says, "Well, we have turned you down, and you say you are a citizen and have been for the required time, so we will just—I will report to the court that you have been rejected, refused registration, because of the fact that it is contended that you are not a legal resident."

Mr. WALSH. No. He does not give the residence.

Senator McCLELLAN. He does not?

Mr. WALSH. His report to the court would be that so and so, on the evidence produced before him, is a qualified voter because he has lived at this place for a certain length of time, and this place is within the appropriate district; he is of such and such an age, and then he has met whatever the other State qualifications are, and then the report is in turn, served on the State registrar.

Senator McCLELLAN. As I understand it, he takes nobody's word, he is not required to take anybody's word for that, except that of the applicant?

Mr. WALSH. That is correct.

Senator McCLELLAN. And making that report.

Mr. WALSH. That is correct.

Senator MCCLELLAN. So he makes that report, and then a report is made and the court orders a copy of that report, as I understand it, served on the registrar——

Mr. WALSH. Right.

Senator MCCLELLAN (continuing). About whom the complaint is made?

Mr. WALSH. That is right, sir.

Senator MCCLELLAN. Then the registrar has got to get counsel, I assume, and go into court in order to try to protect the position he took?

Mr. WALSH. It is also served on the attorney general, the State attorney general.

Senator MCCLELLAN. On the State attorney general.

Mr. WALSH. So he would ordinarily be, or frequently is, his counsel.

Senator MCCLELLAN. That would depend on what the State laws required him to go into court for.

Mr. WALSH. At least, this requires that notice be given to the State attorney general so that he knows, because in some States the State attorney general has undertaken to represent all of the political registrars.

Senator MCCLELLAN. Then you have a trial on the issue?

Mr. WALSH. Then you would have the issues framed but the exceptions would be tried the same as in an ordinary law suit.

Senator MCCLELLAN. Just before the court?

Mr. WALSH. Yes.

Senator MCCLELLAN Then there would have to be——

Mr. WALSH. The court could refer that to a referee, but that would be in the ordinary type of reference that you would have in an ordinary lawsuit.

Senator MCCLELLAN. There would then have to be another order issued, is that correct? If the court found that the registrar was wrong and improperly denied the man the right to register, then another order would be issued?

Mr. WALSH. Then he would issue an order that he was qualified to vote.

Senator MCCLELLAN. And it would be that order and not the previous order then that would have to be violated before the registrar would be in contempt of court?

Mr. WALSH. Well, the order that this man is qualified to vote would be served on not only the registrar, but the other appropriate election officers of the area so that they would all be on notice of it.

Senator MCCLELLAN. I mean, you have to get to that stage before anybody would be in contempt of court.

Mr. WALSH. Correct.

Senator MCCLELLAN. In other words, I mean where you just made a blanket order to start with.

Mr. WALSH. Well, the order to start with, I am not sure I know what order you referred to, but the order of an injunction would be, of course, directed to the State registrar.

Senator MCCLELLAN. They had to make an order finding a pattern or practice.

Mr. WALSH. That would be in connection with the underlying injunction ordinarily in any case I could think of.

Senator MCCLELLAN. Well, it gets kind of complicated, does it not?

Mr. WALSH. Not more than a lot of other legal proceedings, Senator. But complications are sort of relative.

Senator MCCLELLAN. Well, it is not less than others. Let us get back to one thing.

I do not think this is going to be a long drawn out process and very intricate, but if this is the procedure you want to follow, I do not know whether it is quite clear yet.

What I do not understand is, we get a court order, that is what it amounts to, you get an order pretty much on an ex parte statement that, "I have been denied the right to vote."

Mr. WALSH. It is only ex parte up to the point it gets into court. A court does not act on the ex parte report without everybody having a chance to be heard and contradicted.

Senator MCCLELLAN. Let me get one thing clear.

Senator CARROLL. Would the Senator mind if I put a question on this?

Senator MCCLELLAN. No.

Senator CARROLL. Let us forget about the voting referee. Let us assume now the court has found a practice and pattern of discrimination, and this is based upon race or color. Would any applicant under this have a right to go directly to the court?

Mr. WALSH. Yes.

Senator CARROLL. And make such a proof?

Mr. WALSH. Yes.

Senator CARROLL. And if the court made such a finding as is indicated here and gave notice to the people to come in, would it be restricted also, could you not restrict the type of evidence just as you do before the voting referee?

Mr. WALSH. I do not think he would do it that way, Senator. I think if he did not appoint the referee he would handle it just as he would an ordinary adversary lawsuit.

Senator CARROLL. Now, are we conferring upon the voting referee greater and wider powers than the court would have itself?

Mr. WALSH. The referee has nowhere near the power of the court because it is the court order that really carries the authority of the Government. The referee simply makes preliminary findings for the use of the court.

Senator CARROLL. I was under the impression that the purpose of broadening rule 53, the setting up of the referee, was to take this administrative burden off the court.

Mr. WALSH. It is, but the court is not mandated to use the referee unless he wishes to.

Senator CARROLL. That is the point I want to make.

Mr. WALSH. Yes, it is entirely discretionary.

Senator CARROLL. If you have the referee pursuing ex parte hearings, to which you previously testified, this is not a star chamber session, these can be attended by anyone?

Mr. WALSH. Sure.

Senator CARROLL. If you can place a limitation on the type of evidence or the effect of that evidence, the establishment of a prima facie

case, could not the court do the same thing that a voting referee does? That is my question.

Mr. WALSH. Well, I suppose the court could. But what he would then do is, in a sense, take the applicant's contentions and his affidavit and then say to the State registrar, "Here is what this fellow claims. Take 10 days and let me know whether you agree with him or whether you want to except to it, and then we will try it out."

Senator CARROLL. Or he can give the same notice to the Attorney General or to the registrar if he desires?

Mr. WALSH. Surely, and have him come in at the beginning.

Senator CARROLL. My point is this: Are we conferring different powers on the voting referee than the court has inherently in this type of case as he establishes a pattern or practice of discrimination?

Mr. WALSH. The referee has a much more limited set of powers than the court. They are, of course, different. I mean the referee simply helps the court to the extent provided by this statute.

Senator CARROLL. I asked, may I say to the Senator from Arkansas, the Attorney General who was here this morning, because I pursued this, and I think it is very important, this very line of questioning, and I asked the Attorney General about this very matter, about the pattern and the practice and what the applicant can do, and I raised this question that as the court makes its findings of fact, its conclusions of law, it would set up in its decree something—somebody has to control—the voting referee cannot stand out there all by himself and make his determination—would he not be governed by the decree of the court?

Mr. WALSH. He would be subject to the decree of the court, certainly, yes.

Senator CARROLL. That is all I have. I thank the Senator from Arkansas.

Senator MCCLELLAN. Can you tell us what powers this proposed bill will convey upon the courts, vest in the courts, that the courts do not have now? Can you give a differentiation as to what the court can do after this bill is enacted and what it could do before it was enacted, if it is enacted?

Mr. WALSH. Yes, sir.

The most important thing is it permits the court to act without a finding that each individual applicant was—without requiring each individual applicant to prove that he personally was—a victim of racial discrimination, and the other thing that it does——

Senator MCCLELLAN. If the registrar refuses to register him he still has to prove that, according to your theory. You do not, as to race, in other words, any showing a court wants to take, is giving him the power to say that this is a practice and a pattern and saying, "I am going to enjoin against a whole group." Do you say the court could not do that now?

Mr. WALSH. I doubt that it could do that now. You have here—you authorize the court to act on three elements, on the proof of three elements:

One, this is underlying practice of discrimination; two, that this man is a qualified voter. I mean ordinarily if he is qualified he is going to be registered. There is something so you have the practice of racial discrimination, you have the fact that this man is qualified,

and you have him get turned down. We say when you prove those three things the Federal court can grant him relief.

Senator McCLELLAN. May I ask can't the Federal court do that now upon the same proof? There is not any question but what the courts enjoin now——

Mr. WALSH. I think without any question now the applicant would have to prove that he was turned down as a result of that pattern, he would have to prove that the same as he brings in proof on any other issue. This eliminates that item of proof, this bill.

Senator McCLELLAN. In other words, all this bill does is eliminate proof that the law now requires to be made before the court could act.

Mr. WALSH. Oh, no.

Then the other thing it does, it shows—ordinarily the expenses of the referees are put upon the parties. This says the expenses will be absorbed by the United States; and the third thing, ordinarily under rule 53, referees are the exception rather than the rule, and this says they are going to be the rule rather than the exception, or, at least, the court is to have a free hand in deciding whether he wants to do it or not.

Senator McCLELLAN. I thought you in earlier testimony, I thought I heard you say that you hoped the court would not use it. Now you say it is going to be the rule.

Mr. WALSH. They only use it where they have an aggrieved applicant. We are hoping we will not have any aggrieved applicants.

Senator ERVIN. This expression says that on one phase of the case the only evidence to be considered is that of the applicant, which is quite a difference.

Mr. WALSH. Well——

Senator CARROLL. If the Senator will yield, the Attorney General testified this morning along this line. Let us assume you have the Attorney General bring a suit in order to prove a pattern and practice, and you bring in 25 individuals. Those people are before the court.

The court finds that they have been discriminated against. Those 25 people do not have to go back to anybody, the court can order them registered forthwith, is that not so?

Mr. WALSH. That is right. In other words——

Senator CARROLL. In the other event, if there is a finding, and it is shown in the Attorney General's pleading, and there is notice and opportunity to be heard, the Attorney General then asks for a practice and a pattern of discrimination, asked the court to make a finding. When he makes the finding the other people are put in a different category.

If a voting referee is appointed, and they take a different procedure then, is that not true?

Mr. WALSH. That is right.

Senator ERVIN. They are thereupon automatically excused from proving the very thing upon which the power of the Federal Government to act at all depends.

Mr. WALSH. Upon proof of three things: That, one, other people have proved this practice and, two, they are qualified to vote and, therefore, we may parenthetically say it is very unusual that they should not be registered and, third, that they have tried to register and could not.

Senator McCLELLAN. Well, I do not want to continue on this subject, but——

Senator HENNINGS. Will the Senator yield to me for just one or two questions?

Senator McCLELLAN. Yes.

Senator HENNINGS. There are so many things I would like to ask you, Judge Walsh. You gentlemen down there at the Department of Justice rather lightheartedly and, it seems to me, cavalierly, brushed aside all of the recommendations of the Civil Rights Commission, did you not, because you concluded you had a better plan.

As the Attorney General said, you have a very respectable and most respectable group of advisers.

Mr. WALSH. No, we have great respect for the Civil Rights Commission, and it is on the basis of their entire report that this subject matter came up for discussion.

Senator HENNINGS. But you did not suggest anything relating to their proposals.

Mr. WALSH. We had reservations respecting their proposal because we think this is better.

Senator HENNINGS. You came up at the end of some lengthy hearings that we had held in the Committee on Rules and Administration and which it fell my lot to attend, as did Senator Keating, with great regularity, and Senator Ervin and several other Members. Be that as it may, the Attorney General said that so far as he understood it, a great weight of respectable opinion was with you gentlemen on this proposition.

You did not have in your original suggestion—you had two or three proposals, did you not?

Mr. WALSH. We had one basic proposal, and then after testifying before your committee, and after I testified before the House committee, there seemed to be a general desire that we spell it out in the bill instead of leaving it all in the hands of the court, so we spelled it out. That is the difference.

Senator HENNINGS. So you testified one way before our committee and you made a number of changes, did you not?

Mr. WALSH. I think we have testified substantially the same way before both committees.

Senator HENNINGS. Well, gentlemen, substantially, you talked about a referee plan in certain of these matters to which you have averted. You had no provision such as was contained in a plan which I had the temerity against the weight of such respectable company as you keep to get the man to the ballot box, you did not have that in your plan until the House adopted it; did you?

Mr. WALSH. I am not sure what you mean. Our entire plan is designed to get the man to the ballot box.

Senator HENNINGS. Provisional voting, you know what that means, do you not? It is in this bill?

Mr. WALSH. It is in this bill.

Senator HENNINGS. Was it in your plan as you testified before the Rules Committee?

Mr. WALSH. I do not know whether it was before the Rules Committee or not. It has been in ever since we spelled out——

Senator HENNINGS. Didn't you prepare the testimony that the Attorney General gave?

Mr. WALSH. No, sir; I did not.
Senator HENNINGS. Who did?
Mr. WALSH. He had a fair hand in it himself.
Senator HENNINGS. I am sure he did. Did you have anything to do with it?
Mr. WALSH. Just to think back, I think I certainly read it over and I certainly knew what was in it, but I do not remember preparing it.
Senator HENNINGS. Who gave birth to it?
Mr. WALSH. I suppose he did.
Senator HENNINGS. The Attorney General himself?
Mr. WALSH. Yes. He has been deeply interested in this field.
Senator HENNINGS. It is a pity then he is not here. I would have liked to ask him a bit more about that. You do not know exactly; then, so far as you know it was the Attorney General's own plan, is that it?
Mr. WALSH. The Attorney General, as I can remember, has been in every basic discussion of this bill.
Senator HENNINGS. That is not what I asked you, sir. I asked you who drafted the testimony that you gave before the Committee on Rules and Administration, which does not contain anything about provisional—a provision of voting rights?
Mr. WALSH. My recollection is the Attorney General himself went over with great care the testimony which he gave before the Rules Committee. That is my own recollection, and he undoubtedly was helped by——
Senator HENNINGS. Who prepared the testimony?
Mr. WALSH. I think he did.
Senator HENNINGS. He prepared it all himself?
Mr. WALSH. I did not say that. I mean we all worked for it, there was an underlying memorandum of law.
Senator HENNINGS. You did have something to do with it? You knew about it?
Mr. WALSH. Oh, certainly.
Senator HENNINGS. Yes. But you had nothing with respect to a man casting a ballot provisionally in your original——
Mr. WALSH. I do not recall having any express provision in the original draft of the bill.
Senator HENNINGS. Now, Judge Walsh, the press has reported, and I think it is important to develop this very briefly, because the Attorney General and you gentlemen of the Department of Justice seem firmly fixed, immutable to your own plan with respect to voting referees and to no alternative except to those things which the House has thus far put in the bill, which is now before us, before the Senate and before this committee for consideration—after the proposal relating to Federal enrollment officers was adopted by the House, and after the other proposal by Representative—please give his name, it does not come to me at the moment—Representative McCulloch, had you not then asked Members of the House through Representative Halleck, to support the enrollment plan?
Mr. WALSH. No, sir; I did not.
Senator HENNINGS. You did not?
Mr. WALSH. I did not.
Senator HENNINGS. Then I was misinformed.

Mr. WALSH. If anyone told you that he was misinformed.

Senator HENNINGS. Many did, I assure you.

Mr. WALSH. Then they were confused.

Senator HENNINGS. So that insofar as your intentions in the House were related, the House for a time was without any bill whatsoever; is that true?

Mr. WALSH. No, I do not think that—there was a period where the referee section of the bill——

Senator HENNINGS. Was out.

Mr. WALSH (continuing). Was out.

Senator HENNINGS. Yes, sir.

Mr. WALSH. But the rest of the bill, I do not think, was ever involved in that.

Senator HENNINGS. Well, the enrollment section was thereafter voted down, was it not?

Mr. WALSH. The enrollment provision was never offered after the Celler substitute for the McCulloch substitute was introduced.

Senator HENNINGS. It was never offered again?

Mr. WALSH. No, sir; I do not believe so.

Senator HENNINGS. What are your objections principally to the enrollment suggestion, Mr. Walsh?

Mr. WALSH. Well, first, that it offers no advantages over the referee proposal, and has the following disadvantages.

It seems designed primarily to get a person registered, and to us, the essential part of the process is voting and having their vote counted.

Senator HENNINGS. But you had nothing relating to voting in your original proposal before the Rules Committee.

Mr. WALSH. I think you will find there was considerable relating to it, Senator.

Senator HENNINGS. What was it?

Mr. WALSH. There were whole sections.

Senator HENNINGS. I understood your original proposal related to registration.

Mr. WALSH. No, sir, Senator. I think, with the greatest respect——

Senator HENNINGS. I could well be mistaken.

Mr. WALSH. I can remember the language and this was, of course, 2 months ago.

Senator HENNINGS. Yes.

You did not think it then advisable to try to proceed administratively through the President of the United States who, under the enrollment provision, had a right to act within his discretion and who had the right to act at such time as he found it necessary when the State officers, he was convinced that the State officers, had refused to act and were not going to. You thought little or nothing of that?

Mr. WALSH. We never thought the enrollment officer would be a strong enough figure to be of any great value in this field. We thought——

Senator HENNINGS. Even though appointed by the President?

Mr. WALSH. Even though appointed by the President.

Senator HENNINGS. And even after a finding by the court?

Mr. WALSH. Even after a finding by the court.

Senator HENNINGS. You did not think it would be strong enough?

Mr. WALSH. We did not thing it would compare in strength to the referee proposal which the Attorney General advances.

Senator HENNINGS. I would like to enlarge on that with you, but the chairman wants me to confer with him.

Mr. WALSH. Yes, sir.

Senator HENNINGS. We will have more to say about that, of course, Mr. Walsh.

I thank you.

Mr. WALSH. Thank you.

Senator ERVIN. I want to ask you this question.

Senator HENNINGS. Thank you, Senator McClellan.

Senator MCCLELLAN. Yes.

Senator ERVIN. Suppose a man has gone before the referee and the referee relates to the judge he has found in his report that he is qualified to vote under State law and he has applied for registration and been denied.

Mr. WALSH. Yes, sir.

Senator ERVIN. And makes, of course, no finding at all about the question of whether the denial was on the basis of race or color.

Suppose the State attorney general or the State election officer files an exception. Can he put in issue the question of whether the applicant was not denied his right to register and vote on account of his race and color but was denied on other grounds?

Mr. WALSH. He can show, he can put in issue, his qualification to vote or the fact of prior application. Those would be the only two issues.

Senator ERVIN. In other words, he is denied the right to put in issue that the denial was not on account of race or color, and, therefore, that the Federal Government had no jurisdiction at all?

Mr. WALSH. That is right. In other words, he cannot come in and say that "This man is not entitled to vote. I won't let him vote, but it was for some other reason."

Senator ERVIN. In other words, under this proceeding, voting referees, the State and the State officers are absolutely precluded from even litigating the question that the denial was not on account of race or color?

Mr. WALSH. That is correct.

The only question is whether the man is qualified to vote, and whether he has applied to the State registrar for that purpose and tried to vote through the State machinery.

Senator ERVIN. Even if the truth were that the denial was not on account of his race or color, but on some other ground?

Mr. WALSH. Some other erroneous ground.

Senator ERVIN. Then the State would not be allowed to contest the very condition on which the power of the Federal Government to act at all would depend.

Mr. WALSH. In this phase of the proceeding, that is correct.

Senator ERVIN. Well, can he do it before the judge?

Mr. WALSH. No. The only two times, the only places, I mean the only opportunity for that would be if the State registrar wanted to prove that the pattern or the practice of discrimination had ceased, then he could litigate that before the judge, and ask him to vacate the whole referee setup.

Senator ERVIN. Well, that is certainly a remarkable thing to me because if there had not been a denial on the basis of race or color the Federal Government would have no power whatever as to this.

Mr. WALSH. This whole machinery would not have been set up if there had not been proof of a pattern of racial discrimination.

Senator ERVIN. Yet under this finding of practice or pattern, it would become conclusive, and not only conclusive, but it would deny to a State the right to even contest it thereafter.

Mr. WALSH. No, Senator, just—the State or anyone else could contest it whenever they wished to prove that the pattern or practice of discrimination had ceased, but there is a 1-year period intervening.

Senator ERVIN. For a year they could not even question it?

Mr. WALSH. Yes, because otherwise you would be trying the same thing over again tomorrow that you just tried yesterday.

Senator ERVIN. No, you are not, because you have somebody coming in before the voting referee who was not a party to the original case, and who was not even a beneficiary of the original case in that he was relied upon as being one of those who was deprived of his rights. And here for a year, even though the truth might be that there was no denial in the case of the people who come before the referee for the first time, on the basis of race or color, yet the State could not contest that for a year, although that would be the only basis on which the Federal Government would have any power whatever to act.

Mr. WALSH. The State would lose the right to raise the issue that this man was turned down erroneously, but on some other theory.

Senator ERVIN. In other words, the 15th amendment, the provisions of the 15th amendment, would, in effect, be suspended?

Mr. WALSH. For that period.

Senator ERVIN. For a period of a year.

Mr. WALSH. No. The theory of the bill is that if you prove an underlying practice of discrimination, and then you prove they have turned down a qualified voter of the race that was discriminated against, that is enough for a year or until they prove that this pattern of discrimination has ceased.

Senator ERVIN. In other words, even though the discrimination ceased as far as the State officials are concerned 1 minute after the adjudication as to pattern or practice as to other people, even though it ceased, they could not even show that fact.

Mr. WALSH. We risk this danger of coincidence that where a pattern of racial discrimination existed——

Senator ERVIN. If that is not nullifying the provisions of the 15th amendment for a period of a year, at least, I do not comprehend what nullification is.

Mr. WALSH. I recognize the point which you are driving at, Senator. It seems to us this came within the 15th amendment.

Senator ERVIN. In other words, on the basis of the finding of the denial of the rights of somebody else, some other men, other than the applicant who presents himself to the voting referee. The bill provides that the State cannot even show the next day that the election officer has ceased to discriminate, but there is a conclusive assumption, or presumption, or whatever you call it, which has to last for at least a year, under which the State cannot show that it has ceased.

Mr. WALSH. In other words, the presumption is that the election officer, if he turns down a man who is qualified to vote for that rea-

son and not for some other erroneous reason, that is all he gives up is the right to turn him down for some other erroneous reason.

Senator ERVIN. The assumption is so strong that it cannot even be litigated and cannot be nullified or disproved by truth for a year.

Mr. WALSH. Because—the reason for that is, of course, that otherwise these applicants would be in court all the time, I mean, they would be in one long litigation, and after we have proved the pattern of discrimination there should be a period during which we could correct the devastation caused by the discrimination without relitigating the entire issue over again the next day. That is the whole purpose of the bill.

Senator ERVIN. Even though the election officials of the State would remove the registrar who had practiced discrimination and put another man in there with absolute directions to see that he did not discriminate at all, still that presumption would flow for a year, and even truth, if all the truth was on one side of it, that it had ceased, nevertheless the courts could do nothing about it?

Mr. WALSH. In other words, at that point the State had—the applicants had interests that justified their being protected to this extent.

Senator ERVIN. The truth is that the finding would absolutely nullify the 15th amendment for 12 months.

Mr. WALSH. I think it would vitalize the 15th amendment, Senator, but I realize——

Senator ERVIN. Well, the State officially would not be encouraged to stop practicing discrimination under that. It would not do them any good to stop practicing it because it would still be conclusively presumed that they were still discriminating.

Mr. WALSH. I think some State registrars would find themselves in contempt of court if they did not stop.

Senator ERVIN. But you say they still lose their power even if they did stop.

Mr. WALSH. It is only when a qualified voter is turned down that we have any problem.

Senator ERVIN. The only way this would arise though would be on the assumption that the decision of the referee was correct as to the possession of the qualifications under State law, whereas the State election official was wrong.

Mr. WALSH. No. The State election official can come in and put in controversy any conclusion of the referee; he can do that. He would have a full hearing on it. If he thinks the referee is wrong on the law, he can come in and argue the law. If he thinks the underlying facts are wrong, he can come in and controvert those facts, and we would try them out the same as in an ordinary lawsuit.

Senator ERVIN. Do everything except invoke the provisions of the 15th amendment.

Mr. WALSH. He can do everything except distort the provisions of the 15th amendment.

Senator JOHNSTON (presiding). Senator Hart or Senator McClellan? That is right. He has not finished.

Senator MCCLELLAN. Did you state this morning, or was it stated this morning, that there were no required qualifications for the refereees?

Mr. WALSH. The referee must be a qualified voter of the district, Senator.

Senator McCLELLAN. Of the district; what district?
Mr. WALSH. Of the judicial district.
Senator McCLELLAN. The Federal judicial district?
Mr. WALSH. Yes, sir.
Senator McCLELLAN. Well, in Arkansas we have 2 Federal judicial districts, 75 counties, with 37 in each one.
Mr. WALSH. Yes, sir.
Senator McCLELLAN. When you make these findings, the question was asked you a little earlier, I believe, by Senator Eastland, out of the 37 or 38 counties in one of those judicial districts, there has been 1 county where there has been discrimination alleged.
Mr. WALSH. Yes, sir.
Senator McCLELLAN. Would the order apply to the entire district when the order is made on only one complaint of discrimination?
Mr. WALSH. The order would apply to that county, but the referee could be picked from the entire judicial district.
Senator McCLELLAN. But they would go get a referee a hundred miles off, or 200 miles off, and put him in that particular county?
Mr. WALSH. Just the same as you could in a bankruptcy which arose in that particular county.
Senator McCLELLAN. The judge could pick a man who was not——
Mr. WALSH. A judge could pick a good referee.
Senator McCLELLAN. Irrespective of whether it is right or wrong, it can be done, picking a man?
Mr. WALSH. It is right; that is the intent of that.
Senator McCLELLAN. Let us go now to page 2. What is the reason or the need for the word "corruptly"? I believe that was stricken out of the Senate bill. What do you mean by "corruptly"?
Mr. WALSH. That was put in as a protection to the defendants, Senator, to make sure that there was no doubt that this section required a deliberate intent to interfere or obstruct the Federal court order.
Senator McCLELLAN. I am not challenging it, but it seems to me like whoever knowingly, willfully, prevents or by threats and so forth——
Mr. WALSH. I am not sure——
Senator McCLELLAN. I do not understand what "corruptly" adds to it.
Mr. WALSH. I think, Senator, you will find that word was used in section 1503.
Senator McCLELLAN. I know it was stricken out in the Senate when we were considering the bill, and I just wondered what the significance of it was. I fought it when it was in the bill, and I just wondered how it applied.
It seems to me it would have to relate to bribery, that by bribery, that is the way you corrupt people.
Mr. WALSH. The language——
Senator McCLELLAN. If I persuaded you, I would not regard that as corruption, legitimate persuasion. If I bribed you, then I would, perhaps, corrupt you.
Mr. WALSH. This language, I think, was taken from title 18, U.S. Code, section 1503, and 1505 which have the same pattern or language, and I think the word we added was the word "willfully."

Senator McCLELLAN. I think that is correct. I notice it follows down here, "willfully prevents," and so forth.

Mr. WALSH. So that somebody could not get drawn into it.

Senator McCLELLAN. Just in passing, I wanted to call attention to it. So much for that.

What is your objection to striking the following language beginning on line 7 with the word "which" down through and including the word "to" on line 14? I believe the Senate also at one time struck that out, the whole section.

But assuming the section is to remain and the bill is to pass, what is the objection to striking that?

Mr. WALSH. Well, the reason for the language is that this is the only field in which we feel we had a need for this power, and the basic objection is that by expanding the section you expand the opposition to it and lose the section. That seemed to be what happened in the Senate. It was considered 2 weeks ago.

Senator McCLELLAN. Let us forget about that, and let us indulge in the assumption that at least the Congress is not going to remove from the bill something without sufficient reason. What is the valid reason for insisting that it stay in the bill, let us put it that way, irrespective of how folks are going to vote on the whole section?

Mr. WALSH. Well, the reasons that the school orders are unlike any other order are, first, they are, in effect, and under enforcement for a long period of time, longer than most.

And, second, that there has been an actual need shown. Out of 40 school orders there have been violence and attempts to frustrate their execution in 10 cases.

And, third, they relate to the safety of children, which is of concern to all of us.

Senator McCLELLAN. Would you favor the same law and same penalty for the violation by people of any other court order?

Mr. WALSH. The reason that we have not advocated that is that we have had no need for it.

Senator McCLELLAN. I did not ask why you have not advocated it. Would you favor it?

Senator KEATING. Would the Senator yield? You mean if the need were shown?

Senator McCLELLAN. I will when I get an answer.

Mr. WALSH. Well, I would not say that we favor it; no, sir.

Senator McCLELLAN. You would not favor it?

The CHAIRMAN. You mean the Lausche amendment?

Mr. WALSH. We would not favor the Lausche amendment.

The CHAIRMAN. But you are speaking of the Lausche amendment?

Mr. WALSH. Yes.

Senator McCLELLAN. He said he would not favor the law applicable to other cases.

Now, I will be glad to yield to you.

Senator KEATING. I thought the Senator from Arkansas, perhaps, would get a more direct answer if he framed his question would he favor it if the same need were shown as is shown in the school segregation matters.

Senator McCLELLAN. I will let him make his argument. I will let him make his argument.

Senator KEATING. Maybe I should ask it.

Mr. WALSH. My answer to Senator Keating, my answer would be, "Yes." But so far the same need has not been shown.

Senator MCCLELLAN. I think we have far worse conditions in this country prior to this agitation starting in this situation. We had all kinds of gangsterism and all kinds of racketeers.

The CHAIRMAN. Thugs or thieves.

Senator MCCLELLAN. We do not seem to exercise activity or nearly exercise activity in that direction, and I think, and I say this very respectfully to everyone, it would be far less punitive and less discriminatory, and this is a discriminatory thing, singling out one particular area of crime, if it is crime, and it would be far more palatable and have more of the graces of fairness and sincerity to recommend it if we made it applicable to all injunctions, violations of all court orders, and that is the view I take of it, and I just cannot accept that this is the singling out of certain areas and certain sections with a view of some sort of punitive action against it.

I can see no complaint about it. This singling it out on the face of it kind of stands out like a sore thumb.

Mr. WALSH. Senator, I appreciate your point of view, and you know how much respect we have for you in the Department. It is tremendous.

Senator MCCLELLAN. I respect you. It is just a difference of opinion, but I wanted to emphasize my view on it.

Mr. WALSH. It is not a matter of the importance of the crime, because we are interested in crime in all fields.

It just happens that these particular orders lend themselves more to this type of abuse than any other order.

Most orders dealing with highly charged situations are likely to be temporary orders or temporary restraining orders where the period is a short period, and also where you have full support of State and local law enforcement, and this problem came——

Senator MCCLELLAN. Well, you know what I referred to often, that you do not have any cooperation at all of the local law officials.

Mr. WALSH. Well, the situation in which the Federal Government has been drawn, the circumstances in which we were drawn in these cases just have not arisen with any frequency at all, Senator. But my view is not a dogmatic one, and I know what is important, is important to the Attorney General.

Senator MCCLELLAN. I just want to establish for the record the attitude of the Department of Justice, and I put emphasis on the Department of Justice, with respect to a bill that has for its objective, for its purpose, the claim of preventing discrimination, when the bill itself seeks to discriminate against different crimes, punish one, and enacts no law in the same area to deal with another.

Mr. WALSH. As you know, the Attorney General has said that he has no objection, if that is necessary. But this section, whether broadened or narrow, is vital to the bill, as we see it.

Senator MCCLELLAN. All right. There is a difference of opinion. The Attorney General thinks it is not necessary. We do not think this is necessary at all, some of it, but if it is necessary it is as necessary in one field as it is in other fields unless you want to set a record of it, that you are talking about a pattern that the Department of Justice itself and the Congress itself is discriminating in.

Mr. WALSH. Well, we discriminate every day of our lives, but we try to do it not arbitrarily, on the basis of facts, and you have to treat one set of facts—I mean, facts justify different treatment, and we just say in this particular case, the facts have shown the need to which this statute is directed. That is the purpose of it.

Senator MCCLELLAN. All right, Mr. Chairman.

The CHAIRMAN. Senator Hart?

Senator HART. Just with respect to the subject Senator McClellan was just talking about——

Mr. WALSH. Yes, sir.

Senator HART (continuing). So that I can better understand you: Are we to understand that the Department regards this as an acceptable expansion, otherwise the striking of the Lausche amendment is acceptable to the Department or the Department would agree to it, if conditions made it necessary, but in the judgment of the Department conditions do not make it necessary, and further that it may cause long-term damage?

Mr. WALSH. Well, let me put it—I think it was the second alternative that states our position. I mean, to get the power which we think we need to protect school orders. We would not object to the expansion, but we do not believe that the need has been shown for the expansion of an order, and we would prefer it in its present form. That is about the way I would summarize the Department's decision.

Senator MCCLELLAN. If the Senator would yield to me for one question to follow up, may I ask you, this language was in the bill originally, may I ask you about the language that has been added to the bill broadened it so as to cover the fleeing from where a crime was committed, the crime of destroying property, where it originally applied to churches and schools, educational institutions, and now it has been broadened to include personal property and private property as well, did you object to that because it was not needed, the broadening of that authority?

Mr. WALSH. I do not know what we objected. We preferred it in the form it was. In other words, the bill was drawn to direct Federal activities in the narrowest possible areas and areas where there had been a proven need for it.

Senator MCCLELLAN. Just one other question. You did not want it that way, but now it is in the bill and you will take it that way?

Mr. WALSH. Yes, we will take it.

Senator MCCLELLAN. There is one other question. How can broadening the other so as to include any court order, how can that do irreparable damage or any damage to the processes of justice?

Mr. WALSH. Well, there have been some fields where Congress has thought that Federal court action should be restrained, and I suppose that is what the Senator was getting at.

Senator MCCLELLAN. I understood you to say that the second reason he gave, it might do permanent damage.

Mr. WALSH. That was the third.

Senator MCCLELLAN. That was the third.

Senator HART. I have heard several versions as to the position of the Department, and those three have reflected basically what I heard, and I was curious.

Mr. WALSH. I restated what I thought the second reason was.

Senator McCLELLAN. Go ahead.

Senator HART. That was my question.

With respect to the addition of the language that the Negro must seek to register with the local board before it comes to the referee——

Mr. WALSH. Yes, sir.

Senator HART. (continuing). This language was added at some draft after the first one.

Mr. WALSH. The basic language was in all drafts. The only language added was "since such finding by the Court." In other words, as it was originally drawn a man might have gone to the State Registrar, say, 3 years ago, and then after there that had been a proceeding in which he was enjoined, and then he would go directly to the Federal referee without going back to the State Registrar after the injunction, and we agreed that he probably should go back after the injunction to see if he could not——

Senator HART. I wanted to get a specific answer to that.

Mr. WALSH. Yes.

Senator HART. Did you support that addition or did you ask for it? I was not sure.

Mr. WALSH. The addition was made after we had any chance to express our views, so we acquiesced in it, and we now support it.

Senator HART. You now support it.

The questions asked by Senator Carroll and Senator Hennings reflect an attitude on their part which I share.

Mr. WALSH. I see.

Senator HART. But I appreciate your observation on this reaction I had to a remark the Attorney General made earlier today. He objected to the enrollment bill being added as a second mechanism in this voting rights section.

He objected to it because he said that in some communities this whole notion is an unpopular one.

Federal judges are under the impression—and this is a paraphase of it, and if you added the enrollment device—it will give a Federal judge a way to avoid his responsibility.

One of the members of the Civil Rights Commission said the reason they came up with this enrollment concept was because they felt, in view of the facts that they had found, that they would have to have to find something that would be simple and quick and move as quickly as possible, and that is the way we came up with the idea of registrars.

Would it be unfair to the Department for someone to go out of here and say,

The Attorney General rejects the enrollment approach because it would give a Federal judge a way to avoid a responsibility

and, as a consequence, stands on the referee device which makes very difficult, in the judgment of this one member of the Civil Rights Commission, Father Hesburgh, whose language I have read—leaves the Negro seeking to obtain a right, a device, which is delaying, which earlier the Attorney General said had all the usual drawbacks of a judicial procedure but, nonetheless, this is the way they resolve it, they say,

We will use the referee device only because to add the enrollment thing would give a Federal judge an out.

If there is a choice, if that is the dilemma, why don't you resolve it in terms of the Negro seeking a right even though it may have given or it may give a Federal judge an opportunity to duck his obligation?

Mr. WALSH. I think, Senator, these things could be straightened out very easily.

First, as to delay, the enrollment officer plan had no advantage whatever over the referee proposal so far as delay is concerned.

The lengthy part of this litigation will be in getting a preliminary injunction or getting the first underlying injunction, and that part is in both plans.

It is going to take just as long getting the enrollment officer setup as the referee. Once the referee is set up he will function just as fast, if not faster, than the enrollment officer, and he will function much more effectively, because he will be under the day-in-and-day-out protection of the Federal court; and the enrollment officer is not, because he is going to be a stranger.

He is going to register, he does not know whether it is going to be worth a ticket to the Dempsey-Firpo fight, until election day when this fellow tries to vote, and then when he is turned down and someone tries to get a stay or gets a stay from a State court to prevent him from voting, to prevent the election board from even taking his vote, then for the first time the voter realizes he has gotten nothing. He thought he had something, and he has got nothing.

He has got nothing but an illusion, and then he comes looking for the U.S. attorney. In order to get the U.S. attorney to commence a suit to get him in in time to vote, he comes looking for the U.S. attorney.

Well, as Senator McClellan pointed out, these districts are pretty big, and he may have to have a job finding the U.S. attorney, and the U.S. attorney will have a time finding a judge in time to get action on election day. That is why we think that the enrollment officer thing is nothing but an illusion. It gives him nothing, and it gives him worse than nothing because he thinks he has got something until he finds out that he has not.

Now, as to this idea that the Attorney General was saying that when you put both alternatives into this bill you cause trouble, you do not help, you cause trouble because you divide responsibility.

You give a judge a reason to say to the Attorney General, "Don't bother me, I am a busy man, I have got a lot of troubles. You are authorized to go set up another officer who will do this, and have nothing else to do," and that puts the Attorney General and the U.S. attorney in the position of dealing with a judge who feels that he is being imposed on, because there would be an easier way so far as he is concerned for the matter to be handled.

Now, the Attorney General was not casting any aspersions on the judges or the judiciary, but just talking in terms of human nature, which we all recognize, that a man who is as busy as a Federal judge is, would prefer to see the Attorney General use an officer specializing in this field, if he were available.

But we say, don't create that illusion because that specialized officer is not going to be worth anything, and what he does for the voter is not going to be worth anything, and leave this in the hands

of the Federal judge who has the standing in the community to be effective, and he is the only Federal officer who does.

An assistant postmaster or some other Federal officer like that, who is designated as an enrollment officer, I do not think is going to get very far against an entrenched pattern of discrimination. A Federal judge might.

Senator CARROLL. Would you yield for a question at this point?

Mr. WALSH. Yes, sir—excuse me.

Senator CARROLL. Senator Hart, would you yield?

I spoke on this measure, on this dual measure, and I had some qualms about it, but the concept was that the pattern or practice, the judicial finding, would trigger action, either on the part of the judiciary or on the part of the executive branch of the Government.

It has been a long time since I have practiced law, but I used to be taught, I was taught at one time, that before you can invoke the aid of a court of equity there is no adequate remedy at law.

Now, if you set this up, and I do not say this to knock down the enrollment officer concept, could the court not say that you would have an adequate remedy at law?

As a Federal judge, former Federal judge now, suppose you had this before you, and you had the executive branch to trigger some action, and you could trigger some action, what about the old equitable maxim?

Mr. WALSH. I do not know whether I would go so far as to apply that equitable maxim, but I sure would try to talk to the U.S. attorney about going down to Washington and getting somebody else to handle this problem because I have got plenty to do in my court.

Senator CARROLL. You do not know whether that maxim would be applicable in this case?

Mr. WALSH. I hesitate to give it a firm answer. I can see its general applicability, but whether you could say the power of the President to appoint another officer would be a remedy at law——

Senator CARROLL. Well, it is statutory, is it not, that is where it gets its power, from the statute?

Mr. WALSH. No. But the enrollment devices leaves it discretionary with the President, so it is not—in other words——

Senator CARROLL. How can the President get power except by statute unless he wants to use an Executive Order?

Mr. WALSH. Well, he gets them under the Constitution, some of them. I may have missed your question.

Senator CARROLL. I was wondering, I was thinking about the statutory procedure. I thought we were conferring a power upon the President if we followed the Federal enrollment plan?

Mr. WALSH. Well, that is the plan, as I understand it.

Senator CARROLL. Yes, that would be a statutory right.

Mr. WALSH. Right.

Senator CARROLL. Of course, he has general constitutional powers.

Mr. WALSH. Let me say this: that the maxim would cause trouble to a U.S. attorney trying to enforce the referee part of the statute.

Senator CARROLL. I am not one speaking against it, you understand, because in probing around to where to go, I voted for it. I had some qualms.

I thank the Senator.

The CHAIRMAN. Senator Hart?

Senator HART. The other point that was raised that bothers me was one made by Judge Ervin.

After criticism had been voiced that the referee plan was a very slow device, and modifications were made to meet, I assume, this criticism, and they included the provision that the application after the pattern has been found, the application before the referee by one seeking to be enrolled is ex parte——

Mr. WALSH. Yes, sir.

Senator HART (continuing). And then the language later provides that the literacy and other—understanding of other subjects shall be determined solely on the basis of answers included in the report of the voting referee.

Are we to understand that it is the opinion of the Department that this combination, ex parte hearing, and the determination limited solely to the answers obtained in that ex parte hearing, once you get to the Judge, nonetheless give the State and the court opportunity fully to explore the question, which may be the only question, namely, literacy?

Mr. WALSH. Oh, yes, Senator.

Senator HART. There is no doubt in your mind about that?

Mr. WALSH. No, sir; because the validity of the answer is in no sense conclusively determined. All we say is there is the man's answer. He gives the answer to the referee in the same manner in which you would give his answer to a registrar or election official.

All we say is, "Write down his answer," and then take that answer, if it is right, let him—he has passed. If he is wrong he has not passed, but don't tinker with the answer after it gets before the Court. That should be final. That should be a final part of the record, right or wrong; when the referee's report is filed, that is the only purpose of that sentence.

Senator HART. Then clarification on another point already mentioned——

Mr. WALSH. Yes, sir.

Senator HART. Notwithstanding the inclusion of this specific language that a man must prove that he has since such findings, since the finding of a pattern, that he has since sought to be registered locally——

Mr. WALSH. Yes, sir.

Senator HART. Notwithstanding that, a court, if it wants, can waive this requirement and give him the certificate, or the referee may.

At one point here we heard, I heard, some testimony that suggested that notwithstanding this explicit language—Senator Carroll raised it—that the section that is found on page 15, the sentence which, at the bottom includes:

This subsection shall in no way be construed as a limitation upon the existing powers of the court.

That one sentence is enough to elimiate, as a condition precedent of court action, that this requirement that, that he go to the local registrar?

Mr. WALSH. I said whatever validity—I mean whatever extent a court of equity's powers are to eliminate the need for doing a vain act would be applicable to this statute, as they are to any statute.

But actually, I do not thing that we will ever get to that problem under this general provision, because if you will look at the specific language of the statute, you see that if he is, in fact, denied the opportunity to register, in other words, if, in fact, it is vain for him to try to register, that in itself is all that he need show; in other words, that there is no opportunity to register, and I think that is what Senator Carroll had in mind.

Senator HART. How does this giving him an opportunity jibe with your basic approach that once the court issues its order to the local board it is presumed that the board shall comply; in other words, it is presumed that the man will have an opportunity.

Mr. WALSH. I do not say it is presumed that he will. He should have the opportunity to comply. But if, in fact, after the order of the court is issued enjoining the continuation of this pattern of discrimination, if, in fact, there is no opportunity to register, for example, just to take a far-fetched case—supposing a State just says, "We will have no more registration for a year, we have got enough on the rolls, we will just go along as we are," that is it, and the proof of that action is all that this man needs.

Senator HART. Well, that would be an extraordinary and exceptional situation. I think you could even argue that it would be perfectly legitimate if they wanted to make a uniform application of no more voters.

Mr. WALSH. I do not know.

Senator HART. But the bulk of the cases will involve people who are of the class that the court order found to have been discriminated against as a package.

What concerns me is this: Will the bulk of those people have to do what somebody said takes only 5 minutes, and our silence is not to be construed as an agreement, necessarily, but will they have to do that or may a court say, "But I have this basic right as a court of equity, and notwithstanding this explicit language of Congress you do not have to show it."

Mr. WALSH. I think it is very dangerous, Senator, to try to project these things in generalities, but my guess would be that the usual administration of this provision would be, they would go back to the State registrar, or at least find out if there was any registrar available for them, the great bulk of the people you speak of, and it would be unusual——

Senator HART. I am sure you understand from some of the questioning here that this dilemma, if it is a dilemma; namely, who shall you favor, the local registrar who once put under a Federal court order must be presumed to be willing to comply, or the individual from a class that the court had just found had been discriminated against, as a pattern, this dilemma is one where there are many of us who feel that you should resolve it in favor of the class of individual discriminated against, because the fact of the matter is to require the individual in that setting in a community that the Attorney General described, where the whole notion is unpopular, to have him march down the street and into the courthouse and say, "Let's go ahead, here I am," that seems to many of us an extraordinarily heavy burden, when you quite honestly are trying to find out why the Department insists on it.

Mr. WALSH. Let me give you the reasons as best I can. I understand and fully respect the concern that you have that a man who has been humiliated once or twice should not have to go through it again.

But there are reasons. First, the objective here is not to have two parallel methods of registration. That does not do anybody any good.

What we hope for, and which, I would gather from what you have said, you do, would be the nondiscriminatory registration and voting going through State channels. That is what we are working for.

Senator HART. If the objective is to get people in a position where they may very easily vote, that is our objective.

Senator HENNINGS. Did I understand, if I may interrupt, Senator, did I understand the Deputy Attorney General to say that you have two parallel patterns which would not do anybody any good? Do you want to stand on that answer?

Mr. WALSH. I do not know whether I put it that way or whether I have to stand on it or not. But I think that is the least desirable.

Senator HENNINGS. How would you like to put it?

Mr. WALSH. But I think that is the least desirable alternative we would have.

Senator HENNINGS. How would you like to put it then if that is not what you wanted to say?

Mr. WALSH. I think the ultimate objective of this bill is to have a single stream of registration in which Negroes and white have equal rights before the same officers in the State government.

Senator HENNINGS. You have heretofore said, if I may be further indulged one question, that under a proposal of registrars or enrollment officers that the voter would not have the protection of the court or the U.S. attorney. Did I so understand you?

Mr. WALSH. No, sir; he will have whatever protection the court or the U.S. attorney can give him belatedly when they come to him on election day to say that the enrollment officer's certificate has not been respected.

Senator HENNINGS. And you think that under the referee plan he has superior protection for what reason?

Mr. WALSH. Because he will have a Federal court's order at the very termination of this referee's proceeding saying that he is qualified to vote, which order will have been served on every board of elections and every election officer concerned, and which will be proved against stays by any State court or any State officer.

Senator HENNINGS. Are you indicating, sir, that the State officer may not resist at that point?

Mr. WALSH. They can only resist at the danger of contempt.

Senator HENNINGS. Yes. What punishment do you provide for that?

Mr. WALSH. 45 days as provided in the 1957 Civil Rights Act.

Senator HENNINGS. Without trial by jury?

Mr. WALSH. That is right.

Senator HENNINGS. 45 days or $1,000 fine?

Mr. WALSH. That is right, sir; and then a longer period if they are tried by a jury.

Senator HENNINGS. Thank you.

Senator CARROLL. $300 fine, I think.

Mr. WALSH. I guess you are right, yes, Senator.

Senator ERVIN. Which is on a par with this first section where they make one group of people criminals and everybody else is excluded from criminality, and the other law gives everybody a right of trial by jury, where there is a violation of law, but southerners. There seems to be a feeling that members of the Caucasian race residing south of the Mason-Dixon line really have no rights that ought to be respected.

Mr. WALSH. That is not a feeling shared in the Department of Justice, Senator.

Senator CARROLL. I want to say to the judge that this statute could be invoked in my own State. This could happen in my own State where they have got certain counties with preponderantly Spanish-Americans, and there is feeling running in some of those counties, and if they could show a pattern or practice, and I think I am right in this, that this group of people could receive protection and, if necessary, they could send in a voting referee in the Federal court sitting in Denver, send in a voting referee in there, if the State would interfere, and would not register these people.

When you talk about the—aren't we, if I may take a minute here, Senator Hart—isn't really what we are doing here in a court of equity, they have broad powers, and we have given them more powers in 1957, and we have taken two more steps. We are saying to the court, "Now, you can establish a pattern and a practice of discrimination." When you do that, for the first time, I think this is in American history, we are permitting that court to set up voting referees to register these people.

Do you know of any other case in American history where we have done this?

Mr. WALSH. Set up voting referees?

Senator CARROLL. Yes, where the Federal court has set up voting referees in the political arena, I am not talking about stockholders now?

Mr. WALSH. No.

Senator CARROLL. Outside of maybe that *Davenport* case way back.

Mr. WALSH. That is different.

Senator CARROLL. That is an entirely different thing. Is there anything analogous between this situation in this statute and the one setting up *Davenport*?

Mr. WALSH. No, there was no judicial participation in that in the sense, in any judicial sense. The judges had no choice. They were merely ministerial participants in that.

Senator CARROLL. Wouldn't you say that under this the Federal Government, as I understand it, the Attorney General, and I am talking about the United States of America, its Government, if these State registrars give equal treatment to white and black, it will not be necessary for the judge to set up a voting referee?

Mr. WALSH. That is right.

Senator CARROLL. So really when you get all through with it you are talking about the pattern and practice of referees, voting referees, because you have had this before, that if you bring in 50 people or 100 people and they intervene and prove their case in court, the court can order a registrar, can it not, you do not need voting referees in that case——

Mr. WALSH. Well, it is not the referee. This bears on the proof of the item I discussed with Senator McClellan and Senator Ervin.

Senator CARROLL. Let us go back to your question of proof. When they set up qualifications, the court has to acknowledge that, does it not?

Mr. WALSH. The qualifications; oh, yes.

Senator CARROLL. The court is bound under the Constitution to acknowledge that?

Mr. WALSH. He must follow the State law.

Senator CARROLL. Any serious general statement of fact can be litigated in an adversary proceeding?

Mr. WALSH. Yes.

Senator CARROLL. And if the court has to sign an individual order or an order for each individual case, he does, does he not?

Mr. WALSH. Oh, yes.

Senator CARROLL. And each of those orders are reviewable on appeal?

Mr. WALSH. Yes.

Senator HART. I just wondered if the Department of Justice would give us an estimate of the number of people to be added to the election rolls if the referee section is included in any bill?

Mr. WALSH. Senator——

The CHAIRMAN. I can answer that, very few.

Mr. WALSH. I do not think anyone will have, or can give an answer.

Senator HART. We have the same point of view, very few.

The CHAIRMAN. Senator Wiley.

Senator WILEY. I was here at 9:30, and I came back here after 2 o'clock. I listened with profit to everything that has been testified to, covering the waterfront in this matter twice. I am sure that my distinguished Democratic associates have presented a complete record as to their position.

Now, there is just one thing that I think should be done and my good friend, Senator Dirksen, now has prepared a comparison of the Dirksen substitute and the House bill, which I now offer for the record. I think it should go into the record at this time and of course we will read the record.

The CHAIRMAN. It may be done.

(The document referred to follows:)

Comparison of Dirksen substitute and House bill (showing Senate action on Dirksen substitute)

Dirksen substitute to H.R. 8315	Senate action on Dirksen substitute	House bill, H.R. 8601
Sec. 1. Makes it a Federal crime to use force or threats of force to interfere with or obstruct court orders in school desegregation cases. Penalties: $10,000 or 2 years or both.	Laid on the table (motion to reconsider tabled), after adoption of Lausche amendment broadening sec. 1 to apply to all Federal court orders.	Secs. 101-102. Substantially the same. Penalties: $1,000 or 60 days or both.

Comparison of Dirksen substitute and House bill (showing Senate action on Dirksen substitute)—Continued

Dirksen substitute to H.R. 8315	Senate action on Dirksen substitute	House bill, H.R. 8601
Sec. 2. Makes it a Federal crime for suspects to flee from one State to another to avoid testifying or prosecution for bombing of any structure or building, including schools or churches, plus vehicles. Penalties: $5,000 or 5 years or both.	Agreed to after adopting: (1) modified Goldwater amendment broadening provision regarding flight to avoid testifying or prosecution for bombing, so as to include bombing of any structure, facility, or vehicle; (2) Carroll amendment limiting place of trial to the Federal judicial district in which the crime was allegedly committed; and (3) modified Keating amendment making a Federal crime (*a*) the transportation in interstate or foreign commerce of explosives with intent to damage or destroy any real or personal property for the purpose of interfering with its use for educational, religious, charitable, residential, business, or civic objectives—subject to a graduated scale of penalties; and (*b*) bomb threats—subject to $1,000 fine or 1 year or both.	Secs. 201-202. Makes it a Federal crime for suspects to flee from one State to another to avoid testifying or prosecution for bomb threats or bombing of any structure or building, including schools or churches, plus vehicles. Penalties: $5,000 or 5 years or both, except in the case of bomb threats which would be subject to $1,000 fine or 1 year or both.
Sec. 3. Requires, for a 3-year period, preservation of voting records pertaining to Federal elections, and gives the Justice Department power to inspect any such voting records.	Debated, but no changes made as of Mar. 24 when H.R. 8315 was displaced by other Senate business.	Secs. 301-307. Requires, for a 2-year period, preservation of voting records pertaining to Federal elections, and gives the Justice Department power to inspect any such voting records.
Sec. 4. School assistance: Provides grants matched by States or communities for a 2-year program to help provide additional nonteaching professional services required by desegregation cases.	No action.	No comparable provision.
No comparable provisions.		Sec. 401. Authorizes each member of the Civil Rights Commission to administer oaths and take statements of witnesses. Sec. 402. Exempts from the civil service classification laws employment under the Civil Rights Act of 1957.
Sec. 5. School for military: authorizes the Government to provide schools for children of military and other Federal personnel not residing on Federal property in areas where regular schools are closed by desegregation; also provides that the United States shall be entitled to use, on payment of a reasonable rental, any local school facilities for which Federal grants were made for the purpose of providing free public education in federally impacted areas.	No action.	Secs. 501-502. Makes funds available to the Commissioner of Education to make arrangements for providing local educational facilities for children of military personnel, not residing on Federal property, in federally impacted areas. Also permits the Commissioner to negotiate with a local community authority for the use of facilities in closed schools, provided the local authority agrees to and has statutory power to agree to such use.
Sec. 6. Establishes a Commission on Equal Job Opportunities under Government contracts thereby providing for the first time statutory authority for the President's Committee on Government Contracts.	No action.	No comparable provision.
Sec. 7. The Attorney General's proposal to amend the Civil Rights Act of 1957 by providing for court-appointed U.S. voting referees.	No action.	Sec. 601. The Attorney General's proposal, as amended, to amend the Civil Rights Act of 1957 by providing for court-appointed U.S. voting referees.

Prepared by the Senate Republican Policy Committee staff.

Senator WILEY. If we do not have this we do not know just where we are at.

Senator MCCLELLAN. Will the Senator yield?

Do you have copies of that that you might pass around, and let us put that in the record?

Senator WILEY. I want to ask the Attorney General one or two questions, without going into details again.

Which bill to you prefer, the Dirksen bill or the House bill?

Mr. WALSH. At this point, Senator Wiley, we prefer the House bill.

Senator WILEY. You what?

Mr. WALSH. I say at this point we prefer the House bill.

Senator WILEY. Will you say why?

Mr. WALSH. Because it has already passed the House and is here, it is that much further ahead than Senator Dirksen's bill.

Senator WILEY. Now, if you prefer the House bill, are there any amendments that you think should be suggested?

Mr. WALSH. If the bill is to be changed at all, we would like very much to have added the provision for technical aid to schools which was in the bill, Senator Dirksen's bill, and the provision for statutory authorization for the President's Committee on Government Contracts, which is also in Senator Dirksen's bill.

Senator WILEY. I notice you did not mention the Lausche substitute. What was your position on that?

Mr. WALSH. On the Lausche substitute, we would prefer not to have it. If to secure passage of the section on obstructing school court orders, it is necessary to have it, we would have no objection.

Senator WILEY. I did not get that. In other words, there is and there is not an objection to it?

Mr. WALSH. No. The preference is for the bill as now drawn, now coming from the House, on that section. We would prefer not to have the Lausche amendment.

But if it is necessary to take it in order to get the section on obstruction of court orders, we would not object.

Senator WILEY. What then is the basic objection, if you have one, to the Lausche amendment?

Mr. WALSH. That there is a proven need for the statute insofar as school orders are concerned. There is not the same proven needs so far as the Lausche amendment is concerned. The basis for that amendment is simply, well, abstract logic covering an entire range of orders rather than singling out one.

We prefer to move on the narrower basis of asking for relief with respect to those orders as to which there has been a demonstrated need.

Senator KEATING. Would the Senator yield to me on that point?

Senator WILEY. Yes.

Senator KEATING. Would you not want to add to your reason for not favoring it that the experience on the Senate floor indicates that, if it is added, it will result in the loss of the entire section 1?

Mr. WALSH. In all frankness, that is our greatest concern.

Senator WILEY. Is there any other reason, any basic reason?

Mr. WALSH. Well, there are three reasons which, I think, I mentioned to Senator McClellan as to why school orders are in a different category, we think, logically.

In the first place, they are orders which are administered over a long period of time.

A court order for the desegregation of a school continues in effect for many years, and the danger of efforts from time to time cropping out to frustrate it by people who were not parties to the proceeding in which the order was entered is serious and real.

Second, that on the basis of experience there have been 40 such school orders and there have been violence in 10 cases, where persons who were not parties to the order attempted to frustrate the execution of the order, and this high percentage of demonstrated need does not exist in any other field at all.

And third, these orders are concerned with the safety of children. Children are compelled by law to go to school, and these children who go to school, either by State law or by Federal order, are entitled to every type of protection they can be given.

Those are the three reasons why we think school orders are justifiably in a separate category.

Senator WILEY. There is no other reason?

Mr. WALSH. I do not think so, none that we have not mentioned.

Senator WILEY. That is all, Mr. Chairman.

Senator JOHNSTON (presiding). Senator Dirksen?

Senator DIRKSEN. Mr. Walsh, would the Department be satisfied with the House bill?

Mr. WALSH. Yes, sir. I mean, satisfied in the sense that realistically you take less than your hopes.

Senator DIRKSEN. In line with the statement the Attorney General made on the 24th of March?

Mr. WALSH. We feel if there is any change at all in the House bill which is going to require a conference, we would very much like to have the provisions that your bill contains, that this does not, added.

Senator DIRKSEN. Mr. Walsh, you have the bill there, do you not?

Mr. WALSH. Yes.

Senator DIRKSEN. I want these to be specific. On page 2, line 8, you will notice the first words there "threatening letters or communications."

Mr. WALSH. Yes, sir.

Senator DIRKSEN. The question was raised that a rather testive letter, which could hardly be called a threat, but rather a passionate outburst on somebody's part, might be regarded as an infringement of freedom of speech. I did not encounter that word in the basic statute, and I wondered if you had any comment.

Mr. WALSH. We do not think there is any serious danger, Senator. The courts have had to make distinctions far more difficult than between a threat and a protest and a threatening letter can in no sense be regarded as protected by the Constitution, if you read it in context with the whole section.

This is not just a casual threat that "I may vote against you tomorrow." This is a threat which obstructs an order for the desegregation of a school.

Senator HENNINGS. Would the Senator yield at that point for a question?

Mr. WALSH. And I am sure the courts in construing this section would be most conscious of article one in the entire Bill of Rights,

that they will see—I mean, the first amendment in the entire Bill of Rights—they will see to it that it is construed in a way in which the danger does not occur.

Excuse me, Senator Hennings, I didn't mean to keep talking.

Senator HENNINGS. You did not, Judge Walsh. I was asking Senator Dirksen to yield for another observation.

Senator DIRKSEN. Yes.

Senator HENNINGS. Obviously, Judge Walsh, there being such a provision there would be a corollary requirement, would there not, that there be some police activity toward the apprehension of a person or persons engaged in writing a threatening communication?

Would it be your view that the FBI would be such an agency properly supervised to determine and run down the writing of threatening letters and communications?

Mr. WALSH. I believe they probably would in this case.

Senator HENNINGS. Do you believe, Judge Walsh, that there is sufficient manpower in the FBI to engage in such enterprise?

Mr. WALSH. Yes, insofar as school desegregation orders are concerned.

Senator HENNINGS. As I read this it says:

"Whoever, corruptly or by threats of force or by any threatening letter or communication," which, of course, would be a question of fact, "willfully prevents, obstructs, impedes or interferes with or willfully endeavors to prevent, obstruct, or impede or interfere with the due exercise of rights," and so forth, "shall be fined not more than $1,000 or imprisoned for more than 60 days or both"——

Mr. WALSH. Yes, sir.

Senator HENNINGS. And you believe that that would create no problems for the Federal Bureau of Investigation?

Mr. WALSH. Not beyond those for which they are equipped.

Senator HENNINGS. Now, to get down to three, on the question of flight to avoid prosecution for damage or destroying any building or any other real or personal property, if the Senator would yield to me again to pursue that along the same point, do you believe that the FBI would be equipped to handle that?

Mr. WALSH. I think this would be a burden on them, but I think construed as Congressman Cramer intended it, that it could be handled.

Senator DIRKSEN. Thank you, Senator.

Senator HENNINGS. I did not mean to interrupt, but I was just pursuing one point that led me to another.

I wish you'd interject because you and I have had some little discussion about this, too. I now thank the Senator for having yielded to me.

Senator DIRKSEN. I was going to get to that section. That was the provision introduced by Congressman Cramer?

Mr. WALSH. Yes.

Senator DIRKSEN. Which deals with going across a State line after imparting or conveying or causing to be imparted or conveyed through the use of the mails, telephone, telegraph or other instruments of commerce, or any other mode of communication, any threat or false information.

It would put a terrific burden upon the FBI.

I think I remember at some time having had some discussion about that as to the thousands of false clues and false information that they receive.

Mr. WALSH. It runs about 3,000 a year.

Senator DIRKSEN. Much of it of a crackpot nature.

Mr. WALSH. Yes.

Senator DIRKSEN. But you do put them in a hole, and it would add to the burden and, of course, if they charged the field officers of the FBI with having to run this down, it not only adds materially to the burden but conceivably it would have to require more agents. They would have to add materially to their appropriation before they got through.

Mr. WALSH. If this is to be interpreted to cover everything that it literally could, it certainly would. As I understand Congressman Cramer's statement at the time he introduced this amendment, of course, we did not recommend it, and we regret it, it clearly was that he intended this to be a matter of administrative determination and that, as I understand it, unless there is preliminary indication that this is indeed the work of a fugitive and in connection with an actual destruction or actual attempt to destroy a building, that he did not intend for the FBI to be drawn into it.

Now if so construed we could live with it, and we would not want the bill amended simply to correct that. If the bill is going to be amended anyhow, and if there must be a conference, why, this amendment is one we could well do without, and which we would like to have eliminated.

Senator KEATING. Would the Senator yield there? Did the Cramer amendment incorporate the entire provisions of this subsection (b)?

Mr. WALSH. I think it has all of subsection (b), Senator.

Senator KEATING. Thank you.

Senator DIRKSEN. But you would do without this?

Mr. WALSH. We would prefer not to have it.

Senator DIRKSEN. Yes.

Mr. WALSH. But we would not ask that this be the sole amendment of the bill. In other words, if this bill could go through unamended, we would not ask to have it changed simply to take care of this.

We will construe it in the light of Congressman Cramer's remarks, and it will be a very narrow expansion of the FBI's activities, as so construed.

Senator DIRKSEN. Now, on page 8 there are amendments that are just going to have to be made whether we like it or not—on page 8, title 4, the title is "Civil Rights Commission Extended for 2 Years."

Well, it does not extend the Civil Rights Commission at all, and that probably should say, "Civil Rights Commission Authority Extended," if you are going to amend it, or some such language that is appropriate, because what you are actually doing is adding authority to administer oaths and to engaged personnel without regard to the Civil Service and Classification Acts.

Mr. WALSH. Senator, again neither of these provisions were in the administration's bill, and the House has added them, and again we would take them with their imperfections, if an amendment and conference could be avoided.

Senator DIRKSEN. The Attorney General testified at some length this morning on the second section of title IV.

Mr. WALSH. Yes, sir.

Senator DIRKSEN (continuing). Relating to personnel.

Is there really any serious objection to taking that out?

Mr. WALSH. Well, I think that the Civil Rights Commission conceives of itself as pretty much the same as a congressional committee, and that it applies to itself the same standards, except that it has a longer duration, and that was undoubtedly the reason for which it was added, that having the same problems as a congressional committee it wanted the same advantages of law, but that is the only reason for it.

Senator JOHNSTON. At that point, is it not true that they are already staffed at the present time——

Mr. WALSH. They are.

Senator JOHNSTON. They are staffed in accordance with the act relating to other employees, civil service?

Senator HRUSKA. Yes.

Mr. WALSH. That is true, Senator.

Senator JOHNSTON. I have a notice from the Civil Service Commission that they are opposed to the change at this time.

Mr. WALSH. Well, as I say, the administration recommended the change, and we would have no objection to the analogy to congressional committees, if the Commission really has that purpose; it serves no purpose beyond that. It is not a permanent administrative agency of any sort and, therefore, the evils which the civil service and classification laws were designed to prevent are not likely to be very serious, and I do not think this change would cause any great upheaval.

Senator JOHNSTON. The information I have, if some protection is not put in that, they could pay any salaries they wish.

Mr. WALSH. Within their appropriation.

Senator JOHNSTON. Within their appropriation, of course. That is within their appropriation, but a lot of times they have different appropriations that they can shift from one to another.

Senator CARROLL. Do we know of any instance, if the Senator from Illinois would yield, if he will yield, do you know of any instance where a factfinding commission set up by the Congress has been exempt from civil service and classification laws with reference to the payment of salaries?

Senator DIRKSEN. As a general proposition they are not exempt. I think, foreign field if, for instance, investigations must be made there, and you have some difficulty in engaging personnel, exceptions are made. But, generally speaking, this is standard language to make them subject to the Civil Service and Classification Acts.

Senator JOHNSTON. Senator Dirksen has been on the committee with me, and if you do not have some classification act to govern these bodies there is no limit to which they will not go. You have got to watch, and if one gets loose then the others want to get paid the same, and there you have it, each one vying with the other.

Senator MCCLELLAN. Off the record.

(Discussion off the record.)

Senator JOHNSTON. Can you tell us just how it got in the House?

Mr. WALSH. No, sir.

Senator JOHNSTON. Was it put in in committee or on the floor?

Mr. WALSH. My recollection is that it was put in committee, Senator, but I am not sure, and I hesitate to say it without further check.

Senator HENNINGS. Mr. Chairman, at this time I would like the record to show that I have just had word that the Department of Interior appropriation bill may reach the floor at any time. I have an amendment relating to the Jefferson National Expansion Memorial in St. Louis, and it is the only amendment, so far as we know, to be offered to the bill.

Therefore, I ask leave to be excused, and ask the indulgence of our distinguished witness who has given us a great deal of information today, and I want to thank you for it.

Mr. WALSH. Thank you, Senator.

Senator HENNINGS. And I shall return, Mr. Chairman, as soon as I am able to protect, insofar as I can, my own problem on the floor of the Senate.

Senator JOHNSTON. I have an amendment striking this from the bill which will be taken up at the proper time. If we do have to have other amendments, you would not object to this so far as you are concerned?

Mr. WALSH. If I could, Senator, I would like to talk with the Chairman of the Commission and Gordon Tiffany and, perhaps, get a letter to you tonight; would that be satisfactory or a letter for tomorrow morning?

Senator JOHNSTON. That would be satisfactory.

Mr. WALSH. We will do that.

Senator CARROLL. Mr. Chairman, I wonder if I might also be excused? I am a member of the Interior Committee, and it is very important that I be on the floor at this time.

I thank Judge Walsh and the Attorney General for the presentation made here today, and I hope to be present when Mr. Bloch testifies. He is a very distinguished lawyer and we need the benefit of his advice. I assume it will not be today.

Senator DIRKSEN. Senator, your interests will be in good hands.

Mr. WALSH. Thank you, Senator.

Senator DIRKSEN. Judge, if you will turn to page 10.

Mr. WALSH. Yes, sir.

Senator DIRKSEN. Subsection (b), which relates to the power of the Commissioner with respect to school facilities to which payments were made under section 7 of this act pursuant to an application approved under section 6 after the enactment of this subsection, which are not being used by local educational agencies for the provision of free public education and if in the judgment of the Commissioner, after he has consulted with the appropriate State agency, that no local educational agency is able to provide such free public instruction and, two, that such facilities needed, and so forth, and he shall notify such agency of such determination and shall thereupon have authority to secure possession and use such facilities for the purpose of subsection (a) pursuant to an agreement between such agencies which include such terms and conditions as the Commissioner may determine to be necessary to carry out the provisions of this section.

That, I think, is a proposal that was submitted by Congressman Cramer, as I recall.

Mr. WALSH. I think the original title, Senator, was proposed by the administration, by the President, and the bill was drawn by the Department of Health, Education, and Welfare.

But Congressman Cramer amended it to delete a substantial part of the original proposal, and the part which is left in, I think I could summarize, by saying that it authorizes the Secretary of Health, Education, and Welfare to provide for the education of servicemen's children in areas where they had been dependent on local schools, which schools have been closed because of a conflict over desegregation.

This permits him to use those schools, those closed schools, if he can work out an arrangement with the local agency which operates them.

The original proposal would have required that in schools hereafter built with this impacted area aid, that each school agency agree in advance that under such a situation it would let its schools be used by the Secretary upon payment of a rental computed to give a return on the amount of local funds used in the construction of the school.

That part has all been deleted, so we are left now with the authorization in the Secretary to educate these children, and his power to enter into a voluntary arrangement with the locality if he can do so.

Senator DIRKSEN. It has been suggested that that language, beginning at the middle of page 10 and down to and including 9 on page 11, be deleted for two reasons.

The first one is that it will for the first time bring into play Federal control over an educational facility.

Secondly, it will jeopardize the school aid program which was approved by the Senate and passed on to the House, where it is presently pending in committee.

They have a bill there to provide for $975 million for 3 years, grants the first year, and then options with respect to debt service on interest and principal the second and third year, and that representation has been made, and they are a little dubious now about this language, and it was suggested that it could be stricken, and probably not do any real damage to the bill.

Mr. WALSH. If it would be agreeable, I would like to get a letter from the Secretary tonight or tomorrow morning on that point. This is primarily this section of the bill?

(Subsequently, the following letter was received and made a part of the record:)

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE,
March 29, 1960.

HON. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: I understand that your committee's consideration yesterday of the House-passed bill H.R. 8601, two questions were raised regarding the proposed new subsection (b) to be added by title V of the bill to section 10 of Public Law 815, 81st Congress (p. 10 of H.R. 8601, line 13 down to and including line 9 on p. 11 of the bill). The two questions were:

First: Whether the new subsection will for the first time bring into play Federal control over an educational facility.

Second: Whether enactment of the new subsection will jeopardize passage by the Congress of the Senate-passed bill for Federal aid to school construction, which bill is now pending in the House.

The first question must be answered in the negative. Public Law 815 and Public Law 874, since their enactment in 1950, have authorized the Federal Government to operate public schools for children who reside on Federal prop-

erty in situations where local educational agencies are unable to provide suitable and free public education for such children, and for this purpose to construct or otherwise provide such school facilities as may be necessary for the education of such children. Indeed, even before the enactment of these two laws, several Federal agencies, particularly the military departments, were authorized to and did provide education for children on or near military or other installations and to provide school facilities in connection therewith. Thus before and since the enactment of Public Law 815 and Public Law 874, the Federal Government has been operating and controlling educational facilities for children of military and other Federal personnel.

On the second question, it would be my judgment that enactment of title V of H.R. 8601, either as originally introduced or as passed by the House, including the provision to which the question is addressed, would not jeopardize the passage of general school construction legislation. The Federal Government's responsibility for seeing to it that children of military personnel are not deprived of an opportunity for free public education when stationed in places where the usual State or local educational authorities are unable or unwilling to provide them that opportunity, is entirely different from the Federal responsibility of encouraging and aiding States and communities, under general Federal-aid school construction legislation, to construct school buildings urgently needed for the education of children for whose free public education they, and they alone, are responsible.

From the standpoint of our Department, we would prefer the deletion of section 502(b) of H.R. 8601 as passed by the House (that is the portion of the bill referred to above beginning at line 13 of page 10 and ending at line 9 of page 11), because we believe it unnecessarily limits the broader and more flexible authority which section 502(a) of the bill would confer upon the Federal Government to provide on a temporary basis the minimum school facilities for children of members of the Armed Forces in school closure situations. However, if an amendment to H.R. 8601 to delete this material would jeopardize the passage at this session of Congress of H.R. 8601, we would certainly prefer that the amendment not be made; even though the passage in question would limit undesirably the authority elsewhere conferred by the bill, we do not believe that the result would, as a practical matter, impair our ability to provide the minimum facilities needed for the children concerned, since the occasions when these limitations would apply would be few and far between and since even where applicable we believe that we could find ways and means of providing the needed facilities without recourse to the limited authority conferred by these provisions.

Sincerely yours,

ARTHUR S. FLEMMING, *Secretary.*

Senator KEATING. Would the Senator yield on that point?

Senator DIRKSEN. Yes.

Senator KEATING. If you struck that out and did not reinsert the comparable provisions of the Dirksen amendment, what buildings would they use for the purpose of implementing the authority to educate these children?

Senator DIRKSEN. Well, I think either that or substitute language could probably be inserted in place of this language. But I would rather that HEW pass on that matter.

Mr. WALSH. All right, sir.

Senator DIRKSEN. I am raising the question because it has been raised——

Mr. WALSH. All right, sir.

Senator DIRKSEN (continuing). And I think it was rather roundly debated in the House anyway, as a matter of fact.

Mr. WALSH. In the House there was some feeling that this would burden the program for aid to impacted areas.

Senator DIRKSEN. That is right.

Mr. WALSH. Actually, of course, we thought that it would not. But inasmuch as it was entirely prospective in its operation and was not

attempted to do anything with respect to schools already built and committed for, that there would be no embarrassment. But I would feel better if I could talk to the Secretary.

Senator DIRKSEN. I think that is very proper.

Senator JOHNSTON. Isn't this such a small part of the school system of the United States that it is a pity to damage doing good in that particular portion and helping out in the impacted areas, and that is what you are going to do, if you do not mind.

Mr. WALSH. Senator, the only thing is you have this awkward position of people being brought into a part of the country, through no choice of their own, which has different customs, and if the schools are closed, and as they were in Norfolk, and we had a large number of children there who were not getting schooling, it is hard to overlook the Government's responsibility. That is the only reason for this part of the bill.

Senator DIRKSEN. Now, a question was raised by Senator Hart, and I think by Senator Hennings, with respect to the language at the top of page 12.

Mr. WALSH. Yes, sir.

Senator DIRKSEN. And it brings to mind another suggestion that was made, the desirability of inserting a proviso that discretionary authority be vested in the court with respect to this matter of registration, and it would read about as follows:

***Provided*, That the requirements of 2 (a) and (b) may be waived by the court whenever there is reason to believe that such requirements would serve no useful purpose.**

That goes back to this question of registration or an attempt to register, and you belabored that, I think, rather generously.

Mr. WALSH. Yes, Senator.

Senator DIRKSEN. But there was no discussion of the possibility of a waiver provision there, a waiver proviso.

Mr. WALSH. Senator Carroll did have a somewhat similar suggestion, and it just seemed to us that its value did not justify the amendment, and that really we could work very well, and I think we will get substantial justice done under this bill as it stands now.

We are not anxious to bypass the State registrar, as long as he will do his job, and I do not see any reason for eliminating him.

Senator KEATING. Would the Senator yield on that point?

Senator DIRKSEN. Yes.

Senator KEATING. Perhaps it was while Senator Dirksen was necessarily out of the room, but to my precise question, Judge Walsh replied as follows, I believe:

"Do you believe that the Federal judge under his inherent equity powers would have power to waive that requirement in the absence of language similar to that suggested by the Senator from Illinois?"

And his answer was that he would have, and for that reason such language would not be necessary.

Mr. WALSH. In other words, he would have the same extent to do it with respect to this statute as he would with any statute. In other words, it is a general—his power is general.

Senator KEATING. Well, I am a little concerned about that. I respect your opinion. You have served on the bench. This is pretty definite. You must show that he has since such finding been deprived,

and I want to be sure, very sure, that without such language as has been suggested by Senator Dirksen or the language suggested by Senator Carroll, the court would have the right to say, "It isn't necessary for you to have been deprived since the finding, because if you went back and tried it again it would be a useless act."

Mr. WALSH. As I told Senator Hart, it is hard for me to see where this general proposal is going to come into play in view of the express language of the statute if you are deprived of the opportunity to register, and you do not have to do anything more. You have proved enough. So it seems to me that——

Senator KEATING. No; he must go back, he must show after the original finding of the court, that he has tried to be registered and has been denied the registration.

Mr. WALSH. Well, supposing, just to take a fanciful hypothetical, that the State said, "Negroes shall not enter public buildings hereafter."

Now, upon proving that State law, it would seem to me, there would be no need for him to go anywhere, and that is what I thought you had reference to.

In other words, it would be, if he is forbidden to even approach the office of the registrar, that then you can say without more that he does not have to go up there and try to get in.

Senator KEATING. That would be a very strong case. But I would not be satisfied simply to have a case like that taken care of.

If the court, as I understand your position, it is that if the court, made an express finding that to require him to try again would be to require him to perform a useless act, which would serve no useful purpose, that then the court would have inherent power to waive this requirement that he try again.

Mr. WALSH. Well, the only thing that bothers me is attempting to project the action that a court is going to take in cases that have not arisen.

I took a very strong one, to be safe. I would hate to come any further down. You can get cases, perhaps, where a registrar has said: "I don't care what the court says in its order, I am never going to register a Negro," and he proclaims as much.

Perhaps that would take the next step—there come points where I just would not like to attempt now to predict what a court would do.

Senator KEATING. Let me put it another way: Would you have serious objection if we are going to amend this bill anyway, to the inclusion of a provision on such as suggested by Senator Dirksen or very close to that proposal suggested by Senator Carroll?

Mr. WALSH. Well, again, it is hard to say that under no circumstances would we welcome a bill. We would prefer it in its present form. I think that is a valid objective in having the applicant go back to the registrar, that more than offsets the disadvantage to him. Sympathetic though I should be. I think we have to get this back into a single channel of all applicants going back to the State office.

Senator DIRKSEN. Judge, I think the difficulty will arise, however, where you may have quite a number of people whose names are recited in a court order as qualified.

Mr. WALSH. Yes.

Senator DIRKSEN. Suppose you had 100 people?

Mr. WALSH. Yes.

Senator DIRKSEN. Now, the judge makes the finding, they are all there and says now I am making my finding.

All of you go back down——

Mr. WALSH. Excuse me, Senator, I did not mean to interrupt you. Once they get to the judge, they do not have to go back.

Senator DIRKSEN. Qualified. Look at the language, one, he is qualified under State law to vote, and, two, he has since such finding by the court been deprived of or denied under color of law the opportunity to register and vote as a qualified voter.

Mr. WALSH. I think there are two categories of persons we ought to have in mind. There will be a group in most situations who have come to the U.S. Attorney General and complained there is a pattern of discrimination in such and such a county.

Now, we will just take Terrell County, Ga., or Macon County, Ala., where this has happened, and you will have a group of six or seven people with college degrees who have been turned down in their effort to vote.

Now, the court in establishing the basis for its injunction under existing law, under subdivision (c) of section 1971, is entitled to issue a permanent or temporary injunction, restraining order or other order.

Now, if all those facts are litigated out before the court in the original proceeding, its order probably will direct, among other things, the registration of those who have actually been before it.

This provision that we are dealing with here relates to persons who were not in the original proceeding before the court. They are other members of the same race, and it is they who now wish to come in and take advantage of the order obtained, the order of injunction. And it is they who must first go to the registrar to see whether he will comply with the injunction before they go to the Federal referee.

Senator DIRKSON. What is involved here, of course, is the qualification of the applicant and that could be 100 applicants and the anterior language is—

be entitled upon his application therefor,

at the top of page 12—

to an order declaring him qualified to vote upon proof that at any election or elections he is qualified under State law to vote and, two, he has since such finding by the court been deprived of under law the opportunity to register to vote or otherwise qualified to vote.

Mr. WALSH. Senator, the confusion is my fault. I have not made clear a basis difference.

This entire title only applies to persons who are going to seek the right to vote through a Federal referee without proving that they, as individuals, were victims of the pattern of discrimination. The persons who come before the court in the first instance, in the original action under existing law, subsection (c) of 1971, will have proved that the U.S. attorney, will have proved that they as individuals were discriminated against and therefore they are entitled to go right back to the rolls immediately forthwith.

So if they are in the original proceeding, they will have no need to rely on this new section. In this new section, this is to take care of

other members of the same race who were not as individuals participants in the original proceeding, and who do not wish to undertake the problem of proving that they, as individuals, were the victims of this pattern.

Senator ERVIN. If I may interject there, if you change this to conform to the suggestion of Senator Carroll or Senator Dirksen, the result would be that you would be excusing these people from proving they possessed qualifications under State law to the voting referee.

Mr. WALSH. Not to the voting referee, but to the registrar.

Senator ERVIN. They do not come into the court, they come to the voting referee.

Mr. WALSH. Just so I perhaps clear up confusion which I caused, we take this right back now to the beginning. There is a county, and let us assume that a group of 20 witnesses come in, 20 persons come in and say:

> We were clearly eligible to vote and that we have been turned down and turned down in such a way that there is only one conclusion and that is there is a pattern of racial discrimination—

the U.S. attorney and Attorney General say this looks right and they go ahead and try the lawsuit and they prove that to the court. The court will in its first order do three things:

One, it will enjoin the State registrar from continuing to discriminate on the basis of race;

Two, it will order the registrar to put those people back on the registry, put them on the registry forthwith, that they are entitled to vote; and

Three, it will, if the court decides it desirable, appoint a referee to hear other applicants from the same race who claim that they are qualified to vote but have not been able to vote.

Senator KEATING. Would the Senator yield there.

Do I understand then that the original people who were found to be involved in the pattern of discrimination would have no right to go to a referee?

Mr. WALSH. They would not need to, Senator.

Senator KEATING. They might be registered, I get back to your original complaint about the registrar plan?

Mr. WALSH. Yes.

Senator KEATING. They might be entitled to be registered and the court might enjoin the election officials from interfering with their registration or voting, but still they might not vote, and what would their remedy be if they did not vote?

Mr. WALSH. They would be protected by an injunction just as good as ultimately comes through the referee plan. There would be a Federal court order that John Smith is entitled to vote, and shall be permitted to vote, and enjoin anybody from interfering with his exercising that right. They would have the same sort of order that you would ultimately get through the referee.

Senator HRUSKA. Would the Senator yield?

If at that point, however, the State election officer did not abide by the injunction which has been issued by the Federal district judge, their names still would not be on the rolls of the State, would they?

Mr. WALSH. He would be in contempt.

Senator HRUSKA. And then those who are named as parties to the action, who were the original complaining witnesses, would be entitled, would they not, to go to the referee and have their names included on the list that the referee would prepare?

Mr. WALSH. Well, they have already passed that stage.

Senator HRUSKA. No, they have not. The referee has not started yet. The referee has not gone into business yet. The injunction is issued.

Mr. WALSH. Let me put it this way.

Senator HRUSKA. The court order is threefold, as you indicated: The injunction, the order to the State election officer to put their names on the roll, and thirdly, the appointment of the referee.

Mr. WALSH. Yes. Well, the second part of that order would probably be broader than merely putting their names on the rolls. That would depend on who the parties offended were.

Senator HRUSKA. Yes.

Mr. WALSH. But go ahead.

Senator HRUSKA. Possibly, the State election officials do not abide by the injunction; the referee has not gone into business yet.

Mr. WALSH. All you can get when you go through the referee proceeding is an order from the Federal court that these people will already have had.

Senator KEATING. Would the Senator yield?

Mr. WALSH. Yes.

Senator KEATING. Does not the referee, as to the people that he is trying to help, not only issue an order but go physically, if he needs to, to the polling place to supervise and see that they do vote?

Mr. WALSH. Yes.

Senator KEATING. And then their vote is counted, and would you deny that protection to those who were the original complainant?

Mr. WALSH. I think the court would have that under—I think he would have power to do that under section, under subsection (c).

Senator KEATING. Inherent?

Mr. WALSH. Yes. Well, it gives him the power to issue an injunction or other order, in other words, what order, what other order would be appropriate to remedy the situation which he found?

Senator KEATING. Well, it is your contemplation then, and I must say this is a new concept to me, you may be perfectly right about it, but it is your contemplation that the voting referee would have nothing to do with those individuals who were the original complainants in the action?

Mr. WALSH. Yes, sir, that is correct.

Senator KEATING. And he would only deal with those who, of the same race, who came in and claimed that they were entitled to the same protection that the original complainants had been afforded in the original action?

Mr. WALSH. Yes, sir.

Senator ERVIN. The answer to that proposition is that if the State registrar refused to comply with the injunction, he could be placed in jail under a civil proceeding until he placed them on the record?

Mr. WALSH. Yes, sir.

Senator ERVIN. Even if the proceeding were before the referee, the applicant would have to get an order from the judge; the referee's re-

port has to be approved by the judge before the applicant could get a valid order to vote and they would have to enforce that by exactly the same process.

Mr. WALSH. You are right. I mean in additional to criminal attempt, there is the entire civil contempt range of possibility.

Senator JOHNSTON. We are going to have a lot of applications with this, as I see it. A lot of State laws, you have to leave in a precinct where you vote.

Mr. WALSH. Yes, sir.

Senator JOHNSTON. Now then, what if this person happens to move across the line into another precinct, and then they have a certificate to allow them to vote, so far as the certificate is concerned, but some of them have enrolled, some States do, on top of his registration, and they have to register 30 days before the election in some places—what is going to happen if they move? They can have this registration but they do not go and enroll. Are you going to put on down they must be allowed to vote?

Mr. WALSH. The voting——

Senator JOHNSTON. An order——

Mr. WALSH. The voting order would have no greater validity as to time or place, as to duration and place, than that of the State registrar. It is intended to put him in exactly the same position as though they had been properly registered.

Senator JOHNSTON. Of course, if there is any other qualification for all concerned if they do not go and sign the names, probably they would not get to vote; is that not true? That was the law for all, if they were all treated alike and there would not be any descrimination.

Mr. WALSH. That is correct.

Senator DIRKSEN. Of course, that is of general applicability, if the requirement is 30 days in a precinct and 60 days in a county, a voter cannot qualify, it does not make any difference who he is or what State he is in, he would be subject to the same rule.

Mr. WALSH. That is right.

Senator DIRKSEN. Judge, you will understand, these questions are specific and they are suggested by all the discussion in the, and the conferences we have had.

Mr. WALSH. Yes, sir.

Senator DIRKSEN. In the interest of favorable consideration and expedition of the bill.

Mr. WALSH. Yes, sir.

Senator DIRKSEN. I have one more question that was raised, and that is on page 15, beginning with line 9:

> In the case of any application filed 20 or more days prior to an election which is undetermined by the time of such election, the court shall issue an order authorizing the applicant to vote provisionally. In the case of an application filed within 20 days prior to an election, the court, in its discretion, may make such an order. In either case the order shall make appropriate provision for the impounding of the applicant's ballot pending determination of the application.

You may have enough voters, of course, to determine the outcome of an election.

Mr. WALSH. Yes, sir.

Senator DIRKSEN. Who would be involved here, and you could not resolve that election until, first, these provisional ballots had been disposed of one way or the other.

Mr. WALSH. That is correct.

Senator DIRKSEN. As you read that against the short registration period, in some cases a couple of days, maybe one month, maybe a couple of days in another month, unless you have permanent registration, there, of course, you come up against a problem where we may have quite a number of provisional voters, and the residual question there is: How long shall an election remain in doubt and to what extent might that become a real problem in some areas, notably at the local level and at the county level, where you have real difficulty in that?

Mr. WALSH. Senator, I recognize the possibility of difficulty. Of course, it is discretionary in the court, if the application is filed less than 20 days before election, so he will have had 20 days, and ordinarily these issues are not of maximum complexity and in many cases were a custom to courts on election matters having to act with great speed and that would just be a burden on this court.

The CHAIRMAN. Right here, now, we have not got a quorum and Mr. Bloch is to testify. Could we agree to take him at 9:30 in the morning?

Senator DIRKSEN. Our distinguished friend said 10:00 o'clock.

The CHAIRMAN. Any objection?

Senator KEATING. Mr. Chairman, I take it the Attorney General or Judge Walsh or both will also be here when Mr. Bloch testifies.

Mr. WALSH. We will do whatever——

The CHAIRMAN. We are going to need him.

Senator KEATING. Will be available because I have some questions I would like to put to the Attorney General. I do not care when.

The CHAIRMAN. Could we take Mr. Roger[illegible]st and then——

Senator KEATING. Yes.

The CHAIRMAN. I would like to have a discussion between Mr. Bloch and Judge Walsh, is what I would like to have.

Mr. WALSH. Senator, Mr. Chairman——

Senator DIRKSEN. I have no more questions, but, Judge, I did want to make one comment about the so-called enrollment officer provision.

Mr. WALSH. Yes.

Senator DIRKSEN. It seems to me you develop a confusion between the administrative branch of the Government and the judicial branch. In one case the court appoints the referee, just as he does a master in chancery.

Mr. WALSH. Right.

Senator DIRKSEN. And he thereby becomes a court officer, and then his duties are spelled out. In the case of the enrollment officer first, as I recall, the court has to find the pattern.

Mr. WALSH. Yes, sir.

Senator DIRKSEN. Then the court conveys that information to the Attorney General, then the Attorney General conveys that information to the President, and then the President, if he so finds, and the language is "may," I think, the President may then appoint qualified enrollment officers. So there the executive branch comes into play as distinguished from the judicial branch. And, of course, you could get a somewhat bureaucratic cast to it if you were so disposed, by everybody going along with the proposal for enrollment officers. I could see nothing to prevent a referee and an enrollment officer at

one and the same time working on the same applicant for that matter.

Senator ERVIN. If you pardon me there, I will say as a matter of fact, I was very curious about the provisions of the Clark-Javits amendment voted on in the Senate. The amendment had a section which said they could both be appointed for the same voting district. It had a provision there which showed the absurdity of having State officials registering voters, enrollment officers registering voters, and voting referees registering voters, or at least passing on the qualifications of the same district. The amendment had a provision there that the President should see to it that there was no conflict between the Federal enrollment officer and the voting referee where they were both acting in the same election district.

It struck me that the President of the United States has more important things to do than to act as an umpire in an election district.

Senator DIRKSEN. Sam, I just wanted to conclude with this thought, since some exception was taken to the Attorney General's language, and exception was taken to the use of the language "shotgun wedding," I thought the record ought to show that this was an unhappy enforced partnership. Maybe there would not be any objection to that phrase.

Senator ERVIN. And the proponents recognized there might be an element of incompatibility to the two parties to the wedding and stipulated that the President of the United States should lay aside his duties to deal with that compatibility.

Senator DIRKSEN. And then comes the question, of course, of selecting qualified personnel, and if you could not find them in the immediate district affected, I think that section of the act or amendment then, of course, you could find them anywhere in the State, and I think that would be a very unhappy provision.

Mr. WALSH. I think so.

Senator DIRKSEN. So I am glad that the Senate did take the action that it did on the Clark-Javits proposal.

The CHAIRMAN. Well, gentlemen, are we going to quit now?

Senator ERVIN. There is one question that bothers me, on page 15, starting on line 8—page 16—and this will be the last question I ask.

Mr. WALSH. Yes, sir.

Senator ERVIN. It says:

The words "qualified under State law" shall mean qualified according to the laws, customs, or usages of the State, and shall not, in any event, imply qualifications more stringent than those used by the persons found in the proceeding to have violated subsection (a) in qualifying persons other than those of the race or color against which the pattern or practice of discrimination was found to exist.

If I interpret that (a) right, if the misbehaving State election officials should fail, for example, to put a literacy test to white persons, although the State law may require a literacy test, then the State law would, in effect, be amended by this so as to make it unnecessary for voting referees to give literacy tests to the Negroes.

Mr. WALSH. Well, do we understand the 15th amendment, the election law has got to be applied with equality to both, and this seems to us the only way to do it.

Senator ERVIN. But this next sentence says the qualifications of State law shall not be more stringent than the tests the misbehaving officer will put to members of the other race. For example, in my

precinct we have a registrar who is a lady who taught school for years and years and taught about all the white people who vote there. Well, she would not, I imagine, give a literacy test to one side taught and knew she could read and write, whereby she might give it to an unknown Negro.

Now, under this clause if I interpret it right, if she did not give the literacy test to white people and was found to be practicing discrimination against Negroes, the voting referee could not give the literacy tests to the colored people from the precinct. That is where misbehavior of an officer would amend the laws of the State to make the qualifications less than the State law makes them.

Mr. WALSH. I would hardly project to say what would happen in any given set of facts, but I do think that our basic law here is the 15th amendment which says it has got to be equal for both. It may be that you would get substantial equality one way or the other, but that is a matter of fact for each case.

Senator ERVIN. But, in effect, the Federal law amends the State qualifications by providing that they cannot be more stringent than those applied to the other race by the misbehaving officers.

Mr. WALSH. Well, we do not need any statute for that, because the 15th amendment says that the State law, of course, cannot be more stringent for one race than the other.

Senator ERVIN. I know. But this second clause provides, in effect, that the misbehaving State officer amends the State law for all practical purposes because the voting referee shall not apply more stringent qualifications than those applied by the misbehaving officer, though the State law provides otherwise.

Mr. WALSH. Well, I do not think—I can certainly see what you are driving at, but I do not think we can quite put it that way, that a misbehaving officer amends the State law. All this says is that the law has got to mean the same thing in substance, not in words, but in substance, for both groups, have got to be fairly treated. If you are only asking the whites to write a simple sentence and you try to ask the Negroes to write a composition on an abstruse subject, would the 15th amendment be violated and this is done to eliminate that violation.

Senator ERVIN. The point I am making is this: what you are doing here is to define what is the meaning of "qualify" under State law in reference to the voting referee, and then this next clause, in effect, says that if the misbehaving State election official who was found to be guilty of discrimination applied a lesser standard to people of the other race, the voting referee in determining whether persons applying to him possess the qualifications prescribed by the State law shall not follow the law of the State but shall follow the conduct of the misbehaving officer if it is less stringent.

Mr. WALSH. Well, it gets down to the question of administrative interpretation. The referee is going to follow the law of the State as interpreted administratively by the State registrar.

Senator ERVIN. But this is a different point, I think. In other words, it says that this is the State law, but it cannot be more stringent than the course of conduct followed by the misbehaving State official in passing upon qualifications of the other race and that is letting the Federal law amend the State law to conform to the misbehavior of the misbehaving officer when the Federal Government acting through the voting referee administers the State law.

Mr. WALSH. Well, whatever, however you want to characterize it, it certainly is the purpose of this definition to see that the races are treated equally and that one is not submitted to, subjected to a more difficult test than the other. I think that is about where we come out.

Senator ERVIN. I think if you meditate on that you will have to admit I am right in my interpretation.

Mr. WALSH. With a few characterizations removed, I do not think there is any difference between us; I think we both mean the same thing.

Senator DIRKSEN. Shall we quit?

Senator HRUSKA. I just have one or two questions which are not too long.

Judge, I wonder, there has been from time to time references to the Davenport law.

Mr. WALSH. Yes, sir.

Senator HRUSKA. And certain analogies have been made as between the Davenport law and the referee situation in this case. I am sure there are not any points of likeness between the two that go very far. I wondered if for the record you could give us an essential difference between that situation and the present bill?

Mr. WALSH. As I understood the reconstruction laws, one permitted any 2 citizens in a town of 20,000 or more to apply to a Federal circuit judge for the appointment of persons who sort of acted as challengers.

Now, the judge had no discretion, if these applications were made, why, he had to appoint persons who then had power to challenge any vote offered by any person whose legal qualifications these persons who were called supervisors had doubt about, and they had power to inspect and scrutinize the whole manner in which voting was done in this area.

Now, the difference between that and the referees provision seems to us sharp. The judge in this old reconstruction law, he did not act as a judge at all; he was simply an appointing ministerial officer, whereas in our case, the judge does act as a judge, and nobody does anything under this statute unless a judge has found the existence of a pattern or practice of discrimination. He has made a judicial determination before this comes into play at all.

When it does come into play, it comes in to play only as ancillary to the activities of the court, whereas these old supervisors of election were not really ancillary to the court at all; they had no future relationship with the court.

Senator HRUSKA. They had no guidelines by which to go or any duties spelled out except the ultimate objective of trying to get everyone to vote?

Mr. WALSH. They were given this standard and left to apply it, these supervisors of election under that old law.

There was another one, the other law that I know about, of the same period, attempted to make it unnecessary for a person to do a vain act, but it left up to the voter himself to decide what was vain and what was not. He could conclude that he could not be registered, and therefore he would not apply for registration and present himself for voting.

Now, it seemed to us that our recommendation is much more carefully curtailed than either of those, and there is really no fair comparison between them.

Senator HRUSKA. So that there is no law which at one time had effectiveness in our history which can be favorably compared or even fairly compared with the present bill approved by the House and which is before us now?

Mr. WALSH. I do not think so, sir.

Senator HRUSKA. In regard to referee.

Mr. WALSH. I think that is correct.

Senator KEATING. Would the Senator yield.

Insofar as there is any comparison, those old so-called Davenport laws would apply more to the Federal enrollment officer plan than they would to the referee plan, in that in the Federal enrollment plan when he is once appointed he is divorced from court supervision?

Mr. WALSH. You are absolutely right.

Senator KEATING. Of course, in all fairness, the Federal enrollment plan calls for first the first finding and that was not in the Davenport law?

Mr. WALSH. That is right. Of the two principal factors in the Davenport law, one is followed in the enrollment officers law and the other is not. That is right.

Senator HART. Would the Senator yield in that.

Which is the factor which is applicable in the comparison validly in enrollment?

Mr. WALSH. After the judge has appointed the supervisor of election, he has no more contact with him.

Senator HRUSKA. And no control or supervision over him, either?

Mr. WALSH. That is right.

Senator HART. But was not the fact which caused such great confusion and damage and wrong, the fact that it was at the option of the citizen whether he would present himself to the enrollment officer or just go to the ballot box?

Mr. WALSH. That was, I think that——

Senator HART. That is not true of the Hennings Act.

Mr. WALSH. That is right.

Senator HRUSKA. Mr. Chairman, I have further questions but the hour is late and I think perhaps we had better adjourn.

Senator JOHNSTON. We certainly thank you for being with us today, Judge, and it has been kind of hard on you and strenuous to keep answering the questions that we have been shooting at you, so you can be back sometime tomorrow.

Mr. WALSH. I appreciate the interest you have shown, Senator.

Senator JOHNSTON. And we will recess until 10 o'clock.

Senator KEATING. Mr. Chairman, I do have some additional questions to ask Judge Walsh and I would appreciate it if he could be here in the morning. I do not care to interfere with the Chairman's plan to call Mr. Bloch next, but these are matters that I think are fairly important to get on the record before we go into executive session.

Senator JOHNSTON. I appreciate that. So you be here.

Mr. WALSH. I will be here at 10 o'clock. Thank you very much.

Senator JOHNSTON. We will adjourn until 10 o'clock.

(Whereupon at 5:40 p.m., the executive session was adjourned, to reconvene at 10 a.m., Tuesday, March 29, 1960.)

CIVIL RIGHTS ACT OF 1960

TUESDAY, MARCH 29, 1960

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to recess, at 10:05 a.m., in room 2228, New Senate Office Building, Senator James O. Eastland (chairman) presiding.

Present: Senators Eastland, Kefauver, Johnston of South Carolina, Hennings, McClellan, Ervin, Carroll, Hart, Wiley, Dirksen, Hruska, and Keating.

The CHAIRMAN. Proceed, Mr. Bloch.

STATEMENT OF CHARLES J. BLOCH, COUNSEL, BOARD OF REGISTRARS, TERRELL COUNTY, GA.

Mr. BLOCH. Mr. Chairman and Senators, there has been distributed a statement and a supplemental statement which I hope can be made a part of the record.

The CHAIRMAN. It will be admitted into the record.

Mr. BLOCH. I thought if I could be of any help to the committee at all, it would possibly be in deviating somewhat from those written statements in the light of the fact that you had a rather extended hearing yesterday, and some of the questions that are discussed in that statement were pretty well brought out yesterday by questioning, so I had in mind that I would just talk from this standpoint.

As you know, as was mentioned several times yesterday, I was counsel, and I am counsel, for Mr. James Griggs Raines and others who composed the Board of Registrars of Terrell County, Ga., in a suit brought by the United States of America, which was the first suit brought under the Civil Rights Act of 1957.

There has been a whole lot of discussion of that case, and I thought perhaps the committee would like to know the exact status of it so as to consider it in connection with the proposed legislation, particularly title VI, and I am going to confine myself to title VI.

That case was brought in September of 1958 in the District Court for the Middle District of Georgia, Judge Hoyt Davis, and we filed a motion to dismiss it on several grounds, among which, a motion to dismiss under rule 12(b) of the Rules of Civil Procedure on several grounds, among which was the constitutionality of it.

Judge Davis, as you know, of course, sustained the motion only on the ground that it was not proper, not appropriate legislation under the 15th amendment.

That case was reversed by the Supreme Court on the 29th of February. Now, up to the time of the reversal, there had been no responsive pleading or answer filed. So that all the statements that have been made by the Attorney General and his staff with respect to the *Raines* case are based on the allegations of the complaint, which were assumed to be true for the purposes of the demurrer or motion to dismiss.

Now, since the decision, the opinion of the Supreme Court, we filed an answer to that in which we substantially deny every allegation in the complaint and specifically deny the allegations with reference to discrimination. And certainly I think it will be of interest to the committee to know in connection with that *Raines* case that not a single one of the applications—now, these are allegations, too, allegations of the answer—that not a single one of the Negroes of Terrell County who applied for registration under the Georgia act applied when the present board was in office.

Georgia passed a registration act in 1958. The present board was appointed pursuant to that act. I am sorry that I do not have with me a transcript of the record in the *Raines* case, but you will notice in the complaint when you come to look at it that every one of the Negroes who applied for registration applied prior to March 1958, when the present registration act of Georgia was passed.

Now, I think it is important to call to the committee's attention this, too: Under the Civil Rights Act of 1957, which you are proposing to amend, I refer to section (c) of that act as it appears in title 42, section 1971(c).

In the *Raines* case there is an effort being made to require or to ask the district judge to register some four or five of the Negroes who were refused registration by the old county board, by the county board down there.

Now, we are making the point in the *Raines* case that under the Civil Rights Act of 1957 the district court has no right to register a man or a woman, that the act is confined to the grant of preventive relief.

Now, that brings on a construction of section (c) of the act to which Judge Walsh referred yesterday, and it is a right important question to my mind in this discussion.

Section (c) reads:

> Whenever any person has engaged or there are reasonable grounds to believe that any persons is about to engage in any act or practice which would deprive any other person of any right or privilege secured by subsection (a) or (b) of this section, the Attorney General may institute for the United States or in the name of the United States a civil action or other proper proceeding for preventive relief.

Now, I interpolate that I construe this section to mean that the only sort of an action which the Congress has authorized the Attorney General to bring is an action for preventive relief.

Now, to get the whole question before the committee, the act goes on to say:

After "preventive relief" there is a comma, "including an application for a permanent or temporary injunction, restraining order or other order."

Now, as I construe that section, the only relief that a trial court, a district court, can grant is an action for preventive relief. That

preventive relief may be in the shape of an application for a permanent, temporary injunction, restraining order, or other order, but it is confined to preventive relief.

Now, if there is any doubt about that in the mind of any Senator, try to pace that phrase "the Attorney General may institute for the United States or in the name of the United States a civil action or other proper proceeding for preventive relief"—try to get "or other order" in there, as correlative to an action for preventive relief and see where it leads you to.

So that it is quite clear to me, and certainly it is my opinion, legal opinion, that the authority of the Attorney General presently is confined to actions for preventive relief, and we are going to make the point, and we are making the point, we have made the point, that the district judge has not any right to order the registration of the Negroes whose names are mentioned in that particular proceeding down there.

Now, as I recall the decision of the Supreme Court, the opinion of the Supreme Court of the United States, it barely alluded to that contention and said that it would come on later, that it was not ripe for discussion or decision at this particular juncture.

Now, you might ask, and naturally you would ask, if that construction of that act is correct, what about the decision of the Supreme Court of the United States in the Louisiana case where they ordered restored to the rolls the names of several hundred, 1,700 Negroes, I believe.

Well, I can perceive and conceive of quite a difference in restoring to the rolls 1,700 names that were originally registered by the proper State officer and stricken therefrom by State proceeding, quite a difference in that sort of thing under the 15th amendment, from converting the Federal court into a registration board and having him abinitio order the registration of colored citizens.

Senator HENNINGS. Mr. Chairman, I am sorry, Mr. Bloch, last night it became necessary for me to go to the floor following a message I had that the Department of the Interior appropriation bill had reached the floor, and it is my responsibility to offer an amendment to that bill. I was informed this morning that the bill, the appropriation bill, would be called up between 10:30 and 10:45.

For that reason, Mr. Chairman, I, with great regret, because I have respect for Mr. Bloch, I have heard him before our committees in the past, and I assure Mr. Bloch I will read his statement and his testimony and also the transcript. I am sure it will be very informative, and I would ask, Mr. Chairman, that I may be excused at this time.

The CHAIRMAN. Yes.

Senator HENNINGS. At 12:30 there is a meeting of the Democratic Policy Committee, and being a member of that, it may prevent my being here, and I ask to be excused at this time.

The CHAIRMAN. Proceed, sir.

Mr. BLOCH. Now, Mr. Chairman and Senators, let us assume that in the *Raines* case the case proceeded to a decree, and that the Government was successful in obtaining the grant of a decree under section 1971(c). It occurred to me that it might be interesting to the committee to see just what the effect of section—title VI of the bill (H.R. 8601) would be.

I am assuming that the *Raines* case or any other case brought under section 1971(c)—and we can use the *Raines* case as an illustration merely—assume that it has proceeded to a decree, and that in the meantime—assume the *Raines* case or any other case like that brought under 1971(c) had proceeded to a decree, and in the meantime title VI shall have been enacted into law. Let us see what would happen.

It seems to me that that would graphically demonstrate to the committee just what the broad scope—and what I think is the unconstitutional scope—of this bill would be.

I refer now to the bill. On page 11, title VI, line 16:

In any proceeding—

this would be added to 1971 and its subsection (e).

In any proceeding instituted pursuant to subsection (c) in the event the court finds that any person has been deprived on account of race or color of any right or privilege secured by subsection (a), the court shall, upon request of the Attorney General and after each party has been given notice and the opportunity to be heard, make a finding whether such deprivation was or is pursuant to a pattern or practice.

Let us stop right there for the present—"upon application after each party has been given notice."

Now, the only parties to that case would be the United States of America as plaintiffs, and the members of the Board of Registrars of Terrell County, Ga., defendants. They are the only parties. They are given notice "and an opporunity to be heard."

Now, on yesterday I think it was Senator McClellan who asked either the Attorney General or Judge Walsh what the meaning of that phrase "opportunity to be heard" was.

It so happens that I had made some investigation of that, and I read to you from page 3 of my prepared statement:

We must suppose that the phrase in the bill, "opportunity to be heard" contemplates a listening to facts and evidence before adjutication and an opportunity on the part of the defendants to interpose a defense. The phrase "opportunity to be heard" connotes such (*People* v. *Caralt*, 241 N.Y.S. 641, 644; *Ex parte Morse*, 284 Pac. 18; 141 Okla. 75). The case of *People* v. *Oskroba*, 111 N.E. 2d 235, 237; 305 N.Y. 113, however, might indicate that the drafters of this bill did not contemplate that the phrase "opportunity to be heard" required formal procedure. Another New York case is to the same effect: *People ex rel. Massengale* v. *McMann*, 184 N.Y.S. 2d 922.

So that if you leave the status as it is, with simply the phase "opportunity to be heard" in it, we do not know what rights the board of registrars, the defendants in that case, would have, because in applying the Federal statute we do not know whether the Federal courts would apply the Oklahoma rule or what seems to be the New York rule. It is all important because what is the question upon which that board of registrars is given the opportunity to be heard? The question is, under the proposed bill, under the bill passed, as passed by the House, the question is whether the court will make a finding that the deprivation was or is pursuant to a pattern or practice.

And that is fundamental in this bill because whether or not the court makes that finding as to the existence vel nom of a pattern or practice determines entirely all the so-called registrations, subsequent registrations, under the act.

So that the first question to be decided there is, as I have said, is whether the registrars would be given a chance to be heard on that question.

Then would come the question of what is the pattern or practice.

Senator McCLELLAN. May I interrupt at this point. What you are stating——

Mr. BLOCH. Would you mind speaking loud to me. I broke my hearing aid and I am in trouble.

Senator McCLELLAN. Maybe I should not interrupt. You mean the finding that there was a pattern and practice can be made, that is your contention, under the proposed statute, without the hearing and without the interested parties having the opportunity to appear?

Mr. BLOCH. I say this. I will go this far, Senator, that under the act it is doubtful, very doubtful, whether the board of registrars, the defendants in the main case, would have a right to cross-examine witnesses, a right to be there, a right to introduce contrary evidence to that put up by the United States of America.

I say that the act would require judicial construction to determine the meaning of the phrase "opportunity to be heard." And I say that in light of the case of the *People* v. *Oskroba*, 305 N.Y. 113, 111 N.E. 2d 235; and the *People ex rel Massengale* v. *McMann*, 183 N.Y.S. 2d 922.

Now, the Oklahoma Supreme Court has held that the phrase "opportunity to be heard" contemplates that there shall be a full hearing with the right to cross-examine witnesses, represented by counsel, and to introduce evidence to the contrary.

But the New York courts have decided, so far as I read the cases, to the contrary. So that my suggestion in that connection was this: Why leave that, if you are going to pass this, if this bill should be reported out, if this bill should be passed in any form, why leave that phrase "opportunity to be heard" in doubt. Why not spell out what that phrase "opportunity to be heard" means, so that when another case comes up down South some months or some years hence, that we will not be confronted with the suggestion or argument by counsel for the Government:

> Opportunity to be heard, you can be heard all you please, say what you want, but you have got no right to introduce evidence to the contrary under the decisions of the Supreme Court of New York and the court of appeals of New York.

Now, I apprehend that those who drafted this bill, are responsible for the drafting of this bill, are New York lawyers, some of them are certainly, so that they must have had in mind the New York meaning of the phrase "opportunity to be heard" when they inserted it in there.

So my whole point is there, why leave it open, why leave it in doubt? Tell us lawyers who may have to try cases under it just what you mean, particularly in the light of the fact that you are making a finding, that the court will be making a finding there as to whether that deprivation was or is pursuant to a pattern or practice.

Senator JOHNSTON. Will you suggest that they insert that probably at the word "here" and to offer testimony, would that clarify it?

Mr. BLOCH. I would say that the clarification would be a full opportunity to be heard including the right to be represented by counsel, to cross-examine witnesses for the Government, and to introduce testimony contrary to that offered by the Government, and then there

would be no doubt about what the phrase "opportunity to be heard" meant.

Senator JOHNSTON. Who could object to anything like that? I think a person has a right to be heard and offer testimony and put up his defenses.

Mr. BLOCH. I do not see that anybody ought to object to it, and I do not know that anybody will. But certainly the bill ought to be clarified in that respect.

Now, that phrase——

The CHAIRMAN. Judge Walsh, does the Department of Justice have any objection to that amendment?

STATEMENT OF LAWRENCE E. WALSH, DEPUTY ATTORNEY GENERAL—Resumed

Mr. WALSH. Yes, they do. This language did not come from a New York lawyer. It came from a lawyer from Louisiana, a very distinguished man, Ed Willis, who is one of the senior members of the House Judiciary Committee. He wanted to make sure that this pattern and practice was not found until everyone had an opportunity to be heard. These are classic words of art. They mean an opportunity to be heard in argument, an opportunity to present evidence, an opportunity to take advantage of every rule of Federal practice.

If we start to spell out what they mean, then you have to spell them out completely, not only the opportunity to be heard, to examine on direct, to examine on cross-examination, to examine on redirect, to make objections to the evidence—I do not think we can spell out all over again the entire rules of civil practice here.

An opportunity to be heard means to be heard as an adversary in the fullest sense of the word as used in the Federal courts.

The CHAIRMAN. Proceed, Mr. Bloch.

Mr. BLOCH. I suggest to my distinguished friend, that on the bottom of page 15 and the top of page 16 of the bill, there are definitions of phrases, there is a definition of the words "affected area," there is a definition of the phrase "qualified under State law."

Certainly, in some places where there was a phrase of doubtful meaning, of doubtful meaning, that phrase has been defined in the act.

Mr. WALSH. I do not think there is any doubt as to the meaning of an opportunity to be heard, unless you wanted to give it some special meaning, which we certainly do not. The Department of Justice and the administration have no desire to intrude into the administration of the election laws of a State until it has proven by a preponderance of the evidence the existence of a pattern and practice of discrimination and it does not want to do this until everyone who doubts the existence of that pattern has had an opportunity to present evidence to the contrary and been heard in full.

Senator KEATING. Mr. Chairman, may I inquire of the Attorney General, is there a danger that if you try to spell it out, you actually would impair it since these are such carefully selected words of art?

Mr. WALSH. I think there is. I am sure that is what Mr. Willis had in mind, if you start to specify the specifications, they will be used to limit the meaning of a hearing rather than to expand it.

Senator KEATING. Mr. Willis, I might say, as the chairman knows perhaps, served on the committee with me in the House and was the leader and a very able legal-light leader of the opposition to any civil rights legislation.

Senator JOHNSTON. What would be the reason to add these words "offer testimony and present their defenses"?

Mr. WALSH. What does that mean? Why limit that to offering testimony and presenting defenses? Cannot they also proceed to the rights on appeal and all the other rights that a party has in the Federal courts? I think that is the real danger, Senator, and this language, and these lines were worked out in an agreement with Mr. Willis, in an effort to minimize those areas of controversy which this bill presents, to at least make sure there were no technical areas of controversy.

Senator MCCLELLAN. Would the Attorney General object to adding just these words "and make defenses to the action"? I think that would be a solution.

Mr. WALSH. I think if you add those words, does that somehow limit the extent of the hearing to defending? I do not know——

Senator MCCLELLAN. You defend every issue presented, if you make defenses. If there is a charge, and there is an issue, there is an objective sought.

Mr. WALSH. I think, Senator, you will end up by limiting those words, and this word "heard," which is a good, broad, classic word—and I can assure Mr. Bloch and this committee that there are no reservations in the mind of any of those who participated in the drafting of the bill—that would give it a narrower meaning than it has ordinarily.

Senator MCCLELLAN. I think if you add that just one further phrase "to make defense thereto," then you have no question about it. When you say "heard," you mean heard for the purpose of making defenses or controverting the issue. But you could be heard and yet not have all of the rights of contraverting the issue.

Mr. WALSH. Well, Mr. Senator——

Senator MCCLELLAN. I think that would bring it down without trying to spell out everything, cross-examine and everything else.

Mr. WALSH. Senator, again reiterating the respect we have for your wisdom both as a member of this committee and as a lawyer, we would regard that as a surplusage, and its only possible effect in the construction of this statute would be some kind of narrowing effect which in good faith we do not think we should support.

The CHAIRMAN. Proceed, Mr. Bloch.

Mr. BLOCH. Senators, of course, I never saw this bill as passed by the House until last Friday at noon, when Senator Talmadge sent me an extra copy of it, so necessarily I have had to work right fast and my memorandum is not as full, my legal memorandum, is not as full as I would like to have had it.

But I do recall this: If the Senators are interested in a discussion of that phrase and the adjudicated meanings of that phrase "opportunity to be heard," I suggest that you look in "Words and Phrases," particularly in the pocket part of the adjudications of the meaning of that phrase and you can see there is room for argument as to its meaning. And we are in the process of legislating now, so when we know

that a phrase has been given contrary meanings by courts of dignity, why use a phrase which has been given contrary meanings by two different courts. Why not adjudicate that question right now.

Now, we come on to this, the judge after having given that board of registrars—and I am going now, just tracing out what would happen if this act were passed, this bill were passed. After the registrars were given that opportunity to be heard, whatever it may be, the judge will make a finding whether such deprivation was or is pursuant to a pattern or practice.

Now, I hope you Senators will bear in mind that using this *Raines* case as a guinea pig, there were only 10 or 12 Negroes, maybe 14 Negroes, who allegedly were deprived of their right to vote in Terrell County. I do not know how many Negroes live down there, there are thousands of them, but the suit was brought by reason of the fact, by reason of the allegation that these 10 or 12 Negroes, whose names are spelled out in the complaint, were deprived of the right to vote.

Now, under this act with the judge having determined, having made a finding that the State of Georgia has deprived or abridged those particular 12 or 14 Negroes of their right to vote, the next question that would come up would be whether that deprivation or abridgment was pursuant to a pattern or practice.

Now then, you run into a definition of the phrase what do you mean by pattern or practice.

I could not find in "Words and Phrases" the words coupled up at all, any adjudicated meaning, but I do find that "practice" standing alone, has been defined by a New York court as "custom." Other courts define it as a habit or regular conduct. The cases are given in my memorandum, and there used to be or maybe there still is—I am sorry Senator Hennings had to go, he could have told us—a Missouri constitutional provision which provides that nothing therein was intended to justify the practice of wearing concealed weapons. The word "practice" there was defined as having reference to an existing custom of wearing such weapons concealed, more or less generally among citizens, and not to the practice of any particular individual accused of the crime of wearing such weapons.

So that I take it that the phrase "pattern or practice" in this bill must be found to be one generally existing in a particular State or perhaps area within a State.

Now the bill goes on, if the court finds such a pattern or practice, any person of such race or color resident within the affected area, any person—now, mind you, Senators, this *Raines* case, the guinea pig case, only dealt with 12 or 14 or 16 at the most. I can see their names over there on the left-hand side but I didn't count them, comparatively few names, those people have been—or maybe some of them—have been deprived of their right to register or vote under the laws of Georgia, by the illegal act of the registrars.

Now, with that fact established by decree, then any person, 8,000 or 10,000 there may be in Terrell County, Ga., resident within the affected area, and the affected area is defined in the bill over on the next to the last page, on page 16, as meaning—

any subdivision of the State in which the laws of the State relating to voting are or have been to any extent administered by a person found in the proceeding to have violated subsection (a).

So that if any person, just one or two people, have been deprived by the board of registrars of Terrell County of their right to vote, that any of the 8,000 or 10,000 may do what?

And I think the affected area there clearly means Terrell County—for 1 year and thereafter until the court subsequently finds that such pattern or practice has ceased, shall be entitled, any one of those 10,000 Negroes, be entitled, upon his application therefor, application now, let us underscore that word, emphasize it, because I think it is of the utmost importance when we come to consider whether this act in its entirety is constitutional or not.

In other words, when we come to consider what those other 8,000 or 10,000 Negroes will be entitled to do, whether it constitutes a case or controversy under the judicial article of the Constitution. To an order declaring him qualified to vote upon proof that at any election or elections he is qualified under State law to vote, and, two, he has since such finding by the court, been deprived of or denied under color of law of the opportunity to register to vote or otherwise qualified to vote, and found not qualified to vote by any person acting under color of law.

Now, stop right there, sirs, and let us analyze that. Any one of those 8,000 or 10,000 Negroes files an application to the court now; we are dealing with that part of it here that deals with the court.

Senator ERVIN. I have two questions about this part. Now, in North Carolina we have a registration twice during an election year: one for about 5 weeks in May for primaries and another one in about 5 weeks in the fall for general election for people who come of age.

Now this says that any time within 1 year that these people would have a right to come in and if that means what it says and can be sustained, why, it would nullify the North Carolina election law, and instead of having 5 weeks in the springtime and 5 weeks in the fall, we would have to have a whole year to pay our election officials to keep the registration books open.

Then furthermore, one other question: If under this period of a year, not only would it require you to keep your registration books open, but it would also deny the State the right to show that the practice or pattern has ceased and there is no longer any discrimination on account of race or color.

But this statute would say, although the truth would show there is no longer any discrimination, still the Federal voting referees are going to be allowed to function, without any finding being made. And if Congress can deny the State the right to show that the discrimination has ceased for 1 year, then it would seem to me they could do likewise for 2 years or 10 years or 50 years, and have a situation where although the only authority that the Federal Government has to act is under the 14th amendment and based on racial discrimination, they by this kind of a presumption could absolutely deny the State the right not to have this rule superseded by the Federal voting referees' rulings for an indefinite period of time even though the condition on which the Federal Government has any authority whatever has ceased to exist.

Mr. BLOCH. Senator, I am obliged to you for calling something to my mind. It would nullify the Georgia law. Of course, I am not familiar with the registration laws in any State except Georgia—and

sometimes I think I am not very familiar with those. They change a great deal. But I do know we have this salient provision in it. In the Georgia laws, we have the provision that the registration books close 6 months before a general election. It has been construed by the Attorney General to mean 6 months before a primary. Our primaries are held in September. Our general elections are held in November.

So that as suggested by Senator Ervin as to what would happen in North Carolina, it would happen in Georgia, that what I think is a good provision of the law, to make the registration books close 6 months prior to an election, so that the rights of those people to vote can be established while the issues are being discussed and a great many other reasons for it, but whatever the reasons for it, certainly the States still have a right to determine that question.

But under that law, that 6 months' provision in the Georgia statute, and whatever similar provisions there may be in the statutes of any other State, would, as I read this bill, be knocked out. A white person could not, but a Negro could, get the right to vote 3 days before an election or a primary absolutely nullifying what I think is a beneficent provision of law that the registration books ought to close a reasonable length of time prior to the election.

But bear in mind, Senators, that that person or those persons who make that application were not parties to this original suit, and were not even named in the original suit. But upon the application therefor, they get an order declaring them qualified to vote, upon proof, is the language of the bill, upon proof of, one, he has got to prove he is qualified under State law to vote.

Then in addition to that, after he has proven that he is qualified under State law to vote, he has got to prove one of two things, either that he has been deprived of or denied under color of law of the opportunity to register to vote or otherwise qualify to vote, or that he has been found not qualified to vote by any person acting under color of law.

Now I was very, very much interested in the discussion which ensued here yesterday as to the meaning of the first one of those elements of proof, that he has been deprived of or denied under color of law the opportunity to register to vote or otherwise to qualify to vote.

Now as best I could hear, it was suggest that the purpose of this phrase was—somebody, I believe it was Judge Walsh, said—that the courthouse door might be closed to a Negro, that the State might pass a law that he could not come into a public building.

When I heard that I made this note: Suppose a Negro testifying—now bear in mind that phrase "upon proof"—suppose a Negro testifies that he heard a registrar say, as suggested by Judge Walsh, that he was never going to register a Negro. This bill gives the registrar no opportunity to appear and contradict that statement.

If you will read this bill carefully, one of the salient proofs now that that Negro must make is that he has been deprived of or denied under color of law the opportunity to register or vote or otherwise qualify to vote. He can come in under Judge Walsh's statement, as I understood it, and say that he heard a registrar say that he was not going to register any Negro, and that would be sufficient proof to

authorize the court to grant that Negro and hundreds or thousands of others the right to vote, without having given that registrar, or giving that registrar, any opportunity to appear and produce evidence to the contrary.

If I am wrong about that, I hope it will be pointed out. But in the limited time that I have had to study this bill in a proceeding before the judge, I cannot find any provision that gives those registrars as a matter of right—I do not mean a matter of grace now, it takes right to make due process, not grace, the right to introduce testimony and be heard with respect to that proof which has been submitted by the Negro.

Senator HRUSKA. Mr. Bloch, would not an opportunity be given to that registrar to appear before the Federal judge at the time when the referee would have submitted his report including the registration to which you refer, and including others which may be in that report, following the filing of which report there would be a notice to the Attorney General and to the registrar, the State registrar, of that report and giving them a chance to be heard?

We find on page 13 at line 23 and the following that procedure. Would that not be an opportunity to be heard?

Mr. BLOCH. Senator, I am, with all deference to the Senator and the Senator's question, I am not talking now about the referee proceeding. You see, the judge need not appoint a referee. This bill has two phases; it has the phase on page 12 and the phase on page 13.

You will see, sir, that the language you are talking about at the top of page 13, third line, the court may appoint one or more persons who are qualified voters in the judicial district to be referees.

I have got some right serious objections to that part of the bill but I had not gotten that far yet. What I am dealing with now is that phase of the bill that begins at the bottom of page 11 and goes on to page 12. I am assuming that now the judge says, "I am not going to appoint any referee; I am going to do it myself."

Senator HRUSKA. In that event, we would get back to those words in line 21 on page 11 which you consider rather nebulous and vague, "the opportunity to be heard."

Mr. BLOCH. No, sir.

Senator HRUSKA. Would he not be given an opportunity to be heard in the full connotation and implication of that phrase?

Mr. BLOCH. What is he being given an opportunity to be heard on, Senator, even if you take those words on page 11, starting at line 20:

after each party has been given notice and the opportunity to be heard make a finding whether such deprivation was or is pursuant to a pattern or practice.

This is all he is given, even if we give the phrase "opportunity to be heard," its greatest possible legal significance, give it the greatest, broadest, legal significance you want to give it, the only question that this bill gives the registrars an opportunity to be heard on is whether the deprivation was or is pursuant to a pattern or practice.

Senator HRUSKA. And the evidence on that point by the complainant by the witness, the party to the suit, the voter, the voter applicant, the evidence on that would be a relation by him of a conversation that he overheard of the registrar to the effect that the registrar stated, "I will not vote a Negro," then he will have a chance

to veto that, present his rebuttal, as refutation, his evidence, will he not?

Mr. BLOCH. No, sir.

Senator HRUSKA. Why not?

Mr. BLOCH. Let us go beyond the pattern or practice. It is awfully hard for me, and I suppose it is to everybody to whom this bill has been thrown at rather suddenly to analyze and dissect it, so to speak, and pick out the various steps. Let us assume that that pattern or practice has been found by the trial judge. I am assuming that that pattern or practice has been found to exist as suggested, as authorized in lines 20 or 22.

Now, look at the next sentence of the bill, beginning at the end of page 22—of line 22. If the court finds such pattern or practice, that is a step that I am taking up now, the pattern or practice having been found to exist, what happens: Any person of the affected race then, you see, Senator, files an application with the court, and upon proof that he is qualified to vote under State law or that he has since the finding of the court been deprived of that right or found not qualified to vote, then the judge, not the referee, the judge does what—issues an order declaring him qualified to vote.

Now, what I am saying to you, sir, and to this committee is in that proceeding before the judge, where these thousands or hundreds or tens or scores of Negroes come in and ask to be permitted to vote, that there is not any opportunity to be heard given to the registrars.

Senator HRUSKA. Mr. Chairman, may we ask Judge Walsh to comment on that point. It seems to be a critical point.

Senator JOHNSTON. Are you speaking when they have found the pattern to exist?

I say the discussion will be where they have already found the pattern to exist.

Senator HRUSKA. Yes.

Senator JOHNSTON. And then they come in later?

Senator HRUSKA. Yes, I think Mr. Bloch did make clear his point that this was the proceeding still before the judge, but after the decree had been entered that a pattern does exist, and before a referee is appointed.

Senator MCCLELLAN. Will the Senator yield?

Senator HRUSKA. Yes.

Senator MCCLELLAN. I think I understand it, but I want to be sure before you proceed. The question of whether a pattern and practice has prevailed or exists has already been adjudicated. Then you move into what the individual has to do where he sought to register and so forth to qualify himself and has been denied. That is what you are moving into.

Senator HRUSKA. Yes, and before any referee has been appointed.

Senator ERVIN. Will the Senator yield?

I think it would be appropriate here, I have a decision sustaining the point that Mr. Bloch just made about a statute having to require notice, and I would like to put it in the record at this point so that the point will be illustrated, and it is to this effect:

It is the case of *Coe* v. *Armour Fertilizer Works*, 237 U.S., at pages 424 and 425:

> Nor can extraofficial or casual notice, or a hearing granted as a matter of favor or discretion, be deemed a substantial substitute for the due process of law that the Constitution requires.

And then it goes ahead and says:

If the statute did not provide for a notice in any form, it is not material that as a matter of grace or favor notice may have been given of the proposed assessment.

This was a tax assessment.

It is not what notice, uncalled for by the statute, the taxpayer may have received in a particular case that is material, but the question is, whether any notice is provided for by the statute.

Then a little further on:

This notice must be provided as an essential part of the statutory provision and not awarded as a mere matter of favor or grace.

And this:

The right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion.

And finally:

The law itself must save the parties' rights, and not leave them to the discretion of the courts as such.

I would like to put that in the record.

The CHAIRMAN. Judge Walsh, you may comment on the question.

Mr. WALSH. Mr. Chairman, I do not think there is any question but that in the proceeding before the court, as distinguished from the proceeding before the referee, there will be an opportunity for the party to be heard. If we just forget for the minute that there is any provision in this bill relating to the referee, that is ancillary, that was simply to help the judge, and we come back now to what the judge's duties are and what his powers are under the 14th amendment, in the absence of some provision to the contrary; as a matter of fact, we could not make provision to the contrary. You cannot deprive a party of the right to be heard before you make an adjudication against him.

I mean, our statutes are full of things that the judges do or are authorized to do, and we do not specify in each one that he must hear or give opportunity to be heard. All of our statutes are read in the light of the 14th amendment which requires an opportunity to be heard and requires notice.

So if there is no referee appointed, there is not any doubt that the determination of the judge has got to be on notice to the parties defendant, and after an opportunity to be heard, and how the judge does that, that is a matter for the judge to decide. I mean the routine he would follow. You do not ordinarily try to tell him exactly how he would give notice or how he would not.

Second, if you will look at page 12, you have got the word "heard," page 12, line 23. The application of the applicant in the absence of any referee to the judge, has got to be heard. We use that "heard" here.

If there was any doubt at all, if you contrast the proceeding before the judge with the proceeding before the referee which is expressly made ex parte, it seems to me to be made very clear that the proceeding before the judge is not ex parte. So I do not think there is any question about it. I think we are shooting at a straw man.

Senator ERVIN. I would like to ask a question. Is not an interpretation of the 14th amendment requiring an opportunity of notice and

to be heard—your position is correct where it is implied or expressly stated that you are following an established procedure. But that is not true where you are establishing a new kind of procedure, thus far unknown in the law, and that is precisely what you are doing here, after, when you establish this procedure before the judge, after the adjudication has been made that the pattern or practice exists.

In other words, when you establish a new procedure which is not now in existence, as an established legal procedure, you have to provide notice.

Mr. WALSH. Well, Senator——

Senator ERVIN. Expressly.

Mr. WALSH. I think that under any rule of interpretation, first, any procedure, new or old, is going to be construed in conformity with the 14th amendment, and, second, any new procedure, the courts are going to minimize the novelty thereof by construction to accord with our accepted notions of due process.

Senator ERVIN. I believe if you will read those decisions that are cited in the case I put in the record, there you will find it has been held to the contrary, where you establish a new procedure as distinguished from an orthodox legal procedure where you have got provision about summons and all that; for example, in the rule about masters, rule 53, it spells out exactly that the master shall only proceed to hearing after notice to the parties.

Mr. WALSH. I am sure in the absence of any rules to the contrary, the rules of Federal practice are going to apply and they spell out everything. I mean you have rules as to discovery and inspection and summons and papers, all of those apply, some of them are expressly negative, that is the reason we discuss this, we put in ex parte.

Senator ERVIN. This question of what the judge is going to do after making adjudication is quite novel, there is nothing now provided in the rules of procedure, it is something new under the sun.

Mr. WALSH. To the extent that it is not inconsistent there with the things which we are familiar with, the rules of practice in the Federal courts are going to be applicable.

Senator JOHNSTON. What about inserting that in the bill, those words?

Mr. WALSH. Senator, you would have to put that in at every line. That is implied in all statutes.

Senator JOHNSTON. You can put it in, in a section.

Mr. WALSH. I mean, we could talk about it a long time, but there is just a rule of construction if you specify it one place and do not specify it in another place, why, an adverse inference is going to be drawn, and I think it is generally accepted as better not to specify that which underlies all of our statutes, not just a single sentence of it.

Senator KEATING. In other words, Mr. Chairman, do I understand you correctly, Judge Walsh?

Mr. WALSH. Yes.

Senator KEATING. If, in the unlikely event under the wording of this, a court decided to take this burden on himself, rather than to appoint a referee, after he had made his original finding, the Negroes had come in and said they wanted to vote and had been denied that opportunity and they have complied with those conditions that are in the bill——

Mr. WALSH. Yes.

Senator KEATING. And he put them, he either at the time he directed them to vote, he would either put them on the roll and give notice to the registrar of an opportunity to be heard, or he would give notice to the registrar of an opportunity to be heard before he put them on the roll, and that any action of his to the contrary which did not give notice to the registrar would not be due process of law?

Mr. WALSH. That is correct.

If you will look at the bottom of page 12, you will see the paragraph beginning on line 22, which are the only exceptions to the rules of civil practice.

In other words, we cut the time limit, for the need of expeditious determination to 10 days, and we limited the power of the court to grant a stay. But, except as so limited, the court's powers are exactly the same as they would be in any other kind of proceeding, and rule 1 of the rules of civil procedure relating to the U.S. district courts provides:

> These rules govern the procedure in the U.S. district court in all States of a civil nature whether cognizable as cases at law or in equity, with the exception stated in rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action.

That pervades everything our courts do and, in the absence of something which negatives the application of these rules, they are going to govern.

Senator ERVIN. But this bill further on expressly provides, in effect, by stating one thing it excludes another, and it excludes sections which require a master to give notice.

Mr. WALSH. I beg your pardon, Senator?

Senator ERVIN. This cuts out the provision of the rule governing masters which requires notice to the party.

Mr. WALSH. I say, when we get down to the referees, we say ex parte hearing and we show limitations on the rules of Federal practice. But in the absence of any such limitation, and there are very few limitations in the part relating to the court, why, those Federal rules of civil practice would be applicable.

Senator HRUSKA. That ex parte action by the referee is not the end of the road.

Mr. WALSH. No.

Senator HRUSKA. The hearing is had before the court when the referee makes his report?

Mr. WALSH. Exactly.

Senator HRUSKA. I should like to ask you, Mr. Bloch, referring to page 12 at line——

Mr. BLOCH. Page 12.

Senator HRUSKA. Page 12, lines 22 and 23.

Mr. BLOCH. Yes.

Senator HRUSKA. What is your interpretation of those words that "An application for an order pursuant to this subsection shall be heard within 10 days?" What does that mean?

Mr. BLOCH. Shall be heard?

Senator HRUSKA. Within 10 days, yes.

Mr. BLOCH. I think it means——

Senator HRUSKA. In the context of this bill.

Mr. BLOCH. If you mean whether the phrase "shall be heard" connotes a contest, I do not think it does. I think that the phrase "shall be heard" in line 23 means that when that Negro files his application to the judge that the judge shall hear what that Negro has got to say about it within 10 days and give him the opportunity to submit proof in line, in accordance with lines, 3 et sequitur, at the top of the page.

I say that, Senator, for this reason: that if you go back to the top there, look at line 2, that Negro—the colored person, the voter, we will call him, the proposed voter—upon his application therefor shall be entitled to an order.

Now, couple that up with what you called my attention to at the bottom of the page, that application shall be heard within 10 days. Now, let me call your attention, sir, and the other Senators, that so far as this bill says that application need not be in writing. Of course, I assume that it means written application——

Senator HRUSKA. Well, are there not court rules that govern the matter of application?

Mr. BLOCH. No, sir. Court rules are going when we come to submit—to consider this legislation. Here is a law unto itself. The Federal rules of civil procedure are going, because we are supplanting them. This is an act of Congress that supplants the Federal rules of civil procedure, and this act is comprehensive and this act means just what it says, and no more. It does not read the Federal rules of civil procedure into it. If it does put it in there—we are in the stage of legislation now, we are not adjudicating. If there is a doubt about it, just put in there that all the Federal rules of civil procedure shall apply to this act, because if you do not, sir, here is what is going to happen: I can just visualize it because I visualized 3 years ago and have seen those visions come true. Here is some poor lawyer, I visualized it before Senator Keating's committee when he was in the House, here is a lawyer representing the Terrell County Board of Registrars down there. He has been through a trial in which the judge decrees under subsection (c) of 1971. Then he gets into another proceeding which establishes a pattern or practice. All right, that pattern or practice is established by the decree of the court. Then what is the next step. One of these folks who wants to vote files an application, we will assume that it means a written application, because certainly is must mean a written application, he files an application. It does not even say that that application has got to be filed in the court, and upon his application therefor, his application to the judge, it does not even become a file in the office of the clerk so far as this bill says.

Senator HRUSKA. Mr. Bloch, if it provided that he shall file the application, would you want then, would you then want the words also put in there he shall file the application with the clerk? Just how detailed would you want that language to be?

Mr. BLOCH. We can get rid of all that by simply saying that the Rules of Civil Procedure shall apply to the proceeding when it is heard before a judge.

Senator KEATING. Do those rules not apply to every Federal court proceeding? We do not put that language in other bills.

Mr. BLOCH. I do not think that they apply to a proceeding under this act because I do not think—the rules only apply. If Judge Walsh will let me see rule 1:

These rules govern the procedure in the U.S. district courts in all suits of a civil nature whether cognizable as cases at law or in equity with the exception stated in rule 81.

I do not know what that is.

Senator DIRKSEN. Mr. Bloch, would you suspend for a moment.

Mr. BLOCH. Admittedly, I do not think it makes any difference here; leave it out.

These rules govern the procedure in the U.S. district courts in all suits of a civil nature whether cognizable as cases at law or in equity with the exception stated in rule 81.

I say to you, sirs, that this application filed by this Negro does not constitute a suit of a civil nature. It is not a suit.

Senator DIRKSEN. Mr. Bloch, would you suspend for just a moment?

Mr. BLOCH. Yes, sir.

Senator DIRKSEN. Mr. Chairman, I have been watching that clock, and we have until midnight tonight to dispose of this matter, including all the amendments that may be offered, and prepare a report, because this has got to go to the Government Printing Office and be on the calendar tomorrow morning.

Now this morning is pretty nearly gone, and I think we ought to consider for a moment some procedure here. I do not know how many amendments are likely to be offered, but I do believe that we are going to have to set a limit here when we start considering amendments and put a time limit on discussion, otherwise——

The CHAIRMAN. When do you think we should begin to consider amendments?

Senator DIRKSEN. Well, let me as an alternative, Mr. Chairman, suggest 2:30. I think the testimony should end at 2:30 and that at that time we should begin voting on amendments.

I would make this further suggestion, in view of the fact that nearly everything that has been offered or will be offered has been so roundly discussed that I cannot imagine that more than 5 minutes on a side on either amendment would be necessary.

So, Mr. Chairman, first, I will informally suggest, and I could formalize it in a motion, that at 2:30 the committee start considering amendments.

The CHAIRMAN. Is there objection?

(No response.)

The CHAIRMAN. The Chair hears none.

Senator DIRKSEN. Also, that at 2:30 when amendments are considered that there be 5 minutes allotted on the side for each amendment and that the committee then vote, because this job is going to have to be done and we are under a mandate from the Senate.

The CHAIRMAN. Is there objection?

(No response.)

The CHAIRMAN. The Chair hears none.

So ordered.

Senator DIRKSEN. Thank you, sir.

The CHAIRMAN. All right. I am informed that the hearings can be printed tonight and will be available tomorrow, if there are not

too many corrections by the members of the committee. What is the pleasure on that?

Senator McCLELLAN. Let it be printed without correction.

The CHAIRMAN. Will somebody so move?

Senator WILEY. I so move.

The CHAIRMAN. The hearings will be printed tonight if the members will not take time to correct it.

Senator DIRKSEN. I am agreeable.

Senator McCLELLAN. I think the record should show they were not corrected. You can have some word that will destroy the whole meaning. There ought to be some phrase.

Senator DIRKSEN. You mean they are unrevised. I think a separate page shall be included in the hearings, that these hearings, because of the time limit, are unrevised.

Senator McCLELLAN. All right.

Senator DIRKSEN. And make that the first page after the cover page.

The CHAIRMAN. All right. Is there objection?

(No response.)

The CHAIRMAN. The Chair hears none.

So ordered.

Senator KEATING. Mr. Chairman, I have no objection to this procedure. I do have maybe 10 or 15 minutes of questions I would like to ask the Attorney General at some appropriate time. We got halfway down this side of the aisle yesterday and did not have an opportunity to complete it.

The CHAIRMAN. Yes, sir. You were not here, but I took it up with the committee. Mr. Bloch is going to leave town and the committee agreed to hear him first.

Senator KEATING. That is all right.

Senator WILEY. Mr. Chairman, may I be excused. I was on hand this morning and I have listened again with profit to the discussion. I am pretty well versed on all the angles and I am sure as the amendments come up, I will be back here to vote on the same.

The CHAIRMAN. Proceed.

Mr. BLOCH. Following up our discussion, Senator, right along there, I believe I had said that there was no provision in the law requiring that application to be filed.

The CHAIRMAN. I have a request from Senator Dodd:

> In the event that the committee votes on civil rights legislation today and tomorrow, I would appreciate the privilege of voting by telephone when practical considerations permit.

The CHAIRMAN. Under the rule just adopted, he would have to telephone in and vote on amendments. He is in Florida.

Senator ERVIN. I have no objection if the veto amendment were so close you would not know what it was. I would suggest——

The CHAIRMAN. It says when practical considerations permit.

Senator ERVIN. Practical considerations in the case——

Senator JOHNSTON. I do not think he ought to be allowed to vote under those circumstances.

Senator McCLELLAN. Let me ask a question, Mr. Chairman. You have had a rule here that you do not permit anybody to vote by proxy.

The CHAIRMAN. Yes. And I have tried every year to get that rule repealed and never have been able to do it.

Senator MCCLELLAN. This is another vote by proxy, that is the equivalent to it. I have no objection personally. I think by proxy is a proper way to vote because people cannot be here all the time. But you ought to start off with your rules at the beginning of each year, each session of Congress, and then keep them one way or the other.

The CHAIRMAN. I have favored voting by proxy and opposed the rule when Senator Dolen and Senator Watkins presented it and I have tried to get it repealed but have never been able to do it.

Senator DIRKSEN. Of course, in this case you would have to make the rule general, that is to say, if Senator Dodd were permitted to vote, the same privilege would have to be accorded to all Senators who might be absent.

Senator MCCLELLAN. Do not misunderstand me. I think everybody should be entitled to vote if he has got his position made up and the Senator wants to be recorded as voting. I think proxies are proper when properly identified and addressed and directed. I think they ought to be permitted to vote by proxy. But I do think we ought to have a rule one way or the other and observe it.

Senator JOHNSTON. Of course, proxies are dangerous things for this reason—off the record.

(Discussion off the record).

Senator ERVIN. I move we extend him the right to vote in every case except where his vote would change the result, and in that case we extend him the privilege of making his position clear on the record. Because otherwise we might run into a situation where we cannot report to the Senate.

The CHAIRMAN. It takes unanimous consent, gentlemen. Is there objection?

(No response.)

The CHAIRMAN. The Chair hears none.

Proceed, Mr. Bloch.

Mr. BLOCH. There is no provision, and we are talking about filing, I am coming back to your Rules of Civil Procedure in a few minutes, there is not even any provision for service of the application. Upon his application therefor, who is the served party, who knows about it. We talk about an opportunity to be heard on that question, and if I am representing the board of registrars, I might not even know that that application has been filed, even if it required filing. It is purely an ex parte proceeding before the judge unless the judge wants to convert it into an adversary proceeding.

And in that connection, before I come back to the Senator's question about the rules of civil procedure, the Senators will notice that at the bottom of page 13 in that part of the bill where the House deals with proceedings before a referee, which the Senators rather anticipated me on a while ago, in that part of the bill when the referee makes his report, upon receipt of such report the court shall cause the Attorney General to transmit a copy thereof to the State attorney general and to each party to such proceedings, together with an order to show cause within 10 days or such shorter time as the court may fix, why the order of the court should not be entered in accordance with such report.

Now I hope the Senators will bear in mind that in proceedings before the judge, that part of the bill does not apply. There is not one syllable in this bill that requires any notice to anybody at any stage of the proceeding before the judge. The first step is the application and the last step is at the bottom of page 12:

An application for an order pursuant to this subsection shall be heard within 10 days.

Now that application may be made to the judge, it may be heard and determined and hundreds or thousands of people ordered qualified to vote without a single State official ever having been advised of the proceedings.

Somebody show me in that proceeding before the judge that requires any notice to anybody.

Senator McCLELLAN. Mr. Chairman, at this point——

Mr. BLOCH. Mr. Chairman—excuse me.

Senator McCLELLAN. Mr. Chairman, at this point I would like to direct a question to both the witness testifying and also to Judge Walsh, and I would like to have the answers to it.

Let me ask you this, right on this point: Is it not true that there are sufficient laws already to enforce voting rights? But this is purposely, I am talking about this statute, this proposed legislation, is purposely to bypass the rules of civil procedure in order to make haste, in order to expedite this thing—the adjudication of these rights, and thus, if this is passed, as it is, will it not be a special act outside of the rules of civil procedure, and thus will we have to look to the act itself for the procedure to be followed, in other words, to completely bypass the words themselves in the rules of civil procedure?

I would like an answer from each of them.

Mr. WALSH. He wants us both to answer that question. Do you want to go first?

Mr. BLOCH. You go first.

Mr. WALSH. Senator, this act is, incorporates the rules of federal procedure except to the extent they are expressly negatived by express provision of the act.

Senator McCLELLAN. Where does the act say that?

Mr. WALSH. The rules have that. They have the force of law, Senator, and they say in the part that both Mr. Bloch and I have heretofore read that they shall apply to all civil actions except some like bankruptcy where there are special rules, admiralty, and others.

Senator McCLELLAN. What rule then would apply now?

Mr. WALSH. All right. Rule 5 would here be applicable which reads as follows.

Senator McCLELLAN. For what?

Mr. WALSH (reading):

Every order required by its terms to be served, every pleading subsequent to the original complaint, unless the court otherwise orders because of numerous defendants, every written motion, other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties affected thereby, but no service need be made on parties in default for failure to appear, except—

it goes off on an exception.

Senator McCLELLAN. Do you have objection of inserting in this proposed bill a statement providing that those civil procedure rules apply, those civil procedures apply to this act except where otherwise specifically designated?

Mr. WALSH. The objection would be twofold: One, it is surplusage, and, two, that it gets us into trouble.

Senator McCLELLAN. It is not surplusage.

Mr. WALSH. Every time you specify as to this section of the Federal rules of procedure apply, you cast some doubt as to whether they apply to some other section. In view of the all-encompassing language in section 1, they cover all suits of a civil nature except those expressly specified in rule 81. It seems to me it would be unnecessary and undesirable to amend the section in that regard.

The CHAIRMAN. Mr. Bloch says this is not a suit of a civil nature.

Mr. WALSH. I think, with the greatest respect, Mr. Bloch overlooks that all of these activities occur in a suit of a civil nature brought by the United States against, in his case, against the registrars of Terrell County, and these applications are all ancillary to that suit. They are all part of that court file, and it is all included therein.

Mr. BLOCH. I do not overlook the contention that is made in that respect, but I say in the previous appearance that I made before Senator Hennings' subcommittee, I filed a statement there which I hope can be made a part of the record here, that shows that these are not ancillary proceedings, they are not ancillary under any rule that has heretofore been established in the courts of the United States.

But to come back now to—I had that in my statement a little later, but to come back to Senator McClellan's question now, about the Federal rules, to show to you that the Federal rules cannot possibly apply to this thing, in the first place as I pointed out over here a while ago, these rules govern the procedure in the U.S. district courts in all suits of a civil nature, whether cognizable in cases at law or in equity with the exceptions stated in rule 81.

The case of *United States of America* v. *Raines*, or whoever may be the defendants in that main case, has terminated with the decree. The decree granted the relief sought by the United States of America under 1971(c). That is the termination of that case.

Now, even if it be considered that the pattern or practice decree can be ancillary to the decree granted under 1971(c), then after that pattern or practice has been established, a brand new proceeding is started. You are starting a proceeding not one in which the United States of America is the plaintiff and the board of registrars are defendant, you are starting a proceeding, under the House bill, in which these people, residents of the affected area, come in. They do not intervene in *United States of America* v. *Raines* or whatever the title of that case may be. They file applications, or rather, they make applications.

Now, the question is whether that application is a suit at law within the meaning of Federal rule 1. The question goes far beyond that. That question that Senator McClellan has asked goes right to the heart of this bill, because it determines whether it is constitutional or not in its broad aspects. It determines whether or not it is a case or controversy under article III of the Constitution.

Senator McCLELLAN. What is this proceeding where he comes in that has already been adjudicated, areawide, and as to color, and so forth, that has been a pattern and a practice, that has been adjudicated. Now, what is the proceeding when an applicant, when a voter goes and makes application or tries to register or something and he does not get registered and he comes back and makes application under this law; what kind of a proceeding is that?

It is not a part of the original case. He does not become a party to the original case. He comes and makes an application for relief for himself and no one else. What kind of a case is it and what rules apply?

Mr. BLOCH. Well, I think that what it is, it is a registration proceeding with the Federal judge as a registrar, that is all it is. It certainly is not a suit at law. It is nothing in the world but, under that page 12, it is nothing in the world but a registration proceeding, a voter registration proceeding supplanting all registration law.

Now, to show you, Senators, that the civil rules, the rules of civil procedure, cannot apply, look at rule 5:

"Every order required by its terms to be served"—that is the one the judge read—"shall be served at a time"—look at the rules on time and look at rule 8, and does rule 8 apply?

Rule 8 pertains to defenses and forms of denial. If rule 8 applies, then what about rule 12, the first sentence in rule 12 is:

> A defendant shall serve his answer within 20 days after the service of the summons and complaint upon him unless the court directs otherwise when service of process is made pursuant to rule 4(e).

How are you going to have that rule applied when you have not even got any defendants, or if the board of registrars is deemed to be the defendant, does that rule require that that application be served upon them, and does he have 20 days to file his answer? If he has got 20 days to file his answer, it is not going to do him much good because the provisions of the bill are that the judge shall pass upon it within 10 days, so how in the world——

Senator JOHNSTON. You say 10 days or such short a time as the court may fix?

Mr. BLOCH. Ten days ultimate. If the rules of civil procedure apply to this thing, and I do not know what else to call it but this thing, because I do not know what to name it, but if the rules of civil procedure apply to it, then you have got the anomalous situation that some unknown defendant has got 20 days to answer an application which will have been decided, must have been decided, by the judge at the greatest within 10 days, within 10 days after the judge receives it.

Now, all of that demonstrates, Senators, I came mighty near saying, your Honors, and that is all right, too, because you are all lawyers—it demonstrates the utter unconstitutionality of this proceeding, and I know you are pinched for time here, and while it is a little out of the line, I had intended taking it up in my statement to you, I want to call your attention to the case of *Tutun* v. *U.S.*, 270 U.S., at page, it starts at page 568. The question in that case was whether a naturalization proceeding was a case or controversy within the meaning of article III of the Constitution.

The Supreme Court held that it was, and therefore I apprehended that it might be argued here that this application filed by a Negro citi-

zen for an order of the court permitting him to vote was the equivalent rather of an application for naturalization, a petition for naturalization, and that inasmuch as the Supreme Court of the United States has held that a petition for naturalization constituted a case or controversy within the meaning of the constitutional provision, that it followed that an application of this sort constituted a case or controversy.

Well, I think the complete answer to that contention would be found in the language of the Court beginning at page 576 of the opinion. This seems to be a leading case that had great lawyers in it, Louis Marshall, William H. Lewis. Matthew, Levy, and Untermeyer represented the plaintiffs here, and strange to say, the Government was here contending that a naturalization proceeding was not a case or controversy within the meaning of article III.

But the Supreme Court of the United States decided that it was. I may seem to be arguing against myself, but I am not, and I am not, because of this:

The reasons why the courts said that a naturalization proceeding was a case or controversy do not appear in this act, and the salient portion of the opinion in that respect begins at page 576:

The function—

I am quoting—

of admitting to citizenship has been conferred exclusively upon courts continuously since the foundation of our Government. The Federal district courts, among others, have performed that function since the act of January 29, 1795. The constitutionality of this exercise of jurisdiction has never been questioned. If the proceeding were not a case or controversy within the meaning of article 3, section 2, this delegation of power upon the courts would have been invalid,

citing *Hayburn's* case, 2 Dall. 409; *U.S.* v. *Ferreira*, 13 How. 40; and *Muskrat* v. *United States*, 219 U.S. 346.

I interpolate, the *Muskrat* case is another one of the leading cases on this particular subject.

Where a proceeding which results in a grant is a judicial one does not depend upon the nature of the thing granted but upon the nature of the proceeding which Congress has provided for securing the grant.

And I interpolate that is why it is so absolutely important that we, with a fine-toothed comb and a spyglass, examine the nature of this proceeding that is here before this committee.

I go back to quoting:

The United States may create rights in individuals against itself and provide only an administrative remedy. *United States* v. *Babcock* (250 U.S. 328, 321). It may provide a legal remedy, but make resort to the courts available only after all administrative remedies have been exhausted.

The Court cites cases:

It may give to the individual the option of either an administrative or legal remedy—

citing cases—

or it may provide only a legal remedy—

citing a case.

Here is your test, whenever the law provides a remedy enforcible in the courts, according to the regular course of legal procedure—

and now I emphasize the words, "according to the regular course of legal procedure," do you have such a proceeding before you when you when you have got an application which does not have to even be in writing: if in writing it need not be filed in the office of the clerk; if filed it may not need be served upon anybody; if served upon anybody that somebody does not have an opportunity to answer the case; he does not have any opportunity to appear by counsel; he does not have the right to introduce evidence; he does not have the right to cross-examine witnesses.

Now does that measure up to a "remedy in the regular course of legal procedure"?

And it goes on:

And if that remedy is pursued there arises a case within the meaning of the Constitution, whether the subject of the litigation be property or status. A petition for naturalization is purely a proceeding of that character.

That is the end of the quote.

I interpolate there that a proceeding of the character commenced by this application is clearly not a proceeding of that character.

Now the Court goes on and demonstrates, which should demonstrate to the committee the accuracy of the statement I just made:

The petitioner's claim is one arising under the Constitution and laws of the United States. The claim is presented to the Court in such form that the judicial power is capable of acting upon it. The proceeding is instituted and is conducted throughout according to the regular course of judicial procedure.

That is the end of the quote right at that juncture on page 577, and I say to you, gentlemen of the committee, that this proceeding, if instituted, would be conducted throughout contrary to every established rule of judicial procedure.

Now the case goes on, and I still quote:

The United States is always a possible adverse party.

I say to you, gentlemen of the committee, that that is another distinction between the naturalization petition held to be a case, and this proceeding, which is clearly not a case, because there is not any possible adverse party as a matter of course, as a matter of right, and as a matter of law.

Now the Federal judge might permit the board of registrars of Terrell County or of a county in your State or any other county, he might permit them to become an adverse party.

He might permit them to be heard, but there is nothing in this bill that prescribes or sets up any adverse party, any party who has a right to contest the claims of those applicants in the bill.

Now the Supreme Court goes on with the next sentence on page 577.

By section 11 of the Naturalization Act, the full rights of a litigant are expressly reserved to it.

I say to you gentlemen that there is nothing in this act which preserves to anybody the full rights of an adverse litigant.

It goes on:

What makes a naturalization proceeding a case? Section 9 provides that every final hearing must be held in open court.

There is no such provision in this bill, I mean a provision where that application comes in to the judge and he has got to issue an order in 10 days.

That upon such hearing the applicant and witnesses shall be examined under oath by the court and in its presence.

There is no such provision in this bill.

And that every final order must be made under the hand of the court and shall be entered in full upon the record. The judgment, entered like other judgments of a court of record, is accepted as complete evidence of its own validity, unless set aside.

Now that brings me to the next step.

After that proof is submitted, suppose that applicant submits his proof, what happens? He gets an order which is effective as to any election held within the longest period for which such applicant could have been registered or otherwise qualified under State law, at which the applicant's qualifications would be—would under State law entitle him to vote.

Notwithstanding any inconsistent provision of State law or the action of any State officer or court, an applicant so declared qualified to vote shall be permitted to vote in any such election.

We have primaries in Georgia. Under our law, the primary is set for—this year, say for September 12. It is some Wednesday in September. That order of the court may be granted on September 11. Nobody need know about it at all. There is no provision whatsoever for the service of that order upon any person except as is contained in the next lines in this bill.

The Attorney General shall cause to be transmitted—

that is the Attorney General of the United States—

shall cause to be transmitted certified copies of such order to the appropriate election officers.

That is all.

Now the importance of that is that in the case that I read to the committee, that naturalization case, the Supreme Court of the United States, among the tests which it applied as to whether or not a naturalization proceeding constituted a case or controversy under the Constitution, one of the tests was that there was a judgment which had the full force and effect of law.

Well, judgments can be appealed from, if they are valid judgments. There is no provision in this act for anybody appealing one of those orders granted by the judge.

There is some provision with respect to it when it is heard before the referee, but I am confining my remarks now to this proceeding now before the judge.

The first time any officer of a State—now, mind you this—the first time any officer of a State is required by this statute, by this bill, to have any notice of this proceeding is when the Attorney General causes to be transmitted to the appropriate election officers certified copies of the order of the Federal judge granting registration. That is all it is, granting registration to that applicant.

I hope you gentlemen, you Senators, will examine that proceeding before the judge most carefully, comb it with a fine-toothed comb,

as I have tried to do in the last 4 or 5 days, and see if there is one syllable in it that requires any notice to be given to any State officer of the pendency of that proceeding.

Senator JOHNSTON. Not only that, but can't the court order also specify in the order that they will be limited to such testimony as the judge sees fit to submit to the person?

Mr. BLOCH. Upon proof.

Senator JOHNSTON. And he can limit the amount of time to any reasonable time. Of course, I think the courts would probably do that, but the act states that, directs him, to report only upon particular issues or to do or perform particular acts or to receive and report evidence only, and may fix the time and place for beginning and closing the hearings and for the filing of the master's report.

Mr. BLOCH. Where are you reading from?

Senator JOHNSTON. They inserted this. This is a master by rule 53. They inserted this whole section here.

Mr. BLOCH. Those are the civil rules, the rules of civil procedure. But, as I say, they do not apply here.

Senator JOHNSTON. You see, they have inserted it by reference here.

Mr. BLOCH. They incorporate it by reference?

Senator JOHNSTON. They incorporate it by reference.

Mr. BLOCH. When a referee is appointed.

Senator JOHNSTON. Yes.

Mr. BLOCH. When a referee is appointed; I am not talking about that. You are pointing out a situation that is even worse than the one I am pointing out. I had not come to that yet. But I would still confine myself to the proceedings before the judge. We had not gotten over to the next page.

Senator JOHNSTON. But the judge can refer it over that way, though, with these restrictions.

Mr. BLOCH. The part that you are reading from:

Any voting referee—

That is on page 15—

appointed by the court pursuant to this subsection shall to the extent not inconsistent herewith have all the powers conferred upon a master by rule 53(c) of the Federal Rules of Civil Procedure.

I emphasize "to the extent not inconsistent herewith." But neither rule 53 nor any other rule need be followed by the trial judge when he hears, personally hears, one of these proceedings, and as I pointed out, perhaps in some boresome detail, it could not possibly apply because the judgment must be rendered before an answer must be filed, under the Rules of Civil Procedure.

But Senator Johnston's query or comment reminds me of this, too, that I was about to forget. You will notice that the Federal judge grants that certificate, that voting certificate, of that order upon proof that the applicant is qualified to vote under State law.

Well, of course, one of the salient provisions of the—one of the most important provisions of any State law as to whether or not any citizen is entitled to vote is that citizen's age.

Those of us who come from the South know that one of the most difficult things that those folks for whose benefit this legislation is advanced have to determine is how old they are, and most of them

really do not know, but whether they know or whether they do not know is not the important question.

The important question is, so far as this legislation is concerned, if one of them comes before a Federal judge and says, "I am"—in Georgia, and says—"I am 19 years old and, therefore, I am qualified to vote," nobody is given any opportunity to contradict him or to introduce proof in contradiction of that statement.

Now, that is not just play, gentlemen. It is important, and the importance of it is demonstrated by occurrences that I have read about since I left home. I have not seen anything in the Washington papers about them, but, as I left home, I noticed that there were a series of cases just developing in Tampa, Fla., where Negro applicants to vote were being prosecuted because they had lied about their ages.

Now, under this bill, that man or that woman or that boy or that girl would have a voting certificate which the election officials must honor under pain of contempt proceedings, although he lied about his age, and nobody will ever be given an opportunity to have contradicted that salient fact. What kind of legislation is that?

Senator CARROLL. Judge, before you leave that point, do you mean to say——

Mr. BLOCH. Senator, would you mind talking louder to me?

Senator CARROLL. Do you mean to say the qualifications of a voter under State law cannot be proven? Age is a very important qualification.

Mr. BLOCH. Age is a very important qualification.

Senator CARROLL. Age is a very important qualification. Well, that could be raised under this bill. Don't you think that issue could be raised?

Mr. BLOCH. By whom?

Senator CARROLL. By the State, by the registrar, by the Attorney General after he gets notice. The court itself would have no power——

Mr. BLOCH. As I pointed out, Senator, I think it was before you came in, that in a proceeding before the judge, the attorney general of the State, the board of registrars of the State, nobody is given any notice of this proceeding, not only not an opportunity to be heard, and to submit proof, but they are not even served with it. That is what I was discussing before the Senator came in.

Senator CARROLL. What do you say to that, Judge Walsh?

Mr. WALSH. I say that Mr. Bloch overlooks the fact that the Federal Rules of Civil Practice apply to the extent that they are not expressly excluded or contradicted by the statute. There is not any doubt, I do not think. We have a fundamental disagreement on that, but we believe that the Federal rules of practice apply, and they require the service on each party of this application.

Senator CARROLL. And, therefore, they would have notice?

Mr. WALSH. They would have notice.

Senator CARROLL. And they would have an opportunity to test, because basic to this whole question whether it is in the court or in the referee, is that we recognize the right of a State to pass upon the qualifications of its voters, that is, to pass laws, and we have to conform to that, do we not?

Mr. WALSH. That is correct. I mean we have got the 14th amendment to deal with.

Senator CARROLL. And your bill, in your opinion, does conform with that?

Mr. WALSH. It does.

Now, Mr. Bloch——

Senator CARROLL. Senator Hart wishes to ask a question.

Senator HART. I was going to ask for Judge Walsh's observation.

Mr. WALSH. All right. You can proceed, Mr. Bloch. I told him about our controversy. I summarized our controversy.

Mr. BLOCH. The judge is correct. We are in disagreement as to whether the Federal Rules of Civil Procedure apply to a proceeding commenced by this application, this statutory application.

I say that the Federal rules of procedure do not apply because, in the first place, they are impossible of application under their very terms and, in the second plate, this is not a suit at law to which your rule 1 makes the Federal Rules of Civil Procedure applicable.

Senator CARROLL. Let me ask this one question. If we are going to amend this bill at all, what harm could come in a statement—we can make the legislative record in both of these hearings and on the floor of the Senate—but what harm could there be for us to state specifically that this bill is subject to the rules of civil procedure?

Senator JOHNSTON. That is the same question I have asked.

Mr. WALSH. The answers are still the same: (1) It would be surplusage and (2) you run into the fact that we do not say that in each section, and if you start putting it in one section, why, you raise doubts as to the other.

As to the legislative history, I think it should show that that to the extent that the rules of the Federal procedure are not inconsistent with the express provisions of the statute, they do apply, because, you see, the rules themselves so provide, and rule 1 says that it applies to all civil Federal proceedings, and there are certain listed exceptions which, of course, is not this one.

Senator CARROLL. In other words, we could make a legislative history, a historical legislative record——

Mr. WALSH. Surely.

Senator CARROLL. Showing the intent, showing that it comes within the rules and it applies generally, without putting in some specific place in the bill.

On the other hand, it seems to me we might, and we will consider this whether or not we could have a general statement to be all-inclusive as to all sections.

Mr. WALSH. I think the legislative history approach is far better.

Senator ERVIN. Judge, the legislative history and, as we say in North Carolina, the legislative history don't amount to a tinker's dam, which means nothing, where the act itself is unambiguous, and it appears from the act itself that the rules of civil procedure could not apply possibly to this.

Mr. WALSH. Senator, I did not want to take Mr. Bloch's time, but the rules that he was referring to and reading have no application, have no applicability to this problem. He was reading rules that apply to the pleadings and the commencement of an action. This is not a new action. I mean, if you think of this—the Federal courts have

many proceedings of immense and complicated nature, in which you start an action, the parties start an action, and then, incidental to that action, other persons, third parties, can make applications.

Now, all this is, is an incidental application in this underlying action between the United States and in his case the county, the registrars of the County of Terrell, Ga., in which the basic parties are the United States and the registrars. These applicants are incidental.

It is as though in an equity case, a plaintiff challenges the manner in which a corporation was being operated, and the defendant corporation was one party, and the directors were parties defendant, and the plaintiff was a disgruntled stockholder.

Well now, if the court decides that it must order the holding of a corporate election during the course of this proceeding or to make effective its decree, it has the power to do so.

In the course of holding that election it will have all kinds of problems raised by people who do not like the way it is running the election. They will be able to make these incidental applications.

They must be on notice to the underlying parties, but the court will work out its procedures within the limits of the Federal rules of procedure, and the express provisions in this case of the statute. I think the Federal courts have no problem in that regard.

Senator ERVIN. Judge, this is an entirely different proceeding, this application. There is nothing in the rules of civil procedure as to how you start suits on applications.

Mr. WALSH. The bill itself, it seems to me, makes clear that the proceeding is not over until the pattern or practice is proved to have been discontinued.

In other words, the injunction just begins, is one of the first steps of the proceeding, but this underlying proceeding between the United States and Terrell County, Ga., if the United States is successful, will continue until it is ultimately proven that that pattern and practice has been discontinued.

The purpose of that lawsuit is not to register 14 voters: the purpose of that lawsuit is to pry open a system of discriminatory voting and to dispel it, so that thereafter the machinery of government will run without discrimination.

Senator JOHNSTON. Just one question there.

Mr. WALSH. Yes.

Senator JOHNSTON. When you refer to this rule 53, and do not refer to any more, have you not in so many words said that you have set up rule 53 and excluded the others?

Mr. WALSH. Senator, that is—Mr. Chairman, that is—only as to the referee.

As I say, if you think of this bill in two parts, the part that relates to the court and then the incidental part that relates to the referee, I think its structure becomes much easier to understand.

So far as the court acts and proceeds, it proceeds throughout in accordance with rules of Federal procedure.

When we propose to authorize the referee, we set up a special type of procedure before the referee. Originally we were going to leave that to the court, but people said it should be specified.

Senator JOHNSTON. Then you insert this rule 53 which gives the judge the right to set up the rules and regulations which the referee will work under.

Mr. WALSH. We set up special rules for this referee, but that does not in any way affect the action of the court itself if it attempted to proceed without a referee.

Senator CARROLL. May I ask, when we talk about the order of the court, this is a continuing order?

Mr. WALSH. Yes, sir.

Senator CARROLL. And, therefore, being a continuing order, there is not a shutoff as there would be in the case of 10 or 12 people.

Mr. WALSH. No. The shutoff comes, if you will look at page 11, Senator, it reads this way, that the court, after it finds this pattern or practice, and if it finds a pattern or practice it permits this form of application to be made for 1 year, and thereafter until the court subsequently finds that such practice or pattern has ceased.

When it finds that, it vacates its underlying order and it terminates the proceeding. At that point it is over.

Senator CARROLL. As I understand your contention, that after the initial finding, that this is a continuing order?

Mr. WALSH. Yes, sir.

Senator CARROLL. And what you are setting up here are ancillary procedures to permit others to come under the umbrella of this so-called pattern or practice if they can follow certain standards?

Mr. WALSH. That is right. I mean, incidental to the eradication of this pattern of discrimination, the court will receive these applications from other voters of the same race.

Senator CARROLL. But at every stage of the proceeding, either in the court or with the referee, every time the court or the referee attempts to usurp the function of the State to determine the qualification of the voters, that is beyond the scope of their power?

Mr WALSH. Oh, yes. There is no usurpation here. The referee has no power to make a final order himself, and before the court can make a final order, all parties get notice and an opportunity to be heard.

I am sorry, Mr. Bloch.

Senator KEATING. Mr. Chairman, may I inquire of the Attorney General along the line of what he just said about this Georgia case?

Mr. WALSH. Yes, sir.

Senator KEATING. There has been a great deal made, particularly by the opponents of the legislation, about the fact that only four suits had been brought, and Mr. Bloch indicated that there were some 12 or 14 Negroes involved in the suit in Georgia. I gained the possible implication that they were the only ones interested in the suit.

Can you explain what the issues are in these cases and why only four have been brought.

Mr. WALSH. Yes, sir.

In the first place, these suits are not brought by the 8 or 10 persons concerned, except incidental to broader relief.

The interest in this case is the interest of the United States in nondiscriminatory elections and, secondarily, the interest of the United States as expressed by the court in the *Raines* case, as the guardian of those who are being deprived of their right to vote, without discrimination.

The interest in Terrell County is not the eight persons who happen to participate in the proceeding: it is, first of all, the United

States itself and, secondly, the 8,000 or 10,000 others that Mr. Bloch refers to who have over these years, if the United States proves its case, who have over these years been defeated and deprived of their right to vote because of a pattern or practice of discrimination.

Senator KEATING. In Terrell County?

Mr. WALSH. Yes.

Senator KEATING. And that is one county.

Mr. WALSH. And that is what makes so superficial any comment about the period of registration in May or in the fall, because these people have been deprived over the years, if we prove our case, of their right to register in past Mays and in past falls, and that is why this act provides as it does, incidental to the underlying injunction, the right for these people to come in forthwith to the Federal court and to make up for lost time, so to speak.

Senator KEATING. Let me ask you, could you briefly outline for us the principle involved in the other three suits?

Mr. WALSH. Yes, sir. The principle involved in the Terrell County suit, in the Macon County suit in Alabama, is the same. They both relate to general elections and to a pattern of discrimination, and in the Terrell County case, Mr. Bloch moved to dismiss on the face of the complaint. He prevailed below, and it was reversed in the Supreme Court.

In the Macon County case, the registrars all resigned in a body, and the court held that when they resigned in a body that made the case moot and that holding was affirmed by the court of appeals, and now we are appealing to the Supreme Court in that case, and that will be heard very shortly.

In a third case in western Tennessee, there is a similar proceeding brought, but that relates to a primary election, where one of the political organizations said, I mean in its announcement, in all of its rules, said that "This is a white primary only, white voters only," and then the fourth case is the *Thomas* case in Louisiana, where there had been Negroes registered over the years and then a group started to challenge them on very petty ground. They would look over their application and find a misspelled word, or something, and then the registrars struck, as Mr. Bloch said, some 1,700 from the rolls, and Judge Wright, in the court below, ordered, one, he enjoined the registrar from any further activity of that type and enjoined him from administering his office in a discriminatory fashion based on racial discrimination, and ordered reinstated on the rolls the 1,700-odd voters who had been stricken, and that case was unanimously affirmed by the Supreme Court recently.

Senator KEATING. Is it your judgment that, first, in the Terrell County and in the Macon County, Ga., case, the Macon County cases, you have not actually had a trial on the merits?

Mr. WALSH. No, sir; we have not.

Senator KEATING. They went, or you went to Supreme Court on the pleadings?

Mr. WALSH. Exactly.

Senator KEATING. Now, is it your judgment that when these cases are terminated it will result in an adjudication which should enfranchise large numbers of Negroes who are now deprived of that right?

Mr. WALSH. Yes, sir.

Senator KEATING. Do you have other cases in preparation?

Mr. WALSH. Yes, we do.

Senator KEATING. How many others do you have?

Mr. WALSH. I cannot give you an accurate number, but I would say they would be in the dozens.

Senator KEATING. That are actually in the process of investigation and operation?

Mr. WALSH. Yes.

Senator KEATING. That is all I am after.

Senator JOHNSTON. Have they been filed?

Mr. WALSH. No, Mr. Chairman. As long as there was doubt as to the constitutionality of the statute, it was really fruitless to proceed. As long as Judge Davis' opinion stood, we could see that that point would be raised in each case until the Supreme Court had an opportunity to reverse it.

Senator JOHNSTON. So your statement is that there are about a dozen that you are preparing?

Mr. WALSH. I made a hasty computation. I would say there are at least that many.

Senator CARROLL. Judge, are you familiar with the Louisiana decision by a three-man court sitting under the judicial code there where there was a constitutional question involved, in that parish, where there were 40,000 inhabitants, 26,000 whites and 14,000 blacks; do you remember that case?

Mr. WALSH. I am not sure I remember the particular case. I think it was probably Webster Parish, because the Civil Rights Commission has been——

Senator CARROLL. I want to say to the Senator from New York that in that particular case the court heard the evidence, and the substance of the court's decision was this: it was a matter of simple arithmetic. In 30 years there had not been a single registration, in 30 years, and the court said it was just a matter of simple arithmetic to find the nature and type of discrimination.

Now, the question would arise if under this bill, what would we do to a court of equity as cited there? Is it going to make each one of these individuals come in step by step—and this is why I object to having these people go back since—there has never been here an easy thing for them to do; they never had a chance, in all this period of time. If this situation still obtains, if the court of equity cannot function in this field, if they are the guardian of the constitutional rights of the people in this field, if they cannot function under this system, I do not know what any system is under which they can function unless we go all out to a great Civil Rights Commission that we delegate power and authority to to make the regulations and do the job properly.

I want to make a record to show you how difficult the field is, and I hope the Supreme Court and these other courts read the record we are trying to make here today.

Mr. WALSH. Senator, I appreciate the problem to which you allude, and I hope before we undertake any administrative agency which would supersede the State officers, that we, at least, give this referee proposal an opportunity for a trial to see whether, with the help of that, the State officers do not begin to act properly.

Senator CARROLL. I agree with that.

Senator JOHNSTON. I think your investigation will show that year after year the colored registration in the South—that is what you are driving at here—has increased; isn't that so?

Mr. WALSH. It increased from 1952 to 1956 from 1 million to 1,200,000.

Senator JOHNSTON. When was that?

Mr. WALSH. The presidential election of 1952, the Civil Rights Commission estimates the colored registration at 1 million, and in 1956 it estimated it at 1.2 million; in other words, 1,200,000.

Senator JOHNSTON. Do you have any later figures?

Mr. WALSH. I beg your pardon, sir?

Senator JOHNSTON. Do you have any later figures than that?

Mr. WALSH. No, sir; we do not. In specific areas of the South, the registration has sharply decreased.

In Louisiana, for example, where we have the situation that I referred to in the *Thomas* case, there have been other parishes where there have been similar cutbacks in Negro registration.

Senator JOHNSTON. In my State, if you go by Civil Rights Commission, there has been a great cutback; but you must bear in mind that all were stricken off in 1958, and they came along right after that and got the list and were put on. They had approximately 160,000 prior to that, but we register ourselves for 10 years, and it started April 1, 1958, so the Commission came in there immediately thereafter and showed us 'way down. I think you will find much more than that now.

Mr. WALSH. I see.

Senator CARROLL. There is no doubt that there are many problems that the courts are going to be confronted with, and this is one of the reasons why I feel a court of equity ought to be given—we should not attempt to write only minimal standards, because the courts will have different problems in different States and in different Federal judicial districts.

Mr. WALSH. Yes, sir.

Senator CARROLL. And we have to presume that these judges will live up to their constitutional oaths and they will do their job, and that is why I want to give them the widest latitude.

Mr. BLOCH. It might be interesting, along that line, and then I will resume where I was, for some of the Senators to know that in my own county, Macon, Ga., not Macon County, Ala., but in Macon County, Ga., the last two elections have been determined by the colored vote, the vote of the Negroes. The Negroes have had the balance of power in the last two elections held in Bibb County.

One was for mayor last fall, and the other was for a special election to fill a legislator's term.

In our county, in the primaries, and I think in the general elections, the colored people and the white people still vote as separate polling—at separate polling precincts, booths, and their votes are counted differently.

I reckon the next thing we will have to contend with is a law that forbids that, but we still do that, and, therefore, you can tell just what the effect of the vote is, and in the mayor's race a certain candidate was leading by about 800 votes, and then the colored boxes started to come

in, and he lost by about 800 votes, and the same was practically true with respect to an election for the legislature.

I say that, Senator, because I would hate to be here and the opportunity for me to talk with you and not saying that the cases which are pointed out to you, even the alleged cases, and that is meant with no discouragement of my friend Judge Walsh, because he takes information that comes to him, but even if those isolated cases were true, and they are by no means a pattern or practice in my county, I asked the tax collector, the tax commissioner, just before I left home to give me some figures, figures as to the white people there were in Bibb County who paid ad valorem taxes, and the number of those white taxpayers who were registered.

I have forgotten the exact figures, but they ran around 30,000 citizens, white citizens, who made an ad valorem tax return, that is, property owners and there were about 30,000 and about two-thirds of them were registered voters.

With respect to the colored situation, there were around 8,000 colored people who made ad valorem tax returns, and about 50 percent of those were registered.

So you see we have got the situation where 66⅔ percent of the white vote are registered, of the white taxpayers, ad valorem taxpayers are registered, and 50 percent of the colored. That is not a great discrepancy, and I hope some day that maybe that will be the sort of evidence that we can use to prove that there is not any pattern or practice of discrimination against Negro voters.

But, be that as it may, the next thing that I had planned to—

Senator JOHNSTON. Is it not true that a great many of the southern counties where they do not have enrollment of colored people, there is a kind of lethargy there, and they do not try to enroll themselves at all; isn't that right?

Mr. BLOCH. Yes, sir.

Senator JOHNSTON. You find the biggest enrollments in the cities; isn't that true in your State?

Mr. BLOCH. We find the biggest enrollments in the cities, and there are a great many reasons for that. There are a great many reasons for that, I repeat. In the first place, I think there has been a great immigration of people from the country counties to the metropolitan counties, and even to the city counties, which are not metropolitan, and it is natural to assume that the man who immigrates or migrates is a man who has no ambition of his fellows, who wants to better his position, most of them, some of them, want to go because they want to worsen their situation, but, for the most part, it is the ambitious man who moves to where he thinks there is a greater opportunity, and he is likely to want to vote, and he comes in contact with influences that teach him the problems of the times, that make him want to vote.

Whereas the one who stays down in X county, we will say, and is still a farmhand, and the first place, he does not give a continental darn about voting. He does not want to vote. He does not care who is Governor. He might care who is sheriff, but he does not care who is Governor or who is in the legislature. That is true.

It is impossible for a great many of you Senators who are not familiar with southern conditions to realize all of the facets of the problem, but there are a great many of them.

(Off the record discussion.)

Senator JOHNSTON. Proceed.

Mr. BLOCH. I see the time element here, while I could go on and analyze this bill for, perhaps, all day long, it would not be worth while, and certainly I cannot because of your time element, but I would like to have just about 15 minutes and I will wind it up, because there are one or two things that I can't point out better in writing as I can orally.

Senator KEATING. Mr. Chairman, I do not object to the witness taking another 15 minutes, but I call attention to the fact that we are going to want to adjourn here about 1 o'clock to get something to eat, or I suppose shortly after, and I would like to have one or two members here, because I want to deal with some subjects which have not been dealt with today.

There is no point in particularly making a record. I would like to ask the Attorney General about some of the practical problems that this committee is faced with, and I would prefer, if the witness wants 15 more minutes, to convene at 2, and then have 10 or 15 minutes to question the Attorney General before we start voting on the amendments, rather than to do it at a quarter to 1, when everybody has gone. That is satisfactory to the committee——

Senator DIRKSEN. I see no objection to coming back at 2.

Mr. WALSH. This is the most important thing I have.

Mr. BLOCH. What I was going to get to was this: That to my mind, all or most of all that we have been talking about all morning, and it has been very interesting, I think, is the subordinate—all of those things are subordinate—to the two fundamental questions which appear to me to grow out of this bill, two fundamental law questions.

The first one of those questions is whether or not the Congress has a right under the 15th amendment to enact any such legislation as this.

Those questions are rather thoroughly discussed yesterday, or that particular question was rather thoroughly brought out yesterday, in Senator Ervin's interrogation of the Attorney General and Judge Walsh.

But it seems to me that fundamentally under the *Guinn* case and under the recent case of *Lassiter* v. *The Northampton County Board of Elections*, that under the *Mississippi* case, that under *Pope* v. *Williams*, and most particularly under the language which Senator Ervin read from the *Guinn* case which, by the way, is in my written memorandum, that this proceeding, whatsoever you may call it, by which the Federal judge, a Federal judge, is converted into a registrar, a universal registrar, not only a county registrar but a municipal registrar, a Democratic executive committeeman, or Republic executive committeeman, any officer who has the right to say who can vote at an election or primary, is beyond the powers of Congress, that it is not appropriate legislation under the 15th amendment because it is not confined, simply because it is not confined, to the denial or abridgment on the part of a State of the right to vote on account of color; that appropriate legislation under the 15th amendment must be confined to the remedying of the denial or abridgment of the right to vote on account of race, color, or the obsolete words, "previous condition of servitude."

Now, that question is discussed as thoroughly as I could within the limited time that I had to prepare the memorandum, is discussed in the memorandum.

It is discussed in the testimony that I was privileged to give before Senator Hennings' committee back in February, that is published in your Federal registrars book, and it was certainly developed by Senator Ervin yesterday. So there is no need of my repeating that.

But I do want to say just a few words more with respect to that phase of the constitutional problem which is the second question, in my opinion, that this rump proceeding, so to speak, that is commenced by the application of the colored voter to be permitted to vote is not a case or controversy under article III of the Constitution of the United States.

Now, the basic question for determination there is going to be primarily by this committee, next by the Senate, and then for some future date, perhaps, by the court, is whether or not it really is an ancillary proceeding.

Now, bear in mind, as I pointed out several times here today, that the parties to that original case, the parties to the case that are authorized under 1971(c) of the Civil Rights Act of 1957 is a case in which the United States of America is the plaintiff and the people who are doing the depriving are the defendants, and alleged to be doing the depriving, and the case must be limited to the grant of preventive relief under 1971(c).

So that that case necessarily ends when there is a decree enjoining the Board of Registrars of Terrell County or whatever board of registrars may be the defendants in that case, from abridging or denying the right to vote in that county.

That case has ended, there is no further relief that the court can grant that is germane to that proceeding under 1971(c).

Now assuming for the sake of argument that the next step is germane and is a part of that original case, that next step being the application of the Attorney General of the United States to have a pattern or practice declared, assuming for the sake of the argument that that is a part of the main case, why, certainly, the case ends when that pattern or practice shall have been decreed.

I grant you that that pattern or practice may be left up in the air, if there is nothing that can be done about it, except the content order, and that may be so. But he can certainly enjoin all of those who have been guilty of establishing that pattern or practice.

You must have found in finding and decreeing that there was a pattern or practice, he must have heard facts authorizing him so to find, and somebody must have been guilty of some acts which must have made him conclude there was such a pattern or practice.

So the United States is not remediless there. It is entitled, perhaps, to an injunction against those registrars from continuing those acts which led the judge to believe that there was a pattern or practice.

But, granting all of that, assuming all that to be true, you certainly do not have any case or controversy cognizable under section 3, article 3, of the Constitution of the United States when you permit those eight or ten thousand people, white or black as the case may be, to come in before a Federal judge with an application and say, "I want to be registered to vote," and that is about all that application says.

Now, bear in mind, and I never have gotten over it all morning and I never have gotten away from this page 12 of the House bill:

> Such order shall be effective as to any election held within the longest period for which such applicant could have been registered or otherwise qualified under State law and which the applicant's qualifications would under State law entitle him to vote.
>
> Notwithstanding any inconsistent provision of State law or the action of any State officer or court, an applicant so declared qualified to vote shall be permitted to vote in any such election.

Let us see whose rights are affected by that. There are some rights affected here besides the right of that colored man who thinks he has been discriminated against.

So whose rights are affected by that? I can only speak for the system that exists in Georgia.

I assume most of the States have practically the same sort of proceedings, but we have in Georgia statutes which provide that a man cannot vote unless he has been registered by a county board of registrars.

All right. The rights of the county board of registrars are affected by that provision of the statute, without the county board of registrars ever having been given an opportunity to be heard, legally heard, on the application which that colored man has made.

How can that possibly be a case or controversy within the meaning of the Constitution of the United States?

Now, he is in the strongest position. That group, those county registrars, are in the very strongest position of any of them, because they are parties to the oroginal case. But the next group of people who are affeced by that order that the Federal judge issues are a group of people who have never been defendants in any case, and that would be the board of registrars of a municipality located within that county.

Now, suppose an action of this sort, of the sort that has been brought against Terrell County, we have been using it as a guinea pig, supposing an action of that sort were brought against the board of registrars of any county, Bibb County, not only would the registrars of Bibb County be affected by that act, by that order granting that Negro the right to vote, but those municipal officials who have the right to see, to determine, who is qualified to vote in a municipal election, those municipal registrars and those municipal election officials must recognize that order under pain of contempt of court, without ever having been a party to the original case.

If you say that this is ancillary, that this proceeding is simply an ancillary proceeding, to that main case, why, there you have got people, your municipal board of registrars, the election officials of the city of Macon, who never were parties at all to that original case.

What are you going to do about that when you come to talk about this being ancillary to the main case?

That is not all. We have primaries in Georgia, and I guess you do, and there are in most of the States.

We have statutes in Georgia that provide that the State executive committees, the executive committees of the respective political parties, may make rules and regulations determining who may vote at a party primary, and that those rules or regulations shall have the force of law.

Now, I understand that Judge Walsh, in answer to a question yesterday, said that the phrase "any election" means a primary.

Under our law, and under the statutes of most States, the executive committees of the political party holding the primary, in establishing rules and regulations for the holding and conducting of the primary, may provide that only people who believe in the tenets of that party may participate in that party primary. The Republican cannot vote in a Democratic primary; a Democrat cannot vote in a Republican primary.

But under this act now, and I am reading from line 13 on page 12:

"Nothwithstanding any inconsistent provision of State law—

notwithstanding the fact that the State of Georgia, acting through a State Democratic executive committee or a State Republican executive committee, may have provided that only a Democrat can vote in Democratic primaries, and only a Republican can vote in Republican primaries, notwithstanding that fact, when that man comes to that election official and says, "I want to vote, here is my certificate from Judge Davis," or what not, that election official has got to permit him to vote in that primary, notwithstanding any inconsistent provision of the State law—notwithstanding any custom, party regulation, or anything else to the contrary.

In the first place, Senators, I ask you what a provision like that is going to do to your primary system.

Was it meant to disturb your primary system? Was it meant to upset it so that people could cross lines and vote in any primary they wanted to?

But aside from that—that is a political question—but aside from that, you have got your law question when you talk about this proceeding commenced by that application for an order permitting a man to vote being a case or controversy under the Constitution of the United States, you have got your law question.

The rights of those people who compose the State executive committee are not only in Georgia, but in every other State of the Union; not only Democratic executive committees, but Republican executive committees—I think in some States they call them State central committees.

Senator KEATING. In Georgia?

Mr. BLOCH. Yes, sir.

Senator KEATING. In Georgia?

Mr. BLOCH. Oh, yes, we have them in Georgia; yes, sir.

I think I told the committee, your House committee, one time, when you were on it, that I voted in one of them once, I voted in 1952 in one of them, and you chided me about it; you remember? [Laughter.]

But, at any rate, the rights of those people are affected. The rights of every committeeman in every State, whether it be the Democratic committee or the Republican committee, are affected by that law.

Certainly they would be affected by the order granted to vote. What right have they had to be heard on the question?

Now, to go back, and that points this up——

Senator CARROLL. Mr. Bloch, I thought that we had agreed that it was basic that the applicant would have to be qualified to vote under State law.

Mr. BLOCH. Oh, yes; under State law.

Senator CARROLL. The primary system is imbedded under State law.

Mr. BLOCH. Under State law, but not under the rules of the party.

Senator CARROLL. But if the rules of the party are imbedded under State law and looked upon as State law, and valid provisions, then I think that you make—that would be ignored——

Mr. BLOCH. Senator, when he goes before the judge, here is what he has got to prove, that he is entitled, upon his application therefor—here is the way your statute will read if you pass it, like this; he is entitled upon his application therefor to an order declaring him qualified to vote. To vote at what? At any election, upon proof that at any election, any election or elections, he is qualified under State law to vote or, two, he has since such finding by the court been deprived or denied the right to vote or found not qualified to vote by any person under color of the State law.

All right, now. That certificate is given to him. He gets the order. The only contents of it, so far as I know, are that the judge declares him qualified to vote at any election. That is all that the statute says.

Senator CARROLL. At any election upon which he is qualified to vote.

Mr. BLOCH. No, that is not what the statute says. This it not what the bill says.

Senator CARROLL. I would say this to you——

Mr. BLOCH. That is not what the bill says.

Senator CARROLL. If I were seated as a judge in issuing an order——

Mr. BLOCH. Such order shall be effective as to any election held within the longest period for which such applicant could have been registered or otherwise qualified under State law at which the applicant's qualifications would come under State law, entitle him to vote.

Senator CARROLL. Judge, what do you have to say about this, Judge Walsh?

Mr. WALSH. I am not sure I got the full force of the point, but there is not any doubt that this procedure would only authorize this man to vote at those elections at which he is qualified to vote by State law, applied without discrimination.

Senator CARROLL. Let us take, for example, the county in which Mr. Bloch lives. You have a State registrar for a county, and this is for a State ticket, within the confines of an area of which is a municipality. We are not issuing a blanket—I hope we are not issuing a blanket certificate that permits a man to vote at every level of government where he may not be qualified to vote in all levels, and some, but not in others.

Mr. WALSH. The only purpose of this bill, and I think its purpose is manifest, all of this legislative history will make it even more manifest, is to put the Negro vote in the same position as the white person, in the same area. He gets no more and he is to get no less.

Senator CARROLL. Under the same circumstances?

Mr. WALSH. The same circumsances.

Senator ERVIN. Judge, he gets the right if he is denied the right to vote by registrars of the State, he can then go to the voting referees and a white man cannot do that.

Mr. WALSH. If there was any pattern of discrimination against whites, he could.

Senator ERVIN. No, because a white man is not covered by the 14th amendment, 15th.

Mr. WALSH. I think——

Senator ERVIN. The 15th amendment only applies to Negroes.

Mr. WALSH. Well, Senator, I think you are pulling my leg.

Senator ERVIN. That is made by the use of the words, "or previous condition of servitude."

Mr. WALSH. We conceive those words are no longer there. But just to finish up with Senator Carroll, on page 12, lines 8 to 13, I think it makes clear that the only elections we are talking about are those which under State law he is entitled to vote in.

The CHAIRMAN. Judge Walsh, I want to ask you a question, please. Are you acquainted with the Cramer amendment adopted in the House?

Mr. WALSH. The one on bombing?

The CHAIRMAN. Yes.

Mr. WALSH. Yes, sir.

The CHAIRMAN. Now, what is the position of the Department on that amendment?

Mr. WALSH. We regret the amendment, and if the bill were going to be open for amendment, we would like to have it stricken. But if the bill could proceed without amendment, we could live with it and interpret it as we believe Congressman Cramer intended it to be interpreted, which would be very narrowly and would not tax us very much.

The CHAIRMAN. But you are opposed to the amendment?

Mr. WALSH. Yes.

Senator CARROLL. Judge Walsh, I want to make the record and make this observation: This is all the more reason I want to state from the outset that when we put this burden upon the courts, we should not handcuff them, we should not tie their hands. Let the judge use his equity judgment, his equity powers, because no judge, in my opinion, in his right mind, is going to give a wide open certificate to a qualified colored man to go in every election merely because he holds that court certificate. He has got to be qualified not only within the area, but within areas within the area.

For example, let us get back to the primary law. If the Democratic Party in Georgia has promulgated the rules which are embedded in the State law, and which are constitutional, and some of these, you know, have not been constitutional and have been stricken down by the courts—I was reading one last night, one of the decisions in Texas—but assuming it is a part of State law, and let us assume it applies to the whites and is not to apply to the blacks, they would have to follow the rules in primary elections just like they follow any other valid rule, would they not?

Mr. WALSH. Yes, sir.

Senator CARROLL. That is another qualification of the voter.

Mr. WALSH. Yes, sir.

Mr. BLOCH. Let us follow that out. Suppose—I think I can quote almost verbatim the statute of Georgia—the statute of Georgia says that any party may, in addition to what the statute says, prescribe rules or regulations for the conduct of its primaries.

Suppose the Democratic Party of Georgia, for the sake of example, would do what I have hoped for many years that they would do, say that nobody can participate in this primary unless he subscribes to the tenets of the Democratic Party of Georgia, which are as follows, and then that rule or regulation of the Democratic Party so passed under the authority conferred upon it by the general assembly, becomes a part of the State law.

This bill says with respect to that man who comes before an election official holding a certificate entitling him to vote in any election, this bill says that notwithstanding any inconsistent provision of State law or the action of any State officer or court, an applicant so declared qualified to vote shall be permitted to vote in any such election.

Notwithstanding that provision of your State law that only Democrats can participate in Democratic primaries, Republicans in Republican primaries, the holder of this sort of certificate is a preferred sort of character. He can jump from the one to the other and participate in all of them.

Senator CARROLL. Mr. Bloch, as I read the bill and as I look at the legislative intent of this bill, it is not—and, for example, in Colorado we have restrictions upon how people can be Democrats, too, and we do not permit the crossing over from one party to another.

I would assume that a court of equity could certainly study in that area and know the rules of the statutes and qualifications of the voters, and he would observe, within the framework of the Constitution, let me repeat, within the framework of the Constitution, he would observe these qualifications of voters to participate in the primaries in their respective parties.

You know for many years this has been a serious problem in constitutional law, and the Supreme Court time and time again has struck down party provisions which were enacted, and the court has held that this is a grandfather clause and these were the private clubs, and these groups were stricken down by the Supreme Court, but there are valid party rules that ought to be observed by a court of equity and, I think he would observe them.

Senator ERVIN. The trouble with that theory is that the court of equity cannot fly in the face of the law to the contrary, and this law, our brethren want to breathe into the statute, a whole lot of things which are not only not there but are excluded by the statute because, under the theory, under the rule of interpretation, the expression of one thing is the exclusion of another.

Senator CARROLL. I want to say for the record my own feeling is that we would be better off to strike a lot of this out of the bill and just confer the power we have conferred this power on a court of equity by the 1957 act, and now we are broadening the scope of that power by pattern and practice, one, and two, by the broadening of rule 53, and we are sitting in here a lot of standards which I think and I make the record for what I think it is, it is rather than being mandatory it is directory, and that court of equity if this burden is given to it we should not stand in his way, if the is the guardian of the constitutional fundamental rights of American citizens, we ought not to try to circumscribe or invade that judicial power. That is the position as I read this bill, and that is why I hope that he will not, the court in my judgment, will not, interfere in any primary elections, he would

not interfere in municipal elections, unless he is qualified to vote in the area in that situation, and this makes it a tremendous administrative burden on the court, and this is why there is need for voting referees, and this is why there is need for greater hearings than would seem to be contained in the provisions of this bill.

I make that statement so that somebody may read the record at some later day.

Do you take very violent exception to what I have to say on this, Judge Walsh?

Mr. WALSH. Well, of course, that is a relative term, Senator, and I cannot believe I can take violent objection to anything that you have said, because you have been so patient and so fair in your interrogation in this field. But I would like to make this clear that there is no problem here, as I see it, so far as Senator Ervin and Mr. Bloch are concerned.

Page 12 says that this notice shall be effective as to any election held within the longest period for which such applicant could have been registered, and then if you left out the unnecessary words, this order shall be effective as to any election at which "the applicant's qualifications would under State law entitle him to vote."

Then this "not withstanding clause" says:

> Notwithstanding any inconsistent provision of State law or the action of any State officer or court an applicant so declared qualified to vote shall be permitted to vote in any such election.

So I think that there is no danger here of expanding this to an election so that a Republican vote in a Democratic primary if the State law incorporated the rules of the Democratic Party, but I do not want to take Mr. Bloch's time. I have already intruded into it to much.

Senator CARROLL. Mr. Bloch, will you forgive me, I have 40 or 50 young people in from Colorado who are attending the White House Conference on Youth, and I thank you very much. You have made a very fine presentation and you have been very helpful.

Mr. BLOCH. Thank you, sir.

I do not want to keep Senator Ervin any longer, and I have driven everybody off but one. [Laughter.]

Senator CARROLL. I want to say to you, Mr. Bloch, that I got up one morning at 3 o'clock and I read until 6 o'clock, all your previous testimony and your statements, so that you can rest assured that men who are interested, and Senators who are interested in this subject have paid a great deal of attention to your very learned presentation before us. Thank you very much.

Mr. BLOCH. Thank you, Senator.

I wanted to call attention, Mr. Senator, to certain sections of Judge Walsh's testimony before the House committee here. Might I not just read these to the reporter?

Senator ERVIN. That will be fine.

Mr. BLOCH. Thank you very much, sir, and complete the record because it is getting so close to quitting time.

Senator ERVIN. Mr. Bloch, I would just like to ask you one question; I hope it will be my last one. I want to invite your attention to the line starting at the semicolon on line 8, page 16.

Mr. BLOCH. Page 16?

Senator ERVIN. Yes, and going down through to the end of line 15. I will ask you if those words can possibly be upheld by a court, or I will put it this way: Do not those words undertake to provide that the law of the State is, in effect, amended by misconduct on the part of the misbehaving election officials to conform only to the test which the misbehaved State election officials might apply only to persons of the opposite race to those against the alleged pattern of discrimination has been practiced?

Mr. BLOCH. Yes, sir.

Senator ERVIN. What business is it of Congress to undertake in any way to define what the law of a State is?

Mr. BLOCH. Well, I had always thought that was a judicial function.

Senator ERVIN. And it is to be determined by the act of the State legislature of them rather than by the declaration of Congress.

Mr. BLOCH. There is a case on that, I think it is in the minutes of the meeting before Senator Hennings, a Georgia case, which follows the apparent authority. There is nothing new about it. It is not the province of the legislature to declare, to construe, the law. It writes the law, and the judicial function is seen to determine what those words purely mean.

Here you have got the phraseology "qualified under State law," with the Congress or legislature body defining what is meant by the phrase for "qualified under State law," and I do not see how a man—I think the definition is wrong, to start with, and of course if you are going to extend it too, if you are going to say, "also include," that might be something else.

But I do not see how anybody, any legislative body, could say that the words "qualified under State laws" shall mean qualified according to the customs of a State.

What are the customs of a State? Who is going to determine what the customs of a State are, or the usage of a State? Isn't that necessarily a judicial determination?

Senator ERVIN. In other words, I think the only question that will give Congress any right to legislate here would be with respect to State action.

Mr. BLOCH. That is right.

Senator ERVIN. And the determination of that State action should be based on the construction of the Constitution rather than a declaration of Congress.

Mr. BLOCH. The limitation of the power of Congress is the 15th amendment, and the sole delegation to Congress to legislate on the subject of voting, except under article 1, section 2, and now I think it is, is with respect to deprivations or abridgments by the State of the right to vote by reason of race, color, or previous condition of servitude.

Now, it may be customary in some States for a crowd of people to camp themselves out a quarter of a mile from the polling place and say that "only certain people are going to get through this cordon of people."

That might be a custom. I never have heard of it, but if it is, the State of Georgia or no other State is to be blamed for it, and if that cordon of people, private citizens, keep somebody from voting, if that

is customary at every election, that is not State action, because they are not State officers.

Even under the broad concept of State action recently pronounced by the court, the action of those people would be no more the action of the State of Georgia than would be the people, the mob, in the *Cruikshank* case which, back in 92 U.S. almost contemporaneously with the adoption of the 14th amendment, held flatly that such actions were not State actions.

When you get to putting in customs and usages, why, you are going beyond the 15th amendment, certainly.

Senator ERVIN. Thank you. That is a complete answer to my question.

Mr. BLOCH. I wanted to call attention just to certain parts of Judge Walsh's testimony. It is in the bill, in the booklet which is entitled, "Voting Rights. Hearings before the Committee on the Judiciary, House of Representatives."

On page 28, at the bottom of the page, in response to an inquiry by Representative Poff, he says:

> We can get into using labels, but I would say it is more of an administrative determination than a judicial determination. It becomes a judicial determination when it is challenged, and then the judge has to decide between two conflicting claims.

I cite that for the purpose of showing that that seems to recognize that the proceeding before the judge is not or cannot be a case or controversy under the Constitution of the United States, because it is more of an administrative determination than a judicial determination.

On page 25, Judge Walsh says, at the top of page 25, the fourth line, and Representative Willis, to whom allusion was made earlier today, asked the question:

> So do you know of any comparable statute presently on the books or ever put on the books, where we give to a person the right to pass upon any issue, particularly issues of that kind?
>
> Mr. WALSH. I think you can do that, and I think that perhaps the basic difficulty that your questions raise is thinking of this as an adversary proceeding. The proceeding before the referee by the voter is not an adversary proceeding. Who is against him? The only question is, Is he qualified to vote? And, if he is qualified to vote, he is entitled to do so.
>
> I think it would be a shocking mistake if we tried to apply the Administrative Practice Act to the proceeding before the referee. We would never get done. This poor man would take longer to register than everybody else took to register and vote and go for a picnic for the rest of the day.
>
> But this should be thought of, I think, more in terms of a function comparable to a registrar, the administrative type of function which we allow a court to supervise.
>
> For example, if a court order is a corporate election, and the management will not perform the functions required of it to conduct a corporate election, the court can appoint a special master to go in and conduct that special election.

I cite that for the purpose of showing that this proceeding commenced by the application of the voter is not a case or controversy within the meaning of the Constitution of the United States.

I wanted to call attention to a provision on page 14 of the House bill, beginning at the seventh line, when finally in the proceedings before the referee they do come to the point of authorizing exceptions, and the bill says, and I quote, lines 7 through the semicolon on line 11:

> Exceptions as to matters of fact shall be considered only if supported by a duly verified copy of a public record or by affidavit of persons having personal knowledge of such facts or by statements or matters contained in such report—

and that is the end of the quote.

As I pointed out this morning earlier, in my remarks, one of the salient factors that is going to transpire if this bill is enacted into law, and that applicant to vote makes his proof, one of the basic questions is going to be his age.

Well, under the laws of many States—I think it is the law of Georgia—matters of birth, questions of birth, date of birth, and that sort of thing, are exceptions to the hearsay rule, and it seems to me even if this bill is to be passed that on line 11, after the semicolon, there ought to be inserted language like this:

Or by any other evidence admissible under the laws of the State with respect to the subject matter of the exception.

For the sake of example, if a Negro applying to vote says he is 21 years of age, even when we get to the stage of exceptions, those exceptions could only be considered if they are supported by a duly verified copy of a public record, in the first place; and, well, you might not be able to get any public record as to when that applicant was born, or by affidavit of persons having personal knowledge of such fact; and, well, the only people who would have personal knowledge of the fact of when he was born are his mother or an attending physician or midwife and perhaps the father.

But you have got a situation where they cannot even—practically speaking, there cannot be any contradictory evidence adduced even at the exception stage if a Negro chooses to say "I am 21 years of age."

Senator ERVIN. Mr. Bloch, I said I would not ask you any more questions, but I want to ask you one. Do you agree with me in the observation that the due process of law clause of the 15th amendment, which binds the Federal Government and the Congress, gives a person, a litigant, a right to produce evidence in support of his contentions, and that any statute which undertakes to take that away from him violates the due process of law provision?

Mr. BLOCH. It does, and there is a recent case on that which I have not had the opportunity to read thoroughly, but it is a case that the Government won out in Texas, within the last 3 or 4 weeks. It was a decision of the Supreme Court of the United States with respect to a taxing statute of the State of Texas which the Supreme Court of the United States found to be discriminatory against the United States.

I had some trouble with my own thoughts—I had some trouble in my own mind as to the question of whether the due process clause applies to a State. Well, we do not need to be bothered about that because if a State is a person, as contended by the Government, against whom an action can be brought under 197(c), then in that sort of an action a State is a person to whom the due process clause applies, and in addition to that, why, there are individuals who would be affected, as well as the State of Georgia in its sovereign capacity the registrars would be affected, and certainly the due process clause applies to them.

Further, on that question of age, Senator, under the provision of the act if that Negro or any other applicant had applied for life insurance and stated in that life insurance application on a given date that he was a given age, which was contradictory of what he swore to before the judge, that life insurance application signed by him

could not be used as a basis for exceptions to this report because it is not a public record.

The person who receives it did not have personal knowledge of anything but its reception. So there would be a directly contradictory statement to that applicant made, and it could not be used as evidence.

He might have stated in the presence of 50 people, Negroes and whites, "I am going in here to vote, to try to register to vote, and I am going to swear I am 18 years old. Of course, you all know I am not but 17," and that admission could not be used in these exceptions.

Well, I can labor the question by giving hundreds of illustrations, which all go to demonstrate that the due process clause means that all evidence relevant under the rules of law and admissible under the rules of law must be admissible at every stage of the proceeding.

I believe there are one or two more of these.

On page 26 Mr. Willis says:

> As I understand your explanation of the bill, these third parties can get relief ex parte upon proof that they applied to the registrar of voters for registration and they had been denied that right?
>
> Mr. WALSH. Yes, sir; and that they are qualified voters.

On page 6, and this is on a presumption which still lurks in the bill, and which I developed pretty thoroughly in my appearance before Senator Henning's committee, citing the *Tennessee* case and the *Georgia* case that went up to the court of appeals, *Western Atlantic Railroad* v. *Henderson*, *Bailey* v. *The State of Alabama*, and *Manley* v. *The State of Georgia*, all of which were in that printed memorandum, that you have got an unconstitutional presumption lurking in this bill.

The quotations from Judge Walsh's testimony before the House committee tend to demonstrate that.

On the bottom of page 6, Judge Walsh says:

> Ordinarily, when you open up a proceeding like that, and a person wants to take advantage of a judgment which somebody else has obtained, he would have to come in and prove to the referee that he was in exactly the same position as the persons under consideration in the original case; in other words, that he was a qualified voter, that he tried to vote, and that he had been discriminated against because of his race.
>
> The great value of this proposed bill is that it eliminates that last element of proof. Where a judge has just found a pattern or a practice of racial discrimination, it seemed a silly thing to leave it to the master or the referee to fight it out all over again.

Senator ERVIN. But isn't that the crucial thing as to each individual, the question of whether an individual is qualified, being purely a question which can only be determined by an examination of that individual?

Mr. BLOCH. Yes, sir.

Senator ERVIN. And a question as to whether a man is being discriminated against is an individual matter and it cannot be determinded en masse.

Mr. BLOCH. Yes, sir.

Let me show you how that works, Senator, to show you just how, practically speaking, your question applies.

Suppose there is a Negro who is very well educated, and he is 25 years old, but he has been guilty of a felony, he has killed some-

body, and he was sentenced, say, to serve 5 years in the penitentiary.

He goes before a State board of registrars and he seeks to be qualified to vote. He reads the constitution perfectly, he is perfectly well-educated. He is of age but somebody on that board of registrars happens to know that he has been found guilty of a disenfranchising felony, so he asks some questions:

John, aren't you the same John Jones who was convicted down here about 7 years ago for murder?

Yes, sir; but I served my time.

Well, we can't register you.

He is turned down now. He goes before the Federal judge, after a pattern of discrimination has been found, and he does not say anything about that conviction of a felony. He proves that he can read and write, he proves that he is 25 years of age, he proves that he has been turned down by the board of registrars of that county, and the judge must necessarily, under this statute, grant him a certificate, because the judge does not know of his other disqualifications, his criminal disqualification.

The Negro does not choose to make it known, and there is nobody contesting the application who might have knowledge of the fact, who has a right to prove it.

Mr. WALSH. Mr. Bloch, could I interrupt you? Senator, I am due back here at 2 o'clock. Would you have any objection if I went out and got a sandwich and came back, because Mr. Bloch, I take his word on anything, and we have fundamental differences on the law, and I have already intruded on his time more than I am entitled, and I will be back later.

Senator ERVIN. That will be all right, Judge, so far as I am personally concerned.

Mr. BLOCH. I think there are just one or two more.

Page 14, if I can count these lines, line 30, Judge Walsh states:

The proposal of this bill, the essence of this bill, is to take congressional notice that if there is a pattern of discrimination against Negroes, a qualified Negro who is deprived of the right to vote because of that pattern. That is a difficult element to prove for an individual voter, but it is both reasonable as an inference to be drawn by the Congress and, in view of the almost impossibility of proof in each case, it is a conclusive presumption, so to speak, which it is recommended that the Congress here enact into statute.

Page 15, the paragraph toward the top of the page, Mr. Walsh commences:

As I would visualize the proceeding, it would be ex parte, but it would lead to an adjudication; the referee spares the judge the job of testing as to whether a man can read and write, how old he is, and where he lives. The referee gets that.

The CHAIRMAN. Would you say that is adjudicative, judicial?

Mr. WALSH. It is not adjudicated until the judge has ratified it. It is a step in an adjudicative process.

The CHAIRMAN. It is a step in the judicial process, as an aid to the court.

Mr. WALSH. Yes. But before the court acts finally, the referee's tentative findings and recommendations are given to the State registrar and all of the other parties in the underlying proceeding, so that they may challenge them if they see fit.

Then, if they challenge them—supposing the Negro applicant says, "I live on the corner of Third Street and First Avenue in this congressional district," and the State registrar has information that he does not live there, that he really lives in another county altogether, in a different congressional district. I

would assume that the judge in these circumstances, as a matter of consistent practice, will require that the referee's report be served on the State registrar or the other State defendant in this action; and that then, if that State registrar files exceptions to that portion of the report and indicates that there is a substantial issue of fact as to where this man lives, there will be a hearing, the same as there would be in any kind of a court proceeding.

Mr. HOFFMAN. And the court would finally determine that.

Mr. WALSH. That is right. I suppose the court could refer that back to the referee himself, or he could determine it himself.

The CHAIRMAN. Let us assume a pattern of practice where a group is involved. Does that mean the voting referee would have to make a determination based on the deprivation or the discrimination in each individual case in that group?

Mr. WALSH. No, sir. The voting referee would not make that determination. That is the whole purpose of this statute, to avoid the need for that determination in each individual case. Once the judge has found the existence of a pattern or a practice of discrimination which involves a State official who has something to do with the voting process, then all the applicant has to show is that (1) he is qualified to use the voting process and (2) that that State official is not letting him do it.

Page 15, the paragraph toward the bottom of the page, the paragraph beginning with Mr. Walsh testifying in which he states: Congress, if this bill prevails and passes will have made a legislative finding that the probability is so high that that is the only reason for not letting Negroes register, there it may be assumed a conclusive presumption or statutory rule, and therefore need not be found in each individual case.

Then on page 17 toward the middle of the page, the chairman asked this question:

What I was concerned about in the case of the Federal registrar's making a determination that an individual was qualified to vote and was refused registration is that if it is a justiciable question or a disputed question, there would have to be a confrontation of witnesses and cross-examination, and so forth; would there not?

Mr. WALSH. You would have to have due process, and it is harder to generalize about it.

I think the question that concerns you at the moment is this idea of letting a Federal officer be appointed without such a preliminary judicial finding that there is a pattern of discrimination. In other words, a pattern to permit a Federal officer to supplant a State officer merely upon the view of the committee proceeding along the lines of a congressional committee, in which there has been no cross-examination or confrontation extended to the State officer.

You mean that Congress can justify that presumption?

Mr. WALSH. Yes, sir. I think it is a reasonable presumption. I think if you have had a pattern found, the likelihood of any other reason for refusing to let him register even though he was qualified is nil. So I think there is a reasonable basis for such a presumption.

Not only is it reasonable, but it is necessary, because for an individual to prove each case that he had been a victim of prejudice is very difficult. Therefore, I think he needs Congress' help in that regard.

Mr. WILLIS. Would the chairman yield?

The CHAIRMAN. Is there any precedent where Congress has created such a presumption?

Mr. WALSH. The first thing that occurs to me is in the antitrust cases, where the presumption is not conclusive, but presumptive. Where there has been a Government antitrust case, a private plaintiff who claims to have been the victim of the same pattern of restraint of trade which the Government has proved may cover his burden of proof by relying on that proved in the Government case.

This is not a conclusive presumption; that would establish a prima facie case.

Then, lastly, on page 29, Congressman Willis, speaking, says:

> Then you say "This difficult element of proof is the one which the statute would eliminate. Congress would in effect provide that where the court has found a pattern of discrimination against Negroes, it is so obvious that this pattern is the only cause for the denial of registration to a fully qualified Negro applicant that the applicant need not prove this causal link."
>
> Mr. WALSH. That is the heart of the bill.

The fallacy in that presumption is demonstrated by the fact that there ought not to be any such thing in law as conclusive presumptions, and that is demonstrated in the hypothetical case that I stated a while ago, and that Negro, indicted and tried for murder or what not, has served his sentence, or guilty of any other crime which disenfranchises under State law, applies to a State board of registrars, county board of registrars, to be permitted to vote, and they turn him down because he is not qualified to vote because of the Georgia statute which prohibits criminals convicted of felonies from voting, or any other State.

That was the reason for it that he is denied the right to vote, in the language of the bill, he has been denied under color of law the opportunity to register to vote or otherwise qualified to vote.

He proves that; he proves his age; he proves his mental qualifications, and you have got a presumption then, conclusive presumption, that the reason that that board of registrars did not let him vote was because he was a Negro. It is a conclusive presumption, whereas the real reason they did not let him vote was because he was not qualified under the laws of Georgia to vote.

That shows you what presumptions do for you.

Senator ERVIN. I know you pointed out in the hearing before the House very effectively that a conclusive presumption or any presumption which denied an adversary party a fair opportunity to contradict it or disprove it, violates, when created by statute, violates the due process clause.

Mr. BLOCH. It violates the due process of law, and even if it should be a rebuttable presumption, the person against whom the presumption exists is given no opportunity under this bill to rebut it at any stage of the proceeding, either before the judge or the referee.

Senator ERVIN. Certainly there could be no reasonable relation between the finding that other people have been denied the right to vote on account of their race or color pursuant to a pattern or practice, and there is no relation between that finding with respect to certain groups of people when you come to consider other individuals that are not parties to that finding.

Mr. BLOCH. The *Henderson* case in Georgia, *Western Atlantic Railroad* v. *Henderson*, is the leading case that I know of on that, Mr. Senator, and if you compare it with the *Turnipseed case*, Turnipseed being the name of a man, it was the name of a man out in Mississippi——

Senator ERVIN. Yes.

Mr. BLOCH. Decided by the Supreme Court of the United States, and it appears in the statement before you or before Senator Hennings' committee or the House, it points out the difference between a rebuttable presumption and a conclusive one.

A rebuttable one, with somebody given a full opportunity for someone to rebut is all right, but a conclusive one or rebuttable one when you are not given an opoprtunity to rebut is unconstitutional.

I think that is all I have. You have been mighty patient.

(The prepared and supplemental statement of Mr. Bloch follows:)

STATEMENT OF CHARLES J. BLOCH BEFORE THE JUDICIARY COMMITTEE OF THE SENATE OF THE UNITED STATES, MARCH 28, 1960, WITH RESPECT TO H.R. 8601

My statement will, of necessity, principally be a discussion of title VI of H.R. 8601.

Time has not permitted a study of the other five sections. Then, too, title I, title II, title III, title IV, and title V have as their respective subject matters, questions which have, to some extent, been recently debated in the Senate.

I am of counsel for the Board of Registrars of Terrell County, Ga., in the case of *United States of America* v. *Raines, et al.*, I argued it before the Supreme Court of the United States with the result familiar to all of you.

I refrain from any discussion of it because it remains to be tried in the District Court of the United States for the Middle District of Georgia. It may be of interest to you that Mr. James Griggs Raines, the chairman of that board, is a graduate of Harvard University Law School, Class of 1949.

For title VI of H.R. 8601 to become operative there must have been instituted a proceeding pursuant to seciton (c) of 42 U.S.C. 1971. Some person must have engaged in or there must have been reasonable grounds to believe that some person was about to engage in, acts or practices which would deprive some other persons of rights or privileges secured by subsection (a) or (b) of 42 U.S.C. 1971.

The Attorney General must have instituted for the United States, or in the name of the United States, a civil action or other proceeding for preventive relief. As I construe section 1971(c), the power of the Attorney General is limited to seeking "preventive relief," and that relief must be limited to the prevention of acts which would, through State misconduct, deny a person of his right to vote on account of his race, color, or previous condition of servitude, or abridge that right.

The court, in an adversary proceeding, in which the United States of America shall have been the party plaintiff, and certain persons shall have been defendants, must have found that some person has been deprived on account of race or color of a privilege secured by subsection (a) of section 1971.

In the *Raines* case, the United States of America alleged that the rights and privileges secured by subsection (a) of 42 U.S.C. 1971 were "namely the right and privilege of citizens of the United States who are otherwise qualified by law to vote at any election in the State of Georgia to be entitled and allowed to vote at all such elections without distinction of race or color" (complaint in *Raines* case, par. 1; record, p. 1).

That finding of the court must have rested on the premise that persons "qualified to vote" had been or might be deprived of that right.

It must have appeared that those persons were qualified under the laws of Georgia to vote.

Then upon the request of the Attorney General, after each party has been given notice and the opportunity to be heard, the court must make a finding whether the deprivation adjudicated in the decree was or is pursuant to a "pattern or practice."

We must suppose that the phrase in the bill, "opportunity to be heard" contemplates a listening to facts and evidence before adjudication and an opportunity on the part of the defendants to interpose a defense. The phrase "opportunity to be heard" connotes such (*People* v. *Caralt*, 241 N.Y.S. 641, 644: *Ex parte Morse*, 284 Pac. 18, 141 Okla. 75). The case of *People* v. *Oskroba*, 111 N.E. 2d 235, 237; 305 N.Y. 113, however, might indicate that the drafters of this bill did not contemplate that the phrase "opportunity to be heard" required formal procedure. Another New York case is to the same effect; *People ex rel. Massengale* v. *McMann*, 184 N.Y.S. 2d 922. So, in applying this Federal statute, we do not know whether the Federal courts would apply the Oklahoma rule, or what seems to be the New York rule (*Cf. Massengale supra*, with *Amerada Petroleum Co.* v. *Hester*, 188 Okla. 394, 109 Pac. 2d 820, 821).

The phrase, "pattern or practice" does not seem to have an adjudicated legal meaning.

"Practice" standing alone has been defined by a New York court as "custom" (*Kent* v. *Town of Patterson*, 141 N.Y.S. 932, 933). Other courts define it as a "habit or regular conduct" (*Keatley* v. *Grand Fraternity*, 78 Atlantic 874, 875).

There used to be, or maybe still is, a Missouri constitutional provision which provided that nothing therein was intended to justify the "practice" of wearing concealed weapons. The word "practice" there was defined as having reference to an existing custom of wearing such weapons concealed, more or less general among citizens, and not to the practice of any particular individual accused of the crime of wearing such weapons (*State* v. *Keet*, 190 S.W. 573, 574, 269 Mo. 206, LRA 1917c. 60).

So, I take it that the "pattern or practice" must be found to be one generally existing in a particular State, or perhaps, area within a State.

If the court finds such pattern or practice, any person of such race or color resident within the affected area shall, for 1 year and thereafter until the court subsequently finds that such pattern or practice has ceased, be entitled upon his application therefor, to an order declaring him qualified to vote, upon proof that at any election or elections (1) he is qualified under State law to vote, and (2) he has since such finding by the court been (*a*) deprived of or denied under color of law the opportunity to register to vote or otherwise to qualify to vote or (*b*) found not qualified to vote "by any person acting under color of law."

I do not know what 'finding" is intended by the phrase "since such finding." Does it mean the finding as to a pattern or practice, or does it mean the order or finding by the Federal court that he is qualified under State lay to vote?

I do respectfully assert that the conferring upon Federal courts of the power to determine who is qualified under State law to vote contravenes the 10th amendment to the Constitution of the United States. In making that assertion, I, of course, assume that the courts will give that same dignity and importance and effectiveness to the 10th amendment as they have to the 1st and 5th. The 10th amendment is a part of that same Bill of Rights which embraces the 5th and 1st. The right of a State, existing under the Constitution of the United States, to determine who may vote in its elections, except as restrained by the war amendments (and the 19th), is just as important to the States as your right and mine to worship as we please, as the right of any newspaper, large or small, to express its opinions.

The 15th amendment simply does not repeal the 10th so as to permit the Congress to exercise plenary power over voting in all elections.

The Supreme Court has emphatically so stated.

In *Guinn* v. *United States*, 238 U.S. 347, Chief Justice White speaking for himself and Justices McKenna, Holmes, Day, Hughes, Van Devanter, Joseph Rucker Lamar, and Pitney, said:

(*a*) "Beyond doubt the amendment does not take away from the State governments in a general sense the power over suffrage which had belonged to those governments from the beginning and without the possession of which power the whole fabric upon which the division of State and National under the Constitution and the organization of both governments rest, would be without support and both the authority of the Nation and the State would fall to the ground. In fact, the very command of the amendment recognizes the possession of the general power by the State since the amendment seeks to regulate its exercise as to the particular subject with which it deals."

(*b*) "It is true also that the amendment does not change, modify, or deprive the States of their full power as to suffrage except of course as to the subject with which the amendment deals and to the extent that obedience to its command is necessary. Thus the authority over suffrage which the States possess and the limitation which the amendment imposes are coordinate and one may not destroy the other without bringing about the destruction of both" (op. cit. p. 362, 364).

In short, appropriate legislation under the 15th amendment is confined to prevention of denials or abridgements. The Congress through the Federal courts can prevent a State from denying or abridging a Negro's right to vote on account of his race or color. The Congress cannot convert the Federal courts into registration boards to register Negroes, and compel the States to recognize those Negroes as voters.

For it even to be asserted that Congress has any such power over voting in the States calls to mind the famous words of Justice Harlan, the elder, dissenting in ex parte Young (209 U.S. at p. 175):

"This principle, if firmly established, would work a radical change in our governmental system. It would inaugurate a new era in the American judicial system and in the relations of the National and State Governments. It would enable the subordinate Federal courts to supervise and control official actions of the States as if they were 'dependencies' or provinces. It would place the States of the Union in a condition of inferiority never dreamed of when the Constitution was adopted or when the 11th amendment was made a part of the supreme law of the land."

And I may add, when the 10th amendment was almost contemporaneously with the ratification of the Constitution made a part of it.

In *Mason* v. *Missouri*, 179 U.S. 328, the Supreme Court firmly and thoroughly proclaimed the doctrine of States rights in the field of voting.

See also, *Lehew* v. *Brummell*, 103 Mo. 546, 15 S.W. 765; *Blair* v. *Ridgely*, 41 Missouri 63, 97 Am. Dec. 243, in which the Court upheld the validity of a provision in the State constitution requiring that an oath of loyalty be taken by all voters as a condition precedent to their exercise of the right of suffrage at any election held in the State. It cited approvingly the decision of Justice Washington while on circuit, in *Corfield* v. *Coryell* (4 Wash. C.C. 371), speaking of the elective franchise as one to be regulated and established by the laws or constitution of the State in which it is to be exercised.

"Privilege of voting is not derived from the United States, but is conferred by the State and save, as restrained by the 15th and 19th amendments and other provisions of the Federal Constitution, the State may condition suffrage as it deems appropriate" (*Breedlove* v. *Suttles*, 302 U.S. 277, at p. 283).

The potency of this ruling is that it demonstrates that the power of the Federal Congress and the Federal courts is limited to the protection of the right to vote. The power to protect cannot be converted into a power to grant the right to vote.

Most recently, the Supreme Court in *Lassiter* v. *Northampton County Board of* Elections (360 U.S. 45, 50–51) affirmed the ruling in the *Guinn* case, supra, and cited also *Pope* v. *Williams*, 193 U.S. 621, and *Mason* v. *Missouri*, supra.

In seeking to confer upon persons "within the affected area" the privilege of applying to a Federal district court and procuring an order declaring him qualified to vote, the bill violates still another specific provision of the "law of the land"—the Constitution of the United States.

Bear in mind, the case of *United States of America* v. *Blank, et al.*, registrars, ends with the order or decree granting to the United States the preventive relief it sought. Certainly it ended with the finding that the deprivations were or are pursuant to a pattern or practice.

The parties to that case were the United States of America, as plaintiff, and the persons, allegedly doing the depriving, as defendants.

The bill would permit any persons within the affected area, upon certain proof (p. 12, lines 3–8) to apply to the court and receive a voting order.

The States of the Union have not delegated to the Congress the power to bestow upon Federal courts any such jurisdiction, authority, or power.

In article I, section 8, paragraph 9 of the Constitution, the States delegated to the Congress power "to constitute tribunals inferior to the Supreme Court." The power which Congress can vest in such courts is limited and restricted by article III, sections 1 and 2.

The judicial power may extend only to cases and controversies of certain natures.

Congress can confer upon the courts established by it only the power to adjudicate certain cases and controversies.

When there is a plaintiff capable of suing, a defendant who has no personal exemption from suit, and a cause of action cognizable in the court, there is a "case" within the meaning of that term as defined by judicial decisions (*United States* v. *Lee*, 106 U.S. 196, 219; *Osborn* v. *United States Bank*, 9 Wheaton, 738, 819).

A case is a suit in law or equity, instituted according to the regular course of judicial proceedings.

Pacific Whaling Co. v. *United States*, 187 U.S. at page 447, 451, citing Osborn, supra.

Trega v. *Modesto Irrigation District*, 164 U.S. 179, held in effect that a proceeding authorized by California statute was not adversary, being a proceeding by the trustee of an irrigation district against the district itself, and that it was essential ex parte, and therefore not a "case" within the constitutional provisions.

In determining "what is a case or controversy to which, under the Constitution, the judicial power of the United States extends" (*Interstate Commerce Commission* v. *Brimson*, 154 U.S. 447, at p. 475), the committee will doubtless wish to read that case thoroughly and to read many others which time does not permit me even to digest.

I call attention to: *Murray* v. *Hoboken*, 18 Howard 272, 284; *Smith* v. *Adams*, 130 U.S. 173.

This section of this bill is dealt its death blow by the unanimous decision of the Supreme Court in *Muskrat* v. *United States*, 219 U.S. 346, and its companion case, *Brown and Gritts* v. *United States*. The headnotes commence:

"The rule laid down in *Hayburn's* case, 2 Dallas 409, that neither the legislative nor the executive branch of the Government of the United States can assign to the judicial branch any duties other than those that are properly judicial, to be performed in a judicial manner, applied, and held, that it is beyond the power of Congress to provide for a suit of 'the nature there involved' to be brought * * * such a suit not being a case or controversy within the meaning of the Constitution." Going back to *Chisholm* v. *Georgia*, 2 Dallas 431, the Court further said:

"A case or controversy, in order that the judicial power of the United States may be exercised thereon, implies the existence of present or possible adverse parties whose contentions are submitted to the court for adjudication."

Apply that rule to the language of this bill.

That case has terminated with the finding of the Court in the action brought by the United States (p. 11, lines 17–18) and/or the finding contemplated (p. 11, lines 21–22).

The bill seeks to permit other persons, not parties to that case, then to apply to the Federal court to be registered to vote or in the language of the bill, "an order declaring him qualified to vote."

Even if the bill commanded a hearing before a Federal judge only, such a proceeding would not be a case within the meaning of the judicial clause of the Constitution.

It lacks the essential elements of a case.

There are no adverse parties whose contentions are submitted to the court for determination.

The applicant must prove that he is qualified under State law to vote. There is no adverse party who may appear and contend to the contrary. As to 2 (a) and (b) in lines 4–8 on page 12 of the bill, there is no provision for a contest.

(Strangely enough, in these days of alleged congestion in our courts, an application for such order "shall be heard within 10 days" (p. 12, line 22).)

But, the bill does not stop with the provisions to which allusions have been made.

The bill permits the court to appoint one or more persons who are qualified voters in the judicial district to be known as voting referees to receive such applications and take evidence and report to the court findings as set out in the bill (lines 7–13, p. 14).

The referee may be white or black, male or female, 18 years of age or over (in Georgia). In such a proceeding pending in Dade County, Ga., these referees may be residents (qualified voters) of Fulton or DeKalb or any other county in the northern district of Georgia. In such a proceeding pending in Echols or Terrell or Clay or Randolph, the voting referees may be residents of Bibb, or Muscogee or Clark. In such a proceeding pending in Ware or Camden or Liberty Counties, the referees may be residents of Chatham or Richmond. He need have no qualifications except that of a qualified voter. Georgia law requires her registrars to be "upright and intelligent citizens" and so deemed by a superior court judge and the grand jury of the county of their residence.

That the proceedings lack another essential attribute of a "case" is the fact that in the proceeding before the voting referee, the applicant is heard ex parte. His statement under oath shall be prima facie evidence as to his age, residence, and his prior efforts to register or otherwise qualify to vote. There is no provision for cross-examination.

Exceptions are graciously permitted (p. 14, lines 1, et seq.) but there are no provisions by which the foundations for such exceptions may be laid.

There is no justification in the "law of the land" for deeming such a proceeding as that here sought to be authorized—a "case" or "controversy" within the meaning of those words as they are used in the Constitution of the United States.

In *Tutus* v. *United States* (270 U.S. 568, 577) the Court said:

"Whenever the law provides a remedy enforcible in the courts *according to the regular course of judicial procedure*, and that remedy is pursued, there arises a case within the meaning of the Constitution, whether the subject of the litigation be property or status. A petition for naturalization is clearly a proceeding of that character." [Emphasis supplied.]

The italicized language is emphasized because there were the key words, as shown by the paragraph following:

"* * * The claim is presented to the court in such a form that the judicial power is capable of acting upon it. The proceeding is instituted and is conducted throughout according to the regular course of judicial procedure. The United States is always a possible adverse party. By section 11 of the Naturalization Act * * * the full rights of a litigant are expressly reserved to it. See *In Re Mudari* (176 F. 645). Its contentions are submitted to the court for adjudication. See *Smith* v. *Adams* (9 S. Ct. 566, 130 U.S. 167, 173–174, 32 L. Ed. 895). Section 9 provides that every final hearing must be held in open court, that upon such hearing the applicant and witnesses shall be examined under oath before the court and in its presence, and that every final order must be made under the hand of the court and shall be entered in full upon the record. * * *"

The proceeding here sought to be authorized lacks practically every one of these essential attributes of a "case."

(Additional remarks may be made orally. There was no time in which to prepare a further written statement.)

Among those "oral remarks" I hope to have the opportunity of discussing the fate of the "presumption" which appeared in the House bill about which Deputy Attorney General, Judge Walsh, testified before the House committee. He characterized it as "the heart of the bill." What has become of it? Does it still lurk in the bill in secrecy? I also hope to have the opportunity of discussing the effect of title 6 on various State statutes enacted by them under their constitutional right to regulate and prescribe the conditions of voting.

This supplemental statement is to be interpolated at line 6, page 1, of my original statement. Since I prepared my original statement for this hearing, I have read of and heard of the attempted bombing of a Jewish temple in Gadsden, Ala.

When I read of this occurrence, I thought of what the Attorney General had said during the hearings before Subcommittee No. 5 of the Committee on the Judiciary of the House of Representatives of the 86th Congress, just about a year ago. In my testimony before that committee, I referred to what the Attorney General said. At page 595 of those hearings, I quoted him:

"The purpose is to provide a Federal deterrent to the bombing of schools and places of worship, a type of outrage that has shocked all decent, self-respecting people. Such incidents present important problems on the national as well as the local level. They are manifestations of racial and religious intolerance that are of extremely serious national and international concern."

Then I asked:

"Now I ask you, would not decent, self-respecting people be shocked if any building, structure, facility or vehicle were wantonly damaged or destroyed by fire or explosives? Are manifestations of racial and religious intolerance the only manifestations that are of extremely serious national and international concern?

"Why is not our Government equally concerned with bombings of hospitals, courthouses, city halls, auditoriums, highway bridges, underpasses, overpasses, piers, railway bridges, mining facilities, factories, business houses of all sorts?

"Why limit the scope to religious or educational structures?

"If a State government building were bombed, I should think that would be a manifestation of anarchy which ought to be of national concern, though it might be of international concern.

"Should one be permitted to bomb a State capitol or a courthouse or auditorium, or even a building owned by private capital, and flee with impunity?"

Then ensued some questioning by members of the committee and its counsel, and I added: "If you are going to make any extension based on the theory that the Federal Government ought to intervene when a man bombs a building and flees over a State line, or a woman, either, why it ought not to be—if you are

going to pass any legislation on that subject, it ought not to be limited to schools and churches."

Representative Holtzman stated, "I agree with you," and then asked if I knew of any convictions for these bombings.

I replied that I knew of no convictions unless it was a conviction up there in Tennessee. There were trials in Georgia. There were trials for the bombing of our temple in Atlanta, the Jewish temple in Atlanta.

I used the phrase, "our temple," although I am not a member of that congregation in Atlanta. I am a member of Congregation Beth Israel in Macon and have been all of my life. I have been president of it. At the time I delivered that testimony in 1959, I was chairman of a committee of members of our congregation observing the 100th anniversary of the founding of that temple. It was founded 2 years before the outbreak of the War Between the States. Many of its members were members of the Confederate Army. Many of them have been members of the armies of the United States in every war fought by the United States since then.

I state these facts to convey to you my extreme interest in this section of the law, too.

In that interest, I cannot help but wonder why this law as extended was not pressed in 1959. Why did its advocates wait until 1960? Why the hesitancy now to extend it to cover all bombings? Wouldn't the Gadsden bombing and attempted murder have been just as horrible, practically, if it had been a theater filled with people, or a factory filled with people? Of course, bombings of houses of God have a special significance and so horrify us the more.

Horrible as they are, quickly I hope the Congress will take such steps as it constitutionally can to prevent not only bombings of churches and synagogues and schools, but all bombings of all kinds, everywhere in America.

I fail to comprehend why the issue of such bombings has been intertwined with the issue of unconstitutional Federal interference in the area of elections, registrants for voting, and voting.

I fail now to see how the issues are at all related. I fail to see how "bombings" are related to the efforts of so-called liberals of the North to place the Negroes of the South in a position of voting ascendancy over the white people of the South.

Let us sever those issues and not let our horror at such bombings be used as a lever in political fields.

I hope you will not think that I am presumptuous, Senators, when I make this suggestion to you. Whether you are Republicans or Democrats, northerners, southerners, easterners or westerners, whether Christian or Jewish, join in carving out of this bill section 2, which is entitled, "Flight To Avoid Prosecution for Damaging or Destroying any Building or other Real or Personal Property or To Avoid Prosecution for Communicating any Threat or False Information with Respect to Any Attempt to Commit Such an Act." After having carved it out, pass it, send it back to the House, send it to the President, and after having done that, pass on to the political phases contained in the other section of the bill.

Don't any further, I pray you, let the bombings of churches and synagogues and schools be confused in the minds of the American people with the so-called issue of Negro voting in the South.

Senator ERVIN. Well, you certainly have made a fine presentation, and I would just like to say this: I have been living with lawyers all my life, because my father was a member of the North Carolina bar, and I can say this without attempting to be flattering, but simply as a matter of truth: I have never been privileged to know a finer lawyer than yourself, and I can count on the fingers of one hand the lawyers, all the lawyers I have known that I think approach you.

Mr. BLOCH. Well, coming from as fine a lawyer as there is in the U.S. Senate, as well as anywhere else, that is quite a compliment, sir, and I appreciate it.

(Whereupon, at 1:30 p.m., the committee recessed, to reconvene at 2 p.m., the same day.)

AFTERNOON SESSION

(Present: Senators Hart, Dirksen and Keating.)

Senator HART. The committee will be in order.

The Senate has just completed a rollcall on an amendment to an appropriations bill which explains the absence of several members but in view of the agreement that we will proceed to discuss amendments to the pending bill in fairness to the senior Senator from New York and the Department which has been without its legal chief and assistant chief for so long, it is agreed that we will now resume.

It was understood that Senator Keating had a series of questions he wanted to address to Mr. Walsh.

Senator KEATING. Thank you, Mr. Chairman. Judge Walsh, I want to direct your attention to that provision of the Dirksen bill which was not incorporated in the House bill relating to making statutory the Commission on Equal Job Opportunities.

STATEMENT OF LAWRENCE E. WALSH, DEPUTY ATTORNEY GENERAL OF THE UNITED STATES—Resumed

Mr. WALSH. Yes, sir.

Senator KEATING. Do you consider that the work of that Commission has been helpful.

Mr. WALSH. I do, and I say this realizing that I have only been on it since Mr. Rogers left it. I succeeded him when he became Attorney General.

And so when I speak of the work of the Commission, I am not speaking of my own work. I am speaking largely of that which went before. It has been my observation that this Commission is one of the nicest agencies of Government with which I have had any contact. It works almost completely without publicity. No member of it is making any statements militant or otherwise as to what will be done in the future. It just goes along quietly working within the framework that it has.

Senator KEATING. It is somewhat different from a congressional committee in that respect?

Mr. WALSH. Well, no, I make no comment on that.

Senator KEATING. No.

Mr. WALSH. Because there are many congressional committees that have achieved great things, and each groups has its means to an end, and this committee happens to find that that works better without publicity, because then neither employer or employee groups are embarrassed by the time they are through.

In fact most of its work doesn't become public until months after it has concluded, and then only with the consent of both parties. Very often after a company has for the first time employed Negroes, they are glad to have the story of how it came about told.

(At this point, Senator Hruska entered the hearing room.)

Mr. WALSH. Sometimes they would rather not be told and so we go along with them. Our idea is to get employers to see the evils of discrimination in employment and whatever way suits them best the committee operates.

Actually over a period of 7 years it has handled 600 complaints, and it has been an accelerating rate. Last year there were over 200. So actually the number of complaints before the committee went up almost 50 percent in one year as it becomes better known. It works largely by mediation. To take an example, oil refiners, or take the Latex Co. in Dover, Del. Dover is very much like a southern community, and Negro employment alongside of whites has not been traditional there. The International Latex Co. had Government contracts and they just weren't employing Negroes.

A year or two ago they experimented with it and it did not succeed. This year the committee did a fine job on it. I had nothing to do with it myself. There is a Negro school in Dover. But Holland who was the all-American at Cornell is the president of that little school now. They have a fine scientific course. They agreed with the company that they would supply outstanding students for technicians if the company would take them.

The company decided they would try to work this out, and the result was that everybody now, after just—there have been no protests or unhappiness from the moment the thing started.

The Negroes have been taken into the technical side of that company. This is not menial labor at all. These men are going into responsible scientific jobs. They have been accepted, and they are happy. The company is happy and they have now signed up for a course of inservice training for both white and Negro technicians with this school. So the school is happy. This pattern is now established in Dover, and it is a nucleus around which he hope similar patterns will develop.

Senator KEATING. Have most of these complaints been adjusted satisfactorily?

Mr. WALSH. Yes. It takes quite a while, because when you work by mediation it does take a long time.

I say 60 percent of them have been completely settled and I think there are some 200 complaints which are still under active negotiation and investigation. They have either been partially adjusted or the employer is submitting reports for a period of time to make sure that all of his promises are being lived up to, that sort of thing.

Senator KEATING. Why do you feel that it is necessary to make it a statutory body?

Mr. WALSH. The most important thing is that it shows Congress ratification of the principle, that discrimination in employment is an evil, and it is particularly important that in this field of Government contracts that Congress show this feeling, because their tax moneys are being spent, and it is unfair to tax everybody and limit the employment opportunities created by the expenditure of that tax money to people of a particular race.

The contractors who profit from these expenditures, they are getting personal profit from the Government expenditure, there is no better group to undertake this responsibility of seeing that discrimination in employment is broken down.

Now next to discrimination in voting it seemed to us that discrimination in employment is the most frustrating, the most bitter thing that a minority has to contend against. Just the very thought, you are limited, no matter how good you are, you can't compete evenly

with somebody else. Then when you have to tell that to your children, it must be just about the most galling step you take, to explain to them why, no matter how hard they try, they just can't have the same opportunity as somebody who is white.

It seems that there is not any doubt that this pattern is still widespread, this pattern of discrimination in employment. Even companies who do a very nice job as far as absorbing Negroes into unskilled labor categories are most reluctant to deal freely with them in white collar categories and in people who get annual salaries.

(At this point, Senators Eastland, McClellan, Ervin and Johnston entered the hearing room.)

Mr. WALSH. This just can't stay. It is going to break and there are going to be demands for more drastic Government action. It seemed to us that this little committee, that this step of Congress in recognizing this committee as a Commission, this seemingly undramatic step of recognizing this committee will avert demands for much more drastic action such as an FEPC.

(At this point, Senator Wiley entered the hearing room.)

Mr. WALSH. I think that there is serious doubt that the Government should move to anything as drastic as that which can compel someone by its order to employ a person in private industry as long as means such as mediation can succeed. It seems to us that this Commission is an ideal vehicle for this much more moderate course, and will eliminate the need for the more drastic action.

Senator KEATING. Do you feel that making the Commission statutory would strengthen the hand of the Commission in dealing with these problems?

Mr. WALSH. Yes, it would. The Commission now is dependent entirely on other Government departments for its staff. It only has 10 staff members of its own, in other words, it is working through somebody else all the time.

I think that having its own staff, it could do a better job. This is not a militant or radical group at all. The members of this Commission are drawn from people who are middle of the road folks, and its staff is oriented in that fashion. We think it could do a much better job if it had a slightly larger staff of its own, and if its stature were recognized.

Now when the Commission talks to a company they have a great deal of trouble understanding who the Commission is. You try to find it in the Congressional Directory and it is a nonexistent thing.

(At this point, Senators Carroll and Cotton entered the hearing room.)

This statute would establish a solid framework for it.

Senator KEATING. And this, of course, would be applicable throughout the country.

Mr. WALSH. Yes, it would. Unlike most of the other provisions of this bill, which seem to have their impact primarily in a single area of the country, this has its impact throughout the country.

Senator KEATING. Have a very substantial number of your complaints come from northern areas?

Mr. WALSH. Yes, they have. The Commission has really recognized the fact that in certain communities, patterns are more deep-seated than in others, and its work started out in northern and western

communities, California, Philadelphia where I would say that three-fourths of its work has been in nonsouthern communities.

(At this point, Senator Hennings entered the hearing room.)

Senator KEATING. May I direct your attention to page 11 of the House bill?

Mr. WALSH. Yes, sir.

Senator KEATING. Relating to providing educational opportunities for the children of servicemen. In this modified form it calls for the securing of possession and use of State facilities pursuant to an agreement between the State agencies and the Commission.

Let me ask you what would happen if they could not agree?

Mr. WALSH. Well, they just would not be able to go ahead and use those facilities.

Senator KEATING. What facilities would they use?

Mr. WALSH. They would have to use such makeshift facilities as the Government otherwise would have available.

Senator KEATING. I would anticipate that that would become a real problem because all the agencies would have to do would be to say that the price was unsatisfactory or make some other reason for it, and they would not be able to carry out the provisions.

Mr. WALSH. I think you are absolutely right. I mean in this present posture the bill has really little use if there is any hostility at all on the part of the community.

Senator KEATING. And this wording differs from the original bill which you recommend?

Mr. WALSH. Yes, it does.

Senator KEATING. Now there has been some talk regarding title I about the enlargement of it, similar to what took place on the floor in Senate debate?

Mr. WALSH. Yes, sir.

Senator KEATING. You have expressed your opposition to taking that course with this bill. Are you prepared to express a view with regard to separate legislation having nothing to do with the provisions of this bill which would make it a criminal offense to interfere by threats or force with court orders.

Mr. WALSH. We have no objection. Our basic fear is that by expanding this section, we would lose the section. To us this is one of the most important sections of the bill.

Senator KEATING. That, of course, is the experience on the floor of the Senate.

Mr. WALSH. Yes.

Senator KEATING. But if it were introduced as separate legislation, the Department would not oppose it.

Mr. WALSH. That is correct. Our fear is that this bill, the civil rights bill of 1960, might pass with nothing refererring to schools in it, and I think to ignore the problem of school segregation would open it to criticism.

Senator KEATING. Now will you refer to page 12 of the House bill? There was considerable discussion here by Senator Ervin and others about the wording of lines 5 and 6 there, and a contention made with which I realize you are not in agreement, a contention made that there might be constitutional questions involved because they might be dealing with a man who had been deprived or denied the oppor-

tunity to register to vote on some ground other than race or color.

Mr. WALSH. Yes, sir.

(At this point, Senator Kefauver entered the hearing room.)

Senator KEATING. Would it unduly complicate the problem if this No. 2 had some words, I haven't worked them out, but some words "deprived of or denied on grounds of race or color the opportunity," and the same in subsection (b). Would that involve a complication do you think?

Mr. WALSH. Yes, sir; I think that would destroy the usefulness of the bill. The principal accomplishment of the bill is the elimination of that item of proof, that that was the reason for action. It is so hard to prove when a qualified voter is turned down, and there has been a preexisting pattern of racial discrimination, the sequence is easily understandable.

And the chance that there was some other basis for it is extremely slim. Even if there was another basis for it, Senator, it had to be an erroneous basis, because this man is a qualified voter. He should vote. So the only thing in the illustration that Senator Ervin projected was that there is some interest in being able to turn down a qualified voter on some ground other than racial discrimination.

Now that interest, if it exists at all, is so narrow that it is hard to measure.

Senator KEATING. And you are satisfied that because the original suit in which the finding is made is based on the 15th amendment——

Mr. WALSH. Yes, sir.

Senator KEATING. That the procedural steps thereafter are within constitutional limitations even though those words "on grounds of race or color" are not specifically written in at the point I have indicated?

Mr. WALSH. Yes, sir. In other words, we believe that the 15th amendment is satisfied when we require that a pattern of discrimination first be established, and then we show that a qualified voter has again been turned down, and he is a member of the race that was the victim of the pattern of discrimination.

We say then that the chance that he was turned down for any other reason is so insignificant that Congress can justify the omission of that element of proof, which in itself is so difficult as a proper implementation of the 15th amendment.

Senator KEATING. In that connection is there any provision in the bill, or what would happen in your judgment if a person qualified to vote at the time he appeared before the referee became disqualified under State law at the time he presented himself at the polling place, as for instance if he had by that time moved or been convicted of a crime in the interim. How would such a situation be covered?

Mr. WALSH. Under this bill he would not be qualified to vote. His qualifications are no broader than the qualifications under State law.

Senator KEATING. He gets this certificate, does he not, when he shows the referee that he is qualified to vote?

Mr. WALSH. Yes.

Senator KEATING. Now I am trying to take care of the situation where that qualification was lost between that time and the time he presented himself at the polling place.

Mr. WALSH. You would have the same problem that occurs in any court order where there is a subsequent change of fact which makes the court order inadequate.

Senator KEATING. And that would be open to a registrar?

Mr. WALSH. Oh, yes.

Senator KEATING. I just have a few more questions, Mr. Chairman. I would appreciate it if you will bear with me.

Senator HART. Proceed.

Senator KEATING. On page 16 where you define qualified under State law you say that the last part of it—I don't know that it can be stated any more simply, but it takes a Philadelphia lawyer to understand it, I think. This first qualified under State law "shall mean qualified according to the laws, customs, or usages of the State." Now customs or usages of some of the States are not to allow Negroes to vote. Is that taken care of in the language subsequent to that?

Mr. WALSH. I think the court—it would be read to mean valid State laws, customs, and uses.

Senator KEATING. What I was wondering was why the words "customs or usages" were used and why we just did not limit it to laws.

Mr. WALSH. Because the literal laws in some communities are less important than the administrative interpretation which they have received by custom or by usage of successive registrars, and the purpose of this section is that the interpretation put on those laws as to whites shall be equally applicable to the applicants under this bill. That is the sole purpose. In other words, if literacy requirements are satisfied in a particular way as to whites, they shall also be satisfied in the same way before the referee as to Negro applicants.

Senator KEATING. And you are not worried that the words "customs and usages" might cut down the effectiveness of the use of the word "laws" unduly.

Mr. WALSH. No, sir. I think that the entire purpose of this bill will be recognized as the implementation of the 15th amendment and not in furthering any interpretation which could cut against it.

Senator JOHNSTON. Mr. Chairman, I think we agreed to start voting at 2:30.

Senator KEATING. Mr. Chairman, that is true, I will be, I would think not more than 5 minutes more. I have been very much shorter than several who interrogated. I would ask the indulgence of the committee for another 5 minutes or so if I may.

Senator DIRKSEN. Mr. Chairman, I think the request is well taken because we were convened at 2 o'clock and actually we didn't convene until 2:15. So we lost 15 minutes. The Senator was here exactly at 2 o'clock.

Senator JOHNSTON. I only wanted to know if we are interested in starting to vote here, and another thing, we are going to be here late.

Senator DIRKSEN. I ask indulgence for 5 minutes.

Senator HART. Proceed.

Senator KEATING. I want to ask you this practical question. Judge Walsh, one of the objections which you interposed to Senator Hennings' proposal was that first it required a finding, by the court, and then you could go down the referee route, or you could have a Federal enrollment officer appointed, and that Federal enrollment officer you quite correctly said would have no court provision, and that might

open the way to a judge to say you have the remedy of the Federal enrollment officer, so I won't appoint. Now a proposal which I introduced into the hearing before the Rules Committee, I never framed it into actual legislative form, but I have it here now, would provide in the first instance for the two-way approach, and would permit an injured party to go down what we formerly spoke of as the registrar approach, an administrative remedy, which I have now modified to call a Federal enrollment officer, or to go to the court for a finding as a precursor to the appointment of a referee.

Now I recognize the fact that you are wedded and sincerely sold on the referee proposal alone. I personally, and in that respect differ with some of my colleagues, prefer the referee proposal. I think it is the best of any one of the plans here. However, I don't want to see everything fall between two stools. I wondered if you have any comment as to the relative merits of the proposal suggested by Senator Hennings for an original finding by the court, and then proceeding in either direction, or the proposal that I make that in the first instance you proceed either administratively or by a court.

Mr. WALSH. Well, Senator, it is very hard for me to discuss either of these proposals without saying unfavorable things about both of them. I mean great is my respect for those who have advanced them and the care with which they have worked them out. Taking first the simpler proposal, the one that we discussed in the Rules Committee, that you thought should perhaps be at least an alternate form of procedure. As I remember it, if his people complained to the Civil Rights Commission that they had been deprived of the right to vote because of race, the Commission would then make a finding as to the validity of their complaint, and then a recommendation to the President who in turn would appoint an officer comparable to the enrollment officer under Senator Hennings' plan.

Now if the procedures of the Commission continue as they are today, which is almost identical with that of a House committee, in which no one has a right to cross-examine and no one has a right to be heard, I would think there would be serious constitutional basis for any such proceeding.

In other words, the State machinery would be supplanted without any representative of the State having an opportunity to be heard as of right.

Now, Senator Hennings I believe tried to meet that by having his proceeding go through the courts exactly as the referee proceedings would go, and to that extent I think it is on a firmer constitutional basis.

Senator KEATING. I might interpose there to say that I think it could easily be modified, my proposal, to provide for a hearing, but I did submit it to Professor Southerland, the professor of constitutional law at Harvard Law School who is certainly an eminent authority in the field. He advised me that in his opinion it was constitutional. I set forth the possible objection to the Libaray of Congress, and the legal authorities there advised me it was constitutional under the finding which we now make in it, plus the finding when the Commission on Civil Rights was originally created.

But I think it could perhaps be changed to call for such hearing.

Mr. WALSH. But Senator, I don't mean to be dogmatic and I have great respect for the professor.

You get into an argument is the State perhaps a person protected under the fifth amendment from intrusion by the Federal Government. But I think cases under the 15th amendment show that no matter how you answer that question, the Federal Government is not justified in intruding into State affairs any more than necessary to eliminate a pattern of discrimination, and that somewhere there must be proof in accordance with accepted doctrines of due process that that pattern exists before the Federal Government moves into State provinces.

Now if you say "All right, we will adapt the Civil Rights Commission to this job, we will require the proceedings which will make such a finding," then you are going to change its nature completely.

It now serves a valid function, that of sort of a perpetual congressional committee investigating for the help of Congress.

You are going to change it into an administrative adjudicating agency which must make adjudications and must, therefore, have all the proceedings of the Administrative Practices Act, which they may be a little faster than a Federal court, I don't know. I think it is arguable, but sometimes they are slower.

Anyhow, in trying to compare these two alternatives, both of which we don't like, I might say you might pick up some speed at the initial stages at the expense of a constitutional problem.

Senator KEATING. I think I should quote, it is very short, just three sentences, what Professor Southerland said. It seems very convincing to me:

> I see no constitutional obstacle preventing both administrative and judicial remedies for one deprived by State functionaries or others acting under color of State law of either Federal or State voting right. No words in the 14th or 15th amendments or in the "necessary and proper clause of article 1, section 8" suggest that Congress may not adopt administrative remedies in aid of the amendments. On the contrary, there seems to be clear constitutional authority for the administrative remedy.

Mr. WALSH. I think I would probably sign that opinion. But the whole question is bathed in the recital discriminating in violation of the 15th amendment.

The question is how do you establish that discrimination, and to us it seems you have got to establish it in accordance with——

Senator KEATING. In court?

Mr. WALSH. In accordance with due process.

Senator KEATING. Let's get away for the moment from the constitutional inhibition. Would you then have any—would not this plan do away with the possibility that a Federal judge would say "You have a remedy that you can proceed administratively."

Mr. WALSH. It would be less sharp in your case because the alternative would not be given the Attorney General after the adjudication. Once the Attorney General obtained his adjudication from the Federal judge there would be no option on his part.

Senator ERVIN. If you will permit an interruption here, I think that statement you read has a defect in it because section 1 article 4 only relates to election of Congressmen, and by extension of the 17th

amendment to Senators, and this bill relates, and the 14th amendment relates, to cover State elections as well as Federal.

Senator HART. Gentlemen, what is your pleasure now? You have had 10 minutes.

Senator KEATING. I will conclude, Mr. Chairman.

Mr. WALSH. Am I excused, sir?

Senator HART. Yes.

Senator COTTON. I just wanted the record to show that my good friend said he was very, very brief. I waited 2 days to ask one question. He said he was over here at 2 to 2:30. I am just going to vote for an amendment striking out the entire line I am in doubt about and not even ask the question.

Senator KEATING. Mr. Chairman, I am very sorry that my friend takes umbrage, because I sat around here a long time hoping to get an opportunity to ask some questions while some others held the floor.

I don't think I have been unduly long.

(Whereupon, at 2:55 p.m. the hearing was adjourned.)

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