Sobol Case file

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Possible Intervention in Sobol v. Perez, Civil Action No. 67-243 (E. D. LA.)

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Civil Action No. 67-243 (E. D. La.)

I. Background

This suit was filed on February 22, 1967, and an amended complaint was filed on February 27, 1967. It was assigned to Judge Cassibry. The plaintiffs are Richard Sobol, who is a white attorney and a member of the Bar of the State of New York; Gary Duncan and Isaac Reynolds. Duncan is a Negro citizen of Plaquemines Parish who is allegedly represented by Sobol in a criminal proceeding against him (Amended Complaint ¶7). 1/ Reynolds is allegedly the Southern Regional Director of the Congress of Racial Equality and a Negro. Allegedly the Congress of Racial Equality is often represented in civil rights litigation by Sobol (A. C. ¶8). Duncan and Reynolds sue on their own behalf and on behalf of Negroes and civil rights workers represented by Sobol (A. C. ¶9).

The defendants are Leander H. Perez, Sr., Chairman of the Plaquemines Parish Council; Leander H. Perez, Jr., District Attorney for Plaquemines Parish; and Honorable Eugene E. Leon, Judge of the 25th Judicial District of Louisiana. An injunction is sought to restrain the prosecution of Richard Sobol on a charge of unauthorized legal practice in the

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1/ Hereinafter cited as "A. C."

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State of Louisiana. Plaintiffs filed an application for a temporary restraining order but the parties informally agreed to take no further action in the prosecution of Sobol pending further action in the federal court. A check of the clerk's office on March 28, 1967, disclosed that as of that date no responsive pleading had been filed by defendants Perez, Jr. and Leon, but that a motion for summary judgment has been filed on behalf of Perez, Sr. The plaintiffs have filed a request for a three-judge court. No hearings are presently scheduled. Judge Cassabry advised an attorney of this Division that the motion for summary judgment has been postponed indefinitely and that the Judge hopes that further proceedings will be avoided by reason of an agreement which the Judge has proposed to the attorneys in the case.

Richard Sobol is an associate of Arnold and Porter in Washington, D. C. Under the auspices of the Lawyers Constitutional Defense Committee (LCDC) Sobol has since about July 1966 represented Negroes and civil rights workers in matters arising out of civil rights activities and involving federal and constitutional rights (A. C. ¶6). It is alleged that LCDC has been associated since 1964 with the Law Office of Collins, Douglas & Elie in New Orleans, Louisiana; members of the firm are Negroes (Ibid.). It is alleged that Sobol, in association with the law firm in Louisiana, and other LCDC staff members in Alabama and Mississippi, represent Negroes and civil rights workers in thousands of cases arising out of efforts to achieve equal rights for Negroes, and that such representation is furnished without fee (Ibid.).

It is alleged that, after being arrested and charged with cruelty to a juvenile while involved in an incident concerning the court ordered desegregation of the Plaquemines Parish schools, the plaintiff Duncan came to the office of Collins, Douglas & Elie and Sobol and requested representation "because he believed that no lawyer in Plaquemines Parish would vigorously assert all possible defenses and issues in this case, particularly in light of its involvement with court ordered school desegregation (A. C. ¶11)." "This representation was jointly undertaken by Collins, Douglas and Sobol (Ibid.)."

On November 21, 1966 Collins and Sobol appeared before the Juvenile Division of the 25th Judicial District Court in Pointe-a-la-Hache in connection with the defense of Duncan on the juvenile charge. The complaint alleges "Mr. Collins introduced Mr. Sobol to the court and stated that he was associated with him and Mr. Douglas in the defense of the matter (Ibid.)." The complaint does not state whether Judge Leon was sitting or whether the introduction to the court included an explanation that Sobol was a member of the bar of the State of New York; but on both counts we have reason to believe from informal contacts with Sobol and with his lawyer, Bronstein, that this was so. At that time Collins filed a motion to quash the charges against Duncan; other pleadings were signed by Collins (Ibid.).

On the next day, November 22, Duncan was arrested and charged with simple battery arising out of the same instant for which he had been charged with cruelty on a juvenile. The state subsequently nolle prossed the juvenile charge (Ibid.).

January 25, 1967 was the date of the trial of Duncan on the battery charge. "Mr. Collins had another commitment on that date that prevented his attending the trial and the case was tried by plaintiff Sobol without objection by the court or the district attorney (Ibid.)." Duncan was convicted and he was sentenced on February 1, 1967 to a 60 day term and $150 fine. The court granted bond pending a petition for review before the Louisiana Supreme Court on the question of whether Duncan should have had a jury trial under the Fourteenth Amendment (Ibid.). The complaint does not state which lawyers appeared on February 1. Collins, Douglas and Sobol petitioned for certiorari. On receiving notice that the petition was denied, Sobol telephoned Judge Leon and requested an appointment (A. C. ¶12). The appointment was granted for the same day and Sobol appeared before Leon shortly after noon on February 21, 1967 (Ibid.). Sobol presented Leon with a Motion for Bond and a Notice of Intention to Petition the Supreme Court of the United States for a Writ of Certiorari (Ibid.). The petition was based on the right to trial by jury. Judge Leon granted bond pending disposition

of the case in the Supreme Court of the United States. The complaint alleges "as plaintiff Sobol was leaving the courthouse, he was placed under arrest. The warrant specified that the charge was 'practicing law without a license.' Upon information and belief, the warrant was signed by defendant Leon and was actually made out while plaintiff Sobol was in defendant Leon's office pursuant to the aforementioned appointment (Ibid.)." Sobol was placed in the Plaquemines Parish jail for about three hours until he was able to post bond (Ibid.). The complaint alleges that no information was filed against Sobol at that time (Ibid.). However, by informal contacts we have been advised that the information was filed on the date of the arrest. 2/ On the next day, February 22, this suit was filed in federal court.

2/ Sobol was apparently charged under sections 213 and 214 of Title 37 of the Louisiana Revised Statutes. Those sections provide:

§37:213:

No natural person, who has not first been daily and regularly licensed and admitted to practice law by the Supreme Court of this state . . . shall:

(1) Practice law;

(2) Furnish attorneys or counsel or an attorney and counsel to render legal services;

(3) Hold himself . . . out to the public as being entitled to practice law;

(4) Render or furnish legal services or advice;

(5) Assume to be an attorney at law or counselor at law;

(6) Assume use or advertise the title of lawyer, attorney, counselor, advocate or equivalent terms . . . in such manner as to convey the impression that he is a practitioner of law; or

(7) In any manner advertise that he, either alone or together with any other person, has, owns, conducts

(Footnote continued on following page.)

The complaint, which was brought pursuant to 42 U.S.C. §1983, 3/ asserts seven causes of action.

2/ (Footnote continued from preceding page.)

or maintains an office of any kind for the practice of law.

* * *

This Section does not prevent any corporation or voluntary association formed for benevolent or charitable purposes and recognized by law, from furnishing an attorney at law to give free assistance to persons without means.

Any natural person who violates any provision of this Section shall be fined not more than one thousand dollars or imprisoned for not more than two years, or both.

* * *

§37:214:

Except as provided in this Section, no person licensed or qualified to practice as an attorney at law or as an attorney and counsellor at law in any other state and temporarily present in this state shall practice law in this state, unless he has been first duly licensed to practice law by the Supreme Court of this state or unless he acts in association with some attorney duly licensed to practice law by the Supreme Court of this state.

Nothing in this Chapter prevents the practice of law in this state by a visiting attorney from a state which, either by statute or by some rule of practice accorded specific recognition by the highest court of that state, has adopted a rule of reciprocity that permits an attorney duly licensed and qualified to practice law in this state to appear alone as an attorney in all courts of record in the other state, without being required to be admitted to practice in such other state, and without being required to associate with himself some attorney admitted to practice in the other state.

Whoever violates any provision of this Section shall be fined not more than one thousand dollars or imprisoned for not more than two years, or both.

3/ 42 U.S.C. §1983 provides:

(Footnote continued on following page.)

First it challenges the application of Louisiana Revised Statutes Annotated §37:213 and 37:215 on the ground that Louisiana cannot prohibit a member of the bar of the Supreme Court of the United States from taking whatever steps are necessary to the practice of law before that court (A. C. ¶14). The second cause of action alleges that Sobol is an expert in federal questions and that he acted in association with local counsel (A. C. ¶15). It asserts that Louisiana cannot punish his conduct, because it was protected activity pursuant to federal rights of Sobol and Negro plaintiffs. The rights asserted in the complaint include the right to free speech and expression; the privileges and immunities of Sobol to practice law, and of Negro plaintiffs to secure adequate representation; rights under the Supremacy Clause; and other enumerated rights (A. C. ¶16-18). The third cause of action expressly challenges the two Louisiana statutes as applied to Sobol (A. C. ¶19-20). The fourth cause of action asserts that unless Sobol's conduct was permitted under the Louisiana statute providing for out-of-state attorneys acting in association with local counsel, the statute fails to give notice and is void for vagueness (A. C. ¶21-24). The fifth cause of action asserts that Sobol's prosecution harrasses and intimidates him and his clients in the exercise of their federal civil rights (A. C. ¶25-26). The sixth cause of action asserts harassment with respect to Sobol, as an attorney practicing in the federal courts in Louisiana, and harassment of his clients with intent to deny them their equal rights (A. C. ¶27-29). The seventh cause of action asserts a custom and practice in Placquemines Parish and in Louisiana to deny Negroes and civil rights workers adequate representation (A. C. ¶30-31). The complaint further alleges that the

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3/ (Footnote continued from preceding page.)

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. (R. S. §1979,)

defendants acted under color of law, and in furtherance of a conspiracy designed to harass and intimidate plaintiffs and supress unpopular views on the subject of racial equality (A. C. ¶32-33).

The prayer for relief requests that a three judge court be convened (A. C. ¶41). The memorandum submitted by the plaintiffs contends that the first three causes of action attack the constitutionality of the statutes and require a three judge court. The prayer also requests a temporary restraining order against the institution or continuation of proceedings against Sobol, and restraining the harassment and intimidation of Duncan (A. C. ¶41).

The prayer further requests a preliminary injunction pending a plenary hearing, and it requests the court to declare the Louisiana statutes unconstitutional on their face and as applied to Sobol. Finally it requests a permanent injunction against defendants forbidding them from instituting proceedings or prosecuting Sobol for practicing law without a license (Ibid.).

II. Considerations regarding possible intervention by the Attorney General under section 902 of the Civil Rights Act of 1964

A. The Requirements of §902

Section 902 of the Civil Rights Act of 1964 provides:

> Whenever an action has been commenced in any court of the United States seeking relief from the denial of equal protection of the laws under the fourteenth amendment to the Constitution on account of race, color, religion, or national origin, the Attorney General for or in the name of the United States may intervene in such action upon timely application if the Attorney General certifies that the case is of general public importance. In such action the United States shall be entitled to the same relief as if it had instituted the action.

The legislative history of §902 is sparse. The section went through radical changes at first. It was first part of the school desegregation title (Title III) in the Administration bill (House Doc. No. 124, 88th Cong., 1st Sess., June 19, 1963, §307(c)), and provided for intervention in school desegregation suits (H.R. 7152). The House Judiciary subcommittee changed Title III to a sweeping authorization for the Attorney General to initiate or intervene in suits under 42 U.S.C. §1983 (H.R. 7152, Committee Print, October 2, 1963) -- the statute under which the Sobol suit is brought. The Attorney General testified that Title III was too broad (House Judiciary Committee Hearings, 88th Cong., 1st Sess., October 15-16, 1963, Serial No. 4, Part IV, pp. 2656-2659), and the full committee changed §301 to an authorization for the Attorney General to initiate certain suits regarding discrimination in public facilities (Committee Print No. 2, Oct. 30, 1963; Union Calendar No. 386). This new Title III contained §302, the first recognizable precursor of §902. The Mansfield-Dirksen substitute (Amendment No. 656) in the Senate moved §302 to Title IX, making it §902, and added the requirements that the suit have been brought under the Fourteenth Amendment and that the Attorney General certify that it is of general public importance. The Miller Amendment (Amendment No. 769), adopted June 12, 1964, added the timeliness requirement.

The opponents of the Civil Rights Act argued that §902 has a virtually unlimited scope (see, e.g., House Rules Committee Hearings on H.R. 7152, Part II, January 21-29, 1964, pp. 353, 375, 390, 539). The proponents stressed its reasonableness and limitations, and the need for such a provision (see, e.g., remarks of S Sen. Humphrey at 110 Cong. Rec. 6534; Congressman Lindsay at 110 Cong. Rec. 2260). From both the language and the history of the statute it is clear that the Attorney General may intervene under §902 only when:

a) The action seeks relief from a denial of equal protection on account of race, color, religion, or national origin;

b) The Attorney General feels able to certify that the case is of general public importance;

c) The intervention is timely.

In the Sobol case there is no timeliness issue. The question is whether the first two requirements are met -- what kinds of suits did Congress intend the Attorney General to intervene in. The subject matters which Congressmen said might be covered by §902 are numerous. Significant for our purposes is the fact that suits attacking racial discrimination in the administration of justice were prominently mentioned as coming under §902 coverage. For example, Assistant Attorney General Marshall, in a letter to Senator Kuchel said that §902 "would permit intervention by the Department of Justice where, in an action brought by a private party, it is claimed that excessive bail was set and that this setting of bail constituted a denial of equal protection on account of race, color, religion, or national origin." 110 Cong. Rec. 6559. Congressman McCulloch, in his separate views accompanying the report of the House Judiciary Committee, (Report No. 914, 88th Cong., 1st Sess., Nov. 20, 1963), p. 16, said "attention must be given to denials of equal protection of the law by local officials who . . . , in the administration of justice, treat individuals differently because of race . . . ." See also 110 Cong. Rec. 2257 (Congressman Rogers of Colorado).

The Congress understood §902 to grant extremely broad discretion to the Attorney General. In one exchange Senators on both sides so stated. Senator Ervin said that the section "gives the Attorney General the power, at his caprice or whim, to intervene in any action brought in any court of the United States in which the

plaintiff claims that he has been deprived of the equal protection of the laws on account of race or color or national origin or religion." 110 Cong. Rec. 13464. Senator Pastore replied, on the same page:

> . . . . Third, he has discretion on how to intervene. But he must make up his mind that it is in the public interest to do so.
>
> I do not believe that the Attorney General is going to be a monster . . . . I believe that the Attorney General will be guided by the purpose of the bill. There may be situations which are far reaching, in effect, when the Attorney General should intervene in order to see that the citizen is protected.

Senator Javits, on the same page, added:

> . . . . Its purpose is to give the Attorney General some power to look into cases which have caused the greatest difficulty . . . . If he thinks [the case] involves unjust treatment, he will pursue it. If he does not think it involves injustice, he will not pursue it.

Senator Holland concluded the argument by saying that the section "would place the judgment of the Attorney General above that of the court which considers the case." Ibid. See also the remarks of Congressman Willis, 110 Cong. Rec. 2256-57.

It could be argued, on the basis of two isolated remarks, that Congress did not intend the Attorney General to intervene in a case which the plaintiffs are capable of adequately prosecuting. Congressman Celler asked: "Why should not the Attorney General have the power of intervening in case of a poor, lonely Negro who has been deprived of his constitutional rights, on the educational level, on the political level, on the housing level, on any level?" 110 Cong. Rec. 2259. On the same day Congressman Rogers of Colorado said (110 Cong. Rec. 2257):

> Where there is a widespread disregard for and disrespect of the rights of citizens in a community, it is not farfetched to conclude that assistance will be needed to assure a cessation of the unlawful activities. Section 302 will provide that assistance, where needed, by giving the Attorney General the right to intervene in privately brought lawsuits."

But if Congress had intended to place such a limitation on intervention by the Attorney General, it would most likely have written in a needs test similar to the one defined in §301(b) and §407(b).

B. Does the complaint state a cause of action in the denial of the equal protection of the laws of the Fourteenth Amendment on account of race within the meaning of section 902?

1. As to the Negro plaintiffs.

Taking the factual and conclusionary paragraphs of the Complaint together (cf. United States v. Bruce, 353 F. 2d 474 (5th Cir. 1965)) the Negro plaintiffs have stated a cause of action in the denial of the equal protection of the laws under the Fourteenth Amendment on account of race. The cause of action is that the defendants arrested and will prosecute Sobol with the purpose and effect of depriving the Negro plaintiffs of adequate legal representation, on account of their race. (See paragraphs 4-9, 11-12, and 27-31 of the Amended Complaint). The right not to be deprived of adequate legal representation in state courts on account of race has not been directly ruled on by the Courts, although it has been inferentially referred to by the Courts. In N.A.A.C.P. v. Button, 371 U.S. 415 (1963) the Court invalidated on First (through 14th) Amendment grounds a Virginia restriction on law practice by the NAACP, and specifically declined to decide whether the restrictions constituted illegal racial discrimination. 4/ But in so doing, the Court noted at 443:

> Lawsuits attacking racial discrimination, at least in Virginia, are neither very profitable nor very popular. They are not an object of general competition

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4/ See also Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1, 6 (1964) (" . . . in regulating the practice of law a State cannot ignore the rights of individuals secured by the Constitution.")

among Virginia lawyers; the problem is rather one of an apparent dearth of lawyers who are willing to undertake such litigation.

The statute in NAACP v. Button was invalidated without reference to the equal protection clause, but the foregoing language may suggest that equal protection may forbid the application of otherwise valid limitations on the practice of law where the effect of their application would be to deny Negroes a meaningful day in Court because they cannot get adequate representation from the local bar. Two Fifth Circuit opions allude to the problem. In Lefton v. City of Hattiesburg, 333 F. 2d 280, 285 (5th Cir. 1964) (Judges Rives, Bell and Wright) the Court states that, in a federal district court proceeding, "if no local counsel are available, a court rule requiring local counsel should be waived." Judge J. Skelly Wright added, for the Court (333 F. 2d at 285-86):

> And where, as here, the basic public interest involved is the protection of fundamental constitutional rights of the petitioners, courts must give special heed to the teachings of the Supreme Court to permit neither indirect nor direct "means to bar them from resorting to the courts to vindicate their legal rights. The right to petition courts cannot be so handicapped." [Brotherhood of Railroad Trainmen], 84 S. Ct. at p. 1117. And since this is a criminal case, the constitutional right of the accused to the assistance of counsel of his own choice reinforces this principle.

And in United States v. Wood, 295 F. 2d 772, 781, footnote 9, Judge Rives said:

> The Government's brief sets out at length why these acts alone will cause such injury as to warrant injunctive relief. ". . . Such prosecutions, experience has shown, not only are expensive, but it is becoming increasingly difficult for Negroes accused of offenses in the civil rights context even to secure competent legal assistance. There are no Negro attorneys in Walthall County and scarcely a half-dozen Negro attorneys in the entire State of Mississippi. Because of the tremendous political and economic pressures brought to bear by the State of Mississippi, it is difficult, if not impossible, to secure competent white counsel for Negroes in cases such as this. Certainly this will be so if, upon success in this case, some officials of the State of Mississippi will be further emboldened to use harassment by prosecution to an even greater extent than heretofore." 5/

We also learn from Wood that harassment by prosecution of a civil rights worker should be enjoined if it would intimidate Negroes on account of race, from registering to vote. While there are important differences between Sobol and Wood, 6/ Wood seems to support a cause of action for the Negro plaintiffs in

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5/ See also, Marshall, Federalism and Civil Rights, 58:

> "The apparent inability of the bar to bring itself to provide counsel in cases involving racial implications is alone one proof that our basic assumptions about the workings of justice in state courts are wrong."

6/ Wood was brought under 42 U.S.C. §1971(b); Sobol is brought under §1983. In Wood the United States was plaintiff; in Sobol there are private class plaintiffs.

Sobol, who represent a class which is allegedly intimidated, on account of race, by the prosecution of Sobol.

2. As to Sobol.

Sobol alleges that he has been deprived of the equal protection of the laws -- but he does not allege that it is on account of his race, color, religion or national origin. He does allege, however, that his prosecution has the purpose of intimidating and harassing him for protecting Negro civil rights. This may be a violation of the First Amendment as subsumed in the Fourteenth Amendment, in which case a court need not reach an equal protection question as to him. But regardless of the First Amendment question it is arguable that prosecution of Sobol on account of the race of his clients is an invidious discrimination forbidden by the equal protection clause. But that does not solve the intervention problem, because neither the statute nor the legislative history of

§902 is clear on the question of whether the "denial of equal protection . . . on account of race . . ." must be on account of the plaintiff's race. It is doubtful that the question would have occurred to Congress. But the argument can be made that Congress, in enacting §902, had in mind the rights of white civil rights workers as well as those of Negroes, and that Congress intended to allow the Attorney General to intervene in racial equal protection cases regardless of the race of the plaintiff.

Intervention by virtue of the Sobol allegations alone is thus supportable, but barely so. However, if we intervene by virtue of the allegations of the Negro plaintiffs, we would not be barred from participating in other aspects of the case. See, e.g., White v. Crook, 251 F. Supp. 401 (M.D. Ala. 1966), in which we argued the unconstitutionality of excluding women from juries.

C. Does the complaint state a cause of action on due process grounds?

The complaint also asserts claims under the Due Process Clause of the Fourteenth Amendment. The arguments here may provide a basis for decision before the equal protection issues could be reached. Therefore, the validity of the due process claims is relevant to the question of whether the United States should intervene under Title IX.

The due process argument rests most strongly on the lack of notice to Sobol prior to the criminal proceedings against him. It also rests on Sobol's rights to pursue his profession and Duncan's right to counsel. 7/

1. Louisiana law and other principles of law

Sobol's representation of Duncan, as well as his other professional activities in Louisiana were sanctioned under most accepted interpretations of the laws providing for practice by an out of state lawyer. The statute therefore fails to give notice that the practice of law as alleged is illegal. The propriety of Sobol's law practice in Louisiana is recognized under La. Rev. Stat. Ann. §37:214, which outlaws such practice by an out-of-state lawyer "temporarily present" in Louisiana, "unless he acts in association with" Louisiana attorneys. 8/ This statute has rarely been cited, and there is no reported case showing that anyone has ever been prosecuted under it. On the other hand, in State v. Henry, 196 La. 217, 198 So. 910 (1940), the trial court allowed a

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7/ Plaintiffs in Sobol v. Perez also allege a deprivation of due process through abridgment of their First Amendment rights and specifically refer to freedom of expression on the issue of racial equality. It may be that the First Amendment allegations are meritorious, but we need more specific information in this regard and this memorandum does not delve into this possibility.

8/ Perhaps appearing alone is not an act "in association with" the Louisiana attorneys. However, in Lefton v. City of Hattiesburg, Miss., 333 F. 2d 280, 285 (5th Cir., 1964), the court would permit out-of-state counsel to "take the lead in the direction and argument of the case."

resident of Texas to assist a Louisiana district attorney in the prosecution of a criminal case over objections of defendants. One of the reasons the Louisiana Supreme Court reversed was the lack of proof that the Texan was actually licensed to practice law in either Louisiana or Texas. Id. at 229. Apparently the court would have accepted a Texas license. 9/ The only other reported cases arising in Louisiana involved out-of-state lawyers desiring to appear alone and not in association with Louisiana lawyers.10/ In one such case an Illinois lawyer had handled local matters for at least two years and in the end appeared in court for litigation. Robinson v. Hunt, 211 La. 1019, 31 So. 2d 197 (1947). The trial court recognized his status over objections by opposing counsel. The Louisiana Supreme Court affirmed on the grounds that the Louisiana Supreme Court affirmed on the grounds that the Louisiana law would permit the lawyer to practice if the Illinois law would do the same. Under the Illinois Supreme Court Rule 58 (VII), Smith Hurd's Ill. Ann. Stat. §110-101.58 (VII) Illinois courts had discretion to admit out-of-state lawyers. The Louisiana Supreme Court reasoned that the Louisiana law (a predecessor to the present §37:214) gave the Louisiana Court the same discretionary powers.

9/ However, in this case there were other limitations to consider because the Texan had entered a criminal case on the side of the prosecution.

10/ In Ex Parte Perkins, 224 La. 1034, 71 So. 2d 558 (1954), Perkins petitioned the court for a declaratory judgment on his right to either practice alone or in association with a Louisiana lawyer. Perkins had been licensed in Mississippi and had resided and voted in Louisiana for 30 years. The court denied his petition on the grounds that he was not a "visiting attorney" under §37-214.

Robinson v. Hunt, 211 La. at 1034.11/ Since these are the only reported cases on the issue, it may be assumed that normally out-of-state lawyers are allowed to practice law in Louisiana without incident. Furthermore, it is the customary practice in courts in this country to grant admission pro hac vice to attorneys from sister states as a matter of comity. See Mason v. Pelkes, 57 Idaho, 10, 31-32, 59 P. 2d 1087 (1936); Freeling v. Tucker, 49 Idaho 475, 479 (1930); Mock v. Higgins, 3 Ill. App. 2d 281, 292-293, 121 N.E. 2d 865 (1954); Robinson v. Hunt, supra; see also In re Mossness, 39 Wis. 509 (1876) (recognizing custom of admitting attorneys pro hac vice, but refusing admission to general practice on other grounds); In re Pierce, 189 Wis. 441, 450, 207 N.W. 966 (1926) (same). See also Atchison, Topeka & Sante Fe Ry. Co. v. Jackson, 235 F. 2d 390 (10th Cir. 1956) (affirming the trial court's admission of a Minneapolis law firm); United States v. Bergamo, 154 F. 2d 31 (3rd Cir., 1946); Lefton v. City of Hattiesburg, Miss., 333 F. 2d 280 (5th Cir., 1964); Cooper v. Hutchinson, 184 F. 2d 119, 122 (3rd Cir. 1950).

Sobol would have reasonably concluded that Louisiana law permitted him to practice there. He received no notice to the contrary from either §213 or 214 of the Louisiana law. Normal custom and practice would also permit him to appear. Moreover, Judge Leon's apparent endorsement of Sobol's course of conduct would reinforce Sobol's conclusion that he was properly before the court.

2. Would Leon's misleading conduct estop him from later invoking criminal proceedings against Sobol?

Not only did the law appear to allow Sobol to practice, but the complaint and informal contacts suggest

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11/ Had Sobol attempted to appear alone, the rule in Robinson v. Hunt would have been applicable. The New York rule on admitting out-of-state attorneys is similar to the Illinois rule cited above, and gives the New York courts discretion. See Rules of the Court of Appeals for the Admission of Attorneys, R. VII-1, 29 McKinney's Consol. Laws. (Supp. 1966.)

that Leon sanctioned this conduct by allowing Sobol to appear alone at trial and possibly at other times prior to the day of the arrest. Under these circumstances, subsequent criminal proceedings against Sobol would be based on the kind of conduct by public officials that the Supreme Court has called "an indefensible sort of entrapment by the State." Raley v. Ohio, 360 U.S. 423, 426, 438 (1959); Cox v. Louisiana, 379 U.S. 559, 571 (1965). In Raley v. Ohio the Supreme Court held that convictions for refusal to answer certain questions before an Ohio investigatory committee violated the Due Process Clause where the chairman of the commission incorrectly told three of the appellants that they had a privilege not to testify. The Court reversed because (360 U.S. at 438):

> "to sustain the judgment of the Ohio Supreme Court on such a basis after the Commission had acted as it did would be to sanction the most indefensible sort of entrapment by the State -- convicting a citizen for exercising a privilege which the State clearly had told him was available to him."

In Cox v. Louisiana the Supreme Court reversed a conviction for picketing too near a Louisiana courthouse because "the officials present gave permission for the demonstration to take place across the street from the courthouse." 379 U.S. at 569. The local Chief of Police and other officials told the demonstrators, including Cox, that they could demonstrate on the sidewalk across the street, and they did not suggest that they go elsewhere or disband. The Supreme Court held (Id. at 571):

> Thus, the highest police officials of the city, in the presence of the Sheriff and Mayor, in effect told the demonstrators that they could meet where they did, 101 feet from the courthouse steps, but could not meet closer to the courthouse. In effect, appellant was advised that a demonstration at the place it was held would not be one "near" the courthouse within the terms of the statute.

The Court concluded that "the Due Process Clause does not permit convictions to be obtained under such circumstances" Ibid. Thereafter, the Sheriff ordered the demonstrators to disperse. At this point the Supreme Court ruled that Cox was justified in continuing to rely on the prior grant of permission and the prior official view of the law. In the Sobol situation, as in both of these cases, the appropriate official gave

permission for the conduct. As in Cox, the permission was actually an interpretation of law, and Sobol, like Cox, would be entitled to rely on it for determining his future conduct as well as conduct at the moment the permission was granted, and it could not be revoked without warning and without valid reasons to leave Sobol vulnerable to criminal proceedings. Even if the statute were clear, the judge's express permission would protect Sobol as it protected the three appellants in Raley v. Ohio.12/

3. Sobol's rights as an attorney and Duncan's rights as a defendant

The Third Circuit in Cooper v. Hutchinson held that where a state court summarily removed a lawyer before the end of the case, "the lawyer's right in his professional employment is . . . invaded." Id. at 123. In addition, excluding Sobol would be a denial of Duncan's right to counsel of his own choosing. The Second Circuit found a right to bring out-of-state counsel into the federal courts, resting its decision on the privileges and immunities of persons to secure counsel of their choice in Spanos v. Skouras Theatres Corporation, 364 F. 2d 161 (2nd Cir., 1960) the Court said (Id. at 170):

> Indeed, in instances where the federal claim or defense is unpopular, advice and assistance by an out-of-state lawyer may be the only means available for vindication.

The rule permitting the out-of-state counsel to appear recognizes that in certain situations this may be the only way to assure persons adequate representation. See Lefton v. City of Hattiesburg, supra. See also United States v. Bergamo, supra, where the Third Circuit

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12/ The conviction of a fourth appellant was affirmed in a four to four decision. The four affirming Justices made a distinction between an express statement in the three convictions which were reversed and the fourth, where the defendant had been clearly instructed to answer questions which were put to him. However, here, Sobol received no clear statement or any warning whatsoever that this prior interpretation of the law was to be altered.

D. Is the private suit barred by the Anti-injunction Statute?

1. The federal anti-injunction statute and comity.

The law provides as follows (28 U.S.C. §2283, 62 Stat. 968 (1948)):

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

In 1948 §2283 was revised to eliminate the narrow exception which allowed the federal courts to exercise power over state proceedings only with respect to bankruptcy matters. The new language allows federal courts to enjoin state proceedings wherever expressly authorized by act of Congress. Since 1948 there has been an open dispute in the courts over whether 42 U.S.C. §1983, under which the Sobol case is brought, authorizes federal courts to exercise equity powers over state court proceedings.

The Supreme Court has in dicta recognized the right to an injunction in special cases in Greenwood v. Peacock, 384 U.S. 808, (1965). The Supreme Court upheld the District Court's denial of removal under the removal statute, 28 U.S.C. §1443, from the court in Mississippi which was trying civil rights demonstrators (engaged in a voters registration dirve) for obstruction of public sidewalks. One of the reasons for refusing removal was the availability of injunctive relief. The court said, 384 U.S. at 829:

> But there are many other remedies available in the federal courts to redress the wrongs claimed by the individual petitioners in the extraordinary circumstances they allege in their removal petitions. If the state prosecution or trial on the charge of obstructing a public street or on any other charge would itself clearly deny their rights protected by the First Amendment, they may under some circumstances obtain an injunction in the federal court. See Dombrowski v. Pfister, 380 U.S. 479.

The Court in Dombrowski had been able to grant relief without determining whether §1983 was a statutory exception to the anti-injunction statute, see 380 U.S. at 484, n. 2. The Court granted injunctive relief before state court proceedings had commenced, and found §2283 inapplicable on this ground. Ibid. The Court nonetheless gave due consideration to the rule of comity reflected in §2283 which requires federal courts to abstain from interfering with state action unless there are special circumstances justifying the federal action. Such circumstances were found in Dombrowski, where (380 U.S. at 485-487):

> [T]he allegations in this complaint depict a situation in which defense of the State's criminal prosecution will not assure adequate vindication of constitutional rights. They suggest that a substantial loss or impairment of freedoms of expression will occur if appellants must await the state court's disposition and ultimate review in this Court of any adverse determination. These allegations, if true, clearly show irreparable injury.
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> . . . The assumption that defense of a criminal prosecution will generally assure ample vindication of constitutional rights is unfounded in such cases.

Two of the judges of the Fifth Circuit have endorsed opposite views on this issue. In Cameron v. Johnson, Mississippi officials were prosecuting civil rights demonstrators who had been peacefully picketing the courthouse in Hattiesburg. The defendants brought a class action seeking a federal injunction, and a three-judge district court summarily denied relief. In a per curiam opinion, the Supreme Court reversed and remanded with instructions to the court to "first consider whether §2283 bars a federal injunction in this case," and if it does not, to "determine whether relief is proper in light of the criteria" of its decision in Dombrowski v. Pfister, supra. On remand, Circuit Court Judge Coleman and District Court Judge Cox held that 42 U.S.C. §1983 creates no exception to the anti-injunction statute. Cameron v. Johnson, 262 F. Supp. 873, 878 (S.D. Miss. 1966).

However, in a lengthy and well-documented opinion, Circuit Judge Rives dissented on the grounds that §1983, by authorizing suits "in equity," authorized injunctive relief in a case such as the one before them. Judge Rives also concluded that the arrests under the statute were not for the purpose of preventing obstruction to the flow of traffic in and out of the courthouse, but for the purpose of inhibiting the freedom of expression of the picketers. Judge Rives said that "under the circumstances of this case, if the allegations are proved, §1983 is an express exception to §2283." Portions of Judge Rives opinion are set forth as follows (262 F. Supp. at 882-887):

> The circuit court first to consider this question at length was the Fourth Circuit, sitting en banc, Baines v. City of Danville, 337 F. 2d 579 (4 Cir. 1964). In determining that section 1983 was not an express exception to section 2283, the Fourth Circuit reasoned that if section 1983 was read as an express exception to section 2283 there would be little room left in which section 2283 might have an effective field of operation. The Fourth Circuit explained its holding as follows (337 F. 2d 579 at 589):
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> > "Creation of a general equity jurisdiction is in no sense antipathetic to statutory or judicially recognized limitations upon its exercise. Effective removal of a cause of action from a state court to a federal court is incompatible with further proceedings in the state court, but there is no incompatibility between a generally created equity jurisdiction and particularized limitations which restrict a chancellor's power or define the limits of his discretion."
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> * * *
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> Where a specific, limited and clearly delineated substantive right has been conferred by Congress the courts have found an express exception to section 2283. The express exception is the necessary concomitant of the need to vindicate federally created rights and is entirely consistent with the history of section 2283.
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> * * *

Section 2283 is aimed primarily at allowing state courts to proceed to the determination of issues involving state law which might be drawn to the federal courts. The allegations in the instant case show that this Court is asked to vindicate primarily federal rights protected by a specific federal statute. The charge is that section 2318.5 as applied here is a subterfuge for denying plaintiffs their federally protected rights as they relate to voting.

* * *

The allegation is that the purpose of section 2318.5 and these arrests and prosecutions under that section is to harass and punish the plaintiffs for their participation in the civil rights movement and to deter them, and others similarly situated, from exercising rights of free speech and assembly guaranteed by the Federal Constitution and the right to urge or aid others to attempt to register and vote guaranteed by federal statute. If this allegation is true, plaintiffs are not asking the federal courts to enjoin the proper application of state law in state courts, but are merely asking that federal rights be vindicated in federal courts which are primarly responsible for protecting those rights. Under these circumstances, section 1983 is and should be an express exception to section 2283. Cox v. State of Louisiana (II), 348 F. 2d 750 (5 Cir. 1965).

* * *

The great danger in federal intervention in state criminal litigation is that it will cause that litigation to be conducted piecemeal. Thus, federal courts have declined to intervene to suppress alleged illegally seized evidence. The defendant must await federal review through certiorari or by habeas corpus. In the instant case, if the plaintiffs succeed, then the litigation, present and future, will be brought to an end. As Judge Wisdom said in the Cox (II) case, 348 F. 2d 750-755: "[T]here is no federal invasion of states' rights. Instead, there is rightful federal interposition under the Supremacy Clause of the Constitution to protect the individual citizen against state invasion of federal rights."

In City of Greenwood v. Peacock, 384 U.S. 808, 86 S.Ct. 1800, 16 L. Ed. 2d 944 (1966), the Supreme Court held that prosecutions such as those here involved are not removable under 28 U.S.C.A. §1443. In so holding, the Supreme Court recognized that under "extraordinary circumstances," where the state prosecutions are themselves used to intimidate persons in the exercise of their constitutional and federal statutory rights, federal injunctions are available to protect these precious rights. City of Greenwood v. Peacock, 384 U.S. 808, at 829, 86 S.Ct. 1800 (1966).

While the Baines case may be correct as a general principle, its reasoning cannot be logically applied to cases involving specific rights clearly and specifically protected under a federal statute. If the allegations made here are true, the officials of the State of Mississippi by bringing or further continuing the prosecutions here involved have committed a federal crime. Would it not be absurd to say that the public officials here involved may be fined $5,000 and imprisoned for 5 years by a federal court, yet that same federal court may not enjoin their commission of that crime and thus prevent their effecting the very injury the statute is designed to prevent?

Moreover, section 2283 is not a jurisdictional statute, and in spite of its absolute language does not prevent a federal court from issuing an injunction against a state court proceeding where conditions warrant such relief. Section 2283 is a statutory adoption of the doctrine of comity. Judge Wisdom, writing for the Fifth Circuit in Southern California Petroleum Corp. v. Harper, 273 F. 2d 715 (5 Cir. 1960) at 718-719, said:

> "Section 2283 is essentially a rule of comity, and the demand here that a federal court interfere with state court proceedings is directed to the discretion of the federal court. This discretion should be exercised in the light of the historical reluctance of federal courts to interfere with state judicial proceedings."

Judge Rives then proceeded to analyze the facts in detail, and he concluded that in fact the demonstrators had not obstructed the traffic in and out of the Hattiesburg courthouse, and the overly-broad Mississippi law had been used to obstruct their constitutional rights.

As outlined by Judge Rives, the very fact of the proceedings, the restraint on liberty, the cost of litigation and the "presence of an unresolved criminal charge" so injured the exercise of the right to freedom of speech and assembly that the Mississippi statute was unconstitutional and an injunction should issue.

The Fourth Circuit in Baines v. Danville, discussed above by Judge Rives, did grant a temporary restraining order, 321 F. 2d 543 (4th Cir. 1963), pending the court's decision on the constitutionality of the anti-demonstration statute under which plaintiffs and others were being prosecuted. The TRO was issued in order not only to protect the jurisdiction of the court but also because the exigencies of the case presented an "extraordinary situation." Id. at 594. However, after a full hearing the TRO was dissolved 337 F. 2d 579, (4th Cir. 1964), affirmed, 357 F. 2d 756 cert. den., 381 U.S. 939. The court held that circumstances had changed and the TRO was no longer necessary. However, the court nontheless conceded that the limitations imposed by §2283 may be disregarded in certain compelling cases. The court discussed §2283 as follows (337 F. 2d at 593):

> It is a limitation upon the exercise by a District Court of its equity jurisdiction. It was born of the realization of the problems which would arise if the courts of the United States undertook to interfere with proceedings in state courts. It was fathered by the same principles of comity exemplified by Douglas v. City of Jeannette, 319 U.S. 157, 63 S. Ct. 877, 87 L. Ed. 1324. Since the statute was fathered by the principles of comity, it has been held that the statute should be read in the light of those principles and, though absolute in its terms, is inapplicable in extraordinary cases in which an injunction against state court proceedings is the only means of avoiding grave and irreparable injury. In our view, the congressional command ought to be ignored only in the face of the most compelling reasons, but we have certainly been told by the Supreme Court that in those circumstances it may be disregarded, for its parentage discloses that it was not intended to be as absolute as it sounds."

See also Mayberry v. Weinrott, 255 F. Supp. 80 (E.D. Pa. 1966). Suit was brought under the Civil Rights Act, 42 U.S.C. §1983, to enjoin a Philadelphia judge and other officials from going forward with criminal proceedings before them. Without expressly discussing §2283, the federal district court held that there was jurisdiction under 42 U.S.C. §1983, but that this power was to be exercised sparingly in unusual cases. The court said (Id. at 81):

> Intervention by injunction against state criminal proceedings should be resorted to "only to prevent manifest injustice in extraordinary cases involving the violation of fundamental rights or the denial of the basic requirements of due process of law."

In Cooper v. Hutchinson, 184 F. 2d 119 (3rd Cir., 1950) the Third Circuit held that the Civil Rights Act, §1983, confers jurisdiction notwithstanding §2283 of the Judicial Code, but it denied relief because it found a lack of irreparable harm. The Circuit Court remanded the case and instructed the District Court (which had dismissed the complaint) to retain jurisdiction pending determination on the issue in the New Jersey Courts. See also Tribune Review Publishing Co. v. Thomas, 153 F. Supp. 486, 490-491 (W.D. Pa., 1957). (Relief denied on the grounds that the facts did not establish a violation of the laws.)

The language of the Supreme Court, of Judge Rives in the Fifth Circuit, and of the Third and Fourth Circuits seems to allow federal injunctions where necessary to avoid irreparable injury to the constitutional rights of persons who are being subjected to prosecution. Surely such irreparable harm follows where "the state prosecution . . . would itself clearly deny . . ." constitutional rights. Greenwood v. Peacock, supra (dicta). 13/

13/ Most decisions which hold that §2283 bars suits under §1983 may be distinguished because the proceedings themselves did not injure any right. In these cases the §1983 claim arose during the course of litigation which had been initiated for valid reasons unrelated to any civil right claim. For example, in Smith v. Village of Lansing, 241 F. 2d 856 (7th Cir., 1957) the main issue involved property rights, and incidentally the plaintiff alleged a conspiracy to keep him from obtaining repair permits for his property.

Thus, no "irreparable injury" was found in Cooper v. Hutchinson, where the court had curtailed the accused's rights to representation by counsel of his choice, interposing a procedural due processclaim in the middle of criminal proceedings. Moreover, the attorney there was not subject to prosecution. In Baines the probable loss of constitutional rights made injunctive relief appropriate where defendants were being subject to trials sometimes as far as 200 miles from Danville, where some defendants were already serving their sentences, and were facing the possibility of the expense of an appeal, all before the constitutionality of the statute could be determined. 321 F. 2d at 644; 337 F. 2d 593-594. However, the court dissolved this order and denied further relief when "things [had] simmered down" and there was "no other basis for an assumption, or a conclusion in advance, that a trial in the Corporation Court of Danville of any of these defendants would be unfair." 337 F. 2d at 594.

In Sobol v. Perez, plaintiffs are seeking to stop state action which in itself is causing irreparable harm to plaintiffs' constitutional rights. This is not a mere question of procedure which has arisen during the course of valid litigation. Here the very reason for the litigation itself is tainted by the denial of equal protection and other constitutional rights.

13/ (Cont. from preceding page)

In Goss v. Illinois, 312 F. 2d 257, 259 (7th Cir., 1963) accused was trying to avoid state criminal contempt proceedings arising out of divorce proceedings. In Sexton v. Barry, 233 F. 2d 200, 226 (6th Cir., 1956) the case involved only the probate of a will. But see Chaffee v. Johnson, 229 F. Supp. 445 (S.D. Miss., 1964), affirmed on other grounds, 352 F. 2d 514 (5th Cir., 1965), cert. den. 384 U.S. 956.

The Second Circuit in dicta has recognized that equitable relief in the federal courts may be appropriate where a state court has denied litigants their equal rights by excluding their out-of-state lawyer. In State of New York v. Epton 248 F.Supp. 276 (S.D. N.Y. 1965) a criminal defendant in New York petitioned the federal court for removal under 28 U.S.C. §1443 on the grounds that the state had deprived him of his right to counsel. The Court denied removal, but it recognized that racial discrimination might have called for a different result. Id. at 278. The arrest and prosecution pending in the instant case discourages Negroes in pursuit of their civil rights claims in much the same way that the arrest and pending trial of John Hardy, who instructed Negroes in voting procedures, discouraged Negroes from exercising their right to vote. United States v. Wood, supra.

The Fifth Circuit in Wood avoided the anti-injunction statute by holding (1) that it did not apply when the United States was a party; and (2) 42 U.S.C. §1971 was a mandatory jurisdictional statute. However, the principles of the Wood decision should apply to cases brought by private persons under §1983, where the deprivation of rights is effected by the very institution of proceedings. Sobol's trial itself, like the trial of Hardy, injures the rights of the Negroes whom Hardy and Sobol assisted, and they "have no adequate relief," notwithstanding state procedural remedies available to Hardy or Sobol. See 295 F. 2d at 781-782. Civil rights lawyers giving assistance to Negroes in pursuit of their federal rights should not be arbitrarily subjected to prosecution for their activities. As the Court in Wood poiated out, the class of Negroes to be assisted will be intimidated whether or not, as in Wood, their instructor won his case in the state court, or, as here, their lawyer ultimately prevails in the state court.

§2283 does not apply when the United States is a Party.

Even if the court did not have jurisdiction as established above, if the United States intervened §2283 may not apply. Generally §2283 os not applicable here

to suits brought by the United States. United States v. Wood, supra; Leiter Minerals, Inc. v. United States, 352 U.S. 220 (1957); see also Baines v. Danville, 337 F. 2d at 589, and 593 (dicta). It is not clear whether this rule can be extended to allow the United States, by intervening, to confer jurisdiction where it would not otherwise exist. Section 902 of the 1964 Civil Rights Act does provide that when the United States intervenes in an action it "shall be entitled to the same relief as if it had instituted the action." This may mean that injunctive relief can be obtained by the United States, even if the private party could not do so. The dicta in Baines might support this analysis. If his point were pressed, intervention might improve the liklihood that the federal district court would assume jurisdiction. However, as discussed below, there are policy considerations against attempting to aid jurisdiction by intervening.

III. RECOMMENDATION

There are strong considerations on both sides of the question of whether the United States should intervene. On balance, I think we should not. The conflicting considerations are discussed below, but I first should point out the reason that seems most conclusively to suggest that we not intervene. On March 28, 1967, while checking the file of this case in the Clerk's office, a departmental attorney had a conversation with Judge Cassibry, which he reported as follows:

> [Judge Cassibry] told me that the Motion for Summary Judgment was indefinitely postponed and that he hoped that further proceedings by his court be avoided by virtue of an agreement which he had proposed to the attorneys in the case. His proposal was that Plaquemines authorities drop the charges against Sobol and that Sobol be accompanied by local counsel while trying cases in Plaquemines Parish.

This proposed settlement appears to be reasonable. Intervention by the United States would probably make settlement unlikely. It does not appear to be in the public interest to insist on litigating the issues in this case if they can be settled. In addition, our intervention in these circumstances would probably be a most unfortunate beginning to our relationship with a new District Judge. 14/

On the information we have and the pleadings as they stand there are these further considerations for and against intervention:

1. Liberally construed the complaint can be said to allege the denial of the equal protection of the laws of the Fourteenth Amendment on account of race within the meaning of Section 902; that the case is one of general public importance; and that the posture

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14/ However, the Departmental attorney who talked with Judge Cassibry further stated:

> On the basis of Judge Cassibry's demeanor during this conversation and my knowledge of him, I felt that his action in seeking me out was an innocent attempt to be helpful to the Department of Justice rather than a means of suggesting that the Department was not needed in this case.

is such that intervention at this time would be timely. It is fair to assume that among the white members of the Louisiana Bar cases involving civil rights questions by way of claim or defense by Negroes or civil rights workers are unpopular, and that the prosecution of Sobol would have the effect of perpetuating a system under which Negroes have limited access to adequate representation in such cases. It could be said that the United States has a substantial interest, and it is of great public importance, in seeing that the avenues of adequate representation in state courts are open to Negroes pressing civil rights claim--the Nation will be benefited when litigants themselves can effectively press their civil rights claims in state courts rather than having those claims increasingly pressed by the federal government in federal courts. 15/

On the other hand consideration should be given to the possible future effects of adopting a very broad construction of Section 902. There is no reason to suppose that the interest of Negroes will not be adequately represented in the Sobol injunction suit in the federal court; and intervention therefore might suggest that adequacy of representation is not a significant criterion in the exercise of the discretion of the Attorney General. And since the Sobol federal case will not resolve questions affecting our law enforcement responsibilities -- the statutes which we enforce -- intervention could suggest that this aspect is also not a significant criterion in the exercise of discretion by the Attorney General unless it is made clear that these factors were considered in this case but were outweighed by other factors.

15/ The Sobol problem is not confined to Louisiana. A similar suit was filed in Alabama, but was settled when the L.C.D.C. attorney left the State. Jelinek v. Boggs, S.D. Ala., Civil Action No. 4338-67. Berl Bernhard of the Lawyer's Committee told us he expects a case in Mississippi. See also the Reporter, Vol. 36, No. 4, "a Civil-Rights Setback in Southern Courts."

2. At the outside limits this case might involve pressing for the proposition that in cases involving civil rights claims by Negroes and civil rights workers, at least in states where the caste system has prevailed, states may not exclude practice in its courts by lawyers from out of state. The case could conceivably be disposed of on narrower, non-equal protection grounds; but since our authority under Section 902 is tied to equal protection claims intervention by us may mean a commitment by the United States to the broad principle. Since there is some risk of losing this broad principle, it might be asked whether Negro representation would be better served in the long run by a decision on narrower grounds based upon specific facts of the case. On the other hand, we could assert the equal protection claim more narrowly. For example, without claiming that Negroes have an absolute right to out-of-state counsel, we could argue that in the circumstances of this case, whereSobol was in fact associated with a Louisiana firm, it was an unreasonable burden on Plaquemines Parish Negroes to exclude him frmm practice. There is additionally the intimidation point which, if proved, would bring the Sobol case into the same company as Wood and would therefore not necessitate reliance on the broaden grounds.

3. There is some doubt as to whether Sobol's federal case may be barred by the anti-injunction provisions of 28 U.S.C. 2283. However, there is some authority for the proposition that suits by the United States to enjoin state proceedings are not similarly barred. It could thus be argued on the one hand that this being a case of general public importance the Attorney General might possibly intervene in order to save it from a dismissal. On the other hand it could be argued that it is unreasonable and improper for the United States to put its weight into a case solely to provide the court with a jurisdictional basis basis for proceeding.

4. If we decide that this appears to be the sort of case in which we should intervene, we should not do so without establishing independently some of the critical facts. Some of the factual holes that occur to me are as follows.

Has an information or indictment actually been filed or returned against Sobol? If so, what specific acts form the basis of the charges? Does the charge go to his defense of Duncan, or to his efforts to secure the setting of bond pending petition for certorari, or both? What proof is there, if any, that the defendants (especially Judge Leon and Leander Perez, Jr.) knew that Sobol was a member of the Bar of New York but not Louisiana, that his business in Louisiana is solely that of representing Negroes in civil rights cases without compensation from them, that he was actually associated with a licensed local law firm? What exact conversation occurred when and in whose presence between Sobol and the defendants (especially Judge Leon)? To what extent are Negroes in the greater New Orleans area (and Plaquemines Parish) unable to obtain adequate legal representation in cases involving civil rights questions? What is the normal or general practice in the courts of Louisiana respecting representation by out-of-state lawyers apart from the letter of the law? What are the details of Duncan's retention of Sobol as counsel? How many lawsuits has CORE been involved in in Louisiana? What have been the issues? In how many such suits has CORE been represented by LCDC?

- Leander Perez Sr.

Although Section 902 of the Civil Rights Act of 1964 does not expressly require the Attorney General to be satisfied that the private suit is meritorious (as is true with complaints under Title III, for example), some of the legislative history set out, supra, implies that the case should be meritorious. In addition the Attorney General does have to certify that the case is one of general public importance; and in the past this determination has been based at least in part on a close examination of the underlying facts. It is therefore recommended that if, on the basis of legal and other considerations explored herein, it is decided that intervention might be warranted some investigation to resolve these questions of fact should be undertaken.

5. On balance, in the absence of our own formal and independent investigation of the facts, I am inclined to recommend against intervention because (a) there is reason to believe that the legal representation in this case will be good (perhaps excellent); (b) there is a possibility that without our intervention the case will be settled and the charges dropped; (c) our intervention may have the appearance of a purpose to keep the case alive; and (d) there is a fair risk of losing the broad principle and in so doing Negro representation could suffer a setback.

3-judge court
Reg

Reaction

① I don't think LS committed
on any committed to the broad
proposition —

② I would not stay out because
of what judge said — the settlement
is not reasonable

③ I don't believe this suit is unrelated
to our enforcement responsibility under the Civil Rights Act?
→ same

Against

① I don't like intervening to keep suit alive —
problem with 2283 and Carawan?

For

① Public interest in establishing
precedent of United States monitoring operation
of registration