VOTING RIGHTS

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

EIGHTY-SIXTH CONGRESS

SECOND SESSION

ON

H.R. 10018, H.R. 10034, H.R. 10035, and H.R. 10327

PROPOSALS FOR VOTING RIGHTS

FEBRUARY 9 AND 16, 1960

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A BILL To amend the Civil Rights Act of 1957 by providing for court appointment of United States voting referees, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, 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) subsection "(f)":

"(e) In any proceeding instituted pursuant to subsection (c) of this section, in the event the court finds that under color of law or by State action any person or persons have been deprived on account of race or color of any right or privilege secured by subsection (a) or (b) of this section, and that such deprivation was or is pursuant to a pattern or practice, the court may appoint one or more persons (to be known as voting referees) to receive applications from any person claiming such deprivation as to the right to register or otherwise to qualify to vote at any election and to take evidence and report to the court findings as to whether such applicants or any of them (1) are qualified to vote at any election, and (2) have been (a) deprived of the opportunity to register to vote or otherwise to qualify to vote at any election or (b) found by State election officials not qualified to register to vote or to vote at any election.

"Any report of any person or persons appointed pursuant to this subsection shall be reviewed by the court and the court shall accept the findings contained in such report unless clearly erroneous. The court shall issue a supplementary decree which shall specify which person or persons named in the report are qualified and entitled to vote at any election within such period as would be applicable if such person or persons had been registered or otherwise qualified under State law. The Attorney General shall cause to be transmitted certified copies of the original decree and any supplementary decree to the appropriate election officials of the State, and any such official who, with notice of such original or supplementary decree, refuses to permit any person, named as qualified to vote in such original or supplementary decree, to vote at any election covered therebey, or to have the vote of any such person counted, may be proceeded against for contempt.

"The court may authorize such person or persons appointed pursuant to this subsection to issue to each person named in the original decree or any supplementary decree as qualified and entitled to vote at an election, a certificate identifying the holder thereof as a person qualified and entitled, pursuant to the court's original decree or supplementary decree, to vote at any such election.

"The court may authorize such person or persons appointed pursuant to this subsection (or may appoint any other person or persons) (1) to attend at any time and place for holding any election at which any person named in the court's original decree or any supplementary decree is entitled to vote and report to the court whether any such person has been denied the right to vote, and (2) to attend at any time and place for counting the votes cast at any election at which any person named in the court's original decree or any supplementary decree is entitled to vote and report to the court whether any vote cast by any such person has not been properly counted.

"Any person or persons appointed by the court pursuant to this subsection shall 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 person or persons appointed by the court pursuant to this subsection shall be fixed by the court and shall be payable by the United States.

"The court shall have authority to take any other actions, consistent with the provisions of this subsection, reasonably appropriate or necessary to enforce its decrees."

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

"When any official of a State or subdivision thereof has resigned or has been relieved of his office and the successor has assumed such office, any act or practice of such official or relating to a deprivation of any right or privilege secured by subsection (a) or (b) hereof shall be deemed that of the State and the proceeding may be instituted or continued against the State as party defendant."

H.R. 10031, 86TH CONGRESS, 2D SESSION

A BILL To amend the Civil Rights Act of 1957 to provide for court appointment of United States voting referees and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, 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 further amended as follows:

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

"(e) In any proceeding instituted pursuant to subsection (c) of this section in the event that a court finds that any State or subdivision of any person or persons has engaged or is about to engage in any act or practice which deprives any person of any right or privilege secured by subsection (a) of this section, and that such deprivation is or is pursuant to a pattern or practice, the court may appoint one or more persons (to be known as voting referees) to receive applications from any person claiming such deprivation as to the right to register or otherwise to qualify to vote at any election and to take evidence and report to the court findings as to whether such applicants or any class of them are qualified to vote at any election and (2) have been or are being deprived of the opportunity to register to vote or otherwise to qualify to vote at any election or (3) found by State election officials not qualified to register to vote or to vote at any election.

Any report of any person or persons appointed pursuant to this subsection shall be reviewed by the court and the court shall accept the findings contained in such report unless clearly erroneous. The court shall issue a supplementary decree which shall specify which person or persons named in the report are qualified and entitled to vote at any election within such period as would be applicable if such person or persons had been registered or otherwise qualified under (1) below. The Attorney General shall cause to be transmitted certified copies of the original decree and any supplementary decree to the appropriate election officials of the State and any such official who, with notice of such original or supplementary decree, refuses to permit any person named as qualified to vote in such original or supplementary decree to vote at any election covered thereby, or to have the vote of any such person counted, may be given summary notice for contempt.

"The court may authorize such person or persons appointed pursuant to this subsection to issue to each person named in the original decree or any supplementary decree as qualified and entitled to vote at an election a certificate identifying the holder thereof as a person qualified and entitled, pursuant to the court's original decree or supplementary decree, to vote at any such election.

"The court may authorize such person or persons appointed pursuant to this subsection (or may appoint any other person or persons) (1) to attend at any time and place for holding any election at which any person named in the court's original decree or any supplementary decree is entitled to vote and report to the court whether any such person has been denied the right to vote, and (2) to attend at any time and place for counting the votes cast at any election at which any person named in the court's original decree or any supplementary decree is entitled to vote and report to the court whether any vote cast by any such person has not been properly counted.

"Any person or persons appointed by the court pursuant to this subsection shall 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 person or persons appointed by the court pursuant to this subsection shall be fixed by the court and shall be payable by the United States.

"The court shall have authority to take any other actions, consistent with the provisions of this subsection, reasonably appropriate or necessary to enforce its decrees."

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

"When any official of a State or subdivision thereof has resigned or has been relieved of his office and no successor has assumed such office, any act or practice of such official constituting a deprivation of any right or privilege secured by subsection (a) or (b) hereof shall be deemed that of the State and the proceeding may be instituted or continued against the State as party defendant."

H.R. 10535, 89TH CONGRESS, 2D SESSION

A BILL To amend the Civil Rights Act of 1957 by providing for court appointment of United States voting referees, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 1971 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) subsection "(f)":

"In any proceeding instituted pursuant to subsection (c) of this section, in the event the court finds that under color of law or by State action any person or persons have been deprived on account of race or color of any right or privilege secured by subsection (a) or (b) of this section, and that such deprivation was or is pursuant to a pattern or practice, the court may appoint one or more persons (to be known as voting referees) to receive applications from any person claiming such deprivation as to the right to register or otherwise to qualify to vote at any election and to take evidence and report to the court findings as to whether such applicants or any of them (1) are qualified to vote at any election, and (2) have been (a) deprived of the opportunity to register to vote or otherwise to qualify to vote at any election, or (b) found by State election officials not qualified to register to vote or to vote at any election.

"Any report of any person or persons appointed pursuant to this subsection shall be reviewed by the court and the court shall accept the findings contained in such report unless clearly erroneous. The court shall issue a supplementary decree which shall specify which person or persons named in the report are qualified and entitled to vote at any election within such period as would be applicable if such person or persons had been registered or otherwise qualified under State law. The Attorney General shall cause to be transmitted certified copies of the original decree and any supplementary decree to the appropriate election officials of the State, and any such official who, with notice of such original or supplementary decree, refuses to permit any person, named as qualified to vote in such original or supplementary decree, to vote at any election covered thereby, or to have the vote of any such person counted, may be proceeded against for contempt.

"The court may authorize such person or persons appointed pursuant to this subsection to issue to each person named in the original decree or any supplementary decree as qualified and entitled to vote at an election a certificate identifying the holder thereof as a person qualified and entitled, pursuant to the court's original decree or supplementary decree, to vote at any such election.

"The court may authorize such person or persons appointed pursuant to this subsection (or may appoint any other person or persons) (1) to attend at any time and place for holding any election at which any person named in the court's original decree or any supplementary decree is entitled to vote and report to the court whether any such person has been denied the right to vote, and (2) to attend at any time and place for counting the votes cast at any election at which any person named in the court's original decree or any supplementary decree is entitled to vote and report to the court whether any vote cast by any such person has not been properly counted.

"Any person or persons appointed by the court pursuant to this subsection shall 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 person or persons appointed by the court pursuant to this subsection shall be fixed by the court and shall be payable by the United States.

"The court shall have authority to take any other actions, consistent with the provisions of this subsection, reasonably appropriate or necessary to enforce its decrees."

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

"When any official of a State or subdivision thereof has resigned or has been relieved of his office and no successor has assumed such office, any act or practice of such official constituting a deprivation of any right or privilege secured by subsection (a) or (b) hereof shall be deemed that of the State and the proceeding may be instituted or continued against the State as party defendant."

H.R. 10327, 89TH CONGRESS, 2D SESSION

A BILL To amend the Civil Rights Act of 1964 by providing for court appointment of United States voting referees and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, 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) subsection "(f)":

"In any proceeding instituted pursuant to subsection (c) of this section, in the event the court finds that under color of law or by State action any person or persons have been deprived on account of race or color of any right or privilege secured by subsection (a) or (b) of this section, and that such deprivation was or is pursuant to a pattern or practice, the court may appoint one or more persons (to be known as voting referees) to receive applications from any person claiming such deprivation as to the right to register or otherwise to qualify to vote at any election and to take evidence and report to the court findings as to whether such applicants or any of them (1) are qualified to vote at any election, and (2) have been (a) deprived of the opportunity to register to vote or otherwise to qualify to vote at any election or (b) found by State election officials not qualified to register to vote or to vote at any election.

"Any report of any person or persons appointed pursuant to this subsection shall be reviewed by the court and the court shall accept the findings contained in such report unless clearly erroneous. The court shall issue a supplementary decree which shall specify which person or persons named in the report are qualified and entitled to vote at any election within such period as would be applicable if such person or persons had been registered or otherwise qualified under State law. The Attorney General shall cause to be transmitted certified copies of the original decree and any supplementary decree to the appropriate election officials of the State and any such official who, with notice of such original or supplementary decree, refuses to permit any person, named as qualified to vote in such original or supplementary decree, to vote at any election covered thereby, or to have the vote of any such person counted, may be proceeded against for contempt.

"The court may authorize such person or persons appointed pursuant to this issue to each person named in the original decree or any supplementary decree as qualified and entitled to vote at an election, a certificate identifying the holder thereof as a person qualified and entitled, pursuant to the court's original decree or supplementary decree, to vote at any such election.

"The court may authorize such person or persons appointed pursuant to this subsection (or may appoint any other person or persons) (1) to attend at any time and place for holding any election at which any person named in the court's original decree or any supplementary decree is entitled to vote and report to the court whether any such person has been denied the right to vote, and (2) to attend at any time and place for counting the votes cast at any election at which any person named in the court's original decree or any supplementary decree is entitled to vote and report to the court whether any vote cast by any such person has not been properly counted.

"Any person or persons appointed by the court pursuant to this subsection shall 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 person or persons appointed by the court pursuant to this subsection shall be fixed by the court and shall be payable by the United States.

"The court shall have authority to take any other actions, consistent with the provisions of this subsection, reasonably appropriate or necessary to enforce its decrees."

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

"When any official of a State or subdivision thereof has resigned or has been relieved of his office and no successor has assumed such office, any act or practice of such official constituting a deprivation of any right or privilege secured by subsection (a) of this section shall be deemed that of the State and the proceeding may be instituted or continued against the State as party defendant."

VOTING RIGHTS

TUESDAY, FEBRUARY 9, 1960

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to executive session, at 11:10 a.m., in room 346, Old House Office Building, Hon. Emanuel Celler (chairman of the committee) presiding.

Present: Representatives Celler, Walter, Lane, Willis, Rodino, Forrester, Rogers, Donohue, Brooks, Tuck, Ashmore, Holtzman, Whitener, Libonati, Loser, Toll, Kastenmeier, McCulloch, Miller, Poff, Moore, Meader, Lindsay, and Ray.

Also present: Bess E. Dick, staff director, and William R. Foley general counsel, William H. Crabtree, associate counsel.

The CHAIRMAN. The committee will come to order, please.

We have with us this morning the Deputy Attorney General, Lawrence E. Walsh, to give us an explanation of the so-called plan concerning voting referees in connection with civil rights.

Judge Walsh, we shall be very glad to hear from you at this time.

STATEMENT OF DEPUTY ATTORNEY GENERAL LAWRENCE E. WALSH, ACCOMPANIED BY JOHN D. CALHOUN, ASSISTANT DEPUTY ATTORNEY GENERAL; LUTHER HUSTON, DIRECTOR OF PUBLIC INFORMATION, DEPARTMENT OF JUSTICE; AND VICTOR S. FRIEDMAN, ATTORNEY, OFFICE OF THE DEPUTY ATTORNEY GENERAL

Mr. WALSH. Mr. Chairman and gentlemen of the committee, I deeply appreciate the opportunity to come before you and discuss this matter, these bills which have followed the report of the Civil Rights Commission.

As you know, last September the Civil Rights Commission filed an interim report with the President and with the Congress. I think we can fairly summarize the section dealing with voting as concluding that there was a pattern of racial discrimination in certain sections of certain States in the administration of the State election laws.

The CHAIRMAN. Judge Walsh, I want to make a statement. Excuse me.

The hearings we are going to have are on these four bills that have been mentioned. The hearings are not on the civil rights bill that was reported by this committee and which is now pending before the Rules Committee. These hearings, I want the public to understand, these hearings are on these four bills which have been submitted concerning registrars and referees.

Mr. WALSH. Very well, sir. I will limit my remarks to the bills, then, dealing with registrars and voting referees, and I will not talk to the bill which was reported our last year or which was considered last year, unless some member of the committee asks me to do so.

Going on with a brief summary of the Commission's report: it pointed out that certain States had requirements for proof of literacy and that others required an applicant for the privilege of voting to explain certain provisions of the Constitution, and that the administration of these tests showed a pattern of discrimination. They also gave illustrations in which Negroes had attempted to register and were unable to focus the attention of the State registrar to consider his application; and indeed, certain of these Negroes were thereafter approached by persons who attempted to dissuade them from registering, and indicated that it would be for their best welfare if they did not.

The result is that in certain counties where the Negro population is over 50 percent of the total population, there are no Negroes registered, and in other counties there is a disproportionately small number of Negroes registered. I believe each of you has received that report.

Confronted with this problem, the Commission addressed itself to the problem of, how do we provide for a wide-scale rectification of this disparity? Although the Commission itself did not recommend any bill or did not submit a bill to either House for consideration, its recommendations in its report were that a Federal officer in the areas concerned be designated by the President to act as a registrar of voters for Federal elections—that is, for Congressmen or U. S. Senator, or for the electors to choose the President and Vice President; that the President designate an existing Federal official to perform this function, and that this should be done by the President after receiving a complaint of nine or more voters that they had been discriminated against because of their race, and after the Civil Rights Commission had investigated these complaints and found them to be accurate.

The CHAIRMAN. Does this mean that the Civil Rights Commission would be in perpetuity?

Mr. WALSH. I do not know that they discussed, in their recommendation, the extension of the Commission, but it would be in perpetuity, or as long as this function needed to be performed.

Mr. WALTER. May I interrupt at that point?

Mr. WALSH. Yes, sir.

Mr. WALTER. Excuse me.

I am very deeply interested in the Administrative Procedure Act.

Mr. WALSH. I realize that.

Mr. WALTER. I am just wondering whether or not there is anything in the legislation that is now being considered which would have the effect of depriving anyone of a right to appeal; whether or not the Administrative Procedure Act is vitiated or its effect nullified by the legislation now under consideration.

Mr. WALSH. Congressman Walter, the registrar proposals, I believe, do raise that problem, and that is why the Department of Justice has considered this problem and come up with an alternative proposal. It seemed to the Department that the proposal to permit a Federal commission to supplant in whole or in part the function of State officers on the basis of the present procedures of the Civil Rights

Commission, which are exactly the same as that of this committee—in other words, the Civil Rights Commission does not adhere to the Administrative Procedure Act. It follows the fairplay rules of the House of Representatives the same as a standing committee of this House.

Mr. FORRESTER. As I understand you, your proposal is completely different from the recommendation of the Civil Rights Commission.

Mr. WALSH. That is correct.

Mr. FORRESTER. In other words, you are repudiating the recommendation of the Civil Rights Commission.

Mr. WALSH. Yes. We recognize the validity of the observations of the Civil Rights Commission on the need for something to be done in this field, and we respect the attention which they focused on it. We do not think that the Federal registrar proposal is a proper vehicle.

Mr. FORRESTER. Let me ask you this, if you do not mind, because I may not have time to ask any questions.

As a matter of fact, you have not followed a single recommendation of the Civil Rights Commission, have you?

Mr. WALSH. I don't know exactly where you say their recommendation begins and where it ends. We are opposed to the idea of having the relief stem from an administrative Federal officer.

Mr. FORRESTER. You are opposed to that theory, which is in opposition to the Civil Rights Commission.

Mr. WALSH. Right.

Mr. FORRESTER. All right, sir.

Now, are you or are you not in favor, and have you introduced legislation to do away with any literacy test, and that any person who can satisfy the State requirements as to residence and age would be a qualified voter?

Mr. WALSH. No, sir, we did not, and the Commission as a whole did not make that recommendation. It was divided on whether there should be a constitutional amendment to that effect.

Mr. FORRESTER. But it was majority recommendation, was it not?

Mr. WALSH. I believe it was 3 to 3.

Mr. FORRESTER. But at least, you have not accepted all of its recommendations.

Mr. WALSH. In that we have not submitted any proposal to that effect; no, sir.

Mr. FORRESTER. Then may I ask you this question?

What is the Civil Rights Commission, in your opinion? Are they umpires, or are they advocates, or are they agitators, or what?

Mr. WALSH. They are a committee established to perform the fact-finding work of Congress in this field. The purpose of establishing the Commission was to find a group which would not have the manifold problems that each Member of this House has, which could concentrate its attention on a single field and survey that field for the Congress. That is their function, at the moment.

Mr. FORRESTER. They are not advocates?

Mr. WALSH. They are not advocates, and they are not a quasi-judicial body, which comes back to the constitutional problem that Congressman Walter has posed, that their procedures are not established for the purposes of making findings of fact and determinations as to individual registrars or the supplanting of individual registrars.

Mr. FORRESTER. I was sure that was what the gentleman's answer would be

Now, I want to ask the gentleman if he is familiar with the article which appeared in the New York Times on February 4, 1960, about a meeting that was held up there concerning your civil rights proposal by the National Association for the Advancement of Colored People, Americans for Democratic Action, the B'nai B'rith Anti-Defamation League, and some labor union. The statement was made that they had a private strategy meeting, and at that private strategy meeting they were joined by a staff member of the Civil Rights Commission.

Is the gentleman familiar with it?

Mr. WALSH. I am familiar with that article, written by a very able reporter, known for his accuracy.

Mr. FORRESTER. Let me ask the gentleman his opinion in representing the Justice Department: Is it cricket, is it fair, or was it supposed to be assumed that a member of the staff of the Civil Rights Commission would be participating in a strategy meeting with the B'nai B'rith Anti-Defamation League, the Americans for Democratic Action, and the National Association for the Advancement of Colored People?

Mr. WALSH. Mr. Forrester, I do not think it is for me to pass upon the conduct of any other agency. I would assume that whatever was done was done in an honest, earnest, and sincere interest to advocate measures which they thought should be brought to the attention of Congress in as comprehensive a manner as possible.

Mr. FORRESTER. As I understand, although you are familiar with that, you do not think that is any part of your business, and you would not make a recommendation that that man be fired?

Mr. WALSH. No, sir, I have got enough trouble with our own Department.

The CHAIRMAN. I think we should allow Judge Walsh to continue his statement. After you have finished your general statement, then you can be interrogated.

Mr. WALSH. Mr. Chairman, I would like to submit the statement I had prepared, because we are under the pressure of time, and I think I can summarize it fairly quickly.

Coming back, then, to the overall objection we have to the registrar proposal, we think it raises the constitutional question on which Congressman Walter has commented.

You might say all we have to do is amend the Civil Rights Commission procedures, and we take care of that problem. I submit, Mr. Chairman, that if that is done, you might just as well create a new agency, because the purpose for which the Civil Rights Commission was created and the functions it was to perform will be lost and submerged in this new function.

An administrative agency which goes around from county to county, passing upon the conduction of the registrar of that community and determining whether he should be supplanted by a Federal registrar or not has a different type of function than the Commission, which is surveying the operation of the election law throughout the country to find facts for Congress which would justify congressional legislation. They are two different functions, and as the proposal for a review of discrimination, county by county, is much more time-consuming, I do not think the Commission as now set up could function that way.

For example, the Commissioners are not full-time Government officers at all. They are men drawn from other walks of life, university presidents and deans of law schools, who contribute a day or two a month to this very important work. You would have to get a full-time group, a staff, examiners, and all that sort of thing that the Administrative Practices Act contemplates, in order to make the proposal work.

The third point that we raise in objection is that the relief would merely extend to Federal elections; it would not cover State elections; and we think State elections are as important, if not more important, than Federal elections.

Mr. WALTER. On page 3 of the proposed bill, Judge Walsh, the second paragraph from the bottom, it is provided: "Any person appointed by the court pursuant to this subsection shall have all the powers conferred upon a master by rule 53(c) of the Federal Rules of Civil Procedure."

Is that language proposed in order to avoid the provisions of rule 53? Why does it refer to only one section of the rule?

Mr. WALSH. For example, 53(a) deals with standing masters. This is a difficult problem altogether. Rule 53(b) indicates the court's view that masters should not be appointed except in exceptional cases. We did not think either one of those had any applicability.

Then, 53(c) contemplates - - -

The CHAIRMAN. Rule 53(c) is embraced in the act.

Mr. WALSH. Just 53(c).

The CHAIRMAN. Why not 53(d)?

Mr. WILLIS. Rule 53 (d) and (e).

Mr. WALSH. Rule 53 (d) and (e) contemplate a contested hearing on notice.

The act as it was contemplated, the referee would ordinarily not conduct hearings on notice. In other words, we are shifting now from the registrars' act over to the Attorney General's proposal. The referee's hearings would be ex parte and limited to very simple questions: The voter's residence, his age, and then if there were literacy requirements, to test the voter as to those, and if there were other requirements by valid provision of the State law, to test him as to those. Then he would report to the judge, and the judge would then hear exceptions to his report.

The CHAIRMAN. In other words, you do not spell out the nature of the proceeding before the referee at all?

Mr. WALSH. No, sir.

I realize that there has been some comment that that would be desirable. We have no rigid views on that. We felt that this should be left in the hands of the local Federal judge. He knows his community, he knows his problem, he knows his people, and he knows his referee that he is going to appoint. He can control all that in his own discretion. But, I have submitted this morning, not as a recommendation of the Department, but as language to show how these incidental procedures could be spelled in greater detail than the Attorney General's proposal and Congressman McCulloch's bill now spell them out.

Mr. MEADER. Are you referring to page 7, where you say the court will provide in its order for notice to the other parties, and so on?

Mr. WALSH. Page 7 of my statement; yes, sir.

Mr. MEADER. You think that is what the court will do, but you do not think it should be written into the law, that the procedure that you outline on page 7 should be incorporated in the bill as a requirement?

Mr. WALSH. That is right. I did not think it was necessary. I think any judge would do it that way, Congressman Meader. That is the way he would do it.

The only thing we needed this bill for was to make clear what the applicant would have to show in order to qualify to vote before the referee. That was the important part of the bill.

The incidental procedures of how the referee shall report to the court and when, and exactly how notice will be given to the other parties of the action, we intend to leave to the judge. He would follow the usual practices you do where you have a referee to report to you.

Mr. MEADER. Well, it is conceivable that the judge in his order appointing the referee might provide, not for an ex parte proceeding, but an adversary proceeding before the referee.

Mr. WALSH. He could. He could do that.

Mr. MEADER. But your provision on page 7 has nothing to do with an adversary proceeding before the referee, but only on exceptions to the report of the referee before the judge.

Mr. WALSH. What I have done in my statement is outline the way in which I would anticipate the judge would proceed. This is not to say he would not have had power under the bill to proceed in some other way if he saw fit.

If anyone of us were the judge responsible for this proceeding—now, picture yourself. You have just had tried before you a proceeding by the U.S. attorney in which he has proven that there is a pattern of racial discrimination in the administration of the election laws. As a judge, you have found that the pattern exists. Then, you are asked to enter an order which is going to rectify these wrongs.

One of the things you will do is enjoin the State registrar, or whoever the State officer is, from following that pattern any more. And the second thing you will do is, or that I think you would do, realizing that there are a large number of people who have been hurt this way; instead of trying to hear all those people yourself, as a judge who has a lot of other things to do, you are going to appoint a man you have confidence in as a voting referee—in other words, that is just an easy title for a special master that Federal judges use for many purposes. You appoint him to hear persons who feel they have been aggrieved.

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.

Also, we take notice of the fact that it is very difficult to prove the motive for the action of a State officer. So, where the judge has just found a pattern of discrimination against Negroes in voting, and where a Negro then goes to a State registrar and tries to register, and where he is turned down and then comes over to this referee and the referee by his examination finds (1) that he has been to the registrar and turned down and (2) that he is a perfectly well-qualified voter, then we are suggesting that Congress establish the rule that where those two things are found, it is not necessary for him to prove that that was because of a pattern of discrimination; that it is enough, where a pattern has already been found and a qualified voter is turned down, to jump the next hurdle and say that he was turned down because he was a Negro.

Mr. WILLIS. Will the gentleman yield?

Mr. MEADER. I do not know whether I have the floor or not. I wish I had it. I hope I have it. I will yield to the gentleman from Louisiana.

Mr. WILLIS. I will not question now. We are now dealing with the part of the bill which gives me the most concern. I tried last night to understand the procedure. I would like to ask questions as to whether I properly understand the procedure, after you have concluded. May I at this time ask that?

Mr. MEADER. I would like to ask some other questions of Judge Walsh.

I want to call attention to line 10 on page 1 of the McCulloch bill, H.R. 10035. I notice the phrase "under color of law or by State action."

I do not know that there has been any interpretation of the phrase.

What was in the minds of the drafters of this phraseology, "State action"?

Mr. WALSH. Just to go back one step, and then I will come right to the question: the whole purpose of the McCulloch bill is to come within the 15th amendment. The 15th amendment is concerned with action taken by a State to deprive a citizen of the United States——

Mr. WILLIS. Both State and Federal Government.

The CHAIRMAN. That is the 15th amendment you are talking about?

Mr. WALSH. Yes, it is concerned with both; you are absolutely right.

The CHAIRMAN. The 15th amendment of the Federal Constitution.

And the specification of State action was to omit the question of private individual action. The 15th amendment is not directed to individuals; it is directed to State or Federal Government.

Mr. MEADER. The State action referred to might be a law passed by a State legislature; might it?

Mr. WALSH. Yes, such as that all Negroes cannot vote.

Mr. MEADER. Would it also include interpretations of State law by State officials?

Mr. WALSH. By State registrars, yes.

Mr. MEADER. Would it also include a failure on the part of State officials to observe the State law?

Mr. WALSH. Yes, sir.

Mr. MEADER. In other words, State action might include inaction.

Mr. WALSH. In other words, if the State registrar just closed his door and locked it every time he saw a Negro coming down the street,

or just said, "I have got all the whites registered. We will just shut up and not open this office again until after election day."

All of those things would be State action within this bill.

Mr. MEADER. If that is what the intent is, why is it necessary to include "(b)" on line 2 of page 2, saying: "been deprived on account of race or color of any right or privilege secured by subsection (a) or (b) of this section."

Now, (a) relates to action by States with respect to all elections.

Mr. WALSH. Right.

Mr. MEADER. And (b) refers to action by any persons to threaten, coerce, or intimidate with respect to Federal elections only.

Mr. WALSH. Right.

Mr. MEADER. Why, if you are talking about State action, is (b) included on line 2, page 2?

Mr. WALSH. Only out of an abundance of caution. I think we could get along without it, and the reason it is there is to take advantage of any additional constitutional support for this legislation that may be found in article I of the Constitution, which is the article on which (b) is based.

Mr. MEADER. The only right secured by section (b) of the Civil Rights Act of 1957 which is not already secured by section (a) of the Civil Rights Act of 1957, I suppose might be said to be the right to be free from intimidation or coercion.

Mr. WALSH. Yes.

Mr. MEADER. And it was that right which you had in mind by including (b), was it?

Mr. WALSH. We just wanted to make sure we did not leave anything out by not including (b).

Mr. MEADER. But you have limited these cases to those where State action or inaction or deprivation has occurred under color of law?

Mr. WALSH. Yes, sir.

Mr. MEADER. Which refers to the government and not to private individuals?

Mr. WALSH. That is right.

Mr. MEADER. It seems to me it is only confusing to add in section (b), which relates to intimidation by persons other than State officials.

Mr. WALSH. I will not labor the point. The reason it was put in there was simply as a matter of caution, and if the committee or the sponsor of the bill concluded it was more confusing than helpful, we would yield on that position.

Mr. MEADER. I yield to the gentleman from Virginia.

Mr. POFF. I understood the witness to say that section 1971, subsection (b), of title 42, United States Code, had its constitutional basis in article I.

Mr. WALSH. I think that is right.

Mr. LOSER. Would the gentleman yield at that point?

Mr. POFF. No; just a minute, please.

Am I correct in saying that subsection (b) extends not only to elections of Senators and Representatives, but to presidential electors as well?

Mr. WALSH. Yes, it does.

Mr. POFF. Is it not further true that article I does not deal with the presidential electors, but is confined exclusively to the election of Senators and U.S. Representatives?

Mr. WALSH. You are right.

Mr. POFF. Then, is there not a hiatus? Can you properly say that subsection (b) does have a constitutional basis, a full constitutional basis, in article I?

Mr. WALSH. An exclusively constitutional basis in article I right.

Mr. POFF. As a matter of fact, that question has never been before the court, has it?

Mr. WALSH. No.

Mr. POFF. The case of *U.S.* v. *Reines* does not deal with that?

Mr. WALSH. No, it does not.

Mr. POFF. That is all.

Mr. MEADER. I would like to call attention to the word "applications" on line 5 of page 2: "the court may appoint one or more persons (to be known as voting referees) to receive applications." But the remainder does not say applications for what. Does it mean applications for a voting certificate, a certificate that the applicant is entitled to vote?

Mr. WALSH. Yes, sir.

Mr. MEADER. Or does it mean to receive complaints that the person has been denied registration? Would not a proper word be "complaints" that the referee receives?

Mr. WALSH. No; the person is applying to the referee not to have action taken against the registrar, but to himself secure his right to vote.

Mr. MEADER. Should it not be to receive applications for voting certificates, or registration certificates, or something?

Mr. WALSH. Well, applications for an order qualifying him to vote, which is what he would get under this procedure.

Mr. MEADER. There should be some clarification about what this application is for, should there not? If it is an application for some other kind of relief, other than this certificate which the referee is later authorized to deliver to the applicant, than I think it should say that.

Mr. WALSH. Congressman Meader, I do not think the application could be read in any other way. But if you thought by spelling it out again it would be better, we have no objection to that.

Mr. MEADER. It should be clear that what was actually received by the referee was a complaint of denial of registration which the referee is going to investigate.

Mr. WALSH. The essence of the thing is the complaint. All the applicant wants is his right to vote; and what happens to the registrar he leaves to somebody else.

Mr. MEADER. This question of procedure again comes up. The referee proceeds, as I believe you said, on an ex parte basis.

Mr. WALSH. No. That is the way I would assume the judge would have him proceed. That is the way it is anticipated he would proceed.

Mr. MEADER. I think in most referee and master proceedings, all parties to the controversy are given an opportunity to be present, to present evidence, to cross-examine witnesses and be heard before a referee, and some kind of a record is maintained of the evidence. There is nothing in here that provides for notice to the parties against whom a decree is going to run; there is no provision for their appearance, presentation of evidence, cross-examination of witnesses, or the preservation of a record of the evidence.

Mr. WALSH. That is all left to the judge. The anticipated procedure is that he would have the referee report to him as to the qualifications of individual applicants, and when he had enough to conduct a worthwhile hearing on it, he would give notice to the State registrar and to the other parties of the original, underlying proceeding, so that they could come in and except to the referee's report and be heard to whatever extent they are entitled to be heard before the court itself.

Mr. MEADER. My attention has been called to a mimeographed draft with no number and no indication who the author is. On page 2 of this draft, it expressly directs that the application shall be heard ex parte.

Mr. WALSH. I can explain who the author is of this draft, because it is the Department and I. The purpose of the draft was this:

There had been considerable comment exactly along the lines on which you have been proceeding: that the procedures before the referee are not spelled out, and there is not a clear understanding of how this would proceed before the referee, and how it would come to the court, and where there would be opportunity to be heard, and so forth.

We thought that this was all a matter which should be left in the hands of the Federal district judge. He will provide for all that in his order. He issues an order of injunction, and he appoints a referee, and then he is going to tell the referee exactly how he wants him to proceed, whether ex parte or how, and when he is to give notice to the other parties, and so forth. That would all be laid out in the district judge's order in the basic case in which the court found a pattern of discrimination.

But if it were felt by Congressman McCulloch or any member of this committee that this would be better clarified, this language has been prepared which I have just submitted, and which I should like to make a part of the record, if the chairman will permit it——

The CHAIRMAN. Yes, you may——

Mr. WALSH. To show how it should be implemented if it not desirable. It all depends on how much you want to spell out for the judge, or how much to leave to him.

(Document referred to follows:)

A BILL To amend the Civil Rights Act of 1957 by providing for court appointment of United States Voting Referees, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States assembled, 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) subsection "(f)":

"In any proceeding instituted pursuant to subsection (c) of this section, in the event the court finds that under color of law or by State action any person or persons have been deprived on account of race or color of any right or privilege secured by subsection (a) or (b) of this section, and that such deprivation was or is pursuant to a pattern or practice, the court may appoint one or more persons (to be known as

voting referees) to receive applications from any person claiming such deprivation as to the right to register or otherwise to qualify to vote at any election and to take evidence and report to the court findings as to whether such applicants or any of them (1) are qualified to vote at any election, and (2) have been (a) deprived of the opportunity to register to vote or otherwise to qualify to vote at any election, or (b) found by State election officials not qualified to register to vote or to vote at any election.

"*In a proceeding before such person or persons so appointed, 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, they 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 by mail to each party to such proceeding together with an order to show cause within 10 days 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 except as to any applicant named in the report as to whom the State registrar or other appropriate party to the proceeding prior to that time files with the court and serves upon the Attorney General and the applicant concerned a statement of exceptions to such report which, if the exceptions relate to matters of fact, is supported by a duly verified copy of a public record or by affidavit of persons having personal knowledge of such fact and, which, if relating to matters of law, is supported by an appropriate memorandum of law.*

"Any report of any person or persons appointed pursuant to this subsection shall be reviewed by the court and the court shall accept the findings contained in such report unless clearly erroneous. The court shall issue a supplementary decree which shall specify which person or persons named in the report are qualified and entitled to vote at any election within such period as would be applicable if such person or persons had been registered or otherwise qualified under State law. The Attorney General shall cause to be transmitted certified copies of the original decree and any supplementary decree to the appropriate election officials of the State, and any such official who, with notice of such original or supplementary decree, refuses to permit any person, named as qualified to vote in such original or supplementary decree, to vote at any election covered thereby, or to have the vote of any such person counted, may be proceeded against for contempt.

"The court may authorize such person or persons appointed pursuant to this subsection to issue to each person named in the original decree or any supplementary decree as qualified

and entitled to vote at an election, a certificate identifying the holder thereof as a person qualified and entitled, pursuant to the court's original decree or supplementary decree, to vote at any such election.

"The court may authorize such person or persons appointed pursuant to this subsection (or may appoint any other person or persons) (1) to attend at any time and place for holding any election at which any person named in the court's original decree or any supplementary decree is entitled to vote and report to the court whether any such person has been denied the right to vote, and (2) to attend at any time and place for counting the votes cast at any election at which any person named in the court's original decree or any supplementary decree is entitled to vote and report to the court whether any vote cast by any such person has not been properly counted.

"Any person or persons appointed by the court pursuant to this subsection shall 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 person or persons appointed by the court pursuant to this subsection shall be fixed by the court and shall be payable by the United States.

"The court shall have authority to take any other actions, consistent with the provisions of this subsection, reasonably appropriate or necessary to enforce its decrees."

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

"When any official of a State or subdivision thereof has resigned or has been relieved of his office and no successor has assumed such office, any act or practice of such official constituting a deprivation of any right or privilege secured by subsection (a) or (b) hereof shall be deemed that of the State and the proceeding may be instituted or continued against the State as party defendant."

The CHAIRMAN. The reason, as I understand it, Judge, why you prefer the voting referee proposal in contradistinction to the Federal registrars proposal is, among other things, that the voting referees proposal would cover the State as well as Federal elections.

Mr. WALSH. Yes, sir.

The CHAIRMAN. And you base the application of the voting referees to State elections on the 15th amendment.

Mr. WALSH. Yes, sir.

The CHAIRMAN. It is a general prohibition against State or Federal action which interferes with the right to vote because of race, color, or previous condition of servitude.

Mr. WALSH. Either the United States or any State interfering with the right to vote. Race or color or previous condition of servitude, I think it is.

The CHAIRMAN. Also, if I understand it, the Federal registrar provision is limited to registration of voters, and it does not concern actual voting.

Mr. WALSH. That is correct.

The CHAIRMAN. But voting referees cover both registration and voting.

Mr. WALSH. Yes, sir.

The CHAIRMAN. And also counting the vote.

Mr. WALSH. Yes, sir.

The CHAIRMAN. As I understand it also, in the case of Federal registrars, for want of a better term, you have the use of, shall I say, "carpetbaggers." You have people who are not necessarily residents of the particular district where the disturbances occur, or the untoward conduct occurs.

Mr. WALSH. I believe it is not necessary, in the bills that have been introduced—I do not know that the Commission directed itself to the problem, but in the bill introduced it is not so limited.

The CHAIRMAN. But in the case of voting referees, it is essential that those who act as referees be from the locale where the difficulties arise?

Mr. WALSH. It is not made essential, but the assumption is that any district judge is going to appoint somebody from his district.

The CHAIRMAN. In other words, a voting referee would be very much like a special master or a referee in bankruptcy, who are usually appointees of the court, which men are appointed ordinarily for the lists that the judge has of lawyers who appear in that court?

Mr. WALSH. Exactly.

The CHAIRMAN. Would you say that the right to vote and the right to register is a controversy before the court under article III of the Constitution?

Mr. WALSH. Under article III, yes, sir.

The CHAIRMAN. Why would you say that?

Mr. WALSH. Well, because the applicant seeks a court's determination as to his right to vote, the other parties to the proceeding, who would be the U.S. attorney, the registrar, and any other persons who were in the original injunction proceeding, have an opportunity to be heard in opposition to the right asserted by the applicant, and the judge makes a determination which is final. This is no mere advisory determination or administrative determination. This is a final determination. And the only way you can go beyond the judge's determination is to appeal through the courts.

The CHAIRMAN. Now, you speak of a pattern or practice which might involve a number of people. Would you say where a number of people are involved it would be also a justiciable question or controversy under article III of the Constitution?

Mr. WALSH. Yes, sir. The justiciability would not depend on the number of people.

The CHAIRMAN. What would you mean by "pattern or practice"?

Mr. WALSH. Pattern or practice have their generic meanings. In other words, the court finds that the discrimination was not an isolated or accidental or peculiar event; that it was an event which happened in the regular procedures followed by the State officials concerned.

The CHAIRMAN. What would be the sanctions or punishments in the event a State official violates the order of the court?

Mr. WALSH. In addition to whatever criminal sanctions there might be, there would be the punishment for contempt which is provided in the Civil Rights Act of 1957, which is a 45-day penalty.

The CHAIRMAN. And they may be involved in a trial by jury if a demand is made, when the punishment is beyond 45 days?

Mr. WALSH. Yes. Noninjury it is up to 45 days, and with a jury I think it can go to 6 months.

The CHAIRMAN. Under the old Civil Rights Act of 1870, an individual could sue, could he not?

Mr. WALSH. Yes; that is right.

The CHAIRMAN. And he still can?

Mr. WALSH. Yes; that is right.

The CHAIRMAN. There is no provision for the appointment of a voting referee in such a suit, is there?

Mr. WALSH. That is right. It is not a class suit in the usual sense. He is suing for his own relief. This is to extend this power or privilege to a suit like that, that we do not think warranted it. Also, we thought as a practical matter it would involve the Congress in a much more difficult debate, with no practical value, because if there is a pattern or practice, the Attorney General or the U.S. attorney is going to address himself to it. So, I believe that where there is any number of persons involved, the litigation will be litigation conducted under 1971 by the Attorney General.

The CHAIRMAN. In all this, must there be, as a condition precedent, a suit started by the Attorney General under the Civil Rights Act of 1957?

Mr. WALSH. Yes, sir, and there must be a finding in that suit of a pattern or practice of discrimination before any of this comes into play.

The CHAIRMAN. Would not each case of qualification to vote be a separate and distinct issue, and therefore, no class or group action would lie.

Mr. WALSH. The class or group aspect is that all of these persons who are qualified to vote have been deprived of their right to vote because of a pattern of discrimination.

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 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.

The CHAIRMAN. Will that colored individual have to go through the normal procedure prescribed by the State before that conclusion can be reached?

Mr. WALSH. Yes, sir.

Mr. HOLTZMAN. Even after a pattern has been established?

Mr. WALSH. Even after that. The hope is that after a court has enjoined a Federal registrar from a pattern of discrimination, he will be fair about it. We virtually do not want one step beyond that which is necessary. All we want is a fair deal to the Negro applicant for the right to vote.

The CHAIRMAN. In any event, he has to go through the normal processes prescribed by the State.

Mr. WALSH. Yes, sir.

The CHAIRMAN. Would you say that the proceeding before the voting referees would be purely ministerial or administrative, or would it be adjudicative?

Mr. WALSH. 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 those 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. HOLTZMAN. 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.

The CHAIRMAN. But each individual will have to indicate and prove he is qualified.

Mr. WALSH. Yes, sir, he would.

The CHAIRMAN. But as far as the discrimination is concerned, the referee would not have to find that each individual has been discriminated against, for example, judge from the general tenor of the evidence that there is a pattern or practice.

Mr. WALSH. 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, that it may be assumed a conclusive presumption or statutory rule, and therefore need not be found in each individual case.

The CHAIRMAN. Would it be necessary for the judge to issue a separate order in each individual case.

Mr. WALSH. I would assume he would issue a supplementary list which would list the applicants who have been before the referee, every so often, and then he would give each individual applicant a certificate of voting qualification so the applicant has this to show and identify himself before the board of elections and before the State registrar or anybody else.

The CHAIRMAN. You use the phrase "clearly erroneous." How do you compare that with the substantial evidence rule?

Mr. WALSH. We took "clearly erroneous" because that is the test now; it is in the rules of civil procedure.

The CHAIRMAN. In other words, one requires more evidence than the other?

Mr. WALSH. Well, that would get over on one of these metaphysical discussions. I guess it does require more evidence than the other, yes.

The CHAIRMAN. In the case of Federal registrars, as I understand it, there must be nine substantiated complaints. Do you know why they selected nine?

Mr. WALSH. No, I don't. I think it was just a figure that came out of some discussion without much scientific basis. I am not saying that critically, but just as a matter of fact.

The CHAIRMAN. Is it conceivable that the Federal registrar plan could apply to both State and Federal?

Mr. WALSH. I think the difficulties which we have indicated where it applies only to Federal elections would be compounded and made infinitely more complex if you extended it to State elections. There, it has no basis in article I. It depends entirely on the 15th amendment.

The CHAIRMAN. Would not the charge be made if the Federal registrar interfered with State elections, that there was undue interference with States rights?

Mr. WALSH. I think so, Mr. Chairman.

The CHAIRMAN. Which is more or less absent in the case of voting referees.

Mr. WALSH. I think it would be less effective, of less practical value, and it would there be supplanting a State officer with a Federal officer. In the Attorney General's proposal there is no supplanting of a State officer by a Federal officer, as long as the State registrar will proceed in accord with the law the applicant has to go before. The applicant only comes back into the Federal court where his case is tried, after an injunction to get registered before the State registrar, and he has been turned down even though he is qualified. Only then does he come back before a Federal officer.

The CHAIRMAN. Is there not another objection to the Federal registrar, at the point that the Federal registrar would determine an adjudicative problem, whether a man shall have a right to register? And should a purely administrative body, like the Commission or a Federal registrar, determine something that is akin to a judiciable question?

Mr. WALSH. Of course, ordinarily the registration is conducted by administrative officers. I do not think that it is ordinarily regarded as a judicial question unless it is put in controversy. Then it gets into a court.

I think what the chairman may have in mind is that the referee's proceeding is entirely embraced within the court, whereas the registrar is outside and free of it completely. And this is a matter of some significance, because even when this proceeding is set up and this order is issued by the Federal court, the State registrar is still a party to that primary action in the Federal court, and if at any time he wishes to assert that this entire proceeding before the referee should come to an end because the pattern of discrimination has ceased, he can come before the court in that primary proceeding and ask that the injunction be terminated and the referee be discharged.

So there is, it seems to me, an infinitely greater constitutional protection in the Attorney General's proposal than in the registrars proposal, where you have a Federal officer operating completely outside the court, with no supervision by the court unless someone starts an action against him.

The CHAIRMAN. 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 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.

The CHAIRMAN. So there are difficulties presented there, at least.

Mr. WALSH. Yes, sir.

The CHAIRMAN. On the question of voting referees, would there be cross-examination, confrontation of witnesses?

Mr. WALSH. Well, before this underlying finding was made by the court that there was a pattern or practice of discrimination, there would be a full trial, as we know it, with confrontation, cross-examination, and all of the other incidents of judicial procedure. It would be tried by a judge the same as any other case tried by a judge.

The CHAIRMAN. If the referee did not comply with those requirements, the judge would send it back and make him comply with them?

Mr. WALSH. Well, the referee does not even come into being until there has been a judicial determination that there was a pattern or practice of discrimination. Then, when the referee comes into being, he is under the supervision of the judge from the beginning to the end.

The CHAIRMAN. Under the Federal registrar arrangement, the decision of the Federal registrar, of course, would be subject to judicial review if it were questioned.

Mr. WALSH. Yes, it would. It would be reviewable the same as an administrative agency's determination is reviewable, and it would be reviewable before the court selected by those opposing the registration.

The CHAIRMAN. You have no doubt that Congress would have authority to supervise the election of presidential electors, do you?

Mr. WALSH. As to whether I have no doubt, there is no determination, there has been no holding that Federal electors are Federal officers. I think there is a high likelihood that that would be the ultimate determination.

The CHAIRMAN. Is there any problem under the 15th amendment in that regard?

Mr. WALSH. No; the 15th amendment applies to all elections.

The CHAIRMAN. Basing the voting referees on the 15th amendment, there would be jurisdiction over the presidential electors.

Mr. WALSH. Oh, yes.

Mr. LINDSAY. Would the chairman yield on that point?

I am not clear on your argument about the registrar proposal. Is it not true that the 15th amendment would also cover the registrar proposal insofar as State elections are concerned, in the event the registrar proposal were broadened to include State elections?

Mr. WALSH. I think the problem you would be confronted with there is the supplanting of a State officer with a Federal officer without a judicial finding that the 15th amendment conditions have been met.

Mr. LINDSAY. I understand. But do you think that that raises a clear constitutional question?

Mr. WALSH. I think it does, yes.

Mr. LINDSAY. How about *Ex Parte Yarborough*?

Mr. WALSH. Is that not a Federal election?

Mr. POFF. Yes, it is, as to the election of Representatives.

Mr. LINDSAY. Is the *Yarborough* case confined to Federal elections?

Mr. POFF. It is confined to the application of article I with respect to the election of Representatives.

Mr. WALSH. There isn't any doubt there is a greater field of action under article I. The reason we were concerned about the Commission's recommendation even as to article I vacancies was that it did not say that a Federal registrar shall take over in specified counties or throughout the country. It sort of left it to the decision to be made upon a finding by a group which was not a judicial group. So, even as to Federal elections, we had trouble.

When you extend that amendment XV, the courts have held that the State election procedure stays in the State's hands, and the only excuse for intrusion of the Federal Government under the 15th amendment is where it is absolutely necessary to correct a vice, a violation of that article.

The registrar's bill does not have anything comparable to a judicial type of finding, that those conditions are there.

Mr. LINDSAY. Assuming the registrar bill had all of the safeguards of judicial review with respect to the findings of a registrar——

Mr. WALSH. And as to each applicant thereafter? In other words, an individual administrative proceeding with respect to each applicant for registration?

Mr. LINDSAY. Possibly so.

Would you think that would cover the constitutional question insofar as State elections are concerned?

Mr. WALSH. Only upon a congressional finding that the conditions were so grave that we had to have that substitution of a Federal officer for a State officer, which the Attorney General's proposal does not have. There is no substitution in our proposal at all.

Mr. LINDSAY. What I am trying to figure out is, what is the authority for making the distinction under the 15th amendment between the referee proposal and the registrar proposal? Again talking about State elections. I want to see if I understand you clearly on that.

Mr. WALSH. Well, the basic distinction is the analog of the due-process problem.

Mr. LINDSAY. You tie in the business of the court adjudication. In other words, you say in the referee proposal you have got adjudication by a court.

Mr. WALSH. That these evils exist; yes.

Mr. LINDSAY. But how do you tie that in with the 15th amendment problem? There is a step there that escapes me.

Mr. WALSH. Let's see if I can spell it out more accurately.

Under the 15th amendment, Congress has the power to enact statutes to prevent racial discrimination in voting. Congress has enacted such a statute, section 1971. Pursuant to section 1971, the Attorney General is empowered to become a party and to prove the existence of a pattern and practice of discrimination.

The CHAIRMAN. That, with the Civil Rights Act of 1957.

Mr. WALSH. Right.

And the court has the power to find such a pattern and to enjoin its continuance.

Now, the Attorney General's proposal can be justified in two ways as an implementation of that power: (1) As a bare facilitation of an ancillary procedure by that court to make its decree effective. The Civil Rights Act does not say the only thing a court can do is enjoin the registrar. It says it can make such other orders as are desirable. And all Congress would be doing in the Attorney General's proposal, really, would be making a statutory presumption to avoid one element of proof, that causal link which is so difficult to prove.

So it could be justified constitutionally that way.

You might also say that Congress has established a right of Negroes to vote under these circumstances without the obstruction of a State administration, and that that right comes into being on a prior finding by a court that this pattern of discrimination exists. So, I think those two ways it can be rationalized.

If you try to rationalize the Federal registrars proposal that way, I don't think it works. There is no judicial finding to begin with, unless you want to make a scrap of the Civil Rights Commission as it now is and construct a new agency like the Federal Power Commission, which is going to have the same cumbersome procedure as an administrative agency, and which is going to be subject to court review in the end, anyhow, and therefore simply double the time involved as to each step of the proceeding, and which cannot protect its witnesses by court powers, which cannot protect its own decrees by court powers, which cannot move until it goes into court and gets an order—all of which is shortcutted and eliminated by the Attorney General's pro-

posal, which brings this whole thing under the protection of the court at the very outset.

The only time you need an administrative agency, really the only reason they were created was to ease the load on the courts. Actually, I don't know if they have ever done that. Whether they have made more trouble than they have eased has always been questionable. But where the court can do it itself by such a simple device, dealing with such simple issues of fact, I do not see the need for the administrative agency.

Mr. LINDSAY. What you are saying is that in any event you are bringing the Federal Government into State elections.

Mr. WALSH. Yes.

Mr. LINDSAY. And the thing that you say controls the constitutional point is the procedural device by which you do that.

Mr. WALSH. I don't know that I even like to say we are bringing the Federal Government into State elections. We are only bringing it in where the State machinery balks.

Mr. LINDSAY. I understand, and I fully agree.

Mr. WALSH. We hope up to the last instant that the State registrar will go ahead.

Mr. LINDSAY. But what you say is that where the action taken under those circumstances by the Federal Government is device A, it is within the 15th amendment, whereas device B, because of its procedure, is outside the 15th amendment. That is the thing I was wondering about.

Mr. WALSH. I say that when the Federal Government takes over under the 15th amendment, I think that at least a conservative constitutional lawyer would have to assume that it has got to meet the same problems in dealing with the State as you would have in dealing with a private person. But you cannot take over a private person's property without ordinary due process.

It may be that a State is entitled to less protection because it is not a person under the 14th amendment or under the 15th amendment. But I think you have got the same factors, and the court is going to have those same factors in mind and is going to measure the intrusion into the State against the need for it and the procedures by which those steps were taken.

Mr. LINDSAY. That is the point: yes.

Mr. WALSH. I do not think a congressional committee or a commission, the Civil Rights Commission, whose procedures are identical with a congressional committee, is in a position to make the findings which justify the intrusion into the State election machinery. All its findings are only for the purpose of recommending things to Congress, calling attention of Congress to facts which Congress can further explore or act upon. But it does not have the power of action itself. It was not designed to have the power of action itself.

Mr. POFF. Will the gentleman yield?

Mr. LINDSAY. Thank you very much.

The CHAIRMAN. Just a minute. I want to get one matter cleared up, if I may, Judge Walsh.

Let us assume an order is issued, say February 1, appointing a referee, and that names of people who have suffered discrimination are appended to the order issued by the judge appointing the referee.

Then on, say, February 10, some individual comes forward and says, "I have been deprived of my right to vote, of my right to be registered." He comes in 10 days after the order is issued by the judge. His name is not on the original order. Can he become part of that proceeding?

Mr. WALSH. Oh, yes. Yes.

The CHAIRMAN. How can he?

Mr. WALSH. If he came in to the referee, he would have to show two things: One, he was qualified, and two, he tried to apply to register. If he had not gone to the State registrar and tried to register, his application would not be accepted.

The CHAIRMAN. But his name does not appear on the original order.

Mr. WALSH. That is all right.

The CHAIRMAN. And there is no evidence that he was a victim of the practice or pattern when the original order was issued.

Mr. WALSH. Well, if you found a pattern and practice against Negroes, and he is a Negro, I think Congress is justified in jumping the gap and establishing a conclusive presumption that that is the reason for his trouble.

The CHAIRMAN. 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.

The CHAIRMAN. That was not in the statute. That is your interpretation of it.

Mr. WALSH. No, I think that is in the statute.

The CHAIRMAN. I beg your pardon; it is in the statute.

Mr. MCCULLOCH. Will the chairman yield?

The CHAIRMAN. I think Mr. Willis asked before. He has been very patient.

Mr. WILLIS. I will yield.

Mr. MCCULLOCH. I would like to ask this question: If the gentleman who has been charged with denying a qualified citizen his right to register and vote and there has been an ex parte hearing and there then follows a report of a referee, which in turn is followed by a supplemental decree, which is then violated by an elec-

tion official, and he is cited for contempt and is punished by order of the court, is it your opinion that the constitutional rights of that person, who is finally charged with contempt and has had a penalty inflicted, has had his day in court, or is it possible that his constitutional rights have been denied him?

Mr. WALSH. I think there was just one step in there that was dropped out.

Mr. WILLIS. All right. Restate it.

Mr. WALSH. In other words, you get the order of the court. Then that order is to be served not only on the State registrar but upon every official who is part of the State elective process. He is on notice that John Smith is qualified to vote, and John Smith has the counterpart of that order, his certificate of qualification to vote. Then, when he goes before an election official and is turned down, I don't think you can speak in general terms as to whether that election official is guilty of contempt of court or not, without having all of the facts spelled out.

If in fact the election official who turns down John Smith is acting in concert with the State registrar who was the defendant in the original case, and who has had notice of all these proceedings—in other words, he is really helping the State registrar defy the court order—then he also would be guilty of contempt.

When you get beyond that, you get into shadowy ground about which I just would not want to generalize.

Mr. WILLIS. Now, Mr. Chairman, would you yield?

The CHAIRMAN. Yes.

Mr. WILLIS. Let me see if I follow the mechanics of how this act would operate.

I clearly understand from your testimony—and that is the way I had read the bill—that before the voting referee comes into being, there must be a litigated matter pending, according to the terms of the bill, "that under color of law or by State action any person or persons have been deprived on account of race or color of any right or privilege secured by subsection (a) or (b) of this section, and that such deprivation was or is pursuant to a pattern or practice," that after that litigation or pending action where the judge so finds, at that point and at that point only he may appoint a referee.

Mr. WALSH. Yes, sir; a referee with these particular powers.

Mr. WILLIS. With these particular powers.

Then this voting referee, however, would have a right to protect, according to the pattern of the bill, not only persons named in that original action but anybody in the area who feels that he is the victim of the pattern.

Mr. WALSH. Yes, sir; anybody who is a member of the same race.

Mr. WILLIS. In other words, we can call this initial action a class action for the benefit of those in it originally, those similarly situated.

Mr. WALSH. In a loose way; yes, sir.

Mr. WILLIS. Let us see what the bill does as to procedure, first.

Section (a) of rule 53 of the Rules of Civil Procedure provides: "The court in which any action is pending may appoint a special master therein."

Could you not have proceeded under that general authority? I take it you prefer to spell it out, rather than relying upon the general

authority of rule 53 that in any pending action the court may appoint a master.

Mr. WALSH. There are three reasons for spelling it out, Congressman Willis: First, that it is helpful to have the steps indicated; the most important is the second, which is the presumption I have described at some length.

Mr. WILLIS. I will come to that.

Mr. WALSH. And the third is that it provides that the master's compensation shall be at the expense of the Government and not at the expense of the parties.

Mr. WILLIS. Then, rule 53(b) provides that "a reference to a master shall be the exception and not the rule."

Mr. WALSH. That is right.

Mr. WILLIS. It further provides that in a nonjury case, a reference "shall be made only upon a showing that some exceptional condition requires it."

Mr. WALSH. That is correct.

Mr. WILLIS. You do not want to be bound by that rule?

Mr. WALSH. No, sir; we don't. We would like to say right here that this is an exceptional condition that requires it.

Mr. WILLIS. And you are familiar with the fact that is under the jurisprudence interpreting clause (b) of rule 53, to the effect that that subdivision (b) of this rule is but an emphatic reiteration of the law——

Mr. WALSH. Yes, sir.

Mr. WILLIS. As the above existed, that references to masters shall be the exception and not the rule?

Mr. WALSH. That is right. That is so the judges would not turn all their work over to the master and go fishing.

Mr. WILLIS. You deliberately want to get away from that and spell it out and make it a presumption that a referee can be appointed as a general rule, rather than the exception.

Mr. WALSH. Yes, sir.

Mr. WILLIS. You are also familiar with the jurisprudence that under clause (b) of rule 53 the adverse party could insist upon a showing that the exceptional situation existed? In other words, he was entitled to be heard before a Federal judge and to attack his finding that an exceptional rule existed.

Mr. WALSH. Yes, sir; and that was because he would have to pay half of the cost of the master, whereas here no one is going to pay the cost of the master except the Government.

Mr. WILLIS. Well, under the bill—I am now referring to page 3, the last line: "Any person or persons appointed by the court pursuant to this subsection shall have all the powers conferred upon a master by rule 53(c) of the Rules of Civil Procedure." You embrace, therefore, a single provision of rule 53, and that is part (c).

Mr. WALSH. Yes, sir.

Mr. WILLIS. Except, however, without embracing it, you rely upon (e) for the justification of a presumption that the finding of the master shall be binding unless clearly erroneous.

Mr. WALSH. Yes.

Mr. WILLIS. That is where you obtained those words?

Mr. WALSH. Yes, sir.

Mr. WILLIS. But that section is not binding, the whole section. Those two words only are brought into play.

Mr. WALSH. That is right.

Mr. WILLIS. Now under litigation before a Federal court, the proceedings are governed by the rules of procedure.

Mr. WALSH. Yes, sir.

Mr. WILLIS. Now, under litigation before a Federal court, the provisions are governed by the Administrative Procedure Act.

Mr. WALSH. Right.

Mr. WILLIS. But in this case you spell out no rules to govern the referee, except that part underscored in your new proposal, saying that the hearing before him shall be ex parte, and so on.

Mr. WALSH. It is not a proposal. It is simply an example of what could be put in there if someone else wished to propose it.

Mr. WILLIS. But, anyway, so far as this referee is concerned, who is appointed to adjudicate or pass upon the rights of parties not before the court originally, the general public who feel that they are under this pattern, you spell out no rule of procedure that obtains before the referee provision, voting referee?

Mr. WALSH. That is correct, as it is now drawn.

The CHAIRMAN. Will the gentleman yield at that point?

Mr. WILLIS. Yes.

The CHAIRMAN. Would it not be possible for the judge to lay down some ground rules there for the referee?

Mr. WALSH. Yes, Mr. Chairman. That was our assumption, and that is why none are spelled out here. We would assume each judge would want to spell that out in his order appointing the referee.

Mr. WILLIS. Coming to such crucial rights, let us take the normal application of rule 53. Frankly, in the press and in the general discussion of the reach of your proposal, I had been led to believe, well, this is the usual thing; we have this masters' proposition in bankruptcy cases, in patent infringement cases, in compensation cases, in difficult and intricate accounting procedures. But now we come to find out that the only thing that your proposal adopts that is comparable to rule 53 is that one spelling out the powers, but beyond giving him the powers of subpena, and spelled out in detail—you give him powers, but you do not spell out the rules of the game before him, and you trust that the Federal judge will do them.

Mr. WALSH. Yes, sir. I say that that is our judgment. Now we are not dogmatic about it, and we recognize that any group of lawyers like this may wish to spell those procedures out. That is quite all right with us.

Mr. WILLIS. That very seriously concerns me. We know that under the Administrative Procedure Act, which governs determinations on quasi-judicial cases before Federal agencies and boards, there is a detailed spelling out that those examiners will protect a man's right to have a lawyer, that the person involved, whether it is an adversary procedure technically or not, is entitled to counsel. When we come to the Rules of Federal Procedure delineating proceedings before the master, we have the same thing, saying that parties who might be involved must be notified, that they shall have the right to counsel, that the person aggrieved is entitled to a speedy proceeding.

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 question 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 Practices 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.

Mr. WILLIS. And that special master is bound by the rules of procedure in rule 53.

Mr. WALSH. There would be no adjudication concerned with the conduct of the election. He would go in there the same as the secretary of a corporation would, and run it. In other words, he would not be conducting an adversary proceeding; and the same where you have a receiver to manage property. For example, if the life tenant is wasting property of an estate, the court can appoint a receiver to run that property. That receiver is not governed by the Administrative Procedure Act. He is not conducting an adversary proceeding; he is conducting an administrative activity to facilitate the order of a court.

I think I may have gotten into this in an answer I gave the chairman inadvertently, that the referee—I guess I did avoid saying that the referee was conducting a justiciable proceeding. He was conducting a preliminary to the justiciable part, which is by the judge.

I just thought we ought to keep that distinction clear. I think the word "referee" may suggest the conduct of a controverted proceeding, when in fact it was not so intended. It would perhaps be better if we called him a commissioner or something like that.

The CHAIRMAN. Will the gentleman yield a minute?

Mr. WILLIS. All right.

The CHAIRMAN. Isn't it the interpretation of the Constitution as to whether a right has been denied someone.

Mr. WALSH. Really, it is simply the implementation of the court's underlying order that this pattern of discrimination shall be terminated.

Mr. WILLIS. And that is what I am addressing myself to.

First, let me say I am not suggesting that the referee should be bound by the rules of administrative procedure nor by the rules of section 53. That is your job. What concerns me here is that in the ultimate, whereas in litigation before Federal courts the courts themselves and, for the guidance of the lawyers, the lawyers themselves refer to

and know the rules of the game under the rules of court and under other proceedings affecting the vast number of administrative agencies, the rules before the examiners are spelled out. What I wanted to know is, did I understand this thing properly, that you trust, of course, sincerely, that the judge will guide the referee?

Mr. WALSH. Yes, sir.

Mr. WILLIS. All right.

Mr. WALSH. But I say we have no objection to something like this underlying portion. (Displaying mimeographed paper.)

Mr. WILLIS. I understand, and we might use the recommendations of that thing if we must act on this bill.

Mr. WALSH. Incidentally, if you think that the standard of 53(e) is too high a standard to give the referee's report under these circumstances, we have no objection to what change you make in that.

For example, if the statute spells out that the proceeding should be an ex parte proceeding, you may want to say that it is not entitled to that protection.

Mr. WILLIS. Now let me see if this job of the referee is so simple as that, that it just implements the court order. I do not understand it that way, and would like enlightenment.

Mr. WALSH. I appreciate the opportunity.

Mr. WILLIS. I am now speaking of persons in the area in the whole county, if you please, who are not parties to that original action. They read about it in the paper, and they see where the judge adjudicated that nine people—if we adopt that figure from thin air like the Commission did—were discriminated against. Then, instead of 9, 900 in the area, seeing that a voting referee has been appointed, want to vindicate their rights that they honestly believe have been trampled upon.

Mr. WALSH. Yes, sir.

Mr. WILLIS. Let us see if this is just an implimentation.

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.

Mr. WILLIS. And that they are qualified voters.

Well, wait a minute.

Mr. WALSH. That they are qualified to vote, I should say.

Mr. WILLIS. Yes, qualified to vote. That is the point, my friend. That is the point.

The 15th amendment talks about disqualification because of racial discrimination.

Suppose a person, a third party, has been denied the right to vote, which is the only thing he has to represent to the referee—not because of racial discrimination, but because he is not 21, is nonresident, or because of other rules that would apply to the white men and everybody else, and then he makes the representation, "I have applied to vote, and I have been denied the right to vote."

Suppose the denial is on grounds other than racial grounds exclusively?

Mr. WALSH. In other words, he is qualified to vote, but he is denied the right to vote? What other grounds are there?

Mr. WILLIS. Well, he may not have been of age.

Mr. WALSH. But if he is qualified to vote that takes care of that.

Mr. WILLIS. Where is that language in the bill?

Mr. WALSH. If you are working on the mimeographed sheet——

Mr. WILLIS. No; I have never read that.

Mr. WALSH. In the McCulloch bill, it is right at the middle of the page 2.

Mr. WILLIS What line?

Mr. WALSH. Line 9.

Mr. WILLIS. All right. Suppose he shows that he is qualified to vote, or he so represents.

Mr. WALSH. He has to prove that before the referee.

Mr. WILLIS. Well, he has to prove that. What about the registrar of voters? He is not entitled to be heard?

Mr. WALSH. Yes, sir; and before this court.

Mr. WILLIS. Well, the bill does not say that. It says, "it shall be ex parte."

Mr. WALSH. No, that is the underlying insert I suggested for consideration. But the underlying insert also provides that before the report of the referee and his findings become final, they be served upon every party to the original action. The State registrar or whoever the State officer was in that original action will be served with these findings. So he not only will know the contention; he will know the finding of the referee in that regard.

Mr. WILLIS. Will he have the right of appearance before the referee?

Mr. WALSH. Not before the referee. Before the court.

Mr. WILLIS. Well, the referee is the one who is going to make the finding, and then his findings are conclusive "unless clearly erroneous."

Mr. WALSH. If you don't like that "clearly erroneous," some other standing can be included.

Mr. WILLIS. My dear friend; I am just trying to understand the bill. There are a lot of things I do not like about this, which you will soon see.

Mr. WALSH. All right; the referee's findings are not conclusive. They are tentative, and they are extended to the State registrar, or whoever the defendant was in the original proceeding, and he has 10 days or whatever the judge wants to give him, to come in and take exceptions to those findings.

Mr. WILLIS. That is, as to those parties to the original proceedings.

Mr. WALSH. Oh, no. That would be as to this new applicant.

Mr. WILLIS. Where is that in this McCulloch bill?

Mr. WALSH. This would all be part of the judge's order.

Mr. WILLIS. Well, does it say that? Does the McCulloch bill say that?

Mr. WALSH. No. The McCulloch bill does not specify this at all.

Mr. WILLIS. That is the only one I read.

Mr. WALSH. All the McCulloch bill does is authorize these special powers to the referee. The control of the referee is left in the district court's hands, the same as it always was, and he has to comply with standards of due process, whether you put it in the statute or whether you don't.

Mr. WILLIS. Well, I would prefer to have it spelled out in the procedure. But we will talk about that.

Mr. WALSH. I would respect that point of view, and it is perfectly all right.

Mr. WILLIS. Now let us turn to the question of submission of certified copies. That is on page 2.

Mr. LIBONATI. May I ask one question here of you, sir?

Mr. WILLIS. Just one question.

Mr. LIBONATI. Is this a hearing officer, or does he just submit a report to the judge?

Mr. WILLIS. Well, he makes a finding which is presumed to be right unless clearly erroneous, and he makes a report to the Federal judge, and the Federal judge is required to review it.

Mr. LIBONATI. But he actually does not hear any evidence; he hears complaints.

Mr. WILLIS. A Federal judge hears the evidence.

Mr. WALSH. It is not a complaint; it is an application to vote.

Mr. LIBONATI. This application to vote is based on the fundamental ground that he was deprived of the vote?

Mr. WALSH. The application to vote is based on two grounds; he is qualified to vote, and the State registrar would not register him, or some similar action.

Mr. LIBONATI. Then, he is not a hearing officer at all. He just accumulates reports and reports to the judge. He does not conduct any hearing.

Mr. WALSH. That is the way I would assume it would work. The judge might want to use the referee in a different fashion, but that is the way it is anticipated it would work where you have a large number of applicants.

Mr. LIBONATI. But he does not make any findings, does he?

Mr. WALSH. Yes; but they are tentative and are then sent to the registrar or whatever State officer was the defendant in the original action, and that officer is given an opportunity to take exception to the findings; and if there is an issue of fact raised by the exceptions, the judge himself can try out that issue of fact or refer it back to the referee.

Mr. LIBONATI. But if he does not call for evidence of opposing parties, then he is just a factfinding person; is that not right?

Mr. WALSH. Yes, a tentative fact-finding person.

Mr. WILLIS. No; a mixed question of law and fact. He has to define qualification, and that really requires a perusal of the law.

Mr. WALSH. That is right.

Mr. POFF. Is that not a judicial determination?

Mr. WALSH. That is a determination that a State registrar makes every day.

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.

Mr. POFF. But, if it is not considered clearly erroneous, it may never be challenged.

Mr. WALSH. That is right.

Mr. LIBONATI. Will you pardon my line of questions?

Mr. WILLIS. Will you defer 1 minute? There is a question right here in this regard on the passage we were talking about.

Referring again to these third parties in the community or in the area who are not parties to that original action, they make application to the referee for what the bill does not say, but application for the right to vote.

Mr. WALSH. Yes.

Mr. WILLIS. That is implied, I take it.

Mr. WALSH. Yes.

Mr. WILLIS. Then, according to your explanation and clear statement of your proposal on page 6 let us find out what this third party has to prove or not to prove to be registered. You say: "It will not be necessary for the applicant to prove anew the existence of the pattern or practice of discrimination which the judge has already found." Meaning in the original action.

Mr. WALSH. Yes, sir.

Mr. WILLIS. "Neither will it be necessary for him to prove that the denial of his right to register was because of that pattern."

Mr. WALSH. That is right.

Mr. WILLIS. 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 casual link."

Mr. WALSH. That is the heart of the bill.

Mr. WILLIS. That is what I understood it to be.

And we are talking about the 15th amendment, which talks about the lack of power of the Federal Government or of the State to deny or abridge the right to vote on account of race, color, or previous condition of servitude, which is in it. But this very thing that the 15th amendment protects, the individual is not required to prove.

Mr. WALSH. That is the purpose of this statute. In other words, that Congress has a duty under the 15th amendment, where an evil exists, where State election laws are so administered that Negroes cannot vote, Congress has a duty to make it possible for them to vote. And if this statutory provision is the only way in which it can be done, or the only effective way in which it can be done, it is appropriate legislation under the 15th amendment, and we say it is necessary for these reasons: First, the inference is reasonable. If he is qualified to vote, what reason is there for denying him the right to vote? And when we know that the very registrar who denied him the right to vote has been party to a pattern and practice of discrimination, what other inference is possible?

Second, it is necessary that Congress enact such a presumption, because it is almost impossible for this poor individual applicant to prove it.

He has to prove the state of mind of the registrar; and the registrar, knowing he will be under threat of contempt, is not likely to be very helpful in developing this line of proof.

Then, of course, the Civil Rights Commission has found—on which I make this finding of my own—that Negroes who have attempted to assert these rights have been subjected to threats of economic pressure and violence.

For all of these reasons, I think this is appropriate legislation under the 15th amendment.

Mr. WILLIS. I understand, and I am not questioning your devotion to protecting the right to vote. And may I say parenthetically, you can go in my district. They vote, and have been voting, so I am not involved in this thing. But we are talking about a proposal.

This is one approach. The Civil Rights Commission suggested another approach, that you are critical of. As a matter of fact, your chief, the Attorney General, has ridiculed it by saying that their proposal was like buying a ticket to the Dempsey-Firpo contest many years ago. You are not only critical of it, but you ridiculed what the Commission does.

Mr. WALSH. I don't think it was ridiculed.

Mr. WILLIS. Now you come with this proposal. What I am wondering is, could you not perhaps find a better way to achieve what you are after, rather than asking Congress to establish presumptions in the fashion that you suggest?

In other words, have you people thought this thing out long enough? How long have you been working on this bill?

Mr. WALSH. I will tell you how long we have been working on it. It goes back probably to before the time I came to the Department. But since the civil rights report in 1959 we have given it a lot of thought, and we respect the Commission for its report and for its suggestion, which has opened up all this line of legislative possibility.

We started off with the Commission's report, which required appointment by the President. We thought it seemed wrong to draw the President into this. Here is a man who is trying to guard the national security, and he has to start worrying about county registrar? So we tried to find a better way. We thought, who is the officer most likely to be respected in the locality in which this problem exists? And we thought of the Federal judge. Then we said, "All right, have the Federal judge appoint the registrar." Then we said, "Well, that will be supplanting a State officer with a Federal officer. Why do that. We will have the Federal judge appoint a special master, or call him a referee, who wouldn't act unless the State registrar has had a chance to act and has refused to act." That is the next step we took.

Then, we said, "How will this proceeding go before the referee? What will the applicant have to do, and how can we make his right to vote effective?"

Well now, the registrar proposal does not deal with the right to vote. That talks about registration as though that were something of value in itself. So we developed the parts of this bill which authorize the Federal judge to send persons to the polling place and the place where the votes are counted, to see that any rights which he would have would be respected.

Then it came to the question, How does this applicant prove his right to vote? Does he have to prove all over again this pattern of discrimination which it took the U.S. attorney probably weeks of preparation to prove? Or will that make his right to vote effective?

Here the white people are. They are going into the State registrar's office. All they do is fill out a form and answer a few questions, and they vote. Are we doing anything for this Negro if we say, "You go before a voting referee, and you prove your case from beginning to

end. You prove a pattern of discrimination. You prove that you personnally are a victim of that pattern of discrimination." Is that going to get him a chance to vote? We don't make the white people do that. Why do we make the Negroes do it?

So we began to think: What can Congress do to be fair about this, to minimize the amount of intrusion into the State administration and yet make effective the 15th amendment in these sections?

And this was the very best we could do. We would require the Negro to prove every step of his qualification to vote: his age, his residence; if the literacy is required, to prove his literacy; if he was to understand the Constitution, let him answer the question as to the Constitution, it is a valid State provision. And if he has to have somebody identify him—some States, like Louisiana, require that two registered voters identify the new applicant—let him be identified by two registered voters. But here let me point out the referee will have the subpena power to help this man get his two witnesses if he needs them.

We thought that all over, and we came to this one hurdle: Should he be required to prove in each individual case he personally was discriminated against? And we concluded that burden of proof was too difficult under all these circumstances; and indeed the answer to that link and proof was so obvious from the previous pattern of discrimination that we could ask Congress to enact this conclusive presumption at the benefit of the applicant.

Mr. WILLIS. Judge, I appreciate your concern and your sincerity.

Mr. WALSH. I just appreciate the pressure of time, and if I talk rapidly, that is the only reason for it.

Mr. WILLIS. That is all right, and if I seem to be firm in my questions, it is because I have strong feelings on the constitutional point.

Mr. WALSH. I respect you as a constitutional teacher and as a student of jurisprudence.

Mr. WILLIS. Thank you very much.

But now you have talked about a pattern that has been established. Now, the question that comes to my mind is this: You want Congress to embrace the fact that once the pattern has been established—and that is going to be a law on the books for a long time—people can individually indicate their rights to vote without proving individual discrimination. Suppose the pattern changes?

Mr. WALSH. The court can stop this the next day. As a matter of fact, that is the beauty of this proceeding. It is all in the hands of the judge. I think it is a very well thought out bill.

The State registrar, the moment he claims that that pattern no longer exists, can move before the court for the termination of this entire proceeding. It never gets out of the hands of the court. Suppose this pattern comes to an end. I certainly don't think the court is going to run up the expense of maintaining a voting referee, or that we are going to keep voting referees around when State registrars can perform this function. Indeed, if the State registrars will register these applicants, none of them will ever get to the voting referee.

Mr. WILLIS. Would not a wise improvement be—I am thinking out loud—to have the court decree itself, saying that it would be in existence for 6 months or 1 year, and that proof or showing of continuation of the pattern——

Mr. WALSH. It is entirely in the hands of the court.

Mr. WILLIS. Well, I think these hearings are going to produce some good. We may come out with some good amendments.

I have just three or four more questions.

You talked about the service of orders on the people affected. That language occurs at page 2, line 22: "The Attorney General shall cause to be transmitted certified copies of the original decree and any supplementary decree to the appropriate election officials of the State, and any such official who, with notice of such original or supplementary decree, refuses to permit any person, named to vote in such original or supplementary decree, to vote at any election covered thereby, or to have the vote of any such person counted, may be proceeded against for contempt."

Mr. WALSH. Yes.

Mr. WILLIS. Tell me in a few words how that is going to work, the service of this order; upon whom, and all that.

Mr. WALSH. It would depend upon the different States. There would be different officers involved. The decree would be served on the officer responsible for the registration of voters, upon the officers responsible for the supervision of voting, and upon the officers responsible for counting the votes and making the canvass.

Mr. WILLIS. All right.

Now, the bill, page 3 at line 6, provides that the judge may issue to the person allegedly aggrieved a certificate entitling him to vote, in effect.

Mr. WALSH. Yes, sir.

Mr. WILLIS. That certificate, then, is the authority of that person to cast his vote? He presents it to the commissioner of elections, as we call it in Louisiana?

Mr. WALSH. Yes, sir. The Commissioner of elections would see two documents: One, he would have been served with a copy of the supplementary decree of the court in the first place, which would include this voter's name; and the voter himself would have a qualifying voter's certificate to identify himself.

Mr. WILLIS. In other words, he would have the certificate from the Federal judge or the referee, a form certificate, "This is to certify that John Jones has been found to be qualified to vote, and his right to vote shall be respected at the election coming on the named date," or within a certain period of time.

Mr. WALSH. Some form comparable to that.

Mr. WILLIS. All right. Then that person holding that certificate would present himself at the voting polls and tell the election commissioner, as we call him in Louisiana, "Here is my right to vote. I want to vote." In effect, is that not about it?

Mr. WALSH. I don't know what Louisiana provides as to the physical registration of voters. He would have first been registered. He would have gone back to the State registrar to begin with, with this qualifying certificate. I don't know how you would transmit it to your registrars, whether you have a centralized register.

Mr. WILLIS. Under Louisiana law, we have what we call election commissioners. All candidates for public office submit a list of their commissioners and endeavor to be just as to all applications in the

election. They choose five election commissioners, with an idea that everybody should be justly represented at the polls.

Mr. WALSH. At each polling place you would have five people.

Mr. WILLIS. At each polling place, five people, plus a watcher, who is a deputy sheriff, to maintain the peace.

Mr. WALSH. Yes.

Mr. WILLIS. The election commissioners must have before them a list of qualified voters.

Mr. WALSH. They have a bound register?

Mr. WILLIS. Well, it is a photostatic copy, or some such thing, of the records of the registrars—no, it cannot be. It is the account of registered voters, containing all names by alphabetical listing. If I am in precinct 1 or ward 1, the registrar of voters must go over his books and pick out all voters entitled to vote in precinct 1 or ward 1, and then he gives to the election commissioners a list of qualified voters.

Mr. WALSH. I see.

Mr. WILLIS. It is the duty of the election commissioners not to permit anybody to vote unless his name appears on that; otherwise, he goes to jail.

Mr. WALSH. I would assume his name would be on the list. Otherwise, the State registrar would be in contempt. In other words, as soon as he gets his qualification order from the judge and the State registrar is served with the order by the judge, the first step, I would assume, would be to go back to the State registrar and have his name entered in the county register. Therefore, his name would be on the list sent out by the commissioners of election.

Mr. WILLIS. Assuming for some reason, mechanical or deliberate, the list of people with these Federal court certificates did not appear on the registration list which is the guide of the election commission, what will they do? And assuming also that these election commissioners have been served with a court order, what are they going to do? Go to jail under the Federal contempt law, or go to jail under the State law?

Mr. WALSH. I think each case is going to have to be decided on its merits.

Mr. WILLIS. I just want to see something worked out that will be practical.

Mr. WALSH. No one is going to jail for any unintentional act. The very authority of contempt includes that. So I don't see how this situation would arise unless somebody was guilty of contempt, before it got down to the commissioners of elections.

Mr. WILLIS. In other words, the registrar of voters, countywide, would have been ordered to prepare his list and include those people on that registration list?

Mr. WALSH. Yes.

Mr. WILLIS. I see.

Mr. WALSH. If they don't do that, they are the people who have to worry about the contempt.

Mr. WILLIS. My final question, and this is a closer one to the election commissioners being in trouble under State law: Page 3, beginning at line 13, provides that "The court may authorize such person or persons appointed pursuant to this subsection (or may appoint any

other person or persons), (1) to attend at any time and place for holding any election at which any person named in the court's original decree or any supplementary decree is entitled to vote and report to the court whether any such person has been denied the right to vote, and (2) to attend at any time and place for counting the votes" and son on, and to see to it that those votes are counted.

Under State law—and I would imagine that this is true in New York as in Louisiana or anywhere else—the election commissioners, with the help of the watcher or deputy sheriff, or whatever officer is named to see that election laws are respected must bar people around the polling places, must rope off a certain area where no one can intrude. Certainly, it would be a clear violation of State law for any person to look over their shoulders to see that this or that persons' vote is counted.

I am not being ridiculous.

Mr. WALSH. No.

Mr. WILLIS. I am wondering, for the protection of these election commissioners, under pain and penalty of jail sentence in the Federal jails or State jails, which will they respect? State law or the Federal certificate of voting? That is a close one.

Mr. WALSH. I think the Federal law would prevail.

But also, you will notice, this is permissive. This is something the judge can do if he thinks necessary, and he will not if he doesn't.

He is a Louisiana Federal judge, he is going to know the State law and respect the policy of the State law, and he knows the problem he is trying to overcome, and he will decide whether he needs to send somebody to that polling place or not.

The CHAIRMAN. Well, Judge, under the supremacy clause, this would not be such a close question. The State law would have to yield to the Federal law.

Mr. WALSH. I think there is no doubt about that. The only question would be whether this was an unnecessary intrusion of the Federal law into the State administrative procedure. And I think that this is a reasonable proposal within the contemplation of the 15th amendment.

The CHAIRMAN. I would like to ask this question.

Let us assume that a State registrar has resigned who was the defendant in the original proceeding.

Mr. WALSH. Yes.

The CHAIRMAN. The proceedings were started against him, and the order was issued against the man who has resigned, or the man who is dead after the order was issued. What happens then?

Mr. WALSH. There is a case now pending before the Supreme Court that deals with that problem in Alabama, *United States* v. *Alabama*. The practice where a State officer is the person who is responsible, or who is participating in this pattern and practice of discrimination, would be the practice of the Department of Justice to sue the State as one of the parties to the lawsuit. So the State would always be present as a party, and the attorney general of the State would be served with all the processes, as well as the State registrar.

One of the provisions of this bill——

Mr. WILLIS. The very last one.

Mr. WALSH. Expressly gives that privilege, although we think that we already have that under existing law.

The CHAIRMAN. Counsel wants to ask you a question.

Mr. FOLEY. Judge, let us take Mr. Celler's proposition as you heard it. You stated the last section would take care of the Alabama situation, where you substitute the State for persons.

Mr. WALSH. Yes.

Mr. FOLEY. Now, take the next step, if possible. What would happen if the new registrar was appointed to succeed the deceased, and then a Negro applies for the first time to the new registrar, tries to register, and is rejected? Would that presumption which flows from the finding in your original action of a pattern of discrimination cover the new registrar under this new application?

Mr. WALSH. Yes, it would, unless there was some proceeding brought before the court to vacate the injunction and vacate the order because of the death of the previous registrar.

In other words, the order of the court would apply to the registrar and his successor, and any other agent of the State who——

Mr. FOLEY. Even though he was not a party in the original action nor named in the order?

Mr. WALSH. Yes. The identity of the registrar is secondary to his State office. He is in here because he is a State officer, and he is abusing the rights of a State office.

Nobody is coming before this voting referee who has not been first over to the State registrar and tried to get registered. If he is qualified and registered, there is no problem. It is only when he is qualified and not registered that we ask that Congress find that that pattern is continuing in one form or another, and that is the only logical explanation of why he was denied registration.

The CHAIRMAN. In other words, the order would be against a certain registrar and his successors, and so forth.

Mr. WALSH. And the State of Alabama, or whatever State was involved.

Mr. MEADER. Mr. Chairman.

I am concerned about these orders running against persons who are not parties to the action. Let us assume that there has been found to be a pattern or practice. Is that confined to a geographical area or a particular subdivision of the Government?

For instance, let us take my community. We have the city of Ann Arbor, and the township of Ann Arbor and other surrounding townships. Let us assume that some case were brought against the city clerk of the city of Ann Arbor, and he was a defendant. But the clerk of the township of Ann Arbor was not a defendant, although the city and the township are contiguous.

The pattern or practice would not extend beyond the individuals who are party to the action: is that correct?

Mr. WALSH. Beyond the scope of the office of the persons who are party to the action. In other words, if the clerk of the city of Ann Arbor was the person whom the judge found had been a participant in this, and it was the power of that office which was used to further a pattern and practice of discrimination, the order would only apply to that particular jurisdiction and would not apply to the town.

Mr. MEADER. So that if a person came before a referee in a case in which the city of Ann Arbor was the only defendant, or the clerk of the city of Ann Arbor, he could not come in to this referee, assuming

that one had been appointed, and say, "I live in the township of Ann Arbor, and I have been discriminated against because of this same pattern."

Mr. WALSH. He would have to get the U.S. Attorney General to start a new action with respect to the town of Ann Arbor.

Mr. MEADER. So the whole effect of this referee provision is confined to the parties to an action; is that correct?

Mr. WALSH. Confined to the parties to the original action. But those are the parties in their official capacity. In other words, the parties to the original action would be in your case, the city clerk of Ann Arbor, his successors, and so forth.

Mr. MEADER. And any of this business of serving the supplementary order would affect only parties to the original action?

Mr. WALSH. Yes, sir; and their successors in office.

Mr. MEADER. Well, I presume that when you commence the action you try to make it effective as against successors to the actual individuals who are defendants.

Mr. WALSH. Yes, sir. What we did was sue in Alabama, which is the only case we have had like that. We sued the State of Alabama and the registrar of, I think, Macon County, and then other individuals who were also involved in the proceeding as defendants.

Mr. MEADER. One other question bothered me in this additional language you suggested, where you specify that it should be an ex parte hearing before the referee. Are you concerned that the ex parte hearing may result in a denial of due processes against the party to the action when he is brought in for contempt, on the ground that the finding of fact which is reviewable by the court was made ex parte, and he was not given an opportunity to present evidence, cross-examine witnesses, and appear with counsel, or afforded the other protections, in the proceeding where the original fact was found?

Mr. WALSH. The fact is not found with finality until the judge so finds it. So he gets notice and an opportunity to appear before the judge. And if he raises an issue of fact——

Mr. MEADER. Let us say his appellate rights are protected but not his rights in the proceeding before the tribunal of first impression.

Mr. WALSH. I don't think it was contemplated that this would be in an appellant sense. The action before the judge is the original action of the court. He is not merely reviewing a referee's determination; he is inviting exceptions to it. And if there are issues of fact raised by those exceptions, he can try out those issues himself.

There you would have the kind of hearing that we are accustomed to in court, with cross-examination, confrontation, and everything else.

Mr. MEADER. Would it not be a comparable situation if an examiner of the National Labor Relations Board, for example, should hold a hearing and have a record made, receive evidence, with only the complainants present, and the person proceeded against was excluded from the original hearing, and then the only right that the person proceeded against would have would be in filing exception to the findings in the trial examiner's report?

Mr. WALSH. So far, the procedure is comparable. But then you get to the power of the district judge, who is running this whole thing and is setting up the ground rules. He will grant a hearing de novo

if he thinks there is any issue of fact. I am not sure that can help in the example you gave of the National Labor Relations Board.

Mr. MEADER. Let me just give an example. I always have to think in terms of practical situations.

The city of Ann Arbor is the seat of the University of Michigan, and there are 9,200 students there this year who have already received their baccalaureate degree. Many of them are married, most of them are over 21, and many of them have applied to vote in the city of Ann Arbor, though they may come from Syracuse or anywhere else.

We have had difficulties. Our city attorney has had to deny applications to register and vote. There is a very difficult question of residence, whether the residence requirements of the Michigan statute have been complied with, whether this person intends to make Michigan his domicile and live there, or whether he is just there getting an education.

I would say that is a difficult question of law and fact. And you are having the Federal referee in this case pass upon the application of State law, in a sense supervising the determination of the State official who is also bound to apply the State law.

It strikes me that where you have a proceeding which sometimes involves very difficult questions of law and fact, whether actual residence has been established, that where you deny those who take a different view than the applicant the opportunity to present their evidence and to challenge the evidence of the applicant in the fact-finding processes, you may be denying that person, who will be the one against whom the contempt proceedings will run, his day in court.

Mr. WALSH. Let me answer you this way. I understand the point which you raise.

The parallel here before the referee, I would suppose, in most cases where a Federal judge set up this sort of machinery, the parallel would be to what happens before the State registrar. When these people in Ann Arbor come before either the city clerk or whoever the appropriate State officer is, there is no one there to controvert their issues. There isn't a contested hearing before the State registrar or the county clerk. They act ex parte, and they register or deny registration. The controversy begins before the judge when someone challenges the act of the county clerk or the State registrar or, in our case, the voting referee.

When that is challenged an issue of fact is raised, the whole thing will be fought out before the judge, unless he wants to refer that particular controversy back to the referee, in which case he would then require that it be fought out in the way a fact is usually decided in court, with notice and opportunity to be heard, and so forth.

Mr. LINDSAY. Would the gentleman yield?

Mr. MEADER. Let us assume a student applied to the city of Ann Arbor and he is refused the right to register. He has a remedy under the State law through mandamus or some other kind of court proceeding to test the correctness of the decision and the application by the law of those who are doing the registration?

Mr. WALSH. Yes, sir.

Mr. MEADER. In a sense, when he goes to the Federal referee instead of going through whatever State procedure there may be, he is electing to go to the Federal referee and asking for court action to compel the registrar to enter his name on the election rolls.

Mr. WALSH. The answer is: He is asking for court action as far as the referee is concerned in the first instance. But it is the administrative type of action in which a court officer serves in many areas as a receiver of property or as the conductor of a corporate election. It is that type of action he is asking for in the first instance. He says: "I have just been across the street, and I am qualified to vote, and they slammed the door in my face and said 'get lost.'"

Mr. MEADER. Suppose he goes into a State court for redress against the clerk who refused to register him. The clerk will be a party to that action. He will have all of the rights of due process that are accorded to every litigant. But if he goes instead to the referee appointed in the district court case, the clerk will be denied the right to appear and to appear with counsel and present evidence and cross-examine in the referee's factfinding proceedings.

Mr. WALSH. I think the difference perhaps between us comes in comparing the Federal voting referee to the State court. It is more closely comparable to the county clerk. In other words, the referee will do the work which the county clerk should have done under State law. Again, just as the county clerk would be a party to any proceeding before the State court in which his action was challenged, the State official who was a party to the Federal action will have a full opportunity to be heard before the judge, if he wants to challenge the action of the voting referee.

Maybe I could show it physically better [drawing chart].

[Displaying chart.] In other words, your State registrar is here, and you can appeal from him to the State court. Now, the voting referee is not up here; he is down here, too. The fellow goes across the street to the voting referee, and then if he doesn't like what he does, he goes up to the Federal court and fights it out there.

Mr. LINDSAY. Will the gentleman yield for a question?

Mr. MEADER. Yes.

The CHAIRMAN. I hope it is just one question.

Mr. LINDSAY. Yes; this is just one question.

You have said "if the State registrar wants to challenge what was done." At what point in the language of the bill does he do that?

Mr. WALSH. As the bill is now drawn, Congressman Lindsay, that is entirely up to the judge's order. The judge can provide for a hearing on notice for the referee, or however he wants it done. In the example which we have shown here [showing mimeographed sheet] of possible procedural implementation, he would not challenge it before it gets before the Federal district judge.

Mr. LINDSAY. You mean on a contempt order?

Mr. WALSH. No; on exceptions to the referee's report.

Mr. LINDSAY. This is the same question and I am through, Mr. Chairman.

What happens in this case: Let us assume the man who complains he has been denied the right to vote has been denied the right to vote on legitimate grounds. He can't read or write, he doesn't live in the area, he is the wrong age, and a few other things. He comes in to the referee who has previously found "a pattern or practice of voting deprivations."

Mr. WALSH. And he lies to the referee.

Mr. LINDSAY. Yes; he lies and says, "I have been denied the right to vote, and I am qualified." The referee says, "OK," and puts him down.

Mr. WALSH. This could happen before the registrar, too, you understand.

Mr. LINDSAY. That is right.

Mr. WALSH. It is exactly the same problem.

All right. But here the referee then makes a tentative finding, which he sends up to the judge, and a recommendation that the man be qualified. The judge or the referee, or whoever the judge orders to handle this part of the machinery, will give notice of this to the State registrar, or whoever is the State officer involved. If you are looking at page 2 of the mimeographed material, you will see that beginning in paragraph 2, at that point your State registrar, who knows that this fellow has lied about his age, will file an exception to the voting referee's report in which he said, "I except to the finding as to John Smith on the ground that he is under age." Then, if John Smith wants to go through with it and says, "I am over 21," and the registrar wants to contest it and say, "He is under 21," the court is faced with an issue of fact, on which they will call witnesses just as in an ordinary trial.

Mr. LINDSAY. Should not the McCulloch bill have some sort of amendment in there spelling out his right to file exceptions?

Mr. WALSH. Under due process, you could not do anything else.

We have no objection to such an amendment, and that is why I drew this up, as an illustration of what could be done [showing mimeographed paper].

Mr. WILLIS. I have just two questions.

In many counties there are as many as 50 or 100 precincts, voting places?

Mr. WALSH. Yes, sir.

Mr. WILLIS. In order to carry out attendance requirements, would the judge have to appoint that many people?

Mr. WALSH. It would be entirely up to him, as to how he wanted to do that.

Mr. WILLIS. But you could have 50 or more?

Mr. WALSH. He could.

Mr. WILLIS. Not could. It is in the bill. It is permissive that you could have as many as 50 or 100 or more federally appointed people on election day in each voting place.

The CHAIRMAN. Not in your State.

Mr. WILLIS. Well, where the act is applicable.

Mr. WALSH. The answer is that that could happen.

It would depend entirely on how many persons there were involved, or whether the voting referee himself could check on any complaints he had from the people who had been registered through him.

Mr. WILLIS. These people who would be watching as to whether votes had been properly counted or not, I cannot follow that. What happens to the Australian ballot? A person with a certificate from the judge, let us say, is on the list and he votes. The ballot is in there. Is it going to be pinpointed?

Mr. WALSH. Congressman Willis, this is permissive to the judge. I would assume he would tailor his order to the law of the State in which he acted.

Mr. WILLIS. Well, it is the law of the United States, is it not, that in order to see whether a vote is properly counted, it must be marked or pinpointed, and when he comes to that vote, he looks over the certificate, looks over the ballot, and says, "Well, have you properly counted it?" And he must take a look at those ballots to give meaning to this provision, if he votes.

Mr. WALSH. I don't think it would have to go that far, Mr. Willis.

Mr. WILLIS. Well, how is he going to report? And he is ordered to report back to the Federal judge: "* * * and report to the court whether any vote cast by any such person has not been properly counted."

Let us say the judge uses discretion and orders these people to be in that county or in any particular voting precinct, and he is ordered to make that report to the judge. How is he going honestly to make a report to the judge that the vote of Mr. John Brown, and all other similar cited votes, have been improperly counted?

Mr. WALSH. I don't think the judge's order would so require. If you got a complaint that "they took my ballot and threw it out the back window, and it is lying in the backyard," that might be the kind of thing you could report on. But where you vote on a machine, the votes are lost right in the machine. The judge knows that, and is not going to make a foolish order.

Mr. WILLIS. I know that; but why have a foolish bill?

Mr. WALSH. Well, I don't know. The bill might not be so foolish in some areas.

The CHAIRMAN. Mr. McCulloch.

This will the last person to ask questions.

Mr. MCCULLOCH. This will be a statement rather than a question.

We have now been in session more than 3 hours. I think the type of questions that have been propounded to the witness, the very learned answers that we have had from him, and the indecision that still remains in the minds of some members and some of the staff, is evidence enough, if any evidence were needed, of the necessity for having some hearings on this most important proposal.

However, I want it unmistakably understood that I did not suggest hearings for the purpose of delay, and in accordance with the discussion earlier today, when we were entertaining the motion of the gentleman from Louisiana and the substitutes and the amendments thereto, I hope that we will proceed to final hearing without unnecessary delay. Although this is the week of Lincoln's birthday and it is understood that many members are or will be back home, I am ready, willing, and anxious to stay here and have the hearings which will bring this bill to a final decision by the Judiciary Committee within the 7-day period.

The CHAIRMAN. The 7-day period?

Mr. MCCULLOCH. Or within the term "within a 7-day period." That is my statement.

Furthermore, I hope that these hearings will not be seized upon by anyone as an excuse for unnecessarily delaying the Celler bill which is before the Rules Committee, which had so long and so careful a hearing before this committee.

(The statement of Lawrence E. Walsh follows:)

I have been asked this morning to explain Attorney General Rogers' proposal for the use of U.S. voting referees as an instrumentality for the elimination of racial discrimination in voting.

According to the report of the Civil Rights Commission, in certain areas racial discrimination permeates the administration of State election laws. In these areas the number of Negroes registered to vote is far fewer than would be expected from their proportion of the population. In addition, the report gives harsh examples of the administrative harassment which has blocked the efforts of Negroes who try to vote.

Confronted with the problem of State administrative discrimination against hundreds of persons, the Commission recommended that some alternative type of registration procedure be devised through which those persons could establish their right to vote. Although the Commission itself did not submit any proposed bill for the Congress, a number of bills to implement its recommendation have actually been introduced. Most of the bills propose that in areas in which the Civil Rights Commission finds that persons have been deprived of the right to vote because of their race or color, the President designate a Federal administrative official to be a voting registrar with power to register voters for Federal elections—the election of U.S. Senators, U.S. Representatives, and electors for President and Vice President.

It is the view of the Department of Justice that those proposals are inadequate for the following reasons:

1. There is a constitutional question as to whether the present procedures of the Civil Rights Commission are adequate to support a determination which would in whole or in part supplant a State election officer.

2. If the form of the Commission and its procedures are altered to assume the traditional pattern of administrative agencies, this new function will inevitably weigh down and subordinate the present objective of the Commission which is to gather facts to serve as a basis for congressional action in this field.

3. The relief contemplated would merely extend to Federal elections. Even if effective, the invaluable right to vote for State officials would be lost.

4. The persons who registered before the Federal official would in all probability never be able to vote at all. The ballots provided on election day would almost always be consolidated ballots for both Federal and State offices. A person authorized to vote by a Federal registrar would not be authorized to vote for State offices. Those State election officials who are not in sympathy with the program may be expected to find ample excuse for confusion.

5. At the very best there would be segregated voting. The Negro would not vote at all unless there were made available to him a separate Federal ballot or a separate vot-

ing machine. Thus, the ballot of every Negro registered by a Federal registrar would be so clearly identified that for all practical purposes his ballot would not be secret.

6. There would be no effective method for protecting a federally registered person in his attempt to vote. Even though interference with the exercise of this right is a Federal crime, it is unrealistic to expect successful prosecutions for such a crime before a jury drawn from an unsympathetic community.

7. This right to vote would be exposed to restraining orders incidental to State court proceedings commenced on the eve of election and not concluded until it was too late to vote.

8. Finally, whatever type of administrative action is devised, it must be expected that it will not become effective until reviewed by the courts. There is no reason to resort to this doubly time-consuming administrative process when the courts themselves can be equipped with the means necessary to grant effective, expeditious relief.

In order to devise a plan free from these objections the Attorney General has recommended that Congress authorize a Federal judge, after finding the existence of a pattern or practice of racial discrimination in voting, to appoint an ancillary officer to be known as a U.S. voting referee who will be available for the prompt registration of Negroes who can show (1) that they are qualified to vote, and (2) that they have attempted to exercise that right but have been frustrated by State officers. A key feature of the Attorney General's bill is that where a pattern of discrimination against Negroes has been found, a qualified Negro who has been deprived of the right to vote is conclusively presumed to have been so deprived because of the existence of that pattern.

The way it is anticipated that this proposal will work is as follows: The Attorney General under section 1971(c) of title 42 U.S.C. will prove before a Federal court the existence of a practice or pattern of discrimination in a particular area. The court after finding that this pattern exists will enjoin its continuance. As incidental provisions of its order, it will appoint a person or persons to serve as voting referees. In its order it will detail the procedures which those referees are to follow.

The Attorney General's proposal does not contain any rigid set of procedures but does provide for the essential steps which must be taken. Assuming that Negroes are the race against whom the pattern of discrimination is found, it is contemplated that the referee will hear promptly any application by a member of that race. If he can prove ex parte (1) that he is qualified to vote, and (2) that he has tried to comply with the State's procedures and that he has been unable to so qualify because the State registrar denied his application, or refused to act upon it promptly, or made himself unavailable to hear the application, the referee will so find and recommend to the judge that he be ordered qualified to vote.

It will not be necessary for the applicant to prove anew the existence of the pattern or practice of discrimination which the judge has already found. Neither will it be necessary for him to prove that the denial of his right to register was because of that pattern. 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. Such a procedure is clearly appropriate both as a statutory means of enforcement of the 15th amendment and as legislative facilitation of a court's ancillary procedures for the enforcement of its own decrees.

After the referee has heard the voter, he will make his findings and recommendations to the judge. The judge in his order will have provided for notice to the other parties of the action and for an opportunity for them to be heard in opposition. This would ordinarily be by serving upon the State registrar and the U.S. attorney and other appropriate parties to the original action the report of the referee and an order to show cause on a specified date why the persons named in the report should not be authorized to vote. On the return date unless the papers filed in opposition raise a substantial issue of fact there should be no need for a hearing in which the applicant would be required.

It is expected that the judge will provide for a swift sifting of captious objections in the same way in which courts eliminate frivolous contentions by pretrial proceedings or by summary judgment. Here the issues will ordinarily be so simple that a judge should be able to act on a large number of applications at a single hearing and upon short notice.

With respect to literacy qualifications, or the explanation of the meaning of constitutional provisions, as required by some States, there will be no need for the applicant to appear before the court. His answers to the referee will ordinarily not be subject to dispute; their adequacy may be a matter for argument between counsel but there will be no occasion to require the applicant to submit to further examination.

Finally, in those areas in which the State law requires identification by already registered voters, the court or the referee may use their subpena power to compel the attendance of witnesses.

After the appropriate parties have had an opportunity to be heard in opposition to the findings and the recommendation of the voting referee, the judge is required to ratify his findings unless they are clearly erroneous and to issue a supplementary decree which will order that the named persons be permitted to vote and that all State action incidental to the exercise of this right be taken by the appropriate State officers.

The voter will be given a certificate of voting qualification and the judge may direct the voting referee or such other persons as he deems necessary to attend the polls to see that the voters named in the order are not defeated in their efforts to exercise the rights which the court has by its decree established.

It is also required that the Attorney General cause a copy of the order of the court to be served upon every election official whose acts are necessary to make effective the right to vote of the persons named in the order. In this way the exercise of this right is sheltered from beginning to end by the protection of the Federal court. Anyone who knowingly attempts to thwart the court's order risks the penalties of contempt of court. Further, there will be no excuse for intrusion by any State court under these circumstances. Any effort by it to stay the exercise of the right granted by the Federal order would itself be appropriately subject to stay by a further Federal court order.

It is thus believed that, recognizing the immense difficulties of compelling unwilling State officers to comply with the 15th amendment, the proposal of the Attorney General is the most effective that could be devised to meet this problem. Any effort to establish some system for Federal action outside the Federal courts will put in the hands of the opponents of Negro voting a far greater choice of time and forum in which to entangle the rights of the hopeful voter.

The Attorney General's proposal has the full and unqualified support of the administration. It is believed that it is an effective answer to the problem and the best so far devised for the following reasons:

1. Its control lies in the hands of the local Federal judge. He is a person who may be expected to enjoy community respect and to be fully familiar with the exact conditions of the problem to be overcome. Further, as a judge, his actions, and the actions of the referees he appoints, and the reasons for these actions, are all matters of record explainable to the community and directly reviewable by the appellate courts.

2. Because the court itself will be overseeing the implementation of its own decree, there will be no conflict of agencies or duality of responsibility. The referee will be someone in whom the court has confidence and to whom the court will be approachable for instructions and action.

3. The referee and the persons named in the court's order will be protected by the court's power to punish for contempt, a protection which no administrator or administrative agency can give.

4. The proposal presents no constitutional problem. The powers granted to the referee are based upon a judicial determination of a pattern or practice of racial discrimination in voting. The finding in turn is based upon a court-conducted proceeding in accordance with familiar judicial procedures.

5. The inevitable delay required for court tests of new legislation should be shorter than that which would be required by some new administrative system. Not only are the possible questions which may be raised fewer and simpler, but the Attorney General's proposal would be a mere implementation of a section (42 U.S.C. sec. 1971(c)), the constitutionality of which is right now under consideration by the Supreme Court.

6. The Attorney General's proposal does not permit Federal intrusion into State election machinery in any place except those very areas in which a pattern or practice of racial discrimination is a judicially proven fact.

7. Finally the Attorney General's proposal will protect the right to vote in State as well as Federal elections. It gives a broad sweep to Congress' responsibility under the 15th amendment.

State elections must be included in the relief given by Congress for many reasons; we cannot tolerate Jim Crow at the ballot box. It would be ironic indeed if while Federal courts assert the illegality of segregation in public schools, in railroad waiting rooms, in parks, and on public golf courses, it is by Federal legislation expressly condoned in the voting place. State elections may be less dramatic but they can in reality be more important than Federal elections. They decide who will run the schools and who will enforce the laws, who will select the juries, and who will be the local judge. It is only in the right to vote in these elections that there lies the kernel of hope for the ultimate eradication of racial segregation and the long awaited fulfillment of a basic promise that the protection of the law shall be equal to all.

Mr. McCulloch. Mr. Chairman, may I commend the deputy general for his very excellent statement, and for being such an able and cooperative witness. One of my deep convictions is that all qualified Americans are entitled to the full exercise of their constitutionally granted elective franchise. I have repeatedly stressed that the right to vote is the cornerstone of representative self-government.

Our hearings last year indicated that in some sections of our land, in which there are large Negro populations, not a single Negro citizen was registered to vote. Evidence brought to light by the Commission on Civil Rights after civil rights hearings had been concluded by this committee confirmed the charge that responsible and qualified Negroes had been refused the opportunity to register and vote without just or legal cause.

This is a deplorable condition, one which we, as legislators in the world's greatest representative republic, cannot permit to endure. It was for this reason that I introduced H.R. 10035, the administration's proposal as originally outlined by Attorney General Rogers.

My colleagues on this committee know that I am not one to support "force bills" in misguided attempts to secure civil rights for all of our citizens. Such measures failed in Reconstruction days. They would fail now.

The approach of H.R. 10035 is not that of a "force bill." Rather, it seeks a solution to a trying problem through resort to the judicial

process, in accordance with the best American tradition. In keeping with this tradition, the rights of all concerned are duly protected. It bears no resemblance to a punitive measure. It is aimed solely at and limited to securing the right to vote, wrongfully denied.

I regret that it was necessary for the Attorney General to frame, and for me to introduce H.R. 10035. Unfortunately, circumstances gave neither of us an alternative. We could not, in good conscience, continue to countenance the serious deprivation of qualified citizens of fundamental rights, which have been and are now being denied.

If the constitutional guarantee of equality under the law for all of our citizens is to be realized, then it is necessary that the right to vote be secured to all qualified Americans. H.R. 10035 would, I believe, accomplish that goal.

When I introduced this measure in the House of Representatives less than 2 weeks ago, I was concerned that in the press of other important legislative matters before the Congress, the Federal referee proposal would be bypassed without hearing. It was for this reason that I requested the chairman to schedule immediate hearings on this most important and controversial measure. I was gratified by the chairman's response to my plea. Not only did he grant my plea; he did more. He appears to have embraced the administration measure. I welcome his support now, before the Rules Committee, and on the floor of the House.

Thank you, Mr. Chairman.

Mr. WILLIS. Mr. Chairman, I express my appreciation for the action of the committee in accordance with the examining of Judge Walsh in open session and having a reasonable opportunity to present all sides of this issue.

The CHAIRMAN. The hearing will now adjourn, subject to the call of the Chair, and we will then hear from witnesses whose names have been submitted before.

(Whereupon, at 1:45 p.m., Tuesday, February 9, 1960, the committee adjourned, subject to the call of the Chair.)

VOTING RIGHTS

TUESDAY, FEBRUARY 16, 1960

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 10:15 a.m., in room 346, Old House Office Building, Hon. Emanuel Celler (chairman) presiding.

Present: Representatives Celler, Lane, Feighan, Chelf, Willis, Rodino, Forrester, Rogers, Brooks, Dowdy, Holtzman, Whitener, Libonati, Toll, Kastenmeier, McCulloch, Poff, Moore, Smith, Meader, Henderson, Cahill, and Ray.

Also present: Bess E. Dick, staff director; William R. Foley, general counsel; William H. Crabtree, associate counsel.

The CHAIRMAN. Gentlemen, the meeting will come to order.

We have with us today a very distinguished lawyer who has appeared on a number of occasions before this committee, and he has always appeared with great credit to himself and to the people that he represented, to the State which he represents.

He is a scholar and a man of great erudition, who speaks with great authority on the subject of civil rights as they affect his community.

I am sure, Mr. Bloch, we are very, very happy to hear from you again.

But, before we do so, I want to say that the hearings on these particular bills will end this afternoon, or upon the termination of your testimony, unless anyone else wishes to appear. But, in any event, the hearings will not go beyond this day. But the record will be held open for anyone to present their views for or against the bill for a period of 1 week.

Mr. WILLIS. Well, would that include the right, during that period of 1 particular week, for witnesses to make a personal appearance, Mr. Chairman?

The CHAIRMAN. My statement would not permit that. The idea would be—we heard one witness last week. We hear a witness in opposition today. It was our purpose not to prolong these hearings. And if anyone wishes to express views, he can put them in the record.

Mr. WILLIS. Well, last week, Mr. Chairman, we voted upon the effect of your suggestion this morning. It was the judgment of the full committee that that should not be done. You will remember that I made a motion which prevailed that we would have open hearings for a reasonable period of time, so that the views of those in favor of and in opposition to the proposals would be made a matter of record at open hearings, with no intention, as put in my motion, to delay, and reserve it to the full committee, at one point or another, to set a time.

There was a motion made, substitute motion made, by the gentleman from New York, Mr. Miller, to the effect that we would hold the record open for 1 week, and during that 1 week, have 1 day of hearing. That was specifically turned down by the judgment of the full committee.

As I understand the chairman's statement, he is undertaking to set a rule contrary to the express wish of the full committee.

Believe me, I am not the chairman and don't want to be. And our chairman has always been extremely fair, has leaned over backward to be fair, both he and the ranking minority member, Mr. McCulloch. But I would ask that the chairman withhold a binding ruling, on his part as chairman, to go counter to the express wish by a vote of committee, that this will conclude the hearings today, with one additional witness, and that no one else will have the right to appear.

If the chairman would only withhold that ruling, I won't press it any further. I know as usual we can try to resolve our differences of opinion.

The CHAIRMAN. May I make this suggestion? I certainly want to be fair, and the gentleman from Louisiana likewise always is fair. The word "reasonable" was used; and I thought this would be reasonable, to hear Mr. Bloch, having heard from Judge Walsh. Suppose we leave it this way—that the hearings will be closed unless some member wishes some individual to be heard, and then the matter can be presented at a meeting and we can judge then.

Mr. WILLIS. That will be all right. I mean it will be all right with me.

Mr. MCCULLOCH. Mr. Chairman, so that the record will be unmistakably clear, I think it is the duty of this committee to proceed without unnecessary delay to bring these hearings to a close.

The record will show, beyond any doubt, that last year I urged that the hearings remain open for a period far longer than for most, if not for all bills, which have been before this committee during my 12 or 14 years on the committee.

However, at the beginning of the meeting last week, and prior thereto, in private conversation with the chairman, I urged that there be a hearing on the referee bills and on the registrar bills, in order that both the proponents and the opponents could have a day in court. I am happy to say that the decision was made to have those hearings. I think, Mr. Chairman, that those who wish to appear personally or to submit statements should be required to do so within a week. The record should be ready to go to the printer at that time. Any delay beyond that period will be unnecessary and will be intolerable.

It is my studied judgment that those who are opposed to these proposals, as well as those who are in favor of them, with proper amendments, will, within 1 week, have adequate time to prepare that which they wish to say. To conclude, it is my hope that this matter will proceed without unnecessary delay and that a final record will be prepared in order that it may be considered by the Rules Committee in the event that is the final wish of this committee.

The CHAIRMAN. The Chair wants to make another announcement. There is coming up in the House today, immediately after the House resumes its session, a bill for the appropriations for this expense of this committee, and it will be necessary, Mr. Bloch, for us to take a

recess if you are not concluded by 12 o'clock, until, say, the period of 12 to 2 o'clock, because our bill will come up on the floor, and we must be over there. So you will understand that. Then we will resume.

You may proceed.

STATEMENT OF CHARLES J. BLOCH ON BEHALF OF THE STATE OF GEORGIA

Mr. BLOCH. Mr. Chairman, and gentlemen of the committee, I appear again before you as a representative of the State of Georgia, Gov. Ernest Vandiver, and Attorney General Eugene Cook.

I classify among the Federal voting referee bills the following:

(*a*) H.R. 10035, introduced by Mr. McCulloch on January 28, 1960;

(*b*) H.R. 10034, introduced by Mr. Lindsay on January 28, 1960;

(*c*) H.R. 10018, introduced by Mr. Goodell on January 28, 1960.

I have not in this statement planned to discuss H.R. 9452, introduced by Chairman Celler on January 7, 1960.

My reasons for its noninclusion are these:

(*a*) It deals with Federal registrars rather than Federal referees. I testified before a subcommittee of the Rules Committee of the Senate on February 2, 1960, with respect to similar bills pending in the Senate; my statement was inserted in the Congressional Record of that day by Senator Talmadge; it appears at pages 1553–1559. I shall be glad to furnish the committee a copy of that statement and have it made a part of the record here if it is desired.

The CHAIRMAN. We would be very glad to receive it, sir.

(The statement referred to is as follows:)

[From the Congressional Record, Feb. 2, 1960]

STATEMENT OF CHARLES J. BLOCH, OF MACON, GA., ON BEHALF OF THE GOVERNOR OF GEORGIA AND THE ATTORNEY GENERAL OF GEORGIA BEFORE SUBCOMMITTEE OF THE SENATE COMMITTEE ON RULES AND ADMINISTRATION, RE FEDERAL REGISTRATION BILLS, FEBRUARY 2, 1960

S. 2684 by Senator Humphrey defines the term "Federal office" as meaning the office of (1) President or Vice President of the United States, (2) elector for President or Vice President of the United States, (3) Member of the U.S. Senate, (4) Member of the House of Representatives of the United States, or (5) Delegate or Commissioner of any territory or possession representing such territory or possession in the House of Representatives. It defines the term "Federal officer" as meaning an individual occupying any Federal office. It defines the term "Federal election" as meaning any general or special election held solely or partially for the purpose of electing any Federal officer, including primaries.

At the threshold we are met with an effort to convert by legislative flat a State officer into a Federal officer.

The Supreme Court in *Ray* v. *Blair* (343 U.S. 214, 224–225), said: "The Presidential electors exercise a Federal function in balloting for President and Vice President, but they are not Federal officers or agents any more than the State elector who votes for Congressmen."

In so holding, the Supreme Court followed the rule which it had announced in *In re Green* ((Va. 1890) 134 U.S. 377). (See also *Todd* v. *Johnson* (36 S.W. 541, 99 Ky. 548); *Mason* v. *State* (18 S.W. 827, 55 Ark. 529).)

In a case which affirmed a conviction in the District Court of the United States for the Western District of Missouri (18 F. Supp. 213), the Circuit Court of Appeals for the Eighth Circuit (Judges Gardner, Sanborn, and Thomas) held that presidential electors are State officers and not Federal officers since the Federal Constitution leaves it to State legislatures to define the method of choosing electors (*Walker* v. *United States* (93 F. 2d 383(3)); certiorari denied, 58 S. Ct. 642).

Cited in that case is the landmark case of *McPherson* v. *Blacker* (146 U.S. 1) in which Chief Justice Fuller said: "The appointment and mode of appointment of electors belong exclusively to the States under the Constitution of the United States" (op. cit., p. 35).

This bill defines the term "registration district" as a political subdivision of a State authorized under State law to provide for the registration or qualification of individuals, living therein, to vote in Federal elections held in that State.

The gist of the bill is in sections 3, 4, and 5.

Individuals who (*a*) believe themselves to be qualified, under State laws to vote in Federal elections held in such State, (*b*) have within 1 year before filing a petition under this section, unsuccessfully attempted to register, in his registration district, to vote in any Federal election, and (*c*) believes he is being deprived of his legal right to register to vote in such election solely because of his race, religion, color, or national origin, may file with the President a petition requesting that a Federal registrar be appointed for the registration district in which such individual lives. Whenever the President shall have received within a period of a year nine or more of such petitions, he shall refer such petitions to the Commission on Civil Rights. If the Commission investigates and determines that such citizens are being denied the right to vote [sic] solely because of their race, religion, color, or national origin, the Commission certifies that fact to the President. Thereupon, the President shall appoint from among Federal employees living in or near such district an individual to serve as Federal registrar for such district until such time as the President determines that individuals living in such district are no longer being denied the right to vote in Federal elections solely because of their race, religion, color, or national origin.

The Federal registrars so appointed shall accept vote registration applications from all individuals living within that district who allege that they are being denied the right to register to vote in such district solely because of their race, religion, color, or national origin.

Without any determination by any tribunal or person that those allegations are true, the Federal registrar proceeds to examine the applicants.

All applicants whom he finds have the qualifications requisite, under the laws of the State wherein such district is situated, for electors of the most numerous branch of the legislature of such State, shall be registered by him as being qualified to vote in Federal elections in such district, and the Federal registrar shall certify to the appropriate election officials of such State the name of all applicants registered by him and the fact that such applicants have been so registered.

Any individual who is registered under the act by a Federal registrar shall have the right to cast his vote, and any election official who denies him the right is punished criminally.

S. 2719, introduced by Senator Morse, is substantially the same as S. 2684. It was supplemented by S. 2722 introduced by him on the same date. This provides for the preservation by State registration officers of all registration and voting records for a period of 5 years after the making thereof.

On January 11, 1960, Senator Javits introduced S. 2783 "to protect the right to vote in Federal elections against denial on account of race, religion, color, or national origin, by providing for the appointment of Federal registrars by the President."

This bill of Senator Javits' is almost word for word that of the one introduced by Senator Morse (S. 2719) 4 months before. Why the additional bill was thought necessary, I do not know. On January 14, 1960, Senator Humphrey for himself and others introduced S. 2814, Federal Election Registrations Act of 1960. It is similar to S. 2684. Preceding all of the bills mentioned, S. 2535 was introduced on August 12, 1959 by Senator Hart and others including Senators Morse and Hennings.

This bill denominated as the "Congressional Elections Act" seeks to establish an agency of the legislative branch of the Federal Government authorized to conduct the elections of Members of the Senate and the House of Representatives.

It tacitly recognizes what some of the others, S. 2684 for instance, do not: (1) That no one, except Presidential electors, vote for any one for the office of President or Vice President of the United States; (2) that a Presidential elector is a State officer and not a Federal officer; (3) that under the Constitution of the United States (art. II, sec. 1, par. 2) as construed by the Supreme Court

unanimous[1] in 1892,[2] the legislatures of the several States have exclusive power to direct the manner in which the electors of President and Vice President shall be appointed.

"In short, the appointment and mode of appointment of electors belong exclusively to the States under the Constitution of the United States. They are, as remarked by Mr. Justice Gray in *In re Green* (134 U.S. 377, 379), 'no more officers or agents of the United States than are the members of the State legislatures when acting as electors of Federal Senators, or the people of the States when acting as the electors of representatives in Congress.' "[3]

As I read this bill, phrases learned long ago ran through my mind. "He has erected a multitude of new offices, and sent hither swarms of officers to harass our people, and eat out their substance * * * He has combined with others to subject us to a jurisdiction foreign to our constitution and unacknowledged by our laws; giving his assent to their acts of pretended legislation. For taking away our charters, abolishing our most valuable laws and altering fundamentally the forms of our government; for suspending our own legislatures and declaring themselves invested with power to legislate for us in all cases whatsoever."[4]

For those indictments so bitterly stated by the colonists in 1776, complaining of George III, appear again in this bill.

Purporting to act under the 15th amendment and under article I, section 4 of the Constitution, these Senators would have the Congress enact and the President approve a bill establishing "an agency of the legislative branch of the Federal Government, a Congressional Elections Commission, as an authority to conduct primary, special, and general elections for Members of the Senate and the House of Representatives."

That Commission would be composed of three members appointed by the President by and with the advice and consent of the Senate. They shall each receive a salary of $20,000 per year, except that the Chairman shall receive $20,500. Their terms would be 9 years, except that the first three members would have terms expiring December 31, 1963, 1966, and 1969 respectively.

The Commission would be authorized to make and maintain temporary and permanent registers of voters qualified to participate in primary, special and general elections in the various congressional districts (title III, sec. 301).

No person shall be registered as a voter under that section who does not have the qualifications requisite for electors of the most numerous branch of the legislature of the State in which the congressional district is situated (sec. 302).

But, apparently, the members of the Commission, and its agents appointed by them pursuant to title VI, section 601, determine whether an applicant is qualified to vote under the laws of the State with no right of appeal except to the Federal courts (title VII, sec. 701).

No State or local laws governing the time, place, or manner of the registration of voters shall be applicable to or limit the power of the Commission to conduct registration of voters, but the Commission must endeavor, as far as in its judgment is conducive to uniform and orderly election procedures, to conform its conduct of the registration of voters to the procedures governing time, place, and manner of registration, prescribed in the State or local laws or ordinances in effect in the congressional district (sec. 303).

Thus far, S. 2535 coincides in purpose with the bills seeking to regulate registration for voting in so-called Federal elections.

But in title 4, the kangaroo really leaps. That title is "Conduct of Elections by the Commission."

It seeks to authorize the Commission to conduct primary, special, or general elections for the purpose of selecting and electing Members of the Senate and the House of Representatives in any congressional district whenever "the Commission is officially requested so to do by the duly empowered official of the State in which the congressional district is situated," or whenever "the Commission determines that unless such election is conducted by the Commission, persons having the qualifications requisite for electors of the most numerous branch of the legislature of the State in which the congressional district is located are likely to be denied their right in such primary, special, or general elections to cast their votes and to have them fairly counted."

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[1] Chief Justice Fuller writing; Associate Justices Field, Harlan, Gray, Blatchford, L. Q. C. Lamar, Brewer, Brown, and Shiras concurring.
[2] *McPherson* v. *Blacker*, 146 U.S. 1.
[3] Ibid., 146 U.S. at p. 35.
[4] Declaration of Independence.

In *Ex parte Young* (209 U.S. at p. 175), Justice Harlan dissenting, used cogent words which are so apt when we read what is being attempted in this bill.

Said he there: "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 the official action 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. I cannot suppose that the great men who framed the Constitution ever thought that time would come when a subordinate Federal court, having no power to compel a State in its corporate capacity, to appear before it as a litigant, would yet assume to deprive a State of the right to be represented in its own courts by its regular law officer."

And say I here: The principle of this legislation if established would destroy our governmental system. It would inaugurate a new era in the American system of government and in the relations of the National and State Governments. It would enable three subordinate Federal officers to supervise and control the actions of elected officials of the States as if the States were dependencies or conquered 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 10th amendment was made a part of the supreme law of the land. I cannot suppose that the great men who framed the Constitution and the Bill of Rights ever thought the time would come when it would be seriously proposed in the Senate of the United States that three men appointed by the President of the United States might go into a State and conduct its elections after having determined who might vote in those elections, superseding all of its elected and selected officials.

Only once in our history have any such proposals crystallized. After Sherman had burnt and pillaged the States of the South, they became military districts. Now it is proposed to convert us into voting precincts without going through thhe process of subjugation.

The chief law questions which arise in a discussion of these various bills are:

1. Does the Congress have the constitutional power to establish a commission, and delegate to it the powers to conduct elections for the purpose of selecting and electing members of the Senate and the House of Representatives?

2. Does the Congress have the constitutional power to establish a commission and empower it to regulate registrations for voting in congressional elections?

I limit the real law questions presented to the field of congressional elections for there are no elections for President or Vice President, and presidential electors are State officers as to whom the only power of Congress is that which may be conferred by the 14th and 15th amendments.

Both of these questions must be determined by a study of article 1, section 2 and of article I, section 4, clause 1 of the Constitution, which provides:

"The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators."

Prior to the adoption of the 17th amendment, this section was the only source of power which Congress possessed over elections for Senators and Representatives. *Newberry* v. *United States* (256 U.S. 232; 41 S. Ct. 469; 65, L. Ed. 913).

The effect of the 17th amendment is to give to Congress the same breadth of power over the election of Senators as it previously had over the elections of Representatives.

The policy of Congress for a great part of our constitutional life has been, to leave the conduct of the election of its Members to State laws, administered by State officers. Whenever it has assumed to regulate such elections it has done so by positive and clear statutes, *United States* v. *Gradwell* (243 U.S. 476, 485).

In that case, decided in 1916, the Court, at page 482, after stating that the power of Congress to deal with the election of Senators and Representatives was derived from section 4, article I of the Constitution of the United States, said:

"Whatever doubt may at one time have existed as to the extent of the power which Congress may exercise under this constitutional sanction in the prescribing of regulations for the conduct of elections for Representatives in Congress or in adopting regulations which States have prescribed for that purpose has been

settled by repeated decisions of this court, in *Ex parte Siebold* (100 U.S. 371, 391 (1879); *Ex parte Clarke* (100 U.S. 399 (1879); *Ex parte Yarbrough* (110 U.S. 651 (1884); and in *United States* v. *Mosley* (238 U.S. 383 (1915)."

In the statement of Robert G. Storey, Vice Chairman of the Commission on Civil Rights before this committee on January 18, 1960, he said: "First, by article I, section 4, the Constitution has reserved [sic] plenary power to the Congress to legislate upon the 'times, places, and manner of holding elections for Senators and Representatives.'"

Whatever power Congress has under article I, section 4, was not reserved to it. It was delegated to it by the States. More important, though: Is that power correctly described as "plenary"?

The "extent of the power" was stated in the four cases cited in Gradwell.

(*a*) What then was the extent of the power in 1916?

(*b*) Has the extent of the power been since broadened?

To answer the first of these two questions it is necessary to examine the four cases, and one or two others.

The first of the four is *Ex parte Siebold* (100 U.S. 371).

Certain judges of election in the city of Baltimore, appointed under State laws, were convicted in Federal court under certain sections of the Federal statutes for interfering with and resisting the supervisors of election and deputy marshals of the United States in the performance of their duty at an election of Representatives to Congress under other sections of the Federal statutes, taken from the Enforcement Act of May 31, 1870, as amended in 1871.

The gist of the ruling is:

"Congress had power by the Constitution to enact section 5515 of the Revised Statutes, which makes it a penal offense against the United States for any officer of election, at an election held for a Representative in Congress, to neglect to perform, or to violate, any duty in regard to such election, whether required by a law of the State or of the United States, or knowingly to do any act unauthorized by any such law, with intent to affect such election, or to make a fraudulent certificate of the result, etc.; and section 552, which makes it a penal offense for any officer or other person, with or without process, to obstruct, hinder, bribe, or interfere with a supervisor of election, or marshal, or deputy marshal, in the performance of any duty required of them by any law of the United States, or to prevent their free attendaince at the places of registration or election, etc.; also, sections 2011, 2012, 2016, 2017, 2021, 2022, title xxvi, which authorize the circuit courts to appoint supervisors of such elections, and the marshal to appoint special deputies to aid and assist them, and which prescribe the duties of such supervisors and deputy marshals, these being the laws provided in the Enforcement Act of May 31, 1870, and the supplement thereto of February 28, 1871, for supervising the elections of Representatives, and for preventing frauds therein."

Clearly, the basis of this ruling was that the acts of Congress were regulations with respect to the "manner of holding elections," and therefore within the very letter of article I, section 4, clause 1.

In *Ex parte Clarke* (100 U.S. 399), there was considered the appeal of an officer of election, at an election for a Representative to Congress in the city of Cincinnati who had been convicted under section 5515 of the Federal Revised Statutes for a violation of the law of Ohio in not conveying the ballot box, after it had been sealed up and delivered to him for that purpose, to the county clerk, and for allowing it to be broken open.

That section 5515 is set out in full in the *Siebold* case (100 U.S. at p. 381), and is as follows:

"SECTION 5515. Every officer of an election at which any representative or delegate in Congress is voted for, whether such officer of election be appointed or created by or under any law or authority of the United States, or by or under any State, territorial, district, or municipal law or authority, who neglects or refuses to perform any duty in regard to such election required of him by any law of the United States, or of any State or Territory thereof; or who violates any duty so imposed; or who knowingly does any acts thereby unauthorized, with intent to affect any such election, or the result thereof; or who fraudulently makes any false certificate of the result of such election in regard to such representative or delegate; or who withholds, conceals, or destroys any certificate of record so required by law respecting the election of any such representative or delegate; or who neglects or refuses to make and return such certificate as required by law; or who aids, counsels, procures, or advises any voter, person, or

officer to do any act by this or any of the preceding sections made a crime, or to omit to do any duty the omission of which is by this or any of such sections made a crime, or attempts to do so, shall be punished as prescribed in section 5511."

The Court, with two dissents, held that Congress had power to pass the law under which the conviction was had.

That statute clearly dealt with the manner of holding an election for Representatives.

It is important that that old statute passed practically contemporaneously with the ratification of the 15th amendment shows that Congress construed the word "elections" in the constitutional provision (art. 1, sec. 4, cl. 1) to mean the actual casting of votes, and the return and certification thereof. An election is "the act of choosing a person to fill an office or position by vote."

"Election" means the act of casting and receiving the ballots from voters, counting ballots, and making returns thereof *Kilgore* v. *Jackson* (118 S.W. 819, 822). To the same effect is *Lowery* v. *Briggs* (73 S.W. 1062); *State* v. *Nelson* (169 N.W. 788, 789, 141 Minn. 499), and many other cases.

While *In re Coy* (127 U.S. 731), is not cited in the *Gradwell* case, reference should be made to it, for at page 752 the extent of the power of Congress over the election of its members under this provision of the Constitution is stated.

Said Justice Miller speaking for all of the Court except Justice Field:

"But the power, under the Constitution of the United States, of Congress to make such provisions as are necessary to secure the fair and honest conduct of an election at which a Member of Congress is elected, as well as the preservation, proper return, and counting of the votes cast thereat, and, in fact, whatever is necessary to an honest and fair certification of such election, cannot be questioned."

In *Ex parte Yarbrough* (110 U.S. 651), an indictment charging that the defendants conspired to intimidate a Negro in the exercise of his right to vote for a Member of Congress of the United States was held valid.

The Court stated that article I, section 4 of the Constitution "adopts the State qualification as the Federal qualification for the voter; but his right to vote is based upon the Constitution, and Congress has the constitutional power to pass laws for the free, pure and safe exercise of this right" (p. 652).

One of the statutes under which Yarbrough was indicted (Rev. Stat. sec. 5520) penalized the intimidation of any citizen from giving his support or advocacy toward or in favor of the election of electors and Members of Congress, using the same word (election) as is used in the constitutional provision. (That "election" does not embrace registration is somewhat demonstrated by *Scott* v. *United States* (3 Wall. 642), written by Justice Miller, and cited by him at page 660 of the *Yarbrough* case.)

The congressional interpretation of the word "elections" in article I, section 4 is shown by the statutes alluded to by Justice Miller at page 661. An act of 1872 required all the "elections" for such Members to be held on the Tuesday after the first Monday in November 1876, and on the same day of every second year thereafter. In like manner, he pointed out, Congress has fixed a day, which is the same in all States, when the electors for President and Vice President shall be appointed.

After alluding to those laws, the Court by a query very graphically illustrates the extent of the congressional power under this constitutional provision: "Will it be denied that it is in the power of that body to provide laws for the proper conduct of those elections?" (op. cit. p. 661).

At page 663 the "election"—the actual election—is defined as "the voting for those Members."

The act of 1872 appeared in the United States Code as title 2, section 7, until amended in 1934 to conform to the new date for the opening of Congress as fixed by amendment No. 20. But, the statute then enacted provided for the establishment of a day certain "as the day for the election, in each of the States and territories of the United States, of Representatives" (United States Code, title 2, sec. 7, "Time of election").

When, in 1913, the 17th amendment was adopted providing for the election of Senators by the people, Congress enacted the act of June 4, 1914 (38 Stat. 384), providing:

"At the regular election held in any State next preceding the expiration of the term for which any Senator was elected to represent such State in Congress, at which election a Representative to Congress is regularly by law to be chosen, a

U.S. Senator from said State shall be elected by the people thereof for the term commencing on the 4th day of March next thereafter" (U.S.C., title 2, sec. 1).

This section, too, was amended in 1934. The amendment does not detract from the meaning assigned by the Congress to the word "elections" in the constitutional provision—the voting for Senators and Representatives.

In 1915, after deliberating a year and a half, the Court decided (*United States* v. *Mosley* (238 U.S. 383). This case was alluded to by Senator Javits in his testimony before this committee on January 19, 1960. The Court in that case construed the old section 5508 of the Revised Statutes, which had then become section 19 of the Penal Code. It was held constitutional and in the language of the Court "constitutionally extends protection to the right to vote for Members of Congress and to have the vote when cast counted." It was held to apply "to the acts of two or more election officers who conspire to injure and oppress qualified voters of the district in the exercise of their right to vote for Members of Congress by omitting the votes cast from the count and the return to the State election board"—all a part of the actual election.

Along with the *Mosley* case, Senator Javits cites *United States* v. *Saylor, et al.* (322 U.S. 385). We allude to it now although it was not decided until 1944. There is a 6 to 3 decision, the Court held that Congress had the power to punish a conspiracy by election officers to stuff a ballot box in an election in which a Member of Congress was to be elected, and that the Federal statutes were sufficiently broad to embrace such an offense.

Mr. Justice Douglas, with whom Mr. Justice Black and Mr. Justice Reed concurred, dissented. They thought that the general language of section 19 of the Criminal Code under which Saylor had been convicted was insufficient to embrace the acts for which Saylor had been indicted.

I quote Justice Douglas:

"Under section 19 of the Enforcement Act of May 31, 1870 * * * the stuffing of this ballot box would have been a Federal offense. That provision was a part of the comprehensive "reconstruction" legislation passed after the Civil War. It was repealed by the act of February 8, 1894 * * * an act which was designed to restore control of election frauds to the States. The committee report (H. Rept. No. 18, 53d Cong., 1st sess., p. 7), which sponsored the repeal, stated: 'Let every trace of the reconstruction measures be wiped from the statute books; let the States of this great Union understand that the elections are in their own hands, and if there be fraud, coercion, or force used they will be the first to feel it. Responding to a universal sentiment throughout the country for greater purity in elections many of our States have enacted laws to protect the vote and to purify the ballot. These, under the guidance of State officers, have worked efficiently, satisfactorily, and beneficiently; and if these Federal statutes are repealed that sentiment will receive an impetus which, if the cause still exists, will carry such enactments in every State in the Union.' This Court now writes into law what Congress struck out 50 years ago. The Court now restores Federal control in a domain where Congress decided the States should have exclusive jurisdiction. I think if such an intrusion on historic States rights is to be made, it should be done by the legislative branch of the Government. I cannot believe that Congress intended to preserve by the general language of section 19 the same detailed Federal controls over elections which were contained in the much-despised reconstruction legislation" (op. cit., pp. 390–392).

Thereafter, Justice Douglas cited the *Bathgate* case, 246 U.S. 220, and then said: "Congress has ample power to legislate in this field to protect the election of its members from fraud and corruption. * * * I would leave to Congress any extension of Federal control over elections."

Presently, we shall come to consider the problem: How far can Congress go under the Constitution in extending Federal control over election? How far can Congress go in this field of protecting the election of its members from fraud and corruption? Do the Senate bills under consideration exceed the powers of Congress delegated to it by the States? Does the Constitution of the United States warrant what Justice Douglas denominated as "such an intrusion on historic States rights?"

When we come to consider those questions, let us consider Justice Black's admonition in *Reid* v. *Covert* (354 U.S. 1, at p. 14): "The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the

benefit of a written Constitution and undermine the basis of our Government" (June 10, 1957).

Let us remember that the 10th amendment is just as much a part of the Bill of Rights as are the 1st, the 4th, the 5th, the 6th, the 7th, and the 8th.

The Senators, the Representatives, the newspapers, the television and radio commentators who scoff at us who plead for the rights of the States under the 10th amendment may some day rue the days they did so.

For when you make it customary and legal to discard the 10th amendment because, forsooth, your convenience and expediency so dictate, you undermine the other nine.

When you today encourage and countenance the disregard of the 10th amendment, you lay the foundation for others in a future day to encourage and countenance the disregard of the other nine.

If a majority of Senators and Representatives today in Congress can destroy the rights of the States solemnly reserved to them under the 10th amendment, a majority tomorrow can destroy your right to worship whatever your religious faith may be, Jewish, Catholic, or Protestant—a majority tomorrow can destroy freedom of speech or of the press whether sought to be exercised by the greatest or most humble newspaper—a majority tomorrow can deprive you or me of our lives, liberty, or property without due process of law—a majority tomorrow can authorize unreasonable searches and seizures, and abrogate trial by jury.

As a member of a so-called minority religious group, I know that I am protected in my right to worship only by a strict observance of constitutional protections afforded in the first amendment. I am fearful because I wonder when it will become expedient to destroy the first.

If the powers delegated to Congress under the Constitution of the United States are not broad enough for your purposes, don't distort the Constitution by unwarranted construction of it; seek to amend it in the manner provided in it.

If you reply that that is too long and difficult a road, again I call Justice Black as a witness. He, in the last 3 years, said:

"It may be said that it is difficult to amend the Constitution. To some extent that is true. Obviously the Founders wanted to guard against hasty and ill-considered changes in the basic charter of our Government. But if the necessity for alteration becomes pressing, or if the public demand becomes strong enough, the Constitution can and has been promptly amended," (354 U.S. at p. 14, footnote 27).

This study of the cases discloses the extent of the power of Congress under article I, section 4, and the 15th amendment. In 1916, it remained as it was in 1883 expressed in *ex parte* Yarbrough, supra. Congress has the constitutional power to pass laws for the free, pure, and safe exercise of the right to vote at elections for members of Congress, the qualifications of the voter being determined by State law. The States under article I, section 2 of the Constitution define who are to vote for the popular branch of their own legislature, and the Constitution of the United States says the same persons shall vote for Members of Congress in that State. The Constitution adopts the qualifications thus furnished as the qualifications of its own electors for Members of Congress (110 U.S. at p. 663).

Article I, section 2 of the Constitution must be construed in pari materia with article I, section 4, clause 1.

Certain of the people of the several States choose the Members of the Congress. Those certain people are those who have the qualifications requisite for electors of the most numerous branch of their State legislatures. The Constitution, not the Congress, has adopted the qualification furnished by article I, section 2 as the qualification of its own electors for Members of Congress.

It is when, and only when, that group of electors shall have been determined by the laws of the State, restricted only by the 14th and 15th amendments, section 4 comes into play.

With that group of voters defined, selected, chosen, and determined under the laws of the State according to the Constitution of the United States; with it having been determined by the laws of the State, restricted by the 14th and 15th amendment, who may participate as voters at an election for Senators and Representatives, Congress has the right to prescribe the "times, places, and manner" of holding such elections, but that prescription by Congress must be "by law." Congress has no right to prescribe qualifications of such electors except those determined by State law as limited by the war amendments. It is the elector who is qualified by State law who has the right to vote at the election held pursuant to article I, section 4 *U.S.* v. *Goldman* (25 Fed. Cas. p. 1353, case

No. 15,225, Woods, circuit judge). It is the elector qualified by State laws who may be protected in that right under section 4 of article I (ibid).

Congress, under article I, section 4, can no more abridge the powers of the States under article I, section 2 and the 10th amendment, than it can abridge the freedoms guaranteed by the first amendment. *United States* v. *Congress of Industrial Organizations* (77 F. Supp. 355, 357, affirmed 335 U.S. 106).

Has the extent of the power of Congress over congressional elections been broadened since 1916?

Congress has no more power now to prescribe the qualifications of voters in congressional elections than it had in 1916, when *Gradwell* was decided.

The only change in the principles of constitutional law which we have stated is that there has been a broader definition ascribed to the word "elections" in article I, section 4.

In *United States* v. *Classic* (313 U.S. 299), Mr. Justice Stone said: "The questions for decision are whether the right of qualified voters to vote in the Louisiana primary and to have their ballots counted is a right 'secured by the Constitution'" (op. cit., p. 307). (See also p. 315.)

Justices Stone, Roberts, Reed, and Frankfurter held that "a primary election which is a necessary step in the choice of candidates for election as Representatives in Congress, and which in the circumstances of the case control that choice, is an election within the meaning of article I, sections 2 and 4 of the Constitution and is subject to congressional regulation as to the manner of holding it" (313 U.S. 300 (6)).

Justice Douglas dissented, joined by Justices Black and Murphy. (See, also *Smith* v. *Allwright* (321 U.S. 649).)

So, the extent of the congressional power today is just as it was in 1916 except that the word "elections" is to be construed to include "primaries" of the described in the *Classic* case.

Does the sweep or extent of that power show any constitutional right in Congress to enact legislation such as that which confronts us?

The legislation embraces two attempts in general.

1. There is an attempt in S. 2535 to empower a Commission composed of three members appointed by the President to conduct the congressional election in any congressional district whenever:

(*a*) The Commission is requested so to do by the official of the State in which the congressional district is situated; or

(*b*) The Commission determines that unless it conducts such election, persons having the qualifications requisite for electors of the most numerous branch of the legislature of the State in which the congressional district is located are likely to be denied their right in such primary to cast their votes and have them counted.

2. There is an attempt in all of the bills to provide for registration of voters in congressional elections by Federal registrars.

Is the provision in S. 2535 for a Commission to conduct congressional elections valid? Clearly it is not.

If for no other reason, it is not because it would constitute a flagrant attempt by the Congress to delegate its legislative power.

Article I, section 1 of the Constitution provides that "all legislative powers herein granted shall be vested in a Congress of the United States which shall consist of a Senate and House of Representatives."

Under article I, section 4 of the Constitution, Congress may at any time "by law" fix the times, places and manner of holding elections for Senators and Representatives.

The phrase "by law" has a meaning in the field of constitutional law. It is not a phrase haphazardly used. It occurs many other times in the Constitution, e.g.:

(*a*) In article I, section 2, paragraph 3;
(*b*) In article I, section 4, paragraph 2;
(*c*) In article I, section 6, paragraph 1;
(*d*) In article I, section 9, paragraph 7;
(*e*) In article II, section 1, paragraph 6;
(*f*) In article II, section 2, paragraph 2;
(*g*) In article III, section 2, paragraph 3;
(*h*) In the third amendment;
(*i*) In the sixth amendment;
(*j*) In the 14th amendment, section 4;
(*k*) In the 20th amendment, section 4.

Under article I, section 7 of the Constitution, Congress cannot by law make or alter any regulations as to the times, places, and manner of holding congressional elections except by a specific bill which has been introduced and enacted into law, signed by the President, or passed over his veto.

The phrase "by law" has been many times judicially construed.

The term "by law" as used in Kentucky statutes means a statute (*Commonwealth* v. *Wade* (125 Ky. 791; 104 S.W. 965, 966)).

The statutory provision that no money shall be paid out of the treasury except in pursuance of an appropriation "by law" means appropriation by a valid law (*State* v. *Davidson* (114 Wisc. 563; 90 N.W. 1067, 1068)).

The phrase "by law" refers exclusively to statute law (*Board of Education etc.* v. *Greenough* (13 N.E. 2d 768, 770; 277 N.Y. 193)).

The phrase "by law" construed as meaning statewide legislation, and not ordinance (*United States Fidelity & Guaranty Co.* v. *Guenther* (31 F. 2d 919 (per Circuit Judge Hickenlooper))).

The phrase "by law" as used in the constitutional provision authorizing Congress "by law" to vest appointment of inferior officers in the courts of law means by specific legislation (*Cain* v. *United States* (73 F. Supp. 1019)).

The Congress cannot delegate to a Commission of three men, or any other member, its constitutional power to set the time and place and fix the manner of holding congressional elections. Even the stronger, the Congress, cannot authorize a Commission to conduct a congressional election which under article I, sections 2 and 4, is conducted by the State, except as the time, place, and manner of holding it may have been altered by Congress by law.

A few recent instances should suffice to demonstrate the invalidity of the delegation of power here attempted:

(*a*) *Panama Refining Co.* v. *Ryan* (293 U.S. 388, 55 S. Ct. 241, 79 L. Ed. 446);

(*b*) *Schechter* v. *United States* (295 U.S. 495, 55 S. Ct. 837, 79 L. Ed. 1570).

Is the attempt in these bills to provide for registration of voters in congressional elections by Federal registrars valid?

Except for the war amendments, the power of Congress over congressional elections is limited to provisions made by Congress by law as to the times, places, and manner of holding elections for Senators and Representatives.

The war amendments add nothing to that basic power except to authorize Congress to enact legislation preventing the States from denying the right to vote to Negroes.

Those amendments standing alone would not authorize Congress to enact any law as to the times, places and manner of holding congressional elections.

The registration of voters has nothing to do with either the time or place of holding elections. It has nothing to do with the manner of holding elections for the holding of an election presupposes a group of voters ready and qualified to participate in the election.

That the Founders did not mean by the phrase "manner of holding elections" to empower Congress to enact legislation with respect to the qualifications of voters who might participate in such elections is clearly shown by article I, section 2, paragraph 1 of the Constitution, by the history of the United States, and by adjudicated cases.

And, that the registration to vote may be considered by some courts as a concomitant of the act of actual voting in that it is a prerequisite to voting does not serve to embrace the registration as either a time, place, or manner of holding the election.

An abridgment by the State or a denial by a State of a citizen's right to register may by some courts be considered a denial or abridgement by the State of his right to vote, but such holding will not serve to amend the Constitution of the United States so as to permit Congress to alter State laws or enact new laws as to qualifications of voters.

When the Constitution was adopted, the States expressly delegated to the Congress the power to prescribe the time, places, and manner of holding elections for Senators and Representatives. Before they did that they had provided that the House of Representatives should be composed of Members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

And to make certain that all that they intended to empower Congress to do in this field was embraced in article I, section 4, they immediately added the 10th amendment: "The powers not delegated to the United States by the Constitution,

nor prohibited by it to the States, are reserved to the States respectively, or to the people."

When over a century later, an amendment to the Constitution (amendment 17), was added providing for the election of Senators by the people of the States, that amendment contained the same language as to Senators as was in the original Constitution as to Representatives, to wit: The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

The States by the law prescribed those qualifications.

The States by law determined how its officers should ascertain who possessed those qualifications.

That such was indisputably the plan of the Contitution can also be demonstrated in another manner.

Originally under the Constitution—prior to the adoption of the 17th amendment—it was provided (art. I, sec. 3), that the Senate of the United States should be composed of two Senators from each State chosen by the legislature thereof. Article I, section 2 provided that the House should be composed of Members chosen * * * by the people of the several States and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

Now, article I, section 4 applies to Senators and Representatives—the times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof, but the Congress may at any time by law, make or alter such regulations except as to the time of choosing Senators.

If under those sections, the Congress had the right to prescribe and administer qualifications requisite for the electors choosing Members of the House, then by the same token the Congress had the right to supervise and prescribe qualifications for the members of the legislature who chose the Senators. Congress had exactly the same power over the times and manner of holding elections for Senators, as it had over the times and manner of holding elections for Representatives.

What the States did do in their delegation of power to the Congress has been well illustrated by what the courts have decided over the years.

Guinn v. *United States*, 238 U.S. 347, was one of the first cases in which the National Association for the Advancement of Colored People appeared before the Supreme Court. Perhaps it was the first. Mr. Moorfield Storey appeared for it. The grandfather clause in the Oklahoma constitution was held to violate the 15th amendment. In so holding, though, Chief Justice White speaking for himself, and Justices McKenna, Holmes, Day, Hughes, Van Devanter, Joseph Rucker Lamarr 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 authority 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 State 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, p. 34).

And further at page 366: "No time need be spent on the question of the validity of the literacy test considered alone since as we have seen, its establishment was but the exercise by the State of a lawful power vested in it not subject to our supervision, and indeed, its validity is admitted."

In *Pope* v. *Williams* (193 U.S. 621), the Court said: "While the right to vote for Members of Congress is not derived exclusively from the law of the State in which they are chosen, but has its foundation in the Constitution and laws of the United States, the elector must be one entitled to vote under the State statute."

Pope v. *Williams* refers to *Wiley* v. *Sinkler* (179 U.S. 58), and *Swofford* v. *Templeton* (185 U.S. 487).

In the former of these two cases, the Court unanimously held that in an action against election officers of the State of South Carolina for refusing the plaintiff's vote at an election for Members of Congress, the declaration was faulty in that it did not allege that the plaintiff was a registered voter under the laws of South Carolina. The latter follows it.

In *Mason* v. *Missouri* (179 U.S. 328), the Supreme Court of the United States unanimously affirmed a judgment of the Supreme Court of Missouri, and unanimously held:

"The general right to vote in the State of Missouri is primarily derived from the State; and the elective franchise, if one of the fundamental privileges and immunities of the citizens of St. Louis, as citizens of Missouri and of the United States, is clearly such franchise, as regulated and established by the laws or constitution of the State in which it is to be exercised."

The courts of no State in the Union have more firmly and thoroughly proclaimed the constitutional doctrine of States rights than have the courts of Missouri.

In *Lehew* v. *Brummell* (103 Mo. 546, 15 S.W. 765 (1890)), the Missouri Supreme Court upheld the constitutionality of school segregation statutes enacted by her legislature many years before.

In *Blair* v. *Ridgely* (41 Missouri 63, 97 Am. Dec. 243), that court said: "Prior to adoption of Federal Constitution, States possessed unlimited and unrestricted sovereignty, and retained the same afterward, except so far as they granted powers to the general government, or prohibited themselves from doing certain acts. Every State reserved to itself the exclusive right of regulating its own internal government and police."

There 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. In so doing, 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 of the fundamental franchises under our form of government, to be regulated and established by the laws or constitution of the State in which it is to be exercised. (That case has been cited approvingly by the Supreme Court (179 U.S. 58).)

At page 257, the Missouri court uses these cogent words: "There is not to be found in that instrument a single sentence, paragraph or word which gives the National Government power over the qualifications of voters in any of the States. But the direct opposite is affirmed in that clause * * * which declares 'that the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.'"

Those words are as true today as they were when they were written in 1867, with one exception. The war amendments prohibit the State denying or abridging the right to vote on the basis of race, color, or previous condition of servitude.

The 15th amendment provides that the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Assuming (see *Reddix* v. *Lucky* (252 F. 2d 930)) that the right to vote includes the right to register as a prerequisite to voting, and that therefore, a State cannot abridge or deny a citizen's right to register on account of race, color, or previous condition of servitude, it does not follow that Congress has the right to usurp the field of registration even in congressional regulations merely because the war amendments prevent discrimination in that field. The congressional power in that respect is measured not by the war amendments, but by article I, sections 2 and 4, as restricted by the 10th amendment.

Fortunately the Supreme Court of the United States has spoken with unanimity on the subject recently. In *Lassiter* v. *Northampton County Board of Elections* (360 U.S. 45, 50-51; 79 S. Ct. 985, 989), Justice Douglas said: "We come then to the question whether the State may consistently with the 14th and 17th amendments apply a literacy test to all voters irrespective of race or color. The Court in *Guinn* v. *United States*, supra (238 U.S. 366, 35 S. Ct. 931), disposed of the question in a few words: 'No time need be spent on the question of the validity of the literacy test, considered alone, since, we have seen its establishment was but the exercise by the State of a lawful power vested in it not subject to our supervision, and indeed its validity is admitted.' The States have long been held to have broad powers to determine the conditions under which the right

of suffrage may be exercised, *Pope* v. *Williams* (193 U.S. 621, 633, 24 S. Ct. 573, 576, 48 L. Ed. 817); *Mason* v. *State of Missouri* (179 U.S. 328, 335, 21 S. Ct. 125, 128, 45 L. Ed. 214), absent of course the discrimination which the Constitution condemns. Article I, section 2 of the Constitution in its provision for the election of Members of the House of Representatives and the 17th amendment in its provision for the election of Senators, provide that officials will be chosen 'by the people.' Each provision goes on to state that 'the electors in each State shall have the qualifications requisite for the electors of the most numerous branch of the State legislature.' So while the right of suffrage is established by the Constitution (*Ex parte Yarbrough* (110 U.S. 651, 663, 665; *Smith* v. *Allwright* (321 U.S. 649, 661–2), it is subject to the imposition of State standards which are not discriminatory and which do not contravene any restriction that Congress acting pursuant to its constitutional powers, has imposed. See *United States* v. *Classic* (313 U.S. 299, 315). * * * While section 2 of the 14th amendment, which provides for apportionment of Representatives among the States according to their respective numbers counting the whole number of persons in each State (except Indians not taxed), speaks of 'the right to vote' the right protected 'refers to the right to vote as established by the laws and constitution of the State.' (*McPherson* v. *Blacker* (146 U.S. 1, 39)))."

The Justice had pointed out previously in his opinion (op. cit., p. 50) that the issue of discrimination in the actual operation of the ballot laws of North Carolina had not been framed in the issue presented for the State court litigation. It was mentioned in passing so that it might be clear that nothing said or done by the Court would prejudice a tendering of that issue at the proper time (Cf. *Williams* v. *Mississippi* (170 U.S. 213)).

In the statement of purpose prefacing S. 2535, it is said that "American citizens otherwise qualified to vote continue to be denied that right because of their race or color, and that qualified voters are thus arbitrarily and discriminatorily being denied the right to cast a vote for the selection and election of their representatives in the Senate and the House of Representatives."

If that statement is true, why have not those American citizens instituted actions in the courts of the land—Federal or State—seeking to redress the alleged arbitrary discrimination? If their claims are just, the courts afford them a remedy. The powers of the States reserved to them under the Constitution, never delegated by them to the Federal Government, should not be ravished to satisfy the lust of those who claim their constitutional rights have been invaded.

"When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected (Justice Bradley in *Civil Rights* cases (109 U.S. at p. 25, (1883)).

Mr. BLOCH. (*b*) The Federal registrars bills in the House and in the Senate resulted from recommendations of the Civil Rights Commission. Deputy Attorney General, Judge Lawrence E. Walsh, testified before this committee on February 9, 1960. He testified that his proposal was "completely different from the recommendation of the Civil Rights Commission," page 5.

Then Representative Forrester asked him:

In other words, you are repudiating the recommendation of the Civil Rights Commission.

He answered "Yes" and said that he did not think that the Federal registrar proposal was a "proper vehicle:"

(*c*) The Attorney General had testified similarly before the subcommittee of the Senate Rules Committee on February 5, 1960.

H.R. 10035 is apparently an exact copy of that proposed by the Attorney General on or about January 27, 1960.

The examination, which I have thus far been able to make, of H.R. 10034 and H.R. 10018 reveals no substantial difference between either of them and H.R. 10035.

Doubtless the drafters of the bill proposed on January 27, 1960, by Attorney General Rogers conceived its basic idea from the acts of 1870 and 1871 set out rather fully in *Ex parte Siebold*, 100 U.S. 371, 379–380. Those laws—

> relate to elections of members of the House of Representatives, and were an assertion on the part of Congress, of a power to pass laws for regulating and superintending said elections * * *

Those laws were—

> a part of the comprehensive "reconstruction legislation" passed after the Civil War. They were repealed by the act of February 8, 1894, 28 Stat. 36, an act which was designed to restore control of election frauds to the States.

Justice Douglas, in *United States* v. *Saylor*, 322 U.S. at pages 390–391.

After that quotation, Justice Douglas alluded to and quoted from the committee report, House Report No. 18, 53d Congress, 1st session, p. 7, which sponsored the repeal and stated:

> Let every trace of the reconstruction measures be wiped from the statute books; let the States of this great Union understand that the elections are in their own hands, and if there be fraud, coercion, or force used they will be the first to feel it. Responding to a universal sentiment throughout the country for greater purity in elections many of our States have enacted laws to protect the voter and to purify the ballot. These, under the guidance of State officers, have worked efficiently, satisfactorily, and beneficently; and if these Federal statutes are repealed that sentiment will receive an impetus which, if the cause still exists, will carry such enactments in every State of the Union.

In the report referred to immediately following the words just quoted are these:

> In many of the great cities of the country and in some of the rural districts, under the force of these Federal statutes, personal rights have been taken from the citizens and they have been deprived of their liberty by arrest and imprisonment. To enter into the details in many cases where citizens have been unjustifiably arrested and deprived of their liberty would be useless in this report. We content ourselves in referring to report No. 2365 of the second session of the 52d Congress on the subject, where many such instances are detailed.

Perhaps both of these complete reports could be made a part of my statement as exhibits.

Justice Douglas then said:

> This court now writes into the law what Congress struck out 50 years ago. The Court now restores Federal control in a domain where Congress decided the States should have exclusive jurisdiction. I think if such an intrusion on historic States rights is to be made, it should be done by the legislative branch of Government. (325 U.S. 391–392).

Justice Douglas was thus championing historic States rights and complaining so bitterly because the majority of the Court had held that the Federal statute denouncing conspiracy to injure a citizen in the free exercise of any right or privilege secured to him by the Federal Constitution or laws embraced conspiracy by election officers to stuff a ballot box in an election at which a Member of Congress was to be elected.

Now 66 years after Congress decided that this was a domain in which the States should have exclusive jurisdiction, the executive branch of the government, through the Attorney General, is asking the legislative branch not only to make—

such an intrusion on historic States rights—

but to make an even greater intrusion, an intrusion beyond the wildest machinations of Thad. Stevens and Wade and Butler, and other noted wavers of the bloody shirt.

Why is such an intrusion—such an unwarranted invasion of the rights of the States—requested at this time by the executive branch, of the legislative branch?

Sixty-six years ago, the Congress solemnly stated that the laws enacted by the States to protect the voter and purify the ballot were working efficiently, satisfactorily, and beneficiently.

Georgia was one of the States which enacted such statutes. When did they cease to work efficiently, satisfactorily and beneficiently? If and when they ceased to work efficiently, satisfactorily, and beneficiently, was any complaint ever made to any court of Georgia complaining of any lack of efficiency, dissatisfaction, malevolence, fraud, or wrongdoing in the administration of Georgia's laws?

Oh—I know that in recent months—the last 4 or 5 years—at the instigation of some one or ones, a few suits have been filed in Federal courts, but has any Negro citizen, alleging that he was wrongfully deprived of his right to register, ever appealed from the decision of the board of registrars of any county in Georgia to the supreme court and thence to the court of appeals or Supreme Court? This is not a rhetorical question. I am asking for information. I know of no such case. If there be one, certainly the efficient legal staff of the Department of Justice or that of the NAACP knows of it.

Let us examine 42 U.S.C. 1971 as amended by the Civil Rights Act of 1957, and see just what the Attorney General is asking the legislative branch of the Government to enact into law in these United States of America—supposed to constitute a constitutional republic.

In making that examination, remember that the portion of the Civil Rights Act of 1957 sought here to be amended was declared unconstitutional by a Federal district judge in Georgia last April (*United States* v. *Raines*, 172 F. Supp. 552). An appeal by the Government was argued before the Supreme Court of the United States, with the Attorney General appearing in person on behalf of the United States in an unprecedented appearance, for him, on January 12, 1960. As this is written, that case has not been decided. If it is affirmed on the basis of the decision of the trial judge, this proposed legislation automatically would fall with it.

Why is the Congress asked to receive and pass on this legislation while the fate of the basic legislation is at issue before the highest court of the land?

Is there some sort of a contest or game being played in which the rival opponents of the two major political parties are vying to see which can strike the South the sooner and the harder? As I read the bills, I thought of Admiral Farragut entering Mobile Bay, and saying: "Damn the torpedoes; go ahead," for these bills seem to be saying "Damn the Constitution—go ahead."

Under title 42, United States Code, section 1971(c), if it should be held valid, whenever any person, whether or not his acts constitute abridgements or denials by a State, has engaged in or is about to engage in acts or practices which would deprive any other person of any right or privilege secured by title 42, United States Code, section

1971 (b) or (a), 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.

Section 1971(d) confers jurisdiction on the district courts of the United States of such proceedings.

The Attorney General's bill proposes to add to title 42–1971 a subsection (e), in lieu of present (e) which would become (f), authorizing the court in which a proceeding under subsection (c) might have been instituted, in certain events to appoint one or more persons as voting referees.

It is interesting to see that the court may not appoint such persons as referees in just any proceeding which may have been instituted pursuant to subsection (c). The first condition precedent to such appointment is that the court must find that under color of law or by State action a person or persons have been deprived on account of race or color of a right or privilege secured by (a) or (b).

Tacitly, the Attorney General and the authors of these bills here seem to concede the validity of the constitutional attack which has been made, and successfully maintained in a district court, on 1971(c) coupled with 1971(a). The present proposed limitation to the proposed further action of the court demonstrates that under (c) as it now stands the Attorney General may institute a suit whether or not the acts or practices complained of constituted abridgements or denials by the State. Tacitly, therefore, there is an admission that the opinion of Judge T. Hoyt Davis, based as it was on *United States* v. *Reese*, et al., 92 U.S. 214, is correct.

Furthermore, the court may not appoint those persons as voting referees unless the court further finds that the alleged deprivation "under color of law or by State action" was or is pursuant to a "pattern or practice." Whose "pattern or practice?" If the "pattern or practice" is that of individuals, there is no abridgement or denial by the State and the legislation is not appropriate under the 15th amendment.

What "persons" may the court appoint as "voting referee?"

The bill doesn't even provide that the "person" must be disinterested. It contains no provision for any qualifications either as to ability, training, or residence. An employee of the United States may be appointed. A person absolutely untrained in the law may be appointed. A resident of New York, Illinois, or the District of Columbia may be appointed in a case pending in Michigan or Georgia. The chairman of this committee on February 9, 1960, called that fact to the attention of Judge Walsh. He replied that it is not made essential, but that the assumption was that any district judge is going to appoint somebody from his district. We in the South have not so soon forgotten that sometimes judges from North Dakota are sent into the South to try these cases. We do not overlook the fact that under this bill, the Attorney General would choose the forum and the judge.

As will be presently seen, it is the object of this proposed legislation that these voting referees supplant registrars appointed under State law. In Georgia registrars under the State law are required to be "upright and intelligent citizens of the county" (code 34–301). They must be bipartisan (34–302). They must take an oath, faithfully to perform their duties (34–303).

Federal voting referees are not even required to take an oath, and, for all the bill requires, they may be just as ignorant as those whom they might permit to register.

Let us assume that a proceeding under subsection (c) were filed in the District Court of the United States for the Middle District of Georgia, Americus Division, against registrars of Terrell County, and that the court makes the findings required by the proposed bill, and appoints Tom, Dick, and Harry as "voting referees."

What are those voting referees authorized by the proposed bill to do?

Their first authorization is—

to receive applications from any person claiming such deprivation as to the right to register or otherwise to quality to vote at any election * * *

First, I ask, applications for what?

Under that language, if a decree were had as to Terrell County registrars, would the phrase "any person" from whom applications might be received, include a resident of Randolph County, or even Bibb or Fulton or Chatham? Is this language to be used as the basis of creation of a board of voting referees having statewide powers though appointed on the basis of alleged wrong doings by some one in only one county? Don't think these fears are farfetched imaginings. I have observed it solemnly argued by the Department of Justice in a Federal court the word "person" in the statute as it now reads was intended by the Congress to include a sovereign State (*U.S.* v. *State of Alabama*, 171 F. Supp. 720, 267 F. 2d 808).

I have no reason to believe that the phrase "any person" would be limited so as to mean "any person resident of the county involved in the action," particularly in the light of the fact that the quoted language uses the phrase, "any election." "Any election" means what it says. I do not anticipate any voluntary restriction of its meaning if this legislation should be passed.

These persons so appointed as voting referees would "take evidence." Where? Upon what notice to interested parties? Under oath? Would the witnesses giving evidence be subject to cross-examination? Would anyone have the right to oppose those applications? Or would the proceedings be "ex parte"; "star chamber."

These "voting referees" would report to the court findings as to whether such applicants or any of them (1) are qualified to vote at any election, (2) have been (*a*) deprived of the opportunity to register to vote or otherwise to qualify to vote at any election, or (*b*) found by State election officials not qualified to register to vote or to vote at any election.

By the application of what standards will the "voting referees" determine whether the applicants are qualified to vote? Must the applicants have the qualifications requisite for electors of the most numerous branch of the State legislature? What age must they have attained?

This report will be reviewed by the court, and the court shall accept the findings unless clearly erroneous. Does anyone have the right to except to it? The court shall then enter a supplementary decree which shall specify which persons named in the report are qualified and entitled to vote at any election within such period as

would be applicable if such person or persons had been registered or otherwise qualified under State law.

Bear in mind, this scheme doesn't apply only to Negroes. It applies to white people as well.

What has any Federal court to do with whether a person is qualified to vote at any election unless he has been deprived of the right on account of his race, color, or previous conditions of servitude? The phrase "any election" embraces municipal and State elections as well as congressional elections. The Federal power as to congressional elections is quite different from the Federal power as to elections of State officers. At page 37 of the hearing of February 9, Judge Walsh is quoted as saying:

> * * * there has been no holding that Federal electors are Federal officers. I think there is a high likelihood that that would be the ultimate determination.

I call attention to *Ray* v. *Blair*, 343 U.S. 214, 224–225 in which the Supreme Court said:

> The Presidential electors exercise a Federal function in balloting for President and Vice President but they are not Federal officers or agents any more than the State elector who votes for Congressmen. See also, *In re Green*, 134 U.S. 377; *Walker* v. *United States*, 93 F. 2d 383(3), and *McPherson* v. *Blacker*, 146 U.S. 1.

What Congress may have the power to regulate and what it definitely has not are so intermingled in this bill as to render it totally unconstitutional.

Even if it should be held that subsection (c) of section 1971 of title 42 United States Code is valid, and that in a proceeding instituted pursuant to it there may be a decree granting to the United States of America the preventive relief or injunction sought by it, it would not follow that Congress had the power to grant authority to the court to appoint voting referees to receive applications from any person claiming deprivation of his right to vote, and to empower the court, or judge thereof, then to sit as chairman of a superboard of registrars, issue voting certificates, and punish violations of them.

Even if it be assumed that the proceeding now authorized by subsection (c), if it is valid, constitutes a case or controversy within the meaning of article 3, section 2, clause 1 of the Constitution, Congress has no constitutional power to confer on a Federal district court the hermaphroditic powers it would seek to confer by this bill.

The judicial power extends to the "cases" described in the said clause, and to controversies to which the United States is a party.

The so-called proceeding which would follow the decree or finding of the court would not be a case or controversy within the meaning of the Constitution. In the first place, it would not even be confined to alleged deprivations committed by the defendants in the case. It would not be confined to adjudicating the rights of those for whose benefit the United States had brought the suit. It would convert the case or controversy into a universal registration proceeding in which there were no named plaintiffs and no named defendants.

A case is defined as a suit instituted according to the regular course of judicial procedure (*Muskrat* v. *United States*, 219 U.S. 346).

In an ancient volume, 2 Dallas 409–410, the rule was announced in 1792:

> Neither the legislative nor the executive branches can constitutionally assign to the judicial any duties, but such as are properly judicial, and to be performed in a judicial manner.

Registration officers are not judicial officers, and the registration of a prospective voter is not a judicial act (*Murphy* v. *Ramsey*, 114 U.S. 15, 37).

The term, "controversies," if distinguishable at all from "cases," is so that it is less comprehensive in its nature than the latter, and includes only suits of a civil nature (*Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 277, 108 ALR 1000).

In *United States* v. *State of Alabama*, 171 F. Supp. 729, affirmed 267 F. 2d 808, it was held that the State of Alabama was not a "person" within the meaning of section 1971(c) of title 42, and consequently was not a proper party to an action under that section brought by the United States. The case was brought to the Supreme Court of the United States upon petition for certiorari filed by the United States, and granted by the Court. The case is No. 398, October term, 1959. I am advised that it will be heard in March.

This bill seeks an advance and favorable decision of the case by seeking to add at the end of subsection (c):

> When any official of a State or subdivision thereof has resigned or has been relieved of his office and no successor has assumed such office, any act or practice of such official constituting a deprivation of any right or privilege secured by subsection (a) or (b) hereof shall be deemed that of the State and the proceeding may be instituted or continued against the State as a party defendant.

I respectfully submit Congress has no constitutional power to enact that.

In the first place, the determination of what acts or practices constitute a deprivation of rights or privileges under the 15th amendment is a judicial and not a legislative function.

In the second place, Congress, in a case such as comprehended by section 1971(c) cannot authorize a suit by the United States against a State of the Union. The 11th amendment forbids it. I realize that the 11th amendment does not prevent the United States from suing a State in a proper case in a proper court. I realize that Congress in some cases has the power to confer on district courts jurisdiction with respect to actions brought by the United States against a State. (*Farnsworth* v. *Sanford*, 115 F. 2d 375, 379; *Ames* v. *Kansas*, 111 U.S. 449; *United States* v. *Louisiana*, 123 U.S. 32).

But this power does not exist when the action is a derivative one, one in which, while the name of the United States is used by authority of Congress, the persons allegedly aggrieved are individuals.

To hold otherwise would destroy the 11th amendment.

I have had the opporunity of reading the testimony of Deputy Attorney General Judge Lawrence E. Walsh before this committee on February 9, 1960.

With the deepest respect for my distinguished friend for whom I have the utmost respect, I suggest that in the fervor of his advocacy he has overlooked what he would not, as a judge, have overlooked.

For this bill to be valid, it must be appropriate legislation under the 15th amendment. No other provision of the Constitution could

possibly warrant it. To be appropriate legislation under the 15th amendment, congressional legislation must be limited to the prevention of denials or abridgments by a State of the right of a person to vote by reason of his race or color or previous condition of servitude.

In this adroit bill, the scheme is to empower a Federal court to decree that State officials are generally guilty of acts depriving a person of his 15th amendment rights, and then by reason of that decree to compel the State to permit other persons, not parties to the suit, to vote at its elections.

The fundamental vice is the confusion of prevention of discrimination with mandatory provisions compelling the State to permit voting at its elections.

It overlooks the fundamental proposition of law that the privilege of voting is not derived from the United States but is conferred by the State (*Breedlove* v. *Suttles*, 302 U.S. 277, 283; see also, *Lassiter* v. *Northampton Board of Elections*, 360 U.S. 45, 79 S. Ct. 985).

If a person proves to the satisfaction of a proper court that he has been deprived of voting rights contrary to the provisions of the 15th amendment, a court, in a proper case, may have the right to redress that deprivation by compelling the State to permit that particular person to vote. But, that is a far cry from the attempt of this bill. Here, if A is prevented from voting on account of a studied practice contrary to the 15th amendment, the court may confer the privilege of voting in State elections on B, C, D, E, F, G, and X, Y, and Z.

Under its power to enact legislation to prevent denial or abridgment by a State of a citizen's right to vote, Congress may not convert Federal courts into registration boards supplanting State officials.

The questions propounded by the chairman of this committee to Judge Walsh, record pages 44 et seq., show that he, as a trained lawyer, recognized the gravity of this very question.

In response to the chairman's searching questions, Judge Walsh said:

> Well, if you found a pattern and practice against Negroes, and he is a Negro, I think Congress is justified in jumping the gap and establishing a conclusive presumption that that is the reason for his trouble. (Record, p. 45).

"The CHAIRMAN. You mean that Congress can justify that presumption?

Mr. Walsh answered:

> Yes, sir. I think it is a reasonable presumption. I think if you have 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 [sic] is very difficult. Therefore, I think he needs Congress help in that regard.

Here we have a striking example of what Justice Hugo Black was warning against when he recently said:

> The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our Government (*Reid* v. *Covert*, 354 U.S. 1, 14, June 10, 1957).

Here we have the Deputy Attorney General of the United States seeking to justify a "presumption" not on the basis of its constitutional validity but because forsooth it is in his opinion reasonable and necessary.

This is what Congress is being asked to do:

In the opinion of the Attorney General, a person has engaged or there are reasonable grounds that a person is about to engage in acts or practices which would deprive some other person of his right to be entitled and allowed to vote at an election. He institutes a civil action in the name of the United States for preventive relief (42 U.S.C. 1971(c)). The court finds that under color of law or by State action persons have been deprived of those rights on account of race or color. It finds that such deprivation was or is pursuant to a "pattern or practice." The statute is silent as to how this question of "pattern or practice" vel non, is to be put in issue. Whose "pattern or practice," we do not know. The language is not limited to a "pattern or practice" established or sanctioned by the State. It may be just anyone's pattern or practice. All that the court is required to find is that "such deprivation was or is pursuant to a pattern or practice." Then it is authorized to appoint voting referees to receive applications from any person claiming that he has been deprived of his right to register and qualify to vote. It is presumed that such other person is also the victim of such pattern or practice.

The Department of Justice would have the Congress legislate on this basis: In the state of "A," there is a pattern or practice of denying or abridging the rights of Negroes to vote. X is a Negro, and has been refused registration. Therefore X has been unconstitutionally deprived, and the States must let him down.

In seeking to justify the Attorney General's proposal, Judge Walsh says first that it is—

a bare facilitation of an ancillary procedure by that court to make its decree effective.

Just after the language just quoted, it is said:

The Civil Rights Act does not say the only thing a court can do is to enjoin the registrar. It says it can make such other orders as are desirable.

The action which the Civil Rights Act permits the Attorney General to institute for or in the name of the United States is:

* * * a civil action or other proper proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order.

That is the exact langue of 42 U.S.C. 1971(c).

The Attorney General is limited to seeking "preventive relief" which may be granted by the court by means of a "permanent or temporary injunction," a "restraining order, or other order."

And says the Department of Justice—

and all Congress would be doing in the Attorney General's proposal, really, would be making a statutory presumption to avoid one element of proof, that causal link which is so difficult to prove. So it could be justified constitutionally that way.

This overlooks the fact that the Constitution of the United States does not permit such facile leaping of hurdles:

It is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime (*McFarland* v. *American Sugar Co.*, 241 U.S. 79, 86, 36 S. Ct. 498, 501, 60 L. Ed. 899—)

cited in *Manley* v. *State of Georgia*, 279 U.S. 1, 6, holding that a statute creating a presumption that is arbitrary or that operates to

deny a fair opportunity to repel it violates the due process clause of the 14th amendment.

See also *Bailey* v. *Alabama*, 219 U.S. 219, 233 et seq., 31 S. Ct. 145, 55 L. Ed. 191.

A statute creating a presumption that is arbitrary, or that operates to deny a fair opportunity to repel it, violates the due process clause of Constitution amendment 14, since legislative fiat may not take place of fact in judicial determination of issues involving life, liberty, or property (*Western & A. R. Co.* v. *Henderson*, 279 U.S. 639, 49 S. Ct. 445(3)).

Legislation providing that proof of fact shall constitute prima facie evidence of main fact in issue satisfies requirements of due process of law when the relation between the fact found and presumption is clear and direct and is not conclusive (*Adler* v. *Board of Education*, 72 S. Ct. 380(16), 342 U.S. 485).

The presumption there involved was upheld because it was—

not conclusive but arises only in a hearing where the person against whom it may arise has full opportunity to rebut it (342 U.S. at p. 495).

It is suggested that—

maybe * * * a State is entitled to less protection because it is not a person under the 14th amendment * * *

and perhaps the due process clause of the 14th amendment does not apply to a State.

This suggestion overlooks the fact that a "person or persons" are the defendants in an action under 1971(c). It is those "persons" to whom the Attorney General will transmit the "supplementary decree" proposed to be issued under the amendatory act, it is those persons—election officials—who are subject to prosecution for contempt.

During the questioning of Judge Walsh by Representative Willis, he was asked:

Then this voting referee, however, would have a right to protect, according to the pattern of the bill, not only persons named in the original action, but anybody in the area who feels that he is the victim of the pattern?

The answer was:

Yes, sir, anybody who is a member of the same race (record, p. 48).

The bill, H.R. 10035, does not confine the reception by the voting referees of "applications" to those of the same race as those for whom the original suit was brought.

Page 2, lines 5 and 6, empowers these voting referees—

to receive applications from any person claiming such deprivation as to the right to register * * *.

"Applications" for what? For what do the applicants apply? Was the fact that what these "applicants" will be seeking is a registration certificate designedly omitted?

Perhaps the drafters of the bill gagged at the idea of so patently converting a Federal court into a registration board.

At page 50 of the hearings, Mr. Willis asked Judge Walsh if he was familiar with the jurisprudence that under clause (b) of rule 53, the adverse party could insist upon a showing that an exceptional situation existed before a master could be appointed. Judge Walsh replied:

Yes, sir, and that was because he would have to pay one-half of the cost of the master, whereas here no one is going to pay the cost of the master except the Government.

I respectfully suggest that that is not the real reason for the extreme reluctance which exists on the part of Federal judges to appoint "masters."

The real reason is that by its nature and consequence the procedure of reference to a master "nullifies the right to an effective trial before a constitutional court."

See *In re Tom R. Watkins*, praying for a writ of mandamus, decided by the U.S. Court of Appeals, Fifth Circuit, November 24, 1959 (271 F. 2d 771).

The quoted language is at page 775, and reference is there made to the case of *Beacon Theatres, Inc.* v. *Westover* (1959, 359 U.S. 560, 79 S. Ct. 948, 3 L. Ed. 2d 988).

In that case, at pages 508–509, Justice Black speaking for a majority of the Court says:

> Our decision is consistent with the plan of the Federal Rules and the Declaratory Judgment Act to effect substantial procedure reform while retaining a distinction between jury and nonjury issues and leaving substantive rights unchanged.

Then follows language which is summarized in 79 S. Ct. 948, headnote 18, as follows:

> In Federal courts, equity has always acted only when legal remedies were inadequate.

As Justice Black points out, that rule is derived from a long line of cases one of the earliest of which is *Hipp* v. *Babin* (60 U.S. 271, 19 How. 271, 15 L. Ed. 633). Note: See Equity, Supreme Court Digest, key No. 46.

Despite these ancient rules of law, despite the limitations upon the judicial power of the United States as set out in the Constitution, despite the 10th amendment; the Attorney General would have a Federal court become a registration board, and permit the claims of thousands of applicants who have never submitted those claims to proper State tribunals, to be adjudicated in a proceeding said to be ancillary to a pending proceeding, an ex parte proceeding, and to be adjudicated by a so-called supplementary decree. (Prepared statement of Judge Walsh before the committee, p. 6.)

The applications which would be filed by those who were not parties to the original action would in no sense be such a complaint as is required by Federal Rules of Civil Procedure No. 3 for the commencement of a civil action in a Federal court.

A civil action in a Federal court is commenced by the filing of a complaint with the court.

Rule 3: Other rules provide for the issuance of process, the service of process, the filing of defensive pleadings; rules 4, 5, 8, and 12 for example.

Unless those rules are complied with there is no suit in the Federal court. There being no suit at all, there is no ancillary suit.

But even if we can denominate this strange new application as a complaint, a suit it is not in any sense heretofore adjudicated by the Federal courts ancillary to the civil action which, filed by the United States of America, had preceded.

That action created by the Civil Rights Act of 1957 permits the United States of America to institute a civil action for preventive

relief against persons who may be depriving other persons of certain rights.

Now, it is proposed after there shall have been a decree granting such preventive relief, and declaring a pattern or practice to exist, to permit—

applicants not parties to the original suit to be granted mandatory relief, to be by a Federal court registered as voters at all elections, State or Federal.

Up to now, it has been the law that even a real case or controversy, as distinguished from an application, cannot be regarded as ancillary so that jurisdiction can be made to depend upon the jurisdiction in the original suit unless it has direct relation to property or assets actually or constructively drawn into the court's posse sion or control by the principal suit (*Oils, Inc.* v. *Blankenship*, 145 F.2d. 354, 356).

Even if these so-called applications could be dignified with the title of "supplemental bills," they would be unauthorized under presently existing and adjudicated principles of law and equity and equity practice in the Federal courts (*Walmac Company* v. *Isaacs*, 220 F.2d 108, 113–14; *Dugas* v. *American Surety Co.*, 300 U.S. 414, 428, 57 S. Ct. 515, 521, 81 L. Ed. 720).

The bill provides for the issuance of a supplementary decree by the court after these proceedings before the voting referees which proceedings Judge Walsh characterizes as "ex parte," his statement, page 6.

The phrase "supplementary decree" is not recognized or defined in the Federal Rules of Civil Procedure nor in title 28 of the United States Code.

Heretofore an action in equity has ended with the final decree adjudicating the rights of the complainants and defendants in the cause.

A court of chancery has had jurisdiction of course to effectuate its decree by appropriate process (19 Am. Jur. Equity, sec. 420).

Heretofore, in the United States and in England, that effectuation has been confined to the enforcement of the rights of and relief granted to the parties to the cases.

Never before has it been thought that a supplementary decree could be promulgated by a court granting relief to applicants who were not parties to the case in which the decree was promulgated, and granting relief of an entirely different nature from that prayed or granted in the main suit.

The only supplementary decrees known to equity practice in the United States and England as it heretofore existed resulted from supplemental bills founded upon matter arising after entry of the decree.

See, for example, *Root* v. *Woolworth* (150 U.S. 401), *Independent Coal and Coke Co.* v. *United States* (274 U.S. 640), *Looney* v. *East Texas R. Co.* (247 U.S. 214).

The so-called supplementary decree here sought to be authorized would be nothing more or less than what in some countries have been called ukases—which in czarist Russia were "imperial orders or decrees, having the force of law."

I am not familiar with the registration laws of other States. I do know that we have a very full and fair law in Georgia. The one now in force was enacted in 1958, Georgia Laws 1958, page 269 and the following, approved and effective as of March 25, 1958.

If the Congress should enact the proposal of the Attorney General it would supersede this law in most of its important features when, as, and if the Attorney General was successful in maintaining a court proceeding under the 1957 act, and another "if"—if it should be declared valid by the Supreme Court of the United States.

Very recently, our supreme court, the Supreme Court of Georgia, has said:

> Registration laws are the means and machinery by which proofs are submitted showing the existence of the citizen's qualifications as an elector; such statutes having for their purpose regulation of the exercise of the right of suffrage, but not to qualify or restrict the right to vote. Such laws must be impartial, uniform and reasonable, giving to all a fair, equal and reasonable opportunity to exercise the right to qualify as an elector (*Franklin v. Harper*, 205 Ga. 779(3)).

The purpose of the act of 1958, the Georgia Registration Act, and the act which preceded it is and was to provide the necessary machinery to carry out the provisions of the constitution of Georgia which prescribe the qualifications of a voter, among them being that he must be a person of good character.

In legislating upon the subject, our general assembly, acting under the powers reserved to the State of Georgia by the 9th and 10th amendments to the Constitution, enacted another very wise provision, namely that the registrars shall, in each year in which there is a general election for members of the general assembly, cease their operations of taking applications from persons desiring to vote in such election 6 months before the date of such election (Acts 1958, p. 276, Ann. Code, 34-111).

The purpose of that law is to prevent the very occurrence which the Attorney General's plan seeks to insure—the voting of people whose character and qualifications have not been examined and tested.

This bill—if enacted into law, and held valid—will not affect Georgia alone. It will not affect the South alone. It will affect every State in the Union. The evils of its progenitors, the Force Acts of 1870 and 1871, persist in this modern day Force Act. Those evils were not revealed in the South. Those evils were revealed by happenings in the North. For details of the revelation I call attention to an article in the U.S. News & World Report of February 15, 1960, pages 42 et seq. entitled: "Here's the Latest Plan for Cracking Down on the South."

That article demonstrates that in cracking down on the South, the people of the North, East, and West may become crackee victims.

That old law was used, a congressional report said—

> only as part of the machinery of a party to compensate voters who are friendly to it, and to frighten from the polls the voters of the opposing party.

Will the new one be similarly used?

Then, Mr. Chairman, gentlemen of the committee, follows an appendix which has a summary of the Georgia registration laws as they exist through 1958.

Thank you very much.

The CHAIRMAN. Well, Judge, I want to compliment you on your superb presentation. I would say it was clear, distinct, and cogent, and very well documented.

You have the thanks, I am sure, of the members of this committee, for a very fine statement.

However, I take it that you will be willing to subject yourself to some questions.

I refer you to your statement on page 5 where you say Georgia enacted statutes for the protection of the voters, and that those statutes set up an efficient, satisfactory, and beneficent type of machinery of voting.

Now, the Civil Rights Commission has examined the records of a number of States. I don't think they have as yet gone into that. But the Civil Rights Commission came up with a number of conclusions which clearly indicate there was deprivation of the right to vote. That deprivation was leveled against certain people because of their race and their color. There is no doubt about that, is there, Judge? That the Civil Rights Commission did come up with such findings?

Mr. BLOCH. There is no doubt about their having made such finding. I do doubt the accuracy of that finding in this respect. I am talking about Georgia now. I don't know what condition may exist in Alabama, Mississippi, Louisiana, Arkansas, or even New York, or any other State. But I am talking about in Georgia.

If a person, colored or white, thinks he is deprived of the right to vote in Georgia, the right to register and vote, he has got a right to appeal from the decision of the registrars to a superior court, which is our court of last resort—trial court of last resort, highest trial court, and then to the court of appeals of the Supreme Court.

I have always thought, Mr. Chairman, that if people, colored or white, were sincere in their efforts, and merely wanted to vote, and not to create a political issue—but if what they wanted was the right to vote, that if when they applied to vote, and they were refused that right, what would they do? What would I do, or any member of the committee do, if he applied to the board of registrars of Bibb County, my residence, to vote? I would appeal to the superior court. And there he is entitled under our law to a trial de novo, and not merely on the evidence that was taken before the registrars. And then if I were not satisfied with what the superior court did, I would go to the court of appeals and the Supreme Court.

Mr. ROGERS. May I interrupt you there? Suppose you can't find a registrar in order to qualify, as this Civil Rights Commission showed in reports that in many instances the registrars even resigned, and they can't even find them? Well, now, if under your law you must make the application before you can appeal, what would you do in that case?

Mr. BLOCH. Mr. Rogers, I say again that I know the broad findings that the Civil Rights Commission have made. They have made the very sort of findings that I predicted they would make when I sat here before you in 1957 and 1958. But what I am trying to say is that so far as Georgia is concerned, they have not pointed out one single case in which a Negro has sought to register and been deprived of that right to register, and that Negro has appealed to the State courts for relief. Now, they have got the Terrell County case pending in which assertions are made that never have been proven, and I doubt if they ever can be proven.

The CHAIRMAN. It may be that the right exists to follow that legal process which you have indicated. But how could a poor Negro, for example, of limited means, follow that process successfully? Where would he get the money to do it?

Mr. BLOCH. Well, does the U.S. Government have to furnish litigants the money to prosecute their cases?

The CHAIRMAN. I don't say the United States should do it. But that process is so far out of the reach of the ordinary Negro who is deprived of his vote as to render that process almost a nullity, as far as the aggrieved individual is concerned.

Mr. BLOCH. I daresay, Mr. Chairman, with all respect—I daresay that the same folks would furnish the money for that proceeding as are furnishing the money for the other proceedings that are being taken.

The CHAIRMAN. You are referring, I take it, to the NAACP.

Mr. BLOCH. In 1947 and 1948, there were several cases filed in the Federal courts in Georgia. But I never have known one—now, there may be one—I am not making the statement there hasn't been. I am saying I never have known one to be filed in a State court.

The CHAIRMAN. How many cases have been filed under that remedial process that you indicated by Negroes in the State of Georgia?

Mr. BLOCH. You mean under 1971(c)?

Mr. WILLIS. No, he is talking under Georgia law.

Mr. BLOCH. Under the Georgia law? I said I didn't know of any.

The CHAIRMAN. Well, therefore, if——

Mr. BLOCH. Any by a Negro.

The CHAIRMAN. Therefore, I assume there is a reasonable presumption that the process that you have indicated is not of any real and genuine value to those deprived of their right to vote.

Mr. BLOCH. I think the far more reasonable assumption is that they are not merely seeking the right to vote.

The CHAIRMAN. Well, taking the case——

Mr. BLOCH. A far more reasonable presumption is that they are just seeking publicity and the aid of the Government in trying to get these sort of bills driven through. They are trying to make you, Mr. Chairman, do the very thing that you are doing. That is to presume that an evil exists which hasn't been proven to exist.

Mr. MCCULLOCH. Mr. Chairman, could I interrupt there? I would like to ask Mr. Bloch this question, then.

Is it your studied judgment that no Negroes otherwise qualified to vote have been denied the right to vote in Georgia in the last 2 or 5 years?

Mr. BLOCH. No, sir, I wouldn't say that. I wouldn't say that. If I had to guess, I would say that perhaps some of them have been deprived of the right to vote. But I say in connection with that, why don't they follow the procedure given to them by the Georgia law?

Mr. MCCULLOCH. Well, I would like to ask two other questions, since we have that answer from Judge Bloch.

Do you think that public opinion brought to bear on the Negro who has been denied his right to vote is a deterrent to him bringing the action?

Mr. BLOCH. No, sir, I wouldn't say that it was. I say this to you. And I can only speak authoritatively for my county.

The Negroes vote there, and Negroes are registered to vote, and they do vote. And in two recent elections they have had the balance of power, and carried the election. But I say to you that if a Negro qualified to vote in Bibb County, Ga., applied to the registrars to vote,

and was not granted the right to vote, that he would receive a fair trial before the superior court of Bibb County, Ga., and a fair trial before the Court of Appeals of Georgia, and the supreme court, if he didn't get one in the local court.

Mr. McCULLOCH. Well, we are very glad to hear that statement, and, of course, have a very high regard for the courts of Georgia.

My last question in this particular connection, Mr. Chairman, is this:

Do you believe that there are economic sanctions against the Negro in the State of Georgia which deters him from exercising his right to register and vote?

Mr. BLOCH. I have heard of them, Mr. McCulloch, I have heard of them, but I know of no actual fact. I have heard of them just like you have. And it has been reported in the Civil Rights Commission report. But I know of no such instance.

In other words, I know of no instance where Negroes seeking to vote have been told "If you keep that up, you will lose your job," or something of that sort—that is what you mean by economic sanction? I know of no such in my county.

Mr. McCULLOCH. Do you know whether or not, even in the absence of statements to that effect, there is concerted action on the part of Georgia citizens to impose economic sanctions upon Negroes if they seek to exercise their rights which are guaranteed by the Federal Constitution and by the Georgia constitution?

Mr. BLOCH. No, sir, I know of no such. And I would say that there was not any such.

Mr. McCULLOCH. If there were such activities, as indicated by any one of my three questions, in the State of Georgia, would you be of the opinion that there should be some kind of remedy given to those people who might be denied or who have been denied their constitutional rights by such action?

Mr. BLOCH. I would say, Mr. McCulloch, that even if those sort of practices existed, or exist, which I specifically deny, that even if they did it wouldn't justify such legislation as this.

Mr. McCULLOCH. Well, maybe this legislation can be so improved so that it will be justifiable, if such conditions exist—not necessarily in Georgia, but if they exist in Piqua, Ohio, or any other city and State in the Union.

Mr. BLOCH. If such conditions exist, and if there is no remedy for them under the State law, or if the procedure followed by the State law is tested out, and not found to cure the situation, then and then only do I think that Congress should act. But how can the Congress say, or the Civil Rights Commission say, or anybody else say that a Negro—that it is a custom to deprive Negroes, or the pattern or practice is used to deprive Negroes of the right to vote, when we cannot be cited to one single case where a Negro has ever pursued his remedy through the State court. Now, I am not making that statement as a statement of fact. I say that I know of none. And I ask that it be pointed out to me if there was.

The CHAIRMAN. Now, Judge, let's get this into the record. I am reading now from the report of the Civil Rights Commission, page 56. "In Baker County, with some 1,800 Negroes of voting age, none was registered. In Lincoln County"——

Mr. BLOCH. What was the last county?

The CHAIRMAN. This is Georgia. Lincoln County, only 3 out of more than 1,500 registered.

In Wilkes County, 6 out of more than 1,300. In Terrell, 48 out of 5,000.

Now, would you say that from those figures, and these facts, that the Negro has been given the right to vote?

Mr. BLOCH. No, sir, I wouldn't say that. I would say that those Negroes who applied were either not qualified to vote under the standards of the Georgia law, or they really didn't want to vote. But out of those figures that you read me, now, why not ask the Civil Rights Commission how many of those allegedly deprived unconstitutionally applied to a superior court to review the denial of their applications?

The CHAIRMAN Well, let's see how they apply the law in Terrell County. I am reading again from the Civil Rights Commission report.

In Terrell County, the chairman of the county board of registrars gave us grounds for denying registration to four Negro schoolteachers that in their reading test, they pronounced "equity" as "eequity," and all had trouble with the word "original."

Now, you think that is a fair interpretation of the statutes, and would you say that they are properly enforced with that kind of enforcement?

Mr. BLOCH. You are asking me a question which calls on me to admit the truth of the statement that you read. I don't admit the truth of that statement.

The CHAIRMAN. Well, we have to take these statements as true, because——

Mr. BLOCH. I don't admit the truth of that statement. It so happens, Mr. Chairman, that Terrell——

The CHAIRMAN. Well, let's take another angle.

Mr. DOWDY. Let him answer the question. I would like to hear what he has to say.

Mr. BLOCH. I was going to say this. That Terrell County—Dawson, Ga., is the county seat of it—that set of circumstances, alleged circumstances, which you read there, are the basis of the case of *United States* v. *Raines, Oxford, et al.*, in which Judge Davis held the Civil Rights Act unconstitutional, and which is now pending in the Supreme Court of the United States. Now, all those statements made by the Civil Rights Commission, if perchance that case should be reversed, and sent back down there for trial, then we go find out—we are going to find out whether those statements are true or not.

The CHAIRMAN. Well, I have read you—I could read you most statistics, but time will not permit. But we have, for example, the following:

Three members of that Commission were southerners. And they made this statement:

Legislation presently on the books is inadequate to assure that all our qualified citizens shall enjoy the right to vote.

Against the prejudice of registrars and jurors—

said the Commission's report—

The U.S. Government appears under present laws to be helpless to make good the guarantees of the U.S. Constitution.

Now, what have you got to say about those conclusions drawn by the Commission?

Mr. BLOCH. I say they are wrong, despite the fact that the three men, three of them you say are southerners. I think there was Governor Battle, the Governor of Florida, Collins, and Dean Storey—he is from Texas. He is no longer from the South. Texas is in the West now.

The CHAIRMAN. Well, what is your comment——

Mr. BLOCH. So there are only two southerners.

The CHAIRMAN. What is your comment on the following?

Mr. BLOCH. I don't agree with them, Mr. Chairman, seriously. I don't think they are justified.

The CHAIRMAN. You have the right to disagree.

Mr. BLOCH. I do not think those statements are justified. And I will never think they are justified until some Negroes who really want to vote apply to vote, and are turned down, and go through the State courts and see what the courts will do about it. And then we will talk about discrimination.

Mr. HOLTZMAN. Mr. Chairman, may I ask a question along the lines you have been asking?

Judge Bloch, do you say now that the Civil Rights Commission was in error, or misrepresented the facts, either or, in all these instances where they pointed out that Negroes were deprived of the right to register and vote?

Mr. BLOCH. I don't say that they misrepresented the facts.

Mr. HOLTZMAN. You say they are in error?

Mr. BLOCH. I say I think they came to the wrong conclusion. I did not use the word "misrepresent." I think that the Civil Rights Commission came to the wrong conclusion from the facts which may have been presented to them.

Mr. HOLTZMAN. Judge Bloch, I am asking about the facts upon which they predicated their conclusion. The schoolteacher incidents, and so on.

Do you say that those facts are in error?

Mr. BLOCH. I didn't say those facts were in error. I didn't say that. What I said was this, Mr. Holtzman. That if in one of the counties that the chairman asked me about, if there were 1,000 Negroes there, resident in the county, and there were only three registered to vote, that that does not of itself show any intentional discrimination on the part of the State of Georgia until one of those 997 has pursued his remedies through the State courts. That is what I said.

The CHAIRMAN. Now, Judge, on page 9 of your statement, you express the fear of what might commonly be termed as——

Mr. BLOCH. Whereabouts on page 9, Mr. Chairman?

The CHAIRMAN. Well, I am speaking generally. You express in general the fear that there might be appointments of carpetbaggers by the judges. I use the word "carpetbagger" for lack of a better term. Isn't that correct? Isn't that of concern to you?

Mr. BLOCH. I didn't know I had the word "carpetbagger" in here.

The CHAIRMAN. No, you didn't. I used the term, in my colloquy with Judge Walsh.

Mr. BLOCH. Yes, sir. I have a very great fear that a Federal judge trying a case might appoint people who are not qualified, according to our standard, to be Federal—to be voting registrars.

The CHAIRMAN. Now, when the Federal judges, the district judges, have before them applications for the appointment of special masters, or receivers in bankruptcy, do they not usually appoint lawyers from the district over which the judge presides?

Mr. BLOCH. Yes, sir, they do.

The CHAIRMAN. What makes you think that in the case of voting referees, that the judges would follow a different practice?

Mr. BLOCH. Because we seem to have a different sort of feeling and different rules of law in connection with these civil rights cases, and these Negro voting cases, and these school cases, from what pertains in the ordinary forms of jurisprudence. I have seen things happen in these civil rights cases, and in these school cases, that never would happen in a bankrupty case, or in a corporation case. If it did, it would be promptly corrected by the appellate courts. But there seems to be a brandnew set of law, and a different set of law, being applied in these cases from what are applied in other cases, and I say that seriously, respectfully, and rather sorrowfully.

The CHAIRMAN. Suppose in a report that would accompany a bill that we would report out of this committee, there was an admonition to the district judges that they were to confine themselves to those gentlemen who are lawyers, hailing from the district over which the judge presides?

Mr. BLOCH. I don't think that follows. Suppose a judge from North Dakota were sent down there to try one of these cases. How do you know or I know who he is going to appoint as a referee, or master? He might appoint somebody from his own State and bring him down there. That is a detail. That can be very easily cured by an amendment providing that the referee must be a resident of the district.

The CHAIRMAN. Well, if we would put such a cautionary statement in a report, even a judge from North Dakota or Montana coming down to your area would certainly be compelled to abide by that cautionary statement we put in our report.

Mr. BLOCH. Well, I don't know whether he would or not.

The CHAIRMAN. Well, if he wouldn't, I think we would have the right to hail him up before us, and ask him why.

Mr. BLOCH. Yes, sir, I think you would. I think you would have that right. But I can't guarantee that he would, and you can't.

Mr. MCCULLOCH. Mr. Chairman, it would be a simple clerical matter to write such a provision into the law if the committee in its wisdom determined that it was necessary. As a matter of fact, such a provision is already in existence for study by the committee. Later I shall have more to say on this provision.

Mr. CHELF. Mr. Chairman, right on this subject, may I ask a question?

The CHAIRMAN. All right.

Mr. CHELF. Judge——

Mr. BLOCH. I appreciate you gentlemen calling me judge, but I am not.

Go ahead, sir.

Mr. CHELF. In my opinion, you are a good disciple of the representations of the Constitution, so you are a judge in my book.

Mr. BLOCH. Thank you, sir.

Mr. CHELF. Judge, in your fair State and mine, I think we are the only two in the Union that have a constitutional amendment that permits younsters at the age of 18 to vote.

Now, something was said here awhile ago that there were a considerable number of colored youngsters, 18 or better, who had failed or refused to vote, or who had failed or refused to register, or who had not registered. Is that true or untrue?

Mr. BLOCH. I don't know, sir. You know, we have the 18-year provision, I don't know of any instance in my county.

Mr. CHELF. I thought something was said here awhile ago that there was a considerable number of young Negroes at the age of 18 who had not been permitted to register in the State of Georgia. Is that true?

Mr. BLOCH. I don't know. I cannot say it is true. I cannot say it is false. But I know of no such instance. The case that the chairman mentioned down there in Terrell County, those people, the people for whom—on whose behalf that suit was brought, were not 18-year-olds.

Mr. CHELF. Do you happen to know what percentage of the 18-year-olds, regardless of their race, have registered in the State of Georgia?

Mr. BLOCH. No, sir, but I would be glad to try to find out, and make it a part of my statement.

Mr. CHELF. Along that line, may I be permitted to say for the record, I am ashamed to admit it, but there are very few of the youngsters at the age of 18 who have taken the trouble and the time. My two children, I had to get them in the living room and preach them a sermon as to why they should go down and register. So let's get the record straight into a hat here, because I want to know what is going on. I mean if kids at the age of 18 are being denied the right to register that is one thing. But if they are not doing it, and couldn't care less, that is another.

Mr. BLOCH. Well, I don't think, if there is any denial or abridgment by the State, I don't know that it would be directed against the 18 to 21 any more than it would be above 21. In my own county, I find a very great interest among the youngsters, between the ages of 18 and 21, in politics, and in statecraft. And they are interested, and they register right along.

Now, what percentage of the registered voters in Bibb County, the colored registered voters, are between those ages, I don't know.

Mr. CHELF. I would be interested in finding that out, Judge.

Mr. BLOCH. Yes, I will find that out. (See app. A.)

The CHAIRMAN. I want to say to the gentleman from Kentucky, that no mention was made of teenagers at all. When I mentioned Terrell County, I didn't say anything about young Negroes.

Mr. CHELF. I am sorry. I thought you said there were a considerable number 18 years of age who had not been permitted or who had not. And I just wanted to get the thing straightened out.

Mr. BLOCH. I think, sir, what the chairman said was "schoolteachers," and you thought he said "teenagers." They were alleged to be, and they may be—I don't understand—schoolteachers.

The CHAIRMAN. On page 12 of your statement, the second paragraph, you state:

> What has any Federal court to do with whether a person is qualified to vote at any election?

Now, the 15th amendment is not limited to any election, whether it is State or Federal, is it?

Mr. BLOCH. The 15th amendment applies whether it is municipal or presidential.

The CHAIRMAN. And it also provides, in section 2—

> Congress shall have the power to enforce this article by appropriate legislation.

Mr. BLOCH. That is right.

The CHAIRMAN. So that any bill that provides for control of State elections could well be grounded on the 15th amendment?

Mr. BLOCH. The 15th amendment provides, leaving out the United States, that no State shall deny or abridge the right of any person to vote on account of his race, color, or previous condition of servitude. Now, my position is—then in the next sentence is about the appropriate legislation.

My position is, and always has been, and always will be, that for it to be appropriate legislation under the 15th amendment the legislation must be confined to preventing the denial or abridgment of a citizen to vote on account of his race, color, or previous condition of servitude, and that that denial or abridgment must be on the part of a State.

The CHAIRMAN. There is no question——

Mr. BLOCH. And that this goes beyond that definition.

The CHAIRMAN. And when you say "must be on the part of a State" it can also mean under color of State law?

Mr. BLOCH. No, sir; I don't agree to that; no, sir. That is one of the questions that is pending in the Supreme Court right now—this phrase "under color of the law" some smart person thought of. But I don't think "under color of the law," or the phrase "State action," means a blessed thing. The question is whether there is a denial or abridgment on the part of a State, and calling it under color of the law, or calling it State action, doesn't make it a denial or abridgment by the State until the State has denied or abridged.

Mr. MEADER. Mr. Chairman, would the chairman yield to me?

Mr. ROGERS. Just a minute, let me ask him this question.

Then by that answer, any action taken by a State official is not an action of the State. Is that your interpretation?

Mr. BLOCH. Put it this way. All actions taken by a State official are not actions of the State. Read the case I suggested. That question is up over there now. Read the case of *Barney* v. *the State of New York*.

Mr. ROGERS. Then your position is that it is not State action, although the Governor may act: although the sheriff may act.

Mr. BLOCH. No, I didn't say that.

Mr. ROGERS. Well, then, where is the line of demarcation? When does he fail to be a State official, and when does he act on his own when he is performing a duty assigned to him under a State statute?

Mr. BLOCH. Those question, Mr. Rogers, I think have been answered by the Supreme Court of the United States in *Barney* v. *the City of*

New York, which I think is in 193 U.S. and the case that went up from Illinois several years ago, which was treated in Mr. Frankfurter's special concurring opinion there. I think that there is a denial or abridgment on the part of the State—when there has been an action by one of the State officers pursuant to a State law, or pursuant to a State law which directed this particular action, or when a State officer acts beyond a State law, and the courts of the State have ratified that action. Now, that is the position that I have taken and taken always, and that is what the Supreme Court of the United States, in my opinion, said in the *Barney* case, and in this other case in the 321 U.S., page 1.

Mr. ROGERS. Then if an election official has a duty and a responsibility, and he doesn't perform it, then he is acting as a State official?

Mr. BLOCH. Mr. Rogers, that is one of the questions precisely that is pending in that *Raines* case.

Now, in this case, I can answer your question by showing you, if I may, what was alleged there.

It was alleged in that case—and I guess it is all right for me to discuss a case that is pending before the Supreme Court of the United States—it was alleged in the petition in that case that the acts and practices complained of were designed by the registrars and intended by them to do certain things. I took the position then, and I take the position now, that when registrars design acts of their own, which are contrary to State law, and don't follow the State law, that those acts cannot be considered a denial or abridgment on the part of the State.

Mr. HOLTZMAN. May we try to sum it up, then? Is it your position, Mr. Bloch, that unless there is a State law that abridges or denies the right to vote——

Mr. BLOCH. No.

Mr. HOLTZMAN. It is not your position. Then can you tell us any other instance where there would be such a denial or deprivation in the absence of a State law that would deprive or abridge the right to vote?

Mr. BLOCH. Yes, sir. I think if registrars act in defiance of a State law, or act contrary to a State law, and refuses to register a person on account of his race, color, or previous condition of servitude, even though the State law says that they should, that they ignore that, and that case is carried to and through the courts of the State, and the superior court, and the appellate court says that that action of the registrars was right, then I think you have got an abridgment or denial on the part of the State. But until the remedy allowed by the State law has been pursued, then there isn't any denial or abridgment on the part of the State.

Notice, I refrain from using the phrase "State action or color of law," because I honestly don't think that phrase "color of law" adds a blessed thing to it.

The CHAIRMAN. With reference to the term "under the color of law," in the *Classic* case, with which you are familiar, we have the following. It discussed the meaning of the phrase, "Under color of State law." And the Court states as follows:

Misuse of power possessed by virtue of State law, and made possible only because the wrongdoer is clothed with authority of State law, is action taken under cover of State law.

Mr. BLOCH. That is the *Classic* case?

The CHAIRMAN. Yes, sir.

Mr. BLOCH. 313 U.S.?

The CHAIRMAN. Where one assumes to act for a State, or is clothed with its authority, but assumes greater authority, and assumes then to act for the State with full authority, he is acting under color of law, and can be punished under various statutes.

Mr. BLOCH. The *Classic* case—there are some others that are stronger than the *Classic* case apparently against my position. If you read the *Screws* case, in the 325 U.S., you will find where they use that phrase "color of law." But my position is, Mr. Chairman, in the *Classic* case, the 313 U.S., in *Smith* v. *Allwright*, 321 U.S., which followed it, and in the *Screws* case, which I believe is in the 325 U.S., in all of those cases, it was assumed that "color of law" was equivalent to denial or abridgment by the State. And so far as I know, the question has never been decided by the Supreme Court of the United States as to whether acts of a man acting under—merely "under color of law" was the abridgment or denial by the State.

The CHAIRMAN. Well, I read those cases quite differently. You may differ with me, but I have to emphatically differ with your interpretation of those cases. I think they hold under color of law is the same as acting for the State, and penalties can be prescribed against them.

Mr. BLOCH. You might be interested, Mr. Chairman, in reading what Mr. Justice Frankfurter said on that very subject in this case from Illinois, 321 U.S. It begins on page 1. I can't think of the name of the case; 321 U.S. And it is along tbout page 14 or 15, in the specially concurring opinion. Could we get that? (The case is *Snowden* v. *Hughes*, discussed hereinafter.)

The CHAIRMAN. Yes, we will get it.

But, meanwhile, while we are getting it, I want to ask you some other questions.

Mr. BLOCH. He says there that if what I am arguing is not correct, although he doesn't put it that way, then every act of a policeman, or every wrongful act of a policeman on his beat would be a denial or abridgment by the State. And that that cannot be so. That is what Justice Frankfurter says in his specially concurring opinion in that case.

The CHAIRMAN. Well, I don't know what the particular facts were in that case. I don't recall them. But I think we have enough rather broad general opinions of the court.

Mr. BLOCH. Well, you contrast *Classic* with that 321 U.S. page 14. *Snowden* v. *Hughes*, which came after the *Classic* case, which was in the 313. Page 16, he says—this is a specially concurring opinion of Justice Frankfurter:

> But to constitute such unjust discrimination, the action must be that of the State. Since the State, for present purposes, can only act through functionaries, the question naturally arises what functionaries acting under what circumstances are to be deemed the State for the purposes of bringing suit in the Federal courts on the basis of illegal State action. The problem is beset with inherent difficulties, and not unnaturally has had a fluctuating history in the decisions of the Court. Compare *Barney* v. *The City of New York*, 193 U.S. 430, with *Raymond* v. *Chicago Traction Company*, 207 U.S. 20—

and some other cases.

It is not to be resolved by abstract considerations, such as the fact that every official who purports to wield power conferred by a State is pro tanto the State. Otherwise, every illegal discrimination by a policeman on the beat would be State actions for purpose of suit in a Federal court.

The CHAIRMAN. Well, nobody can dispute that.

Mr. BLOCH. And on page 17, he says——

The CHAIRMAN. Just a minute. Nobody can dispute that statement. It must be of a type of action that can be attributed to the State—that the State would ordinarily do. It just cannot be some whimsy of some individual who claims to act for the State. But where registrars, who are supposed to accept names under certain conditions, refuse to act, or act arbitrarily, or act not in the best interests of the State, of course they are acting under color of State authority, beyond question. You don't doubt that, do you?

Mr. BLOCH. May I get into the record what he says here on page 17? This is short:

I am clear, therefore, that the action of the canvassing board taken as the plaintiff himself acknowledges in defiance of the duty of that board under Illinois law cannot be deemed the action of the State. Certainly not until the highest court of the State confirms such action, and thereby makes it the law of the State. I agree, in a word, with the court below that *Barney* v. *City of New York*, 193 U.S. 430, is controlling,

and citing other cases:

Neither the wisdom of this reasoning nor its holding has been impaired by a subsequent decision. A different problem is presented when a case comes here.

and so forth.

Now, that is why I answered some of the gentlemen over here as I did. It was in reliance on what Justice Frankfurter said in this specially concurring opinion in this case, and to what Chief Justice Fuller, speaking for a unanimous Court, had said in *Barney* v. *the State of New York*.

The CHAIRMAN. But Justice Frankfurter's opinion was not the opinion of the Court.

Mr. BLOCH. No, sir, it was not.

The CHAIRMAN. It was just his additional views.

Mr. BLOCH. I said it was a specially concurring opinion. It was not the main opinion. The main opinion affirmed the action of the lower court, just as Justice Frankfurter did, but they did it on a different basis, because there was some doubt in their minds whether *Barney* v. *the City of New York* was still the law.

But I hope Judge Frankfurter's view prevails.

Mr. MEADER. Mr. Chairman, I would like to ask the witness—is it fair to say, then, that action by the State legislature—a law passed by the legislature, or an adjudication by the State courts of the action of executive officials, is State action, but that action by officials in the executive branch of the Government, or by subdivision of the State government, is not State action unless it has been adjudicated by a court?

Mr. BLOCH. I would say this to that, Mr. Meader. I wouldn't want to answer it yes or no, that broad question, because I can illustrate very simply.

Suppose the State of X would tomorrow, its legislature would pass a law saying that no colored person could vote in its elections—no colored person could vote in the elections, and a colored person applied to vote, and the registrar said you cannot vote because the legislature

just passed a law saying you cannot. Well, while that law is patently unconstitutional, or would be, I don't think you would have an abridgment or denial on the part of the State until that colored person had pursued his judicial remedies under the law of the State and appealed this case to the superior court, and give them a chance to knock it out.

The CHAIRMAN. We will now adjourn until 2 o'clock.

(Whereupon, at 11:55 a.m., the committee recessed, to reconvene at 2 p.m., the same day.)

AFTERNOON SESSION

The CHAIRMAN. The committee will come to order.

Mr. Bloch, just before we adjourned this morning, you read from an opinion of Mr. Justice Frankfurter in the case of *Snowden* v. *Hughes*, 321 U.S., page 13. On that same page, Mr. Bloch, is the conclusion of Chief Justice Stone. He wrote the opinion for the Court, and Justice Frankfurter wrote a concurring opinion. In the opinion of the Court, by Chief Justice Stone, we read the following:

> As we conclude that the right asserted by petitioner is not one secured by the 14th amendment, and affords no basis for a suit brought under the section of the Civil Rights Act relied upon, we find it unnecessary to consider whether the action by the State board, of which petitioner complains, is State action within the meaning of the 14th amendment. The authority of *Barney* v. *the City of New York*, *supra*, on which the court below relied, has been so restricted by our later decisions (see *Raymond* v. *Chicago Traction Company*, 207 U.S., p. 20, *Home Telephone & Telegraph Company* v. *Los Angeles*, 227 U.S., 278, *Iowa Des Moines Bank* v. *Bennett*, *supra* 246, the *United States* v. *Classic*, 313 U.S. 299) that our determination may be more properly and more certainly rested on petitioner's failure to assert a right of the nature such as the 14th amendment protects against State action.

In other words, this case was not decided on the 14th amendment, because the Court held it was not necessary for them to decide the case on the 14th amendment, and there was no action they held under the Civil Rights Act, not because of a violation of the 14th amendment, but because of some procedural defect on the part of the petitioner.

Mr. BLOCH. That may be true, Mr. Chairman.

The CHAIRMAN. So that the statement of Judge Frankfurter was purely gratuitous. It has no force or effect whatsoever.

Mr. BLOCH. Well, now, that remains to be seen, because it so happens that of the nine Justices, including the Chief Justice, who were on the Court at the time, that is, at the time of the decision of *Snowden* v. *Hughes*, there are only three left. One is Justice Black, who participated with the majority, for whom Chief Justice Stone wrote. The other is Justice Frankfurter. And the other is Justice Douglas, who dissented in *Snowden* v. *Hughes*.

The CHAIRMAN. What are you going to speculate from that?

Mr. BLOCH. I am not going to speculate. I am just going to hope that when the *Raines* case, which is now before the Court over there, is decided, that Justice Frankfurter's views will prevail over the views expressed by Chief Justice Stone.

And when we recessed, Mr. Meader had asked the question which was right along the line of what we are talking about now, Mr. Chairman, and I wanted to call attention to this.

One of the great questions is whether *Barney* v. *the City of New York* is still the law.

Now, the majority there—well, you are invoking the doctrine of stare decisis. I sort of don't rely on that any more. It all depends on what the Court—who the Court thinks was right—whether they think Chief Justice Stone's view was right, concurred in by three or four of the Justices, or whether they think that Justice Frankfurter was right.

Now, the *Barney* case is sort of a keystone. I do not know that it has been taken back. Justice Frankfurter said it had not.

The CHAIRMAN. Well, Justice Stone—I will read——

Mr. BLOCH. He did not say it was not the law. He said that it has been so weakened by subsequent decisions that we had better plant our decision on another basis. That is what he said. You see if he didn't.

The CHAIRMAN. He said——

Mr. BLOCH. He said *Barney* v. *the City of New York* has been so weakened by the *California* case, the *Home Telephone* case, and the *Raymond Traction Company* case, that we had better plant our opinion on another basis. But he did not take it back.

The CHAIRMAN. We have got to take his word—the words are plain as a pikestaff. It reads as follows:

The authority of *Barney* v. *the City of New York*, on which the court below relied, has been so restricted by our later decision—

and he cites them—

that our determination may be more properly and more certainly rested on other grounds—

and so forth.

Mr. BLOCH. Well, I think, and I hope the Supreme Court is going to decide in one or two or three of the cases about to be pending before them, that the *Barney* case still is law.

Now, at the recess, particularly in the light of some of the questions that were asked me this morning by two of the gentlemen to the right here—I think it was Mr. Rogers and Mr. Holtzman—I went and got the *Barney* case. And the *Barney case*—I believe I said 163 U.S.—it is 193 U.S. That came up in New York. It affirmed a decision of a district judge that is reported in 118 Federal Reporter 683. It is very interesting to see this.

Counsel in the *Barney* case, for Barney, and they were distinguished counsel, Mr. Maxwell Evarts was among them, he was a leading counsel, made certain contentions. He contended in the *Barney* case just exactly what Mr. Rogers and Mr. Holtzman were trying to get me to admit before noon was the law.

Now, here is what he said. He says:

The theory of the court—

speaking of the court below—

seemed to be that an agent of the State can only be considered such when it acts in conformity with the specific authority given to it by the act of the legislature creating it, and that if it does any act without express legislative authority, although purporting to act by reason of the power and right conferred upon it by the State, such act is not done in its character as agent and is not deemed the act of the State. This question, however, is no longer open for argument. Any act of an agent of a State, done pursuant to the powers derived by him from the legislature, and by virtue of his public position as such agent, whether specifically authorized by the statute appointing him or not, is an act of the State within the meaning of the 14th amendment of the Constitution.

Now, that was the contention made. That is in the argument of Mr. Evarts and other counsel for Barney.

Now, what did the Court say about that? At the bottom of page 437, the Court said, beginning at the bottom of page 437:

> Controversies over violations of the laws of New York are controversies to be dealt with by the courts of the State. Complainants' grievance was that the law of the State had been broken, and not a grievance inflicted by action of the legislative or executive or judicial department of the State, and the principle is—

Now, this is the Court talking—

> and the principle is that it is for the State courts to remedy acts of State officers done without the authority or contrary to State law.

Now, at the bottom of page 438, the Court says, speaking through Chief Justice Fuller, for a unanimous Court—

> that when a subordinate officer of the State, in violation of State law, undertakes to deprive an accused party of a right which the statute law accords to him, as in the case at bar, it can hardly be said that he is denied or cannot enforce, in the judicial tribunals of the State, the rights which belong to him. In such a case, it ought to be presumed the Court will redress the wrong. If the accused is deprived of the right, the final and practical denial will be in the judicial tribunal which tries the case, after the trial has commenced.

Now, Mr. Chairman, the most recent case is the case that I was trying to think of when we adjourned—the most recent case which touches on this subject is *Harrison* v. *the National Association for the Advancement of Colored People*, which was decided by the Supreme Court of the United States on June 8, 1959, by a divided Court. It is 360 U.S., and begins at page 167.

That case arose by a—a statutory three-judge Federal court construing certain laws of the State of Virginia which had to do with the controversy existing between the State of Virginia and the National Association for the Advancement of Colored People. And the three-judge Federal court held those laws unconstitutional, most of them.

Now, the Supreme Court of the United States, in a 6 to 3 decision, said—and I am reading from page 176:

> According every consideration to the opinion of the majority below, we are nevertheless of the view that the district court should have abstained from deciding the merits of the issues tendered to it so as to afford the Virginia courts a reasonable opportunity to construe the three statutes in question. This now well-established procedure is aimed at the avoidance of unnecessary interference by the Federal courts with proper and validly administered States concerns, a course so essential to the balanced working of our Federal system. To minimize the possibility of such interference, a scrupulos regard for the rightful independence of State governments should at all times actuate the Federal courts—

citing cases—

> as their contribution in furthering the harmonious relations between State and Federal authority. In the service of this doctrine, which this Court has applied in many different contexts, no principle has found more consistent or clear expression than that the Federal courts should not adjudicate the constitutionality of State enactments fairly open to interpretation until the State court has been afforded a reasonable opportunity to pass upon them.

Now, what is the application of that here?

Of course, what they were talking about here was State enactments, that is, legislative acts passed by the General Assembly of Virginia.

And it was that case that caused me to give to Mr. Meader the answer that I did. But the application here is, and I have written it down so that I can make it perfectly clear—I say there cannot be pattern or practice, using the language of this bill—there cannot be pattern or practice which can legally be synonymous with denial or abridgment by the State until the State courts have been given the opportunity to correct those acts which are said to constitute a pattern or practice.

Mr. HOLTZMAN. Mr. Chairman, may I ask a question at that point?

Mr. Bloch, you are familiar, of course, with the case of *King* v. *Chapman*.

Mr. BLOCH. Yes, sir, I was of counsel there.

Mr. HOLTZMAN. As a matter of fact, did you argue that case?

Mr. BLOCH. Yes. It was tried before the same judge who tried *United States* v. *Raines*, Judge T. Hoyt Davis.

Mr. HOLTZMAN. Now, how did that case come into the circuit court of appeals?

Mr. BLOCH. How did it get to the circuit court of appeals? It was a suit, as I recall it, for damages, brought by Primus King, a colored man, who claimed to have been denied the right to vote in a Georgia primary held on July 4, 1944. He filed a suit for damages against Chapman and others, who constituted the executive committee of Muscogee County, Ga., Columbus.

The defendants had about admitted themselves out of court before I ever got into the case. But be that as it may, it got into court by a damage suit, under section 1983, I think it is now, of title 42, claiming that King had been deprived of his civil right, to wit, his right to vote, by an act of Chapman and others, the Democratic executive committeeman of Muscogee.

We tried to distinguish *Smith* v. *Allwright* from the Georgia system, because *Smith* v. *Allwright* dealt with the Texas primary laws, where the primary was compulsory, and our primary was not.

Judge Sibley, in the 154 F.(2d), I think it is, writing for the court, said that when our State permitted the primary and required the county unit system to be observed in the primary, that that constituted an abridgment or denial on the part of the State.

Mr. HOLTZMAN. I did not get the last part of your answer. When your State did what?

Mr. BLOCH. Judge Sibley, speaking for the circuit court of appeals, held that by reason of the fact that Georgia required all primaries when and if held to be held under the county unit law, that that constituted State action, or denial or abridgment by the State, within the meaning of the 14th amendment. I mean the 15th amendment.

Mr. HOLTZMAN. Well, did not this law permit only white citizens to vote in the Democratic primaries?

Mr. BLOCH. Sir?

Mr. HOLTZMAN. Did not this law, upon which *King* v. *Chapman* was based, permit white citizens only to vote in State and Federal primaries in your State?

Mr. BLOCH. At that time——

Mr. HOLTZMAN. 1946, now, we are talking about.

Mr. BLOCH. Sir?

Mr. HOLTZMAN. 1946.

Mr. BLOCH. At that time we had white primaries. All States in the South had white primaries. The Supreme Court of the United States had held, in *Grovey* v. *Townsend*, that white primaries were perfectly legitimate, and perfectly in accord with the Constitution of the United States.

After the *Classic* case was decided, to which the chairman called attention, then the question was rebrought, and the Supreme Court, in *Smith* v. *Allwright*, in 321 U.S., did not apply the doctrine of stare decisis. They reviewed and overruled *Grovey* v. *Townsend* on the basis of the *Classic* case, and said to the States of the South, "You cannot hold white Democratic or any kind of white primaries any more."

Mr. HOLTZMAN. In the *King* case, the Court held, did it not, that your primary election law that involved the Democratic Party constituted State action, though, did it not?

Mr. BLOCH. Have you got the 154 F. (2d) there before you?

Mr. HOLTZMAN. Yes, I have.

Mr. BLOCH. Look over toward the last of it, where Judge Sibley holds what it is that constitutes the denial or abridgment by the State, or if you want to call it State action, all right.

Mr. HOLTZMAN. Well, is it your impression that it was considered State action?

Mr. BLOCH. What was considered State action, if you want to call it that—what was considered State action there, was that the State of Georgia, through a legislative act, the Neal Primary Act, enacted in 1917, required a party, if it held a primary—required the political party to apply the county unit system in the counting of votes in that primary.

The circuit court of appeals held that that constituted State action, or denial or abridgment by the State. Application for certiorari was filed, and it was denied by the Supreme Court of the United States on the 1st day of April, is my recollection.

Mr. HOLTZMAN. Your recollection is very good.

Mr. BLOCH. But there you see you have the absolute denial or abridgment by the State, or what the Court construed to be denial or abridgment by the State, in the action of the State legislature.

Mr. FORRESTER. Mr. Chairman, I would just like to make an observation here. We are both Georgians. In 1946, a colored Democrat was something unheard of. They were all Republicans, were they not?

Mr. BLOCH. Well, as I say, that is where this Democratic executive committee admitted themselves out of court before I got in the case. In the petition, in the complaint of that case, Primus King alleged himself to be a believer in the tenets of the Democratic Party. Well, that was so unheard of in Georgia at that time that I said, when I got into the case, that all we have got to do in this case is deny that and have an issue of fact made for trial by a judge or jury, and Chapman and others said, you cannot deny it, because we have admitted it, for the purpose of a test case. But it was so unheard of that I think the case could have been won on that decision of that question of fact.

But the application, Mr. Chairman and gentlemen—the application of this case is this. The real bite, the real sting in this proposed legislation—we might as well meet it head on—the real bite and sting

is that a Federal judge is given the opportunity, is given the privilege, is given the right to appoint Federal referees to supplant the State registrars upon certain conditions. The last in the chain of those conditions is that he must have found that a pattern or practice exists.

The CHAIRMAN. Now, what is unusual about that? We have that in our statutes already—pattern or practice. We have it in the antitrust laws.

Mr. BLOCH. Well, I saw where Judge Walsh said that is where they got it from. He alluded to that. But that does not make it right, because it is in some other law.

The CHAIRMAN. Well, it has been in the law for a great many years, and nobody has seen to attack it.

Mr. BLOCH. Well, Negroes were forbidden to vote in white primaries in Georgia, in the Southern States, for a great many years, but that did not make it legal, according to the decision of Supreme Court. It will be attacked if it is ever put into the law—it will be attacked.

The CHAIRMAN. When you have words of that character, they become words of art. They become imbedded in the statute, and the courts are rather loath to change those words or change the practice that has developed as a result of those words. The burden is on you to show that they are so unusual that they should be changed.

Mr. WILLIS. Will the gentleman yield at that point?

The CHAIRMAN. I will yield.

Mr. WILLIS. It is not my recollection at all that the antitrust law uses the word "pattern" at all. If we are trying to put a meaning of a word of art on the word "pattern," what the antitrust law provides is a scheme somewhat like this—and I have not read it in quite a number of years. I see counsel is here.

The CHAIRMAN. Course of conduct.

Mr. WILLIS. That if there is a prosecution for violation—alleging combination or conspiracy to violate the antitrust law, and the corporations or companies involved are held to have conspired or combined, then the very people involved and who have been hurt are given the benefit of that holding in question in connection with a damage suit that flows from it. But there is no reference to the word "pattern" in that statute.

The CHAIRMAN. The word "pattern" is not used, but the Supreme Court, in interpreting the antitrust laws, indicated where a course of conduct prevailed and has endured for a considerable length of time, that may be deemed a combination in violation of the Clayton and/or Sherman Act.

Mr. BLOCH. I noticed, Mr. Chairman and Mr. Willis, and I wondered where that phrase "pattern or practice" came from. Judge Walsh testified before this committee on February 9. I did not see his testimony until about February 11. I noticed in reading it that he said that the phrase "pattern or practice" was used in the antitrust laws.

Mr. WILLIS. No, I do not think he used that phrase.

Mr. BLOCH. Well, he said something which gave me the idea that he had gotten it from the antitrust laws.

Mr. WILLIS. I think he was trying to find a precedent for this procedure, but I do not think he used the words.

Mr. BLOCH. I would be very glad to have the opportunity to supplement my memorandum with a written memorandum to the chairman for insertion in the record. (See app. B.)

Mr. WILLIS. I ask, Mr. Chairman, and that will be done, I know, shortly, that the gentlemen give some study to the precedent, so-called, of the antitrust laws, and let's dig into it.

Mr. BLOCH. He said something about the antitrust laws. I never had an opportunity to look into it. As I say, it has not been but 5 days since I read it.

But my point is this, sir——

The CHAIRMAN. I just want to make an answer to that request. You have a right to insert in the record anything you want to put in there concerning so-called precedents under the antitrust laws.

Mr. BLOCH. Yes, sir.

But what I was talking about was this: Assuming that that is a good phrase, and assuming for the sake of the argument merely that a pattern or practice means something and gives somebody a right to do something—now, here is my point—under this bill, 10035, the Federal judge is given a right to appoint Federal referees whenever he finds that a pattern or practice of discrimination exists.

Now, my point is this, sir: Even if that Federal judge finds that a pattern or practice of discrimination exists, that that pattern or practice of discrimination, or prejudice, as Judge Walsh at one time calls it—that that pattern or practice cannot be considered or cannot be deemed as synonymous with a denial or abridgment by a State until a State—the State in which that pattern or practice is carried on—has had the opportunity to correct that pattern or practice by decisions of its own courts.

That is my point.

The CHAIRMAN. You say Judge Walsh maintains that?

Mr. BLOCH. Sir?

The CHAIRMAN. You did not say Judge Walsh maintains that, did you?

Mr. BLOCH. I said that was my view. That even if a pattern or practice on the part of registrars exists, that that does not mean anything unless that pattern or practice can be legally—is legally synonymous with denial or abridgment by a State. And that that pattern or practice cannot become synonymous with denial or abridgment by a State until the courts of the State have had a right to adjudicate with respect to that pattern or practice.

Now, that is what this case holds.

The CHAIRMAN. You do not mean to say that a State cannot be accused of, say, a wrong, until the State is advised of the wrong and shall have an opportunity to correct it? Is that the gist of what you are saying?

Mr. BLOCH. What I mean to say is this—using the language of the *Raines* case—that is now pending over in Court.

In the *Raines* case, the petition alleged that the wrongful acts alleged to have been committeed against these alleged schoolteachers were designed and intended by the registrars to deprive the colored people in Terrell County of their right to vote.

Now, what I mean to say is that where practices are designed by individuals who happen to be State registrars, and intended by them to carry out a policy of discrimination or unconstitutional abridgment

or denial, that those acts and practices cannot be considered the acts of the State until the State has had an opportunity to pass on them. That is what I mean to say. That there isn't any abridgment or denial by the State——

The CHAIRMAN. What do you mean, until the State has had an opportunity to pass on them?

Let me ask you a question: Suppose an elected official of a State does something in the name of the State. Does that mean that the State is not guilty or is not responsible for the act of that elected official, or even appointed official, acting under color of the State's authority—the State is not responsible unless the State actually had notice? And how could you give notice to the State, except through the duly appointed officials of the State? And if duly appointed officials of the State do certain things, then, why isn't the State having notice of it?

Mr. BLOCH. It isn't a question of notice. It is a question of opportunity to correct. What the Supreme Court held—I think the Supreme Court answered the chairman's question in the *Barney* case, if it is still the law. In the *Barney* case, the members of the Rapid Transit Authority of the City of New York exceeded their authority in building a subway in a place where they had no right to build it under the State law. The Supreme Court of the United States, through Chief Justice Fuller, unanimously held that that was not State action until the courts of New York had had a right to pass on the action of the transit authority.

The CHAIRMAN. You tell us how in the world could the State get notice. How could the State, under your theory, get any kind of notice that it is doing wrong?

Mr. BLOCH. It isn't a question of notice.

The CHAIRMAN. Tell us how you could give notice to the State.

Mr. BLOCH. If one of these people in any county in Georgia, colored people or white people or Puerto Ricans of Filipinos or what-not, claims that he is qualified to vote and that he has a right to vote under State law, and he applies to the board of registrars to be registered so that he can vote, and the registrars willfully, contrary to State law, refuse to let him vote, because he is a Negro or a Puerto Rican or a Filipino or what-not, all that he has got to do is to file an appeal from that decision to the superior court of the county where the board of registrars sits, and then to go to the court of appeals and the supreme court.

What I say is that until he does that, there is no denial or abridgment by the State.

The CHAIRMAN. In other words——

Mr. BLOCH. And I say he has got to pursue his State judicial remedies.

The CHAIRMAN. Do you want him to go through a veritable obstacle race before he can establish notice on the part of the State?

Mr. BLOCH. Our law provides that registrations must close 6 months prior to the election. The reason for that 6 months' period is that the registration list can be scanned, examined, and culled. During that 6 months' period, if that man that claims he is deprived of the right to vote really wants to vote and really has been discriminated against, and really has been unconstitutionally denied the right to vote, he has got his remedy. But there hasn't been one of them I know of to pursue that remedy.

The CHAIRMAN. Mr. Bloch, under that theory, I will say this:

It has taken about 100 years before the States have given some modicum of voting to the colored people, under the 15th amendment. It will probably take 200 or 300 more years, under your theory, to get a genuine voting privilege to the rank and file of the Negroes in your State, under those conditions. It would be utterly impossible, Mr. Bloch.

Mr. BLOCH. Well, with all due respect, that is the opinion of the Chair. But we do not know, because it never has been tried. Let one of them try it. Let anybody, white or black, brown or yellow, who claims that he has been denied his right to vote—why don't they go into the State courts and try it?

The CHAIRMAN. Well, the mere fact that you have told us that you know of no case, you know of no case that has been tried along these lines——

Mr. BLOCH. Why hasn't any case been tried?

The CHAIRMAN. Because it is so utterly impossible.

Mr. BLOCH. You are just assuming that.

The CHAIRMAN. In view of the fact that over the decades no one has tried it, is the clearest kind of indication that nobody wants to venture into that kind of dangerous ground because of the many things that can happen to him, and it is common knowledge, if you read the report of the Civil Rights Commission, you will read that when anyone asserts his rights, he is under a certain kind of danger.

Mr. BLOCH. They do what to him?

The United States of America filed suit September a year ago in the District Court of the United States for the Middle District of Georgia, on behalf of certain citizens, colored citizens, naming them. There has been no wrong done to them. Nobody has put any economic sanction on them or tried to hurt them.

The CHAIRMAN. The Attorney General has only brought four cases under the Civil Rights Act of 1957, and has clearly indicated the inefficacy of that act, and that is why we want to amend it and make changes.

Mr. BLOCH. Well, there have been four cases that I know of. There has been one in Georgia, there has been one in Alabama, there has been one in Louisiana—three cases.

The CHAIRMAN. Four.

Mr. BLOCH. Two in Louisiana—Larch against Hannah, and somebody else against Hannah. And in one of those cases, the Georgia case, the act was held unconstitutional. In the Alabama case, it was held that a State could not be sued. In the Louisiana case, I do not know just exactly what was held.

The CHAIRMAN. Well, in one of the Louisiana cases, they were ordered to put on the registration rolls 1,300 names that had been taken off the rolls.

Mr. BLOCH. And Judge Wright ordered them restored.

The CHAIRMAN. All the names had to be restored.

Mr. BLOCH. And the circuit court of appeals has vacated that order, or rather stayed that order. The Supreme Court of the United States, on the 23d of January, suggested to the Department of Justice that it file an application for certiorari before judgment, and the whole thing is set for argument before the Supreme Court on the 23d of February, as the first order of business on the convening of the

Court. So we are going to get a lot of questions settled, a lot of law questions settled, in the *Raines* case, and in the two *Hannah* cases, from Louisiana, and in *United States* v. *Alabama*.

Mr. McCULLOUGH. Mr. Chairman, I know that it is always foolhardy and sometimes dangerous to disagree with an expert. In order that silence will not indicate that I agree with Mr. Bloch's statement concerning the necessity of a person who has been denied his rights guaranteed by the Constitution, exhausting all State remedies, I want the record to show that I do not agree with the statement of the distinguished gentleman from Georgia. I do not believe that a person, who has been denied his constitutional rights because of his color, has to exhaust State remedies when a State registrar, acting under the color of law, denies him the right to vote.

I just wanted to make my opinion clear for the record.

Mr. BLOCH. Mr. McCullough, *Reddix* v. *Lucky* is one of the cases that discusses what Mr. McCullough is talking about. In that case, as well as some other cases from the fifth circuit, it held that the colored people did not have to exhaust their administrative remedies, but that is not what I am talking about, sir.

Mr. McCULLOUGH. Well, Mr. Chairman, might I interrupt again?

It is my opinion that such persons are neither required to exhaust their administrative remedies in the State administrative processes, nor their legal remedies in the State courts, if the discrimination which I mentioned is present.

I just want the record to show that there is disagreement on what the law is, even if disagreeing requires one to differ with an expert.

Mr. BLOCH. Well, we had a very famous lawyer in Georgia make a statement once that has become quite a classic in Georgia—that it is the clash of mind on mind which causes the spark of truth to scintillate.

Mr. McCULLOUGH. Well, I think that is the case. That is really what we are here for.

Mr. MEADER. Mr. Chairman, I would like to pursue a little different line of inquiry with the witness.

Mr. Bloch, the Federal district court has the right to appoint referees, isn't that clear, without any new legislation?

Mr. BLOCH. In a proper case, under rule 53 (a) (b) (c) and (d), I think it is, presently regulates the right of the Federal court to appoint masters. I do not know why they changed the name from master to referee. I have an idea. But that governs the procedure.

Mr. MEADER. Now, could the court, under existing law and rule 53, have the right to appoint masters or referees for the purpose of taking evidence to determine whether or not the decree previously entered should be amended, possibly expanded, or modified, in some way?

Mr. BLOCH. I am afraid I did not get your question.

Mr. MEADER. Let us assume that a court has entered a decree, that it may be in such broad terms that the court might desire to have it made more specific. But to do so, the court needed a factual foundation to make that decree more specific.

Would there be any reason why the court could not appoint a referee or a master for that purpose?

Mr. BLOCH. I think they would. If you care to, sir, I think the latest expression on the right of Federal courts to appoint masters in equity cases is in a case which appears on my memorandum, *In Re*

Tom R. Watkins, application for mandamus, which is not a voting case—it is a business case, involving some business deal down in the State of Mississippi.

The Circuit Court of Appeals of the Fifth Circuit, speaking through Judge John R. Brown, held in that case that a special master, or master, was improperly appointed, because a party, under the present Federal system, was entitled to a trial by a constitutional court.

Now, I can see that cases, of course—can perceive of cases where even under the strict rules that seem to exist now, under the statutory procedure, under the Federal Rules of Civil Procedure, where a special master, or master, could be appointed after a court has ruled and say it appears from the course of dealings between the complainant and the defendant, that the complainant is entitled to recover under the law of this case. But the amount that he is entitled to recover is in doubt. And he will appoint a master, a referee, an auditor, or what-not, in order to ascertain that amount. I think that a Federal court has that power.

Mr. MEADER. Well, now, let us take it one step further:

Do you agree that it would be perfectly legal and constitutional for this Congress to pass as a law what is now the procedure and the power of the district court with reference to appointing referees?

Mr. BLOCH. Oh, yes, certainly. The Congress fixes the jurisdiction. The district courts are creatures of the Congress, and their jurisdiction is defined by the Congress.

Mr. MEADER. Certainly it would not be illegal for the Congress to pass as a statute something which the courts are already doing by court order.

Mr. BLOCH. To do what?

Mr. MEADER. For Congress to pass as a law or enact into law existing procedure of the courts with reference to the appointment of referees.

Mr. BLOCH. They have already done it. The Federal Rules of Civil Procedure are in vogue, are the law, because Congress has impliedly adopted them. The Federal Rules of Civil Procedure are really an act of Congress.

Mr. MEADER. If the Congress, in adopting such a law, were to alter the rules of procedure with reference to appointing referees, and procedure under them—referees or masters—but not in any way impairing any constitutional rights, there certainly could be no question about the constitutionality of such a statute, could there?

Mr. BLOCH. To my mind there could not. I think that the Congress could broaden the present rule 53 without impinging upon the Constitution.

Mr. MEADER. All right.

Now let's go back to your statement, because I believe——

Mr BLOCH. Unless it went to the point of violating the seventh amendment.

Mr. MEADER. I believe that you have contended that H.R. 10035 and companion bills are unconstitutional—that is the legislation to which you directed your statement this morning—the bill providing for the appointment of voting referees.

Now, if we assume that there is nothing in this legislation which violates the constitutional rights of any individual, then isn't it

necessarily true, from what you have just said, that Congress could pass H.R. 10035 and provide for the referee procedure in either modifying or executing court decrees?

Mr. BLOCH. Where are you reading from, Mr. Meader?

Mr. MEADER. Well, you have said that referees can be appointed right now by a court, and that Congress could write the existing procedures of courts in appointing referees into statutes. And that so long as it did not deprive anyone of constitutional rights, the statute would be constitutional. That is all H.R. 10035 does.

Mr. BLOCH. I cannot agree to that, sir.

What H.R. 10035 does is this: The Attorney General of the United States, on behalf of the United States, or rather in the name of the United States, on behalf of citizens who think that they are constitutionally harmed, files a petition for an injunction against the board of registrars, we will say. Now, the parties to that case are the United States of America and the registrars, we will say, against whom it is brought. And the only question at issue in that case, under 1971(c)—the only question at issue in that case is, assuming the constitutionality of 1971(c), whether or not those persons for whom the United States has brought the suit have been denied or abridged in their privileges of voting, so that the 15th amendment is violated. The only right that the district court has, under subsection (d), is to grant an injunction, restraining order, or other order prohibiting those practices.

Now, what I say, Mr. Meader, is that assuming the validity of all that, and assuming the breadth of the power of Congress under the judicial clause, and assuming that you have got all sorts of rights to appoint masters or referees, that you have not the right, under the Constitution, that you have not the right to tack on to a proceeding of that sort the privilege of the trial judge finding that a pattern or practice of discrimination exists, and turning the Federal courts into a registration board, and permitting the Federal courts to register Tom, Dick, and Harry, who are not parties to that original suit.

Mr. MEADER. Now, I think we must make one modification in your statement, because section 131(c) of the Civil Rights Act of 1957—and I do not want to read it all—contemplates that the party to the suit will be the United States of America, brought by the Attorney General, who is authorized to bring the suit, and the other parties to the suit are the persons whom he charges have engaged in or are about to engage in an act or practice which would deprive any other person of a right secured by section (a). The person to whom the right to vote is denied, that person is not a party to this litigation. The parties are just two, the United States of America, as plaintiff, and the officials or any individuals against whom the injunction is sought, as defendants. The voter, the Negro voter who is denied, is not a party to that suit.

Mr. BLOCH. No. The United States of America is a party.

Mr. MEADER. And he is not even the beneficial party to the suit contemplated by the statute. It may have been brought in the names of A, B, C, D, and so on. But the action the suit is against is a practice engaged in by an official, whether with reference to named individuals or others.

Isn't that correct?

Mr. BLOCH. The case, to use the language of the Constitution, or controversy, is one in which the plaintiff is the United States of America, and the defendants are those who are accused of having engaged in acts or practices which have deprived certain named people of their rights under 1917 (a) or (b). And the object of the case——

Mr. MEADER. Now, wait a minute. You bring in certain named people—I want to correct this—you say certain named people.

Mr. BLOCH. Read, if you do not mind——

Mr. MEADER. This is what (c) says:

Whenever any person has engaged——

Mr. BLOCH. That is 1971—how does 1971(c) start? "Whenever"?

Mr. MEADER (reading):

any person has engaged or there are reasonable grounds to believe any person 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), 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, including an application for a permanent or temporary injunction, restraining order or other order. In any proceeding hereunder the United States shall be liable for costs the same as a private person.

It does not say that the Attorney General must name Joe Doakes or Eli Smith as having been deprived of the right to vote. It does not indicate that any person who has been deprived is either a primary party or a beneficial party to the action.

Is that correct?

Mr. BLOCH. I do not believe, sir, that any court in the land, any district court in the land would entertain an action under 1971(c) as it presently exists, unless the Attorney General of the United States of America would allege the names of the persons who are claimed, who he says have been deprived of their constitutional right by other persons.

Mr. MEADER. That may be, but certainly the statute does not require the naming of any individual, does it?

Mr. BLOCH. Well, that would be a question of court construction. If I were a judge, I would say that the statute does require it. It doesn't say it in so many words, but if I were a judge, and the Attorney General of the United States of America brought a suit in my court against a board of registrars of any county in your State or my State, and said that that board of registrars, those persons have deprived other persons of their 15th amendment right, contrary to 1971 (a) and (b), I would make him allege what persons have been so deprived, because how can you try a case without it?

Mr. MEADER. Would you permit him to name 4 or 5 or a dozen or two dozen or 50 individually named persons, and say, "and others"?

Mr. BLOCH. And others similarly situated?

Mr. MEADER. Yes.

Mr. BLOCH. If I were the judge, I would make him say who the others similarly situated were.

Mr. MEADER. You would not permit a suit on behalf of a class?

Mr. BLOCH. No, sir. I think the doctrine of class suits has gone too far.

Mr. MEADER. You would then say that only those individuals named in the complaint of the Attorney General could possibly be beneficiaries of anything that resulted from 1971(c)?

Mr. BLOCH. No, sir, I would not go so far as to say that. But I would say that persons for whose benefit the suit is brought cannot be in an independent proceeding registered by a Federal court to referees, because that would be another and a distinct proceeding which would not be a case of controversy under the Constitution of the United States.

Mr. MEADER. Let us assume it were limited to named persons. Would you believe it would be the right of the district court, whether this bill, H.R. 10035, were passed or not, to appoint a referee or a master to determine whether or not there were other persons similarly situated who should be added as intervenors or added to the complaint?

Mr. BLOCH. Do I think that would be the right of the district court? I do not.

Mr. MEADER. You do not think the court would have that right—not even if he gave notice to the parties, gave them all the rights they had before a referee?

Mr. BLOCH. I do not.

Mr. MEADER. Why?

Mr. BLOCH. Because I do not think that presently the district courts have that power under the Civil Rights Act of 1957, and I do not think that the Congress has got a right to confer that power on the district courts, because I do not think it comes within the judicial power. The judicial power is confined to the determination of cases and controversies. I do not think that the Congress of the United States, broad as its powers are, all of which are delegated, has got any right to confer any such power on a Federal court.

Mr. MEADER. Well, now, you have conceded that the court has a right to appoint a master to do factfinding for him.

Mr. BLOCH. In a case where the court had jurisdiction; yes. They have got a right to appoint a master to supply gaps, to fill in blanks. But, in the first place, they have not got any right to appoint a master to try a case, except in exceptional cases. And they haven't got a right on the basis of one case to say here is another one and we will appoint a master to decide it.

Mr. MEADER. But here is a proceeding which contemplates the Attorney General proceeding in the name of the United States against certain persons, probably election and registration officials of a State, who have deprived somebody of the right to vote, which is guaranteed him under the 15th amendment.

Now, if the Attorney General is required to name certain persons, it is conceivable he might not know everybody before he starts a suit. He ought to have the benefit of the powers of a court, through a referee, if the court's powers are as broad as I believe they are, to appoint referees in aid of the court, to determine what additional individuals should be named in that proceeding, if you require that they be named in the proceeding, rather than being a class.

Mr. BLOCH. Now—were you through, sir?

Mr. MEADER. I am asking for your comment on my statement.

Mr. BLOCH. Here is my comment, here is the way the statute reads—I mean, the bill reads:

> In any proceeding instituted pursuant to subsection (c) of this section, in the event the court finds that under color of law or by State action any person or persons have been deprived, on account of race or color, of any right or privilege secured by subsection (a) or (b) of this section, and that such deprivation was or is pursuant to a pattern or practice, the court may appoint one or more persons, to be known as voting referees, to receive applications from any person claiming such deprivation as to the right to register or otherwise to qualify to vote at any election, and to take evidence and report to the court findings as to whether such applicant or any of them (1) are qualified to vote in any election, and (2) have been (a) deprived of the opportunity to register to vote or otherwise to qualify to vote in any election, or (b) found by State election officials not qualified to register to vote or to vote in any election.

Now, Mr. Meader, what I am trying to say is that even if the court finds those condition precedents, and even if we should concede their validity, and constitutionality, and even if it should be conceded that the pattern or practice therein referred to would be an abridgment or denial on the part of the State, that even if all of those things were considered, that the Congress has not the right to confer upon the district courts the rights to receive applications for registration from persons residing all over the State, or even within a limited area of the State, who are not concerned with the original suit, and convert that Federal court into a registration board.

Mr. WILLIS. Will the gentleman yield?

Mr. MEADER. I yield for one question.

Mr. WILLIS. To see if I understand your point, your point is that under the Civil Rights Act, the power of the court is to issue an injunction and to stop the practice and to punish those engaging in that practice, but that now we cannot add a provision going beyond preventive measure, and to turn the Federal courts, through Federal receivers, into boards of registration. That is the issue.

Mr. BLOCH. That is the issue, succinctly stated, but there is another issue.

If the court should—after making those findings—if the court should appoint one or more persons to receive applications from other persons, and so forth, that that latter proceeding, which they try to say is ancillary to the main proceeding, or supplemental to the main proceeding, as you have pointed out, it really is not. It is not ancillary or supplemental. And that latter proceeding is not a case or controversy under the judicial power.

Mr. WILLIS. Under article 3. In other words, the Congress cannot constitutionally confer the extra power sought by it.

Mr. BLOCH. That is right. That was decided in the *Muskrat* case—a funny name, but that is it. In that—that was 291 U.S., I think, on my brief—and the old *Dallas* case, from the Second Dallas. But that latter proceeding is not a case or controversy within the judicial clause of the Constitution.

Mr. MEADER. Mr. Bloch, if I may return, I had some misgivings, if you have read the record of our previous hearing, about some passages of this legislation, which I discussed with Judge Walsh when he was before our committee a week ago today. One of them was whether or not the order of the court, or the decree of the court, would run against persons who were not parties to the proceeding, and it seems to me you have just, in your reply to Mr. Willis, indicated that you believe that

the order of the court might run against persons who were not defendants in the suit. Is that your belief?

Mr. BLOCH. I said in my prepared statement that that might be possible. I have not studied it sufficiently to say even whether the court, in a supplemental proceeding, could be authorized by the Congress to register people. My view is—I said there that it might be legal.

My view is that it would not be legal. I say legal, that it would not be constitutional, because even in the case of one person named in the bill, for the same of example—named in the suit—that Congress would be conferring upon the court a nonjudicial power.

Now I am not as strong on that—I am frank to admit I am not as strong on that as I am on the general provisions of the bill. But that question also, Mr. Meader, was raised in the *Raines* case.

Mr. MEADER. Let me read a passage from the hearings a week ago, from the top of page 36.

Mr. BLOCH. What are you reading from, sir?

Mr. MEADER. The hearings a week ago, with Judge Walsh.

Mr. MEADER. So the whole effect of this referee provision is confined to the parties to an action. Is that correct?

Mr. WALSH. Confined to the parties to the original action. But those are the parties in their official capacity. In other words, the parties to the original action would be in your case—

and so forth.

Mr. MEADER. And any of this business of serving the supplementary order would affect only parties to the original action.

Mr. WALSH. Yes, sir; and their successors in office.

So in any case brought by the Attorney General, under subsection (c) of 131, according to the Attorney General's representative before this committee, was intended to affect only the parties named as defendants to the action or their successors in office.

Mr. BLOCH. Yes, sir.

Mr. MEADER. It would not apply to the whole State, as you just said, in your answer to Mr. Willis.

Mr. BLOCH. Well, that is what he says. But what does the bill say?

Mr. MEADER. I am perfectly willing to concede that the present phraseology of this legislation we have been talking about, the bill pending before the committee, might lend itself to the interpretation you have made of it. Then it seems to me the problem is for the committee to draft language which says only what the Attorney General says he wanted it to say; namely, that the parties to the action were the only ones intended to be affected; that is, parties to the action or their successors in office intended to be affected by the decree.

I think it should be perfectly feasible to draft phraseology to limit it in that respect, don't you?

Mr. BLOCH. It would be feasible to draft it, yes. I don't know whether I would like it when it was drafted.

Mr. MEADER. But if it were not so limited, Mr. Bloch, I apprehend that others not party to the action might very well be denied due process, or their day in court, if they were to be affected by a decree in which they had no participation, in which they had not been permitted to produce evidence, cross-examine witnesses and make their arguments before the court.

Do you agree with me on that?

Mr. BLOCH. Yes, I notice I have not had the opportunity to read this printed report of the hearing. I had not seen one of them.

I did have the mimeographed copy and I noticed your questions of Judge Walsh along that line. But I was struck with the fact that in the time that I had had to read it that there was considerable discussion as to the effect on certain parties defendant, but I didn't see much discussion, if any, as to what the meaning of the phrase "receive application from any person claiming such a deprivation." What was the meaning of that phrase, "any person?"

Mr. WILLIS. Will the gentleman yield?

Mr. MEADER. Just for one question.

Mr. WILLS. Judge Walsh made that perfectly clear. I didn't know there was any apprehension or misunderstanding about it; the real purpose of the bill is an honest effort by the Department of Justice to provide a right to vote and to provide a means to enforce the right to vote of persons not in the original action at all.

That is the whole idea of the bill; the third party, not the parties to the original action, as the parties to the action are protected by injunction.

The whole idea of this bill is to give opportunity to people not in the original action, but in the whole area, the whole county supposedly effected by the pattern of discrimination, to come in and say, "I want the right of a certificate to vote" and be accorded by the conclusive presumption that I have been discriminated against.

Mr. MEADER. I don't yield further because I think the gentleman has assumed.

The CHAIRMAN. Wait a minute, Mr. Meader. I want to correct the gentleman. There is nothing conclusive about the presumption. It is a rebuttable presumption, not conclusive.

Mr. MEADER. I took exception to Mr. Willis' statement that the people deprived of the right to vote were parties to the action.

I thought we had that stage behind us because the party to the action is the Attorney General, whether he is required to name individuals or not, they are not parties to the action.

Mr. BLOCH. Well, Mr. Meader, I think you called it 131–C and I called it 1971–C—what power does it give to the Attorney General? Would you mind reading that to me again? I thought I had a copy of the statute.

Mr. MEADER. I just got through reading it a few minutes ago, but the action is on behalf of the United States by the Attorney General and it doesn't require him to name individuals.

Mr. BLOCH. What does it say?

Mr. MEADER. It says:

Whenever any person has engaged or there is reasonable grounds to believe that any person 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).

Mr. BLOCH. What comes next?

Mr. MEADER (continuing):

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.

Mr. BLOCH. Preventing what?

Mr. MEADER (continuing):

Including an application for a permanent or temporary injunction or other restraining order.

Mr. BLOCH. How would you get the injunctive order preventing such practices unless the persons were named? Could you just get a general antidiscrimination order under that?

Mr. MEADER. Well, as far as the statute is concerned, I believe that is what is contemplated. It doesn't say that you have to get an injunction restraining you from discriminating against Susie Jones.

It doesn't say that you have to name the person, but at any rate I think we should go on to another point, whether these people are parties or not.

I would like your comments on this question. If this legislation authorized the district court to issue a writ of mandamus to a State registrar compelling him or ordering him to register a certain person, would you have objection to that on constitutional grounds?

Mr. BLOCH. If the statute left the registration process to the State registrars and then issued a writ of mandamus commanding the State registrars to register a certain person——

Mr. MEADER. Without any reference to this referee?

Mr. BLOCH. I have objection to that.

Mr. MEADER. What would it be?

Mr. BLOCH. It would contravene the 10th amendment.

My objection secondly would be until the action of those registrars had been reviewed by the State courts, that there hasn't been any abridgment or denial on the part of the State and that the district courts of the United States, as said in this recent case, that the district courts of the United States ought not to interfere with the State processes until the State courts have had an opportunity to rectify any errors which have been committed; but if a person claims to have been unconstitutionally deprived of his right to vote on account of his race or color, that the district courts of the United States ought not to be granted the power to compel a State body by writ of mandamus to register that person without that person having first exhausted his State judicial remedies, but until he does that, that that isn't any abridgment or denial on the part of the State.

Of course, that is the question upon which Mr. McCulloch stated the opposite view awhile ago so it gets down to the basic question.

Mr. MEADER. There is nothing in the 15th amendment that says the United States has to wait until the States have completely failed in their judicial processes for remedies for these people who are guaranteed the right to vote.

If I agree with Mr. McCulloch that the United States can act right now without waiting until the States have failed in their duty, then your argument wouldn't apply.

Mr. BLOCH. But Mr. Meader, how can Congress ever determine—this is more or less a rhetorical question—how can the Congress ever determine that the States have failed in their judicial process when the States have not been given an opportunity to apply their State laws so far as the record shows and where there is a case in Georgia where a Negro voter claiming that he has been denied the right to vote, or that his constitutional rights have been abridged, has ever appealed to the State courts.

The CHAIRMAN. Mr. Bloch, I think there is ample answer there in the 15th amendment.

The 15th amendment doesn't say that before you can redress that wrong you have to go through the encompassing process of going through the courts of the States and you must exhaust all your State remedies.

It simply gives the complete right of an individual to have his wrong redressed when the wrong is committed by the State and then section 2 says the Congress shall have the power to enforce this article by appropriate legislation.

Now that is full and sweeping powers. If there is any doubt about it, I'm going to cite you the very decision of the court in the case in which you represented the defendants in the *Raines* case and here is what the court said.

Mr. BLOCH. What are you reading from, Mr. Chairman?

The CHAIRMAN. Beg pardon?

Mr. BLOCH. Are you reading from the *Raines* case?

The CHAIRMAN. I am reading from the decision of the judge in the case in which you appeared as defendant, Judge Davis:

The fact that Congress in subsection 4 of section 1971—

that is the Civil Rights Act of 1957—

provided that the court shall exercise that jurisdiction "without regard to whether the party aggrieved shall have exhausted any administrative or other remedies that may be provided by law" does not change the nature of this action from one in equity.

It merely provides that in such an equitable proceeding a certain, well established principle shall not be applicable.

The court knows—

and listen to this—

the court knows of no limitation on the right of Congress to so legislate.

It is well known that the Federal courts have often refused to act because complainants had failed to exhaust their other remedies (*Peay* v. *Cox*, 190 Federal 2d 123).

This rule, however, could hardly be applied where Congress has expressly directed the courts—

as they did in the Civil Rights Act of 1957—

to exercise their jurisdiction without regard to such a fact.

Now that is without regard to exhausting other remedies.

Mr. BLOCH. Administratively?

The CHAIRMAN. Any remedies. That is the decision of your own judge.

Mr. BLOCH. Mr. Chairman, would you mind reading the last 8 or 10 lines of that opinion, right at the very end?

The CHAIRMAN. Be glad to.

For the reasons set forth above, the court concludes that the section 1971–C—

and the portion I read, he spoke of 1971–D—

of title 42 is beyond the jurisdiction of Congress and unconstitutional. It is not appropriate legislation within the meaning of section 2 of the 15th amendment to the Constitution of the United States.

There exists no other basis for action by the Attorney General in the name of the United States seeking the remedy here sought, the action to dismiss your appeal.

Mr. BLOCH. That is the complete answer to the chairman's suggestion, the 15th amendment and the second clause of it gives the right of the Congress to enforce it by appropriate legislation.

Now, to be appropriate legislation, the legislation must be confined to the denial or abridgment by a State.

Now the question is what constitutes denial or abridgment by a State, and I continue to say that there can't be any denial or abridgment by a State when the acts or practices or pattern or whatever you want to call them, are those of individuals, not warranted by the laws of the State and acts or patterns which the State courts have not been given an opportunity to correct.

The CHAIRMAN. Counsel wishes to ask you a question.

Mr. BLOCH. And that question too is before the Supreme Court of the United States in that very case.

Mr. FOLEY. Mr. Bloch, did not the district judge in his opinion, predicate the unconstitutionality upon the fact that the act could operate against private actions of individuals as distinguished from State actions and therefore, since that was possible it was unconstitutional under the 15th amendment.

Isn't that the main issue?

Mr. BLOCH. That is about what he held. But in addition to that——

Mr. FOLEY. That was the issue in the appeal.

Mr. BLOCH. He said the act was unconstitutional because it was not appropriate legislation under the 15th amendment and the reason it wasn't appropriate legislation under the 15th amendment was that it was so broad that it could be applied to persons as well as to States and that there was no separability clause in it and therefore in the *Raines* case it was invalid.

The CHAIRMAN. That is a horse of a different color because the statute went too far in the judge's opinion. It covered private lawsuits against private individuals. That is why he struck the statute down.

Mr. BLOCH. I didn't say that he held that in order to have an abridgment or denial by the State that you have to have the State courts to pass on it.

But he slid over it and based it on the grounds that I very much preferred and if it can be held, that will end all our controversies for a while.

The CHAIRMAN. One other thing I want to get clear, Mr. Bloch.

I have been puzzled as you have been puzzled about the so-called rebuttable presumption.

In other words, where the court has ruled that there is a pattern or practice of discrimination, then the presumption is that all people of a certain race in that particular bailiwick are prescribed against, they are discriminated against as to voting and the pattern or practice applies to all of them.

I have been a little disturbed about that also. But we have had and we have passed rather a number of statutes containing rebuttable presumptions which have been upheld by the Supreme Court.

For example, in the case of the kidnaping statute where a child is spirited across a border, Congress has stated in so many words that those facts constitute a rebuttable presumption of kidnaping and that the burden of proof shifts to the defendant to disallow any criminal intent.

Now I would think that it the Supreme Court in the kidnaping cases and in similar cases held that rebuttable presumptions were within the power of Congress to declare, certainly under the broad provisions of the 15th amendment where Congress has the power to make and pass appropriate legislation implement the first section of the 15th amendment it strikes me then that Congress has the power to set up such a rebuttal presumption to enforce the 15th amendment.

Now that presumption gave me concern. I set my fears and doubts to rest by following the statement that I have just given you.

Mr. BLOCH. Mr. Chairman, where is there anything in the bill that says that is a rebuttable presumption?

The CHAIRMAN. Nowhere does it say that.

Mr. BLOCH. Where is there anything in the bill giving anybody an opportunity to introduce evidence to rebut that presumption?

Mr. MCCULLOCH. Mr. Chairman, might I comment at that point?

The CHAIRMAN. Yes.

Mr. MCCULLOCH. The matter generally is approached on lines 14, 15, 16 and 17 on page 2 of H.R. 10035.

It, of course, declares that the findings in the report shall be accepted by the court unless they are clearly erroneous.

The phrase "clearly erroneous" implies that evidence might be submitted under proper conditions which would show that the report was clearly erroneous. Furthermore, it is a very simple matter to write an amendment whereby exceptions may be filed and witnesses may be called on behalf of the exceptors in order that there may be a final supplemental decree which is based upon evidence introduced into the case after the exceptors have been given an opportunity to be heard.

Later in these hearings, I shall make a statement concerning two drafts of bills designed to cure many of these possible defects. A great deal of time and care has been devoted to the problem of affording the State officials, who may later be charged with contempt, an opportunity to call and examine witnesses.

Mr. BLOCH. Does it say so?

Mr. MCCULLOCH. Not in H.R. 10035, except as I said where the phrase "clearly erroneous" is used, there is a clear implication that evidence might be submitted to disprove the findings in the referee's report or there would have been no use for that phrase.

Mr. BLOCH. Mr. McCulloch, I was more apprehensive about the presumption which is a component part of the bill before you ever get to lines 14 and 15 and about which Judge Walsh testified.

The CHAIRMAN. I am sorry I can't make it stronger, Mr. Bloch.

Mr. BLOCH. It wouldn't do me much good.

Mr. MEADER. Mr. Bloch, if I could help you, I would like to have you read what Mr. Walsh said on page 14. It is not a rebuttable presumption but a conclusive presumption which Congress is enacting into law and that is why he wants this bill.

Mr. MCCULLOCH. Mr. Chairman, I do not agree with that statement. The language of H.R. 10035 does not justify that statement, in my opinion.

Mr. MEADER. That is what Judge Walsh thinks the bill does.

Mr. BLOCH. What page, Mr. Meader?

Mr. MEADER. Page 14.

Mr. WILLIS. I will bring that out, Mr. Bloch. I underscored passages along that line.

Now may I call this to your attention. On questioning by the chairman and Mr. Lindsay of this committee, Mr. Walsh brought out that the registrar proposal was vulnerable on constitutional grounds.

For example, on page 18 of the printed record Mr. Lindsay said:

I am not clear on your argument about the registrars proposal. Is it not true that the 15th amendment would also cover the registrar proposal insofar as State elections are concerned in the event that the registrar proposal were broadened to include State elections.

Mr. Walsh said:

I think the problem you would be confronted with there is the supplanting of a State officer with a Federal officer without a judicial finding and that the 15th amendment conditions have been met.

Mr. Lindsay said:

I understand. Do you think that raises a clear constitutional question?

Judge Walsh said: "I think it does, yes."

Then on page 19 Mr. Lindsay said:

What I am trying to figure is what is the authority for making the distinction under the 15th amendment between the referee proposal and the registrar proposal. Again talking about State elections, I want to see if I understand you clearly.

Judge Walsh said:

Well, the basic distinction is the analogy of a due process problem.

I am just making that statement so that my questions will follow, Mr. Bloch.

Then, having raised that question of constitutionality, he tried to bring out the virtue of his proposal and he was the one who introduced the question of presumptions, and I have underscored some of his statements which I now read before I will ask you a few questions.

For instance, he brings out the idea of the presumption on page 14 as Meader developed and then on page 15 also.

Mr. MEADER. You better read that.

Mr. WILLIS. I will read those passages.

The voting referee, I would not make that determination. That is the whole purpose of the statute to avoid the need for that determination in each individual case; namely, the termination of individual discrimination.

Then again on page 16 Judge Walsh says:

The 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; that it may be assumed a conclusive presumption or statutory rule that therefore need not be found in each individual case.

Mr. BROOKS. What page was that?

Mr. WILLIS. Pages 15 and 16.

Mr. BLOCH. That is the part I was talking about.

Mr. WILLIS (continuing):

Well, if you found a pattern and practice of Negoes, and he is a Negro, I think Congress is justified in jumping the gap and establishing a conclusive presumption that that is the reason for his trouble.

In other words, he said that five times. Now isn't he treading on due process there, on constitutional grounds as of serious import as is his criticism on the registrar proposal?

Mr. BLOCH. Yes, and I called attention to that in my original statement and that was just what I was about to point out to Mr. McCulloch when I said I was troubled, apprehensive about the presumption that was created before you ever got to lines 14 and 15, up at the top of the page.

I called attention in my written statement to that language on pages 45 and 46 of the mimeographed copy and it is on page 21 of the printed record where Judge Walsh said:

Well, if you found a pattern and a practice against Negroes, and he is a Negro, I think Congress is justified in jumping the gap and establishing a conclusive presumption that that is the reason for his trouble.

The Chairman said:

You mean the Congress can justify that presumption?

Mr. Walsh said:

Yes, sir. I think it is a reasonable presumption. I think if you have had a pattern and found the likelihood of any other reason for refusing to let him register even though he is qualified, I think there is a reasonable basis for such a presumption.

Then he goes further and says:

"Not only is it reasonable but it is necessary because for an individual to prove in each case that he had been a victim of prejudice is very difficult. Therefore, I think he needs Congress' help in that regard."

Now I say that that presumption as construed by Judge Walsh violates the due process clause of the Constitution.

Mr. MEADER. Will you yield for just a minute?

Let me ask you if you wouldn't add it is a judicial determination and not a legislative determination.

Article III says the judicial power of the United States shall be vested in the Supreme Court and such inferior courts as Congress may ordain and establish. The finding that a particular act or practice has occurred is a judicial function, not a lawmaking, legislative, policymaking function.

Mr. BLOCH. That should be for the judiciary to determine.

There is another subparagraph of that article, a little below that, that refers to cases and controversies (we are going back to the supplemental proceeding now and getting away from the presumption) and I contend that that supplemental proceeding would not be a case or controversy and I say further that a registration proceeding is not a case or controversy under the judiciary clause of the Constitution. (See app. A.).

But to go back to the presumption section, I further contend in response to Mr. Willis' suggestion that that presumption that is created there, an irrebuttable presumption or if rebuttable, nothing in the acts give anybody the right to rebut it, giving nobody the right to introduce evidence to rebut it, giving nobody the right to appeal to the court, is a violation of the due process clause. (See cases cited in my prepared statement, pp. 28–29, supra.).

Now, as I said to Congressman Forrester at lunchtime, it seems to me that it is akin to this other situation.

Suppose that the registrars in my county were about to register a group of people of any race, white, colored, or red from the lower 20th district, we will say. I will say the lower 20th because there isn't any such and I don't want to step on anybody's toes.

Let's say there were 100 people there seeking to register and the board of registrars asked 20 of them various questions about the Constitution of the United States under the registration statute and all 20 of them couldn't answer.

The registrars could then say that creates a presumption that the rest of you are ignorant, that all 80 of you are ignorant and we won't register any of you. That is what the bill does in reverse.

Mr. WILLIS. Let's pursue what Judge Walsh's interpretation of the proposal is.

Mr. MCCULLOCH. Might I add something there?

Mr. WILLIS. I am sorry. I want to nail this down because I think we are talking about two bills. I have been talking about 10035 and Judge Walsh in his testimony on page 21 of the record is talking about his mimeographed bill.

Mr. WILLIS. What page?

Mr. MCCULLOCH. On page 21 of the printed record. Isn't Judge Walsh talking about his mimeographed proposal and not about the printed bill which bears my name, H.R. 10035? If he isn't, then the record ought to make that fact unmistakably clear.

Mr. WILLIS. Page 21?

Mr. MCCULLOCH. Yes.

Mr. WILLIS. Of course not. Well, I say of course not; from reading it, it doesn't say so, it doesn't say he is speaking of his mimeographed proposal. He said it five times.

Now may I pursue it further?

Mr. MCCULLOCH. All right, if you will limit your questioning to H.R. 10035 so that there will be no mistake in the record I shall be pleased.

Mr. WILLIS. All right. On page 29 in my colloquy with Judge Walsh I said:

> Then you say this different element of proof is the one which the statute would eliminate; namely, proof of individual discrimination. 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 proof this casual thing.

Judge Walsh said that was the heart of the bill.

Mr. BLOCH. Yes.

Mr. WILLIS. Now Mr. Willis said this:

> That is what I understood it to be and we are talking about the 15th amendment which talks about the lack of power of the Federal Government or of a State to deny or abridge the right to vote on account of race, color, or previous condition of servitude which is in the constitutional provision, but this very thing that the 15th amendment protects, the individual is not required to prove.

Judge Walsh said that is the purpose of this statute. He said:

> That is my construction of what we are after.

Now coming to rule 53 of the Rules of Civil Procedure, this proposal would only take one of the five subsections of rule 53, namely, subsection (c) which vests in the masters or the referees certain powers.

Now those powers in this bill are given to this referee. But the protective features of subsections (a), (b), (d), and (e) are not included. In other words, in normal master in chancery references, in exceptional cases, the Federal judges have a right to name masters and ref-

erees, but then rule 53 doesn't stop with giving them powers but spells out that in proceedings that they are to conduct they are required to give notice to parties; that the parties are entitled to counsel, to consultation, to cross-examination, confrontation and then following these protective measures, subdivision (e) says that the findings of a master with these protective features shall be binding on the Federal judge except when shown to be "clearly erroneous."

In this proposal, the findings of the referee, the voting referee, are dignified with that evidentiary weight to the effect that the judge is bound by them without requiring confrontation and so on.

Now isn't it true that under all matters referred to a subsidiary officer, whether it be a referee or an examiner under this Civil Procedures Act, before the report of an examiner or of a referee is dignified with that presumption, it is supposed that it has that weight because of these due process standards, and can this Congress dignify the report or the actions of a referee without any constitutional standards to giving the parties interested an opportunity to appear, a notice to appear, the right to cross-examination, the right to counsel.

Now can that stand, that provision?

Mr. BLOCH. I don't think so.

Mr. WILLIS. Can it stand constitutionally?

Mr. BLOCH. In my opinion, no.

Mr. WILLIS. I wish you would express yourself on that a little further.

Mr. BLOCH. I think there, too, that you have a presumption of correctness.

There is a presumption of correctness attributed to the referee's finding; presumption of correctness that just can't stand up in the law when the persons against whom that presumption of correctness is to be used have had no opportunity to offer evidence, to swear witnesses, to cross-examine witnesses or even have notice of the hearings.

Going back of that, Mr. Willis, going back before the district judge is authorized under this bill even to appoint those referees or masters or whatever they are going to call them, he must find a pattern that there exists a pattern or practice of discrimination.

Now analyze that phrase—"pattern or practice of discrimination."

A pattern or practice of discrimination on the part of whom—the State of Georgia, the State of Louisiana, or certain individuals?

Where is your "State action," unless there is a pattern or practice of discrimination on the part of the State involved—aside from that and as a matter of procedure, how is that question of whether or not there is a pattern or practice of discrimination to be put into issue?

The first time that that phrase "pattern or practice" appears in the bill is in line 3, on page 2—

in the event one of those proceedings under 1971–C, that the court finds that such deprivation was or is pursuant to a pattern or practice.

Now what is going to be the basis for the district judge's deciding that there is a pattern or practice? Is the court simply to reach up into the air and say there is such a pattern or practice, or is the Attorney General, representing the United States, going to be required to allege and prove that there is such a pattern or practice with the right on the part of the defendents in that main case to introduce evidence to the contrary?

Where is that determination of whether or not there was a pattern or practice to come from? How is it to get into the case?

That is one of the basic questions.

Mr. WILLIS. One final question as I don't want to prolong the hearing.

Judge Walsh answered most of my questions along this line by saying that it is to be assumed that the primary party to the initial proceeding, let's say the registrar of voters, could somehow come in, although the bill doesn't require a rule to show cause and file exceptions to the findings of the referee, voting referee, but as I see it, since the referee proceeded on a presumption of discrimination which the individual voter doesn't have to prove and secondly, that his findings are given the weight of being right unless proved erroneous, wouldn't it follow that the registrar, if he does have a right to file an exception, and be placed in the analogous position of having to disprove or to prove disqualification rather than the individual affected having the right to prove that the right to vote has been denied or abridged.

Wouldn't that be an analogous position to put a person filing an exception into?

Mr. BLOCH. Yes.

Mr. WILLIS. Do you follow my point?

Mr. BLOCH. Yes.

Mr. WILLIS. In other words, the problem of proof would shift and the registrar would have to prove disqualification in order to challenge the report or to file an exception.

Do you know of any such comparable proceeding?

Mr. BLOCH. I know of none, sir. This is about as far reaching as any proposal as I have ever heard of and you might add to the statement that you have just made that you will notice that under that proposed supplemental proceeding, that there isn't any time limit on it, within which it must be brought.

The reason for my calling the attention of the committee to the fact that we have a law in Georgia which requires the registration books to close 6 months before the general election so that there is a period of 6 months when the rights of persons who may or may not be on that list can be adjudicated is illustrated by that lack of "time limit" in this bill.

Now under this law, under this bill if it is passed into law that supplemental decree could be issued 3 days before the general election and that supplemental report issued the next day and the registrars be compelled to include those names and permit those names to vote at an election held on say the 4th of November when they had absolutely no opportunity to appeal that ruling.

Mr. WILLIS. Maybe the Federal judge wouldn't do that, but the bill does not stop him from doing it.

Mr. BLOCH. Let's not fool ourselves. Whatever rights Federal registrars in the South get have got to be spelled out in the law.

Mr. MCCULLOCH. Mr. Chairman, I would like to interrupt to say that there are many States which have no registration for prospective voters. Voters come in on election day and are forthwith given or denied the right to vote. It is utterly impossible to provide by law a certain time limit that would accommodate the time limit set by various States in the Union.

Speaking generally of my State, there are only two cities in my congressional district that require registration. The people come in on election day and either vote or do not vote in accordance with the decision of the registrars or the precinct election officials.

But in any event, this is a matter that can be taken care of by amendment so that a time limit of 6 months, which may be reasonable in certain sections of the country, will not be required in all sections of the country.

Mr. WILLIS. I have concluded, but let me reply to my good friend. I think this is the fourth or fifth time he has indicated he would be receptive to amendments.

Every time Judge Walsh was pressed he said that he did not mean to be rigid, but unfortunately the only thing we have before us is this bill.

Now we would like to see those amendments and I think we are going to be in a mess if we are going to try to write a bill on the floor of the House without them.

Mr. MCCULLOCH. Mr. Chairman, last week, after Judge Walsh's excellent presentation, I suggested to members of the staff that an attempt be made to redraft the voting referee bill in order to take advantage of the points which came out in Judge Walsh's discussion.

In particular, I was interested in protecting the rights of local and State officials, while at the same time providing an effective measure to assist the district judge in his task of providing effective relief for all members of the class of persons who have been denied the right to register and vote.

I now have drafts of two separate bills which, I wish to emphasize, are still in the draft stage; but which I believe overcome most of the major objections raised by Mr. Bloch to H.R. 10035, H.R. 10034, and H.H.10018. I am frank to concede that one of these drafts proceeds on the class suit theory which is not expressly authorized by the 1957 Civil Rights Act and, therefore, may not be feasible.

I request that these drafts be included in the record at this point and that Mr. Bloch be given an opportunity to submit a statement within the time fixed by the chairman.

I might add that the committee profited greatly from the views of Judge Walsh and I am sure that the committee will equally profit from the views of Mr. Bloch on this subject.

The CHAIRMAN. Will the gentleman yield?

Mr. MCCULLOCH. Yes.

The CHAIRMAN. Is that the draft of which the original was sent to me?

Mr. MCCULLOCH. That is right, together with additional drafts that I have.

The CHAIRMAN. Very well.

(The proposed drafts are as follows:)

A BILL To amend the Civil Rights Act of 1957 by providing for court appointment of United States Voting Referees, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America assembled. 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) 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 application of the Attorney General make a finding as to 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 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 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 and as to any election 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 of the state. The refusal by any such officer with notice thereof to permit any person so declared qualified to vote to vote at an appropriate election shall constitute contempt of court.

"An application pursuant to this subsection shall be heard within ten days after the filing of such application 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, 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 been (a) deprived of or denied under color of law the opportunity to register to vote or otherwise to qualify to vote, (b) found not qualified to vote by any person acting under color of law. In a proceeding before such 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 fact; those relating to matters of law shall be supported by an appropriate 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 affidavits 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.

"The court may authorize such referee or such other person or persons as it may designate (1) to attend at any time and place for holding any election and to report whether any such person declared qualified to vote has been denied the right to vote, and (2) to attend at any time and place for other action relating to such election necessary to make effective the vote of such a person and to report to the court any action or failure to act which would make such vote ineffective.

"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.

"The court shall have authority to make provisional orders to permit an applicant to vote pending final determination of any exception and to take any other action appropriate or necessary to carry out the provisions of this subsection and to enforce its decree, and 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; '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 '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 or discrimination was found to exist."

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

"When any official of a state or subdivision thereof has resigned or has been relieved of his office and no successor has assumed such office, any act or practice of such official constituting a deprivation of any right or privilege secured by subsection (a) or (b) hereof shall be deemed that of the State and the proceeding may be instituted or continued against the State as party defendant."

A BILL To amend the Civil Rights Act of 1957 by providing for court appointment of Special Masters to receive applications to vote, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America assembled, 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) "(f)":

"In any proceeding instituted pursuant to subsection (c) of this section for the benefit of a class of persons who have been refused the right to register or otherwise to qualify to vote at any election in the event the court finds that under color of law or by state action the class of persons has been deprived on account of race or color of any right or privilege secured by subsection (a) or (b) of this section, and that such deprivation was or is pursuant to a pattern or practice of state action, the court may appoint one or more attorneys from the bar of the District Court to act as a Special Master or Masters to receive applications to vote from such persons who have been refused the right to register or otherwise to qualify to vote at any election and to conduct hearings as hereinafter provided. The Special Master or Masters after conducting the hearings shall file a report with the court specifying whether such applicants or any of them (1) are qualified to vote at any election, and (2) have been (a) deprived of the oppor-

tunity to register to vote or otherwise to qualify to vote at any election, or (b) found by state election officials not qualified to register to vote or to vote at any election.

"In any proceeding before the Special Master or Masters, unless otherwise directed by the Court, 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 Special Master or Masters shall examine the applicant and his answers shall be included in the transcript of the hearings. All statements of the applicant shall be under oath and shall be taken down stenographically and a transcription thereof shall accompany the report of the Special Master or Masters to the court.

"Upon receipt of such report, the court shall cause the Attorney General to transmit a copy thereof by mail to each party defendant and to each state election official, thereafter to be furnished a certified copy of the original or any supplementary decree pertaining to such report, together with an order to show cause within ten days why an order of the court should not be entered in accordance with such report. Any party defendant or such state election official desiring to show cause why such an order of the court should not be entered shall within such ten day period, or such other period as the court may specify, file written exceptions with the court.

"Any such report of the Special Master or Masters together with the exceptions filed thereto, after an opportunity for oral argument and, subject to limitations to be imposed by the court, the presentation of additional evidence by the persons filing such exceptions, shall be reviewed by the court. After such review the court shall issue a supplementary decree which shall specify which person or persons named in the report are qualified and entitled to vote at any election within such period as would be applicable if such person or persons had been registered or otherwise qualified under State law. The Attorney General shall cause to be transmitted certified copies of the original decree and any supplementary decree confirming or modifying such report to the appropriate election officials of the State, and any such official who, with notice of such original or supplementary decree, refuses to permit any person named as qualified to vote in such original or supplementary decree to vote at any election covered thereby, or to have the vote of any such person counted, may be proceeded against for contempt.

"The court may authorize the Special Master or Masters to issue to each person named in the original decree or any supplementary decree as qualified and entitled to vote at an election a certificate identifying the holder thereof as a person qualified and entitled, pursuant to the court's original decree or supplementary decree, to vote at any such election.

"The court may authorize any Special Master or Masters appointed pursuant to this subsection (or may appoint other Special Masters) (1) to attend at any time and place for holding any election at which any person named in the court's original decree or any supplementary decree is entitled to vote and report to the court whether any such person has been denied the right to vote, and (2) to attend at any time and place for counting the votes cast at any election at which any person named in the court's original decree or any supplementary decree is entitled to vote and report to the court whether any vote cast by any such person has not been properly counted.

"Any Special Master or Masters appointed by the court pursuant to this subsection shall have all the powers conferred upon a master by Rule 53(c) of the Federal Rules of Civil Procedure. The compensation to be allowed such Special Master or Masters shall be fixed by the court. Such compensation and the cost of conducting the hearings, including the cost of the transcript, shall be payable by the United States.

"The court shall have authority to take any other actions, consistent with the provisions of this subsection, reasonably appropriate or necessary to enforce its decrees."

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

"When any official of a state or subdivision thereof has resigned or has been relieved of his office and no successor has assumed such office, any act or practice of such official constituting a deprivation of any right or privilege secured by subsection (c) or (b) hereof shall be deemed that of the State and the proceeding may be instituted or continued against the State as party defendant."

Mr. FORRESTER. Mr. Chairman, may I ask a question?

The CHAIRMAN. Yes.

Mr. FORRESTER. Mr. Chairman, I wanted to ask the witness and I want to direct these questions to the attention of the members of the committee also.

I have been sitting here all day and according to all of the testimony which I have heard, all of these cases are similar in that there is always the same plaintiff and the same defendant.

Mr. BLOCH. Always what?

Mr. FORRESTER. The same plaintiff and the same defendant, and when these cases reach the court and as you well said you didn't know how that point is going to be raised, whether the Attorney General is going to have to specify a pattern or whether simply evidence is going to be heard, we do know there is going to have to be some evidence introduced in a judicial finding.

Now, as I understand it, if the court holds there has been any pattern of discrimination, that holding, in effect, becomes res judicata. Then they can come in in a wholesale manner and everyone who claims that he has been discriminated against, he is in court and is not required to prove at all that he has been discriminated against.

Mr. BLOCH. That is right.

Mr. FORRESTER. Now I want to ask the gentleman this.

Since they are the same parties and it is the same State, the same defendant and that point is raised in the court and the evidence does not develop that there is a pattern of discrimination, then I am asking you, wouldn't that also be a res judicata and wouldn't that be a conclusive finding that anyone else who had been up and tried to register and was denied registration, wouldn't that be res judicata to him and he could not come into the court and raise that point?

Mr. BLOCH. I think so.

The CHAIRMAN. Are you acquanited with, and you just pointed with justified pride to the ballot safeguards according protection to all of the people of Georgia as to the right to vote, but I now draw your attention to an excerpt from the Atlanta Constitution of the 20th of February 1958, which reads as follows:

The House handed Governor Griffin another stinging defeat Wednesday by approving overwhelmingly a bill backed by Lieutenant Governor Vandiver's forces seeking to tighten voter qualifications.

Mr. BLOCH. Seeking what?

The CHAIRMAN. Seeking the tightening of voter qualifications.

The measure passed by the House is aimed primarily at curbing Negro voting.

Representative Frank Twitty of Mitchell, a Vandiver leader in the house, took the floor to oppose Hawkins' poll tax proposals to plug the passage of the bill.

He said the bill would give local registrars the "weapon" they need to combat "insidious organizations" such as the NAACP by keeping off the registration rolls those "who ought not to be there."

"Let's give the local registrars the weapon they need to preserve the southern way of life as we know it in Georgia," Twitty said.

Representative William M. Campbell of Walker County said, "We haven't got the Negro problem in our county that some of you have, and we control them and we don't have to come to the legislature and ask for help to do it."

The editorial comment by the Atlanta Constitution was to the following effect, and I am only going to read one paragraph from the editorial:

Nowhere in its approximately 9,000 words does the act mention Negroes, but it has been plain all along that the intent is to discourage Negro registration.

I shall place this statement from the Atlanta Constitution, plus the editorial from that same paper into the record at this point.

(The article from the Atlanta Constitution and the editorial comment is as follows:)

[From the Atlanta Constitution, Feb. 20, 1958]

VANDIVER'S VOTER CURB WINS IN HOUSE, 134 TO 40

(By William M. Bates)

The house handed Governor Griffin another stinging defeat Wednesday by approving overwhelmingly a bill backed by Lieutenant Governor Vandiver's forces seeking to tighten voter qualifications.

Before passing the bill 134 to 40, the house rejected an amendment sponsored by Griffin Floor Leader W. Colbert Hawkins of Screven County to levy a $1 poll tax on future new voters. The vote against the amendment was 97 to 61.

The Vandiver-backed bill was transmitted immediately to the senate for a first reading Wednesday so that it will have time to win final passage by Friday's adjournment.

The action came just 1 day after the house had killed Griffin's own voter qualification proposal. Griffin had assailed the house's earlier action.

CURBING NEGRO VOTE

The measure passed by the house is aimed primarily at curbing Negro voting. It was drafted by a special election law study committee that worked for 10 months on the voting question.

Major provision of the bill is a 30-question examination test to be required of persons attempting to register who cannot qualify by reading and writing a section of the Constitution.

The test would replace one now required of illiterate voters. But the proposed new examination is made up of difficult questions and an applicant must get 20 of the 30 to pass.

PRESENT LAW

Under the present law, the questions are relatively simple and only 10 must be answered correctly for passage.

The new bill also tightens generally the present voter registration machinery and procedure, but does not apply to the 1,200,000 persons already qualified to vote and does not call for a reregistration.

House passage of the voter qualification bill climaxed a day of parliamentary maneuvering between the Vandiver and Griffin factions over the voter registration question.

Representative Robert L. Russell of Barrow, Vandiver's brother-in-law, moved early in the day to take the voter registration bill from the house state of the republic committee, where it has been languishing since early in the session, and putting it in the rules committee.

The house backed Russell's move, over the opposition of administration forces, by a vote of 82 to 50.

Shortly after noon, the rules committee approved the measure and put it on the calendar to be considered at the call of Speaker Marvin Moate.

When Moate called up the bill for debate, Representative William R. Killian of Glynn protested it was out of order because it had been offered as a substitute for the Griffin voter bills on Tuesday. The substitute was tabled along with the Governor's proposal.

However, Moate overruled Killian's objection and directed the house to proceed with the Vandiver-backed bill.

During the day, Hawkins offered the $1 registration fee as a "little amendment." The poll tax was a major feature of Griffin's defeated measure.

Hawkins said his amendment would put teeth into the registration bill and said he would support the measure if the amendment were adopted.

"You will have done something for this bill and you will have done something for the counties of Georgia that have a problem with Negro registration," Hawkins declared.

Representative Frank F. Twitty of Mitchell, a Vandiver leader in the house, took the floor to oppose Hawkins' poll tax proposals to plug for passage of the bill.

"There has been some misapprehension on how the lieutenant governor and his friends stand on voter registration," Twitty said.

"I want to tell you here and now that all of us favor as stringent voter qualifications as possible," he said.

But Twitty said he did not "believe in taxing a man's right to vote." He said repeal of the poll tax had been a good thing for the State.

"Let's tighten voter qualifications, but let's not put a tax on a man's right to vote," he said.

He said the bill would give local registrars the "weapon" they need to combat "insidious organizations" such as the NAACP by keeping off the registration rolls those "who ought not to be there."

"Let's give the local registrars the weapon they need to preserve the southern way of life as we know it in Georgia," Twitty said.

Representative Raymond M. Reed of Cobb County warned that the NAACP would "school" Negroes to enable them to pass the 30-question test proposed by the bill.

"But who is going to school the poor white people who can't pass the test?" Reed asked. "If you want to play into the hand of the NAACP, this test will do it."

Representative William M. Campbell of Walker County warned that measures such as the voting bill would "drive the Negroes into the NAACP."

"We haven't got the Negro problem in our county that some of you have," Campbell said. "We control them and we don't have to come to the legislature and ask for help to do it."

Representative W. K. Smith of Bryan urged against any change in present voting laws.

[From the Atlanta Constitution, Mar. 20, 1958]

STATE LAW PAVES ROUGH, RUGGED ROAD TO BALLOT BOX—TOUGH ON REGISTRARS AND APPLICANTS

(By Margaret Shannon)

There's a strange new road ahead to the ballot box for Georgians who want to vote this year, but who hadn't registered by last Tuesday.

That's the day Governor Griffin signed into law the voter registration bill passed in the closing days of the 1958 general assembly.

With that stroke of his pen, he scrapped existing registration procedure and fouled up—at least temporarily—the machinery for qualifying to vote.

All persons registered by last Tuesday stay registered. Although some sources placed a contrary interpretation on the act, the attorney general's office has said no one already on the list has to reregister.

Since this is the year a governor and other statehouse officers are elected, as well as a whole general assembly, it's a big political year and a time when voter registration usually picks up.

It looks as if it's going to be tough on registrars and applicants alike for the next few weeks.

The new registration measure, as passed by the legislature, provided no future effective date and therefore automatically became effective when Governor Griffin signed it.

So there was no changeover period provided for, and the registration deadline for this year's election was only 6 weeks away. It is May 3.

The attorney general's office has been advising county boards of registrars just to shut up shop until they can get new registration cards and otherwise prepare to administer the new law.

That seemed likely to cut 10 days or 2 weeks off the remaining registration time and make for more of a jam than ever at the last minute, particularly in urban areas.

Nobody exactly plotted the squeeze that has developed. A spokesman for the legislature-created election laws study committee, which proposed the legislation, said that group expected its proposals to pass early in the session and be signed promptly by Governor Griffin.

Instead, Griffin forces came up with some proposals of their own, which failed. Then Lt. Gov. Ernest Vandiver's team pulled out the committee proposals and put them through. This all happened right at the close of the session.

Then Governor Griffin didn't get around to signing the bill for over a month after the legislature adjourned. Nobody made a move because there was a chance he might veto it—a chance that speculation had was pretty good because the measure bore the Vandiver stamp.

Thus, with one thing and another, the new law is 6 weeks to 2 months later getting going than the study committee figured on.

Nowhere in its approximately 9,000 words does the act mention Negroes, but it has been plain all along that the intent is to discourage Negro registration.

Some voter groups like the Metropolitan Voting Council of Atlanta and the Georgia League of Women Voters take a dim view of the new law. They say it will discourage anybody, white or Negro, from registering.

Once the law does get into operation, this is how registration will go:

Basic qualifications: They're the same—18 years old, 1 year of residence in Georgia with 6 months in the county in which registering.

Application: Go to the office of the county board of registrars—it may be the same as the tax collector's office—and fill out a registration.

It asks name, address, date and place of birth, color of hair and eyes, weight, height, race, occupation, mother's maiden name and father's name.

It also contains an oath about length of residence and another about crimes convicted of that would bar you from voting. These are the same as in the State constitution and are unchanged, though there was talk in the legislature of lengthening the list.

There's also this question to be answered: "Under what constitutional classification do you desire to make application for registration?" That brings on more talk.

Classifications for application: There are two: (1) literacy: (2) good character and understanding of the duties and obligations of citizenship.

These are provided in the State constitution. The law spells out the tests for both classifications.

Literacy test: The county board of registrars gives the applicant a section of the State or U.S. Constitution—any one it wants to—to read aloud and write "in the English language."

If, in the board's judgment, the reading is intelligible and the writing legible, the applicant passes the test.

This is about the same as past procedure.

Citizenship test: This is the only way an illiterate can qualify, and it involves the much-discussed list of 30 questions.

The new law sets forth 30 questions about government—and no answers—to be propounded to the applicant orally by the registrars. The applicant must answer 20 of them correctly to pass.

This is real toughening up of the law. There was a question-and-answer provision in the former law, but the questions were easier and the applicant had to get only 10 out of 20 right.

Two trips to register: It will take two trips to register unless a county board of registrars makes special arrangements to accommodate the applicant.

The first trip will be to apply—to fill out the registration card.

The second trip will come after the board of registrars notifies the applicant to report to take the test he has chosen—either the reading-and-writing test or the question-and-answer test.

No longer can a deputy qualify an applicant. The board of registrars itself must do so.

Fulton County already is planning to have the board of registrars in constant session to prevent the necessity of two trips. Under the new law, the tax commissioner and two deputies are to constitute the county board of registrars in Fulton. But this provision does not apply to any other county.

Challenges: As in the past, any registered voter can challenge the right of any other registered voter to be on the list.

But something new has been added—any registered voter may challenge the qualifications of any applicant.

Registrars: Existing county boards of registrars will continue to serve until July 1, 1961. However, right away—by Tuesday, April 1—the superior court judge in each county must designate one member of the board as chief registrar.

The 1961 appointments will be made as in the past. The superior court judge

in each county will appoint three citizens as registrars from a list of six names submitted by the grand jury.

State board: The act creates an entirely new agency, the State Registration and Election Information Board. The members are the Governor, the attorney general and the secretary of state.

It's supposed to prepare and distribute material to registrars to "enable them to more efficiently perform their duties" and to conduct "seminars and meetings at such times and places deemed advisable."

The board is authorized to employ an executive director and other personnel to do whatever the board assigns for them to do.

Requalifying: If for any reason a voter's name is cut off the list, he must start from scratch and register under the new procedure.

Under the old law a voter dropped from the list could be placed back on by requesting reinstatement, wtihout the necessity for going through the whole rigmarole.

Purge: The new act provides for the first purge of the voter list for nonvoting to take place in 1959. But there's a conflict in the section of the act providing this, so the 1959 legislature will have to straighten it out.

The original bill provided for persons who hadn't voted within 2 years to be dropped from the list. A house amendment changed that to 5 years, but neglected to make the rest of the section conform. So the 1959 legislature will have to determine whether it will be 5 years or 2 years.

Mr. BLOCH. Mr. Chairman, may I comment on that?

The CHAIRMAN. Yes.

Mr. BLOCH. That 1958 act about which the Atlanta Constitution was apparently writing and quoting various people is the act to which I referred in my written statement.

Now if that act is derelict in the manners pointed out in that newspaper article, I wonder why in the year and a half or 2 years since that act was passed that nobody in Georgia has filed a suit to test its legality or validity or constitutionality.

The comments that were made on the floor of the House or in the newspapers don't prove anything.

If the act did do what the proponents of it or those arguments for it said in the newspaper, if it is illegal, why hasn't somebody tested its legality?

I am sure if the chairman or the members of the committee will read the act as its appears in the Georgia Code you will find it is a perfectly valid constitutional act and if it should be applied unconstitutionally, if it should be applied so as to discriminate between races, then those races have their remedy. The act appears in the Georgia Code Annotated (pocket part) as sections 34–101 to 34–145, inclusive.

Mr. MEADER. Mr. Bloch, I don't want you to close your testimony in this record without commenting on what I think is a very important problem which has not so far been discussed either in your prepared statement or in the colloquy.

It is one that has disturbed me from the beginning when this legislation was first called to my attention and that is the remedy or the device that is employed in this legislation.

Let me state it to you this way. The function of determining the qualifications of electors and the whole election process under our Constitution is vested in the States and their local subdivisions and there is only a limitation upon that function by the 15th amendment which is a negative thing.

It says you may determine the qualifications of electors and conduct the voting process, but you shall not abridge the right of a Negro to vote.

Now the remedy here is for the Federal Government to appoint a person, an agent of the Federal Government or of its court system when it believes that the States are not performing their functions honestly or correctly.

Now that to me is a novel device. So far as I know, there is no precedent that where there is any State authority which is limited by a prohibition in Federal law: that the Federal Government, if it is unhappy or dissatisfied with the manner in which the States are functioning, may, in effect, appoint a receiver to perform the State function.

But here the voting referee must pass judgment on State law. He must determine that the applicant has the proper age, proper qualifications; and that he has the residential qualifications prescribed by State law within the State and within the precinct where he desires to register.

He must find that the person is not ineligible because of a criminal record that he has the proper educational qualifications and that he is not an idiot or any of the other disqualifications that the States still have the right by legislation to prescribe for electors.

Now the remedy is to appoint a Federal official who will pass judgment on all of those matters, and since the Federal official finds that the individuals are qualified under the State requirements, then he infers as a matter of course that the only reason he is not registered is because he is a Negro.

Now to me this is a novel device. It is a remedy in the field of relationships between the States and the Federal Government which so far as I know has never been tried before and it may be tried again in other fields. I think that, as an opponent of this legislation, you ought to have some views upon that remedy and I think the committee should have the benefit of those views.

Mr. BLOCH. Mr. Meader, I don't know whether you were here this morning when I started my testimony or not.

I have some very definite views on it and, of course, your question goes to the bases of all the bills, not only the referee bill, but the registrar bills, and I said in the opening this morning that those very basic questions of constitutional law and of history which you have raised were discussed by me on the 2d of February in a hearing before the subcommittee of the Rules Committee.

Mr. MEADER. Unfortunately, I was not familiar with your testimony.

Mr. BLOCH. On those basic questions which to me, sir, go to the very heart of the problem I made a statement to the Rules Committee of the Senate.

It so happens that I have a copy of it with me here, but that statement was incorporated in the Congressional Record of February 2, by Senator Talmadge.

I said in the opening of my prepared statement here this morning that if the committee desired, I would be very glad to furnish the chairman a copy of it and it could be made a part of this record here.

You will find the reference to it on the very first page of my prepared statement, and that 40- or 45-page brief, it is a law brief, appears in the Congressional Record of February 2, beginning at page 1553 and going through page 1559.

It deals, Mr. Meader, with the very, very basic questions of law and history that you raise.

I would be very glad to furnish the chairman a copy of it and have it incorporated in this record.

The CHAIRMAN. Mr. Lindsay?

Mr. LINDSAY. Mr. Chairman, just on that point, do I understand that this statement which you filed expresses your views as to the extent to which the Federal Government may regulate Federal elections under article I, section 4 of the Constitution?

Mr. BLOCH. You mean the statement that I filed with the Senate committee?

Mr. LINDSAY. Yes.

Mr. BLOCH. Yes.

Mr. LINDSAY. You go into that question?

Mr. BLOCH. We discuss it here. You will find some reference to that also in the record of the hearings a year ago where the chairman and I had, what was to me, a very interesting colloquy back and forth as to the meaning of the phrase, "time, place, and manner of conducting elections."

That memorandum goes very fully into the meaning of those words "time, place, and manner of conducting elections" and especially as to what the phrase "manner of conducting elections" authorizes the Congress to supersede State powers with respect to the qualifications of people who are to vote in elections.

Mr. LINDSAY. In Federal elections?

Mr. BLOCH. Federal elections primarily because the Federal registrar bills were confined to Federal elections. Yes, it goes into that.

Mr. POFF. Mr. Chairman, I would like to pursue a somewhat different line of questioning and I believe one which has not been opened so far.

First of all, in your opinion, may the Attorney General bring a class action under 1971 (a) and (b)?

Mr. BLOCH. You mean bring it under 1971(c)?

Mr. POFF. Bring the action under (c) based on (a) or (b).

Mr. BLOCH. No, sir; I don't think he can.

Mr. POFF. All right, sir. Now the second question is, assuming that you are wrong and that in such an action the court proceeds to issue a determination that there is a pattern of discrimination, then when would that determination constitute a final judgment to which an appeal would lie?

Mr. BLOCH. Well, under the present state of this bill as drawn or were it enacted into law, I would have to answer the question that I don't know because there is no provision in the bill as I have pointed out. There is no provision of the bill for putting in issue a question of pattern or practice, whether or not there is such a discriminatory pattern or practice.

But ordinarily speaking I would say that if the law provided that before that pattern or practice could be found, that the Attorney General must allege it and prove it by a preponderance of evidence and carry the burden of proving it and the judge so found that the decree would not become res judicata until the time for appeal had expired by the defendants in the main suit.

Mr. POFF. Well now, that is just my point. Are we to assume that when the court issued its first decree finding that a pattern of discrimination existed that decree constitutes a final judgment to which an appeal would lie and if the answer to that question is affirmative,

would appellant have the right to a stay and if that question is answered in the affirmative, would the court at that point have the right to appoint a referee?

Mr. BLOCH. I see what your question is. That is whether that decree which had judged a pattern of practice was a final decree.

Mr. POFF. Exactly.

Mr. BLOCH. Which had to be appealed from then or not at all.

Mr. POFF. Exactly.

Mr. BLOCH. I would say it was not such a final decree.

I changed the statement I made a while ago because I had not thought of it in terms of whether it was an interlocutory decree or a final decree.

I think it is such a decree that could be appealed from under two provisions of the judicial code, title 28, that it could be appealed from but that first in that it granted an injunction which made it subject to immediate appeal and secondly, that it might come under the interlocutory, recent interlocutory appeals act.

Mr. POFF. Let's assume that an appeal was filed under either of those alternatives; during the pendency of the appeal, the perfection of the appeal, would the judge have the right to appoint a referee——

Mr. BLOCH. I think he would unless somebody granted a supersedeas.

Mr. POFF. Now secondly, assuming that is not a final decree at that stage when would the decree become final to which a general appeal would lie?

Mr. BLOCH. I am sort of shooting from the hip and I don't like to shoot from the hip on something that is going to be printed and perhaps come back at me at some future date.

But answering as best I can I would say that there was a final decree, of such a finality to the decree as compelled an appeal when that supplemental decree was signed, that the time ran from then; the supplementary decree I think you would call it and not until then would an appeal be compulsory.

We have had that question come up once or twice in these school cases and it is a question that you just can't say red or blue on.

Mr. POFF. Thank you. No further questions.

The CHAIRMAN. Are there any other questions?

There appear to be none.

Well, thank you very much, Mr. Bloch.

I just want to comment that you have been very patient in answering our questions. You have been most helpful in your testimony.

I might add that the opponents of this measure can find no better spokesman than your good self.

Mr. BLOCH. Thank you, sir.

The CHAIRMAN. With that, we will adjourn the hearing and the record will remain open for any statements by opponents or proponents of the bill.

You might have the opportunity within the designated period to file additional data.

Thank you again.

Mr. BLOCH. I suppose if you gentlemen want me to do that, that you will let me have Mr. McCulloch's amendments.

The CHAIRMAN. The committee is adjourned.

(Whereupon, at 4:15 p.m., the committee adjourned subject to the call of the Chair.)

APPENDIXES

APPENDIX A

LAW OFFICES,
BLOCH, HALL, GROOVER & HAWKINS,
Macon, Ga., February 20, 1960.

Mr. WILLIAM R. FOLEY,
General Counsel, Committee on the Judiciary,
Old House Office Building, Washington, D.C.

DEAR MR. FOLEY: I have received yours of February 18, have made certain corrections, and return the copy of the testimony herewith.

At page 54, Representative Chelf asked me what percentage of the registered voters in Bibb County, the colored registered voters, are between the ages 18 and 21. I told him that I didn't know, but that I would try to find out.

Upon inquiry yesterday from Mr. Dan D. Dunwody, our tax commissioner, I find that as of October 28, 1959, there were 22,029 white registered voters, and 4,351 Negro registered voters in Bibb County, Ga., of which Macon is the county seat. How many of those are between the ages of 18 and 21 could be determined only by a tabulation of the cards, one by one. If the gentleman of the committee still desires that done, I am sure that our tax commissioner would be glad to do it.

At page 80 you will notice that I was granted permission by the chairman to insert into the record anything that I wanted to concerning so-called precedents under the antitrust laws. I have not yet had the opportunity to prepare that memorandum. How long do I have to get it to you?

At page 121 of the record, Congressman Meader said: "Let me ask you if you wouldn't add, 'It is a judicial determination and not a legislative determination.'" The Congressman went on with a statement of a couple of sentences and when I started replying, I didn't answer his question specifically. I should like to add on page 121, just before my words: "There is another subparagraph of that article * * *" the following: "That should be for the judiciary to determine." And I should like to add as a note supporting that statement the following:

"See *Kilbourn* v. *Thompson*, 103 U.S. 168; *U.S.* v. *Carolene Products Company*, 304 U.S. 144, 152 holding: 'that a statute would deny due process which precluded the disproof in judicial proceedings of all facts which would show or tend to show that a statute depriving the suitor of life, liberty, or property had a rational basis.' See also *Bandini Petrolcum Co.* v. *Superior Court*, 284 U.S. 8; *Morrison* v. *California*, 291 U.S. 82.

" 'Congress cannot enlarge Federal judicial power even to suit wants of commerce, nor for more convenient execution of its commercial regulation.' *The Belfast*, 74 U.S. 624; the *Genesee Chief*, 12 Howard 443. 'Congress cannot bring under the judicial power a matter which, from its nature, is not a subject for judicial determination.' *Murway* v. *Hoboken Land Co.*, 18 Howard 272."

I call your attention to the fact that at page 131 a request was made by Congressman McCulloch that I be given an opportunity to submit a statement with respect to some amended drafts within a time fixed by the chairman. I do not find that any time was so fixed. I have not received the amended bill. Mr. McCulloch handed me a rough draft of one of them. What time do I have within which to prepare that statement?

Further, in response to Representative Meader's question at page 121 of the record, I call attention to the case of *McCutcheon* v. *Smith*, 199 Ga. 685, which is one of the leading authorities in Georgia, with respect to an attempt by the legislature to perform a judicial function by construing a law. It supports the correctness of Mr. Meader's statement: "The finding that a particular act or practice has occurred is a judicial function, not a lawmaking, legislative policy-making function."

Sincerely yours,

CHARLES J. BLOCH.

APPENDIX B

LAW OFFICES,
BLOCH, HALL, GROOVER & HAWKINS,
Macon, Ga., February 21, 1960.

Mr. WILLIAM R. FOLEY,
Counsel, Judiciary Committee, House of Representatives, Old House Office Building, Washington, D.C.

DEAR MR. FOLEY: Supplementing my letter of February 20, at page 80 of the typewritten transcript of the hearing of February 16, 1960, is a discussion of the precedent in the antitrust laws as to the presumption sought to be set up in House bill 10035.

What I had in mind was that at page 21 of the confidential committee print of Judge Walsh's testimony of February 9, 1960, the judge had said: "Well, if you found a pattern and practice against Negroes, and he is a Negro, I think Congress is justified in jumping the gap and establishing a conclusive presumption that that is the reason for his troubles."

The chairman then asked: "You mean that Congress can justify *that presumption?*" [Emphasis added.]

A few lines later, the chairman asked: "Is there any precedent where Congress has created *such a* presumption?" [Emphasis added.]

Judge Walsh answered: "The first thing that occurs to me is in the antitrust cases, where the presumption is not conclusive, but presumptive. * * * This is not a conclusive presumption; that would establish a prima facie case."

Doubtless, Judge Walsh was referring to title 15, section 16, of the United States Code. (Act of October 15, 1914, c. 323, sec. 5, 38 Stat. 731.)

While that statute was amended July 7, 1955 (69 Stat. 283), title 15, section 16 of the United States Code Annotated shows that it continues to read: "A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 15(a) of this title as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: * * *."

In the United States Code Annotated, note 19 to title 15, section 16 is: "Prima facie effect of criminal convictions."

Theatre Enterprises v. *Paramount Film Corporation*, 346 U.S. 537, 542, 74 S. Ct. 257, 260, shows how carefully the Court provides that such prior decrees should be only prima facie evidence in the subsequent proceeding. That the question was decidedly an issue is shown by Justice Black's dissent.

The limitation as to the application of the prior decree in an antitrust suit is demonstrated by *Eagle Lion Studios, Inc.* v. *Loews, Inc.*, 248 F. 2d 438 (2d circuit). (Affirmed, 358 U.S. 100.)

The limitation is further demonstrated by *Monticello Tobacco Co. Inc.* v. *American Tobacco Co.*, 197 F. 2d 629 (2d circuit). (Certiorari denied, 344 U.S. 875.)

Both of these cases were tried in the last decade in the southern district of New York, and Judge Walsh is undoubtedly familiar with them.

Aside from any other consideration, the constitutionality of a statute creating a rebuttable presumption is quite different from the constitutionality of a statute creating a presumption which is fixed and irrebuttable.

Adler v. *Board of Education*, 72 S. Ct. 380(16), 342 U.S. 485, demonstrates that. It recognizes that the relation between the fact found and the presumption must be clear and direct, and not conclusive.

The most cogent demonstration of the constitutional difference between rebuttable and irrebuttable presumptions is a comparison of the cases of *Mobile, J. & K. C. R. Co.* v. *Turnipseed*, 219 U.S. 35, and *Western & A. R. Co.* v. *Henderson*, 279 U.S. 639.

In the former, the Court held a "presumption statute" valid because its only legal effect was to cast upon the defendant the duty of producing some evidence to the contrary.

In the latter, the Court held a similar statute invalid because it created an inference that was given effect of evidence to be weighed against opposing testimony, and was to prevail unless such testimony was found by the jury to preponderate.

How much the stronger would a statute be unconstitutional if it did not afford those affected by it the opportunity to introduce any evidence to contradict the presumption.

If such "presumptions" as these are to become a part of the body of our law, we are opening up a dangerous field containing many hidden mines.

Sincerely,

CHARLES J. BLOCH.

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