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Sumter County, Alabama and the Origins of the Voting Rights Act

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I been in de war so long, I ain't got tired yit,
I been in de war so long, I ain't got tired yit,
Well, my head been wet wid de midnight dew,
The 'fo'-day star was a witness, too,
I been in de war so long en I ain't got tired yit.[1]
—*African-American of Sumter County*

The Voting Rights Act of 1965[2] employs a wide menu of innovative techniques to secure the right to vote free from racial discrimination. The

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1. "HONEY IN THE ROCK:" THE RUBY PICKENS TARTT COLLECTION OF RELIGIOUS FOLK SONGS FROM SUMTER COUNTY, ALABAMA 47 (Olivia & Jack Solomon eds., 1991) [hereinafter HONEY IN THE ROCK].

Act radically changed the enforcement of the Fifteenth Amendment,[3] by relying less on the local federal courts and more on the Department of Justice, shifting the burden of justification away from those representing blacks and onto voting officials, and making extensive use of a test that looked to the effects of official action rather than requiring proof of discriminatory purpose.[4] These techniques were rooted in the litigation of the preceding seven years. That litigation flowed from an unusual tacit partnership—black citizens attempted to register to vote and the United States Department of Justice brought suits when local registrars discriminatorily denied them the vote.

Sumter County, Alabama exemplifies this process. To paraphrase the song of a black Sumter Countian,[5] local blacks had long been in a peaceful struggle for the vote, with a small vanguard repeatedly applying to register. Along with the "'fo'-day star," registration records bore mute witness to the systematic discrimination they encountered. Within a few years of the passage of the first modern civil rights act in 1957,[6] a newly reinvigorated Department of Justice exposed the practices that had denied many the right to vote. The Department developed innovative legal theories, methods of proof, and remedies in this and other similar cases. These would, in turn, supply the tools for structuring a truly effective voting rights law.

The story of Sumter County reveals particular types of civil disobedience. Martin Luther King, Jr.'s *Letter from the Birmingham Jail* speaks of just and unjust laws and justifies disobedience to the latter.[7] The blacks who sought to register to vote in Sumter County were in essence challenging the unjust law regime of white supremacy. Their means were not marches or sit-ins, but a much milder form of disobedience. By seeking to register to vote in significant numbers, the blacks of Sumter County disobeyed the customs, but not the laws, of Alabama. The real civil disobedience came from the state and local officials, who systematically violated the Fifteenth Amendment and sought to perpetuate the unjust and unlawful racial caste system. Official disobedience took two forms: "massive resistance in the sense of outright defiance of federal authority" and, more pervasively, "open failure to comply with unquestioned standards of federal law until forced to do so."[8] The response to all this, the Voting Rights Act, demon-

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2. Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1994)).

3. U.S. CONST. amend. XV.

4. Voting Rights Act of 1965 § 2, 42 U.S.C. § 1973 (1994).

5. HONEY IN THE ROCK, *supra* note 1, at 47.

6. Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634 (codified as amended in scattered sections of 28 and 42 U.S.C.).

7. Martin Luther King, Jr., *Letter from the Birmingham Jail* (Apr. 16, 1963), *available at* http://www.nobelprizes.com/nobel/peace/MLK-jail.html.

8. BURKE MARSHALL, FEDERALISM AND CIVIL RIGHTS 7 (1964). Marshall notes: "There is no parallel to be found in law enforcement." *Id.* He adds, "The crisis is more deplorable, of course, because it is not private persons . . . who are failing to comply with laws, but the states themselves, and the instrumentalities of state law." *Id.* at 8.

strates the law generating power of disobedience. Lawyers played important roles in all this. The black applicants for registration did not have their own lawyers; indeed, the few Alabama lawyers willing to challenge the system of white supremacy had their hands full. The passage of the 1957 Civil Rights Act introduced a new set of lawyers into the picture, the Civil Rights Division of the U.S. Department of Justice.[9] Their presence emboldened blacks to assert their right to vote. On the other side, the actions of Alabama Attorney General Gallion and Sumter County Probate Judge Dearman, described below, are examples of lawyers using illegitimate tools to support the illegal conduct of the local registrars.

Sumter County's story significantly supplements the two stories of the origins of the Voting Rights Act that are more familiar to us. Most prominent in public consciousness is the March 1965 civil disobedience exercised by civil rights marchers at the Edmund Pettus Bridge in Selma, Alabama, and the brutal response by Alabama state troopers, Dallas County deputy sheriffs, and their posse.[10] That assault, heavily covered by mass media, shocked the nation.[11] The march successfully resumed after a federal court, in light of the vast deprivations of black voting rights, upheld the right of the marchers to walk along the highway from Selma to the state capitol.[12] President Johnson quickly mobilized his legislative team, beginning with a ringing speech equating Selma with Lexington, Concord, and Appomattox—turning points in "man's unending search for freedom."[13] Congress enacted the Voting Rights Act in record time. President Johnson stressed that "[t]he real hero of this struggle is the American Negro."[14] So it seems plausible that the brave civil disobedience of leaders like John Lewis and Albert Turner[15] and of ordinary black citizens of Dallas County and its environs, coupled with the naked abuse of power by the state and local law enforcement officials, were the main sources of the Voting Rights Act.

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9. Civil Rights Act of 1957 § 111.

10. For discussion and photographs of these events see The Library of Congress, American Memory Section, *Today in History: March 7*, *at* http://www.memory.loc.gov/ammem/today/mar07.html (last visited March 3, 2003).

11. *See id.*; *see also* Roy Reed, *Alabama Police Use Gas and Clubs to Rout Negroes*, N.Y. TIMES, Mar. 8, 1965, at 1, 20.

12. The court held that the enormity of the deprivation outweighed the expense and inconvenience that the march would cause. Williams v. Wallace, 240 F. Supp. 100, 106-07 (M.D. Ala. 1965).

13. Lyndon B. Johnson, Special Message to the Congress: The American Promise (March 15, 1965), *in* 1 PUB. PAPERS 281 (1966).

14. *Id.* at 285.

15. John Lewis, an Alabama native, was the chairman of the Student Nonviolent Coordinating Committee from 1963-1966 and suffered severe head injuries when he helped lead the march over the Edmund Pettus Bridge. He had previously participated in lunch counter sit-ins and in the Freedom Rides. He has been a member of Congress from Georgia since 1986. *See generally* JOHN LEWIS & MICHAEL D'ORSO, WALKING WITH THE WIND: A MEMOIR OF THE MOVEMENT (1998). Albert Turner was a leader in a Perry County, Alabama, civil rights organization and was affiliated with the Southern Christian Leadership Conference. He was another leader of the Selma-Montgomery march. *See* Tom Gordon, *Turner Recalled as "One of Giants" of Civil Rights Era*, BIRMINGHAM NEWS, Apr. 15, 2000, at 1A; Tina Kelley, *Albert Turner is Dead at 64; Strove for Civil Rights in South*, N.Y. TIMES, Apr. 15, 2000, at A27.

The Supreme Court version expands the creation story, focusing on the longer history of discrimination. In upholding the constitutionality of this extraordinary law, the Court emphasized the history of denials of voting rights "through unremitting and ingenious defiance of the Constitution," and the civil disobedience of state officials.[16] The Court described the failure of prior civil rights laws, which imposed lesser measures, to remedy the constitutional violations.[17] That history, detailed in the record before Congress, exposed the flaws of case-by-case litigation of voting rights before hostile Southern federal courts.[18] Ninety-five years had elapsed since the Fifteenth Amendment forbade racial discrimination in voting[19] and Congress enacted legislation to secure the right to vote free from race discrimination.[20] Numerous Supreme Court decisions had elaborated on Fourteenth and Fifteenth Amendment rights to vote, free from sophisticated methods of discrimination.[21] And eight years earlier, Congress had attempted to strengthen enforcement by granting the Department of Justice authority to seek injunctive relief against racial discrimination in voting practices.[22] Yet discrimination persisted. Broadly speaking, these are the reasons the Court upheld the Voting Rights Act, and this history is often cited as justifying the Act.[23]

The case of Sumter County, Alabama, supports the Supreme Court's story, as do numerous other voting rights cases from the early 1960s. It is instructive to examine that case in detail, to humanize the very general story told by the Supreme Court. Close examination of this case—from investigation, to filing of suit, to trial, to decision, to aftermath—moves the story from the general to the specific.[24] However, the case provides illumination in another way. It not only helps explain why the Voting Rights Act was enacted, but also helps us understand the content of the Act. The remarkable provisions of this law did not spring full-grown from the Johnson administration or Congress, but were based in large part on lessons learned in the government's litigation of cases such as Sumter County's. Black civil disobedience of the customs of Sumter County was focused on voting rights, so the lessons learned were focused there, as well.

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16. South Carolina v. Katzenbach, 383 U.S. 301, 309 (1966).

17. *Katzenbach*, 383 U.S. at 309-15; *see also* Lyndon B. Johnson, Remarks in the Capitol Rotunda at the Signing of the Voting Rights Act (Aug. 6, 1965), 2 PUB. PAPERS 840, 841 (1966) ("There were those who said smaller and more gradual measures should be tried. But they had been tried. For years and years they had been tried, and tried, and tried, and they had failed, and failed, and failed. And the time for failure is gone.").

18. *Katzenbach*, 383 U.S. at 308-15.

19. U.S. CONST. amend. XV, §1.

20. The Enforcement Act of 1870, ch. 114, 16 Stat. 140 (1870).

21. *See Katzenbach*, 383 U.S. at 311-12 (citing ten such Supreme Court decisions).

22. Civil Rights Act of 1957 § 131(c), 42 U.S.C. § 1971(c) (1994).

23. *Katzenbach*, 383 U.S. at 337.

24. *See, e.g.*, Alfred L. Brophy, *The Tulsa Race Riot of 1921 in the Oklahoma Supreme Court*, 54 OKLA. L. REV. 67, 69 n.10 (2001) ("The trial is a particularly good vehicle for crystallizing the issues, which can sometimes tell a great deal about the ideology surrounding the trial, in addition to the factual questions in front of the court.").

Passage of the Voting Rights Act concluded a process that had begun with the first modern civil rights act, the Civil Rights Act of 1957[25]—a move from an intent test to an effects test to determine whether a practice was discriminatory, as well as a move from litigative to administrative remedies. The 1957 Act contained no new substantive standards, but created the Civil Rights Division of the U.S. Department of Justice and authorized it to bring civil suits to remedy racial discrimination abridging the right to vote.[26] To prevail in such a suit the government would have to prove that state or local officials treated black applicants for registration or voting less favorably than whites, or that the state law or practice was adopted with the intent of discriminating against blacks.[27] The 1957 Act also created the Civil Rights Commission, which was to become an important voice for further change.[28] The 1957 Act triggered an initially gradual, but later quickening, process of litigative action and congressional reaction.

Initial efforts to enforce the 1957 Act revealed the depth of Southern official resistance to black voting rights and the need for stronger measures.[29] Congress therefore enacted the 1960 Act, which, while hardly a radical measure, provided additional enforcement tools, including voting referees appointed by federal courts[30]—the precursor to the administratively appointed federal voting examiners of the Voting Rights Act.[31] The Department of Justice filed an increasing number of cases, attempting, with variable success, to use those new tools.[32] Yet Southern voting officials, though sworn to uphold the Constitution and laws of the United States, continued to resist.[33] Moreover, many Southern federal courts took refuge in the lack of specificity in the 1957 and 1960 Acts, and refused to grant effective relief.[34] This led in turn to the voting rights provisions of the 1964 Act.[35] While that Act primarily addressed segregation and discrimination in employment and federally assisted programs, it also adopted substantive standards that would enable the Department of Justice to prevail in voting rights litigation with-

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25. Pub. L. No. 85-315, 71 Stat. 634 (codified as amended in scattered sections of 28 and 42 U.S.C.)

26. *Id.*

27. *Id.* § 131.

28. *Id.* § 101.

29. *See* S. REP. NO. 86-1205, at 1926 (1960) ("Congress, when it passed the voting provisions of the Civil Rights Act of 1957, believed they would be effective tools in fulfilling the federal government's responsibilities under the 14th and 15th amendments to the Constitution. . . . To date, this assumption with respect to the 1957 Act has proved wrong.").

30. Civil Rights Act of 1960, Pub. L. No. 86-449, 74 Stat. 86 (codified as amended in scattered sections of 18 and 42 U.S.C.).

31. Voting Rights Act of 1965 § 6, 42 U.S.C. § 1973d (1994).

32. *See, e.g.*, United States v. Mayton, 335 F.2d 153, 164 (5th Cir. 1964) (remanding case and suggesting that district judge utilize services of voting referee); United States v. Parker, 236 F. Supp. 511, 518 (M.D. Ala. 1964) (denying motion to appoint federal voting referees).

33. *See* United States v. Mississippi, 339 F.2d 678, 682 (5th Cir. 1964) (discussing barriers to black voters added in 1960 and 1962).

34. *See, e.g.*, United States v. Mississippi, 229 F. Supp. 925 (S.D. Miss. 1964), *rev'd*, 380 U.S. 128 (1965).

35. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.).

out explicitly proving race discrimination.[36] Before the effectiveness of the 1964 Act could be tested, however, the combination of the Mississippi summer of 1964 and the attack at the bridge in Selma led to the 1965 Act. This radical legislation imposed very strict administrative remedies on the covered jurisdictions and contained the first explicit use of an effects test for racial discrimination.[37]

The choice of Sumter County may appear somewhat arbitrary. It was not a focal point of congressional attention and spawned no groundbreaking appellate decision. The case I want to discuss is a federal district court case, never reviewed on appeal. It cannot even be found in the Federal Supplement. Sumter County was far from Alabama's worst violator of black voting rights. Unlike in, for example, Lowndes and Wilcox Counties, at least some blacks in Sumter County were registered to vote.[38] Sumter lacks the notoriety of Dallas County, where the 1965 incident at the Edmund Pettus Bridge took place and where Registrar Victor Atkins, Sheriff Jim Clark, and other public officials engaged in a determined, lengthy, and sometimes violent, campaign against black voter registration.[39] Sumter was a remote county that did not attract attention from civil rights activists. And Alabama was no worse a violator of black voting rights than Mississippi and Louisiana.[40] The Sumter case saw less federal court delay, and the federal judge in the case granted some relief.

I chose Sumter County for three reasons. First, I worked on the case as a fledgling lawyer. This means I bring firsthand knowledge to bear,[41] though personal involvement may skew judgment. Second, it is precisely Sumter's ordinariness that makes it an appropriate case to study. Heroes such as Robert Moses, John Lewis, and Albert Turner could not be everywhere and the blacks of Sumter County, as in many places, operated without their aid. Similarly, if one points to judges like the oft-reversed Daniel Thomas of Alabama or the racist Harold Cox of Mississippi, or to overtly segregation-

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36. *See infra* notes 480-86 and accompanying text.

37. An excellent early commentary that recognizes the link between the government litigation and some provisions of the Voting Rights Act is Barry E. Hawk & John J. Kirby, Jr., Note, *Federal Protection of Negro Voting Rights*, 51 VA. L. REV. 1051 (1965).

38. DAN T. CARTER, THE POLITICS OF RAGE 247 (1995).

39. *See id.* at 248-50 (discussing the "clash between state and local police and civil rights marchers on the Pettus Bridge").

40. Mississippi was the location of considerable efforts by civil rights organizations to register blacks to vote, especially in the famous "Mississippi Summer" of 1964. These events, and the discriminatory and often violent reactions of white officials and others are well summarized in FRANK PARKER, BLACK VOTES COUNT: POLITICAL EMPOWERMENT IN MISSISSIPPI AFTER 1965, at 1-33 (1990). For a summary of voting discrimination in Louisiana, see United States v. Louisiana, 225 F. Supp. 353, 370-80 (1963), *aff'd*, 380 U.S. 145 (1965).

41. Some would go so far as to say "*Who we are* matters as much as what we are and what we think." Jerome McCristal Culp, Jr., *Autobiography and Legal Scholarship and Teaching: Finding the Me in the Legal Academy*, 77 VA. L. REV. 539, 543 (1991). I'm not so sure. My book, ENFORCING CIVIL RIGHTS: RACE DISCRIMINATION AND THE DEPARTMENT OF JUSTICE (1997), drew on both personal experience and Department of Justice files. To several reviewers, my personal knowledge enhanced the book; indeed, one wanted *more* personal feeling. Tinsley E. Yarbrough, *Book Review*, GA. HIST. Q., 1998, at 230. On the other hand, one objected that it was laced with my own bureaucratic policy bias. Michael D. Cary, *Book Review*, HIST: REV. OF NEW BOOKS, Winter 1998, at 61.

ist registrars like Theron Lynd of Hattiesburg or Victor Atkins of Selma,[42] the rejoinder may be that they are aberrations, because most judges and registrars simply tried to do their job as best they could. No such claim is available regarding Sumter County, an arguably ordinary place in the state that prompted this trenchant remark from an Alabama newspaper: "Mark it well: Alabama passed this law [the Voting Rights Act]."[43] The law is more easily adapted to deal with clear-cut villainy than with the non-malicious misdeeds of ordinary people, but only by addressing the ordinary can we eliminate discrimination. Finally, despite the ordinariness of the case, the complex relationships of Sumter blacks and a remarkable white woman, Ruby Pickens Tartt—folklorist and voter registrar—add a layer of richness to the story.

It is important to tell this story for several reasons. First, we are in the midst of a struggle for control of memory. If David Irving can deny the Holocaust,[44] so will some future historians deny or try to explain away the United States' record of racial discrimination. Indeed, the early twentieth century school of American history did precisely that, aided by such popular culture creations as *Birth of a Nation*[45] and *Gone with the Wind*.[46] Second, the justification for the prophylactic rules of the Voting Rights Act rests on somewhat impersonal accretions of evidence. Most writing about the Voting Rights Act focuses on its post-1965 history and amendments and provides only passing reference to the pre-1965 litigation.[47] Full understanding of what happened in Alabama in the 1960s will provide a better base for evaluating the continuing need for these rules. Third, Sumter County serves as a laboratory for more general lessons about judicial and governmental behavior. Finally, the case recalls a day when all three branches of government were, in varying degrees, united in seeking enforcement of a right conferred by the Constitution.

The late Robert Cover wrote, "No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning."[48] I want to explore whether we can learn more about a case by going beyond the court's opinion and examining the case's context, the judge, the parties, the testimony, and the contentions of the lawyers. In particular, can we learn

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42. FRANK SIKORA, THE JUDGE: THE LIFE AND OPINIONS OF ALABAMA'S FRANK M. JOHNSON, JR. 278-79 (1992); TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS, 1963-65, at 52 (1998).

43. *The Wallace-Lingo Act*, ALA. J., Aug. 9, 1965.

44. *See generally* DEBORAH LIPSTADT, DENYING THE HOLOCAUST: THE GROWING ASSAULT ON TRUTH AND MEMORY (1993) (describing the growth of Holocaust denial by persons such as Irving).

45. THE BIRTH OF A NATION (D.W. Griffith 1915).

46. MARGARET MITCHELL, GONE WITH THE WIND (1936).

47. *See, e.g.*, Thalia L. Downing Carroll, Casenote, *One Step Forward or Two Steps Back?* Abrams v. Johnson *and the Voting Rights Act of 1965*, 31 CREIGHTON L. REV. 917 (1998); Tyler J. Krandel, Note, *The "Safe" Danger: Remedies Under the Amended Voting Rights Act of 1965*, 12 N.Y.L. SCH. J. HUM. RTS. 163 (1994).

48. THOMAS ROSS, JUST STORIES: HOW THE LAW EMBODIES RACISM AND BIAS 10 n.12 (1996) (quoting Robert M. Cover, *The Supreme Court, 1982 Term: Foreword: Nomos & Narrative*, 97 HARV. L. REV. 4 (1983)).

by directing "greater attention to the concrete experiences of the disadvantaged and forgotten"?[49] In every case the lawyers shape their presentations to tell a story. The opinion in every case tells a story. However, the rules of evidence, the limited goals of the law, the agendas of those associated with the case, and the limitations of human nature may lead the players to distort the story or omit essential elements of it.[50] The role of the Department of Justice here adds a layer of complexity, for the Department represents the United States, not the black citizens whose right to vote is at stake. The case becomes a struggle between national power and a white minority local government seeking to perpetuate its power over the black majority. Representing the United States are lawyers who exert their skill and idealism within the context of a political bureaucracy.[51] Presiding over the struggle is a white judge, with a white court staff, inevitably influenced by the dominant white culture.[52] Moreover, the events recounted at trial have a beginning and end that differ from the story's beginning and end.[53] This is a case study of how trials shape narratives and how those narratives, once filtered through the prism of law, shape later responses.

I. SUMTER COUNTY

When I started work with the Civil Rights Division in 1964, I had little understanding of litigation or of racial discrimination. I had taken law school courses in trial advocacy and constitutional law. Still, my understanding was rudimentary, at best. I had never visited the Deep South. My boss, Dave Norman, sent me to Alabama to work under the tutelage of an experienced lawyer, Carl Gabel. My feet first touched Alabama soil in January 1964 when Southern Airways deposited me in Tuscaloosa, where Carl picked me up, and where we checked into a motel, part of a well-known national chain. That evening the black bellhop confided to us that the front desk was listening in on our conversations. The next day we drove off

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49. Rachel F. Moran, *Race, Representation, and Remembering*, 49 UCLA L. REV. 1513, 1514 (2002).

50. *See, e.g.*, Thomas Ross, *The Richmond Narratives*, 68 TEX. L. REV. 381, 405 (1989) (arguing that judges who disfavor affirmative action employ abstraction in their opinions, while those who favor it name names and talk of persons and places).

51. *Cf.* PETER IRONS, THE NEW DEAL LAWYERS, at xii (1982) (noting the skill, idealism, and worth of the work of governments lawyers, but also the inherent limitations stemming from bureaucratic rigidity and episodic political repression).

52. *See* VICTOR NAVASKY, KENNEDY JUSTICE 243 (1971) ("As a study of the Southern Regional Council concluded, 'A Negro involved in a federal court action in the South could go from the beginning of the case to the end without seeing any black faces unless they were in the court audience, or he happens to notice the man sweeping the floor.'"); ROSS, *supra* note 48, at 11, 14-15; Charles R. Lawrence, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322-23 (1987).

53. In addition to the published sources cited, I have drawn heavily on original Department of Justice records contained in DJ File 166-1-17, now found at the National Archives, College Park, Maryland, in Box 5, NN3-060-99-008. Early documents bear the file number 72-1-17, but appear in the above file. I also inspected the federal court file at the National Archives, East Point, Georgia, in Box 217, 80018. Finally, I have a personal file.

into some of the heavily black areas of Alabama and interviewed black contacts. This was before the days of direct dial phone calls, and we learned that the phone operator in one county was the sheriff's wife, and that she, too, listened in on our phone calls. It was clear that we federal attorneys had no cover of anonymity. Soon I was on my own in Sumter County, interviewing potential witnesses from Buck's Chapel to Kinterbish and from Black's Bluff to Emelle and Geiger, getting stuck in the slick red clay mud, tearing my suits on barbed wire, and learning the strange local dialect.

Let me place the lawsuit in perspective. Sumter County is a rural county that has always been sparsely populated, sitting in the middle of the so-called "Black Belt" of the Deep South, on the Mississippi border. In 1960 its voting age population consisted of only 3061 whites and 6814 blacks.[54] Even today, the population density of this 905 square mile county is just 16.4 people per square mile.[55] Only two towns have more than 500 people; the county seat, Livingston, is home to 3297 people, and York's population is 2854.[56] Until 1863, when President Lincoln issued the Emancipation Proclamation, both state and federal law treated almost all members of the black majority in Sumter County as slaves. "Most whites in Sumter County considered slavery an ordinance of God which had been revealed in the scriptures. Blacks were inferior to whites . . . ."[57] The Thirteenth, Fourteenth, and Fifteenth Amendments were enacted to protect the rights of the newly freed slaves. And, for a short period of time, blacks were allowed to vote. White candidates for office actively campaigned for black support.[58]

A classic tour of Alabama folklore describes the myth of Reconstruction[59] in Sumter County:

> Sumter had been having a hard time before Steve [Renfroe] came. The Republicans and the niggers had been raising hell. Black congressmen were sitting in the state house at Montgomery. Carpetbaggers were sitting in judgment at the Livingston courthouse. The Ku Klux had tried to help matters but only made them worse, for after they had ridden a few times a detail of Yankee soldiers had

54. United States v. Hines, 9 Race Rel. L. Rep. 1332, 1333 (N.D. Ala. 1964).

55. U.S. Census Bureau, State and County Quick Facts, *at* http://quickfacts.census.gov/qfd/states/01/01119.html (last modified Sept. 24, 2002).

56. *Id.*

57. Louis Roycraft Smith, Jr., History of Sumter County, Alabama, through 1886, at 106 (1988) (unpublished Ph.D. dissertation, The University of Alabama) (on file with The University of Alabama Library).

58. *Id.* at 187.

59. Southern literature repeatedly invokes Southern myths and legends. *See, e.g.*, W.J. CASH, THE MIND OF THE SOUTH (Doubleday Anchor 1956) (1941) (describing the legend of an idyllic era in the Old South (the pre-Civil War South), with antebellum life playing heaven to Reconstruction life's supposed hell. The myth of Reconstruction held that the South had been ruined and despoiled by carpetbaggers, scalawags, and ignorant, corrupt blacks.); *see also* RALPH MCGILL, THE SOUTH AND THE SOUTHERNER (1963).

> been sent to Livingston—to prevent further "outrages." Then things began to happen.[60]

What "things began to happen"? The whites of Alabama, through the use of terror, trickery, and the legal system, succeeded in disenfranchising their black fellow citizens by the early twentieth century.[61] Sumter County was known as a particularly tough place:

> An agent of the Justice Department assigned to anarchic Alabama during Reconstruction sent back word that "he had rather be in the heart of Comanche country than in Sumter County without soldiers." Klansmen in "bloody Sumter," reputedly led by notorious former Sheriff Stephen S. Renfroe, conducted a sustained reign of terror, whipping blacks in daylight and murdering, along with several blacks, a white lawyer from New York who had been politically active among black voters. [62]

In 1870, a black legislator from Sumter County was murdered as part of a wave of violence against blacks[63] and, in 1874, a black Sumter County Republican leader was assassinated, along with a carpetbagger, "and others saw white mobs destroy their homes and crops."[64]

Despite the violence, by 1900 there were over 78,000 registered black voters in the fourteen Black Belt counties of Alabama.[65] Disfranchisement came through the legal system: after adoption of the 1901 Alabama Constitution, there were only 1081.[66] As the noted political scientist V.O. Key

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60. CARL CARMER, STARS FELL ON ALABAMA 126 (1934). Ruby Pickens Tartt, the registrar who would play such an important role in the 1950s and 1960s, is credited in an author's note as having made his Black Belt excursions in the 1930s possible. *Id.* at xii.

61. Ex-slave Henry Garry gave this colorful description to W.F. Jordan of the Federal Writers Project of the Works Progress Administration:

> Git rid of the carpetbaggers? Oh, yes, sir, they vote 'em out. . . . The 'publicans done paid all the niggers' poll tax and give 'em a receipt so they could vote same as the whites. They made up to 'lect the offieers at the courthouse all niggers and then send other ones to Montgomery to make the laws. Same day the election come off there was a circus in Livingston, and the Democrats 'suaded the boss man of the circus to let all Sumter County niggers in the show by showing their poll-tax receipts. Yes, sir, when the show was over, the 'lection was over too, and nobody was 'lected 'cepting white Democrats.
>
> Course that made Sumter County a mighty unhealthy place for carpetbaggers and uppity niggers.

LAY MY BURDEN DOWN: A FOLK HISTORY OF SLAVERY 263 (B.A. Botkin ed., 1945).

62. VIRGINIA VAN DER VEER HAMILTON, ALABAMA: A BICENTENNIAL HISTORY 84 (1977) (citing Roy Granade, *Violence: An Instrument of Policy in Reconstruction Alabama*, 86 ALA. HIST. Q. 181, 199 (1971)); *see also* BORN IN SLAVERY: SLAVE NARRATIVES FROM THE FEDERAL WRITERS' PROJECT, 1936-1938, at 29 (1941) (containing Tartt interview of Oliver Bell on June 17, 1937, describing incidents with Renfroe and the Klan).

63. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 426 (1988).

64. *Id.* at 552.

65. NEAL R. PIERCE, THE DEEP SOUTH STATES OF AMERICA 246 (1974).

66. *Id.* The 1901 constitution was designed to disenfranchise blacks. Over eighty-eight percent of the voters in heavily black counties were counted as in favor of ratification of the 1901 constitution,

observed in 1949, the problem of governance in the Black Belt was seen as "one of the control by a small, white minority of a huge, retarded, colored population."[67] Although Sumter County's voting age population was seventy-six percent black in 1930 and sixty-nine percent black in 1960, ninety-five percent of the persons registered during that time period were white.[68] The government of Sumter County was a white oligarchy, with white officials wielding largely unchecked power over the black citizens. Ku Klux Klan violence continued to play an important role in Sumter County in the 1930s and '40s.[69] Vestiges of slavery remained in remote corners of the county, such as a plantation near the unincorporated town of Boyd, on the Mississippi border, where the violent death of an unwilling black "employee" resulted, not in a state court homicide prosecution, but in a peonage conviction in federal court in 1954.[70] An outside observer might well sympathize with the moralizing of Addie, the black maid in Lillian Hellman's melodrama, *The Little Foxes*: "Yeah, they got mighty well off cheating niggers. Well, there are people who eat the earth and eat all the people on it like in the Bible with the locusts. Then there are people who stand around and watch them eat it."[71]

Some blacks, despite the barriers placed in their way, bravely tried to register to vote. Registration, a simple procedure in most states, had been transformed by racial politics into a difficult challenge for black applicants. Those blacks who did manage to register would vote in the Democratic primary in this one-party state, using ballots containing the symbol of the "Alabama Democratic Party," not a donkey, but a rooster and the slogan "white supremacy."

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while less than half the voters in the other counties voted to ratify. J. MORGAN KOUSSER, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880-1910, at 166-67 (1974); *see also* Symposium, *Celebrating the Centennial of the Alabama Constitution: An Impetus for Reflection*, 53 ALA. L. REV. 1 (2001).

67. V.O. KEY, SOUTHERN POLITICS 5 (1949).

68. Brief in Support of Plaintiffs' Findings of Fact, Conclusions of Law and Decree at 10, United States v. Hines, 9 Race Rel. L. Rep. 1332 (N.D. Ala. 1964) (No. 63-609) [hereinafter U.S. Brief].

69. *See generally* GLEN FELDMAN, POLITICS, SOCIETY, AND THE KLAN IN ALABAMA, 1915-1949 (1999). Feldman relates several incidents of Klan violence in Sumter County in the '30s and '40s. For example, "A Sumter County mob did lynch a black man on Independence Day [1931?], . . . precipitating a race riot in which three more blacks and two whites died." *Id.* at 213. In 1935, during a Share Croppers Union campaign, "Whites also riddled a car with bullets as it carried northern organizers across Sumter County's Gorgas bridge near Livingston." *Id.* at 267. In 1948 "Sheeted raiders also broke a Massachusetts student's windshield in Sumter County because it had a Henry Wallace bumper sticker on it." *Id.* at 298. Feldman also mentions the Klan's women's auxiliary in York [the second largest town in Sumter County] in the 1920s. *Id.* at 23.

70. *See* discussion of the *Dial* case, *infra* notes 275-78 and accompanying text.

71. LILLIAN HELLMAN, *The Little Foxes*, *in* SIX PLAYS 205 (1979).

JEFFERSON COUNTY

Official Absentee Ballot

PRIMARY ELECTION

MAY 1, 1962

DEMOCRATIC PARTY

INSTRUCTIONS: To vote for any candidate make a cross (X) in the square in the appropriate column, according to your choice.

V.O. Key compared the Black Belt with the Dutch and British colonies, present-day Indonesia and India: "[A]s in the case of the colonials, that white minority can maintain its position only with the support, and by the tolerance, of those outside—in the home country or in the rest of the United States."[72] Two governing interrelated myths served as support for the white minority to submerge the African-Americans' rights: the belief in the tragedy of Reconstruction, as retold in countless histories of the South, and the belief in the incompetence of most African-Americans. Both myths appear in a 1946 newspaper advertisement that the Sumter County Democratic Executive Committee placed in the *Birmingham News* in support of a ballot measure designed to impede black voter registration.[73] The ad bore the headline: "Save Alabama from Negro Rule and Domination," and argued:

72. KEY, *supra* note 67, at 5. The position they were maintaining was "an economic and social system based on subordinate, black labor." *Id.* at 9.

73. Sumter County Democratic Executive Comm., *Save Alabama from Negro Rule and Domination*, BIRMINGHAM NEWS, Oct. 30, 1946, at 9 (political advertisement).

> During the tragic era of the Reconstruction, many Alabama counties, in the hands of carpetbaggers and scalawags, backed by Federal bayonets, were represented by negroes in our State Legislature.
>
> These ignorant negroes and their associates ruined the State financially by issuing bonds at high rate of interest, on which we have already paid out over $60,000,000 in interest, and still owe a large part of the principal which is in non-callable bonds. Their crimes against the intelligent white people smell to High Heaven even to this day. A more glaring example of the folly and seriousness of placing the franchise AGAIN in the hands of thousands of ignorant people could not be named.
>
> The Boswell Amendment . . . will correct this defect in our State Constitution and will in no way affect present voters. Vote "YES," and save our State from negro rule and domination.[74]

Sumter County had a mixed record when it came to black voter registration. Unlike some counties, it allowed and even encouraged a few blacks to register. The voting rolls listed 3238 white (more than 100% of the white voting age population) and 315 black registered voters (or 4.6% of the black voting age population).[75] The first three blacks known to have registered in the 1900s did so in 1933.[76] The next one did not register until after World War II, in 1947, with twenty-three more in the next six years.[77] Then, in January of 1954, Alabama repealed the cumulative aspect of its poll tax, and a large number of both black and white citizens registered in the early months of 1954.[78] However, in May of 1954 the Supreme Court decided *Brown v. Board of Education*[79] and black registration came to a virtual standstill until 1962, when thirty-nine blacks registered. After *Brown*, the board of registrars rejected 47% of the black applicants and 1.7% of the whites.[80] The district court concluded that these statistics "created a presumption that Negro citizens have been deprived, and are being deprived, of the right to register to vote because of race or color."[81]

These are not the only statistics suggesting blacks were discriminated against based on the color of their skin. In 1960, the average Sumter County black had about five years of education, whereas the average white had approximately 11.5 years of schooling.[82] The few years of education blacks did receive took place in racially segregated schools, even ten years after

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74. *Id.* The Boswell Amendment did pass, but a federal court held it unconstitutional. Davis v. Schnell, 81 F. Supp. 872 (S.D. Ala. 1949) (three-judge district court panel), *aff'd*, 336 U.S. 933 (1949).

75. United States v. Hines, 9 Race Rel. L. Rep. 1332, 1333 (N.D. Ala. 1964).

76. U.S. Brief, *supra* note 68, at 11.

77. *Id.*

78. Transcript at 587, United States v. Hines, 9 Race Rel. L. Rep. 1332 (N.D. Ala. 1964) (No. 63-609) (on file with author) (testimony of Judge W.E. Dearman).

79. 347 U.S. 483 (1954).

80. *Hines*, 9 Race Rel. L. Rep. at 1333-34.

81. *Id.* at 1335.

82. U.S. Brief, *supra* note 68, at 84.

racial segregation in public education had been declared unconstitutional, where teachers were paid less to teach and the student-to-teacher ratios were considerably higher.[83] While $2.63 was spent on capital improvements for every white student, only $0.41 was spent for every black student.[84] Sumter County schools spent over twenty-eight dollars to transport every white student, while spending only $7.54 to transport each black student.[85] For every black student, the county spent $129 on teachers; nearly 150% of that was spent on teachers for every white student.[86]

The disparity between opportunities for blacks and whites did not end when they left the academic setting. Though the percentage of unemployed blacks and whites was almost equal in 1960, the median income was significantly lower in black families.[87] In 1959, forty-nine percent of black families in Sumter reported an income under $1000 as compared to only nine percent of white families.[88] While .08% of white families made over $10,000, the percentage of blacks making more than $10,000 was forty times smaller.[89] Only thirty-two percent of black families in Sumter were homeowners while over ninety-two percent of whites owned their own home.[90] Disparities in wages and job opportunities became more dramatic in the following decades, with black unemployment growing to almost sixteen percent in 1980.[91]

Despite the history of slavery, the violence, and the rigged economic system, not all was bleak for Sumter County blacks. A vibrant black culture developed, including a rich trove of folk tales and music. The songs are preserved in the John Lomax collection, *Deep River of Song: Alabama*, recorded in 1937-1940.[92] The liner notes observe: "It is a testament to the creativity and resilience of these African Americans that singing constituted such an affirmative part of their life experiences even under the most appalling socio-economic and political circumstances."[93] Folklorist Alan Lomax referred to the singers whom his father recorded as "the black geniuses who have made life in this country so much more livable and more beautiful by

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83. *Id.*

84. *Id.*

85. *Voting Rights: Hearings on S. 1564, Before the Senate Comm. on the Judiciary*, 89th Cong. 1169 (1965) [hereinafter *Senate Hearings*].

86. *Id.*

87. U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, 1 CENSUS OF POPULATION: 1960, pt. 2, at 2-224, 2-229 (1960). This discrepancy grew over the next twenty years such that the 1980 Census reported the median black family earning only $8095 while the median family earned $20,436. U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, 1 CENSUS OF POPULATION: 1980, pt. 2 (1980).

88. U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, 1 CENSUS OF POPULATION: 1960, pt. 2, at 2-224, 2-229 (1960).

89. *Id.*

90. U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, 1 CENSUS OF HOUSING, pt. 2, at 2-69, 2-85, 2-97 (1960).

91. U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, 1 CENSUS OF POPULATION: 1980, pt. 2 (1980).

92. VARIOUS ARTISTS, DEEP RIVER OF SONG: ALABAMA (Rounder Records 2001).

93. Jerrilyn McGregory, *Alabama Bound*, *on* DEEP RIVER OF SONG: ALABAMA (Rounder Records 2001) (contained in liner notes).

their wit and by their music."[94] While most blacks were dirt poor, some owned their own homes and land. A few, such as undertaker James Weatherly—who had informed the U.S. Attorney of the peonage-related killing of Herbert (Monk) Thompson by members of the Dial family[95]—and contractor L.L. Delaine, were not economically dependent on the white minority.[96] Others, such as public school teachers and the Negro county agent[97] Henry J. Spears, earned a middle class living, but were dependent on the good will of the white-run Board of Education or Agricultural Service.[98] While for a period in the 1950s there seems to have been a countywide black organization, James Weatherly told us that it had been disbanded because of "a few 'Judases' among [the] Negro community who kept on informing the white leaders of their actions."[99] National civil rights organizations mainly ignored Sumter County. The black community was widely dispersed, and civic life was organized around local churches.

II. VOTER REGISTRATION IN ALABAMA

Voter registration has always been a state, not a federal function. As an Alabama federal three-judge district court noted, "The States, not the Federal Government, prescribe the qualifications for the exercise of the franchise, and Federal Courts are not interested in these qualifications unless they contravene the Fifteenth Amendment or other provisions of the United States Constitution."[100] So qualifications and procedures for registering to vote varied from state to state. Universal suffrage was not yet firmly established. Twenty-one states still maintained literacy or character requirements of some sort, some states required payment of a poll tax as a prerequisite to voting, and the age of eligibility to vote was fixed at twenty-one.[101]

I registered to vote in California as soon as I turned twenty-one, then the minimum age for voters. As I recall, I had been in a post office, seen a registration form, written in my name, birth date, and address, signed it and

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94. *Id.* (citing Lomax to Jonathan Lindsey, *quoted in* VIRGINIA POUNDS BROWN & LAURELLA OWENS, TOTING THE LEAD ROW: RUBY PICKENS TARTT, ALABAMA FOLKLORIST (1981)).

95. *See* discussion of *Dial* case *infra* notes 275-78 and accompanying text.

96. Memorandum from Edward H. O'Connell to file (Nov. 19, 1964) (on file with author).

97. County Agents worked for the Agricultural Extension Service, which was funded by the federal government to provide information and assistance to farmers. In Alabama, the service was strictly segregated. Interview with H.J. Spears by R.J. Groh and Gerald Stern, in Livingston, Alabama (Aug. 22, 1961) (on file with author).

98. For example, Spears "indicated that most of his work on voter registration must be sub-rosa due to his fear that he will lose his job." Memorandum from Edward H. O'Connell, Attorney, to Trial File, Sumter County (Nov. 19, 1964) (on file with author).

99. *Id.*

100. Davis v. Schnell, 81 F. Supp. 872, 876 (S.D. Ala. 1949), *aff'd*, 336 U.S. 933 (1949). Indeed, one judge of the United States Court of Appeals for the Fifth Circuit argued: "The reach of the Fifteenth Amendment was never meant to apply to registration, but was only to protect against denials, not distinctions, because of race or color, to vote." United States v. Alabama, 304 F.2d 583, 604-05 (5th Cir. 1962) (Cameron, J., dissenting).

101. *See Voting Rights: Hearings on H.R. 6400 Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 89th Cong. 30 (1965) [hereinafter *House Hearings*].

mailed it in.[102] Registration in most states was relatively simple, conducted by a civil service clerk.[103] Not so in some of the states of the Deep South. In Alabama, registration was conducted by a board of registrars, three local citizens—generally retired men and widows—appointed by the governor, the auditor, and the commissioner of agriculture and industries.[104] In essence, during the administration of Governor George Wallace, the appointers were all under the influence of the governor, who had won office on a platform of "Segregation today, segregation tomorrow, segregation forever."[105] Why a board instead of a clerk? A student of voting in Alabama speculates: "[A] board may be more useful for purposes of discrimination and as an instrument to deter Negro voting by those who wish to do so."[106]

Registrars, invariably white, were paid ten dollars for each day they worked—a modest but not insubstantial sum in 1964 (ten days at a nice motel in Montgomery cost me $70.80 in 1964, according to my diary).[107] The Board in a county the size of Sumter met twice a month, with extra days in July, in January of even-numbered years, and the fall of odd-numbered years.[108] The 1901 Alabama Constitution had been designed to facilitate disenfranchisement of black voters and to minimize future black registration.[109] In addition to the usual age, competency, and residency requirements, it required that applicants be of good character and understand the duties and obligations of citizenship, and it conditioned the right to vote on payment of a poll tax.[110]

For decades, the white primary system shielded Alabama from black voters. Because election in the Democratic primary was in those days tantamount to election, exclusion of blacks from the primaries meant that even if they could register, blacks could not influence the outcome of elections.[111] However, after the National Association for the Advancement of Colored People (NAACP) successfully convinced the Supreme Court in 1944 to outlaw the white primary system,[112] the Alabama Democratic Party became concerned that black voters would begin to have a voice in Alabama poli-

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102. However, California's constitution did require that registrants be able to read the constitution in the English language. *See id.* at 31 n.7 (citing CAL. CONST. art. II, § 1).

103. Thirty-one states had no literacy tests in 1960; for examples of registration in many such states, see REPORT OF THE PRESIDENT'S COMMISSION ON REGISTRATION AND VOTING PARTICIPATION, 31-34 (1963).

104. DONALD S. STRONG, REGISTRATION OF VOTERS IN ALABAMA 1 (1956).

105. Governor George C. Wallace, Inaugural Address (Jan. 14, 1963), *available at* http://www.archives.state.al.us/govs_list/inauguralspeech.html (last updated Apr. 12, 2002).

106. STRONG, *supra* note 104, at 115-16.

107. *Id.* at 17.

108. *Id.* at 15-16.

109. MALCOLM COOK MCMILLAN, CONSTITUTIONAL DEVELOPMENT IN ALABAMA, 1798-1901: A STUDY IN POLITICS, THE NEGRO, AND SECTIONALISM 263-309 (1955); *see also* Wayne Flynt, *Alabama's Shame: The Historical Origins of the 1901 Constitution*, 53 ALA. L. REV. 67 (2001).

110. Like most states, Alabama also disqualified persons convicted of serious crimes. The list of crimes was designed to stress those crimes that were thought to be "black" crimes. That aspect of the Alabama requirements was held unconstitutional in *Hunter v. Underwood*, 471 U.S. 222, 232-33 (1985).

111. STRONG, *supra* note 104, at 21-22.

112. Smith v. Allwright, 321 U.S. 649 (1944).

tics. So it sponsored the so-called "Boswell Amendment" to the Alabama Constitution, which the voters adopted in 1946.[113] The Boswell Amendment required that an applicant be able to "*understand and explain* any article of the Constitution of the United States."[114]

Black applicants who were refused registration successfully challenged the Boswell Amendment in federal court in 1949.[115] The court quoted a prominent backer of the Amendment, who had proclaimed: "I earnestly favor a law that will make it impossible for a Negro to qualify, if that is possible. If it is impossible, then I favor a law, more especially a constitutional provision, that will come as near as possible, making possible, the impossible."[116] Not only was the Boswell Amendment intended to exclude blacks, it was administered to do so: "[T]he ambiguous standard prescribed has, in fact, been arbitrarily used for the purpose of excluding Negro applicants for the franchise, while white applicants with comparable qualifications were being accepted."[117]

Within two years of the decision invalidating the Boswell Amendment, Alabama amended its constitution again, this time adopting the requirement that the applicant be able to read and write any article of the United States Constitution selected by the registrars.[118] The Board was to determine qualifications by furnishing the applicants with an application form, whose content was determined by the Supreme Court of Alabama. The board was to require applicants to fill out the forms with no assistance.[119] The applicant was to sign the form and an oath of allegiance before a registrar.[120]

The application forms had evolved from a simple one-page form in use in 1902, which called for little more than the applicant's signature, affirming his qualifications.[121] In 1922, after women were allowed to vote, the form was expanded; while only one page long, the applicant had to fill in blanks reflecting name, occupation, marital status, sex, race, residence, and length of residence.[122] By 1952, the form had become four pages long,[123] with the addition of more questions, a separate oath (so that the applicant would have to sign two places on the form), and an "examination of supporting witness."[124] The supporting witness had to be a registered voter and

113. STRONG, *supra* note 104, at 22.
114. *Id.*
115. Davis v. Schnell, 81 F. Supp. 872 (S.D. Ala. 1949), *aff'd*, 336 U.S. 933 (1949).
116. *Davis*, 81 F. Supp. at 880.
117. *Id.*
118. ALA. CONST. art. 8, § 181 (amended 1951).
119. A study of voter registration in Alabama concluded that "the task of filling it out is so difficult that the majority of the counties studied ignore" the ban on assistance. STRONG, supra note 104, at 36. For example, "in five north Alabama counties a registrar reads the questions aloud, the applicant gives an oral reply, and the registrar writes in the answers." *Id.* These counties had a small black population. *Id.* at 36-37.
120. *Id.* at 21, 31.
121. Application for Registration, 1902-1921 (on file with author).
122. Oath of Applicant for Registration, 1922 (on file with author).
123. STRONG, *supra* note 104, at 30.
124. *Id.* at 30-47.

had to certify to the length of the applicant's residence[125] and that "I know of no reason why he is disqualified from registering."[126] Later the form was revised to delete the reference to race.

The new form, with twenty-one questions, plus sub-questions, required the applicant to disclose facts that went beyond the qualifications for registration.[127] For example, to the question about whether the applicant had ever been convicted of a felony or crime of moral turpitude the Alabama Supreme Court added the question whether the applicant had ever been charged with such a crime.[128] There were now six questions and one subquestion relating to loyalty. The applicant was required not only to affirm that he or she would support and defend the Constitution, but also to list the duties and obligations of citizenship and to say whether he or she regards "those duties and obligations as having priority over the duties and obligations you owe to any other secular organization when they are in conflict."[129] In 1954, the NAACP identified nine techniques being used to deny Alabama blacks registration; many of those techniques continued in use until adoption of the Voting Rights Act.[130]

In 1960, after black organizations had begun educating blacks how to fill out the form, the order in which the questions appeared was arranged in twenty different sequences.[131] In 1964, as civil rights activity intensified, the Alabama Supreme Court adopted a new five-page form, which included this question: "Have you ever seen a copy of this registration application form before receiving this copy today? If so, when and where?"[132] It was perfectly lawful to see a copy of the registration form, which, after all, the law prescribed in order to determine qualifications, rather than as some sort of test. This question did not, however, bear at all on voter qualifications, but could intimidate or entrap applicants. Perhaps even more important was the addition of Part III of the form, composed of civics questions (e.g., "Name the lieutenant governor of Alabama?"), excerpts from the Constitution which the applicant was required to read aloud, and a space for the applicant to write words dictated by the registrar.[133] A different Part III was to be used

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125. *Id.* at 45-46.

126. Oath of Applicant for Registration, 1952 at 4 (on file with author).

127. STRONG, *supra* note 104, at 31-33.

128. *Id.* at 32.

129. *Id.* at 33.

130. The techniques were the requirement of a white character witness, property qualifications, strict enforcement of literacy tests, use of unreasonable questions about the Constitution, rejection for technical mistakes in filling out forms, delay in serving applicants, helping whites but not blacks fill out their forms, evasion, and deliberate threats by official hangers-on. Herbert Hill, *Southern Negroes at the Ballot Box*, THE CRISIS, May 1954, at 261, 265-66.

131. U.S. Brief, *supra* note 68, at 6 n.3.

132. The court stated that it did so because "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." U.S. Brief, *supra* note 68, at Table E (quoting Supp. Order of the Sup. Ct. of Ala., *In re Application for Registration Questionnaire and Oath* (Jan. 14, 1964) (on file with author)).

133. *See* Application of Richard Wilson, Jr., *infra* at Appendix B.

each month.[134] The new form also eliminated the requirement that the supporting witness certify that he or she knew of no disqualifying circumstance; the witness only had to certify to the applicant's residence.[135]

The Alabama system of registration was suspect, to say the least. It resembled in many ways the system adopted by the Boswell Amendment and thrown out by the federal court as racially discriminatory. It was the descendant of the 1901 constitution, which had as its "purpose . . . to disfranchise every Negro in the state and not a single white man."[136] It left each county board of registrars great latitude in deciding whom to register and whom to reject. Moreover, its lack of transparency facilitated registrar discrimination based on race, and it was administered by untrained officials who owed their position to a segregationist governor. However, the system's adoption had not been marked by the same overt expressions of intent to exclude blacks from the vote, and the system was not phrased in the same standardless words as the Boswell Amendment. Arguably, a frontal attack on the system would be more difficult to sustain. That frontal attack would not be mounted until January 1965, when the United States filed *United States v. Baggett*,[137] seeking to enjoin the state and every board of registrars from using the literacy comprehension test embodied in the application form.[138] In the interim, how would racial discrimination in voter registration in Sumter County be addressed, if at all?

III. THE CIVIL RIGHTS DIVISION

Into this picture entered the Civil Rights Division of the U.S. Department of Justice. Congress created the Division in 1957,[139] in a bipartisan vote (minus the so-called "Dixiecrats"—Southern Democrats) primarily to enforce the Fifteenth Amendment right not to be denied the vote on account

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134. U.S. Brief, *supra* note 68, at Table E (quoting Supp. Order of the Alabama Supreme Court, *In re Application for Registration Questionnaire and Oath* (Jan. 14, 1968) (on file with author)).

135. *Id.*

136. United States v. Alabama, 252 F. Supp. 95, 98 (M.D. Ala. 1966) (quoting Delegate Heflin at the 1901 Alabama Constitutional Convention).

137. Memorandum from Frank M. Dunbaugh to Brian K. Landsberg (Mar. 22, 1966) (on file with author) (explaining that *United States v. Baggett*, a case in the Middle District of Alabama, "attacked the literacy tests then in use in Alabama," but after the passage of the Voting Rights Act the tests were no longer used, so voluntary dismissal was recommended).

138. *See* 1965 ATT'Y GEN. ANN. REP. 171. The case relied on the disparate education theory and on the freezing principle, charging that because blacks had received an inferior education, the new application test adopted in 1964 "freezes the existing racial imbalance of the voting structure in Alabama." Arthur Osgoode, *U.S. Would Nullify State Voter Tests*, MONTGOMERY ADVERTISER, Jan. 16, 1965, at 1. In a last ditch repetition of earlier tactics, probate judges in six counties (Dallas, Perry, Hale, Wilcox, Lowndes, and Marengo) were enjoined from allowing illiterate registrants to vote; a three-judge federal district court declared those injunctions null and void. Reynolds v. Katzenbach, 248 F. Supp. 593, 594 (S.D. Ala. 1965). By March of 1966 the need for litigation on literacy tests in Alabama had disappeared, since the tests were no longer in use. They were abandoned when the constitutionality of the Voting Rights Act was upheld. Memorandum from Brian K. Landsberg to Frank M. Dunbaugh (Mar. 22, 1966) (on file with author).

139. *See* Civil Rights Act of 1957 § 111, Pub. L. No. 85-315, 71 Stat. 634 (paving the way for the creation of the Civil Rights Division).

of race.[140] The characteristics of the Division and its lawyers helped shape the ultimate content of the Voting Rights Act.[141] That Act marks the culmination of Congress's quest to ensure nondiscrimination in voting. Not only did state and local officials resist racial neutrality, but also many federal district court judges were at best reluctant, and at worst antagonistic, to the enforcement of the Fifteenth Amendment.[142] The one seemingly reliable neutral party, willing and able to attack racial discrimination in voting practices, was the Civil Rights Division of the Department of Justice.

Creation of a special division for civil rights enforcement deviated from the enforcement structure during Reconstruction. Then, the department had relied on the local United States Attorneys to enforce the civil rights laws.[143] However, the United States Attorneys were political appointees chosen from the local party faithful. Thus, the replacement of United States Attorneys "by men who were, in Wade Hampton's phrase, 'always conservative, staunch & true,'"[144] hastened the end of Reconstruction. By contrast, after 1957 enforcement was centralized in Washington, D.C. headquarters, in the Civil Rights Division.[145]

The Division's function was law enforcement, not voter registration or civil rights activism.[146] The Division leadership tried hard, and with general success, to promote a culture of fair treatment of local officials who were the potential defendants.[147] The lawyers were vigorous, pragmatic idealists, trained to turn square corners.[148] They were not desk lawyers, but spent much of their time in the field, interviewing prospective witnesses and gaining firsthand understanding of the facts on the ground. They developed an eye for spotting discrimination and they carefully selected strong cases. Some Division lawyers might be prone to see discrimination under every tree, but the Division's structure and procedures required a strong showing before suit could be filed. The philosophy was to present such a strong case that if the trial court ruled adversely, the government could convince the court of appeals that the lower court's fact findings were clearly erroneous. The government lawyers, though talented, did not all come from "the best and the brightest" of the Ivy League, but included people from small towns,

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140. *Id.* § 131 (codified as amended at 42 U.S.C. § 1971 (1994)).

141. On the role of the Justice Department, see Hawk & Kirby, *supra* note 37, at 1060-61 (explaining that the different philosophies attributed to different attorneys general impacted the amount of litigation brought and the amount of active investigation undertaken in areas of known discrimination).

142. *See, e.g.*, United States v. Mississippi, 229 F. Supp. 925 (S.D. Miss. 1964), *rev'd*, 380 U.S. 128 (1965).

143. ROBERT M. GOLDMAN, *A FREE BALLOT AND A FAIR COUNT*, THE DEPARTMENT OF JUSTICE AND THE ENFORCEMENT OF VOTING RIGHTS IN THE SOUTH, 1877-1893, at 35-40 (2001).

144. *Id.* at 189.

145. *See* LUTHER A. HUSTON, THE DEPARTMENT OF JUSTICE 69-86 (1967).

146. *Id.* at 69-70.

147. *See* BURKE MARSHALL, FEDERALISM AND CIVIL RIGHTS 23-25 (1964).

148. Justice Holmes had said "Men must turn square corners when they deal with the Government." Rock Island, Ark. & La. R.R. v. United States, 254 U.S. 141, 143 (1920). John Doar, who led the litigation activities of the Division under Burke Marshall, turned the phrase around and required that government attorneys, too, always turn square corners.

from the Midwest, West, and South, as well as Northeasterners. This proved invaluable to understanding the workings of rural boards of registrars. The Department lawyers developed innovative theories of liability and relief, and they carefully based their relief requests on the facts in the record. The record they compiled not only showed discrimination, but a cumulative disregard of clear legal mandates by both voting officials and some federal judges throughout much of the Deep South.[149] So it was no accident that the Department of Justice played a major role in drafting the proposed legislation and that when Congress began considering the content of the Voting Rights Act, it could call on an impressive factual record and well-developed legal theories.

With the arrival of the Justice Department attorneys, Sumter County officials whose discrimination had gone on unchallenged were faced with what they probably viewed as a flood of federal interlopers. In retrospect, the suit may seem incredibly easy for the government to win, because the evidence of racial discrimination was overwhelming. Yet, in 1964, some courts were still ruling against the government in similar cases, either on the merits or in fashioning relief.[150] The underlying legal issue of equal voting rights for whites and blacks hardly seemed contestable, for the Fifteenth Amendment explicitly forbade abridging the right to vote because of race.[151] Yet the doctrine of white supremacy was so ingrained in the political process that Southern government officials viewed nondiscrimination in voting as a radical idea and Southern federal judges were, of course, political appointees who could normally be expected to echo the prevailing community sentiment.

A presidential appointee, confirmed by the Senate, headed the Division.[152] The Division did little in 1958 and 1959, its first two years,[153] but in 1960, President Eisenhower placed New Yorker Harold Tyler in the position, and Tyler hired John Doar, a Wisconsin Republican, as his top assistant. Suddenly the Division became quite active, including its initial attempted foray into Sumter County. President Kennedy's inauguration in January 1961 brought new top leadership to the Department, including Attorney General Robert F. Kennedy and Assistant Attorney General for Civil Rights, Burke Marshall. But bipartisanship survived and John Doar was retained, becoming "the imperturbable Gary Cooper of the Kennedy civil rights team."[154] As Democrats, the president and attorney general had close

149. *Voting Rights Legislation: Joint Statement on S. 1564, Before the Senate Committee on the Judiciary*, 89th Cong. 6-9 (1965).

150. *See* CIVIL RIGHTS DIV., DEP'T OF JUSTICE, STATUS REPORT 1964, at 41, 77 (Dec. 31, 1964), *reprinted in Senate Hearings*, *supra* note 85, at 1219, 1251 (citing Judge Cox's remedy of complete re-registration and Judge Dawkins's refusal to grant freezing relief) [hereinafter STATUS REPORT].

151. U.S. CONST. amend. XV, § 1.

152. Civil Rights Act of 1957 § 111, Pub. L. No. 85-315, 71 Stat. 634.

153. U.S. COMM'N ON CIVIL RIGHTS, REPORT OF THE U.S. COMMISSION ON CIVIL RIGHTS 1959, at 131 ("Nearly two years after the passage of the Act, the Department of Justice had brought only three actions under its new powers to seek preventive civil relief.").

154. DIANE MCWHORTER, CARRY ME HOME 240 (2001). Peter Irons noted that "each of the New

relationships with many politicians from what was still a one-party Deep South. However, most attorneys in the Division were merit, rather than political, hires. Indeed, the first merit hire under the Kennedy administration was Arvid (Bud) Sather, a Republican. Many newly hired attorneys came straight from law school, under the Attorney General's Honors Program, which Attorney General Brownell instituted in 1954, to end "cronyism, favoritism and graft" in hiring.[155] According to Burke Marshall, he was looking for "young lawyers that would travel and work very hard, and we were pretty successful in doing that."[156] The Division was a small law office. In 1963, it had twenty-one lawyers assigned to forty-five voting rights cases plus fifty-six ongoing investigations.[157] This made it, however, the largest civil rights law office in the country, far outstripping the NAACP Legal Defense Fund.[158]

The Division viewed the effort to make the right to vote a reality for black citizens as "simply a matter of law enforcement."[159] As Assistant Attorney General Burke Marshall explained, "It turns on the impact of the federal system on law enforcement action directed against state officials—a question of the ability of the federal courts to control state officials in the conduct of state business."[160] Marshall did not claim that securing the right to vote would bring about an end to other forms of discrimination, but he did argue that "federal rights cannot successfully be asserted where the right to vote is not protected."[161] In other words, the right to vote is a necessary, but not a sufficient, protector of other rights.

The Division's initial approach in each county with alleged voter discrimination was to attempt to negotiate with local officials before going to

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Deal general counsel I have studied . . . personified a distinctive legal style that shaped his agency's approach to litigation and influenced agency lawyers in their handling of cases . . . ." PETER H. IRONS, THE NEW DEAL LAWYERS 5 (1982). Doar's legal style and work ethic profoundly influenced the Division lawyers. As described in detail below, it entailed vigorous presence in the field, reliance on tedious analysis of records, and presentation of a massive case so that adverse fact-findings would be overturned as clearly erroneous.

155. BRIAN K. LANDSBERG, ENFORCING CIVIL RIGHTS 157 (1997); *see also* HUSTON, *supra* note 145, at 255-56.

156. Transcript, Burke Marshall Oral History Interview I, by T.H. Baker (Oct. 28, 1968), Internet Copy, LBJ Library, at 3, *available at* http://www.lbjlib.utexas.edu/johnson/archives.hom/oralhistory.hom/MARSHA-B/marsha-b.pdf (last visited Mar. 4, 2003) [hereinafter Marshall Oral History Interview].

157. Affidavit of Burke Marshall at 48-49, United States v. McLeod, 229 F. Supp. 388 (5th Cir. 1964) (No. 21475) (Record on Appeal).

158. See JACK GREENBERG, CRUSADERS IN THE COURTS (1994), for an account of the Legal Defense Fund's staffing and work. *See also* J.W. PELTASON, FIFTY-EIGHT LONELY MEN 94-95 (Urbana, Univ. Ill. Press 1971) (1961). The LDF, as it is now known, depended entirely on philanthropy for its budget; the concept of a private attorney general, who may receive an award of attorney's fees in successful litigation, had not yet emerged to supplement the LDF's budget. The first black lawyer was admitted to the Alabama bar in 1937. By 1961, only 19 had been admitted. S. Christian Leadership Conference v. Sessions, 56 F.3d 1281, 1286 (11th Cir. 1995) (en banc). Since most local white lawyers would not bring suits challenging racial discrimination, the LDF had to rely on a slender network of black attorneys to supplement its central staff, located in New York.

159. MARSHALL, *supra* note 147, at 8.

160. *Id.* at 8-9.

161. *Id.* at 11-12.

court.[162] This was in line with a policy of federal deference to the states. As Assistant Attorney General Marshall explained, the policy "has been to try to make the federal system in the voting field work by itself through local action, without federal court compulsion."[163] However, as he further noted, in some areas efforts to achieve voluntary compliance were fruitless, because "the political viability of white supremacy is at stake."[164] Marshall presciently noted that "the degree of federal involvement will be determined more by the amount of acceptance of state responsibility for the recognition of federal rights, than by anything else. But the prospect for the near future is not good."[165]

Early Division efforts in Sumter County were scattered. The F.B.I. interviewed the members of the Board of Registrars in 1960, and Department attorney R.J. Groh (now a United States Magistrate Judge) suggested that he go to Sumter and "do a little drum beating."[166] Attorney Gerald Choppin, a native of New Orleans, argued a records production case in 1961 and supervised records inspection. He was followed by Gerald Stern, a bright young attorney who would much later, in private practice, distinguish himself, first in a mass tort case involving a collapsed dam in West Virginia,[167] and later as the lawyer for Armand Hammer of Occidental Oil. Then came Frank Dunbaugh, a career lawyer who would later be in charge of all litigation in Alabama, and Warren Radler, now a noted trial lawyer in Chicago. They were followed by J. Harold (Nick) Flannery, the urbane, courtly raconteur who became an appellate judge in Massachusetts,[168] and Carl Gabel, the steady, dependable career attorney who introduced me to Alabama in 1964. All these lawyers worked briefly in Sumter County in 1961. During the 1960s, the small staff, unpredictable crises, and shifting priorities led to constant shuffling of personnel from one case to the next.

The small size of the Division and the heavy and shifting caseload led to frequent readjustments of attorney assignments.[169] The trial team in the

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162. *Id.* at 23.

163. *Id.*

164. MARSHALL, *supra* note 147, at 24.

165. *Id.* at 40.

166. Memorandum from R.J. Groh to Mr. Norman, Sumter County FBI Report (Aug. 16, 1960) (on file with author).

167. *See generally* GERALD STERN, THE BUFFALO CREEK DISASTER (1977).

168. A judge who served with Flannery on the Massachusetts Court of Appeals recalled that Nick,

> [B]ecame a leader in the civil rights division's increasingly aggressive efforts to secure the right to vote of black citizens in the south . . . . The headline of a newspaper published by a civil rights organization in Holly Springs, Miss., once announced, "Flannery is Coming," so well-known had he become as a champion of voting rights in the area.

Rudolph Kass, *A Judge Who Had a "Taste for Life,"* 27 MASS. LAW. WKLY. 1099 (1999).

169. *See, e.g.*, Memorandum from John Doar to Burke Marshall, Attorney Assignments (Sept. 14, 1964) (on file with author). It lists active cases in twenty-three counties (some with multiple cases), as well as decrees in eight counties requiring enforcement follow-up. It assigns a supervisor, an attorney in charge, and other attorneys assigned to each county. Although other lawyers were listed as working on enforcement in Perry County, I was drafted to handle the case in October. Although I was listed as in charge of the three cases in Dallas County, John Doar tried them. In short, assignments were in constant flux.

Sumter County case consisted of attorneys different from those who worked on the initial investigation. All were white attorneys from the North—David L. Norman from the northern plains via California, Arvid (Bud) Sather from Wisconsin, Jonathan Sutin from New Mexico (now an appellate justice there), Jim Kelley from Iowa, and me. In the words of one federal appellate judge, we constituted the "spectacle of the invasion by the bright young men from the North which is taking place in the South today."[170]

Bud Sather tried the Sumter County case. He had served as a naval aviator and was still active in the Naval Reserves. In his early thirties, he impressed me, at twenty-six, as a seasoned trial lawyer. Presumably because of his calm, unflappable demeanor and his intelligence and common sense, the Department had assigned him to serve as James Meredith's roommate at the University of Mississippi during the early tumultuous days of Meredith's desegregation of Ole Miss. By the time of the Sumter trial, he had worked actively in fifteen Alabama counties, as well as in Georgia, Mississippi, and Louisiana.[171] Bud was a litigator in the best sense of the word—organized, focused, skeptical, well prepared, and articulate.

Chief advisor and supervisor of the case was David L. Norman, who would later rise to become Assistant Attorney General for Civil Rights. He was a brilliant man who treated litigation like a chess game and who helped develop the innovative legal theories that would eventually migrate from the caselaw into the Voting Rights Act.[172] He was deeply dedicated to black voting rights, as indicated by this interview a year before the Sumter County case was tried:

> I have a technique I use and I used it in the Madison Parish, Louisiana case. I got the registrar on the stand and the galleries were packed with Negro leaders in the county. So I asked her questions for the benefit of the Negroes. Questions like: Now what are your office hours? What days are you in your office? Now just what do you require of persons who come in to make application to register? etc. And the Negroes are sitting right there and they leave the courtroom armed with all that information. Plus, you see, I purposely ask the registrar if she intends to register all persons who come in and who are qualified.

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170. Alabama v. United States, 304 F.2d 583, 611 (5th Cir. 1962) (Cameron, J., dissenting). Similarly, New Deal attorneys had been referred to as a "plague of young lawyers." IRONS, *supra* note 154, at 300.

171. Record on Appeal at 129, 173, United States v. McLeod, 229 F. Supp. 383 (5th Cir. 1964) (No. 21475).

172. "A large amount of the credit for the development of the government's strategy in enforcing the Civil Rights Act of 1957 belongs to Norman . . . ." John Doar, *The Work of the Civil Rights Division in Enforcing Voting Rights Under the Civil Rights Acts of 1957 and 1960*, 25 FLA. ST. U. L. REV. 1, 2 (1997).

> Now, we just recently tried that case before Judge Dawkins and he is nowhere near a decision, but the next week seventy Negroes were registered.[173]

I had spent most of my life in California. I was in the eleventh grade at C.K. McClatchy Senior High School in Sacramento when *Brown v. Board of Education*[174] was decided, and I attended U.C. Berkeley as an undergraduate and law student until 1962, just missing the Free Speech Movement and general campus turmoil. Aside from raising "Nickels for Bricks" to help rebuild a school in Clinton, Tennessee, that had been bombed to thwart integration, my only other "civil rights" activities had been a few courses on free speech and equality from Jacobus tenBroek,[175] American history from the renowned Reconstruction scholar Kenneth Stampp, and equity from Dean Frank Newman of Boalt Hall. I had started my first law job, with the Civil Rights Division, just a few months before the Sumter County trial, at a salary of $7030 a year. I had already worked on trials in the Middle and Southern Districts of Alabama by the time I helped with the Sumter County trial. During my first year as a Justice Department lawyer, I would work on nine trials and hearings and spend about 150 days in Alabama.

In earlier days, some regarded Department of Justice lawyers as "political hacks whose sympathy for their programs was suspect."[176] Attorney General Kennedy and Burke Marshall had, by 1964, shunted any such persons in the Division aside. Lawyers assigned to the Division's litigation in the Deep South were dedicated to enforcing the civil rights laws, which at that time primarily protected voting rights. Burke Marshall noted that as events revealed that the Department of Justice would be thrust into the thick of the "dramatic, colorful, interesting, turbulent" civil rights period, "there were just a lot of young people coming out of law schools that wanted to participate."[177] John Doar explains that "the spirit of the Division lawyers assigned to enforce the Civil Rights Acts was governed by what President Havel of Czechoslovakia calls a philosophy grounded in hope . . . the ability to work hard for something because it makes sense, not because it stands a chance to succeed."[178] A very short time analyzing voter records or interviewing potential witnesses revealed the depth of racial discrimination in voter registration, enough to fire up anyone with a fundamental sense of

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173. CHARLES V. HAMILTON, THE BENCH AND THE BALLOT: SOUTHERN FEDERAL JUDGES AND BLACK VOTERS 220-21 (1973) (quoting a Jan. 1963 interview with David L. Norman).

174. 347 U.S. 483 (1954).

175. Professor tenBroek, I later learned, had written the seminal works on the history of the Fourteenth Amendment and on the Equal Protection Clause. JACOBUS TENBROEK, THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT (1951); Jacobus tenBroek & Joseph Tussman, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341 (1949).

176. IRONS, *supra* note 154, at 11 (describing New Deal lawyers' perceptions of the Department of Justice).

177. Marshall Oral History Interview, *supra* note 156, at 4.

178. Doar, *supra* note 172, at 5.

fairness. Attorney General Nicholas Katzenbach singled out the Division attorneys for praise: "I believe I have never, whether in government, in private practice, or in the academic world, seen any attorneys work so hard, so well, and, often, under such difficult circumstances."[179]

Racial discrimination in administration of voter registration had been illegal since the Fifteenth Amendment was adopted in 1870.[180] Congress had immediately exercised its power under section two of the Amendment to enact legislation protecting the right to vote free from racial discrimination.[181] But during the more than ninety years leading up to these lawsuits, the courts and Congress had provided no clear road map of how to secure equal voting rights. They simply forbade racial discrimination in voting. The earlier cases had involved the grandfather clause, white primaries, racial gerrymandering—all legislative actions with clear racial purpose.[182] When Alabama blacks sought relief against racially discriminatory practices of registrars in the early 1900s, the Supreme Court, in a remarkably brutal and insensitive opinion of Justice Holmes, had said that the courts were powerless to provide a remedy even if the alleged discrimination existed.[183] Even when the Court did say that plaintiffs were entitled to a remedy, as in the school desegregation cases, it left the content of the remedy vague.[184] And in 1959, the Supreme Court upheld North Carolina's use of a literacy test despite its disproportionate exclusion of black citizens whose poor literacy stemmed from the state's discrimination in education.[185]

So the Department faced two difficult hurdles. First, what proof would be needed to make out a case of racial discrimination in registration? Second, what relief would the government be entitled to? In the end, the voting cases became a template for other racial discrimination cases and legislation, and eventually for legislation and cases protecting against discrimination on account of sex, national origin, religion, disability, and age.[186] And they laid the template for the Voting Rights Act, often called the most effective piece of civil rights legislation.[187]

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179. *House Hearings*, *supra* note 101, at 5.

180. U.S. CONST. amend. XV ("Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude. Section 2. The Congress shall have power to enforce this article by appropriate legislation.").

181. The Enforcement Acts (including the Civil Rights Act of 1870, ch. 114, 16 Stat. 140, and the Force Act of 1871, ch. 99, 16 Stat. 433. Both were repealed by Act of Feb. 8, 1894, ch. 25, 28 Stat. 36).

182. *See, e.g.*, Smith v. Allwright, 321 U.S. 649 (1944) (declaring white primary unconstitutional); Guinn v. United States, 238 U.S. 347 (1915) (declaring grandfather clause unconstitutional).

183. Giles v. Harris, 189 U.S. 475, 488 (1903).

184. *See* Brown v. Bd. of Education, 349 U.S. 294 (1955); Brown v. Bd. of Education, 347 U.S. 483 (1954).

185. Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959).

186. *See* Civil Rights Act of 1964, tit. VII, 42 U.S.C. § 2000(e) (1994); Americans with Disabilities Act, 42 U.S.C. § 2101 (1994); Age Discrimination in Employment Act, 29 U.S.C. § 621 (1994).

187. *See, e.g.*, Drew S. Days, III, *Reality*, 31 SAN DIEGO L. REV. 169, 176 (1994) ("As the Voting Rights Act approaches thirty, it deserves to be regarded as the most effective piece of federal civil rights legislation on the books.").

Although the front persons in court in 1964 were all white men, behind the scenes the Civil Rights Division had, in one important respect, departed from traditional hiring practices in the Department of Justice. One had to look far to find a black person in the other divisions, except, perhaps, for messengers. Even the Civil Rights Division had only a few black lawyers; few blacks were admitted to law schools in those days. However, the Civil Rights Division began recruiting black clerical staff from business colleges and other predominantly black institutions. Analysis of voter applications was a resource intensive exercise, and a group of black clerical staff worked alongside the white attorneys in a two-room suite known as "Hattie's shop." It was named after the senior clerical worker, Hattie Ballard. The work somewhere acquired the nickname "Geef work." The existence of this group was inspiring to the lawyers, in at least two ways. First, the black women in Hattie's shop put their all into the work; they knew firsthand about racial discrimination and they thought they were doing the Lord's work. Second, the contrast between the complexion of the Civil Rights Division work force and that of the rest of the Department, combined with the hard work and ability of Hattie's shop, suggested to us the depth of racial discrimination. We knew that our colleagues in other divisions would simply believe that their hiring practices were not discriminatory. If Robert Kennedy's Justice Department could rationalize its behavior in that way, how much more likely was it that Southern voter registrars would do the same? Thus, Hattie's shop stood as a reminder that special measures might be required to ensure against racial discrimination and also as an example that could support the prophylactic measures of the Voting Rights Act.

IV. *DRAMATIS PERSONAE*

The other players in the Sumter County case represent well some of the general types of persons whose conduct led to the adoption of the Voting Rights Act.

A. Joe Bizzell

I had begun work for the Civil Rights Division of the Justice Department in January of 1964, after compiling a very good record as a law student at Boalt Hall and the University of London. Eager to correct injustice and litigate constitutional cases, I immediately found myself stuck for long hours at a microfilm machine, reading voter registration applications from Alabama seven days a week. Then came my first trip to Alabama, interviewing black citizens who had tried to register to vote. So this was law practice. Records work and driving the red clay roads of rural Alabama. This was how I first met Joe Bizzell, a fifty-seven-year-old farmer in Coa-

topa,[188] Alabama, who had tried unsuccessfully to register to vote in 1954 and 1961. He had, indeed, been in the war so long, but hadn't got tired yet. Mr. Bizzell, a handsome middle-aged man with a confident and pleasing manner, owned 120 acres of land; he had a fifth-grade education. My analysis of voter registration records had revealed that a white person of comparable background had successfully registered at the same time as Bizzell's 1954 application was rejected; the white applicant, Winn Holley, had not filled out his own form. Mr. Bizzell's penmanship was ragged but legible. I got directions to his home, located six miles past the end of the hardtop; as I neared it, the wheels of my rental car began to slip in the wet red clay of the road. Soon I was stuck; trying to rock the car out of the increasingly deep rut, I managed to wedge it against a pine tree. I walked the final yards to Mr. Bizzell's white wooden farmhouse. He threw a saw into his tractor and went to my car. After cutting down the tree, he towed me out of the mud. He then invited me to his plain but comfortable home where we talked about his experiences trying to register to vote.

Mr. Bizzell's account was factual and straightforward. Three times he had made applications, had received no help from the registrar, had never heard whether his applications were accepted or not, but figured he had failed the "test" somehow. The first time the merchant he had asked to serve as supporting witness said "that he would have to know Mr. Bizzell for 25 years in order to be able to sign, so he did not sign."[189] He told me he had not tried to register since 1961 because "he feels that he had done his best and does not think that he could do any better."[190] I asked him to read to me from the application form and he read it out loud and well; by comparison, several white witnesses at the trial were unable to read at all, though they had nonetheless succeeded in registering.

In Sumter County, rejected black applicants for registration routinely explained to me that they had not been victims of discrimination; they had simply "failed" the registration process in some way. I don't know whether they really believed that. Perhaps they were simply reluctant to tell a white man from Washington what they really thought about the local white officials. However, from my study of rejected and accepted applications for registration, I knew that the registrars commonly completed forms for illiterate whites while turning down literate blacks, including teachers with masters degrees. I knew that courthouse officials routinely vouched for white applicants while refusing to vouch for most blacks.[191] I knew that all

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188. As with many Sumter place names, Coatopa was named by Choctaw Indians, who preceded whites and blacks in Sumter County; the name means "wounded panther." VIRGINIA O. FOSCUE, THE PLACE NAMES OF SUMTER COUNTY, ALABAMA 27 (c1978).

189. Interview with Joe Bizzell, in Coatopa, Alabama (Apr. 7, 1964) (on file with author).

190. *Id.*

191. For example, the record in the case reflects that one white official told a black applicant that he could not vouch for the applicant because the official was "under bond." However, that official vouched for over one hundred white applicants. *See* U.S. Brief, *supra* note 68, at 38. That official in effect engaged in covert civil disobedience to the Constitution's non-discrimination requirement.

manner of procedures had been waived for whites but stringently imposed on blacks. The black applicants might suspect these things but were in no position to know them, and so they generally did not allege them. At Appendix B, *infra*, for example, is the application of Richard Wilson, Jr., who tried to register in 1964 at the age of twenty-eight.

According to the law of Alabama, Wilson was entitled to vote if he met citizenship, age, residency, literacy, character, and mental fitness requirements and had not been convicted of enumerated crimes.[192] His application reflects that he met all these requirements. The Board rejected him for two wrong answers to a newly adopted test that applicants before 1964 had not been required to take. In fact, the registrars had registered illiterate whites for years; from 1954 to 1963 more than sixty whites had been registered whose forms were filled out by someone else.[193] In any event, there *were* forty-eight states when Wilson graduated from high school, and the other answer was arguably correct.

I never asked the blacks whom I interviewed why they had defied the norms of the ruling minority by trying to register to vote. It was none of my business; federal law guaranteed them non-discrimination in registration and it was my job to enforce that law. It was the view of Congress and the attorney general that voting was a foundational right, a prerequisite to other rights.[194] I think the desire to register stemmed in part from belief in the American creed, civic duty, and equality of citizenship. My visits to these counties also revealed more concrete reasons. Blacktop roads turned to dirt ones and sewer pipes to open ditches when one reached the black areas. Black schools had still not been brought to physical and fiscal parity with white ones, though progress had been made in an effort to avoid the desegregation required by *Brown v. Board of Education*.[195] Government employees were all white, except for teachers in the black schools and holders of some menial jobs. In short, government had little reason to respond to black citizens and much reason to respond to white voters.

It was the efforts of blacks like Joe Bizzell and Richard Wilson that laid the foundation for the Voting Rights Act. Thousands of disenfranchised blacks showed their interest in participating in democracy, as well as their ability. Many tried repeatedly. Their personal experiences proved the corrupt nature of the state voting system.

B. Ruby Pickens Tartt

The Voting Rights Act is based largely on the prophylactic need to guard against the risk of discrimination, not only by overt racists but also by

192. *See* United States v. Hines, 9 Race Rel. L. Rep. 1332, 1333 (N.D. Ala. 1964).

193. U.S. Brief, *supra* note 68, at 51.

194. *See* MARSHALL, *supra* note 147, at 10.

195. 347 U.S. 483 (1954).

well-intentioned white officials.[196] No one more poignantly shows this need than Ruby Pickens Tartt, the descendant of a Revolutionary War general. By 1963 she was in her eighties. Miss Ruby, as both black and white residents of Sumter County affectionately called her, had held what one author later called "a chair of anguish"[197] as a member of the board of registrars, the body responsible for registering voters, since 1952.

Mrs. Tartt had close ties with the black community. In the 1930s she had interviewed former slaves and their descendants for the Works Progress Administration oral history project. She recorded their recollections of being sold as young children and taken from their mothers;[198] of being whipped;[199] of the packs of dogs trained to find runaway slaves.[200] Some recalled Reconstruction, blacks voting and being elected to office, trickery and Ku Klux Klan violence to maintain white rule.[201] Miss Ruby was regarded as one of the best of the WPA interviewers, "due in large part to the unique relationship that she shared with the impoverished blacks of Sumter County."[202] She later became a "song-catcher" for John Lomax and Harold Courlander, leading them to African-Americans who followed the traditions of black Sumter County musicians and singers.[203] The depth of her ties to the blacks of Sumter County became manifest in her final years. One of the black singers, Rebertha Marsh remembered visiting Tartt in a nursing home: "I stopped by there and sang for her, and she didn't want me to leave. I went down there just like she was my mother."[204] Another of the singers, Dock Reed, sang at her funeral.

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196. 42 U.S.C. § 1973 (1994) (focusing on discriminatory result rather than discriminatory intent).

197. HONEY IN THE ROCK, *supra* note 1, at ix.

198. Laura Clark was born in North Carolina and was bought as a child by Mr. Garret of Sumter County, Alabama.

> He never bought my mammy, so I had to leave her behine. I recollect Mammy said to old Julie, "Take keer my baby chile (dat was me) and iffen I never sees her no mo' raise her for God." Den she fell off de waggin where us was all settin' and roll over on de groun' jes acryin'.

BORN IN SLAVERY, *supra* note 62, at 72 (from Tartt's interview of Laura Clark on July 15, 1937).

199. Angie Garrett said "I been whooped 'tel I tell lies on myself to make 'em quit." *Id.* at 134 (from Tartt's interview of Angie Garrett on June 15, 1937). Others told of beatings they had observed. "One day my mammy done sumpin' an' ol' marster made her pull her dress down 'roun her waist an' made her lay down 'crost de door. Den he taken a leather strop an' whooped her." *Id.* at 28 (from Tartt's interview of Oliver Bell on June 17, 1937).

200. George Young's brother, Harrison, ran away "an' dey sot de 'nigger dogs' on him lack fox houn's run a fox today." After Harrison was caught "den dey turned de dogs loose on him agin, an' sich a screamin' you never hyared." *Id.* at 433 (from Tartt's interview of George Young on June 3, 1937).

201. *See* GABR'L BLOW SOF': SUMTER COUNTY, ALABAMA, SLAVE NARRATIVES (Alan Brown & David Taylor eds., 1997); *see also* LAY MY BURDEN DOWN, *supra* note 61, at 19-20.

202. GABR'L BLOW SOF', *supra* note 201, at vii.

> Tartt, like the rest of genteel white Livingston, exercised a kind of benign paternalism in her dealings with the blacks who worked for her and lived in her area . . . . Yet, Tartt went beyond merely extending kindness to blacks; she risked the ridicule of her neighbors by becoming actively involved in the lives of her black friends.

Id.

203. She eventually received royalties from singers such as Harry Belafonte for having found these songs. Alabama Women's Hall of Fame, *Ruby Pickens Tartt (1880-1974)*, *at* http://www.awhf.org/tartt.html (last visited Mar. 4, 2003).

204. Clarke Stallworth, *She Heard a Hymn in Cotton Fields She's Been Singing Ever Since*,

Mrs. Tartt had tried unsuccessfully to persuade the Board of Supervisors to place in the county courthouse a sculpture honoring a black child who had died while trying to rescue a drowning white child. Such a sculpture might have ameliorated the dominating presence of the statue of the confederate soldier in front of the courthouse, which members of the Tartt family and others had built in 1908 to memorialize those who had fought and died to preserve slavery in Sumter County.

In the 1940s she wrote about the indefensible treatment the South accorded the Negro.[205] On one occasion she helped a black landowner whose white neighbor had tried to trick him into selling off his land. She decried the lack of fire hydrants in the black part of town. She persuaded local officials to place benches in the square in Livingston, the county seat, on which blacks could rest after the long walk to town. There is no indication that she saw any anomaly in the need to have special benches for black citizens. She loved to tell stories about the blacks of Sumter County. One story reflects both her fond but patronizing feelings toward blacks and her understanding of the discrimination in the voter registration process:

> She wrote about "an old Negro man registering who wrote down two words in answer to the so-called 'catch question' to prevent the Negroes from voting. The question is: Name the duties and obligations of citizenship. We had college graduates and every answer from the Declaration of Independence to the Sermon on the Mount. This eighty-year-old uneducated Negro wrote, 'Be manable.' I hope the board passes him for coining such a beautiful word."[206]

Among the first Department of Justice lawyers to meet Ruby Tartt was J. Harold Flannery. Nick, as he was called, concluded that Mrs. Tartt viewed "the Negro community in Sumter County with the benign paternalism of a benevolent despot." She expressed the view to him that many blacks are not qualified to vote "because they do not keep up with public events or are easily misled by unscrupulous politicians."[207] On the other

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BIRMINGHAM NEWS, June 12, 1983, at 1D.

205. DIM ROADS AND DARK NIGHTS: THE COLLECTED FOLKLORE OF RUBY PICKENS TARTT 171 (Alan Brown ed., 1993) ("Certainly there was no attempt [in her writings] to defend this section in their treatment of the Negro. There still isn't. This I *know* to be true. Awful tho it all was. And so much is wrong today in *not* doing what we should for them.").

206. BROWN & OWENS, *supra* note 94, at 53 (citing to Tartt, manuscript fragment). Another version of the story has been sanitized: "An old Negro man was registering to vote. Question No. 20 is, 'According to the Declaration of Independence, what are some of the duties and obligations of citizenship?' His answer was, 'Be more *able*.' I think he coined a mighty expressive thought. I hope he gets to vote!" DIM ROADS AND DARK NIGHTS, *supra* note 205, at 146.

207. One of her slave interviews includes this: "Atter S'render, dey tuck a darky for de probit jedge, but dat nigger didn't know nothin' an' he couldn't rule. So den dey tuck a white man name Sanders, an' he done all right." BORN IN SLAVERY, *supra* note 62, at 435 (Tartt's interview of George Young on June 3, 1937).

hand, she said, that whites who execute poor forms "are qualified because they 'keep up with the newspapers.'"[208]

In 1962, Justice Department attorney Carl Gabel met Ruby Tartt when he inspected the records of the Board of Registrars.[209] Unlike many of the registrars he had met during records inspections, Miss Ruby was cordial to Gabel. She was also talkative. When I interviewed Gabel in 2000, he still remembered, thirty-eight years later, her telling him that if the blacks ever got the vote, the City of Lexington would have financial problems, because they would have to build a second water tower in order to extend running water to the black part of town.[210] In a letter to a friend, Ruby Tartt characterized Gabel as "delightful and a real brain," but expressed concern about whether blacks in Sumter County were ready for the vote.[211] Noting that a different and unprincipled type of white people had recently moved into the county, she worried:

> This being election year, it has already shown its monstrous head, so that what the docile, illiterate and ignorant negro now faces is not in accord with human life, human justice or with human decency. Their weaknesses are being exploited. They can be trained away from cruelty and into moderate energy and to respect the law—if they see the white man obey the law and that the laws apply equally to black and white. Having been born poor, crushed by a lifetime of squalor and privation, then to be offered this single blessing of hope by the ballot which, they are told and believe, will be the resting place of their salvation, it is not surprising that the negro should grasp at anything to make this possible. For years they have chosen to live in the day that was passing; now they are showing consideration for remoter tomorrows. Is the privilege to vote under condition here the answer? Who can say what is fair, and to whom? Few of them can read the registration form intelligently—after having been drilled on the outside! Education is no doubt necessary before they will dare be on their own.[212]

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208. Memorandum from J. Harold Flannery to David L. Norman, Sumter County, Alabama: Summary and Recommendations (Feb. 27, 1963) (on file with author). On an earlier occasion she explained to Flannery and Carl Gabel that blacks could learn to write well at Tuskegee, which she called "the penmanship academy," while the forms of less educated whites do not look very good. However, "These whites know what is going on, are not subject to bloc voting, and they keep informed by reading the newspaper." Therefore, "she would accept the white and reject the Negro applicants described above." Note from Carl Gabel, Statement of Mrs. Ruby Tartt (Aug. 31, 1962) (on file with author).

209. The Department first inspected records in Sumter County in 1960 and again in 1961, 1962, 1963, and 1964. Gabel's inspection was apparently on March 6, 1962. *See Senate Hearings, supra* note 85, at 1410.

210. Telephone interview with Carl Gabel (Jan. 18, 2000).

211. Letter from Ruby Tartt, Registrar, Sumter County, to Henry Snow (Mar. 16, 1962) (on file with the University of West Alabama, Ruby Pickens Tartt Collection, Alabama Room Archives and Special Collections) [hereinafter Letter from Tartt to Snow].

212. *Id.*

Confessing that she felt "like Atlas carrying the world on my bended back," she acknowledged, "When I think of what wrongs, what cruelties they've suffered in helplessness, one wonders if this hope which they are told and believe to be their salvation should be denied them."[213] However, she went on to ask, "shouldn't education come first so they will not remain slaves, but individuals who can think and act for themselves?"[214] She confessed that: "Somehow I can't find any fixed rules for judging, for there are so many intense local attachments. Five generations of us have lived here, have worked among them and helped with their problems."[215] She concluded, "It's a responsibility—but one I'm unwilling to abdicate (before I'm asked)."[216] She wrote a note on a scrap of paper in 1963, saying that as the longest serving registrar she accepted "the responsibility . . . for any and all mistakes which in the eyes of certain FBI gentlemen have been made."[217]

This mea culpa may have been warranted. Bud Sather, after interviewing black leaders and white officials in 1963, attributed the 1961 resignation of the Chairman of the Board of Registrars to a dispute over the registration of several black applicants. "Mr. Godfrey apparently wanted them registered and Mrs. Tartt refused to sign the applications."[218] Flannery and Gabel concluded from their conversations with Mrs. Tartt "that when a Negro of whom she approves applies, she helps him materially to fill out the form and get a voucher. Conversely, when a Negro she dislikes or doesn't know applies, he is almost invariably rejected and receives no help."[219]

Ruby Tartt and the other registrars were instruments of the law of Alabama. That law was facially neutral.[220] Although it had been adopted with racially invidious intent, it could have been applied in a racially neutral manner. Miss Ruby's instincts all led her to seek fairness. There is no evidence that the other registrars wished to act unfairly. Bernard Hines, a registrar who testified at trial, told the court he had never made distinctions based on race. Yet the social and legal structure of Alabama led the registrars, whether knowingly or not, to treat whites one way and blacks another, to the detriment of the black citizens of Sumter County. The white people of Alabama were no better and no worse than the white people of the United States. They were no better and no worse than people of color throughout the world. Ruby Tartt was able to see that injustices were being visited on blacks in Alabama, and she did take some steps to bring about fair treat-

213. *Id.*

214. *Id.*

215. *Id.*

216. Letter from Tartt to Snow, *supra* note 211.

217. *Id.*

218. Memorandum from Mr. Sather to Mr. Norman, Sumter County, Ala., Status of Registration (May 6, 1963) (on file with author).

219. Memorandum from Carl Gabel & Flannery, R.P. Tartt and Registration Statistics (July 20, 1962) (on file with author).

220. *See* United States v. Hines, 9 Race Rel. L. Rep. 1332, 1332-33 (N.D. Ala. 1964) (explaining that under Alabama law, the qualifications for registration were limited to age, residency, literacy, and certain character requirements).

ment. However, her writing and her actions suggest that she proceeded from a hierarchical base line. This may help explain why she was inconsistent in her quest for fairness. She regularly filled out registration forms for white applicants, thus ensuring that there would be no disqualifying errors. She did so only three or four times for black applicants, while rejecting many blacks for making disqualifying errors on their applications.[221] Similarly, she regularly found supporting witnesses for white applicants, while rarely doing so for black applicants, whom she instead rejected for failure to supply a supporting witness.

In later years, I litigated cases against racially segregated school districts. It was often clear that the school authorities wanted to desegregate but needed the political cover of a federal court order to do so.[222] It was never my sense that this was true in the voter registration cases. Registrars either believed that they were lawfully denying registration to unqualified applicants or they believed that the end of ensuring white electoral supremacy justified the discriminatory means they employed. As appointees of statewide officers in the George Wallace administration, they may well have recognized that their job, as far as Governor Wallace was concerned, was to impede, rather than facilitate, registration by black citizens. Voter registration seems to be an area where the natural inclination of officials to favor the status quo prevailed over their fidelity to federal law.[223]

C. Willie Dearman

The prophylactic provisions of the Voting Rights Act—especially its suspension of the supporting witness requirement[224]—respond, as well, to a risk exemplified by the story of Willie Dearman, a lifelong resident of Sumter County who had served as the probate judge there for over eleven years. Voter applicants frequently asked him to serve as a supporting witness because he was conveniently located in the county courthouse where the registrars normally met and as an elected official he knew and wanted the votes of a large number of Sumter Countians.[225] He had vouched for twenty-three blacks in ten years, while vouching for 205 whites during the same time period.[226] Judge Dearman testified as to why he vouched for some black

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221. U.S. Brief, *supra* note 68, at Table D (Analysis of Accepted Applications Jan. 1, 1954 to Feb. 1, 1964) (demonstrating the assistance given by Ms.Tartt).

222. This was true as early as 1961, when J.W. Peltason published his study of federal courts and school desegregation. Many school board members "will publicly deplore such an injunction, but often they will applaud privately." Peltason added, "Some federal judges have failed to recognize that their primary role is to 'take the heat.'" PELTASON, *supra* note 158, at 96.

223. *See* Russell Korobkin, *The Endowment Effect and Legal Analysis*, NW. U. L. REV. (forthcoming) (explaining the "status quo bias").

224. United States v. Logue, 344 F.2d 290 (5th Cir. 1965) (enjoining the supporting witness requirement under the authority of 42 U.S.C. § 1971).

225. He said he knew eighty-five percent of the adults of both races in Sumter County. Transcript at 571, United States v. Hines, 9 Race Rel. L. Rep. 1332 (N.D. Ala. 1964) (No. 63-609) (on file with author) [hereinafter Hines Transcript].

226. U.S. Brief, *supra* note 68, at 44.

applicants for voter registration but not for others: He followed what I have described as "the boat-load theory." As an amateur historian he claimed to know which boat had brought the slave ancestors of these applicants to America. Some boats brought good blacks and some brought bad ones. My notes reflect that he testified that Negroes vary from tribe to tribe and about fifteen percent of Sumter County Negroes are from an intelligent race.[227] At trial, he testified for the defense, and his testimony shocked many in the courtroom:

> [T]here are differences in your Negroes. There are differences in places in Sumter County that you can go back to your old slave records that Africa was a big continent, that Negroes came from many tribes in Africa. Your old slave records will show you that Negroes from one tribe would sell for as high as $3,000.00, where Negroes from another tribe, it would be hard to get $300.00 for that Negro because he didn't have the intellect . . . .[228]
>
> Well, I would say fifteen per cent of the Negroes in the county here were from an intelligent race, in other words they could learn if they were taught.[229]

Dearman had an even lower opinion of black lawfulness: "It would be at least ten to one with the Negroes committing [infamous crimes]."[230] This estimate varied wildly from the sheriff's, who thought that the ratio was closer to two to one, reflecting the population of the county.[231]

My reaction at the time was one of absolute disbelief. I had not yet been exposed to the writing of Zora Neale Hurston. The black protagonists in her classic, *Their Eyes Were Watching God*, agree that whites think the blacks they know are good, but those they don't know are bad.[232] Nor had I yet read R.D. Spratt's 1928 book entitled *A History of the Town of Livingston, Alabama*.[233] Spratt declared that the intelligent blacks "have sought the cit-

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227. Hines Transcript, *supra* note 225, at 574, 579.

228. *Id.* at 574. In answer to the question on cross-examination, whether he felt "that this ability to read and write is based on the basic inherited intelligence" he responded "Yes sir. All of your I.Q.'s, no matter where your race is from, it makes a difference. For instance, a water lily grows up in an ugly environment, but it turns into a very beautiful flower. Why, certainly, inheritance has much to do with it." *Id.* at 579.

229. *Id.*

230. Deposition of Willie E. Dearman at 8 (April 29, 1964) (No. 63-609); Hines Transcript, *supra* note 225, at 576.

231. Deposition of Sheriff Melvin Stephens at 8 (April 29, 1964) (No. 63-609) (stating about sixty-five percent of those convicted of infamous crimes are Negroes and thirty-five percent whites).

232. ZORA NEALE HURSTON, THEIR EYES WERE WATCHING GOD 255 (1937). Hurston writes:

> "De ones de white man know is nice colored folks. De ones he don't know is bad niggers." Janie said this and laughed and Tea Cake laughed with her.
>
> "Janie, Ah done watched it time and time again; each and every white man think he know all de GOOD darkies already. He don't need tuh know no mo. So far as he's concerned, all dem he don't know oughta be tried and sentenced tuh six months . . . ."

Id.

233. The Town of Livingston is the county seat of Sumter County.

ies, and it is very largely the stupid incompetents who remain on the farms."[234] Judge Dearman's position may not be so different from modern America's. As one court recently put it: "As more well-educated blacks flowed into America's mainstream, whites even began to differentiate between the kind of blacks who reflected white values and who were not like 'those other' blacks akin to the inner city stereotype."[235]

D. United States District Judge Hobart Grooms

Several provisions of the Voting Rights Act reflect distrust of federal trial judges in the Deep South.[236] Other provisions incorporate doctrines first articulated in the Southern federal courts.[237] The late United States District Judge Harold Greene, who served in the Civil Rights Division from 1957 until 1965, observed that the Division initially "developed facts that evidence of abuse existed throughout the South. However, after a couple of years a pincer movement began. On the one hand was the district court judges . . . . They always ruled against us. On the other side were white government officials that resisted integration."[238] A rotten political system, spawned by the combination of one-party rule and one-race rule, had placed much of the federal bench in bed with the state governmental apparatus.

Judge Hobart Grooms, the judge in the Sumter County case, had allowed The University of Alabama to expel its first black student in 1955,[239] and, in 1962, had refused a prison sentence for men who had committed mayhem and assault in burning a Freedom Ride bus.[240] The Supreme Court had, at about the same time, reversed Judge Grooms's dismissal of a habeas

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234. R.D. SPRATT, A HISTORY OF THE TOWN OF LIVINGSTON, ALABAMA 200 (1928).

235. United States v. Clary, 846 F. Supp. 768, 779 (E.D. Mo. 1994), *rev'd*, 34 F.3d 709 (1994). Gunnar Myrdal gives another possible explanation for the fact that some blacks were allowed to vote:

> Some Negroes may be permitted to vote because they are "good" (a reward for obedience to the caste rules), because an influential white group needs their votes, because so few Negroes vote that it is not worth the effort to hamper them beyond a certain point . . . , or because a few Negro votes are handy to refute the accusation of unconstitutionality.

GUNNAR MYRDAL, AN AMERICAN DILEMMA 480 (1944).

236. *See* Appendix A, *infra*.

237. *See* Appendix A, *infra*.

238. Harold Greene, *Civil Rights Division Association Symposium: The Civil Rights Division at Forty*, 30 MCGEORGE L. REV. 957, 962 (1999).

239. *See* JACK BASS, UNLIKELY HEROES 181 (1981); JACK GREENBERG, CRUSADERS IN THE COURTS 226 (1994). Another author reports that before upholding the suspension, Judge Grooms told her lawyers that,

> [A]lthough he had ruled with them in the past, he could do so no longer if he was to continue living with his wife. Friends knew that Grooms slept with a loaded shotgun under his bed, and his wife was badly frightened and concerned about their two young children because of threats that were received after he ordered Miss Lucy's admission.

JACK BASS, TAMING THE STORM 106 (1993). Judge Grooms in 1963, nonetheless, ordered the university to admit two black students. GREENBERG, *supra* at 338; *see also* PELTASON, *supra* note 158, at 84, 138-42.

240. *See* BRANCH, *supra* note 42, at 570. Grooms's version is that the sentence was based on a plea bargain, after a first jury had been unable to agree on a verdict. *See* H.H. Grooms, Segregation, Desegregation, Integration, and Resegregation 36 (1979) (unpublished manuscript, on file with The University of Alabama Library).

corpus petition by civil rights leader, Rev. Fred L. Shuttlesworth.[241] Yet Grooms had often ruled for black plaintiffs in cases attacking various aspects of the racial caste system when the law and facts were clear.[242] Judge Brown, one of the progressive members of the Fifth Circuit, characterized Judge Grooms as "a conscientious, vigorous, energetic Judge."[243] Unlike many other judges in the Deep South, Judge Grooms did not engage in delaying tactics in handling civil rights cases.[244] Judge Grooms's record, while cause for concern, was better than the record of the other two judges in the Northern District of Alabama, Seybourn Lynne and Clarence Allgood.[245]

Although he was born and educated in Kentucky, where he was editor in chief of the *Kentucky Law Review* in 1926, and was an Eisenhower appointee and, therefore, not in the political mainstream of Alabama,[246] Judge Grooms's roots developed in white society. He practiced with a Birmingham firm from 1926 until taking the bench in 1953. Since the Democratic party controlled Alabama politics and both senators were Democrats, the appointees to federal court vacancies in Alabama during a Republican presidency had to satisfy both political parties. This led to noncontroversial appointees, who "come from bland backgrounds, men of local but not national fame, men who make *Who's Who* after rather than before appointment."[247]

Judge Grooms took the oath of office in a ceremony that, as judicial investitures often do, took on the aspect of a love feast. Often such ceremonies celebrate the brilliant career, the intelligence, the success at the bar, and the deep knowledge of the law that the speakers attribute to the new judge. Judge Grooms, however, was celebrated as a man of unblemished character, "a man of courtesy, of friendliness, and of personal consideration."[248] An

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241. *In re* Shuttlesworth, 369 U.S. 35 (1962).

242. *See* SIKORA, *supra* note 42, at 46, 176, 180, 278.

243. Nelson v. Grooms, 307 F.2d 76, 79 (5th Cir. 1962) (Brown, J., concurring). One author opined: "[T]he courage of U.S. District Judge Hobart Grooms of Birmingham has been documented on more than one occasion because of his forthright and even-handed manner in dispensing the law." SIKORA, *supra* note 242, at 278.

244. For a general description of judicial delays in race discrimination cases in the 1960s, see Note, *Judicial Performance in the Fifth Circuit*, 73 YALE L.J. 90 (1963). In 1965, Assistant Attorney General Burke Marshall testified that the average time between the filing of suit challenging discrimination in voter registration and decision in the suit was 17.8 months and that it took, on average, another year to complete an appeal from an adverse decision in such a case. Burke Marshall, Prepared Statement Submitted to the United States Commission on Civil Rights, Jackson, Mississippi (Feb. 18, 1965), *reprinted in House Hearings*, *supra* note 101, at 304, 308. Judge Grooms decided the Sumter County case within ten months of its filing.

245. *See* PELTASON, *supra* note 158, at 84; *see also* RICHARD C. CORTNER, CIVIL RIGHTS AND PUBLIC ACCOMMODATIONS: THE *HEART OF ATLANTA MOTEL* AND *MCCLUNG* CASES 72 (2001) (discussing Lynne). Lynne was known by Civil Rights Division lawyers as "the sly fox," because we perceived him as a smart chess player trying to find ways to avoid ruling in favor of the Department of Justice in race discrimination cases. *See* ALEXANDER BICKEL, POLITICS AND THE WARREN COURT 69-70 (1965) (discussing Allgood).

246. Judge Grooms, a native of Kentucky, was appointed to the bench in 1953. THE AMERICAN BENCH, JUDGES OF THE NATION 70 (Mary Reincke & Jeaneen C. Wilhelmi eds., 1977)

247. PELTASON, *supra* note 158, at 7.

248. Frank E. Spain, *Alabama's Newest Federal Judge, Harlan Hobart Grooms*, 15 ALA. LAW. 180, 181 (1954).

account of the ceremony concluded that "Harlan Hobart Grooms, in the eyes of his partners is a simple man. Straight thinking is as natural as breathing in the performance of his professional duties."[249]

Judge Grooms characterized himself as "a good conservative, but not so conservative that I can't see what the law is."[250] Although he could not be expected to look at race discrimination from any perspective other than a white one, most people, black or white, would probably have characterized him as a decent man. He wrote in his civil rights memoir that desegregation of The University of Alabama "was not only the right course legally and equitably, but the right course morally."[251] Judge Grooms was a devout Christian, active in the Baptist church. In an article entitled *Christianity and the Law*, he stressed that the law should be grounded in the lessons of religion: "The moral teachings of the scriptures emphasize the worth of the individual, the protection of whose dignity is the prime purpose of all law."[252] He believed that Christianity's "influence has enabled men to conform their conduct to its principles—principles rooted in the perpetual, universal, unchangeable moral laws of God."[253] And his article closed with the recognition that "legislators and judges are subject to influences which stem from their religious as well as their personal, social and cultural backgrounds."[254]

Judge Grooms was aware of the importance of the vote to the blacks of Alabama. Governor George Wallace had attacked him for ordering, in 1963, that Vivian Malone be admitted to The University of Alabama.[255] Governor Wallace had issued a statement that, as Grooms later noted, "set the tone of defiance."[256] Grooms wrote in 1979: "Governor Wallace felt safe politically in taking this stance since the black vote in the state at that time was insignificant. The Democrat ballot still carried the emblem 'White Supremacy.' Federal registration of black voters was in the future."[257]

It is apparent that Judge Grooms did not regard the Sumter County voting rights case as memorable. In his civil rights memoir, he tried to discuss all the civil rights cases he had tried that involved racial discrimination, but he noted "I may have overlooked some." Indeed he had. While he had wanted "to preserve the record of events which are a part of the history of the period in which they occurred," lest they "'fade into the storied past, and in a little while are shrouded in oblivion,' [Aurelius]," he omitted mention of discrimination in voter registration in Sumter County.[258]

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249. *Id.* at 184.

250. MCWHORTER, *supra* note 154, at 247. *But see* FRANK T. READ & LUCY S. MCGOUGH, LET THEM BE JUDGED: THE JUDICIAL INTEGRATION OF THE DEEP SOUTH 201 (1978) ("In political philosophy perhaps the only characterization that can be made about him is that he defies categorization.").

251. Grooms, *supra* note 240, at 7.

252. H.H. Grooms, *Christianity and the Law*, 25 ALA. LAW. 311, 318 (1964).

253. *Id.* at 323.

254. *Id.*

255. Grooms, *supra* note 240, at 23.

256. *Id.*

257. *Id.* at 24.

258. *Id.* at 87.

When he died in 1991, the *Birmingham News* headline announced: "Civil rights judge H. Hobart Grooms is dead at 90."[259] The President of Samford University recalled that "Judge Grooms was a gentle giant of the legal profession, a man whose devout Christian faith caused him to stand for principle, even when it was not popular to do so."[260] And the Dean of Cumberland School of Law said that Grooms had "very courageously applied the law fairly and evenhandedly."[261]

V. THE CASE

A. Steps Leading up to Suit

Although the Civil Rights Act of 1957 had authorized the attorney general to bring suit to remedy racial discrimination in voting practices,[262] the Eisenhower administration had brought only three cases in the first two years under the legislation.[263] The Division attributed the paucity of cases in part "to lack of access to local registration records."[264] Thus began the pattern of legislative action, local intransigence, and legislative response that culminated in the Voting Rights Act. On May 6, 1960, Congress adopted the Civil Rights Act of 1960, which authorized the Department of Justice to require voting officials to allow the Department to inspect and copy voting records.[265] Department files do not reflect why, in June of 1960, President Eisenhower's Attorney General, William P. Rogers, chose Sumter County as one of four counties in Southern states to be asked to make their voting and registration records available for inspection by agents of the Department of Justice. A press release from the Department of Justice simply noted that "[t]hese are the third in a series of investigative demands served on Southern counties . . . to determine whether constitutional rights have been denied citizens through discriminatory practices based on race or color."[266] The release then recited the available population and registration statistics for each county.[267]

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259. Bob Blalock, *Civil Rights Judge H. Hobart Grooms is Dead at 90*, BIRMINGHAM NEWS, Aug. 24, 1991, at 1A.

260. *Id.*

261. *Id.*

262. Civil Rights Act of 1957 § 131, Pub. L. No. 85-315, 71 Stat. 634 (codified as amended at 42 U.S.C. § 1971 (1994)).

263. U.S. COMM'N ON CIVIL RIGHTS, REPORT OF THE U.S. COMMISSION ON CIVIL RIGHTS, 1959, at 131 (1959).

264. *Id.* at 133. In addition the Department may have been awaiting the outcome of a constitutional challenge to the Act's authorization for the Department of Justice to bring suits challenging racial discrimination in voting practices. United States v. Raines, 362 U.S. 17 (1960).

265. 42 U.S.C § 1971 (1960).

266. Press Release, Department of Justice (June 6, 1960) (on file with author) (noting "Available statistics show 8,700 Negroes of voting age in Sumter County, census 1950, and 175 registered voters in 1958. White persons of voting age numbered 3,600 in 1950 and 2,858 were registered in 1958").

267. *Id.*

Perhaps the choice of Sumter County was random; after all, Sumter was one of twenty-two counties in Alabama in which less than ten percent of the black voting age population were registered to vote.[268] The file contains no complaint from black citizens of Sumter County. As the attorney general testified in 1959, "we have been surprised that we have not had as many complaints as you might expect in this area."[269] He acknowledged that one reason could be fear, but said he had no way of knowing the reason.[270] Although initial practice of the Civil Rights Division had been to rely primarily on complaints before investigating possible violations of the civil rights laws, Assistant Attorney General Harold Tyler, who took office in 1960, eliminated the requirement of a formal written complaint as a prerequisite to a voting discrimination investigation.[271] While the Department might sometimes act in response to information from the Civil Rights Commission, the 1959 Commission report had not included Sumter County in its list of possible discriminators.[272] Or perhaps the Department had chosen Sumter because it was known as a place where the white majority tolerated particularly harsh treatment of blacks. Just six years earlier, United States Attorney Frank M. Johnson (soon to become a federal judge) had successfully prosecuted the Dials, white owners of a Sumter County plantation, for violating the federal peonage laws.[273] They had whipped to death a black worker who had tried to escape from their plantation, but the local prosecutor apparently never charged them with homicide. Testimony reflected that Herbert Thompson "was tied by the neck, feet and waist with rope to a bale of hay and beaten by eight men with ropes," while Fred Dial "held a shotgun to force Negroes to beat Thompson, and later participated in the beating himself . . . ."[274] J.W. Boyd, a white farmer from Livingston who had testified that beatings were common on the Dials' farm, later told defense counsel that "whooping a nigger *ain't* bad in Sumter County."[275] It is also possible

268. U.S. COMM'N ON CIVIL RIGHTS, REPORT OF THE U.S. COMMISSION ON CIVIL RIGHTS, 1961, at 104 (1961).

269. CIVIL RIGHTS: Hearings on H.R. 300, 351-53, 400, 461, 617-19, 759, 913-14, 1902, 2346, 2479, 2538, 2786, 3090, 3147-48, 3212, 3559, 4169, 4261, 4338-39, 4342, 4348, 4457, 5008, 5170, 5189, 5217-18, 5276, 5323, 6934-35 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 85th Cong. 214 (1959).

270. The Kennedy Administration, by contrast, adopted an explicit policy of investigating counties where "most white adults are registered and qualified Negroes are being turned down." Burke Marshall, *Federal Protection of Negro Voting Rights*, 27 LAW & CONTEMP. PROBS. 455, 465 (1962). The administration believed that "[t]hese two facts alone establish a case of discrimination. Only the details of the techniques of discrimination are lacking . . . ." *Id.* The Kennedy Administration did not wait for complaints from such counties, because it believed that the separation of the races meant that rejected blacks did not know that the registration requirements they had failed to meet were not applied to whites. Hence, they tended not to complain. *Id.*

271. LANDSBERG, *supra* note 155, at 85; Hawk & Kirby, *supra* note 37, at 1060-61.

272. U.S. COMM'N ON CIVIL RIGHTS, REPORT OF THE U.S. COMMISSION ON CIVIL RIGHTS, 1959, at 71ff. (1959).

273. TINSLEY E. YARBOROUGH, JUDGE FRANK JOHNSON AND HUMAN RIGHTS IN ALABAMA 25-31 (1981).

274. *Jury is Still Deliberating Case of Slavery Defendants*, BIRMINGHAM NEWS, May 14, 1954, at 10.

275. TONY A. FREYER & TIMOTHY DIXON, DEMOCRACY AND JUDICIAL INDEPENDENCE: A HISTORY OF THE FEDERAL COURTS OF ALABAMA, 1820-1994, at 231 (1995) (quoting JACK BASS, TAMING THE

that the Civil Rights Division chose Sumter because it was one of the few Black Belt counties in the Northern District of Alabama, since it already had cases pending in the other two federal judicial districts.[276]

The journey from records demand to discrimination suit followed an unsteady path, marked by dilatory tactics of state officials, evolution of the Civil Rights Division's understanding of the nature of the discrimination, frequent turnover in Division personnel assigned to Sumter County, a gradual increase in the number of rejected black applications for registration, and unexplained delays by the Division which probably resulted from the demands that litigation elsewhere placed on the small staff.

Records inspection was normally an essential first step in determining whether the registrars discriminated against black applicants. An early student of the voting rights cases noted that "[w]ithout the records one cannot demonstrate even so basic a fact as that 98 per cent of whites of voting age in the county are registered whereas the corresponding figure for Negroes is 2 per cent."[277] The records may also show "that the registration imbalance is due to the rigorous standards required of Negroes and the very indulgent standards applied to whites."[278] Registrars, anxious to avoid disclosure of their discriminatory practices, often played a delaying game—one that eventually led to the Voting Rights Act's bypassing local registrars, by authorizing the attorney general to bring about appointment of federal voting examiners to register voters. By 1964, registrars in thirty-eight of the one hundred counties where the Department of Justice sought records had refused to provide them, and the Department had been required to sue under the 1960 Act.[279]

County officials initially took a public relations stance of cooperation with federal agents, while assuring the press that they had not discriminated in voter registration and accusing the agents of conducting a fishing expedition. A news article reported that Ruby Tartt told the FBI agents "that since 1955 there has been no rejection of Negro voting applicants in Sumter County."[280] Judge Dearman told the reporter "that Sumter County had never barred Negroes from voting and that there have always been a percentage of

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STORM 83 (1993)); *see also Dials' Attorney Says DA Has Not Acted in Good Faith*, BIRMINGHAM NEWS, May 13, 1954, at 59. The national press yawned at this sensational case. The *New York Times* devoted three sentences, not to the convictions, but to a UP story on the dismissal of charges against some of the defendants. United Press, *Slavery Charges Dropped*, N.Y. TIMES, May 12, 1954, at 23. The *Birmingham News*, however, covered every day of trial and jury deliberation, culminating in a front-page story about the conviction on May 15, 1954. *Dials Convicted in Forced Labor Case in Sumter*, BIRMINGHAM NEWS, May 15, 1954, at 1.

276. According to John Doar, "[T]he Division's strategy was to develop and file a case of voter discrimination against a registrar in one county in each of the judicial districts" in Alabama, Louisiana, and Mississippi. Doar, *supra* note 172, at 3.

277. DONALD S. STRONG, NEGROES, BALLOTS, AND JUDGES: NATIONAL VOTING RIGHTS LEGISLATION IN THE FEDERAL COURTS 20 (1968).

278. *Id.* at 20-21.

279. *Id.* at 21.

280. Hugh W. Sparrow, *FBI Agents Checking Sumter Vote Records*, BIRMINGHAM NEWS, June 6, 1960, at 1.

Negroes on the voting lists. He said that every Negro school teacher in the county is a registered voter."[281] However, after allowing a few poll tax records to be copied, the local circuit solicitor advised the FBI agents that a state judge in Montgomery had enjoined the release of the records.[282] The *Birmingham News* trenchantly summarized this first episode in Sumter the following week with the headline: "U.S. agents sent out in ignorance; Washington flubs in Sumter voting."[283]

For the next six months state and local officials engaged in a form of civil disobedience to federal law.[284] The Sumter registrars and probate judge took the position that they could not turn over the record, due to state court orders. In August, United States District Court Judge Frank M. Johnson had overturned the order of the state court judge from Montgomery.[285] So the FBI agents returned in October to copy the voting records, only to be advised that another state court judge, this one from the circuit that includes Sumter County, had transferred custody of the records to MacDonald Gallion, Attorney General of Alabama, and had ordered that no one but Gallion and the Sumter County officials could have access to the records.[286] As with the first order, this one was entered without notice or hearing; and this was not even a case, in the normal sense, because there was a plaintiff but no defendant. Because Gallion, not the local officials, now purportedly had custody of the records, the Department of Justice demanded that Gallion provide access to them.[287] The Department also tried, repeatedly and to no avail, to get access from Judge Dearman, the registrars, and from Judge Hildreth, who had entered the most recent order.[288] The *New York Times* reported that Attorney General Gallion risked a possible jail sentence be-

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281. *Id.* In fact, several black Sumter County teachers testified at trial about their unsuccessful efforts to register.

282. Hugh W. Sparrow, *U.S. Agents Sent Out in Ignorance: Washington Flubs in Sumter Voting*, BIRMINGHAM NEWS, June 12, 1960, at 1.

283. *Id.*

284. They were following a pattern previously established by Attorney General (later Governor) John Patterson and Circuit Judge (later Governor) George Wallace, who had defied Civil Rights Commission subpoenas for records under the 1957 Act. *See* U.S. COMM'N ON CIVIL RIGHTS, REPORT OF THE U.S. COMMISSION ON CIVIL RIGHTS 1959, at 70-71, 81 (1959).

285. Alabama *ex rel.* Gallion v. Rogers, 187 F. Supp. 848 (M.D. Ala. 1960), *aff'd*, 285 F.2d 430 (5th Cir. 1961), *cert. denied*, 366 U.S. 913 (1961).

286. Memorandum from FBI Birmingham Field Office, Inspection and Copying of Voter Registration Records in Sumter County, Alabama (Oct. 12, 1960) (quoting Order, Judgment and Decree, *State of Alabama, ex rel MacDonald Gallion, Attorney General of the State of Alabama, Petitioner*, signed by Emmett F. Hildreth (Oct. 11, 1960) (on file with author)).

287. Letter from Harold Tyler, Assistant Attorney General, to MacDonald Gallion, Attorney General (Oct. 24, 1960) (on file with author).

288. Memorandum from Director of the FBI to Harold Tyler, Assistant Attorney General, Inspection and Copying of Voter Registration Records in Sumter County, Alabama, Election Laws (Nov. 3, 1960); Memorandum from FBI Birmingham Field Office, *Inspection and Copying of Voter Registration Records in Sumter County, Alabama* (Dec. 2, 1960) (on file with author).

cause of his refusal to grant access.[289] It quoted Gallion as saying he had taken his stand as a matter of states' rights and sovereignty.[290]

This episode of official civil disobedience dissolved after a second federal court suit, this one before Judge Hobart Grooms in the Northern District of Alabama, finally resulted in an order, three days after President Kennedy was sworn into office and a new team of leaders began taking over the Department of Justice.[291] MacDonald Gallion, a Democrat rumored to be running for governor,[292] decided to resist no longer.[293] The following day, three FBI agents under the direction of a Civil Rights Division attorney, began copying records, prompting a flurry of news reports. For example, one local paper's headline read: "Justice Snoopers Raid Vote Records After Court Rules."[294] A few days later, a cryptic editorial page item in the *Birmingham News* noted that the Sumter County officials "took the situation with a calmness and stoicism which could have been expected. Anyone familiar with Sumter Countians would have known it would take more than such an invasion to ruffle folks there. In Sumter County, the view is long, the patience deep, and the self-confidence beyond intrusive onslaught."[295] The press flurry ended with a short note in the *Sumter County Journal*: "The Snoopers are gone from Livingston and odds are the Justice Dept. boys simply wasted thousands of dollars of the taxpayers money without finding any discrimination whatever."[296]

The records inspection had consisted of photographing thousands of pages of registration and poll tax records. The film would have to be developed and then sent to the Civil Rights Division for indexing and analysis. This meant spending weeks viewing poor quality microfilm and analyzing the records. This was before the days of high-quality photocopiers, computer scanners, and personal computers. Division attorneys and clerical staff

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289. UPI, *Alabama Aide Defies U.S. Order to Yield Voter Registering Data*, N.Y. TIMES, Nov. 12, 1960, at 10.

290. *Id.*

291. *In re* Gallion, 6 Race Rel. L. Rep. 185 (N.D. Ala. 1961); *see also* Jo Ellen O'Hara, *Grooms Asked to Bare Voter Registrations*, BIRMINGHAM NEWS, Jan. 23, 1961, at 1; Jo Ellen O'Hara, *After Court Order—FBI Starts Probe of Sumter Voting*, BIRMINGHAM NEWS, Jan. 24, 1961, at 1. The Department had filed the case on Dec. 22, 1960. Judge Grooms acted promptly, in contrast to Judge Thomas of the Southern District, who took sixteen months to deny, without explanation, similar requests. The Fifth Circuit Court of Appeals was "unable to find any conceivable justification supporting the trial court's action." Kennedy v. Bruce, 298 F.2d 860, 862 (5th Cir. 1962). Judge Thomas's dilatory actions are described in Note, *supra* note 244, at 97. It bears mention that, in contrast with Judge Johnson, Judge Grooms did not submit this case for publication in the *Federal Supplement*, the official reports of the United States District Courts.

292. Memorandum from Director, FBI (initialed JEH), to The Attorney General, MacDonald Gallion, Attorney General, State of Alabama, Information Concerning Inspection and Copying of Voter Registration Records in Sumter County, Alabama (Nov. 3, 1960) (on file with author). Mr. Hoover also noted that when Gallion had opposed inspection he had commented "that he would like to be arrested by the FBI because he would 'politically have it made.'" *Id.*

293. Jerry Norris, *Gallion Advises Sumter Officials to Release Files*, BIRMINGHAM POST-HERALD, Jan. 24, 1961, at 1.

294. SUMTER COUNTY J., Jan. 16, 1961, at 1.

295. *The Agents and Sumter*, BIRMINGHAM NEWS, Jan. 29, 1961, at A12.

296. Dick Smith, *HiLites*, SUMTER COUNTY J., Feb. 2, 1961, at 1.

developed a system for analyzing voter records. When I arrived in 1964, the system was as follows: I would read an application on the microfilm machine and then dictate into a dictaphone what appeared on each blank on the application. I would then turn the tape over to Hattie's shop.[297] They would type the information onto three-by-five inch, six-ply multi-colored carbon sets and would then arrange sets by race (where known), chronologically, alphabetically, and based on how various questions were answered.[298] This laboriously compiled information served as the basis for further investigation and also was used to prepare exhibits and briefs.[299] As Jimmie Breslin later explained in his book about the impeachment summer of 1974, "By cross-filing index cards of white and black voters, the lawyers were able to prove that if a black man and a white man gave exactly the same answers to the questions, the black man failed and the white man passed."[300] Arranging the cards in various ways would reveal patterns of conduct. John Doar said, "Sometimes you get to moving them around and you find the cards are telling you a story you didn't know."[301] For example, in the Sumter County case, the records reflected a pattern of courthouse officials acting as supporting witnesses for many whites and only a few blacks. That analysis then became the basis for cross-examination of those officials. Although the tedious examination of microfilm hardly seemed romantic, Division attorneys were taught to think of it as "the romance of the records." These analyses underlie much of the detailed record of discrimination that Congress relied on in enacting the Voting Rights Act.

Departmental forays into Sumter County to interview black applicants and leaders began after the records inspection. The FBI was, of course, the investigative agency for the Department of Justice, and Civil Rights Division lawyers were not supposed to be investigators. So the attorneys took trips to interview prospective witnesses, not to "investigate."[302] The visit of Division attorneys to Sumter County in the spring of 1961 provided information that would become useful when the Division requested an FBI investigation.[303]

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297. *See supra* Part II (describing Hattie's shop).

298. For example, in one case the master chronology was arranged as follows:

(1) Negro accepted - yellow copy
(2) Negro rejected - blue copy
(3) White accepted - orange copy
(4) White rejected - green copy

Civil Rights Div., Dep't of Justice, *Program for Birmingham* 4 (Undated and unsigned) (on file with author).

299. 1963 ATT'Y GEN. ANN. REP. 184 (describing this system).

300. JIMMIE BRESLIN, HOW THE GOOD GUYS FINALLY WON 111-12 (1975).

301. *Id.* at 115.

302. "J. Harold Flannery, a young lawyer in the Division, says, 'We always had to disguise it as interviewing potential witnesses; otherwise it was usurping the Bureau's function.'" NAVASKY, *supra* note 52, at 125.

303. John Doar told Navasky:

> We'd go down South and make a tour of several counties, and we ourselves would interview Negroes that had made some effort to register. We'd get *their* experiences and ask the names

Some Division attorneys also engaged in aggressive "SNCCing," a term that denoted urging blacks to attempt to register to vote.[304] They understood that their mere presence might encourage black applications, because once blacks were aware that the federal government was investigating some of the fears that impeded efforts to register might be lessened. On the other hand, they were theoretically not supposed to overtly "SNCC." Nonetheless, Nick Flannery wrote:

> Gerry Stern gave [Sumter County black leader L.L.] Delaine a stiff ultimatum on his last visit and the 15 Delaines who registered on 5 March 1962 were the result. I gathered that he had not done much else and I gave him a lecture, after which he promised to get 20-25 people from that part of the county to go up during the first week in July.[305]

Without black applicants it would be hard to prove discrimination. If blacks were to apply, either they would become registered, obviating the need for litigation, or they would be rejected and a basis would exist for determining whether the registrars were discriminating against black applicants. Yet blacks were unlikely to apply without some outside encouragement: "For it takes courage, patience, and a massive effort before a significant number of Negro residents are ready to break the pattern of their lives by attempting to register to vote."[306] Because civil rights organizations had bypassed Sumter County, there would be no outside encouragement there if Division attorneys strictly followed Division policy. In effect, the Division would be transferring to the civil rights organizations the power to set Division priorities. SNCCing is, in a way, analogous to a sting operation against a suspected law violator, an accepted if controversial law enforcement tool. SNCCing could, however, create dangers. It might call into question the Division's impartiality. It seemed inconsistent with Attorney General Robert F. Kennedy's mantra that the Department's activities in the South were limited to carrying out the normal duties of law enforcement.[307] It could subject the Justice Department to the charge of stirring up litigation. In addition, Division attorneys might unwittingly be subjecting black applicants to the danger of reprisal. In light of these dangers, the Division's informal policy was that its lawyers were not to SNCC, but some Division

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> of anyone they knew of who had tried to register. Then we'd come back and . . . ask the Bureau to interview. It was like a pyramid club. Out of that would come 250 interviews.

Id. at 103-04.

304. "SNCC" refers to the Student Non-Violent Coordinating Committee, which played a central role in voter registration campaigns in many counties in the South. Division lawyers also used the term as a verb, meaning to actively promote black voter registration.

305. Memorandum from J. Harold Flannery to John Doar, Sumter County, Alabama: Summary and Recommendations (July 6, 1962) (on file with author).

306. MARSHALL, *supra* note 160, at 21.

307. Robert F. Kennedy, *Foreword* to BURKE MARSHALL, FEDERALISM AND CIVIL RIGHTS, at vii-viii (1964).

attorneys thought there was a "wink, wink, nod, nod" flavor to the policy. The approved approach is reflected in attorney Arvid (Bud) Sather's 1963 conversation with black leaders in Sumter County:

> I pointed out to them that virtually no Negroes had been applying recently and under these conditions the government was unable to make a final determination as to discriminatory policy carried out by the current Board, if any, and is unable to make any such determination unless there is a substantial attempt by Negroes to register to vote. It was explained to these persons that it was not a concern of the government as to whether Negroes decided to apply for registration . . . [but that] it was our concern that they be acquainted with the laws and the present situation so that whatever decision they make, will be based upon an informed knowledge . . . .[308]

While the subtlety of Sather's formulation might escape the listener, it would provide deniability if his actions were challenged, as they later were in an attempted state grand jury investigation in Dallas County.[309]

In May 1961, two Department attorneys made the first visit to interview blacks in Sumter County. They brought with them a list of rejected applicants and interviewed a prominent black to ascertain which ones were black. After speaking with a few other black residents whose stories were not helpful, they left.[310] In June of 1961—a year after the initial records request—Assistant Attorney General Marshall asked the FBI to interview black applicants, and the FBI furnished a 141 page report of those interviews.

These limited contacts led to an arguably premature proposal to sue. The Department's files contain a memorandum that John Doar apparently sent in July 1961 to Burke Marshall, recommending that the United States bring suit against the Sumter County registrars.[311] The memorandum is only three pages long.[312] It says that in the past seven years, thirty-three applications have been rejected, most from persons "known to be Negroes."[313] The memo mentions only one discriminatory practice, but one that was clearly unlawful: "The Board of Registrars has required Negro applicants to get a

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308. Memorandum from Mr. Sather to Mr. Norman, Sumter County, Ala.; Status of Registration (May 6, 1963) (on file with author).

309. *See* Record on Appeal at 5, United States v. McLeod, 229 F. Supp. 388 (5th Cir. 1964) (No. 21475) (stating that a grand jury was investigating "the role of the Justice Department in 'racial unrest' in the area"). The county's attorney asked, "So, the effect of you and Mr. Doar there being in this county is to disturb racial harmony rather than to keep it at rest, is it not?" *Id.* at 161.

310. Memorandum to Sumter County DOJ file, May 11, 1961 Trip to Sumter County (Undated and unsigned, the names of attorneys Dunbaugh and Radler handwritten at top) (on file with author).

311. Memorandum from John Doar to Burke Marshall, The United States of America v. Earl C. Godfrey, et al. (July 14, 1961) (on file with author).

312. *Id.*

313. *Id.*

white person to vouch for them."[314] The memo mentions that winning this suit would stimulate black registration efforts in Sumter and neighboring Black Belt counties.[315] The file is silent as to why the Division did not sue based on this memorandum. One possible reason was that other, more compelling cases were being brought and Division resources were stretched too thin to accommodate Sumter.[316] Closely related is the probability that the discrimination in the other cases was more egregious.

A year elapsed without significant Division activity in Sumter County. Then Nick Flannery spent four days there and interviewed three of the black applicants who successfully registered in the prior six months and ten of the thirteen blacks who had been rejected in the prior ten months. Flannery developed a clearer understanding of the registrars' practices. He concluded that the white voucher requirement had quietly been dropped "and the well-qualified Negroes are getting registered, some with assistance."[317] However, he noted a pattern of discrimination: while "the rejected Negroes are not an impressive group . . . there are whites registered who are no better qualified than some of the Negroes now being turned down."[318] Often, the "most poorly qualified whites received substantial assistance."[319] Flannery concluded that if enough additional blacks applied—twenty-five to fifty—"we shall have a basis for suit even if the Board continues to accept well-qualified Negroes."[320] In the month after Flannery's visit, another twenty-nine black applicants were rejected.[321] Flannery then prepared a memorandum that noted that in the past year, thirty-four blacks had applied unsuccessfully sixty-three times, while no whites had been rejected during that period.[322] Again noting that "[t]he Negroes and their applications are not, for the most part, impressive," Flannery reiterated that "in a county in which whites are usually helped and never rejected, we do have enough for a suit."[323] This time he concluded that vestiges of the white voucher rule re-

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314. *Id.*

315. *Id.*

316. The Kennedy Administration's first suits challenging discrimination in voter registration involved Dallas County, Alabama, whose county seat is Selma, and East Carroll Parish, Louisiana. United States v. Atkins [Dallas County] and United States v. Manning [East Carroll Parish] were filed on April 13, 1961. *Senate Hearings*, *supra* note 85, at 1196, 1199. These cases were followed in July by suits in Clarke and Forrest Counties, Mississippi and Ouachita Parish, Louisiana—United States v. Ramsey, 331 F.2d 824 (5th Cir. 1964); United States v. Lynd, 349 F.2d 790 (5th Cir. 1965); and United States v. Lucky, 239 F.Supp. 233 (W.D. La. 1965). *Id.* at 1202, 1205, 1208. The Division filed three more suits in August and six more in the remaining months of 1961. Thus, the Division, which had filed six registration suits from 1957 until January 19, 1961, had filed fourteen such suits in the first eleven months of the Kennedy Administration.

317. Memorandum from J. Harold Flannery to John Doar, Sumter County, Alabama: Summary and Recommendations (July 6, 1962) (on file with author).

318. *Id.*

319. *Id.*

320. *Id.*

321. U.S. Brief, *supra* note 68, at Table C-21.

322. Memorandum from J. Harold Flannery to John Doar, Sumter County, Alabama: Summary and Recommendations (typed Oct. 25, 1962) (date stamped Feb. 27, 1963) (on file with author).

323. *Id.*

mained.[324] Variations in procedure "stem from Mrs. Tartt's insistence that she know the voucher and the persons used as references. She does know and approve of some Negroes whom the applicant may use if he, fortuitously, knows them also."[325] He concluded that "[w]hether a Negro will be registered depends in the last analysis upon Mrs. Tartt's estimation of him."[326] Flannery also learned that the board was applying an "unauthorized rule that persons are permitted to apply only three times."[327] Mrs. Tartt said that Judge Dearman told her (erroneously) that this was state law. Based on his review of the rejected blacks' applications, Flannery believed that most would be registered if they had been white.[328] In November, David L. Norman told Flannery to prepare a suit justification memorandum and a complaint "if you are convinced that we have a suit here."[329]

By the following spring, attorney Arvid Sather, newly assigned to the case, had concluded that the registrars had violated federal law in six ways.[330] Every item in his list provides an example of the devices and procedures that the Voting Rights Act would later seek to end:

> (1) A resignation and a death left Ruby Tartt as sole registrar; in effect, no board any longer existed;
> (2) The board refused to give three time losers a fourth opportunity to register;
> (3) The board had no clear meeting place for registration;
> (4) The registrars registered low literacy whites and did not use the application form as a test for them, but rejected low literacy and some good literacy blacks, using the form as a test for blacks;
> (5) Blacks must supply supporting witnesses; whites need not do so; and
> (6) Rejected applicants are not notified of their rejection or the reasons for it.[331]

Sather recommended that the Division notify the circuit solicitor of these issues and of "the procedures and standards which we feel the new Board must comply with."[332]

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324. *Id.*
325. *Id.*
326. *Id.*
327. Memorandum from J. Harold Flannery to David L. Norman, Sumter County, Alabama; Summary and Recommendations (typed Oct. 25, 1962) (date stamped Feb. 27, 1963) (on file with author).
328. *Id.*
329. Note from David L. Norman to Mr. Flannery (Nov. 17, 1962). Flannery apparently was reassigned after this, though the file does not reflect the change. A 1964 status report lists Flannery as handling primarily cases in Mississippi: Sunflower County, Chickasaw County (two cases), Marshall County, and Clarke County. It also shows him as in charge of a case in Fayette County, Tennessee. *Senate Hearings*, *supra* note 85, at 1175ff.
330. Memorandum from Mr. Sather to Mr. Norman, Sumter County, Ala.; Status of Registration (May 6, 1963) (on file with author).
331. *Id.*
332. *Id.* Division policy required an attempt to negotiate prior to bringing suit. *See* MARSHALL, *supra*

Sather's recommendation triggered an extended period of negotiations. Because there was no functioning Board of Registrars, Assistant Attorney General Burke Marshall initially wrote to Alabama Attorney General Richmond Flowers, sending a copy to the Circuit Solicitor for Sumter County. Marshall's letter described in detail both the discriminatory practices and the steps that must be taken to remedy them.[333] Marshall pointed out that "The Civil Rights Act of 1957, as amended, authorizes the Attorney General to bring suit against the State alone where there is no functioning board of registrars."[334] He expressed the hope that a new board would be appointed and would voluntarily comply, so that litigation would be unnecessary.[335] The new board should, according to Marshall, apply to black applicants the same qualification requirements under which whites had been registered; use the application form to determine whether applicants possess those applications, instead of as a test; inform applicants whether they had successfully registered, and if not, the specific reasons for denial; allow rejected applicants to reapply without any waiting period; give adequate notice of when and where persons could apply; and clearly tell applicants of the supporting witness requirement and that the witness may be black.[336]

Unlike Governor George Wallace, Attorney General Flowers was viewed as a moderate on race relations.[337] Nonetheless, Flowers did not respond to Marshall's letter, which had requested a response by June 15. However, two new members were appointed to the Board in June, so there was a functioning Board that would once again process applications. In October, Marshall wrote Flowers a letter saying that a review of actions since June revealed "that the Board has elected not to follow" the procedures outlined in the May letter.[338] Twenty-three blacks had applied to register, but twenty applications were rejected, including four by school teachers and six by persons with high school educations.[339] Marshall said that nineteen of the twenty applications met the standards under which whites had been registered.[340] He reiterated his desire for voluntary resolution, and gave the Board of Registrars two weeks to agree to register the nineteen qualified

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note 160, at 23.

333. Letter from Burke Marshall to Richmond Flowers (May 23, 1963) (on file with author).

334. *Id.*

335. *Id.*

336. *Id.*

337. In 1965, he brought two prosecutions for murders of civil rights workers. Ala. Dep't of Archives & Hist., *Alabama's Attorneys General: Richmond Flowers*, *at* http://www.archives.state.al.us/conoff/flowers.html (last visited Aug. 7, 2002). He won support of black voters in his unsuccessful 1966 race for governor against Lurleen Wallace. Assistant Attorney General Gordon Madison, the head of the federal section of the Alabama Attorney General's office and Flowers's top assistant in voting rights matters, was a fair and able lawyer, who also seemed to be a "moderate." JOHN HAYMAN, BITTER HARVEST: RICHMOND FLOWERS AND THE CIVIL RIGHTS REVOLUTION 188 (1996). Flowers characterized Madison as "an experienced, brilliant lawyer." *Id.*

338. Letter from Burke Marshall to Richmond Flowers (Oct. 16, 1963) (on file with author).

339. *Id.*

340. *Id.*

applicants and to otherwise comply, as spelled out in the May letter.[341] Presumably, the Division did not expect the registrars to comply, for the following week John Doar forwarded Assistant Attorney General Marshall a memorandum recommending suit together with the necessary papers to commence suit, "so that we can file Friday if we get no satisfaction."[342]

The Board of Registrars did respond by the deadline.[343] It agreed to take some steps, but not the steps required by Marshall's letter. For example, instead of agreeing to stop using the application form as a test and to apply the standard under which whites previously had registered, the Board simply said it would use the application to see whether the applicant was qualified and would use the same standard for both black and white applicants.[344] Instead of agreeing to register the nineteen recently rejected applicants whose applications reflected that they were qualified, the Board gave attempted justifications for each rejection.[345] Arvid Sather concluded:

> The action of the new board has again discouraged Negroes at a time when they had expectations that the white officials at the courthouse would give them a fair chance to register. From my observations talking to Negroes and the county officials at the courthouse I cannot help but feel that the next step, whether it be additional negotiations or litigation, must produce decisive results in this matter.[346]

The following week, Sather prepared a letter for Marshall to send to Flowers explaining that suit would be filed because "it is apparent from the Board's response that it is unwilling to make necessary changes in its practices in order to comply with federal law."[347] A month passed before the letter was sent and suit was filed. The file does not explain this latest delay, but it was most likely due to President Kennedy's assassination, which briefly brought Robert F. Kennedy's Department of Justice to a standstill.

On December 16, 1963,—more than two-and-one-half years after Attorney General Rogers's initial records demand—the United States brought its suit against the three members of the Board of Registrars and the State of Alabama.[348] The complaint was signed by Attorney General Kennedy, Burke Marshall, United States Attorney Macon Weaver,[349] and John Doar.

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341. *Id.*
342. Memorandum from John Doar to Burke Marshall (Oct. 22, 1963) (on file with author).
343. Letter from Bernard G. Hines, Ruby P. Tartt, & William S. Holman to Burke Marshall (Oct. 23, 1963) (on file with author).
344. *Id.*
345. *Id.*
346. Memorandum from Arvid A. Sather to David L. Norman, Status of the Negotiations with the Sumter County, Alabama Board of Registrars Concerning the Discrimination Against Negro Applicants for Registration to Vote (Nov. 7, 1963) (on file with author).
347. Letter from Burke Marshall to Richmond Flowers (Nov. 14, 1963) (on file with author).
348. United States v. Hines, 9 Race Rel. L. Rep. 1332 (N.D. Ala. 1964) (No. 63-609).
349. In the Northern District of Alabama, as in most judicial districts in the South, the United States

Its allegations largely tracked the letters that Marshall had sent to Flowers.[350] However, as in some other cases brought during this time period, the complaint added a set of allegations that had not been mentioned in either the letters or the suit justification memorandum: that the racially separate but unequal schools for blacks in Sumter County had provided a public education that "has been and is inferior to that provided for white persons," and that therefore the use of the form as a test is racially discriminatory.[351] The complaint alleged that these "deprivations of rights have been and are pursuant to a pattern and practice of racial discrimination."[352] This allegation, if proven, could lead to the appointment of a federal referee who could consider applications for registration.

The complaint asked for injunctive relief.[353] This was not a case for damages, nor was it a criminal prosecution, either of which would have required a jury trial. Suits for injunctions are called actions in equity and are not included in the constitutional right to trial by jury.[354] So this case would be tried before a judge, who would find the facts and apply the law. If the government were to win the case, the critical question would be what relief the judge would grant. The prayer for relief requested that the defendants be enjoined from specified acts, including "applying different and more stringent registration qualifications, requirements, procedures, or standards to Negro applicants for registration than those which have been applied to white applicants in determining whether or not such applicants are qualified to register to vote," as well as "rejecting applicants by grading the application form and questionnaire as a test under unreasonable and arbitrary standards."[355] The prayer also asked that the court order the defendants to register blacks whose rejected applications met the standards previously applied to whites.[356]

The United States had filed its case. Now it would have to support it with law and facts. The defendants aimed their first salvo at the government's claim of unequal education, quickly filing a motion to strike that allegation.[357] They soon followed with discovery papers—interrogatories and motions to require the government to produce documents.[358] The motion to strike previewed the defense's general theme that low black registration simply reflected low black qualifications: "Said paragraph seeks to

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Attorney would sign as local counsel, but would not actively participate in the case. One of Weaver's assistants, Ray Acton, was normally assigned to make appearances and provide advice to the Civil Rights Division lawyers.

350. Complaint, United States v. Hines, 9 Race Rel. L. Rep. 1332 (N.D. Ala. 1964) (No. 63-609).

351. *Id.*

352. *Id.*

353. *Id.*

354. *See* Shields v. Thomas, 59 U.S. 253, 262 (1855) (holding that right to jury trial under Seventh Amendment does not extend to actions in equity).

355. Complaint, United States v. Hines, 9 Race Rel. L. Rep. 1332 (N.D. Ala. 1964) (No. 63-609).

356. *Id.*

357. STATUS REPORT, supra note 150, at 100, *reprinted in Senate Hearings*, *supra* note 85, at 1273.

358. Plaintiff's Answers to Defendants' Interrogatories, United States v. Hines, 9 Race Rel. L. Rep. 1332 (N.D. Ala. 1964) (No. 63-609).

have the court place a premium on ignorance and lack of education . . . [and] would have the court discriminate against better educated persons in favor of those with inferior education."[359] This theme had animated opposition to the black vote even before the Fifteenth Amendment was adopted.[360] The interrogatories added the "two wrongs don't make a right" theme, perhaps drawn from an early Alabama voting rights case that reached the Supreme Court:[361] "Do you now claim that Negroes may be registered contrary to the Constitution and laws of Alabama because Whites have been?"[362] Later, the defendants' answer would raise two more defenses: They denied that past or present Boards of Registrars in Sumter County had discriminated based on race; and the State claimed that since there was now a functioning Board of Registrars, there was no justification for keeping the State of Alabama as a defendant in the case.[363]

In February, the court granted the motion to strike the unequal education claim.[364] However, the theory was far from dead, and the government's evidence of unequal education in Sumter County ultimately became part of

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359. Motion to Strike, United States v. Hines, 9 Race Rel. L. Rep. 1332 (N.D. Ala. 1964) (No. 63-609) (filed Dec. 30, 1963, by Attorney General Richmond Flowers and Assistant Attorney General Gordon Madison). Even before the complaint was filed, the Circuit Solicitor for Greene, Marengo, and Sumter Counties had explained the low black registration as stemming from high black illiteracy. In a dig at the home of the Justice Department, he claimed that "[a] high school education in a negro school in Sumter County means possibly no more than one in a largely predominate Negro school in Washington, D.C., where, I have read, many cannot even read and write after receiving their diplomas." Letter from Thomas H. Boggs to Burke Marshall (Oct. 18, 1963) (on file with author).

360. *See* ROBERT M. GOLDMAN, RECONSTRUCTION AND BLACK SUFFRAGE: LOSING THE VOTE IN REESE AND CRUIKSHANK 9 (2001) (referring to "those who agreed with President [Andrew] Johnson in believing that African Americans were not yet ready to be granted the right to vote. Having been denied by law the opportunity for education under slavery, the vast majority of black adults were illiterate, and, so the argument went, were incapable of exercising the franchise in any meaningful way").

361. Giles v. Harris, 189 U.S. 475, 486-87 (1903). Justice Holmes assigned as one reason for denying equitable relief that if the Court accepted plaintiffs' claim that the "whole registration scheme of the Alabama constitution is a fraud upon the Constitution of the United States," the Court would then lack equitable power to order the plaintiffs registered, because that would simply perpetuate the fraud. *Giles*, 189 U.S. at 486-87. The anomalous result was to leave the white registrations under the scheme standing and to leave the black applicants with no remedy.

362. Defendants' Interrogatories, United States v. Hines, 9 Race Rel. L. Rep. 1332 (N.D. Ala. 1964) (No. 63-609). The United States responded, at length, to this question:

> Plaintiff does not contend that any person should be registered contrary to law. Plaintiff's position is that under the Constitution and laws of the United States the registration requirements of Alabama law must be construed to require reasonableness in the administration of the laws and that, in accordance with the decision of the Court of Appeals in *U.S. v. Atkins*, the Constitution and laws of Alabama require registrars to determine the qualifications of applicants by fair and reasonable methods, standards and procedures. Further, insofar as voters in Sumter County are concerned, the law of Alabama is no more and no less than it has been interpreted and construed by the usages of the Board of Registrars of Sumter County. Therefore, the Board of Registrars is obliged to register all Negro applicants who possess the substantive qualifications to register, measured fairly and reasonably, as those qualifications have been construed and applied by the Board in registering white persons in the County.

Plaintiffs' Answers to Defendants' Interrogatories, United States v. Hines, 9 Race Rel. L. Rep. 1332 (N.D. Ala. 1964) (No. 63-609).

363. Answer of Defendants, United States v. Hines, 9 Race Rel. L. Rep. 1332 (N.D. Ala. 1964) (No. 63-609).

364. Order, United States v. Hines, 9 Race Rel. L. Rep. 1332 (N.D. Ala. 1964) (No. 63-609).

the record submitted by Attorney General Katzenbach to support adoption of the Voting Rights Act.[365]

Meanwhile, the Civil Rights Division filed some discovery papers, but its lawyers were busy preparing other cases. In March, Arvid Sather tried a voter discrimination case in the federal court in Montgomery, against the Elmore County Board of Registrars. I spent almost two weeks working on that case, my first experience in federal court. In April, Sather tried a case in the federal court in Selma, against the Perry County Board of Registrars. I had made my first trip to Sumter County, where Jonathan Sutin and I interviewed thirty-three black applicants for registration, for a solid week. Sather and I then attended the pre-trial conference in the Sumter County case, held in the federal courthouse in Tuscaloosa,[366] where I met Judge Grooms for the first time. I also met Registrars Hines and Holman and County Solicitor McConnell, whom a memo to our files had described as "a very staunch segregationist."[367] Sumter County case preparation was then immediately interrupted by preparation for the trial of the Perry County case, which Sather presented in late April. I then resumed my work on the Sumter County case, which was tried on May 5 and 6. On May 8, I returned to Washington, which I had not seen since April 5. All successful lawyers face the need to juggle cases, but the combination of resistant state and local officials and foot-dragging judges was stretching the resources of the Civil Rights Division. It was becoming obvious that county-by-county litigation offered a painfully slow and resource-intensive path to compliance with the Fifteenth Amendment. One possible solution was statewide rather than county-by-county litigation. The other would be sweeping legislation, the Voting Rights Act.

For the lawyers assigned to the case, however, statewide suit or sweeping legislation were remote, while the trial was quickly approaching. Trial preparation for the government attorneys was intense. They interviewed and re-interviewed the black witnesses, prepared exhibits, and took depositions. They prepared a witness folder for each potential witness, containing copies of registration forms, interview notes, reports of FBI interviews, and an outline of information to be elicited.

One of the requirements in any case alleging race discrimination in registration is proof of the race of each applicant. Without knowing the race, it

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365. Letter from Katzenbach to Sen. James O. Eastland (April 2, 1965), *reprinted in Senate Hearings*, *supra* note 85, at 249-50. The analysis of unequal educational facilities in Sumter County appears in *Senate Hearings*, *supra* note 85, at 1161-74.

366. The courthouse, a classical granite and brick building built in 1910, now serves as the Tuscaloosa City Hall.

367. Memorandum to Sumter County, Alabama file, Photographing of Registration Records (May 9, 1963) (describing McConnell as "about 5'9" tall and . . . very solidly built." Based on conversations with McConnell during the photographing the anonymous DOJ attorney concluded: "He resents very much the federal government's activities, and I have the impression that he is a very strong type of white Citizens Council member." Citizens Councils were segregationist organizations that formed after the decision in *Brown v. Board of Education*. Unlike the Ku Klux Klan the Citizens Councils renounced violence as a means to promote segregation) (on file with author).

is impossible to know whether blacks and whites are being treated differently. In Sumter County, registration books reflected the race of registered voters, but the race of rejected applicants was not noted in county records. One of the techniques the government lawyers used to establish the race of rejected applicants was to take the deposition of public officials, post office employees, and storeowners. The Division took twenty-one such depositions in late April at which defendants' lawyers asked questions designed to support their general theme that most Sumter County blacks were not qualified to register. In addition to Judge Willie Dearman, whose testimony was described above, a parade of witnesses testified that almost all whites in Sumter County were literate and that many or most blacks were illiterate. Thus, the postmaster in Ward, Alabama, testified that ninety percent of whites were literate and seventy-five percent of blacks were illiterate.[368] The sheriff testified that fifteen percent of whites and seventy percent of blacks were illiterate,[369] while the tax assessor said that two percent of whites and sixty-five percent of blacks were illiterate and that fifteen blacks were convicted of infamous crimes in Sumter County for every one white.[370] The other recurring theme was that blacks were not interested in registering.[371]

The defense had adopted familiar themes that, though they could easily boomerang, would in time be echoed by opponents of the Voting Rights Act.[372] If local officials presumed that blacks were not qualified and that whites were qualified to vote, that could explain but could not justify their discrimination. Their assumptions made credible the government's contention that the defendants applied a double standard in registering voters. And the contention that blacks were not interested in registering reflected a failure to appreciate the dampening effect that repeated rejections of qualified blacks would have on registration efforts.

B. The Trial

Judge Grooms set the case for trial in May 1964. Four years had elapsed since Attorney General Rogers had demanded voter registration records in Sumter County, but only five months had passed since the United States had filed the suit. The leadership of the Division formed a trial team, composed of lead attorney Arvid Sather; supervising attorney David L. Norman; attorneys Jonathan Sutin, James Kelley, and me; and secretary Joyce Auth. My files contain a nine-page list of assignments for each trial team member. For

368. Deposition of Emma P. Mitchell at 8 (April 29, 1964) (No. 63-609).

369. Deposition of Melvin Stephens at 8-9 (April 29, 1964) (No. 63-609).

370. Deposition of Sam Webb at 9-10 (April 29, 1964) (No. 63-609).

371. *E.g.*, Deposition of Pierson Stuart at 10-11 (April 29, 1964) (No. 63-609).

372. *See, e.g.*, *Senate Hearings*, *supra* note 85, at 740 (testimony of Frank Mizell, representing the registrars of Alabama: "illiteracy, conviction of disqualifying crimes, mobility of the population . . . plus plain inertia and indifference" explain Alabama's low voting rate). The theme of black ignorance had a long pedigree, beginning at least as far back as 1866, when it was argued that blacks' lack of education rendered them not ready to be given the vote. GOLDMAN, *supra* note 360, at 9, 13. Proponents of the Boswell Amendment had made the same argument. *Id.* at 11.

example, my pretrial assignments were to prepare offers of proof relating to the education claim,[373] help check the completeness and accuracy of our fifty-two exhibits, figure out how to make our proof on discriminatory use of the voucher requirement, and help prepare witnesses. During the trial I was to take attendance of subpoenaed witnesses, prepare black witnesses, interview white witnesses whom we had not previously interviewed, and interview some additional blacks.

We had to deal with two types of white witnesses. First, we had subpoenaed some whites in order to demonstrate that they had received favored treatment. Our analysis of accepted application forms led us to suspect that some were illiterate or only marginally literate and had received help in filling out the forms. Others appeared not to have been required to secure a voucher (supporting witness). Some had been interviewed by the FBI and had corroborated our suspicions. Others had never been interviewed, so we were the first to speak with them about their registration experience. While a few were hostile, most were glad to speak with us because the subpoena caused anxiety. We had established an order of calling witnesses that called for us to put one or two blacks on the stand, followed by a white whose experiences would contrast with that of the blacks. We knew which black witnesses we would put on, but relied largely on the interviews at the courthouse to determine, at the last minute, which whites to put on, and when. The defendants had called other white witnesses, and we needed to speak with them to determine the nature of their testimony and to plan our cross-examination.

Joe Bizzell's story at trial was the story I recounted earlier, minus the car and tree. Eighteen blacks—college graduates, teachers, contractors, maids, and housewives whose registration efforts had been rebuffed—testified for the government. One black witness after another recounted the story of filling out the registration form and seeking a supporting witness. The government also called the same number of white witnesses, who had been registered despite their limited literacy, their failure to complete the registration form, or their failure to secure a supporting witness. But at trial there was a depressing sameness as each took the stand. The witnesses' personhood was not explored; they were simply tools to prove a pattern of racial discrimination. The Department of Justice lawyers represented the government, not the black witnesses. So the persons whose rights were at stake had no control over what questions would be asked or who would be called to testify. The evidence was limited by the nature of the issue raised in the government's complaint. That issue was not why the registrars discriminated, nor was it the effects on the victims of discrimination. It was simply whether unlawful discrimination had taken place, and by what means. On

373. Because Judge Grooms had stricken that claim from our complaint, we assumed he would not allow us to present evidence to support it. Under Rule 43(c) of the Federal Rules of Civil Procedure (now found in the Federal Rules of Evidence, Rule 103(a)(2)), however, we had the right to inform the court of the substance of the evidence we wished to submit, in order to preserve the issue for appeal.

this point, the testimony devastatingly supported the claim of racial discrimination.

For example, Margaret Campbell Brown, a maid at the white college in Livingston, testified about her two attempts to register. Brown, a homeowner with an eleventh-grade education, had lived in Sumter County for all of her forty-six years. She first tried to register in 1957, at the age of thirty-nine. Only one black successfully applied that year. Brown's application form is reproduced in the government's brief.[374] It is written in clear, firm penmanship. In response to the question: "Name some of the duties and obligations of citizenship," she responded: "Honesty, obedience to all laws of our country."[375] And she responded correctly to the next, "trick," question: "Do you regard those duties and obligations as having priority over the duties and obligations you owe to any other secular organization when they are in conflict?"[376] Many applicants of both races were tripped up by this question, and answered "no" when they meant "yes," or simply left the question blank. Whites who answered "no" or did not answer at all were nonetheless registered, while similarly situated blacks were rejected. However, Brown answered "yes." Moreover, unlike many rejected blacks, Brown had persuaded a white employee in the courthouse to vouch for her. So why was her application rejected? Brown did not know; she had never been notified of her rejection, much less the reason for it. She had assumed that she had properly conveyed the information needed, because the registrars had told her they would let her know whether she was registered. The word "Incomplete" was written, presumably by a registrar, at the top of her form.[377] Was she rejected for failing to say when she had become a "bona fide" resident of her precinct? If so, why did Mrs. Tartt not tell her to fill in that blank? In any event, numerous whites had failed to fill in that very same blank and had nonetheless been accepted. Was she rejected for failing to fill out page three of the application (the oath page)? The government's brief listed twenty-four accepted applications of whites on which the registrars, rather than the applicants, had filled out page three, in whole or in part.[378]

We don't know what prompted Margaret Brown to seek to register in 1957, but it seems likely that her application in July 1963 was an outgrowth of Arvid Sather's conversation with black leaders in May. Two blacks, including Brown, were rejected on July 1, another six on July 2, and three on July 3.[379] Only one black had even applied in the preceding six months,[380] perhaps because of the lack of a truly functioning board until June. After registrars Hines and Holman took office in June, the Board met and agreed

374. U.S. Brief, *supra* note 68, at 56.
375. *Id.*
376. *Id.*
377. *Id.*
378. *Id.* at Table D.
379. U.S. Brief, *supra* note 68, at Table C-22 to C-23.
380. *Id.* at Table C-22.

that all applicants must give a "reasonable" answer to all questions on the form and must provide a supporting witness.[381] As the government argued in its brief:

> When the Board adopted this new and more strict requirement it was obvious that many qualified applicants would be rejected for many of the applicants who had been registered since 1954 had failed to give an answer to all questions. The registrars also knew that practically all eligible white persons were registered to vote while only very few eligible Negroes were registered.[382]

Brown's rejection was par for the course for black applicants under this new board. In its first eight months, it rejected twenty-two (sixty-one percent) of all black applicants, while rejecting only eight percent of the 141 white applicants.[383] Brown's application was again rejected for being incomplete and also for failure to provide a supporting witness. She testified she had been unable to find anyone to sign before closing time that day. In contrast, a white who applied a few months later testified that a registrar had gone with him to find his supporting witness.[384]

Despite the seeming abstraction of the issue, in the courtroom there was flesh and blood. The registrars were determined to defend the case vigorously. They cross-examined most of the black witnesses for the government, seeking to show that the black applicants had failed to ask the registrars for help, and to poke other possible holes in the testimony. They called as witnesses eight blacks who had successfully registered to vote. Eighty-three-year-old Addie B. Jackson, a retired schoolteacher who had lived in Sumter County since her birth in 1880, had successfully registered a few months before trial. She had no explanation of her failure to try to register between the adoption of female suffrage and 1964. Her testimony implicitly backfired: it showed that even highly educated blacks were not expected to register and vote in Sumter County. This was underscored by her testimony, on cross-examination, that she hoped to vote for the very first time in the November 1964 election, if she lived that long. Similarly, testimony of a black illiterate who had been registered and of blacks who had received help finding a supporting witness underscored the arbitrary distinctions registrars drew between "good" and "bad" blacks. The defendants also presented fourteen white witnesses, including Judge Dearman, Registrar Hines, and other county officials, to testify about the fairness of the registration process. The testimony of several of these white officials also backfired, both by reflecting the prejudices of some witnesses and by demonstrating the arbitrary

381. *Id.* at 59.

382. *Id.* Once a person becomes registered in Alabama, he or she normally stays registered for life. *See* Report of the President's Commission on Registration and Voting Participation 65 (1963) (indicating that Alabama had statewide "[p]ermanent registration").

383. U.S. Brief, *supra* note 68, at 59.

384. *Id.* at 32.

nature of such decisions as whether to vouch for an applicant. Although the form now only asked the witness to verify the applicant's residency, a black person's right to vote was made to depend on whether a white person thought she was "a good Negro" or not.

The Sumter County case played out, in the legal arena, the old debate between the views of Booker T. Washington and those of W.E.B. DuBois. Washington, in his autobiography, looked back at what he regarded as the errors of post Civil War Reconstruction.[385] He argued that Reconstruction policy was artificial and forced; that it was used as a tool to elect white officials; that it included a punitive element that was bound to hurt blacks in the end.[386] He thought more attention should have been paid to education.[387] And, as to voting, he said:

> I cannot help feeling that it would have been wiser if some plan could have been put in operation which would have made the possession of a certain amount of education or property, or both, a test for the exercise of the franchise, and a way provided by which this test should be made to apply honestly and squarely to both the white and black races.[388]

By contrast, W.E.B. DuBois, one of the founders of the NAACP, believed that Washington's ideas had led to the disfranchisement of African-Americans "and the legal creation of a distinct status of civil inferiority of the Negro."[389] The historian John Hope Franklin notes that "DuBois contended that it was not possible . . . for Negro artisans, business men, and property owners to defend their rights and exist without the suffrage."[390]

The government's suit supported DuBois's position that the vote should come first, a position later adopted by the Voting Rights Act.[391] While the defendants tried to show that educated and responsible blacks were allowed to vote, the government did not stop at demonstrating that in fact many educated and responsible blacks were denied the vote. We also argued for registering the less educated blacks. The country could wait no longer for blacks to advance educationally or economically before allowing them to vote because as long as blacks were denied the vote, the white majority would continue to keep them down educationally and economically. So although we made much of the prejudice implicit in the testimony of Willie Dearman and other white officials of Sumter County regarding the low educational attainments of Sumter County blacks, we also reinforced it to some extent

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385. BOOKER T. WASHINGTON, UP FROM SLAVERY (1900).
386. *Id.*
387. *Id.*
388. *Id.* at 84.
389. JOHN HOPE FRANKLIN, FROM SLAVERY TO FREEDOM: A HISTORY OF NEGRO AMERICANS 388 (2d ed. 1956).
390. *Id.*
391. Voting Rights Act of 1965 § 4, 42 U.S.C. § 1973 (1994).

by offering dramatic evidence of discrimination in educational opportunities. We showed that the median education of blacks in Sumter County was five years, while the median for whites was 11.5 years.[392] We also showed gross disparities in per pupil expenditures and pupil-teacher ratios in the racially segregated schools of Sumter County.[393] Proffered testimony would have included Reverend Will Jimerson's story of his five years attending school for three months a year in a one-room log cabin, taught by a teacher with an eighth-grade education. His story resembled that of Amanda Halsey, who attended a one-room school with over one hundred students and one teacher, where the students sat on planks laid across wood blocks and wrote on slates for the two-and-a-half months the school met. Black witnesses would have testified that there was no transportation to the black high schools, so that only those who lived nearby or could afford to board away from home were able to attend them. Another black witness, Bernice Hood, had taught from the time she graduated high school in 1944 until 1959, while trying to take college classes during the summers.

The government's argument was twofold. First, the defendants had registered uneducated whites. White illiterates were part of the electoral majority and could generally be counted on to support the status quo. For whites, the vote was a right, unimpaired by any educational or character requirement. Was a white applicant illiterate? A registrar would fill out the applicant's form. Did the white applicant know no one to serve as a supporting witness? A registrar would find a witness. But for African-Americans, registration was a privilege to be earned only by meeting some undefined and flexible standard, depending on the registrars' and potential witnesses' exercise of a sort of *lèse majesté*. After all, blacks were in the majority, and a large proportion of them were poorly educated. Second, the requirements, even if fairly administered, were racially discriminatory. The literacy requirement was discriminatory because the state had denied most blacks a decent education, while providing a much better education to whites. The supporting witness requirement was discriminatory initially because the registrars would accept only white supporting witnesses; even after the white voucher requirement was dropped, there were so few black registered voters that it continued to be much more difficult for blacks to find a supporting witness than for whites.

Although the Department of Justice is not normally viewed as taking radical positions, implicit in its argument was a radical shift in the place of voting in Alabama. The shift was caused, not by radicalization of the Department, but by the facts of this and similar cases. Alabama's view of the vote came through clearly in testimony about the supporting witness requirement, which placed an applicant's right to vote into the hands of those already admitted to the club. Whites who vouched seemingly did not under-

392. U.S. Brief, *supra* note 68, at 84.

393. *Id.*

stand that under Alabama law the only point they were vouching for was the applicant's residence and, prior to 1964, lack of disqualifying circumstances. Repeatedly, whites testified that they signed as supporting witnesses if they considered the applicant a "good citizen." For example, one witness said he signed for Dave Wabbington, a black applicant, because "He was intelligent enough to vote" and was "an awful good boy," who "paid taxes like the rest of us."[394] The defendants treated the vote as a privilege that must be earned; racial prejudice and racial politics made it more difficult for African-Americans to earn it. In simple terms, whites were presumptively qualified to vote, while blacks were presumptively not qualified. In fact, Alabama granted virtual universal suffrage for whites, so the application of the non-discrimination rule led the Department to argue for virtual universal suffrage for blacks.

At the end of the trial, Judge Grooms gave the United States thirty days to brief the case, with the defendants' brief due fifteen days after ours was filed.[395] The government attorneys would have to work quickly. In those pre-computer days the Division mimeographed its trial briefs, a laborious process requiring the preparation of stencils that were difficult to correct. Each person on the trial team was assigned portions of the brief for which he would be responsible. I was to write the description of the case, the parties, and the registration process, the argument regarding discrimination in the use of the supporting witness requirement, and to compile detailed appendices regarding the witnesses, exhibits, race identification, and analysis of accepted and rejected application forms.

The government's "brief" contained eighty-eight pages of facts, law, and argument, followed by more than thirty pages of proposed findings of fact, conclusions of law, decree, and list of sixty-four rejected blacks whom the court should order the registrars to register.[396] A separate volume contained over one hundred pages of tables providing more detailed analysis of the voting records and testimony, as well as analysis of the disparities between black and white education in Sumter County.[397] Faced with the voluminous brief and tables, Alabama Assistant Attorney General Gordon Madison requested oral argument and did not file a reply brief. He complained: "We could not help but recall that in one of the early Tidelands' cases . . . Mr. Justice Black of the Supreme Court of the United States ordered the attorneys to brief the briefs before they received any consideration by the Court."[398] The following week the government made one last attempt to convince Judge Grooms that racially disparate educational opportunities in Sumter County rendered the manner in which the registrars were using

394. *Id.* at 42 (containing testimony of Andrew Parker) (quoting transcript at 16-17, United States v. Hines, 9 Race Rel. L. Rep. 1332 (N.D. Ala. 1964) (No. 63-609)).

395. Court Docket, United States v. Hines, 9 Race Rel. L. Rep. 1332 (N.D. Ala. 1964) (No. 63-609).

396. U.S. Brief, *supra* note 68, at i-xi.

397. *Id.* at Tables A to G.

398. Letter from Richmond Flowers, by Gordon Madison, to Honorable H.H. Grooms (June 22, 1964) (on file with author).

the application forms unlawful. David L. Norman wrote to Judge Grooms to tell him of Judge Johnson's decision, rendered after the government's brief was filed, in a similar case in Elmore County, ruling for the government on the educational theory.[399]

The record does not reflect why no oral argument was held, but events in the country were placing increased responsibilities on the court and the Department of Justice. The day before Madison sent his letter, three civil rights workers in Neshoba County, Mississippi, disappeared.[400] Their murder triggered a massive investigation and federal prosecution. Ten days after Madison's letter, President Johnson signed the Civil Rights Act of 1964, which forbade race discrimination in public accommodations and employment and vastly increased the enforcement authority of the Department of Justice.[401]

C. The Court's Decision

Judge Grooms issued his decision on the day that he joined two other judges in holding that the Civil Rights Act of 1964 was unconstitutional insofar as it forbade Ollie's Barbecue in Birmingham to discriminate based on race.[402] The Ollie's Barbecue opinion contained a detailed analysis of the law and the facts.[403] It was published in the official reporter. Judge Grooms's decision in the Sumter County case contained no such opinion and he chose not to publish it in the official reporter. He transformed the stories that the witnesses recounted into findings of fact and conclusions of law and an order, following in many respects those proposed in our brief.[404] The court held the registrars' earlier requirement of a white supporting witness, and their more recent discriminatory application of a facially neutral supporting witness requirement, were both unlawful.[405] They also discriminated in the use of the application for registration, allowing assistance to whites but not blacks and using the application form as a strict test for blacks but not for whites. Even after the Department of Justice investigation and complaint in 1963, the Board rejected sixty-three percent of the black applications and only eight percent of those from whites.[406] Judge Grooms found that even the facially neutral use of the form as a strict test would

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399. Letter from Burke Marshall, by David L. Norman, to Honorable H.H. Grooms (June 29, 1964) (on file with author).

400. BRANCH, *supra* note 42, at 365 (citing Claude Sitton, *Three in Rights Drive Reported Missing*, N.Y. TIMES, June 23, 1964, at 1.).

401. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.).

402. *See generally* CORTNER, *supra* note 245 (describing the Ollie's Barbecue case). Cortner characterizes Judge Grooms as having "compiled a record of hostility to civil rights claims during his tenure on the district bench." *Id.* at 72.

403. McClung v. Katzenbach, 233 F. Supp. 815 (N.D. Ala. 1964), *rev'd*, 379 U.S. 294 (1964).

404. United States v. Hines, 9 Race Rel. L. Rep. 1332 (N.D. Ala. 1964) (setting forth findings of fact and conclusions of law).

405. *Id.* at 1335.

406. *Id.* at 1334.

"have a definite tendency to freeze indefinitely the imbalance in the registration between Negroes and white persons in Sumter County."[407] He rejected two of the government's arguments. Although agreeing that particular black applicants "appear to have been victims of the practice and pattern of racial discrimination herein found to exist," he stopped short of finding that those applicants were qualified to register and vote.[408] He also rejected the government's argument that even a facially neutral literacy requirement would be discriminatory in light of the disparities in educational opportunities in Sumter County.[409] He followed legal standards that the Fifth Circuit Court of Appeals had already adopted, but the government was pushing the envelope with the educational arguments, which the court of appeals had not addressed.[410]

These findings and conclusions were legally all that was needed to justify relief against the defendants. They failed to tell the individual stories of the witnesses and other victims of discrimination, but they were dramatic. They did tell the story to anyone who would give any serious thought at all to what they meant: that officials of the State of Alabama had, solely on account of race, denied black citizens of Sumter County a place in the body politic. Although two-thirds of the county's population was black, its government was reserved for whites only. And the defendants had done this even though it clearly violated the Constitution and laws of the United States. Lawlessness of this magnitude would not be tolerated in non-racial areas of the law. The court's job was to ensure that it would no longer be tolerated here either.

Despite his findings, Judge Grooms awarded only part of the relief the United States had sought. He enjoined the defendants from discriminating based on race and specifically enjoined the use of the supporting witness requirement and application of "different and more stringent registration" standards to black applicants than had been applied to whites since 1954.[411] This latter provision seemingly required the registration of applicants with only the barest minimum of literacy. He ordered the defendants to register applicants who met qualifications specified in his order, but included a requirement that the "applicant is able to demonstrate his ability to read and write."[412] We were especially disappointed that Judge Grooms—following a pattern set by a federal court in Montgomery in *Giles v. Harris*[413] in the early 1900s—refused to order the Board to register the persons on his list of

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407. *Id.* For the development of "freezing" doctrine, see Hawk & Kirby, *supra* note 37, at 1137-52.

408. *Hines*, 9 Race Rel. L. Rep. at 1334.

409. *Id.* at 1332-37.

410. Judge Frank M. Johnson did adopt the government's theory in the Elmore County, Alabama, voting rights case, which was decided shortly after the Sumter County brief was submitted. United States v. Cartwright, 230 F. Supp. 873 (M.D. Ala. 1964). However, his decision, in another judicial district, was not binding on Judge Grooms.

411. *Hines*, 9 Race Rel. L. Rep. at 1336.

412. *Id.*

413. This unreported case from the Circuit Court of the United States for the Middle District of Alabama was appealed to the United States Supreme Court at *Giles v. Harris*, 189 U.S. 475 (1903).

apparent victims of discrimination; instead, he ordered that they be notified of their right to reapply.[414] So Joe Bizzell, Margaret Campbell Brown, and the other discriminatorily rejected blacks would have to apply yet again, despite having already demonstrated their qualifications to register. The court's failure to tell their stories in the merits portion of the findings made it possible to neglect them in the remedy portion.[415] In our view, we had proved that each of the sixty-four listed blacks was qualified to register and had been discriminatorily denied registration, some more than once.[416] Therefore, we believed the court had the duty of requiring the registrars to register them.

The government did not appeal the decision. Although the Department of Justice files do not reflect why it decided not to appeal,[417] there are several possible reasons. The government's brief had cited no authority compelling the court to enter such an order. Indeed, it did not even cite authority showing that the court had power to enter the requested order.[418] Although no higher court had yet found a duty to enter such an order where a pattern or practice of discrimination in voter registration existed, the Fifth Circuit had upheld a lower court's order requiring registration of named black rejected applicants.[419] An appeal would challenge the district court's exercise of discretion, always a risky claim.[420] Moreover, in the wake of the adoption of the Civil Rights Act of 1964 a few months earlier, our personnel were stretched to the limit. Finally, we probably thought that the blacks on the list would in fact reapply and would this time be registered under the revised standards. While this hardly seems fair to the rejected blacks, they were not our clients, and I imagine that practical results seemed more important to us than a chancy appeal to the Fifth Circuit. So instead of appealing, the De-

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414. *Hines*, 9 Race Rel. L. Rep. at 1336.

415. *See* ROSS, *supra* note 48, at 23 (describing the use of abstraction to ignore the stories of the litigants and justify the doctrine of separate but equal).

416. The sixty-four black applicants accounted for a total of ninety-five rejected applications over a ten-year period.

417. The Division is supposed to consult with the solicitor general on whether to appeal an adverse decision. 28 C.F.R. § 0.20(b) (2001). However, Judge Grooms's decision was partially favorable to the government, so we may have thought it unnecessary to write a no-appeal memorandum. *See Hines*, 9 Race Rel. L. Rep. at 1332.

418. The government did send Judge Grooms a letter attaching Judge Johnson's opinion and order in the Elmore County voter registration case, in which Judge Johnson ordered that the defendants register 102 named rejected black applicants. Letter from David L. Norman to Judge Grooms (June 29, 1964) (on file with author).

419. Alabama v. United States, 304 F.2d 583 (5th Cir. 1962).

420. *Alabama*, 304 F.2d at 589 (upholding Judge Frank M. Johnson's exercise of remedial discretion in ordering that fifty-four named black applicants be registered, the court noted, "It was in this setting—under the cumulative impact of gross abuses in the past and little expectation of improvement for the future—that the Judge was led to conclude 'that this Court is of the firm opinion that this case warrants not only a prohibitory decree but a decree mandatory in nature.'" The court of appeals concluded, "In the light of the circumstances . . . we are of the clear view that this order was within the power of the Court to grant, and that the exercise of that power was eminently proper."). *Id.* If an order to register named applicants was within the court's discretion, so might the court have discretion not to enter such an order. *See id.*

partment declared victory: "Judge Grooms' decree is one of the most far-reaching we have obtained in Alabama."[421]

D. Post-Trial Developments

A lawsuit does not end with the trial or even with the court's decision. The immediate goal of this lawsuit was to change behavior and transform Sumter County into a democracy. After the trial, and before Judge Grooms ruled in the case, the defendants changed their practices slightly: they began rejecting more white applicants (twenty-four percent).[422] However, they rejected sixty-seven percent of the blacks who applied.[423] For example, one of the government's witnesses at trial, Atlas Campbell, was once again rejected. A farmer who co-owned one hundred acres, Campbell had previously applied in 1954, at the age of forty-six. His 1954 application reflected that he was qualified. Though it contained minor errors, whites who filled out forms with identical errors were registered. He testified that he never heard from the Board about his 1954 application. The Board later cited as the reason for rejecting the July 1964 application of Campbell: "Failed Test," consistent with the government's charge that the registrars were using the form as a test rather than to elicit information about the applicant's eligibility to register.[424] During this period fifty-one blacks "failed test" and two more were rejected for failing to provide a supporting witness.[425] The Board did register some blacks between trial and decision, including Margaret Campbell Brown.[426] Atlas Campbell was finally registered in October 1964, after Judge Grooms entered his decree.[427]

After the decree was entered, the *Sumter County Journal* published an article with the curious headline, "Federal Judge Hits Sumter Voter Records."[428] The article further stripped away the story of the discrimination against blacks in Sumter County. It provided the overall statistics and reported that Judge Grooms had ordered the Board of Registrars "to stop discrimination against Negro voter applicants."[429] It did not explain the devices that the Board had used to discriminate. The article did accurately report the content of the decree, including a list of the sixty black applicants who, as the article mistakenly put it, had been "ordered by the court to try to re-register."[430] While the registrars continued to administer the literacy test, they did not reject applicants based on their poor performance on the test. Joe Bizzell filed his fourth application, which this time was accepted. The

421. STATUS REPORT, *supra* note 150, at 100, *reprinted in Senate Hearings*, *supra* note 85, at 1273.
422. Board of Registrars' Report (Feb. 18, 1965) (on file with author).
423. *Id.*
424. *Id.*
425. *Id.*
426. *Id.*
427. Board of Registrars' Report, *supra* note 422.
428. *Federal Judge Hits Sumter Voter Records*, SUMTER COUNTY J., Sept. 24, 1964, at 1.
429. *Id.*
430. *Id.*

Department of Justice moved to hold the registrars in contempt for administering the literacy test, but Judge Grooms held his order did not forbid the use of the test; it only forbade rejecting applicants for failing the test.[431]

I went to Sumter County shortly after the decree had been entered. The federal job had largely been completed; we had cleared the way for nondiscriminatory registration, but the federal government had no responsibility to organize a voter registration drive. Black leaders in the county were excited and spoke of plans to organize in order to register enough blacks to defeat the sheriff in the next election, "unless he changes his attitude toward the Negro people of the County."[432] However, the Department of Justice assessed the situation thus: "At present Sumter County seems to suffer from a lack of Negro leadership or an organization that would stimulate voter registration. Until this problem is solved it is doubted that Negro voter registration will be materially increased."[433]

The following year Congress adopted the Voting Rights Act.[434] The Act empowered the attorney general to send federal examiners to counties covered by the law, where the registrars were not properly registering voters.[435] The attorney general sent examiners to recalcitrant counties, but tried to convince registrars to comply instead.[436] Within three months, examiners had listed over 56,000 black voters in the twenty covered counties.[437] More remarkably, local registrars had registered more than 110,000 blacks, including 229 in Sumter County.[438] Sumter County registrars rejected no applicants during that period.[439] My own involvement with Sumter County ended about this time, but not the involvement of the Department of Justice.

Once blacks were free to register, and did register, how would the all-white leadership of the Sumter County government react? In 1966, Judge Dearman acknowledged that "the county made a mistake years ago when there were only registered Negro teachers and perhaps they should have registered more Negroes."[440] In 1982, Justice Department lawyer David Hunter observed in a pre-election report: "whites do not wish to relinquish political control in Sumter County."[441] The Department had by then sued

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431. STATUS REPORT, *supra* note 150, at 99-100, *reprinted in Senate Hearings*, *supra* note 85, at 1272-73. Alabama registrars attempted to use Judge Grooms's approval of this practice as an argument against the Voting Rights Act's suspension of literacy tests. *Senate Hearings*, *supra* note 85, at 769 (containing testimony of Frank Mizell).

432. Memorandum from Edward H. O'Connell to Sumter County Trial File (Nov. 19, 1964) (on file with author).

433. *Senate Hearings*, *supra* note 85, at 1273.

434. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1994)).

435. *See* 42 U.S.C. § 1973 (1994).

436. U.S. COMM'N ON CIVIL RIGHTS, THE VOTING RIGHTS ACT: THE FIRST MONTHS 40 (1965).

437. *Id.* at 37-39.

438. *Id.* at 2, 37.

439. *Id.* at 55.

440. Memorandum from Gary L. Betz to Frank M. Dunbaugh, Sumter County, Alabama Voting Post Election Conference with Judge Dearman (May 25, 1966) (RG 60, File 166-1-17/10; National Archives Building, College Park, Md.).

441. Memorandum from David Hunter to Gerald Jones (Aug. 25, 1982) (on file with author).

Sumter County officials to allow federal observers to fully observe elections,[442] and to prevent a voter re-identification law from being implemented until it could be made non-discriminatory.[443] The Department sent federal observers to every Sumter County election. In justifying sending observers in 1983, David Hunter noted that "potential exists for the type of tense, polarized election that Sumter County has witnessed in recent years."[444] By 1974, blacks constituted a majority on the Democratic Party County Executive Committee, and Willie Dearman, still the probate judge, was sued for attempting "to circumvent the authority of the black-controlled" committee.[445] By 1976, supporters of white office-seekers sent a flyer to 554 persons listed as registered in Sumter County who had non-Sumter County addresses, urging them to vote absentee because "of the delicate political situation that exists in our County. Certain individuals and groups of individuals are making a concentrated effort to seize control in this election."[446]

Gradually, blacks began winning other county offices, until, by 1986, the state legislators representing Sumter County were black, as were the tax assessor, the appraiser, the tax collector, and all members of the Board of Education and County Commission.[447] Today, blacks hold more than seventy percent of the elected offices in Sumter County and constitute about seventy-two percent of the population.[448] They hold most of the important county offices and many offices in the little cities around the county.[449] They are no longer outsiders at the county courthouse. It seems fair to say that the political process is open today, though racial tensions may still effect elections. Are the blacks of Sumter County better off now that they can influence the government? Surely securing the franchise has been an important step toward the full citizenship that the Fourteenth Amendment guaranteed more than 130 years ago. Hopefully there is now running water for the residences of blacks in Livingston. My guess is that it will take some years before blacks in Sumter County achieve economic equality.

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442. United States v. Executive Comm. of the Democratic Party, 254 F. Supp. 543 (N.D. Ala. 1966), *described in Extension of the Voting Rights Act: Hearings on H.R. 939, H.R. 2148, H.R. 3247, and H.R. 3501 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 94th Cong. 204 (1975).

443. United States v. Bd. of Registrars (N.D. Ala. 1981) (CV81-P-1075-W).

444. Memorandum from David Hunter to Gerald Jones (Oct. 17, 1983) (on file with author).

445. U.S. COMM'N ON CIVIL RIGHTS, THE VOTING RIGHTS ACT: TEN YEARS AFTER, 169-70 (1975); *see also* Ward v. Dearman, 626 F.2d 489 (5th Cir. 1980); Sumter County Democratic Executive Comm. v. Dearman, 514 F.2d 1168 (5th Cir. 1975).

446. Memorandum from David H. Hunter to William Bradford Reynolds (Sept. 21, 1981) (on file with author).

447. Telephone conversation of Charles McKeag with Gerome Gray, Alabama Democratic Conference (Jan. 19, 2000).

448. *Id.*

449. *Id.*

VI. ORIGINS OF THE VOTING RIGHTS ACT

The conventional story is that the Voting Rights Act primarily responded to the frustration and sense of crisis many Americans felt when the Alabama state troopers and Dallas County deputy sheriffs so visibly and brutally went to war against black citizens who were simply seeking the voting rights that the country thought it had already secured in the Civil Rights Acts of 1957, 1960, and 1964.[450] The charge by mounted law enforcement officers against unarmed Americans was the final straw. The normal reaction to frustration and crisis is that we must "do something." So it was clear that new legislation would be brought before Congress.

This conventional story, while correct as far as it goes, omits two important elements. First, the charge at the Edmund Pettus Bridge was simply the dramatically visible manifestation of the official racial caste system. The everyday working of the system depended on the actions of government officials to enforce it. Some registrars consciously wished to subordinate blacks, but even those who professed a desire to act fairly found themselves applying a double standard for voter registration.[451] Even after the 1957 Civil Rights Act reiterated the promise of the Fifteenth Amendment, the Sumter County registrars persisted in applying that double standard, in "apparent ostrich-like disregard as well as disrespect for the law."[452] Nor did

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450. When the Act became law, an Alabama newspaper editorialized:

> The harsh and extravagant voting rights bill was passed . . . at the Edmund Pettus Bridge, when Col. Lingo's forces of law and order commenced to beat the daylights out of a handful of marchers. The television view of that cruel and stupid performance brought . . . new shame to the state . . . . Mark it well: Alabama passed this law.

The Wallace-Lingo Act, *supra* note 43; *see also* DERRICK BELL, RACE, RACISM AND AMERICAN LAW 596 (4th ed. 2000) (recognizing both origins); KEITH J. BYBEE, MISTAKEN IDENTITY: THE SUPREME COURT AND THE POLITICS OF MINORITY REPRESENTATION 16-22 (1998); DAVID J. GARROW, PROTEST AT SELMA: MARTIN LUTHER KING, JR., AND THE VOTING RIGHTS ACT OF 1965 (1978) (describing two equally weighted origins of the Voting Rights Act: the events at the bridge in Selma and the history of state and local obstruction of federal efforts to enforce the Fifteenth Amendment); SAMUEL ISSACHAROFF, PAMELA S. KARLAN, RICHARD H. PILDES, THE LAW OF DEMOCRACY 546-48 (2d ed. 2002) (quoting Attorney General Katzenbach, as reported by HOWELL RAINES, MY SOUL IS RESTED: MOVEMENT DAYS IN THE DEEP SOUTH REMEMBERED 215 (1977), as saying "You people in Selma passed that [Voting Rights Act] on that bridge that Sunday."); PARKER, *supra* note 40, at 9 (the civil rights "protest effort succeeded in accomplishing what case-by-case litigation against registration restrictions failed to do"); ABIGAIL M. THERNSTROM, WHOSE VOTES COUNT? AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS 2-4 (1987); Michael J. Klarman, Brown, *Racial Change and the Civil Rights Movement*, 80 VA. L. REV. 7, 147-49 (1994).

451. Lawrence, *supra* note 52, at 322. Charles Lawrence argues that because of our shared experiences "that attach significance to an individual's race and induce negative feelings and opinions about nonwhites . . . we are all racists." *Id.* However, "We do not recognize the ways in which our cultural experience has influenced our beliefs about race or the occasions on which those beliefs affect our actions." *Id.* The Sumter County Registrars at best were not consciously racists but easily fit into Lawrence's definition. *See also* ROSS, *supra* note 48, at 17 ("Even the white segregationists did not make their law out of stories about a world of black subjugation and the special advantages this subjugation created for the whites; instead, they too envisioned a world of perfect harmony, although their vision included a perfect separation which they imagined as just and righteous.").

452. Burke Marshall, Speech at Howard Law School Annual Dinner (undated), *in* 1 CIVIL RIGHTS, THE WHITE HOUSE, AND THE JUSTICE DEPARTMENT: 1945-1968, at 399, 404 (Michal R. Belknap ed., 1991).

their practices change after Attorney General Rogers sought their records in 1961, or even after suit was brought in 1964. As Attorney General Katzenbach testified:

> [I]n some areas, it has become the theory that a voting registrar is not really required to do anything except what he has been doing until his records have been examined and he has been hauled into court and, at public expense, his case has been defended by the State, and all the delaying devices possible have been used . . . . Then, when a decree is finally entered, that decree can be construed as narrowly as possible and he can do as little as he can get away with under that decree. Then that decree—what it means—can be questioned again in court, new evidence can be introduced, and, meanwhile, election after election is going by.[453]

Similarly, the discriminators had "found aid and comfort in the disingenuousness of some district judges and in the genuinely troubled vacillation of others."[454] While most federal judges were not aversive racists, many nonetheless had difficulty believing that strong remedies were needed for discrimination in voter registration, just as federal judges in a prior era did not see racial discrimination in the separate but equal doctrine.[455] The Chairman of the House Judiciary Committee, which was considering the proposed Voting Rights Act, observed, "officials as high as the U.S. district judges have taken on the color of their surroundings and have given forth decisions which seem contrary to the Supreme Court decision and the Constitution."[456]

There would have been no Voting Rights Act had the registrars applied a neutral standard. There probably would have been no Voting Rights Act had all the federal judges issued effective relief. Conversely, even without the debacle at the Edmund Pettus Bridge, further voting rights legislation might well have been enacted.[457] President Johnson expressed interest in such legislation in December of 1964.[458] He "indicated a desire to move forward early next year with a legislative proposal authorizing a Commission to appoint federal officers to serve as registrars . . . ."[459]

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453. *House Hearings*, *supra* note 101, at 66-67.

454. Hawk & Kirby, *supra* note 37, at 1196.

455. *See House Hearings*, *supra* note 101, at 83 (containing Remarks of Chairman Emmanuel Celler).

456. *Id.* More recent studies suggest that "although judges should be constantly vigilant for potential biases and prejudices, they will not always recognize their own biases and stereotypes." Debra Lyn Bassett, *Judicial Disqualification in the Federal Courts*, 87 IOWA L. REV. 1213, 1250 (2002).

457. "Selma was in a sense the breaking of a dam—a dam which had been blocking the participation of the Negro in constitutional government in the South for a century." Hawk & Kirby, *supra* note 37, at 1053.

458. Memorandum from Lee C. White for Bill Moyers (Dec. 30, 1964), *reprinted in* 15 CIVIL RIGHTS, THE WHITE HOUSE, AND THE JUSTICE DEPARTMENT: 1945-1968, at 150 (Michal R. Belknap ed., 1991).

459. *Id.*; *see also* GARROW, *supra* note 450, at 36-39 (describing the White House and Justice De-

Second, the conventional story fails to account fully for the content of the Act. For once the public was determined to "do something," it would still have to decide what that something should be. What should the legislation provide beyond what had already been enacted? True, accounts of the origins of the Act do mention that it responded in part to a history of litigative delays and of the unfair use of various tests and devices.[460] However, those statements fail to place any flesh on the skeletal account.[461] True, too, some of the new methods of enforcement had been proposed in the past. For example, the administration had proposed the appointment of temporary voting referees in its proposal that led to adoption of the 1964 Act.[462] This proposal, like the referee provision of the 1960 Act,[463] may be seen as a precursor to the federal examiner provision of the 1965 Act.[464] However, appointment of the temporary voting referees was to be placed within the discretion of the court, while the 1965 Act placed the appointment function with the attorney general.[465]

The content of the Act drew heavily on both the positive and negative lessons of litigation—on the rules developed by federal litigation in Alabama, Louisiana, and Mississippi—and on the failures of some federal judges to properly enforce the Fifteenth Amendment.[466] The impact of Department of Justice litigation on the Voting Rights Act can be summarized as follows: The litigation:

(1) Developed legal rules that VRA adopted.
(2) Provided a factual predicate for Congress's power to enact the legislation.

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partment 1964 consideration of new voting rights legislation).

460. J. MORGAN KOUSSER, COLORBLIND INJUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION 54-55 (1999); Thernstrom, supra note 450, at 11-14.

461. *See, e.g.*, ALEXANDER M. BICKEL, POLITICS AND THE WARREN COURT 125-26 (1965); KOUSSER, supra note 460, at 54-55; PARKER, *supra* note 40, at 29-33; THERNSTROM, *supra* note 450, at 11-14.

462. *Hearings on S. 1731 Before the Senate Comm. on the Judiciary*, 88th Cong. § 101(c) (1964). President Kennedy had noted the "usual long and difficult delay which occurs between the filing of a lawsuit and its ultimate conclusion" and proposed that temporary federal voting referees be appointed "to provide for interim relief while voting suits are proceeding through the courts . . . ." John F. Kennedy, Special Message to the Congress on Civil Rights, PUB. PAPERS 221, 223-24 (Feb. 28, 1963) [hereinafter Special Message to Congress].

463. Civil Rights Act of 1960 § 601, 42 U.S.C. § 1971(e) (1994).

464. Voting Rights Act of 1965 § 3, 42 U.S.C. § 1973a (1994).

465. *See* 42 U.S.C. § 1973.

466. The relation between the litigation and the content of the act is recognized by Hawk & Kirby, *supra* note 37, at 1195-1204. This shows "how the courts shaped the 1957 Civil Rights Act and its 1960 amendments into a flexible and creative law which provided the model in most significant respects for the 1965 act." *Id.* at 1054; *see also* Doar, *supra* note 172, at 13-14 ("The Division's hard work underpinned the opinions and orders . . . that established the freezing principle . . . . These decisions had an influence on individual members of the House Judiciary Committee as they decided upon the final content of the 1965 Voting Rights Bill . . . ."). Armand Derfner also has pointed out that the development of the freezing principle, of statistically based presumptions, and of judicial supervision of local voting officials "were instrumental in formulating the pattern of the Voting Rights Act of 1965." Armand Derfner, *Racial Discrimination and the Right to Vote*, 26 VAND. L. REV. 523, 550 (1973).

(3) Through the development of stringent remedies, signaled Congress that it could impose strong enforcing legislation.
(4) May have helped the Department of Justice to grab the laboring oar, contrary to some Civil Rights Commission proposals.
(5) Revealed the need to bypass some federal judges.
(6) Either because they would not do their jobs; or
(7) Because Congress had placed unreasonable and unrealistic demands upon them.
(8) Revealed the need to bypass local registrars.[467]

The bill that became the Voting Rights Act was drafted by lawyers in the Department of Justice and presented to Congress by Attorney General Nicholas Katzenbach.[468] Katzenbach noted that Congress had thrice in modern times adopted litigation tools as the solution for discriminatory denials of the right to vote.[469] Referring then to the record of Department of Justice enforcement efforts, he declared: "But three times we have seen that [litigation] alternative tarnished by evasion, obstruction, delay, and disrespect. The alternative, in short, has already been tried and found wanting. 'The time of justice,' the President said on Monday 'has now come.'"[470] Thus, the Voting Rights Act would contain administrative as well as litigation methods of enforcement, would shift some enforcement away from Southern federal judges to the federal court in the District of Columbia, and would ban outright the use by Southern states of literacy tests and supporting witness requirements.[471]

The very failure of suits such as the Sumter County case to provide prompt and effective relief became the justification for drastic new administrative remedies—appointment of federal officials to prepare and maintain lists of persons eligible to vote in the covered jurisdictions[472] and to observe elections,[473] and the requirement that changes in voting standards, practices or procedures in the covered jurisdictions be pre-cleared as nondiscriminatory.[474] Appendix A, *infra*, charts the origins of prominent provisions of the Act. And the record compiled in these cases of disparate educational opportunities, and abuse of the literacy test and supporting witness requirement supported the temporary regional ban on their use.[475] The most damning evidence was not that some aversive racist registrars discriminated; nor was it that some aversive racist federal judges denied relief. More important than either of these facts was the record of well-meaning registrars like Ruby

467. *See* Derfner, *supra* note 466, at 545.
468. *See House Hearings*, *supra* note 101, at 2-19.
469. *Id.* at 5.
470. *Id.*
471. *See id.* at 2-19.
472. 42 U.S.C. § 1973d (1994).
473. *Id.* § 1973f.
474. *Id.* § 1973c.
475. President Kennedy had previously noted the abuses of tests and devices but had proposed more limited corrective action. Special Message to Congress, *supra* note 462, at 223-24.

Tartt and Bernard Hines, and of conscientious judges such as Judge Grooms.[476] Prior laws had required only racial neutrality, but too many local officials and federal judges had proven unwilling or unable to provide neutrality.

The Fifteenth Amendment had provided a simple formulation: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."[477] Similarly, the Civil Rights Act of 1870 (also known as the Enforcement Act), which provided civil and criminal remedies, stated the substantive rule simply, requiring election officials to "give to all citizens of the United States the same and equal opportunity to perform such prerequisite [to voting], and to become qualified to vote without distinction of race, color, or previous condition of servitude."[478] The 1957 Civil Rights Act had essentially adopted the same formulation.[479] The 1960 Act did not tinker with the substantive formulation; it simply added to judicial power and duty where the government proved an "act or practice" of racial discrimination in voting or registration.[480] Not until the 1964 Civil Rights Act did Congress attempt to provide a more specific statement of what constituted unlawful discrimination.[481] Here, for the first time since Reconstruction, Congress banned some registration practices without specific reference to race.[482] Responding especially to the freezing principle established in the Department of Justice litigation up to that time, Congress made it unlawful to deny registration to some applicants by applying different standards, practices, or procedures than had been applied to successful applicants; it also banned denial of registration for immaterial mistakes made on the application form, required that any literacy test be conducted wholly in writing; and made completion of the sixth grade presumptive evidence of literacy.[483] The 1964 Act constituted a tentative, limited step toward recognition that registrars simply could not follow some practices without discriminating, and that the federal courts needed much more explicit guidance.[484] However, with the gathering storm of official violence and black protest against discrimination, the 1964 Act proved to be too little, too late.

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476. *See* PELTASON, *supra* note 158, at 138-42.

477. U.S. CONST. amend. XV, § 1.

478. Civil Rights Act of 1870 § 2, ch. 114, 16 Stat. 140.

479. 42 U.S.C. § 1971(a)(1) (1994):

> All citizens of the United States who are otherwise qualified by law to vote at any election . . . 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.

Id.

480. *Id.* § 1971(c).

481. *See id.* § 1971(a)(2).

482. *See id.*

483. 42 U.S.C. § 1971(a)(2).This was in substantial accord with recommendations of the Civil Rights Commission. *See House Hearings*, *supra* note 101, at 124-28.

484. *See* 42 U.S.C. § 1971(a)(2).

The Voting Rights Act, enacted the next year, took the logic of the 1964 Act to a striking conclusion.[485] It embraced a variety of "effects" tests for unlawful discrimination: a statistical test to determine which states would be covered by the special provisions of the Act, bans on various practices that had the effect of excluding blacks from the vote in covered jurisdictions, and an effects test for judging the validity of changes in voting practices in covered jurisdictions.[486] Literacy tests, good character requirements, and supporting witness requirements were forbidden outright in the covered states.[487] In other words, even plainly illiterate individuals must be allowed to vote if they possessed the qualifications other than literacy.

The federal ban on literacy tests was a truly radical measure. It bypassed a discussion which President Kennedy's Commission on Registration and Voting Participation had initiated of whether literacy should be a prerequisite for voting, transforming it into an issue of racial discrimination.[488] The Supreme Court had previously upheld the constitutionality of literacy tests as against a constitutional challenge,[489] and Horace Busby, a close advisor to President Johnson, objected that the ban "might place the President in the indefensible position of advocating 'illiteracy' as a qualification, rather than a disqualification, for electors."[490] Busby worried about "the incompatibility of an illiterate minority with the successful functioning of our Democratic system,"[491] much as Ruby Tartt had. However, the record in Sumter County and other cases showed that bans on discrimination in the design or administration of literacy tests were ineffective. Attorney General Katzenbach argued that Congress had power to outlaw "the use of any practices utilized to deny rights under the 15th [A]mendment."[492] And, he argued, the covered states had already, in effect, abandoned literacy as a requirement "by registering illiterate or barely literate white persons."[493]

Eventually, the ban on literacy tests was made permanent,[494] poll taxes were held unconstitutional,[495] the age for voting was lowered to eighteen,[496] and other federal laws promoting ease of registration led to virtually universal suffrage. The cases showing how various registration restrictions were

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485. *Id.* § 1973.

486. *Id.*

487. *Id.* § 1973(b).

488. The majority of the commission had recommended that literacy tests not be a requisite for voting, arguing that the right to vote "is the right of every citizen no matter what his formal education . . . ." REPORT OF THE PRESIDENT'S COMMISSION ON REGISTRATION AND VOTING PARTICIPATION 40 (1963). Commissioner Brendan Byrne dissented, arguing that "some minimal standards in knowledge and understanding are needed to make an intelligent choice at the polls." *Id.* at 53.

489. Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959).

490. Memorandum from Horace Busby to Bill Moyers & Lee White (Feb. 27, 1965), *reprinted in* 14 CIVIL RIGHTS, THE WHITE HOUSE, AND THE JUSTICE DEPARTMENT: 1945-1968, at 3 (Michal R. Belknap ed., 1991).

491. *Id.* at 4.

492. *House Hearings*, *supra* note 101, at 15.

493. *Id.* at 16.

494. *See* Katzenbach v. Morgan, 384 U.S. 641 (1966).

495. U.S. CONST. amend. XXIV, § 1.

496. U.S. CONST. amend. XXVI.

improperly manipulated smoothed the way toward universal suffrage. Opponents of the Act were not "willing to make the argument flatly that Negroes shouldn't be allowed to vote,"[497] they could not credibly argue that Southern states were complying with the Fifteenth Amendment and civil rights acts,[498] and so their primary arguments against the proposed Act were that it was unconstitutional[499] and that it would promote "political domination by a majority which is illiterate."[500]

The temporary ban on the use of tests or devices was not the only provision invalidating facially neutral state laws and practices.[501] Perhaps the most remarkable provision, the one that Justice Black could not support, was section five of the Act. Justice Black's objection, however, went to the procedure—requiring States to come to Washington for approval of changes in state voting laws.[502] The substantive standard of section five is just as remarkable. Pre-clearance is to be granted only if the state or subdivision is able to show that "such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color."[503] Section five thus adopts an effects test for the validity of changes in voting practices.[504] This test is based on a prophylactic principle: Congress may legislate against the risk that state law, while neutral on its face, is in fact racially discriminatory.[505] As the Supreme Court subsequently said, in upholding section five, Congress knew that some covered jurisdictions "had resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees."[506] Therefore, "Congress had reason to suppose that these States might try similar maneuvers in the future in order to evade the

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497. Interview by Paige E. Mulhollan with Nicholas D. Katzenbach, Attorney General of the United States, at 21 (Nov. 12, 1968), *available at* http://www.lbjlib.utexas.edu/johnson/archives.hom/oralhistory.hom/katzenbach/katzenb1.pdf (last visited Mar. 5, 2003).

498. *But see Voting Rights Legislation: Joint Statement on S. 1564, Before the Senate Committee on the Judiciary*, 89th Cong. 13-14 (1965) (statement of Charles J. Bloch; individual views of Senators Eastland, McClellan, and Ervin).

499. *Id.* at 2-20 (statement of Charles J. Bloch), *Id.* at 21-34 (statement of Thomas H. Watson); *see also* Katzenbach interview, *supra* note 497 (transcript at 21) ("[T]hey tried constitutional arguments and this, that and the other thing.").

500. *Senate Hearings*, *supra* note 85, at 737 (testimony of Frank Mizell on behalf of registrars of State of Alabama).

501. *See generally* Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (prior to 1970 and 1975 amendments).

502. *Id.* § 5.

503. 42 U.S.C. § 1973c (1994).

504. *Id.*

505. Section three also includes an effects test: Where the Attorney General proves that a "test or device has been used for the purpose or with the effect of denying or abridging the right . . . to vote on account of race or color," the court is to suspend the defendant's use of tests or devices. Voting Rights Act of 1965 § 3, 42 U.S.C. § 1973a (1994). Section four, the so-called "bail-out" section, allows jurisdictions covered by the Act's formula to escape coverage by proving that no test or device has been used in the past five years "for the purpose or with the effect of denying or abridging the right to vote on account of race or color . . . ." *Id.* § 4, 42 U.S.C. § 1973b (1994).

506. South Carolina v. Katzenbach, 383 U.S. 301, 335 (1966).

remedies for voting discrimination contained in the Act itself."[507] This provision of the 1965 Act would ultimately lead to the imposition of a nationwide "results" standard for judging laws that affect voting rights.[508]

VII. CONCLUSION

Civil disobedience can be categorized by the group engaging in it, the type of action taken, the policy to which the protestors object, or the type of relief sought. Is the group well defined or amorphous? Are the actors engaged in violence, non-violent but unlawful behavior, or behavior that is lawful but at odds with custom? Do the protestors object to an unlawful policy or one that is lawful but perceived as unjust? Are the protestors' aims well defined or amorphous? Are they narrow or broad? Are they clearly linked with the policy that the protestors challenge?

Civil disobedience is an inherently blunt instrument. It can communicate broad messages, but not details. The confrontation at the Edmund Pettus Bridge is a perfect example. It originated with voter registration drives in Selma and Marion, Alabama.[509] Jimmie Lee Jackson, a black demonstrator in Marion, was killed by an Alabama State Trooper.[510] From the initial suggestion of a funeral cortege going from Marion to Montgomery came the idea of a Selma-Montgomery march for voting rights.[511] The marchers thus knew they wanted black voting rights; the Alabama State Troopers and the Dallas County Sheriff's deputies knew they opposed black voting rights.[512] Widespread television and newspaper coverage of what came to be called "Bloody Sunday" energized the nation, the President, and Congress to "do something" to ensure black voting rights.[513] However, neither the marchers, nor the mounted wielders of billy clubs, nor the media reporters were communicating the details of what that "something" should be.[514] Many acts of civil disobedience have resulted in remedial actions that proved to be ineffective because the unfocused nature of the actors' grievances led to unfocused or poorly implemented solutions that lacked popular support.[515] And

507. *Katzenbach*, 383 U.S. at 335; *see also* Brian K. Landsberg, *Safeguarding Constitutional Rights: The Uses and Limits of Prophylactic Rules*, 66 TENN. L. REV. 925, 938-39 (1999).

508. *See* 42 U.S.C. § 1973 (1994); *see also* THERNSTROM, *supra* note 450, at 82.

509. LEWIS, *supra* note 15, at 314-16.

510. *Id.* at 314-17.

511. *Id.* at 318.

512. *Id.* at 326.

513. *See generally id.* at 323-47.

514. *See* LEWIS, *supra* note 15, at 323-47.

515. For example, the cries of despair that fueled the 1967 riots in large American cities gave rise to the recommendations of the Kerner Commission. The Commission conveyed a sense of urgency in recommending programs embracing three principles:

> 1. To mount programs on a scale equal to the dimension of the problems:
> 2. To aim these programs for high impact in the immediate future in order to close the gap between promise and performance;
> 3. To undertake new initiatives and experiments that can change the system of failure and frustration that now dominates the ghetto and weakens our society.

U.S. KERNER COMM'N, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 2

some have resulted in no remedial action at all, because of the lack of clarity of their message or the lack of a firm foundation for further action.[516]

The civil disobedience of the blacks of Sumter County to the customary law of white supremacy took a more subtle form. They simply tried to exercise their rights that were guaranteed by the Constitution. In this, they more closely resembled Rosa Parks, who took a bus seat that the Constitution said she could take. In her case, the remedy was to desegregate the buses. The Civil Rights Acts had designed a simple remedy for the deprivation of voting rights, but a combination of official disobedience and judicial ineffectiveness led to the complex scheme of the Voting Rights Act.

The Department of Justice's focus on letting the remedy flow from the facts led, I believe, to an unanticipated dividend. The black registration efforts and the Department's voting rights suits in the early 1960s did not pursue a conscious policy of laying the groundwork for either more legislation or for major changes in race discrimination law. The lawyers developed theories of the case that were driven by their understandings of the facts. Defendants helped the process along through actions that required ever tighter remedial orders. Yet it is hard to envision that the Voting Rights Act would have taken its particular shape without the foundation created by these cases. The records in these cases established the existence of widespread discrimination; the failure of some federal district judges to award effective relief, along with the recalcitrance of some defendants, established the need for rigid rules and administrative relief. Had there been no cases, but only the official recalcitrance and the violence at the Edmund Pettus Bridge, it seems unlikely that Congress would have adopted the effects test, the freezing principle, federal examiners and observers, the pre-clearance requirement, or universal suffrage.

The story of racial discrimination resonates with great power if it is properly told. The road to change in Sumter County included many detours. Few could have predicted that the end of the road would be legislation as sweeping and powerful as the Voting Rights Act.

(New York, Bantam Books 1968). While some recommendations were adopted, many of the core conditions that led to the riots continued. *See generally* ANDREW HACKER, TWO NATIONS, BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL (1992).

516. For example, the Albany Movement of the early 1960s failed to bring about meaningful progress in desegregation. BRANCH, *supra* note 42, at 630-31. It was later criticized as having "spread its demands too broadly." *Id.* at 631 (describing criticism by Slater King).

APPENDIX A:
VOTING RIGHTS ACT ANALYSIS

PROVISION OF 1965 VOTING RIGHTS ACT	PRECURSOR *(Sumter case in Italics)*[517]	RATIONALE
Special coverage formula, § 4	Litigation. *"In the problem of racial discrimination, statistics often tell much, and Courts listen."*[518]	Effects probative of discrimination.[519]
Temporary ban on literacy tests; § 4	Litigation. *"Where, as established . . . in this case, a great majority of one race is already permanently registered while but a small minority of the other race has succeeded in registering, the adoption and application of new and more stringent registration requirements or standards, the effect of which is to perpetuate past discriminations, are constitutionally impermissible."*[520]	Freezing. "[E]ven fair administration of the tests, following decades of discrimination when most whites were permanently registered without having had to pass such tests, would simply freeze the present registration disparity created by past violations of the 15th amendment. As the courts have made clear, this is not acceptable. (*See, e.g.*, United States v. Louisiana, 380 U.S. 145 (1965))."[521] Prophylactic. "[N]ot capable of fair administration."[522] "[N]ot bona fide qualifications."[523]

517. While the chart refers extensively to Sumter County, many other cases could be used to make the same points. *See, e.g.*, United States v. Strong, 10 Race Rel. L. Rep. 710 (M.D. Ala. 1965); United States v. Scarborough, 10 Race Rel. L. Rep. 709 (N.D. Ala. 1965).

518. *United States v. Hines*, 9 Race Rel. L. Rep. 1332, 1335 (N.D. Ala. 1964) (quoting Alabama v. United States, 304 F.2d 583 (5th Cir. 1962), *aff'd*, 371 U.S. 37 (1962)); *see* Hawk & Kirby, *supra* note 37, at 1119-34 (discussing the development of this doctrine).

519. "Experience demonstrates that the coincidence of such schemes [tests or devices] and low electoral registration or participation is usually the result of racial discrimination in the administration of the election process." *Senate Hearings*, *supra* note 85, at 14 (testimony of Attorney General Katzenbach).

520. *Hines*, 9 Race Rel. L. Rep. at 1335.

521. H.R. REP. NO. 89-439, at 15 (1965).

522. *Id.*

523. *Id.*

Temporary ban on supporting witness requirement.	Litigation. *"The use of the supporting witness requirement with the present disproportionate number of registered Negro voters, as compared to white voters of approximately ten to one, is in contravention of Fourteenth and Fifteenth Amendments . . . ."*[524] The requirement "has been strictly applied as to Negroes but not as to whites."[525]	Prophylactic. Freezing.
Pre-clearance of changes in voting practices. § 5	Litigation. *Reference to "[t]he more complicated and burdensome requirements imposed by the present application form and the stricter standards of grading . . . ."*[526]	Prophylactic. "Barring one contrivance too often has caused no change in result, only in methods."[527] The act is "necessary to meet the risk of continued or renewed violations . . . ."[528]
Pre-clearance suits must be brought before District Court in District of Columbia	1964 Act had allowed A.G. to seek three judge district court in voting rights cases.	Prophylactic. Record of some federal district courts in South of, at best, grudging and ineffective enforcement of the 1957 and 1960 acts.
Administrative appointment of Federal examiners. § 6	1960 Act's Referee provision; Civil Rights Commission proposals in 1959 and 1961 for federal registrars; Kennedy proposal for stronger Referee provision in 1963.[529]	Prophylactic. Needed where registrars engage in slow down, close offices, or otherwise impede registration.[530] Federal judges had failed to make adequate use of referee provision.
Administrative appointment of Federal observers. § 8	Force Act of 1871. Leadership Conference on Civil Rights proposal of April 1, 1965.[531]	Prophylactic.

524. *Hines*, 9 Race Rel. L. Rep. at 1335.
525. *Id.* at 1334.
526. *Id.* at 1335.
527. H.R. REP. NO. 89-439, at 10 (1965).
528. *Id.* at 19
529. *See* Hawk & Kirby, *supra* note 37, at 1062. In addition, one author claims that Burke Marshall, before he became Assistant Attorney General, had proposed federal registrars in the 1950s, and that Attorney General Rogers had "converted the suggestion to the tamer one of federal referees." NAVASKY, *supra* note 52, at 194.
530. *See* H.R. REP. NO. 89-439, at 16 (1965).
531. *See House Hearings*, *supra* note 101, at 689-91 (testimony of Roger Wilkins and Joseph Rauh).

APPENDIX B:
VOTER APPLICATION OF RICHARD WILSON, JR.

[illegible]

PART I

[illegible]

Full Name: Wilson (Last) Richard (First) Jr

Date of Birth: Nov 7 193[illegible] Sex Male Race Colored

Residence Address: Cuba, Ala

Mailing Address: Rt. 1 Box 195

Voting Place: Precinct 18 Ward District

Length of Residence: In State Nov. 7, 1936 County Nov 7, 1936

Precinct, ward or district 18

Are you a member of the Armed Forces? No

Are you the wife of a member of the Armed Forces? No

Are you a college student? No If so, where —

Have you ever been registered to vote in any other state or in any other county in Alabama? No 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 12th Where Kinterbish High School

Years college completed None Where

PART II

[illegible]

I, Richard Wilson Jr, do hereby apply to the Board of Registrars of Sumter 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.

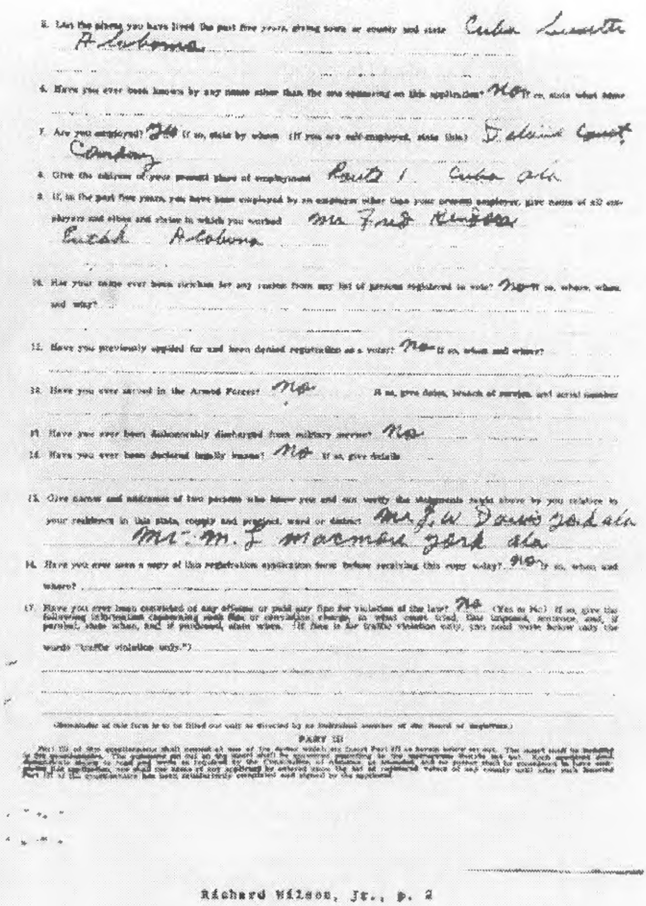
Richard Wilson Jr

1. Are you a citizen of the United States? Yes
2. Where were you born? Sumter County Cuba alabama
3. If you are a naturalized citizen, give number appearing on your naturalization papers and date of issuance: No
4. Have you ever been married? Yes If so, give the name, residence and place of birth of your husband or wife. Sumter County Cuba alabama

Are you divorced? No

PM 6 43

Richard Wilson, Jr., p. 1



5. List the places you have lived the past five years, giving town or county and state Cuba [illegible] Alabama

6. Have you ever been known by any name other than the one appearing on this application? No If so, state what name

7. Are you employed? [illegible] If so, state by whom. (If you are self-employed, state this) [illegible] Company

8. Give the address of your present place of employment Route 1 Cuba Ala

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 Mr Fred [illegible] [illegible] Alabama

10. Has your name ever been stricken for any reason from any list of persons registered to vote? No If so, where, when and why?

11. Have you previously applied for and been denied registration as a voter? No If so, when and where?

12. Have you ever served in the Armed Forces? No If so, give dates, branch of service, and serial number

13. Have you ever been dishonorably discharged from military service? No

14. Have you ever been declared legally insane? No 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 residence in this state, county and precinct, ward or district Mr J. W. Davis York ala Mr. M. J. [illegible] York ala

16. Have you ever seen a copy of this registration application form before receiving this copy today? No If so, when and where?

17. Have you ever been convicted of any offense or paid any fine for violation of the law? No (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

[illegible]

Richard Wilson, Jr., p. 2

INSERT PART III (B)

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

1. In what town or city in the courthouse located in this county? Tuscumbia

2. How many stars are there in the United States Flag? 48

3. What is the lawmaking body of Alabama called? Legislature

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) True

INSTRUCTIONS "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 the inserted Part III and shall mark thereon the words missed in reading by the applicant.

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.

INSTRUCTIONS "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.

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.

Signature of Applicant Richard Wilson Jr

Richard Wilson, Jr., p. 3

[illegible]

PART IV

OATHS

STATE OF ALABAMA

Sumter .... COUNTY

Before me, Richard Wilson Jr. ....

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."

Richard Wilson Jr.
(Signature of applicant)

Sworn to and subscribed before me this the 20 day of April ...., 64

....
(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 block letters and words in the case of persons with sight handicaps.) ....

Richard Wilson, Jr., p. 4

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 application 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 duly considered the foregoing application 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: [illegible])

The Applicant, ________________, due to failure to meet the requirements of state law for qualification 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: H. J. Mears

Address: P. O. Drawer E

Place of Voting: Livingston, Ala.

"I have known the applicant Richard Wilson for 17 years and 6 months and I have personal knowledge that his place of residence is McGowan, Cuba, Ala.

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

H. J. Mears
Signature of Witness

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

____
(Person Administering Oath)

Date ________________

Richard Wilson, Jr., p. 5