

IN THE
UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

UNITED STATES OF AMERICA,
PLAINTIFF,

versus

CIVIL ACTION NO. 2159-N

AGNES BAGGETT, Secretary
of State, State of
Alabama; and the STATE OF
ALABAMA,

DEFENDANTS.

BRIEF IN OPPOSITION TO MOTIONS TO STRIKE,
TO DISMISS AND TO DROP DEFENDANTS AS PARTIES

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IN THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff	)	
	)	
v.	)	CIVIL ACTION NO. 2159-N
	)	
AGNES BAGGETT, Secretary	)	<u>BRIEF IN OPPOSITION TO</u>
of State, State of	)	<u>MOTIONS TO STRIKE, TO</u>
Alabama; and the STATE OF	)	<u>DISMISS AND TO DROP DE-</u>
ALABAMA,	)	<u>FENDANTS AS PARTIES</u>
	)	
Defendants.)	)	

STATEMENT

On January 15, 1965, the United States filed its complaint in the present case. On January 28, 1965, the defendants filed motions to strike, to dismiss, and to drop the defendants as parties. In responding to these motions, it is appropriate, first, to review the allegations of the complaint, and, secondly, to summarize the contentions of the defendants (redundantly stated in 43 separately numbered paragraphs).

I

THE COMPLAINT

The complaint names as defendants the State of Alabama (which through its agents prescribes and administers the voter registration tests and requirements in Alabama) and the Secretary of State for the State of Alabama (who provides to

the registrars of voters of each County the forms of applications and tests to be administered in the registration of voters).

The complaint (paragraph 6) alleges that under Section 181 of the Constitution of Alabama of 1901, as amended by Amendment XCI (adopted December 19, 1951), citizens who are age and residence-eligible are qualified to register as electors (if not disqualified under section 182) if they can read and write any article of the Constitution of the United States and if they are of good character and embrace the duties and obligations of citizenship under the Constitutions of the United States and Alabama, and that in order to aid the county registrars in determining whether applicants for registration possess the above qualifications, each applicant is to answer in writing without assistance a questionnaire prescribed by the Supreme Court of Alabama.

Paragraphs 7 and 8 allege that from January 1952 to about February 1964, applicants for registration to vote in Alabama, except in two counties, rarely were required to demonstrate their ability to read and write any article of the Constitution; that white applicants were not required to complete the application form and questionnaire then in use without error or omission and without assistance, and that during the same period numerous

Negro applicants were denied registration on the ground that they made errors and/or omissions, and were denied assistance, in completing the application form and questionnaire. Paragraph 8 further alleges that Negroes in Alabama have been deprived of their right to vote without distinction of race pursuant to a pattern and practice of racial discrimination.^{1/}

The complaint further asserts (paragraph 10) that on January 14, 1964, the Supreme Court of Alabama prescribed a new and different application form and questionnaire to be used by the boards of registrars throughout the State, including a page labeled "Insert Part III," which contained tests to be used as part of the questionnaire.^{2/} The Supreme Court's order -- a copy of which is attached to this brief as Appendix A -- provided for twelve of these inserts -- a different one to be used each month.

^{1/} Paragraph 9 asserts that in Alabama there are approximately 1,353,058 white persons and 481,320 Negroes of voting age; that of these, approximately 935,695 white persons (or about 69%) and about 93,737 Negroes (or about 19%) are registered to vote.

^{2/} A copy of the new application form, including one of the Insert Part III tests, is set forth in Attachment C to the complaint, which by the terms of Paragraph 10 of the complaint is expressly incorporated therein.

Paragraph 11 asserts that in February 1964, registrars in Alabama began to require applicants for registration to take the Insert Part III tests; that these tests as a procedure and standard for testing the literacy of applicants are more stringent than any testing procedures or standards previously applied to individuals who have been found qualified to vote by Alabama registrars, and that numerous applicants have been denied registration on the ground that their performance on these tests was unsatisfactory.

The complaint goes on to allege (paragraph 12) that on August 26, 1964, the Supreme Court of Alabama ordered the county boards of registrars throughout Alabama to use a revised form of Insert Part III, containing tests different from those which previously had been used. According to this order--attached to this brief as Appendix B--this revision was necessary because of the passage of the Civil Rights Act of 1964. Copies of the 100 different forms of this test, containing a total of 399 different questions on government and 139 different excerpts from the Constitution, are appended as attachment D to the complaint and incorporated therein.

Paragraph 13 asserts that in September 1964, the registrars in Alabama began to require applicants for registration to take the revised Insert Part III tests; that numerous applicants have been denied registration on the ground that their performance on these tests was unsatisfactory, and

that the testing procedures and standards established by the revised Insert Part III are more stringent than any testing procedures and standards previously applied to individuals who have been found by Alabama registrars of voters to be qualified to vote.

Paragraph 14 states that the successful performance by applicants in taking the original and revised Insert Part III tests is directly related to the educational achievement of the applicants, and that applicants who have enjoyed superior educational opportunities and attainments are better able to become qualified voters in Alabama than those with inferior educational opportunities and attainments. Yet, according to paragraphs 15 and 16 of the complaint, the State of Alabama, which since at least 1900 has provided a program of public education for its residents, has maintained during this period separate public schools for Negro and white students^{3/} in which the public educational facilities and opportunities provided for Negroes have been vastly inferior to those provided for white persons. Paragraph 16 asserts that in white schools the pupil-teacher

^{3/} Paragraph 15 alleges that since 1963, pursuant to federal court orders, eight of Alabama's 118 bi-racial school districts have been desegregated, and that at the present time about 294,000 Negro children are enrolled in Alabama public schools, 94 of which are enrolled in desegregated schools.

ratio was consistently lower; the length of school terms longer; expenditures per pupil higher; average teachers' salaries higher, and the qualifications and training required of teachers superior.

Paragraph 17 alleges that numerous Negro applicants for registration to vote who were of school age and eligible for public education in Alabama when the public educational opportunities provided for Negroes were inferior to those provided for whites have been denied registration on the ground that they did not satisfactorily pass the test provided for under the original and revised versions of Insert Part III.

Paragraph 19 alleges that the use in Alabama of the original and revised Insert Part III tests as prerequisites to voting violates 42 U.S.C. 1971(a) and the Fifteenth Amendment to the Constitution of the United States for the following reasons:

(a) It imposes testing procedures and standards which are different from and more stringent than any testing procedures or standards which have been applied to other individuals who have been found by Alabama registrars to be qualified to vote in Alabama, in violation of 42 U.S.C. 1971(a)(2)(A).

(b) It nullifies the sixth grade presumption of literacy established by Congress in 42 U.S.C. 1971(c) by requiring a comprehension and literacy level higher than is normally attained by the completion of six grades of

education, in violation of Article VI of the Constitution of the United States. 4/

- (c) It imposes an oral dictation test in violation of 42 U.S.C. 1971(a)(2)(C).
- (d) It discriminates against Negro applicants and in favor of white applicants because of distinctions in the quality of educational opportunities resulting from a segregated public school system in Alabama, in violation of the Fifteenth Amendment to the Constitution of the United States.
- (e) It freezes the existing racial imbalance of the voting structure in Alabama by imposing new and more stringent registration requirements and standards upon future applicants following a long period of discrimination against Negroes in the registration of voters in Alabama, in violation of the Fifteenth Amendment to the Constitution of the United States.
- (f) It imposes arbitrarily difficult voter registration requirements and standards at a time when less than 20% of the adult Negroes and more than 65% of the adult white persons in Alabama are registered to vote in a state where there has been a long standing policy of racial segregation and discrimination.

4/ Paragraph 18 alleges that successful performance by applicants for registration on the original and revised versions of the Insert Part III tests requires a comprehension and literacy level higher than that normally attained by the completion of six grades of formal public education.

The complaint prays for a preliminary and permanent injunction restraining the defendants and their agents from (1) in determining whether any individual is qualified to vote in any federal election, applying any testing procedures or standards which are different from and more stringent than any which have been applied to other individuals who have previously been found qualified to vote in Alabama; (2) using either the original or the revised Insert Part III tests in determining whether applicants for registration are qualified to register to vote; (3) using any literacy test as a prerequisite to voting in federal elections which requires a performance level higher than that normally obtained by the completion of six grades of education; (4) using any literacy test as a prerequisite to voting in federal elections which is not wholly in writing; (5) requiring any Negro applicant for registration to vote in Alabama who was of school age and eligible for public education at a time when the public schools were segregated according to race, to take or complete any voter qualification test the successful performance of which is directly related to the educational achievement of the applicant; or (6) engaging in any act which would deprive any citizen in the State of Alabama of the right to register and the right to vote without distinction of race or color.

The complaint further asks this Court to order the defendants and their agents to take whatever steps are necessary to place upon the current voter registration rolls of their respective counties the names of all applicants for registration to vote who have been denied registration on the ground that they have failed the tests provided for in the original and revised Insert Part III; to make a finding that Negro citizens in Alabama have been deprived of the right to vote without distinction of race pursuant to a pattern and practice; to instruct the defendant Secretary of State to advise each of the County registrars of voters in Alabama to cease using either the original or the revised Insert Part III tests, and for such additional relief as justice may require.

II

The Defendants' Motions

The defendants first have moved to strike paragraphs 15, 16 and 17 of the complaint as "either redundant, immaterial, impertinent, or scandalous." Secondly, they have moved to dismiss. Stripped of frivolity and redundancy, the motion to dismiss asserts jurisdictional objections; attacks the standing of the United States to bring this suit; urges that the State of Alabama cannot be sued and that the defendants are improper parties; contends that the members of the Supreme Court of Alabama and the registrars throughout the State of Alabama, or both, are indispensable parties; argues that it is improper to bring a suit, statewide in scope, attacking the voter registration tests in question, apparently implies that the case is not properly before a three-judge court; asserts that the allegations of racial discrimination in the registration process are inadequately alleged, and states that the complaint fails to state a claim upon which relief can be granted.^{5/} Also incorporated in the motion to dismiss is a request that the present cause should be stayed because there are suits under 42 U.S.C. 1971 pending in eleven counties of Alabama against individual registrars. The motion to drop the defendants as parties merely incorporates by reference the grounds assigned in the motion to dismiss.

^{5/} Although the motion to dismiss does not so assert, the State's brief urges in addition that this Court cannot make a statewide finding of a "pattern or practice" of discrimination under 42 U.S.C. 1971(e). We deal with this contention infra.

ARGUMENT

At the outset, it is appropriate to dispose of the motion to strike paragraphs 15, 16 and 17 of the complaint. These paragraphs, fully described supra, contain relevant allegations concerning the racial segregation of Alabama schools, the inferior public educational facilities and opportunities provided to Negroes as compared with those afforded to whites in Alabama, and the fact that numerous Negroes who were of school age in Alabama when the public educational opportunities afforded to Negroes were inferior have been denied registration on the ground that they did not satisfactorily pass the original and revised Insert Part III tests.

These paragraphs of the complaint--the facts of which are admitted by the motion to strike^{6/}--raise a disputed and substantial question of law: whether it is permissible to require Negroes to pass a difficult voter registration test after subjecting them to a system of public education that is grossly inferior to that afforded white persons. It is settled that ". . . courts generally are not willing to determine disputed and substantial questions of law upon a motion to strike." Augustus v. Board of

^{6/} Texeramics, Inc. v. United States, 239 F. 2d 762, 764 (C.A. 5, 1957); Town of River Junction v. Maryland Casualty Co., 110 F. 2d 278, 280 (C.A. 5, 1940), cert. denied, 310 U.S. 634 (1940).

Public Instruction, 306 F. 2d 862, 868 (C.A. 5, 1962); Loney v. Resort Airlines, 18 F.R.D. 37, 41 (S.D. N.Y. 1955); United Artists Associated v. NWL Corp., 198 F. Supp. 953, 959 (S.D. N.Y. 1961); Wells v. Place, 92 F. Supp. 473, 476 (N.D. Ohio, 1950); 1A Barron and Holtzoff, Federal Practice and Procedure 480-486, §367 (Wright Ed. 1960). "The motion to strike is not designed to give the movant a premature ruling on a doubtful question of law tendered by the pleadings . . .". Wells v. Place, supra.

Since the motion to strike clearly should be denied, and since the motion to drop parties is based upon grounds asserted in the motion to dismiss, we turn now to the motion to dismiss.

I

The Court Has Jurisdiction

Paragraphs 1 and 2 of defendants' motion to dismiss for lack of jurisdiction are frivolous. This is an action brought by the Attorney General in the name and on behalf of the United States under 42 U.S.C. 1971, as amended by the Civil Rights Acts of 1957, 1960 and 1964, challenging the validity of Alabama's voter registration tests. The jurisdiction

of this court is therefore appropriately founded
upon 42 U.S.C. 1971(d) and 28 U.S.C. 1345.^{7/}

^{7/} Prior to the revision of the Judicial Code in 1948, absent a special provision, suits by the United States against a State were within the exclusive original jurisdiction of the Supreme Court. See 28 U.S.C. (1940 ed.) 341. Even then, the power of Congress to provide for the trial of such cases in the district court had been affirmed (see Ames v. Kansas, 111 U.S. 449 (1884); United States v. Louisiana, 123 U.S. 32 (1887), and, in specific instances, that power had been exercised. E.g., United States v. California, 297 U.S. 175 (1936); Case v. Bowles, 327 U.S. 92 (1946). Now however, by virtue of 28 U.S.C. 1251(b)(2) and 1345, the district courts may entertain any suit by the United States against a State without special legislation. Thus there is no question of the district court's jurisdiction here. In any event, such jurisdiction is explicitly confirmed by 42 U.S.C. 1971(d).

II . . .

The United States Is Authorized to
Challenge Racially Discriminatory
State Voter Registration Tests

Under 42 U.S.C. 1971 the Attorney General is expressly authorized to institute "in the name of the United States" a proceeding to enjoin "any act or practice which would deprive" any citizen "otherwise qualified by law to vote" of his right to participate in elections "without distinction of race, color, or previous condition of servitude." Thus, insofar as paragraphs 12, 23, and 29 of defendants' motion to dismiss allege that the United States is without legal authority to bring this action, the contention is totally without merit.^{8/} There is no foundation

^{8/} Because, in our view, the statutory basis for the present suit is clear, we find it unnecessary to discuss other possible grounds of standing. At least insofar as the challenged registration tests discriminate against Negroes with respect to their right to vote in federal elections (see Ex parte Siebold, 100 U.S. 371 (1829); Ex parte Yarborough, 110 U.S. 651 (1884); Logan v. United States, 144 U.S. 263 (1829) Wiley v. Sinkler, 179 U.S. 58 (1900); Swafford v. Templeton, 185 U.S. 487 (1902); United States v. Mosley, 238 U.S. 383 (1915); Burroughs and Cannon v. United States, 290 U.S. 534 (1934); United States v. Classic, 313 U.S. 299 (1941); United States v. Saylor, 322 U.S. 385 (1944); Westerry v. Sanders, 376 U.S. 1 (1964), the United States may have standing, independent of 42 U.S.C. 1971(c), to seek injunctive relief. Cf. In re Debs, 158 U.S. 564 (1895); United States v. City of Jackson, Mississippi, 318 F. 2d 1, 320 F. 2d 870 (C.A. 5, 1963); United States v. U.S. Klans, 194 F. Supp. 897 (M.D. Ala. 1961); United States v. City of Montgomery, 201 F. Supp. 590 (M.D. Ala. 1962); United States v. Louisiana, 225 F. Supp. 353 (E.D. La. 1963), prob. juris. noted 377 U.S. 987 (1964).

for the contention in paragraph 29 that the provision of 42 U.S.C. 1971 authorizing the Attorney General to sue is unconstitutional. The Supreme Court expressly upheld that statute in United States v. Raines, 362 U.S. 17 (1960). See also United States v. Manning, 206 F. Supp. 623 (W.D. La., 1962); United States v. Fox, 211 F. Supp. 25 (E.D. La., 1962), affirmed 334 F. 2d 449 (C.A. 5, 1964).

Under 42 U.S.C. 1971(c) the United States is authorized to institute a suit to vindicate rights secured by section 1971(a), irrespective of the form in which the State has transgressed these rights. Thus in United States v. Louisiana, 225 F. Supp. 353 (E.D. La., 1963) prob. juris. noted 377 U.S. 987 (1964), a three-judge court invalidated a Louisiana law which provided that an applicant for registration to vote must read and give a reasonable interpretation of any section of the state or federal Constitutions. To be sure, another three-judge court, in United States v. Mississippi, 229 F. Supp. 925 (S.D. Miss. 1964), prob. juris. noted 377 U.S. 988, has held (Judge Brown dissenting) that Section 1971(c) "does not invest the United States or the Attorney General with power to bring any action to destroy any State's constitution or laws." 229 F. Supp. at 944. In this suit, however, unlike United States v. Mississippi (which, like United States v. Louisiana, is awaiting decision by the Supreme Court), the federal government is not seeking to invalidate provisions of the organic or statutory law of a State, but only to enjoin a

particular statewide voting test which Alabama law authorizes (but does not require).

Even if the Mississippi case were in point here, however, it is clearly inconsistent with the more soundly-based holding of the court in United States v. Louisiana, supra. If the proposition announced in United States v. Mississippi were accepted, the result would be that the Attorney General could seek injunctive relief against the relatively little wrongs involved in the discriminatory acts of minor officials, but that federal district judges must turn a deaf ear to his plea that Negroes are being disenfranchised under authority of organic and statutory provisions of State law which bring about discrimination on a massive scale. Indeed, if the court's holding in Mississippi is correct, suit would not lie to restrain action taken under a state law which explicitly denied Negroes the right to vote. Such a narrow and paradoxical construction of the statute is warranted neither by its language nor by its legislative history.

The text of Section 1971(a) is unambiguous.

It states:

All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any state, . . . municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or

regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding.

Of course, the phrase "otherwise qualified by law" does not mean "otherwise qualified under the laws of the State, whether or not those laws (or regulations promulgated under their authority) work a discrimination on account of race or color." Such a construction would ignore the last clause of the provision--the obvious intent of which is to remove racially discriminatory qualification laws (organic or statutory), and regulations promulgated under their authority, as effective bars to the exercise of the elective franchise. Such a reading would render the statute meaningless, for a State could then disfranchise Negroes simply by erecting a statutory barrier to their participation in elections by expressly decreeing that Negroes could not vote, or by enacting strict standards and exempting therefrom persons previously registered at a time when Negroes were not permitted to vote. See Lane v. Wilson, 307 U.S. 268 (1939); Guinn v. United States, 238 U.S. 347 (1915). Obviously, the "law" under which the claimant must be "otherwise qualified" does not include racially discriminatory provisions or regulations imposing onerous procedural

requirements invalidated by the Fifteenth Amendment.

Cf. Neal v. Delaware, 103 U.S. 370, 389 (1880).^{9/}

The fact is that Section 1971(a) is a statutory recital of the rights guaranteed by the Fifteenth Amendment, fully as broad as the constitutional provision which inspired it. Those who were present at its

9/ In Neal, a Delaware constitutional provision restricted the right of suffrage at general elections to free white male citizens, and a Delaware statute confined the selection of jurors to persons "qualified to vote at the general election." The question was whether a Negro indicted in a Delaware court could remove his case to a federal court on the ground that Delaware's Constitution and laws denied to Negroes the right to serve as jurors. Holding that the discrimination did not result from Delaware's Constitution and laws, the Supreme Court said (103 U.S. 370, 389):

"Beyond question the adoption of the Fifteenth Amendment had the effect, in law, to remove from the State Constitution, or render inoperative, that provision which restricts the right of suffrage to the white race. Thenceforward, the statute which prescribed the qualifications of jurors was, itself, enlarged in its operation, so as to embrace all who by the State Constitution, as modified by the Supreme law of the land, were qualified to vote at a general election."

If the phrase "qualified to vote" in a State statute means "qualified to vote under valid State law," a fortiori, it means the same thing in a federal statute implementing the Fifteenth Amendment.

enactment in 1870, both proponents^{10/} and opponents^{11/},
so viewed it, as did the legislators of 1957 who added^{12/}
to it. The lower federal courts have consistently so
understood it, from the beginning^{13/} to the present.^{14/}

Indeed, the Supreme Court has impliedly equated the
statute and the Amendment it implements. Guinn v.
United States, supra, 238 U.S. at 355, 361 (1915);

^{10/} Representative Davis of New York, who had served
on the conference committee, stated: "The first
section is substantially a recital of the provisions
of the Constitution." 92 Cong. Globe 3882.

^{11/} Senator Morton of Indiana asserted that "[t]he
first section might be left out * * * because it is
simply declaratory of the amendment itself." 91
Cong. Globe 3571. Similarly, Senator Thurman of Ohio
declared that "[y]ou cannot add any strength to the
fifteenth constitutional amendment by putting the
very identical provision of that amendment into the
shape of a statute." 91 Cong. Globe 3485. And
Representative Swain of Maryland, also an opponent of
the bill, said that section 1 was "affirmatory only of
the Fifteenth Amendment." 94 Cong. Globe 432. See also
the remarks of Representative Kerr of Indiana. 92
Cong. Globe 3872.

^{12/} The bill which ultimately became the Civil Rights
Act of 1957 was H.R. 6127, introduced by Representative
Celler, chairman of the House Committee on the Judiciary.
Discussing subsection (a) on the floor of the House, he
referred to it as "a statutory declaration of the
protection of the fifteenth amendment * * *. Cong. Rec.
84th Cong. 2d Sess. 12925.

^{13/} See, e.g., Ex parte McIllwee, 16 Fed. Cas. No. 8,820
(C.C. Va. 1870).

^{14/} See, e.g., United States v. McElveen, 177 F. Supp.,
355, 358-359 (E.D. La. 1959), later judgment affirmed
in part sub nom. United States v. Thomas, 362 U.S. 58
(1960).

15/

Myers v. Anderson, 238 U.S. 368, 379 (1915). Thus, it is clear that section 1971(a), like the Fifteenth Amendment itself, nullifies racially discriminatory voting laws, or racially discriminatory statewide regulations or procedures promulgated pursuant to state law, as well as the racially discriminatory acts of officials in administering valid laws, regulations or procedures. See Lane v. Wilson, supra; Guinn v. United States, supra; Myers v. Anderson, supra; Ex parte Yarbrough, 110 U.S. 651 665 (1884); Neal v. Delaware, 103 U.S. 370 (1880).

Section 1971(c), added by the Civil Rights Act of 1957, permits a suit to challenge State laws (or statewide regulations or procedures promulgated pursuant to State law) if these laws (or regulations or procedures) abridge section 1971(a) rights. The text of the statute makes this plain:

Whenever any person has engaged or
there are reasonable grounds to believe
that any person is about to engage in any

15/ Whereas it has recently been said that §1971(a) has a broader scope than the Fifteenth Amendment, and is therefore unconstitutional in whole or in part, see United States v. Raines, 172 F. Supp. 552 (M.D. Ga. 1959), reversed, 362 U.S. 17, it has never been suggested that the scope of §1971(a) is narrower than the Fifteenth Amendment. The dearth of judicial opinion interpreting Section 1971(a) reflects the fact that--until 1957, when it defined the scope of a suit by the United States--it was viewed as a merely declaratory provision which added nothing to the self-executory first section of the Fifteenth Amendment. See United States v. Reese, 92 U.S. 214, 216 (1875); Terry v. Adams, 345 U.S. 461, 481, note 9 (1953).

act or practice which would deprive any other person of any right or privilege secured by subsection (a) or (b) of this section, the Attorney General may institute for the United States, or in the name of the United States, a civil action or other proper proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order. * * *

On its face, the statute authorizes a suit to enjoin every "act" which abridges a "right or privilege" secured by section 1971(a). Since the substantive provision (subsection (a)) confers, inter alia, an exemption from racially discriminatory voting regulations or procedures prescribed pursuant to law, and subsection (c) draws no distinction, it makes no difference whether the "act or practice" complained of (assuming it is "state action") is proscribed by the State Constitution or statutes, permitted by local law, or dictated by it. Plainly, State officials are "persons," and, when they apply discriminatory procedures adopted under direct authority from the State Constitution and applied upon direct command from State statutes, they "engage in [a prohibited] act or practice" to the same degree as when they discriminate on their own initiative. The only difference is that, in the one case, the State officials are enjoined from enforcing offensive laws (or statewide regulations or procedures promulgated pursuant to state laws), while, in the other, the constitutional and statutory provisions (or the statewide regulations or procedures) themselves are not affected but individual discriminatory practices are restrained.

This natural reading of Section 1971(c) is fully confirmed by its legislative history. In describing the proposed legislation, which became Section 1971(c), the Report of the Committee on the Judiciary of the House of Representatives stated: "Therefore, the sovereign, acting within its constitutional jurisdiction, must preserve this fundamental and basic right against any and all unlawful interference. That the proposal of this section does that very thing is clear." House Report No. 291, Committee on the Judiciary, 85th Cong., 1st Sess., p. 13 (emphasis added). And in the hearings before the House Rules Committee, Representative Keating of New York, a member of the Judiciary Committee which reported out the bill, stated: "The Attorney General is given the right to bring civil actions to prevent any kind of activity aimed at disenfranchising the citizens * * *" (emphasis added). Hearings before the House Rules Committee on H.R. 627, 84th Cong., 2nd Sess., pp. 64-65.

Opponents of the proposal were clear as to its scope. Thus, Senator Ervin of North Carolina stated during hearings of the Committee on Rules of the House of Representatives:

So the Attorney General under this bill could bring a suit for any alien, any citizen, any private corporation, on any cause of action which alleged that, either by the wording of the State law or by the application to him of the State law by State or local officials, he had suffered discrimination; * * * Hearings before Comm.

on Rules, House of Rep. on H.R.
6127, 85th Cong., 1st Sess., p. 130.

Finally, it is instructive that, when adding to the provision in 1960, Congress understood that it had already authorized suits directly challenging discriminatory State statutes. This is made plain by the legislative history of Section 1971(e), added by the Civil Rights Act of 1960 (Pub. L. 86-449, §601(a); now 42 U.S.C. (Supp. V) 1971(e)). Section 1971(e) permits special relief in the event the court finds that a violation of Section 1971(a) is "pursuant to a pattern or practice." Explaining that phrase on the day the proposal passed the Senate, Senator Keating, a prominent proponent, explicitly stated (106 Cong. R. 7767) that the "enactment of a statute directed at Negroes could in itself constitute a pattern or practice of discrimination." Since Section 1971(e) is, in terms, applicable only to a suit by the Attorney General under Section 1971(c), it follows, of course, that a State law and, a fortiori, a statewide regulation or procedure promulgated pursuant to a state law, is within the reach of the latter provision.

III

The State of Alabama Was Properly Joined as a Defendant

In paragraphs 6, 7, 8, 9, 15, 24, 25 and 30 of their motion to dismiss, the defendants challenge the authority of the United States to sue the State of Alabama and the appropriateness of joining the State of Alabama in this suit.^{16/} Each of these contentions is without merit.

A. At least since United States v. Texas, 143 U.S. 621 (1892), it has been settled that the states, by joining the Union and submitting to the Constitution, surrendered any claim of sovereign immunity as against the national government. To borrow the blunt phrase of Mr. Justice Holmes from a somewhat different context, a proceeding by the United States to enforce the Constitution against State action "is not a controversy between equals." Sanitary District v. United States, 266 U.S. 405, 425 (1925).

Of course, the United States must have the interest necessary to maintain the action and the state must be an appropriate defendant. As in other cases, the standing of the United States to bring the proceeding may be inherent, as when it sues to recover its own property (e.g., United States v. Oregon, 295 U.S. 1

^{16/} The defendants also urge dismissal of the complaint on the ground that this suit challenges conduct on the part of the State which would amount to crime under 18 U.S.C. 242. (Motion to Dismiss, paragraph 14). The simple answer is that this is not a criminal action brought under 18 U.S.C. 242 and in no way purports to be one.

(1935)) or that of its wards (e.g., United States v. Minnesota, 270 U.S. 181 (1926)); when the action is on a monetary claim, whether arising out of contract (e.g., United States v. North Carolina, 136 U.S. 211 (1890)), tort (e.g., United States v. California, 328 F.2d 729 (C.A. 9, 1964), cert. denied, 379 U.S. 817 (1964), or otherwise (e.g., United States v. Michigan, 190 U.S. 379 (1903)); and when the government seeks to enjoin State interference with federal rights (e.g., United States v. California, 332 U.S. 19 (1947)), federal activities (see United States v. West Virginia, 295 U.S. 463, 467 (1935)), federal officers (e.g., United States v. Louisiana, 188 F. Supp. 916 (E.D. La., 1960), stay denied, 364 U.S. 500, and affirmed sub nom. Bush v. Orleans Parish School Board, 365 U.S. 569 (1961), or the orders of a federal court (e.g., United States v. Mississippi, No. 19475, 9/25/62 (C.A. 5), leave granted to United States to be joined as respondent and certiorari denied sub nom. Mississippi v. Meredith, 372 U.S. 916 (1963)). In such instances, it is irrelevant that Congress has withheld express authorization for the suit. United States v. California, supra, 332 U.S., at 26-28. On the other hand, standing may derive from statute. That is the case when the government sues to collect a tax (e.g., New York v. United States, 326 U.S. 572 (1946)), or a penalty (e.g., United States v. California, 297 U.S. 175 (1936)). Cf. United States v. Raines, 362 U.S. 17 (1960). But, whatever the basis, the sufficiency of the interest to prosecute the suit

does not depend on the character of the defendant. If the United States can sue at all, it can sue a State (assuming that the state is otherwise a proper defendant).

Thus here, the standing of the United States being settled beyond constitutional doubt by Section 1971(c), it follows, without more, that the State can be sued. There is no separate question of authorization to join the state. The only relevant inquiry is whether Congress has changed the usual rule by explicitly barring an action against the State and whether, in the circumstances, the state is an appropriate defendant. Whatever the answer earlier (see United States v. Alabama, 171 F. Supp. 720 (M.D. Ala. 1959), affirmed, 267 F.2d 808 (C.A. 5), vacated and remanded, 362 U.S. 17/ 602. 1960), both questions have been resolved by section 601(b) of the Civil Rights Act of 1960, which added the following paragraph to section 1971(c) (42 U.S.C. (Supp. V) 1971(c)):

Whenever, in a proceeding instituted under this subsection any official of a State or subdivision thereof is alleged to have committed any act or practice constituting a deprivation of any right or privilege secured by subsection (a) of this section, the act or practice shall

17/ Even before the 1960 amendment to §1971(c), the only real argument that joinder of the State was unauthorized was that the original section impliedly restricted the Attorney General to injunctive proceedings against a "person" and that a State is not a person. The weakness of this contention is illustrated by such decisions as South Carolina v. United

(Cont. on following page.)

also be deemed that of the State and the State may be joined as a party defendant and, if, prior to the institution of such proceeding, such official has resigned or has been relieved of his office and no successor has assumed such office, the proceeding may be instituted against the State. [Emphasis added.] 18/

17/ (Cont. from preceding page.)

States, 199 U.S. 437 (1905); Ohio v. Helvering, 292 U.S. 360 (1934); United States v. California, 297 U.S. 175 (1936); New York v. United States, 326 U.S. 572 (1946) and Sims v. United States, 359 U.S. 108 (1959).

18/ In paragraph 30 of their motion to dismiss, the defendants question the validity of this provision on the ground that the discriminatory acts of registration officials which are contrary to State law cannot be imputed to the State. Here, of course, we are attacking voter registration tests promulgated pursuant to State law. Moreover, this Court previously answered the defendants' contention in United States v. Alabama, 188 F. Supp. 759, 762 (M.D. Ala., 1960):

The related contentions of the defendants that the State of Alabama is not accountable for any discriminatory acts on the part of its registration officials are also without merit. Any discriminatory acts on the part of state officials while acting in the discharge of their official duties, which deprive citizens of their constitutional rights are properly imputed to the state when the action to prevent such discrimination is to secure rights as guaranteed by the Fourteenth and Fifteenth Amendments to the Constitution of the United States. As a matter of fact, it is only because of the states' constitutional responsibility that the actions on the part of state officials fall within the prohibition of these constitutional amendments.

As the Supreme Court said in Cooper v. Aaron, 358 U.S. 1, 17 (1958):

[When an official] is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning.

On its face, the statute is unambiguous.

First, as a substantive matter, it declares that "any act or practice constituting a deprivation" of subsection (a) rights committed by "any official of a state or subdivision thereof" shall "be deemed that of the state." Second, it provides a procedural remedy to enforce that substantive right. It does this by prescribing two things: (a) the "state may be joined as a defendant;" and (b) if there is no person holding the office capable of being sued as a defendant to which the state may be joined, then "the proceeding may be instituted against the state." To construe section 601(b) as precluding suit against the state where there are functioning registrars--as the defendants assert in paragraph 8 of their motion to dismiss--is to ignore the plain words of the statute.

The question whether section 601(b) authorizes joinder of the State when there are, at the outset, officials amenable to suit, is fully settled by decided cases. Indeed, the Supreme Court's affirmance of the Alabama decision after remand at least impliedly upholds joinder of the state in such circumstances. United States v. Alabama, 371 U.S. 37 (1962) affirming, 304 F.2d 583 (C.A. 5, 1962). For there, dismissal of the State was denied even after new registrars had qualified and the decree was rendered against both. See 188 F. Supp. 759, 762 (M.D. Ala., 1960); 192 F. Supp. 677 (M.D. Ala. 1961). Except for the decision in United States v. Mississippi, *supra*, the courts, including this Court, have consistently so ruled. United States v. Lynd, 301 F.2d 818 (C.A. 5, 1962), *cert. denied*, 371 U.S. 893; United States v. Dogan, 314 F.2d 767 (C.A. 5, 1963), *cert. denied*, 375 U.S. 968; United States v. Duke, 332 F.2d 759, 770 (C.A. 5, 1964); United States v. Cartwright, 230 F. Supp. 873 (M.D. Ala. 1964); United States v. Penton, 212 F. Supp. 193, 200 (M.D. Ala. 1962); United States v. Louisiana, 225 F. Supp. 353, 356 (E.D. La. 1963), *prob. juris. noted* 377 U.S. 987 (1964). See also, United States v. Fox, 211 F. Supp. 25, 35 (E.D. La., 1962), affirmed, 334 F.2d 449 (C.A. 5, 1964); United States v. Wilder, 222 F. Supp. 749, 753, 754-755 (W.D. La. 1963); United States v. Ward, 222 F. Supp. 617, 620 (W.D. La., 1963), appeal pending, No. 21235, C.A. 5; United States v. Manning, 205 F. Supp. 172, 174 (W.D. La. 1962); United States v. Clement, 231 F. Supp.

913 (W.D. La., 1964); United States v. Crawford, 229 F. Supp. 898, 901 (W.D. La., 1964); United States v. Logue, Civil Action No. 3081-63, (S.D. Ala.), March 31, 1964; United States v. Cox, No. D-C-53-61, (N.D. Miss.), June 24, 1964.

There are, it is true, decisions holding that, in the circumstances, the State should not be joined in the ultimate decree. See United States v. Atkins, 323 F.2d 733, 740, n. 8 (C.A. 5, 1963); United States v. Ramsey, 331 F.2d 824, 826 (C.A. 5, 1964); United States v. Ford, Civil Action No. 2829, S.D. Ala., decided April 13, 1964. But that is a separate question. No court, other than the court in United States v. Mississippi, *supra*, has held joinder of the State unauthorized under section 601(b).

Defendants suggest, however, that there are constitutional obstacles to joinder of the state. Relying upon what Judge Brown, in his dissenting opinion in United States v. Mississippi, 229 F. Supp. at 179, labeled "Eleventh Amendment dialectic," the defendants--like the defendants in the Mississippi case--contend that if 42 U.S.C. 1971 does authorize this suit against the state, it is unconstitutional because "the Fifteenth Amendment only authorizes appropriate legislation against persons" (Brief of Richmond K. Flowers, p. ^{19/}29. This

^{19/} The court in United States v. Mississippi, although it characterized the contention as "substantial" (229 F. Supp. at 933-34), did not rule on the question.

contention draws a distinction between the state as an idealism, incapable of wrong, and its erring agents, who are viewed as acting individually and unofficially when violating the Constitution. See Ex parte Young, 209 U.S. 123, 159 (1908). There are two answers.

First, the State is not joined here as an abstraction; in Section 601(b) the term "State" is used precisely in the same sense as in the Fifteenth Amendment. Here, as there, "State" is a convenient collective embracing the several branches and officers of the State government. Under Section 601(b), the State is sued only because the responsible officials are unknown or may withdraw or lose their identities. In effect, the action is directed to all those who participate in the scheme of racial disfranchisement, none of whom, of course, enjoys legal immunity from the Constitution - be they legislators (e.g., Lucas v. Colorado Gen. Assembly, 377 U.S. 713 (1964), the governor (e.g., Sterling v. Constantin, 287 U.S. 378 (1932), judges (e.g., Ex Parte Virginia, 100 U.S. 339 (1879) or lesser officials. See Cooper v. Aaron, 358 U.S. 1, 16-19 (1958). After all, the State "can act in no other way." Ex Parte Virginia, supra at 347. And, when the thrust of the suit is merely to enjoin conduct (without touching State property), a decree nominally against the State actually reaches its agents alone. In short, the suit is against the State government. If private plaintiffs were involved, the Eleventh Amendment or considerations of sovereign immunity might render such shorthand impermissible; but the United States labors under no comparable disability. See, e.g., United States v. Texas, 143 U.S. 621 (1892); United States v. California, 332 U.S. 19 (1947).

Second, the cases relied upon by the defendants deal with a question of remedies: by virtue of the Eleventh Amendment and the doctrine of sovereign immunity, the states, as such, are not amenable to private suits, whether asserting rights under the Constitution or otherwise. But it hardly follows that the states are not bound to obey the Fifteenth Amendment, which is "directed to the United States and to the individual States"

Terry v. Adams, 345 U.S. 461, 473 (1953) (opinion of Mr. Justice Frankfurter). On the contrary, as the Supreme Court said with respect to the Fourteenth Amendment in Home Tel. & Tel. Co. v. Los Angeles, 227 U.S. 278, 286-87 (1913), in language equally applicable to the Fifteenth Amendment:

* * * the provisions of the Amendment as conclusively fixed by previous decisions are generic in their terms, are addressed, of course, to the States, but also to every person whether natural or juridical who is the repository of state power. By this construction the reach of the Amendment is shown to be coextensive with any exercise by a State of power, in whatever form exerted. (Emphasis added). 20/

20/ The Court further indicated that "the Amendment, looking to the enforcement of the rights which it guarantees and to the prevention of the wrongs which it prohibits, proceeds not merely upon the assumption that States acting in their governmental capacity in a complete sense may do acts which conflict with its provisions, but, also conceiving, which was more normally to be contemplated, that state powers might be abused by those who possessed them and as a result might be used as the instrument for doing wrongs, provided against all and every such possible contingency. Thus the completeness of the Amendment in this regard is but the complement of its comprehensive inclusiveness from the point of view of those to whom its prohibitions are addressed." 227 U.S. at 288. (Emphasis added.)

That the States are not always answerable does not mean that there is no duty. Nor does immunity from suit imply that no "wrong" has been done, but rather, that, as respects those barred from suing, there is no legally cognizable wrong which they can have "righted" by the judicial process. See Kawanankoa v. Polyblank, 205 U.S. 349, 353 (1907). In short, the State is an "idealism," sovereign and perfect, only in the sense that there will be no inquiry into the lawfulness of its action in a private suit. Hence, when the United States is plaintiff and the shield of sovereign immunity no longer blinds the eyes of the law, the State itself may be seen to have committed wrongs which require correction. In short, as the court said in United States v. Louisiana, 225 F. Supp. 353, 357 (E.D. La., 1963) prob.juris noted, 377 U.S. 987 (1964), "the necessary fiction to accommodate the Eleventh Amendment provides no basis for any argument that the State cannot be made a party to this action." See also, United States v. Fox, 211 F. Supp. 25 (E.D. La., 1962), affirmed, 334 F. 2d 449 (C.A. 5, 1964).21/

21/ Cf. Iowa-Des Moines National Bank v. Bennett, 284 U.S. 239, 246, n. 5 (1931), where Justice Brand' stated: "Cases discussing the question of what constitutes a suit against a state within the meaning of the Eleventh Amendment . . . have no bearing upon the power of this Court to protect rights secured by the federal constitution."

Nor can joinder of the state in this action be said to be inappropriate. As we have shown, under Section 601(b), "the act or practice" of any state official which is alleged to violate Section 1971(a) rights "shall also be deemed that of the state," and "the state may be joined as a party defendant . . .". In our view, this provision for permissive joinder leaves entirely to the Attorney General the determination whether the state will be named as respondent.

Until United States v. Mississippi, supra, no court had dismissed the state as a party defendant prior to trial. The reason, we suggest, is that normally the question whether there is occasion to join the state cannot be definitively resolved on the face of the pleadings. In the present case, however, it is clear, from the outset, that the State of Alabama is an appropriate defendant. First, the complaint challenges the validity of state voter registration tests prescribed by the Supreme Court of Alabama pursuant to state constitutional authority and applied by state officials pursuant to statutory authority. These tests are of statewide application. On this score alone, the state is an interested party, as the requirement of a three-judge court and notice to its governor and attorney general suggests. See 28 U.S.C. 2281, 2284(2). Second, the complaint charges racial discrimination by the state in affording unequal public educational facilities and opportunities since at least 1900, resulting in distinctions in the level of education of the races. The burden of

the defense (if one can be made) appropriately falls on the State itself. Finally, the prayer seeks statewide relief. Plainly, no effective remedy can be given unless the State, in all its governmental operations, is enjoined from abridging rights guaranteed by the Fifteenth Amendment and its implementing legislation.

In sum, whatever the proper rule in another case, this is unmistakably an appropriate occasion for the joinder of the State itself as a party defendant. To paraphrase Judge Brown's words in his dissenting opinion in United States v. Mississippi: "This contest is a big one. It is no little controversy between one or more individual Negro voters and individual Registrars. It is between all Negro adults and the State. Indeed, it is between all citizens of the United States and the State. In that setting, it is fitting that the protagonists appear to be what they really are - the United States and the State of . . . [Alabama]." (229 F. Supp. at 974).

IV

The Alabama Secretary of State Is a Proper Party Defendant

Defendants further contend, erroneously, that Agnes Baggett, the Secretary of State for the State of Alabama, is improperly joined as a defendant (Motion to Dismiss, paragraph 17).

Under the Constitution of Alabama, Amendment XCI, Section 181, the Supreme Court of Alabama is required to file with the Secretary of State the questionnaire which it prescribes--a questionnaire which is challenged here as unconstitutional and violative of 42 U.S.C. 1971(a) and the application of which is sought to be enjoined on a statewide basis. It is incumbent upon the Secretary of State to provide to the registrars of voters of each county the forms of applications and tests to be administered in the registration of voters. (Ala. Code (1958), Title 17, Section 37.) Thus, she has an important role in the statewide administration of the tests attacked in this suit. It is plainly appropriate to join the official who centrally controls the administration of these tests and through whom it is distributed on a statewide basis.

There is no basis for defendants' contention that relief cannot be sought or granted against an official who acts in a ministerial capacity. On the contrary, a three-judge court may properly enjoin all those charged with executing an unconstitutional statute.

Bevins v. Prindable, 39 F. Supp. 708 (E.D. Ill., 1941) affirmed per curiam, 314 U.S. 573 (1941); Orleans Parish School Board v. Bush 268 F. 2d 78, 80 (C.A. 5, 1959). See, also, James v. Almond, 170 F. Supp. 331, 341 (E.D. Va., 1959) appeal dismissed, 359 U.S. 1006 (1959); Evans v. Members of State Board of Education, 149 F. Supp. 376, 378 (D. Del. 1957), affirmed sub. nom. Evans v. Buchanan, 256 F. 2d 688 (C.A. 1958), cert. denied, 358 U.S. 836 (1958).

The United States Has Not Failed To
Join Indispensable Parties

Paragraphs 5, 10, 16 and 28 of defendants' motion to dismiss allege that the United States has failed to join indispensable parties, i.e., the members of the Supreme Court of Alabama and the registrars of the sixty-seven counties in the State of Alabama. This contention also is without merit.

A party is indispensable only if the decree would injuriously affect his rights or leave the final determination of the controversy inconsistent with equity and good conscience. Shields v. Barrow, 17 How. 130 (1854). Neither the registrars of the sixty-seven counties in Alabama nor the members of the Supreme Court of Alabama are personally interested in a decree which enjoins them from promulgating or administering a voting test pursuant to state law. They have no "right" to do that which is declared invalid. Nor is it inconsistent with equity and good conscience to invalidate a State testing procedure promulgated and administered pursuant to State law in a proceeding defended by the State itself.

In moving to dismiss the action for failure to join indispensable parties, defendants entirely misconceive the nature of this suit, which is between the United States, acting on behalf of and in the interests of its people and the State of Alabama, representing its interests. See State of Missouri v. Illinois, 180 U.S. 208, 241-42 (1901); State of Kansas v. Colorado, 185 U.S. 125, 142 (1902); see also, Wyoming v. Colorado, 286 U.S. 494, 508-09 (1932). The question of whether a state official is indispensable

The question of whether a state official is indispensable arises in suits in which, owing to the doctrine of sovereign immunity, it is necessary to sue an official rather than the State itself. See Ex parte Young, 209 U.S. 123 (1908). When, as here, sovereign immunity is no bar and the State is sued, the interests of the State's officials purporting to act in an official capacity are synonymous with the interests of the State. Indeed, if every agent who is bound by a decree need be joined as a defendant, there would be no need for Rule 65(d), F.R. Civ. Proc., which states that "[e]very order granting an injunction...is binding...upon parties to the action, their officers, agents, servants, employees and attorneys." It is well settled that a decree which binds a sovereign binds its officials. See Sunshine Anthracite Coal Co. v. Atkins, 310 U.S. 381, 403 (1940); City of Takoma v. Taxpayers of Takoma, 357 U.S. 320 340-41 (1958).^{22/} Accordingly, while the state officials may have been proper parties, they are not indispensable.

^{22/} Of course, even if the state officials in question were indispensable, since they are within the jurisdiction of the court, the proper relief would be to join them as defendants, not to dismiss the complaint. Rule 19, F. R. Civ. P.

VI

The United States May Maintain
This Suit In This District

In paragraphs 3, 22, and 23 of their motion to dismiss, the defendants challenge the propriety of bringing this suit, statewide in scope, in this district. To the extent that this contention challenges the venue of the suit, it clearly must fail. The defendant Baggett has her official residence in this district, which also contains the State Capitol. Thus, venue is properly laid here. U.S.C. 1391^{23/}(b), 1392^{24/}(a).

It is apparently defendants' contention, however, that it is necessary to bring separate lawsuits in each judicial district in which the tests under attack are administered. But here again the defendants misconceive the nature of this suit.

When one sovereign brings suit against another to enjoin the enforcement of an unconstitutional statute or regulation, it is not necessary to institute a separate action in each judicial district

^{23/} "A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, except as otherwise provided by law."

^{24/} "Any civil action, not of a local nature, against defendants residing in different districts in the same state may be brought in any of such districts."

in which the act or regulation is administered. See Pennsylvania v. West Virginia, 262 U.S. 553 (1923); United States v. Louisiana, 225 F. Supp. 353 (E.D. La., 1963) prob. juris. noted 377 U.S. 978 (1964). This is not a suit against individual registrars who are alleged to be acting in excess of their authority. In such a suit the facts relating to the conduct of each registrar are unique, and consequently there must be a separate claim against each. Here, however, the United States is seeking to enjoin the use of invalid testing procedures promulgated pursuant to Alabama law, and administered statewide by all Alabama registrars. The United States and the State, representing their respective interests, are before the court. See, State of Missouri v. Illinois, 180 U.S. 208, 244-42 (1901); State of Kansas v. Colorado, 185 U.S. 125, 142 (1902); see also, Wyoming v. Colorado, 286 U.S. 494, 588-09 (1932). Between them there is but one claim.

In the typical case in which the constitutionality of a state voter registration law (or regulation or order promulgated pursuant to such a law) is challenged, the claimant, in order to obtain effective relief, need only sue the local official who has enforced or threatens to enforce the law (or regulation or order) against him. See, e.g., Lassiter v. Northampton Election Board, 360 U.S. 45 (1959); Davis v. Schnell, 81 F. Supp. 872 (S.D. Ala., 1949), affirmed, 336 U.S. 933. Such a suit is not statewide in scope since the decree operates only upon the local official. But here the claim is not made on behalf of one individual, or the inhabitants of a single community. The interest of the United States reaches the allegedly unconstitutional tests wherever they are enforced. In such circumstances, it is obviously desirable to avoid a multiplicity of suits by bringing a single action against defendants upon whom a decree granting statewide relief can operate.

VII

The Case Is Properly Before A Three-Judge Court

Paragraph 13 of the motion to dismiss asserts that 28 U.S.C. 2281-2284 specifically authorizes an injunction only "restraining the action of any officer of such state in the enforcement or execution" of the statute alleged to be unconstitutional. It is not clear what defendants mean by this allegation. If they mean that sections 2281-2284 refute the right of the United States to injunctive relief against the named defendants, it is apparent that they misconceive the nature of those sections, which merely provide for three-judge courts in given circumstances. If, on the other hand, the defendants are urging that a three-judge court was improperly convened in this case, there is also no basis for the contention. The three-judge court statute provides:

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any state statute by restraining the action of any officer of such state in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under state statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

Since it is apparent that the orders of the Supreme Court of Alabama implementing Alabama constitutional provisions governing voter qualifications were issued in the exercise of administrative functions assigned to it by the Alabama Constitution,

and since the defendant Baggett, who is sought to be enjoined, is clearly an officer of the state, a three-judge court properly was convened under section 2281.^{25/}

In addition, 42 U.S.C. 1971(h) explicitly provides for the convening of a three-judge court where the Attorney General, in a suit brought by the United States under 42 U.S.C. 1971(h), requests a finding of a pattern or practice of discrimination under Section 1971(e)^{26/}--a request made in paragraph 8 of the instant complaint.

^{25/} The complaint also seeks injunctive relief against other "officers" of the state, i.e., the state's "agents" and "employees."

^{26/} "In any proceeding instituted by the United States in any district court of the United States under this section in which the Attorney General requests a finding of a pattern or practice of discrimination pursuant to subsection (e) of this section the Attorney General, at the time he files the complaint, or any defendant in the proceeding, within twenty days after service upon him of the complaint, may file with the clerk of such court a request that a court of three judges be convened to hear and determine the entire case. A copy of the request for a three-judge court shall be immediately furnished by such clerk to the chief judge of the circuit (or in his absence, the presiding circuit judge of the circuit) in which the case is pending. Upon receipt of the copy of such request it shall be the duty of the chief judge of the circuit or the presiding circuit judge, as the case may be, to designate immediately three judges in such circuit, of whom at least one shall be a circuit judge and another of whom shall be a district judge of the court in which the proceeding was instituted, to hear and determine such case."

VIII

Defendants' Attack on the Statistical Data in the Complaint Affords No Basis for Dismissal

Paragraphs 27, 34 and 41 of the motion to dismiss state that the statistics contained in the complaint and in the attachment thereto do not substantiate the allegations that Negroes have been discriminated against, either locally or "statewide," because of their race, and further assert that such statistical data does not present a prima facie case.

On a motion to dismiss, of course, it is not the function of the court to resolve disputed issues of fact. Racial discrimination in the registration process from January 1952 to about February 1964 is alleged. Whether such discrimination was in fact practiced is a question to be resolved after trial.^{21/}

^{27/} Indeed, many of the theories upon which the complaint is based do not depend upon racial discrimination in the registration process, e.g., the theories based on Title I of the Civil Rights Act of 1964, on the educational disparities between Negroes and whites, and on the perpetuation of racial imbalance by an arbitrary test.

The relevance of the statistics set forth in the complaint, and the attachment thereto, to the issue of discrimination, moreover, is well settled. As the Fifth Circuit observed in United States v. Alabama, 304 F. 2d 583, 586 (C.A. 5, 1962), affirmed per curiam 371 U.S. 37 (1962) "in the problem of racial discrimination, statistics often tell much, and courts listen." The statistics show that in Alabama about 69% of the eligible whites are registered to vote while only approximately 19% of the eligible Negroes are registered. It cannot be assumed that Alabama Negroes in substantial numbers have voluntarily foregone their right to participate in the electoral process. United States v. Duke, 332 F. 2d 759, 763 (C.A. 5, 1964); see United States v. Harpole, 263 U.S. F. 2d 71, 78 (C.A. 5, 1959), cert. denied, 361 U.S. 838. On the contrary, the statistics compel the inference that Negroes have been systematically discriminated against in the registration and voting process on a statewide basis. Byrd v. Brice, 104 F. Supp. 442 (W.D. La., 1952), affirmed 201 F. 2d 644 (C.A. 5, 1953). And they present a "strong prima facie case" making it incumbent upon the State to refute the conclusion which springs from them, that the State of Alabama has not "freely and fairly registered qualified Negroes." United States v. Duke, supra at 766-7. See also, United States v. Crawford, 229 F. Supp. 898 (W.D. La. 1964); United States v. Wilder, 222 F. Supp. 749 (W.D. La., 1963).

Paragraphs 27 of the motion to dismiss also asserts that "the judgments of boards of registrars are equal in dignity and standing to the judgments of any other court and may not be overcome by statistical data alone. . . ." To be sure, Section 181 of the Alabama Constitution, as amended by amendment XCI, purports to constitute the members of the boards of registrars "judicial officers." And the Supreme Court of Alabama has said that a determination by an Alabama Board of Registrars "will not be presumed to be influenced by discrimination, and such determination will stand on the same basis as the judgment of any other court." See Opinion of the Justices, 252 Ala. 351, 359, 40 So. 2d 849 (1949). But even assuming that, as a matter of state law, statistics could not establish a prima facie case against the registrars, there would be no warrant for the conclusion that the state law overrides the federal rule. Where, as here, the jurisdiction of a district court rests upon a federal substantive statute, the issues must ordinarily be determined by reference to federal law. See, e.g., Deitrick v. Greaney, 309 U.S. 190, 200 (1940); D'Oench, Duhme & Co. v. F.D.I.C., 315 U.S. 447, 455-56 (1942). As the Supreme Court declared in Sola Electric Co. v. Jefferson Electric Co., 317 U.S. 173, 176 (1942):

It is a familiar doctrine that the prohibition of a federal statute may not be set at naught, or its benefits denied, by state statutes or state common law rules. . . . When a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, though left by statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted. To the federal statute and policy, conflicting state law and policy must yield

Thus, state law characterizations are not controlling in construing a federal statute. Wragg v. Federal Land Bank, 317 U.S. 325, 328 (1943). Obviously, the prima facie rule would be meaningless if States could confer immunity from the rule upon registrars merely by calling them "judicial officers." That no such evasion is permissible is made clear by the fact that voter registration statistics were relied upon in United States v. Alabama, 304 F. 2d 523, 586 (C.A. 5, 1962), affirmed per curiam, 371 U.S. 37, where Alabama registrars--"judicial officers" then as now ^{22/}under state law--were defendants.

^{28/} In its brief, the State says that the statistical data set forth in the complaint "to be of any value at all under the allegations of the complaint . . . should be limited to the periods of time when literacy requirements and questionnaires were in use." But these statistics reflect the racial imbalance among registered voters in the State of Alabama, which use of the challenged tests allegedly perpetuates. Quite plainly, these statistics are relevant to the government's claim. And, of course, the statistics also are relevant on the issue--also tendered by the complaint--whether this imbalance stems from past acts of discrimination apart from the use of the tests.

IX

The Complaint Adequately Alleges That There has Been Racial Dis- crimination In The Registration Process

Paragraph 40 of the motion to dismiss states that "[F]or ought that appears neither the State nor any official thereof has discriminated against Negroes who register to vote in Alabama." It is difficult to understand the basis for this statement, since paragraph 8 of the complaint very explicitly alleges that during the period from January 1952 to about February 1964:

White applicants were not required to complete the application form and questionnaire without error or omission and they were not required to fill out the application form and questionnaire without assistance. During the same period numerous Negro applicants for registration to vote in Alabama were denied registration on the ground that they made errors and/or omissions in completing the application form and questionnaire. They were denied assistance in filling out the application form and questionnaire. Negroes in the State of Alabama have been deprived of their right to vote without distinction of race pursuant to a pattern and practice of racial discrimination.

In view of these allegations, it is also difficult to understand the basis for defendants' statement in paragraph 33 of the motion to dismiss -- a statement inconsistent with paragraph 40 of the motion -- that the allegation that "Negroes have been

deprived of their right to vote without distinction of race pursuant to a pattern and practice of racial discrimination" is a "mere conclusion of the pleader." Indeed, in paragraphs 34 and 41 of their motion defendants concede that we have alleged such discrimination.

Defendants also state, in paragraph 39 of the motion to dismiss, that it does not appear that Negroes have been discriminated against in federal elections. Paragraph 5 of the complaint, however, expressly declares that in Alabama "registration is a prerequisite to voting" in any election. Consequently, the discrimination in the registration process alleged in paragraph 8 of the complaint relates to federal as well as State elections. In any event, it is immaterial whether the discrimination related to state or federal elections, or both.

Paragraphs 35 and 36 of the motion to dismiss state that "for ought that appears" both white and Negro applicants have been required to complete the Insert Part III tests as a condition of registration and whites have been rejected for failure to complete them. But these omissions are irrelevant. This suit is not grounded upon discrimination in the administration of the Insert Part III tests, but upon the invalidity of the tests themselves.

Paragraph 43 of the motion to dismiss asserts that the complaint is defective because it does not allege "that persons rejected because of errors or mistakes, or otherwise, in the use of the Insert III tests were otherwise qualified under state law to register and vote." There are three answers.

First, it is clear that such a precise allegation is unnecessary. As this Court declared in Kohler v. Jacobs, 138 F. 2d 440, 441 (C.A. 5, 1943):

On a motion to dismiss * * * the allegations ought to be given a fair construction to come at the case intended to be stated, and unless it clearly appears that the facts do not authorize relief, or that relief is barred by some fact alleged, the matter ought to be further examined by summary judgment proceeding or by a trial.

Accord, Des Isles v. Evans, 200 F. 2d 614, 615 (C.A. 5, 1952).

Second, the clear, indeed the inescapable, implication of the language of these portions of the complaint, that "[n]umerous applicants have been denied registration on the ground that their performance on these tests was unsatisfactory" (paragraphs 11 and 13), is that these applicants were otherwise qualified under state law.

Finally, the allegations of the complaint which are based on sections 101(a)(2)(A) and (B) and section 101(b) of the Civil Rights Act of 1964 do not depend on whether applicants are otherwise qualified to register and vote under state law.

X

"Pattern or Practice" Relief Statewide
is Appropriate Under Section 1971(e).

Defendants contend that a finding of a "pattern or practice" of discrimination pursuant to 42 U.S.C. 1971(e) may not be made by a three-judge court with respect to all the counties in the State^{29/}. Such a finding is the necessary predicate for summary relief from further discrimination affecting members of the same class and, where appropriate, the appointment of federal referees for that purpose. See United States v. Manning, 215 F. Supp. 272 (W.D. La. 1963).

To be sure, this is not the typical "pattern or practice" case. Ordinarily Section 1971(e) is invoked in suits by the United States against individual registrars who have repeatedly discriminated against Negro applicants. E.g., United States v. Manning, *supra*; United States v. Mayton, 335 F.2d 153 (C.A. 5 1964); United States v. Duke, 332 F.2d 759 (C.A. 5, 1964). But the broader scope of the present action does not make Section 1971(e) relief inappropriate here. On the contrary, if the allegations of the complaint are proved, it is difficult to conceive how the court could fail to find a "pattern or practice" of discrimination, and the statewide decree would most probably suggest invoking the special relief provisions.

The legislative history of Section 1971(e) makes it clear that "a single act such as the enactment of a statute directed at Negroes would in itself constitute a pattern or practice of discrimination." 106 Cong.

^{29/} Since this is a question of relief, defendants would not be entitled to dismissal of the complaint even if they were correct on this issue.

^{30/}
Rec. 7767. Nor is there any jurisdictional or practical
obstacle. Whether or not the requisite finding would
normally be entered by a statutory court of three
^{31/}
judges, it is settled that such a court--once properly
convened--may properly decide all issues in the case.
Florida Lime and Avocado Growers v. Jacobsen, 362 U.S.
73 (1960). And 42 U.S.C. 1971(h) explicitly provides
that a three-judge court convened pursuant to that
Section shall "hear and determine the entire case." In-
deed, it is only when a "pattern or practice" finding is
requested that a three-judge court is properly convened
under section 1971(h).

^{30/} The statute provides that if the court makes a
finding of a pattern or practice, any person of the same
race or color who is resident "within the affected area"
may apply for an order declaring him qualified to vote.
The statute defines "affected area" as meaning "any sub-
division of the State in which the laws of the State
relating to voting are or have been to any extent admin-
istered by a person found in the proceeding to have
violated subsection (a) of this section." But this
language does not bar a finding that there has been a
pattern or practice of discrimination in the collective
subdivisions of a state. The legislative history shows
that the concern of Congress focused on the existence
of established policies of discrimination, wherever they
might have occurred.

^{31/} Section 1971(e) is expressly applicable to "any pro-
ceeding instituted pursuant to subsection (c) [of section
1971]" to enforce subsection (a) rights and subsection
(d) of section 1971 grants to the district courts juris-
diction of "proceedings instituted pursuant to this
section." The language of the statute does not limit
such proceedings to single-judge district courts.

XI

The Court Should Not Stay This Action

In paragraph 38 of their motion to dismiss, defendants request that this action be stayed "in that the United States has already filed suits against individual boards of registrars in the following counties in Alabama: Macon, Bullock, Montgomery, Elmore, Dallas, Perry, Choctaw, Jefferson, Wilcox, Hale and Sumter." This request should be refused.

First, the issues raised in this suit differ substantially from the issues raised in the foregoing cases. Although the validity of the Insert Part III tests has been questioned in some of those suits, the issue is not central to their decision. In those actions the United States has sought to enjoin discriminatory acts and practices of registrars, and to obtain "freezing" relief against, inter alia, the application of the ^{32/}new tests. In the present case, on the other hand, the Insert Part III tests alone are attacked, and on several additional grounds not urged in the earlier actions.

^{32/} See, e.g., United States v. Cartwright, 230 F. Supp. 823 (M.D. Ala. 1964) in which the use of the original Insert Part III test was enjoined.

More fundamentally, the complaint in the present case seeks to enjoin the use of the tests in all sixty-seven counties of Alabama. It is statewide in scope, whereas the earlier suits were regional in their significance. This dissimilarity, in and of itself, is reason enough to refuse a stay. United States v. Standard Oil of California, 7 F.R.D. 338 (339) (S.D. Calif. 1947). Moreover, where the issues are not identical, ". . . the suppliant for a stay must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to someone else. . . ." Landis v. North American Co., 299 U.S. 248, 255 (1936). To stay this action would substantially delay the vindication of constitutional rights sought to be protected here. On the other hand, no benefit whatever could be derived from such a stay. For this reason also, a stay clearly would be improper. Radio Corporation of America v. Igoe, 217 F. 2d 218 (C.A. 7, 1954), cert. denied, 348 U.S. 973 (1955).

XII

The Complaint States a Claim Upon Which Relief Can Be Granted

As the defendant Baggett concedes in her brief (p. 2), the well-pleaded facts in the complaint are taken as true on a motion to dismiss, e.g. Gomillion v. Lightfoot, 364 U.S. 339 (1960), and the complaint is viewed in a light most favorable to the plaintiff. Reddix v. Lucky, 252 F. 2d 930, 931 (C.A. 5, 1951). Indeed, it is "the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957).^{33/} Thus, only if the Court, in light of the foregoing guides, is prepared to reject wholesale each of the theories of the complaint without a trial on the merits, would dismissal be proper.

In defending the theories of the complaint, we begin with the self-evident proposition that, notwithstanding the originally absolute power of the states to prescribe the qualifications for voting (later subject to a potential apportionment penalty under the second section of the Fourteenth Amendment), the Fifteenth Amendment (and 42 U.S.C. 1971(a)) invalidates every State law, which "denies or abridges" the right to vote "on account of race." See United States v. Reese, 92 U.S. 214, 217-218 (1875). Of course, state laws, or regulations adopted pursuant thereto, which in terms bar Negroes from the franchise fall before the Amendment.

^{33/} See also, Kohler v. Jacobs, 138 F. 2d 440, 441 (C.A. 5, 1943); Des Isles v. Evans, 200 F. 2d 614, 615 (C.A. 5, 1962).

Neal v. Delaware, 103 U.S. 370, 389 (1880). But the constitutional guarantee does not end there: "The Amendment nullifies sophisticated as well as simple-minded modes of discrimination." Lane v. Wilson, 307 U.S. 268, 275 (1939). See also, Guinn v. United States, 238 U.S. 347 (1915). In short, no State rule fixing voting qualifications is insulated against the charge that it works a discrimination "on account of race." Though the fashioning of such qualifications and the implementing procedures normally involve the exercise of power wholly within the domain of state interest, there is no insulation where that "power is used as an instrument for circumventing [the] federally protected right [to exemption from racial discrimination in voting]." Gomillion v. Lightfoot, *supra*, at 347. See United States v. Louisiana, 225 F. Supp. 353, 358 (E.D. La. 1963), prob. juris. noted, 377 U.S. 987.

The power of the states to set voter qualifications also is subject to valid restrictions imposed by Congress, which has the power under Article I, section 4, as implemented by the "necessary and proper" clause (Article I, Section 8, Clause 18), to "make or alter" the [t]imes, places, and manner of holding elections for Senators and Representatives * * * prescribed in each State by the Legislature thereof." Thus, in Ex parte Siebold, 100 U.S. 371 (1879), the Supreme Court sustained a Reconstruction statute providing

for the attendance of federal supervisors at registration places under Article 1, Section 4. The broad scope of the federal power under this provision is illustrated by the following statement from United States v. Classic, 313 U.S. 299, 315 (1941):

While, in a loose sense, the right to vote for representatives in Congress is sometimes spoken of as a right derived from the states [citations omitted] this statement is true only in the sense that the states are authorized by the Constitution, to legislate on the subject as provided by §2 of Art. I, to the extent that Congress has not restricted state action by the exercise of its powers to regulate elections under §4 and its more general power under Article I, §8, clause 18 of the Constitution 'to make all laws which shall be necessary and proper for carrying into execution the foregoing powers.' See Ex parte Siebold, 100 U.S. 371 ... Ex parte Yarbrough, *supra*, [110 U.S. 651], 663, 664...

See also Lassiter v. Northampton County Board of Elections, 360 U.S. 45, 51 (1959); United States v. State of Louisiana, 225 F. Supp. 353, 358 (E.D. La. 1963), prob. juris. noted 377 U.S. 978.

Similarly, Congress has the power to enact "appropriate legislation" to implement the Fourteenth and Fifteenth Amendments -- a power "as broad as the 'necessary and proper clause' as construed in McCulloch v. Maryland, ...", United States v. Louisiana, *supra*, 225 F. Supp. at 360; Ex parte Virginia, 100 U.S. 339 (1879) and the implied power to protect the integrity of the federal electoral process. Burroughs v. United States, 290 U.S. 534 (1934). Thus, the voting provisions of the Civil Rights Acts of 1957, and 1960 have been sustained as appropriate exercises of congressional

power. See United States v. Raines, 362 U.S. 17 (1960); In re Wallace, 170 F. Supp. 63, 67 (M.D. Ala. 1959); United States v. State of Alabama, 188 F. Supp. 759, 762 (M.D. Ala. 1960); United States v. Louisiana, 225 F. Supp. 353, 359-361 (E.D. La. 1963), prob. juris. noted 377 U.S. 978; United States v. Manning, 215 F. Supp. 272, 277 (W.D. La. 1963).

To be sure, the voting provisions of the Civil Rights Acts of 1957 and 1960 which were sustained in these cases do not operate directly on state qualifications. However, as we have seen, the Fourteenth and Fifteenth Amendments, ex proprio vigore, vitiate state qualifications which offend against it. Neal v. Delaware, supra. It follows, then, that federal legislation either restricting state qualifications which inherently, or in their discriminatory administration, violate the Fourteenth and Fifteenth Amendments,--or, a fortiori, regulating the manner in which those qualifications are tested--is valid and "appropriate" legislation under sections 5 and 2 respectively, of those Amendments.

Having sketched generally the constitutional limitations on the powers of the States to impose voter qualifications and having outlined the scope of the powers of Congress to legislate concerning voter registration and elections, we turn now to consideration of the various theories advanced in the complaint.

A. A State May Not, Consistently
With The Fifteenth Amendment
Or 42 U.S.C. 1971, Impose A
Qualification for Voting Which,
Contrary to its Constitutional
Obligation, it has Afforded
Whites a Greater Opportunity to
Meet than it Has Afforded Negroes

The complaint alleges that, because of inequalities in educational facilities and opportunities for which the State of Alabama is entirely responsible, Negroes have not been afforded an equal chance to meet the requirements reflected in the Insert Part III tests. If this allegation is true, the Insert Part III tests are invalid.

1. The imposition by a State of a condition, upon which a privilege is granted or withheld, contravenes the equal protection clause of the Fourteenth Amendment if the State unconstitutionally has afforded to white persons a greater opportunity to meet the condition than it has afforded to Negroes. And, when, as here, the condition involves a qualification for suffrage, the imposition of the condition contravenes the Fifteenth Amendment and 42 U.S.C. 1971. In short, the State of Alabama cannot, consistently with the Fourteenth or Fifteenth amendments or with 42 U.S.C. 1971, provide Negroes with inferior educational opportunities and facilities--contrary to its constitutional obligation even under the separate-but-equal rule of Plessy v. Ferguson, 163 U.S. 537 (1896)--and then

refuse the franchise to Negroes on the ground that they do not possess sufficient educational attainments.^{34/}

As the Supreme Court has noted, the validity of a statute (or other governmental act) traditionally is "tested by its operation and effect." Near v. Minnesota, 283 U.S. 697, 708 (1931); Griffin v. Illinois, 351 U.S. 12, 17, n. 11 (1956); Guinn v. United States, 238 U.S. 347 (1915); Bailey v. Alabama, 219 U.S. 219, 235 (1911); Home Insurance Co. v. New York, 134 U.S. 594, 598-599 (1890); Henderson v. Mayor of New York, 92 U.S. 259, 268 (1877). In particular, "a law [or, as here, a requirement adopted pursuant to a law] nondiscriminatory on its face may be grossly discriminatory in its operation." Griffin v. Illinois, 351 U.S. 12, 17, n. 11 (1956); Guinn v. United States, *supra*; Lane v. Wilson, 307 U.S. 268 (1940); Gomillion v. Lightfoot, 364 U.S. 339 (1960). In determining whether a challenged state action which is innocuous on its face is "discriminatory in its operation", the courts have examined its effect when considered in relation to other relevant state acts.

^{34/} We do not deal here with a literacy test which, through no fault of the State, has a racial impact. Compare Camacho v. Rogers, 199 F. Supp. 155 (S.D. N.Y. 1961).

For example, in Ludley v. Board of Supervisors, 150 F. Supp. 900 (E.D. La. 1957), affirmed, 252 F. 2d 372 (C.A. 5, 1958), cert. denied, 358 U.S. 819, a Louisiana statute required, as a prerequisite for admission to a state university, a certificate of good moral character signed by the principal of the high school from which the applicant was graduated and the superintendent of education for the area in which the high school was located. A second statute jeopardized the job of any principal or superintendent who certified the eligibility of Negroes to a university. The court held that the first statute, even if otherwise innocuous, was "unconstitutional when applied in tandem with" the second. 150 F. Supp. at 903-904. See also Bush v. Orleans Parish School Board, 138 F. Supp. 337 (E.D. La. 1957), affirmed, 242 F. 2d 156 (C.A. 5, 1957).

Another example is Taylor v. Board of Education of New Rochelle, 191 F. Supp. 181 (S.D. N.Y. 1961), affirmed, 294 F. 2d 36 (C.A. 2, 1961), cert. denied, 368 U.S. 940, where the issue was the validity of a neighborhood school policy. It was established that the school board originally had drawn school district lines "out of a desire to separate whites and Negroes." 191 F. Supp. at 195. The Board defended the neighborhood school policy as "reasonable and educationally sound" and contended

"that it is not violating the Constitution in adhering to it." Ibid. The court rejected this argument, stating (Ibid.):

But, this argument ignores the essential nature of the plaintiffs' position. They are not attacking the concept of the neighborhood school as an abstract proposition. They are, rather, attacking its application so as to deny opportunities guaranteed to them by the Constitution.

The Court concluded that the neighborhood school policy "cannot be used as an instrument to confine Negroes within an area artificially delineated in the first instance by official acts. If it is so used, the Constitution is violated." See also, Goss v. Board of Education, 373 U.S. 683, 686 (1963); Dove v. Parham, 282 F. 2d 256, 258-259 (C.A. 8, 1960).

There is nothing novel in the proposition that, by indulging in one unconstitutional act, a state is barred from engaging in action otherwise within its power because such action would perpetuate the unconstitutionality. In the cases involving discriminatory exclusion of Negroes from juries, for example, it is not a sufficient remedy to enjoin the discrimination. An ensuing conviction of a Negro will be invalidated. Patton v. Mississippi, 332 U.S. 463 (1947); Avery v. Georgia (1953). Similar principles govern the validity of state or local rules establishing qualifications which perpetuate prior discrimination by the state.

Thus, in Ross v. Dyer, 312 F. 2d 191 (C.A. 5), Negro parents attacked the constitutionality of a so-called "brother-sister" rule--applied by the School Board of the Houston, Texas Independent School District for over 40 years, and applied in most cities of substantial size throughout the state and nation--which required children in grades 1 through 6 to attend the same school as an older brother or sister. There was proof that the rule was applied indiscriminately to Negroes and whites, and, according to the Fifth Circuit, "an impressive showing" was made in the district court "that there are many good reasons for this rule, such as achieving maximum value out of the family as a unit as schools encounter the many and unpredictable curricular and extracurricular problems", 312 F. 2d at 196. The District Court rejected the attack on the brother-sister rule, concluding that the plaintiffs were not seeking the same treatment as white students, but superior treatment. 312 F. 2d at 174. But the court of appeals held that the rule could not be applied because its practical effect was to compel continued attendance at a racially segregated school. "That . . . [the rule] applies equally to white and Negro," said the court, "overlooks the fact that as to one group, compulsory attendance at certain schools has been the result of unconstitutional discrimination." 312 F. 2d at 194.

Similar principles preclude a state from imposing a condition on the exercise of a privilege which reflects and perpetuates prior discrimination by the state. In particular, the state cannot give white persons an educational advantage over Negroes, and, on the other hand, condition the grant of a privilege upon the possession of a qualification directly related to the educational advantage. In Parker v. Franklin, 223 F. Supp. 724 (M.D. Ala. 1964), modified and affirmed, adopting the opinion of the district court, 331 F. 2d 841 (C.A. 5), the Negro plaintiff was a graduate of Alabama State College, from which he had received a bachelor of arts degree. He sought admission to Auburn University--an Alabama State institution--in order to obtain a master's degree, but was refused admission solely on the ground that he had not obtained his undergraduate degree from an accredited educational institution. Alabama State College was one of only two state colleges at which Negroes were permitted to attend. Neither was accredited. The other seven state-operated colleges were all accredited but refused to admit Negroes. The defendant argued that the requirement of graduation from an accredited institution was a nondiscriminatory and necessary educational standard. But this Court rejected this reasoning, stating (223 F. Supp. at 726):

...The State of Alabama has denied to Harold A. Franklin, a Negro--solely because he is a Negro--the opportunity to receive an undergraduate education at an accredited state college or university; On its face, and standing alone, the requirement of Auburn University concerning graduation from an accredited institution as a prerequisite to being admitted to graduate school is unobjectionable and a reasonable rule for a college or university to adopt. However, the effect of this rule upon Harold A. Franklin--an Alabama Negro--and others in his class. . . is necessarily to preclude him from securing a post-graduate education at Auburn University solely because the State of Alabama discriminated against him in its undergraduate school. Such racial discrimination on the part of the State of Alabama amounts to a clear denial of the equal protection of the law. This is true regardless of the good motives or purposes that Alabama University may have concerning the rule in question.^{35/}

See also Meredith v. Fair, 298 F. 2d 696 (C.A. 5, 1962), cert. denied, 371 U.S. 828, and Hunt v. Arnold, 172 F. Supp. 847 (N.D. Ga. 1959), where Negroes seeking admission to State universities, in Mississippi and Georgia respectively, were confronted by requirements of alumni sponsorship. There were no Negro alumni. Since a heavier burden was placed on Negro applicants than on white applicants, the alumni sponsorship requirement was held in each case to result in unconstitutional discrimination against Negroes. And compare

^{35/} In adopting the opinion of the district court, the court of appeals modified the judgment in one respect not relevant here.

Bates v. State University of New York, 6 RRLR 1215 (1961), where a teacher training school's admission policy of giving preference to relatives of former or present students was found by the New York State Commission against discrimination to be violative of the State anti-discrimination law, inasmuch as Negroes had not formerly been admitted.^{36/}

There is no essential difference between a state statute which capitalizes upon an educational disadvantage which the state has imposed upon Negroes in order to bar Negroes from further educational privileges, and a state statute which relies on such a disadvantage in order to exclude Negroes from the privilege of voting. Ever since Guinn v. United States, 238 U.S. 347 (1915), it has been clear that a state cannot utilize a burden which it previously has laid upon the Negro as a reason for disqualifying him from voting. In Guinn, the Supreme Court voided an Oklahoma "grandfather clause" as violative of the Fifteenth Amendment

^{36/} Similarly, in Lefkowitz v. Farrell, Complaint Case No. C-9287-63, decided February 26, 1964, the New York State Commission for Human Rights invalidated, as violative of the New York anti-discrimination law, a union apprenticeship requirement under which one could become an apprentice--a prerequisite to gaining admission to the union--only by being a son, nephew or other close relative of a union member. The Commission said (slip op., p. 17):

Exclusionary practices, whatever their vice or merit, are not necessarily violative of the Law Against Discrimination. It should be noted that a chronological list,

(Continued on following page)

because it exempted from a literacy test persons whose forebears were eligible to vote at a time when Negroes were slaves. By virtue of state law during the period of slavery, whites, but not Negroes, could satisfy the requirement. The statute was invalidated on the ground that it contravened the Fifteenth Amendment.

Following Guinn, Oklahoma adopted a statute which required all qualified persons not registered when the grandfather clause was in effect to register within twelve days or be permanently disfranchised. The Supreme Court, relying upon the "practical effect" of this statute, struck it down as violative of the Fifteenth Amendment, noting that under the statute "[u]nfair discrimination was . . . retained . . .". Lane v. Wilson, 307 U.S. 268, 275 (1939). The Court said (307 U.S. at 275):

The [Fifteenth] Amendment nullifies sophisticated as well as simple-minded modes of discrimination. It hits onerous procedural requirements which effectively handicap exercise of the franchise although the abstract right to vote may remain unrestricted as to race.

See also Myers v. Anderson, 238 U.S. 368, 380 (1915).

36/ (Continued from preceding page)

a monolithic pattern, or a nepotistic system, each by itself, is not being held by this Commission to be discriminatory per se. However, when a combination of these devices in given circumstances is utilized for apprentice or journeyman admission so as to bar equality of employment opportunity because of color or race, it does become violative of the law.

Slavery, of course, was not unconstitutional until the adoption of the Thirteenth Amendment. If, as in Guinn and Lane, a State cannot capitalize on a disadvantage which it was legal for the state to impose, a fortiorari a state cannot avail itself of a burden which it was forbidden to lay upon the Negro, but nevertheless imposed, as a disqualification for voting. Thus, state requirements that a voter registration applicant be identified by registered voters, when only white persons are on the registration rolls, have been invalidated as violative of 42 U.S.C. 1971(a) and the Fourteenth and Fifteenth Amendments. United States v. Ward, 222 F. Supp. 617, 620 (W.D. La. 1963); United States v. Manning, 205 F. Supp. 172, 173-174 (W.D. La. 1962); United States v. Hines, No. 63-609, N.D. Ala., September 17, 1964, slip op., p. 5-6. The principle of the voucher cases applies not only when no Negroes are on the registration rolls, but also where there are a disproportionate number of registered Negroes as compared with registered whites. United States v. Hines, supra. And where such a disproportion exists the requirement that a voter registration applicant produce a supporting witness from the ranks of the registered voters also is invalid. In Hines, the District Court for the Northern District of Alabama ruled that (slip op., p. 3):

Since there is only one-tenth as many Negroes qualified to serve as supporting witnesses, it is more difficult for Negroes to obtain supporting witnesses than for white persons. Consequently, the supporting witness requirement discriminates against Negroes.

The now-familiar "freezing" cases rest upon similar considerations. In the "freezing" cases, the courts prohibit a state which has issued a lifetime voting ticket to whites but has discriminatorily excluded Negroes from the registration rolls from imposing more stringent (though otherwise valid) qualification standards even though it applies the new standards to whites and Negroes alike without discrimination. Compare United States v. Mississippi (Walthall County), 339 F. 2d 679 (C.A. 5, 1964); United States v. Duke, 332 F. 2d 759 (C.A. 5, 1964); United States v. Dogan, 314 F. 2d 767 (C.A. 5, 1963); United States v. Lynd, 301 F. 2d 818 (C.A. 5, 1962), cert. denied, 371 U.S. 893; United States v. Atkins, 323 F. 2d 733, 743-745 (C.A. 5, 1963); United States v. Ramsey, 331 F. 2d 824, 833 (dissenting opinion of Judge Rives); United States v. Penton, 212 F. Supp. 193, 200 (M.D. Ala. 1962); United States v. Parker, 236 F. Supp. 511 (M.D. Ala. 1964); United States v. Louisiana, 225 F. Supp. 353 (E.D. La. 1963), prob. juris. noted 377 U.S. 987. The rationale of the freezing cases was noted in United States v. Duke, supra, 332 F. 2d at 768 (citing the dissenting opinion of Judge Rives in United States v. Ramsey, 331 F. 2d 824, 833 (C.A. 5, 1964)):

While theoretically applicable to all, these new requirements primarily affect those who bore the brunt of previous discrimination and tend to maintain the position of advantage which one class has already obtained over the other.

This rationale was critical in United States v. Louisiana, supra, where a three-judge district court enjoined the use of an objective multiple-choice citizenship test in those parishes where the Louisiana "constitutional interpretation" test--found to have been discriminatorily applied--had been used. The court said that ". . . a literacy test bears a reasonable relation to a governmental objective and, if it does not perpetuate past discrimination, is a permissible requirement." 225 F. Supp. 305, 385 (emphasis added). With respect to the test in issue, however, the court declared (225 F. Supp. at 393):

. . . the new test, or any other procedure more demanding than those previously applied to the white applicants, will have the effect of perpetuating the differences created by the discriminatory practices of the past; most of the potential white voters are on the rolls but few if any of the potential Negro voters are on the rolls. As in Gomillion v. Lightfoot and Lane v. Wilson, the necessary effect of the new law, regardless of its fair facade, is built-in unconstitutional discrimination (emphasis added).

The cessation of prior discriminatory practices cannot justify the imposition of new and onerous requirements, theoretically applicable to all, but

practically affecting primarily those who bore the brunt of previous discrimination. An appropriate remedy therefore should undo the results of past discrimination as well as prevent future inequality of treatment. A court of equity is not powerless to eradicate the effects of former discrimination. If it were, the state could seal into permanent existence the injustices of the past (emphasis added).

Thus, as we show infra, this Court, in United States v. Cartwright, 230 F. Supp. 873, 877 (M.D. Ala. 1964) and United States v. Parker, 236 F. Supp. 511 (M.D. Ala., 1964) and courts in the Northern and Southern Districts of Alabama, United States v. Hines, No. 63-609, N.D. Ala., September 17, 1964, and United States v. Atkins, No. 2584, S.D. Ala., February 4, 1965--recognizing that a state may not perpetuate its prior discrimination--have granted "freezing" relief against either the original or ^{37/} the revised Insert Part III tests.

^{37/} The freezing principle is applicable here in its own right. As we show infra, the complaint alleges that the original and revised Insert Part III tests impose more stringent standards following a period of discrimination against Negroes. Since registration is permanent in Alabama, whites discriminatorily registered under laxer standards are frozen on the rolls. It is important to note, however, that while the State could cure this type of built-in discrimination by re-registration, the built-in discrimination resulting from the inferiority of Negro schools can be eliminated only by unconditionally enjoining the application of the original and revised Insert Part III tests to those who have been victimized by the State's unconstitutional discrimination in providing separate and unequal facilities.

(Continued on following page)

2. Nothing in Lassiter v. Northampton Election Board, 360 U.S. 45 (1959)--upon which defendants so heavily rely to sustain the validity of the Insert Part III tests--is inconsistent with the foregoing. In Lassiter, the Supreme Court upheld a North Carolina requirement that a prospective voter "be able to read and write any section of the Constitution of North Carolina in the English language", but there is no indication in the Supreme Court's opinion or in the opinion of the North Carolina Supreme Court, 248 N.C. 102, 102 S.E. 2d 853, that the Negro plaintiff had urged in that case that the racial effect of the literacy test was unconstitutional because of unconstitutional disparities in the state's racially separate educational systems.^{38/}

^{37/} (Continued from preceding page)

The constitutional question arising from the educational disparity cannot be avoided in this case, for the relief to which the United States would be entitled on this theory, would be more extensive than the relief to which we would be entitled on the basis of the "freezing" theory, or on the basis that the tests conflict with any of the provisions of Title I of the Civil Rights Act of 1964--one of which nullifies only those portions of the tests which are not wholly in writing, and all of which apply only to federal elections.

^{38/} The brief of the defendant Baggett concedes (p. 11) that "the issue of discrimination in the actual operation of the law was not framed in the issues presented" in Lassiter. See also 360 U.S. at 50.

3. To be sure, it is possible to conceive of circumstances in which a racial effect may have to be endured simply because the offending standard is an indispensable pre-condition to the exercise of the right involved. For example, while it would be unconstitutional for the State of Alabama to require twenty years of schooling for surgeons while forbidding Negroes to continue beyond high school, the judicial relief in such a case would not be to make surgeons of all deft Negroes. The limitation on Negro schooling would be invalidated, but the unconstitutionally produced racial effect would have to be endured for eight more years because ^{39/} surgery does indeed require twenty years of schooling. But it cannot be said that the original and revised Part III tests are so indispensable to intelligent voting that the racial effect must be suffered. On the contrary, thirty-one States have no literacy tests whatever, and, of those States which do impose a literacy requirement, all but a few require no more than what amounts to an ability to read everyday ^{40/} materials, such as a newspaper. The Lassiter case

^{39/} The Supreme Court occasionally has sustained a legal restriction with a racial impact on the ground of overriding public necessity. Korematsu v. United States, 323 U.S. 214, 216 (1944).

^{40/} The exceptions are Alabama; Mississippi (which employs a constitutional interpretation test) and Louisiana (which has a constitutional interpretation test on the books but is presently applying a multiple-choice citizenship test).

itself, in upholding a literacy test, equated literacy (and an informed electorate) with the ability to read". . . newspapers, periodicals, books and other printed matter [which] canvass and debate campaign issues. . . ." 345 U.S. at 52.

The original and revised Insert Part III tests call for attributes well beyond this kind of functional literacy. The original Insert Part III contains three tests. The first test measures knowledge of various aspects of government, including the names of various elected officials. The second test consists of four excerpts from the Constitution. The applicant must read one or more of these excerpts, and the Board member marks on a duplicate form the words which the applicant misses in his reading of the excerpt. As this Court noted in United States v. Parker, 236 F. Supp. 511, 515 (M.D. Ala. 1964), the applicants in Montgomery County, Alabama "were required to read and pronounce such words as 'delegated', 'prohibited', 'respectively', 'construed', 'apportioned', 'enumeration', 'ordain', and 'affirmation'." In the third test the Board member has the applicant write several words, "or more if necessary to make a judicial determination of his ability to write." The choice of words is committed entirely to the registrar's discretion. See United States v. Atkins, Civil Action No. 2584, S.D. Ala., decided February 4, 1965, where Judge Thomas noted that, in the implementation of this

test by the Dallas County Board of Registrars, "[t]he words for dictation were selected by the registrars and they were very difficult words" (slip op. p. 3).

The Revised Insert Part III--of which there are 100 different forms--also contains three tests.^{41/} The first test is a dictation test. The applicant selects at random the Insert, on the back of which the applicant must write "as instructed by the Board member." The Board member reads aloud to the applicant, from a duplicate form of the Insert, one or more of four excerpts from the Constitution of the United States which appear on the front of the Insert. The applicant must write on the back of the Insert that part of the Constitution which is thus read to him. This is done before the applicant completes any other part of the Insert. The excerpts from the Constitution vary in length and complexity.^{42/} Some are short and simple, others long and

^{41/} These 100 forms are not generally available to the public. The Board member administering the test selects one of the 100 forms at random.

^{42/} E.g.: "The 18th Article of Amendment to the Constitution of the United States is hereby repealed."

^{43/}
complicated. Among the words used in the excerpts are "letters of marque and reprisal", "bill of attainder", "imposts", "affirmation", "enumeration", "capitation . . . tax", "emoluments", and "president pro tempore."

The second test in the Revised Insert Part III consists of four questions testing the applicant's knowledge of government. Many of the questions are difficult, e.g., whether it is lawful for the State of Alabama to borrow money, whether a municipal governing body can levy taxes, whether Congress decides in what manner states elect presidential electors, whether a veteran of wartime military service is exempt from the poll tax requirement, whether members of Alabama jury commissions are elected or appointed, where presidential electors cast ballots for president,

^{43/} E.g.: "Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being 21 years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens 21 years of age in such state."

how many presidential electors Alabama chooses, the name of the official from whom one must seek a permit to carry a pistol, whether a petit larceny or vagrancy conviction disqualifies one from voting, and whether a city may assess the cost of paving a street against property abutting the street.

The third test in the Revised Insert Part III consists of four questions purporting to test the applicant's comprehension and reasoning ability. The applicant reads to himself the printed excerpts from the United States Constitution from among which the Board member has previously selected one or more provisions for use in the dictation test. The applicant then must answer correctly four questions based upon the excerpts.

4. As the sharp differences in the degree of difficulty between a sixth-grade literacy test and the Insert tests suggest, our argument would not necessarily invalidate all literacy tests in States in which Negroes have received inferior educational opportunities in segregated school systems. Whether or not the educational disparities between the Negro and white school systems here would be significantly reflected in the ability to perform successfully on a test of literacy in the sense employed by North Carolina in Lassiter (see Bazemore v. Bertie County Board of Elections, 254 N.C. 398, 119 S.E. 2d 637 (1961)) is a question of fact very different from the issue of whether such disparities would be significantly reflected in the ability to pass the Insert Part III tests.

It may be assumed, for purposes of argument, that literacy in the Lassiter sense is imparted even by woefully inferior schools. Since we do not complain here of tests geared to a sixth grade level of literacy, it is unnecessary to decide that question in this case. Secondly--although it is also unnecessary to decide the issue here--literacy in the Lassiter sense might be thought so indispensable to an informed exercise of the franchise as to warrant the conclusion that the racial effect must be tolerated. The same cannot be said of the Insert tests.

5. It should be stressed that the relationship between the educational disparities in question and ability to perform successfully on the Insert tests is an issue of fact to be resolved at trial. For purposes of the motion to dismiss it is sufficient that it does not appear "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

The relationship of low Negro voter registration to "limited educations received in inferior schools" has been judicially noticed. United States v. Louisiana, 225 F. Supp. 353, 360 n. 8 (E.D. La. 1963), prob. juris. noted, 377 U.S. 987. If further confirmation were needed that it is "conceivable" that the relationship can be established at trial, we might point out that, according to the authors of the Stanford Achievement

Test, "[p]aragraph meaning [tested by the Revised Insert Part III] is a vital part of school achievement" Stanford Achievement Test, Directions for Administering with Separate Answer Sheets (World Book Co. 1953), p. 3. Since a paragraph meaning test measures, among other things, "word recognition" and "word attack procedures," "[s]pecial efforts have been made [in devising the Stanford paragraph meaning test] to . . . make certain that the test does not become one of word knowledge rather than of comprehension of connected discourse." Ibid.

Qualitative differences in education are also clearly reflected in the dictation tests, contained in both the original and revised Insert Part III. "[T]he taking of dictation, even in longhand, requires skill, learning and practice over and beyond the ordinary process of writing". Bazemore v. Bertie County Board of Elections, 254 N.C. 398, 119 S.E. 2d 637, 642 (1961). Dictation tests obviously reflect differences not only in the ability to write and spell, but also in vocabulary, knowledge of correct pronunciation, and special training in transcribing orally pronounced words.^{44/}

^{44/} When Alfred Binet--co-founder of the Stanford-Binet IQ test--sought in the last version of his test to eliminate all items "which require knowledge rather than intelligence," he concluded that [t]here are tests too exclusively scholastic, like reading and retaining a given number of memories of what has been read, or copying a written model, or writing from dictation. We eliminate these." (Quoted in Mayer, The Schools (Anchor 1963) (emphasis added).

Both the original and revised Insert Part III also contain tests designed to elicit knowledge of government. As the Supreme Court noted in Brown v. Board of Education, 347 U.S. 483, 493 (1954), public education "is the very foundation of good citizenship." The ability to answer properly the questions contained in these tests is partly a function of education in civics, and partly a function of reading skills developed in the schools.

It can hardly be disputed, therefore, that the kind of education an individual receives in the classroom may well vitally affect his ability to perform on the Insert Part III tests. If, as paragraph 16 of the complaint alleges, the pupil-teacher ratio consistently has been lower, teacher salaries higher, teacher qualifications superior, and school terms longer in white schools, the ability of Negroes to perform on the Insert Part III tests would be significantly affected. For the reasons we have stated, we are entitled to a trial on that issue.

B. Use of the Insert Part III Tests
Violates Section 101(b) of the
Civil Rights Act of 1964

1. Section 101(b) of the Civil Rights Act of ^{45/}1964 provides in pertinent part as follows:

If in any . . . proceeding [under 42 U.S.C. 1971(c)] literacy is a relevant fact there shall be a rebuttable presumption that any person who has not been adjudged an incompetent and who has completed the sixth grade in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico where instruction is carried on predominantly in the English language, possesses sufficient literacy, comprehension, and intelligence to vote in any Federal election.

The section appears to admit of two interpretations:

(a) Section 101(b) does not prescribe a maximum allowable standard of stringency in state literacy tests, but merely governs the method of proving whether a particular individual possesses state-prescribed literacy qualifications, however stringent the test of such qualifications may be.

(b) Although Section 101(b) is a procedural rule governing burden of proof in voting discrimination cases, its effect is to prohibit use of literacy tests based on levels of literacy or comprehension higher than those normally achieved after six years of formal education. The section creates only a rebuttal presumption of literacy so that registration officials may show that certain individuals, notwithstanding their having completed six or more years of

^{45/} Section 101(b) is codified as the second sentence of 42 U.S.C. 1971(c).

education, are unable to pass a literacy test geared to sixth grade or lower levels of literacy.

If the second interpretation is correct, use of the Insert Part III tests is inconsistent with section 101(b) because they require a comprehension and literacy level higher than that normally attained by the completion of six grades of education. Such a conflict is, of course, resolved in favor of the federal statute by the supremacy clause.^{46/}

2. The legislative history bearing on the question of whether section 101(b) imposes a limitation on the allowable difficulty of state literacy tests is in conflict. Concededly, prominent proponents of the bill and of section 101(b)--notably Senators Humphrey and Keating and Representative Celler--made statements which suggest a negative answer. These statements are to the effect that section 101(b) (1) does not interfere with the power of the states to set voter qualifications, and (2) merely establishes a rule of evidence in voter discrimination cases.

For example, Senator Humphrey made the following statement in regard to section 101(b):

The title also provides that in any voting rights suit under the Civil Rights Act of 1957 in which literacy is a relevant fact, there shall be a rebuttable presumption that a person with a sixth-

^{46/} Art. VI, U. S. Constitution.

grade education is sufficiently literate to vote in a Federal election. This provision is in no way an interference with the State's right to fix voter qualifications; it merely establishes a rule of evidence applicable in voting discrimination suits in the Federal courts -- a rule which places on the State officials in such suits the burden of showing that persons who have completed the sixth grade are, in fact, not literate. 47/

Senator Keating made a similar statement, and went on to assert that under section 101(b) a State would remain free to adopt any literacy tests it chose to adopt. He said that section 101(b):

. . . would not establish any qualification for voting, nor would it in any way interfere with the right of the State to establish a qualification.

It would merely establish a rule of evidence in court proceedings in voting discrimination cases. Even then, the presumption set forth there is a rebuttable one. The States remain free to set literacy standards; and the sixth grade presumption would not apply at all when, for example, at the point where a registrar tested an applicant's literacy. But when a lawsuit charging discrimination was brought, and when the matter came to court, the burden, instead of being on the applicant, would be on the defendant. The defendant would have the burden of showing that the person who had completed the sixth grade was not literate. If the defendant could show that even though the applicant had finished the sixth grade, he still was not literate, the defendant would win the case. But the burden would be on the State to prove that. In other words, if a State has set a literacy requirement, that would remain the requirement -- whatever that literacy requirement might be. The presumption

47/ 110 Cong. Rec. 6309.

relates only to the manner in which literacy might be proven in specific kinds of cases in the courts; and the States would remain wholly free to adopt literacy as a qualification, or any kind of literacy test as a qualification, or not to do so, as they might choose. 48/

Similarly, when Mr. Roy Wilkins, Executive Secretary of the National Association for the Advancement of Colored People, testified before the House Judiciary Subcommittee and criticized the section because he thought that registrars would still be in a position to reject applicants regardless of their educational qualifications, Representative Celler, Chairman of the Judiciary Committee, agreed:

They could say that a sixth grade education was insufficient and overcome the presumption of literacy by asking all manner of questions and then you might have the same difficulty presented as you have now. 49/

The statements that section 101(b) does not interfere with the power of the states to establish voter qualifications and that it is a "rule of evidence" do not conflict with the interpretation of the section advanced herein. As demonstrated more fully infra,

48/ 110 Cong. Rec. 6508.

49/ Hearings before Subcommittee No. 5, House Judiciary Committee, 88th Cong., 1st Sess., Pt. III at 2150.

the section, construed as we urge, does not establish literacy qualifications; it merely limits one way in which such qualifications can be tested. And the section can be fairly characterized as creating a "rule of evidence" in that, in our view, it excludes as inadmissible all tests which are keyed to educational levels higher than the sixth grade.

The statements of Senator Keating and Representative Celler do support the position that section 101(b) does not limit the allowable stringency of literacy tests. But other statements by Senators Humphrey and Keating, and by Attorney General Kennedy, strongly support precisely the opposite conclusion. For example, Senator Keating stated:

. . . It is difficult for me to understand how anyone who is competent and has, in the words of the bill 'completed the sixth grade in a public or private school, accredited by any State or Territory, the District of Columbia, or the Commonwealth or Puerto Rico, where instructions are carried on predominantly in the English language,' and who possesses sufficient literacy, comprehension, and intelligence to vote in any Federal election, could be barred from voting unless an effort is made to discriminate against certain people.

* * *

. . . even in the lowest standard school in any State in the Union I am certain that a person who has been able to finish the sixth grade can certainly read and write and has a considerable amount of comprehension. It seems to me not extreme to say that such a person should be allowed to vote (emphasis added). 50/

50/ 110 Cong. Rec. 5519.

And the following colloquy between Senator Byrd of West Virginia and Senator Humphrey supports the conclusion--which we urge here--that under section 101(b) the states are free to impose educational qualifications higher than the sixth grade only so long as such qualifications are measured by some standard other than a literacy test:

Senator Byrd. If title I of the substitute bill were to be approved as written, I ask the Senator from Minnesota whether a State would not be precluded from requiring, as a qualification for voting in Federal elections, that an individual must have an 8th grade education or a 12th-grade education if it so desired?

Mr. Humphrey. If the State said that an individual must have a 12th grade education, and if the State said that criteria were established which applied equally, without favor to all citizens, it would probably be a valid requirement for voting.

Mr. Byrd. How could a State do so if Congress had already, by favorable action upon title I of the civil rights bill, established the completion of the sixth grade as a rebuttable presumption of literacy?

Mr. Humphrey. That is where the State requires that the individual be literate and does not specify any particular grade but merely requires that the individual be literate. It is a rebuttable presumption that if a person has a sixth grade education, he can therefore read and write. It is merely a rule of evidence (emphasis added). 51/

Senators Byrd and Humphrey went on to indicate that, consistent with Attorney General Kennedy's

51/ 110 Cong. Rec. 12284

statements quoted infra, section 101(b) contemplated that the state would be allowed to show that certain individuals were illiterate (in the narrow sense) despite six years of education.

Mr. Humphrey. I have said that if a State has a literacy test, a person with a sixth-grade education will be presumed to be literate unless the State can prove to the contrary.

Mr. Byrd. Many students complete the sixth grade without having acquired a sixth-grade education and are functional illiterates.

Mr. Humphrey. The State can introduce admissible evidence demonstrating that the applicant is in fact illiterate; and if it can be demonstrated that the party is illiterate then, of course, the person would not be entitled to vote in that State.

Mr. Byrd. The burden is, therefore, upon the State to prove that the applicant is not, in fact, literate?

Mr. Humphrey. The Senator is correct. It will have to be admissible evidence, demonstrating that the applicant is in fact an illiterate, if the individual can show that he has been through the sixth grade in public or private school. It is not a qualification -- the States can still establish qualifications -- but rather it is a rule of evidence in the Federal courts (emphasis added). 52/

Similarly, Representative Celler made the following statement -- inconsistent with his statement at the hearings--on the floor of the House:

It [section 101(b)] means that . . . the burden of proof shifts to the State to get evidence that he is nonetheless illiterate, and not literate, despite the sixth grade schooling (emphasis added). 53/

52/ Ibid.

53/ 110 Cong. Rec. 1473.

In 1962, the administration proposed a bill which, among other things, prohibited rejection of voter registration applicants on account of performance in literacy tests if they had completed six years of formal education and had not been adjudged incompetent.^{54/} In effect, completion of the sixth grade established a conclusive presumption of literacy. Attorney General Kennedy's comments on the differences between section 101(b) and the earlier bill explain a principal reason for the use of a rebuttable presumption and support the view we have advanced:

A second major obstacle besides delay is the continued use of literacy tests and similar performance examinations as a device for discrimination.

Last year I appeared before this committee in support of the administration's proposal, embodied in H. R. 10034, which would have established an objective standard to determine competency to vote in Federal elections -- completion of six grades of schooling. We are again proposing an objective standard for Federal elections, but with some modifications.

^{54/} The bill was introduced in the House of Representatives as H. R. 10034 and in the Senate as S. 2750. Both bills died in the judiciary committees of the House and Senate to which they were referred.

The present proposal provides for a rebuttable rather than a conclusive presumption of literacy upon a showing that the applicant has completed six grades of schooling. This change was made because of the feeling expressed by some that in all fairness a registrar should have the opportunity to show that a particular person with a sixth-grade education is not actually literate.

I believe that the practical result will be the same, for I have little doubt that practically all persons who have completed the sixth grade are fully capable of meaningful participation in the democratic process (emphasis added). 55/

In other words, registration officials remain free to reject illiterates who have completed six years of formal education.^{56/} This would not have been true under the 1962 proposal, which was not enacted. And the clear negative implication of the Attorney General's statement is that states may not employ literacy tests geared to educational levels higher than those normally achieved after six years of formal education. If this were not so, then the "practical result" which the Attorney General thought would be "the same" under both bills, would, on the contrary, be vastly different.

55/ Hearings before Subcommittee No. 5, House Judiciary Committee, 88th Cong., 1st Sess., Pt. II at 1379-80.

56/ This rather obvious point completely disposes of the only specific objection to Section 101(b) in the brief for the State of Alabama. The State argues that there are some individuals who are promoted through the sixth grade for "social" reasons but who "cannot read or write beyond the level of a first-grade pupil" (Brief p. 25). The State complains that no standards are provided for rebutting the presumption of literacy. The clear implication of Section 101(b) is that if an individual cannot pass a reasonable test geared to sixth grade standards, his rejection on literacy grounds would be justifiable under that section.

3. In summary, the legislative history reflects the lawmakers' unanimity on the proposition that section 101(b) puts the burden of persuasion on the defendants to show illiteracy as to rejected applicants who had completed the sixth grade. But it is equally certain that there was no legislative consensus as to the narrower question of whether the section imposes a limitation on the permissible difficulty of literacy tests. Indeed, the question did not receive any specific and considered attention.

Since contradictory and discursive legislative history should be disregarded, see, United States v. Dickerson, 310 U.S. 554, 562 (1940); cf. Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 395-96 (1951) (Jackson, J. concurring), we submit that the ambiguities should be resolved in light of the well-known historical problem which impelled Congress to act and the broad remedial purposes of the statute.^{57/} See Puerto Rico v. Shell Co., 302 U.S. 253, 258 (1937).

^{57/} When the Civil Rights Act of 1964 was being debated, Senator Humphrey stated the problem and the purpose of Title I of the bill:

Good citizens have been denied the right to vote . . . professors having the degree of Ph.D. have been declared illiterates, based upon the way they are judged in literacy tests. Yet persons who could not find their way out of the rain have been declared literate because they are white. Such action is plain racial discrimination. We seek to eliminate it (emphasis added). 110 Cong. Rec. 5811.

4. If section 101(b) is interpreted as merely a procedural rule and the states remain free to adopt literacy tests geared to, say, the educational achievement of high school graduates rather than sixth graders, then section 101(b) is virtually meaningless. To be sure, as to individuals who have completed the sixth grade, the burden of proof to show illiteracy (broadly defined) in voting suits would be on the registration officials, but that burden would be so readily discharged that it would prove no burden at all. Presumably, all that would need to be shown is that the applicant's performance did not measure up to the state's standard, however high that standard might be.

Moreover, under this narrow interpretation Congress would have wholly failed to eliminate use of a notoriously discriminatory device. A test keyed to twelfth grade literacy levels would be relatively difficult. The more difficult the test, the more it lends itself to discriminatory administration. Congress knew that a common discriminatory practice in the administration of literacy tests is to tell white applicants the acceptable answer to a difficult question and not to assist Negro applicants.^{58/} It hardly seems possible that Congress intended to authorize continued use of such tests, thereby perpetuating the very practices

^{58/} See generally, 1961 Report of the United States Commission on Civil Rights on Voting; 110 Cong. Rec. 5810, remarks of Senator Humphrey.

which were so roundly condemned by the proponents
of the bill.^{59/}

5. To be sure, Section 101(b) is literally applicable only when suit is brought by the United States under 42 U.S.C. 1971(c). Accordingly, it might be argued that the statute applies only in civil actions where the United States has asked the court to order registration of named individuals (see Alabama v. United States, 304 F. 2d 583 (C.A. 5), aff'd, 371 U.S. 37 (1962)), and that it does not apply to the registration process. The statute certainly does apply in the former case, but such a narrow reading creates a paradox not reasonably attributable to Congress.

^{59/} See, e.g., remarks of Senator Humphrey, 110 Cong. Rec. 6309.

It might be argued that even if section 101(b) is merely a procedural rule, disposition of voter discrimination cases would be expedited to a significant extent by operation of the rule. As a practical matter, this narrow interpretation would not appreciably facilitate proceedings in voter discrimination cases. It is true that, as to applicants who were rejected on literacy grounds, the plaintiff need only show a sixth grade education and the burden of persuasion on this issue shifts to the defendants. But obviously the defendants would attempt to discharge the burden by introducing the tests. Thus, from the court's viewpoint, section 101(b) would represent no net gain since the same voluminous evidence would be before the court.

It makes no sense to say on the one hand (as, we submit, must be said) that evidence of failure to perform satisfactorily on a difficult test is inadmissible to rebut a presumption of literacy based on six years of education, and, on the other hand, to conclude that the statute does not, ex proprio vigore, prohibit use of such a test in the registration process. Under this construction, the legality of the test would depend upon whether the Attorney General decided to bring suit.

Apart from its novelty, such a construction would have a particularly corrosive effect on the delicate federal-state relationships which Congress attempted to harmonize in this legislation. Registration officials would be free to apply difficult tests and accept or reject applicants based on the tests, only to be told at a later date by a federal court that these standards, though legal when imposed and acted upon, could not be given effect in litigation. We think it clear that Congress could not have intended such a bizarre result.

6. It might be contended that court-contested rejections of voter applicants by Alabama registration officials for failure to pass the Insert Part III tests do not raise issues of literacy, but rather the applicants' abilities under some more sophisticated state qualification, such as understanding of government. Such a distinction assumes that "literacy" means only a

more or less elementary ability to read and write and that section 101(b) is inapplicable to rejections of voter applicants based on their failure to satisfy some higher standard of intelligence or education. Such a construction ignores the concluding language of the section, that applicants who have completed six years of formal education "possess sufficient literacy, comprehension, and intelligence to vote in any federal election." The underscored language is broad and comprehensive; the clear implication is that the presumption is applicable where failure to pass any test purportedly "designed to promote intelligent use of the ballot" (see Lassiter v. Northampton Election Board, 360 U.S. 45, 51 (1959)) is introduced to justify rejection of voter applicants. Thus it is clear that the presumption applies to rejections of voter applicants based on the Insert Part III tests.

7. In considering the constitutionality of Section 101(b) under the construction we urge, it is important initially to distinguish between voter qualifications themselves and the means employed to determine whether applicants possess the qualifications. It is perfectly clear that under this con-

___/ A conflict could arise between the power of Congress under Article 1, section 4 and the state's power to establish qualifications. For example, all States have age qualifications. Such a qualification might be proved in various ways, including birth certificates, selective service cards, or the sworn statement of the applicant. If Congress prohibited every means reasonably suited to the proof of a given qualification, the net effect would be to prohibit the qualification itself, and the federal power would swallow up the state power. But no such problem is presented by Section 101(b). See, Van Alstyne, The Administration's Anti-Literacy Test Bill: Wholly Constitutional But Wholly Inadequate, 61 Mich. L. Rev. 805, 818 (1963).

struction Section 101(b) does not affirmatively pre-
scribe a qualification for voting in federal elections.
As Senator Humphrey pointed out, the section applies
only "where the State requires that the individual
be literate and does not specify any particular grade."^{61/}
For example, the states remain free to require comple-
tion of high school as a voter qualification, so long
as proof of this qualification is not required to be
shown by completion of a high school level literacy
test. The narrow function of Section 101(b) is to
restrict one means of proving "literacy," in the
broad sense of that term.

^{61/} See p. 88 supra, for the full context of this
statement.

A previous administration bill, discussed
supra at , established a conclusive presumption
of literacy as to persons who completed the sixth grade.
In explaining the significance of the distinction
between qualifications and the means of proving them,
Attorney General Kennedy said:

We are not suggesting legislation that
will set the qualifications. All we are
doing is suggesting legislation which
deals with the testing of these qualifi-
cations, and the qualifications in this
field of literacy have been used in an
arbitrary fashion to deny individuals
the right to vote because of their color.

Now, we are saying that if a State
establishes a vague test on the question,
and says an individual has to be literate
and does not establish a particular and
specific test, and establishes a vague
test -- we say that if they completed a
sixth grade education they should be
considered literate.

If they establish a specific and
particular test for themselves of a
second grade, fourth grade, or eighth
grade we do not change that one single
bit. They have some specific test.
Hearings before the Subcommittee on
Constitutional Rights, Senate Judiciary
Committee, 87th Cong., 2d Sess. on S.
2750 at 271.

Viewed as a limitation on the means of proving state qualifications, the power of Congress under Article I, Section 4 to regulate the "manner of holding elections for Senators and Representatives" is more than adequate to sustain the constitutionality of Section 101^{62/}(b). It is settled that the "manner" of holding elections extends to the registration process. See, e.g., Smiley v. Holm, 285 U.S. 355, 366 (1932); Ex parte Siebold, 100 U.S. 371 (1879); Cf., United States v. Classic, 313 U.S. 299 (1941). In Siebold, the Court sustained, on the basis of Article I, Section 4, a Reconstruction statute providing for the attendance of federal supervisors at registration places. These cases support the principle that matters affecting the choice of the federal electorate are so closely related to the election process itself as to come

^{62/} Section 101(b) is restricted in its application to "federal" elections, as defined in section 101(c) of the Act.

within the "manner" of holding the election under Article I, section 4. Since, as we have seen, the section does not trench on the state's right to establish high literacy qualifications, there appears to be no reasonable basis for doubting the constitutionality of Section 101(b). The validity of the section is supported as well by Congress' power under Section 5 of the Fourteenth Amendment, section 2 of the Fifteenth Amendment and by the implied power of Congress to protect the purity of the federal ballot. See Burroughs v. United States, 290 U.S. 534^{63/} (1934).

^{63/} The scope of these Congressional powers is outlined supra.

C. The Original And Revised Insert
Part III Tests Are Invalid
Insofar As They Impose Oral
Dictation Tests In Violation
Of 42 U.S.C. 1971(a)(2)(C).

The original and revised Insert Part III tests also are invalid insofar as they impose an oral dictation test in violation of 42 U.S.C. 1971(a)(2)(C). That section--newly enacted as part of Title I of the Civil Rights Act of 1964--provides that "[n]o person acting under color of law shall--(C) employ any literacy test as a qualification for voting in any Federal election unless (i) such test is administered to each individual and is conducted wholly in writing . . . (emphasis added). The phrase "literacy test" is defined in 42 U.S.C. (a)(3)(B) to include "any test of the ability to read, write, understand or interpret any matter."

The original Insert Part III reading test, in which the applicant reads aloud from one or more excerpts from the United States Constitution, is an oral test plainly prohibited by the foregoing provisions. The original Insert Part III writing test, in which the applicant writes words dictated by the registrar, also is partly oral. The Supreme Court of Alabama, in its order promulgating the revised Insert Part III tests, apparently recognized the invalidity of the original tests under 42 U.S.C. 1971(a)(2)(C), since the order stated that the revision was necessary because of the passage of the Civil Rights Act of 1964. Curiously, however, the new Insert Part III also contains a dictation

test in which the registrar orally dictates excerpts from the Constitution which the applicant must then transcribe in writing--also in contravention of 42 U.S.C. 1971(a)(2)(C).

In United States v. Atkins, Civil Action No. 2584, S.D. Ala.--decided February 4, 1965--Judge Thomas specifically ruled that "[i]nsofar as . . . [the original and revised Insert Part III] tests involve elements of oral reading or oral dictation, they violate section 101(a)(2)(C) of the Civil Rights Act of 1964 which requires all literacy tests to be 'wholly in writing'." (slip op. p. 3). See also, United States v. Parker, 236 F. Supp. 511, 515 (M.D. Ala., 1964), where Judge Johnson noted that the cessation, by the Montgomery County, Alabama Board of Registration, of its practice of requiring applicants to read aloud and interpret the excerpts from the Constitution "was in compliance with that portion of the Civil Rights Act of 1964 (Public Law 88-352) that such tests, to prove literacy, must be wholly in writing".

The constitutionality of this provision is clearly sustainable under the power of Congress to regulate the "manner" of holding federal elections, pursuant to Article 1, Section 4, as well as the power of Congress to enact "appropriate legislation" to implement the Fourteenth and Fifteenth Amendments.^{64/}

^{64/} The scope of these provisions is discussed supra.

- D. If the Allegations of the Complaint Are True, The Original And Revised Insert Part III Tests Are Invalid Because, In A State Where Registration Is Permanent, They Impose More Stringent Voter Qualification Requirements Following A Period Of Unconstitutional Discrimination In The Registration Process.

Paragraphs 11 and 13 of the complaint allege that the original and revised Insert Part III tests, as a procedure and standard for testing the literacy of applicants, are different from and more stringent than any testing procedures and standards previously applied to individuals who have been found by Alabama registrars of voters to have been qualified to vote. Paragraph 8 of the complaint alleges that from January 1952 to about February 1964, Negro applicants for registration were discriminated against in the registration process. Whites discriminatorily registered are sealed on the rolls, for (as paragraph 5 of the complaint alleges), registration is permanent in Alabama.

It is settled that a state cannot, absent re-registration, impose more stringent voter qualification requirements following a period of unconstitutional discrimination against Negroes in the registration process. United States v. Duke, 332 F.2d 759 (C.A. 5, 1964); United States v. Mississippi (Walthall County), No. 21212 (C.A. 5, December 20, 1964); United States v. Dogan, 314 F.2d 767 (C.A. 5, 1963); United States v. Lynd, 301 F.2d 818 (C.A. 5, 1962), cert. denied, 371 U.S. 893; United States v. Cartwright, 230 F. Supp. 873, 877 (M.D. Ala. 1964); United States v. Penton, 212 F. Supp. 193 (M.D. Ala. 1962); United States v. Parker, 236 F. Supp. 511 (M.D. Ala. 1964);

United States v. State of Louisiana, 225 F. Supp. 353 (E.D. La. 1963), prob. juris. noted, 377 U.S. 987; United States v. Atkins, No. 2584, S.D. Ala., February 4, 1965; United States v. Hines, No. 63-609, N.D. Ala., September 17, 1964. See also Lane v. Wilson, 307 U.S. 263 (1939); Guinn v. United States, 238 U.S. 347 (1915). The reasons for this rule--to avoid perpetuation of the prior discrimination--have been elaborated supra.

Thus, in Alabama counties where prior discrimination was proven in lawsuits filed under 42 U.S.C. 1971, this Court twice has enjoined application of the original Insert Part III tests on the basis of the freezing principle. United States v. Cartwright, 230 F. Supp. 873, 877 (M.D. Ala. 1964) (Elmore County); United States v. Parker, 236 F. Supp. 511, 517 (M.D. Ala., 1964) (Montgomery County). Similar freezing relief against application of the original Insert Part III test by the registrars of Sumter County, Alabama, was granted by the Northern District of Alabama in United States v. Hines, No. 63-609, N.D. Ala., September 17, 1964. And recently, in United States v. Atkins, No. 2584, S.D. Ala., February 4, 1965, Judge Thomas granted freezing relief against application of the revised Insert Part III tests. The present lawsuit seeks freezing relief against both tests on a statewide basis.

E. The Original And Revised Insert Part III Tests Are Invalid Because They Result in Application Of More Stringent Standards To New Applicants Than To Those Previously Registered Under The Same Laws, In Violation Of 42 U.S.C. 1971(a)(2)(A)

The original and revised Insert Part III tests also conflict with Section 101(a)(2)(A) of the new Civil Rights Act (42 U.S.C. 1971(a)(2)(A)). That section provides:

No person acting under color of law shall--

(A) in determining whether any individual is qualified under State law or laws to vote in any Federal election, apply any standard, practice, or procedure different from the standards, practices, or procedures applied under such law or laws to other individuals within the same county, parish, or similar political subdivision who have been found by State officials to be qualified to vote. . . .

This is a "freezing" provision. If, as the complaint alleges, whites in the past have been found "qualified to vote" without applying to them the "standard" that they must pass the original or revised Insert Part III tests, Negroes cannot, consistently with Section 101(a)(2)(A), be required to pass such tests.

To be sure, Title I says only that in determining qualifications to vote under state law or laws a registrar must not apply different standards, practices, or procedures "under such law or laws." Thus, if a wholly new qualification law should be enacted prescribing a novel qualification for registration, Title I would not prevent the application of such a new standard to future applicants. But that limitation is not apposite here. The original

and revised Insert Part III tests were promulgated by the Supreme Court of Alabama pursuant to the same constitutional provision under which the former questionnaire was prescribed. Both tests thus constitute a different "standard" promulgated under the same "law or laws."^{65/}

^{65/} Unlike the freezing requirement imposed by the Fifteenth Amendment and 42 U.S.C. 1971 prior to the 1964 Act--and implemented in such cases as United States v. Duke, supra--the new section 101(a)(2)(A) requires registrars to apply to present applicants the same standards applied in the past to others whether or not present or past registrars have ever engaged in racial discrimination of any kind. This sanction was thought by Congress to be a necessary and proper prophylactic means of eliminating the practice of shifting registration standards, a practice which had frequently resulted in "freezing in" past discrimination. By dispensing with the requirement of proof of racial motivation when persons in fact have been treated differently the new provision facilitates litigation intended to eliminate racial discrimination. And, of course, it eliminates the necessity of proving a background of racial discrimination before freezing relief may be granted. Section 101(a)(2)(A) thus readily falls within the power of Congress under the Fourteenth and Fifteenth Amendments to enact "appropriate legislation" to prevent discriminatory denial of the right to vote, and to assure that no state shall deny to any of its citizens the equal protection of the law.

F. The Original and Revised Insert
Part III Tests Conflict With
the Fifteenth Amendment and 42
U.S.C. 1971 Because They
Arbitrarily Perpetuate Racially
Disproportionate Voter Regis-
tration in Alabama

Although the States enjoy a wide latitude in determining the conditions upon which the franchise shall be exercised, see Lassiter v. Northhampton County Board of Elections, 360 U.S. 45, 50-53 (1959), there are limits. As the Supreme Court declared in Lassiter: "We do not suggest that any standards which a State desires to adopt may be required of voters." 360 U.S. at 51. See also, Gray v. Sanders, 372 U.S. 368, 379 (1963), where the Court stressed that "States can within limits specify the qualifications of voters" (emphasis added). Plainly, no State can confine the right to vote for State-wide officers to residents of the countryside. Cf. Gray v. Sanders, 372 U.S. 368. Likewise, it would seem clear that there can be no capricious distinction made on the basis of physical traits or other characteristics wholly unconnected with the ability to participate meaningfully in the political process--regardless of whether the excluded class is large or small. Nor do we suppose that, today, the franchise can be restricted to persons over 60, to lawyers, to farmers, to third-generation residents of the State, or to any other peculiar minority--including "philosopher-kings". United States v. Louisiana, supra, 225 F. Supp. at 386.

Here, as elsewhere, the Constitution requires a rational nexus between the rule adopted and a legitimate objective, and, when this most fundamental right is involved--whatever "the conception * * * of a bygone day"--it is surely axiomatic in our present democracy that no classification is reasonable which makes arbitrary distinctions with respect to the franchise. Cf. Gray v. Sanders, supra, 372 U.S. at 376-377, n. 8, 380; Wesberry v. Sanders, 376 U.S. 1, 7, ^{66/}18.

This Court already has condemned the original Insert Part III reading and writing tests as containing "defect[s] of subjectivity and non-uniformity of standards." United States v. Parker, 236 F. Supp. 511, 516 (M.D. Ala. 1964). The dictation test in the Revised Insert also is adapted to arbitrary administration--as Congress recognized

^{66/} In providing that Representatives shall be "chosen . . . by the People," and in effect defining "People" as including all those who "have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature," (Art. I, §2), the Constitution necessarily assumes that some State elections are determined by "popular vote." Madison's boast that federal Representatives would be chosen by "the great body of the people of the United States" (The Federalist, No. 57, quoted in Wesberry, supra, 376 U.S. at 18), suggests that most "people" (presumably then understood as free white adult males) would participate in the election of at least one house of the State legislature. But, however that may be, as Gray v. Sanders makes clear, the enactment of the Fourteenth, Fifteenth, Seventeenth and Nineteenth Amendments has expanded the constitutional view of popular government.

in enacting Section 101(a)(2)(C) of the Civil Rights Act of 1964 (42 U.S.C. 1971(a)(2)(C)), prohibiting ^{68/}oral tests.

^{68/} The ability to read and write may be tested by requiring the applicant to copy printed material. The dictation feature--although it may test certain learned skills--does not test skills relevant to intelligent voting.

Similarly, we have detailed supra some of the more obscure and difficult questions on knowledge of government contained in the Revised Insert Part III tests. It is irrational (to take just one example) to contend that a citizen who knows which official is responsible for the issuance of permits to carry pistols is more likely to exercise the franchise intelligently than one who is not so enlightened. In this respect, the Insert Part III tests are, in substantial part, "tests for the possession of useless knowledge^{67/}."

Since the Insert Part III tests are arbitrary, they represent an unreasonable barrier to registration for both Negro and white applicants and are unconstitutional under the due process clause of the Fourteenth Amendment. See Lassiter v. Northampton County Board of Elections, supra. But their validity must also be judged under the Fifteenth Amendment and 42 U.S.C. 1971 in light of the fact that over 65% of the voting age white persons in Alabama did not have to take the tests and are permanently registered to vote, while less than 20% of the voting age Negroes in the State became permanently registered before the tests were adopted. Thus, the evil inherent in the tests--their arbitrary nature--has its primary impact on prospective Negro voters and perpetuates the system of white political supremacy. Thus, the tests must fall under the Fifteenth Amendment and 42 U.S.C. 1971.

^{67/} Key, Southern Politics, at 577 (1949), quoted in United States v. Duke, supra, 332 F. 2d at 770.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the defendants' motions to strike, to dismiss and to drop defendants as parties should be denied.

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FEBRUARY 1965.

APPENDIX A

~~XXXXXX~~

SUPPLEMENTAL ORDER OF THE SUPREME COURT OF ALABAMA

IN RE: APPLICATION FOR REGISTRATION QUESTIONNAIRE AND OATH

SUPPLEMENTAL ORDER

WHEREAS, heretofore on the 29th day of March, 1960, this Court prescribed the form and content of a questionnaire and oath to aid the members of boards of registrars, all as set forth in the order made and entered on the date aforesaid; and

WHEREAS, the Legislature of Alabama has enacted Act No. 92, approved July 26, 1961. Acts of Alabama, 1961, Vol. I, page 107; which provides for the filing of twelve sets of questions so that a different questionnaire may be used each month;

NOW, THEREFORE, in compliance with Section 181 of the Constitution of Alabama of 1901, as amended, and said Act No. 92, it is ordered by the Supreme Court of Alabama, as follows:

The questionnaire, omitting Insert Part III which is to be inserted as hereinafter provided for, shall be as follows:

APPLICATION FOR REGISTRATION
QUESTIONNAIRE AND OATHS

PART I

(This is to be filled in by a member of the Board of Registrars or a duly authorized clerk of the board. If applicant is a married woman,

she must state given name by which she is
known, maiden surname, and married surname,
which shall be recorded as her full name.)

Full Name: _____
Last First Middle

Date of Birth: _____ Sex _____ Race _____

Residence Address: _____

Mailing Address: _____

Voting Place: Precinct _____ Ward _____ District _____

Length of Residence: In State _____ County _____

Precinct, ward or district _____

Are you a member of the Armed Forces? _____

Are you the wife of a member of the Armed Forces? _____

Are you a college student? _____ If so, where _____

Have you ever been registered to vote in any other state or
in any other county in Alabama? _____ If so, when and
in what state and county and, if in Alabama, at what
place did you vote in such county? _____

Highest grade, 1 to 12, completed _____ Where _____

Years college completed _____ Where _____

PART II

(To be filled in by the applicant in the presence
of the Board of Registrars without assistance.)

I, _____, do
hereby apply to the Board of Registrars of _____
County, State of Alabama, to register as an elector under
the Constitution and laws of the State of Alabama and do
herewith submit my answers to the interrogatories propounded
to me by the board.

(Signature of Applicant)

1. Are you a citizen of the United States? _____
2. Where were you born? _____
3. If you are a naturalized citizen, give number appearing on your naturalization papers and date of issuance _____

4. Have you ever been married? _____ If so, give the name, residence and place of birth of your husband or wife _____

Are you divorced? _____
5. List the places you have lived the past five years, giving town or county and state _____

6. Have you ever been known by any name other than the one appearing on this application? _____ If so, state what name _____
7. Are you employed? _____ If so, state by whom. (If you are self-employed, state this.) _____

8. Give the address of your present place of employment _____

9. If, in the past five years, you have been employed by an employer other than your present employer, give name of all employers and cities and states in which you worked _____

10. Has your name ever been stricken for any reason from any list of persons registered to vote? _____ If so, where, when, and why? _____
11. Have you previously applied for and been denied registration as a voter? _____ If so, when and where? _____
12. Have you ever served in the Armed Forces? _____ If so, give dates, branch of service, and serial number. _____
13. Have you ever been dishonorably discharged from military service? _____
14. Have you ever been declared legally insane? _____ If so, give details _____
15. Give names and addresses of two persons who know you and can verify the statements made above by you relative to your residences in this state, county and precinct, ward or district _____
16. Have you ever seen a copy of this registration application form before receiving this copy today? _____ If so, when and where? _____
17. Have you ever been convicted of any offense or paid any fine for violation of the law? _____ (Yes or No) If so, give the following information concerning each fine or conviction; charge, in what court tried, fine imposed, sentence, and, if paroled, state when, and if pardoned,

state when. (If fine is for traffic violation only, you need write below only the words "traffic violation only.")

(Remainder of this form is to be filled out only as directed by an individual member of the Board of Registrars.)

PART III

Part III of this questionnaire shall consist of one of the forms which are Insert Part III as herein below set out. The insert shall be fastened to the questionnaire. The questions set out on the insert shall be answered according to the instructions therein set out. Each applicant shall demonstrate ability to read and write as required by the Constitution of Alabama, as amended, and no person shall be considered to have completed this application, nor shall the name of any applicant be entered upon the list of registered voters of any county until after such Inserted Part III of the questionnaire has been satisfactorily completed and signed by the applicant.

PLEASE INSERT PART III HERE

PART IV

Oaths

STATE OF ALABAMA

_____ COUNTY

Before me, _____
a registrar in and for said county and state, personally appeared _____.

an applicant for registration as an elector, who being first duly sworn deposes and says:

"I do solemnly swear (or affirm) that the foregoing answers to the interrogatories are true and correct to the best of my knowledge, information and belief. I do further personally swear (or affirm) that I will support and defend the Constitution of the United States and the Constitution of the State of Alabama; that I do not believe in nor am I affiliated with any group or party which advocated or advocates the overthrow of the United States or the State of Alabama by unlawful means. I do further solemnly swear (or affirm) that in the matter of this application for registration I have spoken the truth, the whole truth and nothing but the truth, so help me God."

(Signature of Applicant)

Sworn to and subscribed before me this the ____ day
of _____. 19 ____.

(Signature of Board Member)

Explanation and Remarks

(Board members interviewing applicants may place here any special explanations, such as of residence status, or other remarks for purposes of clarification. If person is blind or is otherwise physically handicapped to such an extent that he cannot fill out this application form, the circumstances are to be recorded here, along with an explanation of the method used to determine if the person is, in fact, literate and can spell words and recognize those spelled to him, or can read large black letters and words in the case of persons

with sight handicaps. _____

PART V

Action of the Board

STATE OF ALABAMA

_____ COUNTY

The applicant, _____,
appeared before the board of registrars for said state and
county in a regular session and executed the foregoing appli-
cation in the manner prescribed by law. The Board, having
further examined said applicant under oath, touching his
qualifications under Section 181, Constitution of Alabama,
as amended, and having fully considered the foregoing appli-
cation for registration, questionnaire and oaths, adjudges
said applicant entitled to be registered and he was duly
registered this the ____ day of _____, 19 ____.

Signed: _____
Chairman

Member

Member

(NOTE: The act of actually determining an applicant entitled
to be registered is judicial. A majority of the Board must
concur. A majority must be present. The power cannot be
delegated. Each member must vote on each application. Not
until this is done may a certificate be issued the applicant.)

The Applicant, _____,
due to failure to meet the requirements of state law for
registration as an elector, is hereby rejected on this the

____ day of _____, 19____.

Signed: _____
Chairman

Member

Member

PART VI

Examination of Supporting Witness

(The witness shall be placed under oath to tell the truth, the person administering the oath being a Board member or other person authorized to administer oaths and acting under the direction of the Board.)

Name of Witness _____

Address _____

Place of Voting _____

"I have known the applicant _____

_____ for ____ years and ____ months and I have personal knowledge that his place of residence is _____

_____ and that he has resided in the State of Alabama at least one year and in _____ County for at least six months."

Signature of Witness

Sworn to and subscribed before me this the ____ day of _____, 19 ____.

(Person Administering Oath)

Date _____

Insert Part III shall be in twelve different forms as follows:

INSERT PART III (1)

(The following questions shall be answered by the applicant without assistance.)

1. What city is the capital of the United States? _____
 2. How many states are there in the United States? _____
 3. How many senators from each state are in the United States Senate? _____
 4. The president of the United States is elected for a term of how many years? _____
-

INSTRUCTION "A"

The applicant will complete the remainder of this questionnaire before a Board member and at his instructions. The Board member shall have the applicant read any one or more of the following excerpts from the U. S. Constitution using a duplicate form of this Insert Part III. The Board member shall keep in his possession the application with its inserted Part III and shall mark thereon the words missed in reading by the applicant.

Excerpts from the Constitution

1. "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."
2. "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."
3. "Representatives shall be apportioned among the several states according to their respective numbers, count-

ing the whole number of persons in each state, excluding Indians not taxed."

4. "The congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration."

INSTRUCTION "B"

The Board member shall then have the applicant write several words, or more if necessary to make a judicial determination of his ability to write. The writing shall be placed below so that it becomes a part of the application. If the writing is illegible, the Board member shall write in parentheses beneath the writing the words the applicant was asked to write.

HAVE APPLICANT WRITE HERE, DICTATING WORDS
FROM THE CONSTITUTION.

Signature of Applicant: _____

X X X X X X X X X X X X X X X X X X X

INSERT PART III (2)

(The following questions shall be answered by the applicant without assistance.)

- 1. What city is the capital of Alabama? _____
- 2. How old must a person be in order to be eligible to vote in Alabama? _____
- 3. What is the lawmaking body of the United States called? _____
- 4. The Constitution of the United States provides that Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, (True or false) _____

INSERT HERE THE SAME INSTRUCTIONS "A" WHICH
APPEAR ABOVE AT THE CORRESPONDING PLACE IN
INSERT PART III (1).

Excerpts from the Constitution

1. "The house of representatives shall 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."

2. "Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the state may be entitled in the congress; but no senator or representative, or person holding an office of trust or profit under the United States, shall be appointed an elector."

3. "The judicial power of the United States, shall be vested in one supreme court, and in such inferior courts as the congress may from time to time ordain and establish."

4. "The senators and representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this constitution."

INSERT HERE THE SAME INSTRUCTIONS "B" WHICH
APPEAR ABOVE AT THE CORRESPONDING PLACE IN
INSERT PART III (1).

Signature of Applicant: _____

X X

INSERT PART III (3)

(The following questions shall be answered by the applicant without assistance.)

1. In what town or city is the courthouse located in this county? _____
2. How many stars are there in the United States Flag? _____
3. What is the lawmaking body of Alabama called? _____
4. Those who shall be convicted of any crime punishable by imprisonment in the state penitentiary shall be disqualified from voting in Alabama. (True or false) _____

INSERT HERE THE SAME INSTRUCTIONS "A" WHICH
APPEAR ABOVE AT THE CORRESPONDING PLACE IN
INSERT PART III (1).

Excerpts from the Constitution

1. "The congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this constitution shall be so construed as to prejudice any claims of the United States, or of any particular state."

2. "The ratification of the conventions of nine states, shall be sufficient for the establishment of this constitution between the states so ratifying the same."

3. "The electors shall meet in their respective states, and vote by ballot for president and vice-president, one of whom, at least, shall not be an inhabitant of the same state with themselves."

4. "The person having the greatest number of votes as vice-president, shall be the vice-president, if such number be a majority of the whole number of electors appointed, and if no person have a majority, then from the

two highest numbers on the list, the senate shall choose the vice-president; a quorum for the purpose shall consist of two-thirds of the whole number of senators, and a majority of the whole number shall be necessary to a choice."

INSERT HERE THE SAME INSTRUCTIONS "B" WHICH
APPEAR ABOVE AT THE CORRESPONDING PLACE IN
INSERT PART III (1).

Signature of Applicant: _____

X X

INSERT PART III (4)

(The following questions shall be answered by the applicant without assistance.)

1. What is the chief executive of the United States called.

2. Name the two major political parties in the United States.

3. Who coins money, the state or the United States? _____
4. If the president dies, who takes his place? _____

INSERT HERE THE SAME INSTRUCTIONS "A" WHICH
APPEAR ABOVE AT THE CORRESPONDING PLACE IN
INSERT PART III (1).

Excerpts from the Constitution

1. "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."

2. "Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort."

3. "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."

4. "The senators and representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this constitution; but no religious tests shall ever be required as a qualification to any office or public trust under the United States."

INSERT HERE THE SAME INSTRUCTIONS "B" WHICH
APPEAR ABOVE AT THE CORRESPONDING PLACE IN
INSERT PART III (1).

Signature of Applicant: _____

X X

INSERT PART III (5)

(The following questions shall be answered by the applicant without assistance.)

1. What is the chief executive of Alabama called? _____
2. Are post offices operated by the state or federal government? _____
3. What is the name of the president of the United States?

4. To what national lawmaking body does each state send senators and representatives? _____

INSERT HERE THE SAME INSTRUCTIONS "A" WHICH
APPEAR ABOVE AT THE CORRESPONDING PLACE IN
INSERT PART III (1).

Excerpts from the Constitution

1. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

2. "Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed."

3. "Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort."

4. "The senators and representatives before mentioned, and the members of the several legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this constitution."

INSERT HERE THE SAME INSTRUCTIONS "B" WHICH
APPEAR ABOVE AT THE CORRESPONDING PLACE IN
INSERT PART III (1).

Signature of Applicant: _____

X X

INSERT PART III (6)

(The following questions shall be answered by the applicant without assistance.)

1. How many senators from each state are in the United States Senate? _____

2. The president of the United States is elected for a term of how many years? _____
3. What is the name of the governor of Alabama? _____
4. Of what political party is the president of the United States a member? _____

INSERT HERE THE SAME INSTRUCTIONS "A" WHICH
APPEAR ABOVE AT THE CORRESPONDING PLACE IN
INSERT PART III (1).

Excerpts from the Constitution

1. "The judicial power of the United States, shall be vested in one supreme court, and in such inferior courts as the congress may from time to time ordain and establish."
2. "All bills for raising revenue shall originate in the house of representatives; but the senate may propose or concur with amendments as on other bills."
3. "Every bill which shall have passed the house of representatives and the senate, shall, before it become a law, be presented to the president of the United States."
4. "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."

INSERT HERE THE SAME INSTRUCTIONS "B" WHICH
APPEAR ABOVE AT THE CORRESPONDING PLACE IN
INSERT PART III (1).

Signature of Applicant: _____

X X

INSERT PART III (7)

(The following questions shall be answered by the applicant without assistance.)

1. What is the lawmaking body of the United States called?

2. The Constitution of the United States provides that Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.
(True or false) _____
3. Name one of the United States senators from Alabama.

4. When residents of a city elect their officials, the voting is called a municipal election. (True or false) _____

INSERT HERE THE SAME INSTRUCTIONS "A" WHICH
APPEAR ABOVE AT THE CORRESPONDING PLACE IN
INSERT PART III (1).

Excerpts from the Constitution

1. "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."
2. "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."
3. "The ratification of the conventions of nine states, shall be sufficient for the establishment of this constitution between the states so ratifying the same."
4. "The congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and

nothing in this constitution shall be so construed as to prejudice any claims of the United States, or of any particular state."

INSERT HERE THE SAME INSTRUCTIONS "B" WHICH
APPEAR ABOVE AT THE CORRESPONDING PLACE IN
INSERT PART III (1).

Signature of Applicant: _____

X X

INSERT PART III (8)

(The following questions shall be answered by the applicant without assistance.)

1. What is the lawmaking body of Alabama called? _____
2. Those who shall be convicted of any crime punishable by imprisonment in the state penitentiary shall be disqualified from voting in Alabama (True or false) _____
3. How many states are in the United States? _____
4. What city is the capital of the United States? _____

INSERT HERE THE SAME INSTRUCTIONS "A" WHICH
APPEAR ABOVE AT THE CORRESPONDING PLACE IN
INSERT PART III (1).

Excerpts from the Constitution

1. "The electors shall meet in their respective states, and vote by ballot for president and vice-president, one of whom, at least, shall not be an inhabitant of the same state with themselves."

2. "The congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration."

3. "Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the state may be entitled in the congress; but no senator or representative, or person holding an office of trust or profit under the United States, shall be appointed an elector."

4. "Every bill which shall have passed the house of representatives and the senate, shall, before it become a law, be presented to the president of the United States."

INSERT HERE THE SAME INSTRUCTIONS "B" WHICH
APPEAR ABOVE AT THE CORRESPONDING PLACE IN
INSERT PART III (1).

Signature of Applicant: _____

X X

INSERT PART III (9)

(The following questions shall be answered by the applicant without assistance.)

1. Who coins money, the state or the United States? _____
2. If the president of the United States dies, who succeeds to the presidency? _____
3. What city is the capital of Alabama? _____
4. How old must a person be to vote in Alabama? _____

INSERT HERE THE SAME INSTRUCTIONS "A" WHICH
APPEAR ABOVE AT THE CORRESPONDING PLACE IN
INSERT PART III (1).

Excerpts from the Constitution

1. "The house of representatives shall be composed of members chosen every second year by the people of the several states, and electors in each state shall have

the qualifications requisite for electors of the most numerous branch of the state legislature."

2. "The judicial power of the United States, shall be vested in one supreme court, and in such inferior courts as the congress may from time to time ordain and establish."

3. "Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort."

4. "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."

INSERT HERE THE SAME INSTRUCTIONS "B" WHICH
APPEAR ABOVE AT THE CORRESPONDING PLACE IN
INSERT PART III (1).

Signature of Applicant: _____

X X

INSERT PART III (10)

(The following questions shall be answered by the applicant without assistance.)

1. What is the name of the president of the United States?

2. To what national lawmaking body does each state send senators and representatives? _____

3. How many stars are there in the United States Flag? _____

4. In what town or city is the courthouse located in this county? _____

INSERT HERE THE SAME INSTRUCTIONS "A" WHICH
APPEAR ABOVE AT THE CORRESPONDING PLACE IN
INSERT PART III (1).

Excerpts from the Constitution

1. "Every bill which shall have passed the house of representatives and the senate, shall, before it become a law, be presented to the president of the United States."

2. "The senators and representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this constitution; but no religious tests shall ever be required as a qualification to any office or public trust under the United States."

3. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

4. "Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort."

INSERT HERE THE SAME INSTRUCTIONS "B" WHICH
APPEAR ABOVE AT THE CORRESPONDING PLACE IN
INSERT PART III (1).

Signature of Applicant: _____

X X

INSERT PART III (11)

(The following questions shall be answered by the applicant without assistance.)

1. What is the name of the governor of Alabama? _____
2. Of what political party is the president of the United States a member? _____
3. Are post offices operated by the state or federal government?
4. What is the chief executive of Alabama called? _____

INSERT HERE THE SAME INSTRUCTIONS "A" WHICH
APPEAR ABOVE AT THE CORRESPONDING PLACE IN
INSERT PART III (1).

Excerpts from the Constitution

1. "The person having the greatest number of votes as vice-president, shall be the vice-president, if such number be a majority of the whole number of electors appointed, and if no person have a majority, then from the two highest numbers on the list, the senate shall choose the vice-president; a quorum for the purpose shall consist of two-thirds of the whole number of senators, and a majority of the whole number shall be necessary to a choice."

2. "The senators and representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this constitution."

3. "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."

4. "Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed."

INSERT HERE THE SAME INSTRUCTIONS "B" WHICH
APPEAR ABOVE AT THE CORRESPONDING PLACE IN
INSERT PART III (1).

Signature of Applicant: _____

X X

INSERT PART III (12)

(The following questions shall be answered by the applicant
without assistance.)

1. Name one United States senator from Alabama. _____
2. When residents of a city elect their officials, the voting
is called a municipal election. (True or false) _____
3. Name the two major political parties in the United States.

4. What is the chief executive of the United States called?

INSERT HERE THE SAME INSTRUCTIONS "A" WHICH
APPEAR ABOVE AT THE CORRESPONDING PLACE IN
INSERT PART III (1).

Excerpts from the Constitution

1. "The times, places, and manner of holding elec-
tions 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, ex-
cept as to the places of choosing senators."

2. "All bills for raising revenue shall originate
in the house of representatives; but the senate may propose
or concur with amendments as on other bills."

3. "The house of representatives shall 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."

4. "Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the state may be entitled in the congress; but no senator or representative, or person holding an office of trust or profit under the United States, shall be appointed an elector."

INSERT HERE THE SAME INSTRUCTIONS "B" WHICH
APPEAR ABOVE AT THE CORRRESPONDING PLACE IN
INSERT PART III (1).

Signature of Applicant: _____

X X

One of the foregoing forms of Insert Part III shall be used each month, the same form being used for all persons who apply for registration during the same month. During the following month a different form shall be used in like manner.

IT IS FURTHER ORDERED that the Supreme Court of Alabama have and retain the right and authority to amend, change, and alter said questionnaire and oath when deemed by the Court expedient to do so.

IT IS FURTHER ORDERED that this Supplemental Order be spread upon the Minutes of this Court and that a copy of this Order be filed with the Secretary of State of the State of Alabama.

Promulgated and Adopted this the 14th day of
January, 1964.

J, ED LIVINGSTON, CHIEF JUSTICE

THOMAS S. LAWSON

ROBERT T. SIMPSON

JOHN L. GOODWYN

PELHAM J. HERRILL

JAMES S. COLEMAN, JR.

ROBERT B. HARWOOD

Associate Justices

The State of Alabama

DEPARTMENT OF STATE

I, MRS. AGNES BAGGETT, Secretary of State of the State of Alabama, do hereby certify that the pages hereto attached, contain a true, accurate and literal copy of the SUPPLEMENTAL ORDER to the ORDER OF THE SUPREME COURT OF ALABAMA promulgating and adopting the APPLICATION FOR REGISTRATION, QUESTIONNAIRE AND OATH dated January 14, 1964, adopted by the Court on August 26, 1964.

as the same appears on file and of record in this office.



In Testimony Whereof, I have hereunto set my hand and affixed the Great Seal of the State, at the Capitol, in the City of Montgomery, this 2nd day of October One Thousand Nine Hundred and Sixty-four

Mrs. Agnes Baggett
(Secretary of State.)

IN RE: APPLICATION FOR THE RIGHT TO VOTE IN THE ELECTIONS FOR THE
SHERIFF OF ALABAMA

WHEREAS, heretofore on the 14th day of January, 1964, this Court prescribed the form and contents of a questionnaire and order to aid the members of boards of registrars, all as set forth in the order made and entered on the date aforesaid; and

WHEREAS, since said date, the Congress of the United States has enacted and the President has approved the "Civil Rights Act of 1964," which forbids the giving of any oral test to applicants who seek to register to vote; and

WHEREAS, the validity of said provision of said act of the Congress has not been determined; and

WHEREAS, said questionnaire heretofore prescribed by this Court did provide for the giving of an oral test to applicants who seek to register to vote; and

WHEREAS, this Court deems it proper and advisable to change said questionnaire so as to avoid conflict with said Act of the Congress.

NOW, THEREFORE, in compliance with Section 181 of the Constitution of Alabama of 1901, as amended, it is ordered by the Supreme Court of Alabama, as follows:

That paragraph of said order made on the 14th day of January, 1964, under the heading: "PART III," which begins: "Part III of this questionnaire shall consist," and ends "satisfactorily completed and signed by the applicant," is hereby amended to read as follows:

PART III

Part III of this questionnaire shall consist of one of the forms which are inserted Part III as herein below set

out. The completed insert shall be fastened to the questionnaire. The insert shall be completed according to the instructions therein set out. No person shall be considered to have completed this application, nor shall the name of any applicant be entered upon the list of registered voters of any county until after such Insert Part III has been satisfactorily completed and signed by the applicant. The Board of Registrars shall provide a loose-leaf book with one of each of said forms of Insert Part III placed in said book. Applicant shall open said book at random. The form appearing where applicant opens the book is to be used by applicant.

X X

That part of said order of the 14th day of January, 1964, which begins:

"Insert Part III shall be in twelve different forms as follows:";

and ends:

". . . . During the following month a different form shall be used in like manner.";

shall be amended to read as follows:

Insert Part III shall be in one hundred different forms as set out in the Exhibit "A" in this order.

X X

In all respects, other than the changes hereby made in Insert Part III, aforementioned order of the 14th day of January, 1964, remains in full force and effect.

IT IS FURTHER ORDERED that the Supreme Court of Alabama have and retain the right and authority to amend, change, and alter said questionnaires and attachments deemed by the Court expedient to do so.

IT IS FURTHER ORDERED that this Supplemental Order be spread upon the Minutes of this Court and that a copy of this Order be filed with the Secretary of State of the State of Alabama.

Formalized and Adopted this the 26th day of
August 1964.

/s/ J. Ed Livingston

J. ED LIVINGSTON, CHIEF JUSTICE

/s/ Thomas S. Lawson

THOMAS S. LAWSON

/s/ Robert T. Simpson

ROBERT T. SIMPSON

/s/ John L. Goodwyn

JOHN L. GOODWYN

/s/ Pelham J. Merrill

PELHAM J. MERRILL

/s/ Jas. S. Coleman, Jr.

JAMES S. COLEMAN, JR.

/s/ Robert B. Harwood

ROBERT B. HARWOOD

Associate Justices